Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 188

Eibe Riedel · Rüdiger Wolfrum (eds.)

Recent Trends in German and European Constitutional Law

German Reports Presented to the XVIIth International Congress on Comparative Law, Utrecht, 16 to 22 July 2006

Springer

Max-Planck-Institut für ausländisches
öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Begründet von Viktor Bruns

Herausgegeben von
Armin von Bogdandy · Rüdiger Wolfrum

Band 188

Eibe Riedel · Rüdiger Wolfrum (eds.)

Recent Trends in German and European Constitutional Law

German Reports Presented to the XVII[th] International Congress
on Comparative Law,
Utrecht, 16 to 22 July 2006

Springer
the language of science

ISSN 0172-4770
ISBN 3-540-34667-8 Springer Berlin · Heidelberg · New York

Bibliografische Information Der Deutschen Bibliothek

Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.ddb.de> abrufbar.

Printed in Germany

Satz: Reproduktionsfertige Vorlagen vom Autor
Druck- und Bindearbeiten: Strauss Offsetdruck, Mörlenbach
SPIN: 11767435 64/3153 – 5 4 3 2 1 0 – Gedruckt auf säurefreiem Papier

Preface

The present volume compiles the German National Reports on Public Law that are to be presented at the XVIIth Congress of the International Academy of Comparative Law, which will take place from 16 – 22 July 2006 in Utrecht, the Netherlands. By publishing the conference report before the conference itself has taken place, we hope to enable interested scholars and practitioners to gain information in greater detail as it will be possible during the conference, and in this way to stimulate and inspirit the overall discussion. The Congress, like its predecessors, will bring together academics and practitioners from all over the world and thus offer an excellent opportunity for discussion and comparison on a wide range of current and interesting issues.

The articles of this volume map out the current situation and doctrinal ramifications of a specific comparative project, as designed by the Congress organisers. Each contributor provides both a full picture of the subject area and sets out his or her view on the topic, which will, given our experiences from the previous conferences, stimulate and enrich the discussions at this year's conference.

This volume contains eight reports focussing on specific topics of German Public Law and two dealing with questions of European Constitutional Law.

Two reports, by Armin von Bogdandy and Ralph Alexander Lorz, analyse new trends in European Constitutional Law. Jürgen Bast will take a look at the ever topical issue of legal positions of migrants in Germany. Markus Böckenförde analyses the relevancy of constitutional referenda. Thomas Fetzer addresses the recent issue of e-government, while Kristian Fischer carefully examines the phenomenon of Quangos in German law. Dirk Hanschel raises fundamental questions about progress and the precautionary principle in administrative law. Anja Seibert-Fohr concentrates on constitutional guarantees of the independence of the German judiciary, and, last but not least, Sebastian Graf Kielmansegg takes a close look at legal means for eliminating corruption in the public service, a topic which has gained increasing importance over the last years. Thilo Marauhn analyses characteristics of international administration in crisis areas from a German perspective with special focus on German participation.

Brought together, these articles will provide an overview over recent developments and new issues in both European Constitutional and German Public Law.

We are highly indebted to the authors of these reports for submitting their reports in time so that they may be available in published form at the Congress. They have already contributed significantly to the success of the conference through their careful research and thoughtful insights as contained in these reports. Sincere thanks go to Ms Katharina Engbruch, senior research fellow at the University of Mannheim, Christel Selzer, secretary at the chair of Eibe Riedel, Ms Angelika Schmidt and Birgit Jacob, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, for their editorial assistance. We also wish to thank the Springer Verlag, Heidelberg, for publishing this volume.

Mannheim/Heidelberg, March 2006 Eibe Riedel/Rüdiger Wolfrum

Table of Contents

Constitutional Principles for Europe*

Armin von Bogdandy

I. General Issues

1. The Subject Matter

This contribution presents a doctrine of principles, that is a systematic exposition of the most essential legal norms of the European legal order. For these purposes it is not necessary to precisely define the concept "principle"[1] since the study will work with a broadly accepted minimal

---

* This contribution is based on *A. von Bogdandy*, Constitutional Principles, in: id/Bast (eds), Principles of European Constitutional Law, 2006.

understanding: principles are legal norms laying down essential elements of a legal order.[2] The purpose of this study is above all to identify and clarify these principles, in particular on the basis of further legal concepts, more specific norms, settled case-law as well as established constitutional theories and doctrines.[3]

The doctrine of principles presented here will not discuss all principles of primary law. Rather, this study is concerned with *founding* principles analogous to Art 20(1)[4] German Basic Law[5] or Art 1 Spanish Constitution.[6] Art 6 EU and Arts I-2, III-193(1) CT-Conv (Arts 2, 292 CT-IGC) are of great significance with regard to their identification.[7] They express an overarching normative frame of reference for all primary

---

1 For a good overview of the diverse understandings, *R. Alexy*, Theorie der Grundrechte, 1996, 71 *et seq*; *M.L. Fernandez Esteban*, The Rule of Law in the European Constitution, 1999, 39 *et seq*; *M. Koskenniemi*, General Principles: Reflexions on Constructivist Thinking in International Law, in: id (ed), Sources of International Law, 2000, 359; *R. Dworkin*, Taking Rights Seriously, 1977, 24 *et seq*.

2 See, in more detail, *O. Wiklund/J. Bengoetxea*, General Constitutional Principles of Community Law, in: U. Bernitz/J. Nergelius (eds), General Principles of European Community Law, 2000, 119; on the status of principles within the hierarchy of Union law, see *J. Nergelius*, General Principles of Community Law in the Future, in: *ibid* 223, at 229 *et seq*.

3 *E. Riedel*, Der gemeineuropäische Bestand von Verfassungsprinzipien zur Begründung von Hoheitsgewalt, in: P.C. Müller-Graff/E. Riedel (eds), Gemeinsames Verfassungsrecht in der Europäischen Union, 1998, 80 *et seq*, demonstrates that this is a "typical German" approach.

4 The decisions concerning Article 20 German Basic Law are considered to be "fundamental statements with respect to the constitutional identity", "the normative core of the constitutional order", provisions determining the "character of the Federal Republic of Germany" and "blueprints"; for more details, *H. Dreier*, in: id (ed), Grundgesetz-Kommentar, 1998, vol II, Art 20 (Einführung), paras 5 *et seq*.

5 For an English version, see <http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf> (8 April 2004).

6 For an English version, see <http://www.oefre.unibe.ch/law/icl/sp00000_html> (8 April 2004).

7 *M. Scudiero*, Introduzione, in: id (ed), Il diritto costituzionale comune europeo. Principi e diritti fondamentali, 2002, ix. Neither Art 6 EU nor Art 2 CT-Conv (Art 2 CT-IGC) contain an exhaustive list of the founding principles. Of further significance – under current law – are in particular Art 2 EU and Arts 2, 5 and 10 EC.

law, indeed for the whole of the Union's legal order. Although Art I-2 CT-Conv (Art 2 CT-IGC) uses the term "value", the tenets it lays down can be considered as principles. Usually, principles are to be distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms. Since the "values" of Art I-2 have legal consequences (Arts I-1(2), I-3(1), I-18 CT-Conv; Arts 1(2), 3(1), 19 CT-IGC) they are legal norms and can be considered as principles.[8]

This study examines only the European Union's constitutional principles. Although European constitutional law is closely intertwined with the national constitutions, forming the "European constitutional space", principles of the national constitutions will not be discussed. To focus almost exclusively on the European level is justified by the concept of autonomy of European primary law, analytical necessities and limitations of space.

2. National and Supranational Principles: On the Question of Transferability

Many of the principles laid down in Art 6 EU are well-known from the national constitutions and have been the object of thorough research. A key question for a European doctrine of principles (and indeed for the whole of European constitutional law) is to what extent and with what provisos the relevant national jurisprudence can be used in order to develop the supranational principles.[9] More than a few scholars deny the possibility of such recourse by claiming that the new form of governance requires "unprecedented thinking".[10]

---

[8] For the reasons why the term "value" might have been chosen, see *A. von Bogdandy*, Europäische Verfassung und europäische Identität, Juristenzeitung (2004) 53, at 58 *et seq*.

[9] In detail, *R. Dehousse*, Comparing National and EC Law, 42 AJCL (1994) 761, at 762 and 771 *et seq*.

[10] *G.F. Schuppert*, Anforderungen an eine europäische Verfassung, in: H.D. Klingemann/F. Neidhardt, Zur Zukunft der Demokratie, 2000, 249. Schuppert himself demonstrates the utility of comparative thought, see *G.F. Schuppert*, Überlegungen zur demokratischen Legitimation des europäischen Regierungssystems, in: J. Ipsen/E. Schmidt-Jortzig (eds), Recht – Staat – Gemeinwohl: Festschrift für D. Rauschning, 2001, 201, at 207 *et seq*. On the theoretical aspect, see *P. Zumbansen*, Spiegelungen von "Staat und Recht", in: M. An-

Yet this demand clashes with the very nature of legal thinking, which at its heart is comparative and dependent on the repertoire of established doctrines of viable institutions.[11] Nor is it necessary to renounce any such comparison since there is sufficient similarity between the supranational and the national legal orders. The Union's and Member States' constitutions confront the same central problem: the phenomenon of public power as the core of every constitutional order.[12] Most if not all constitutional principles are eventually concerned with this problem.[13] In view of this issue identity there is a sufficient degree of similarity to justify transferring the insights from the one order to the other.

Nevertheless, a simple transfer of concepts and insights from the national context in many instances will not be adequate for the issues that arise in the EU context. The transfer of constitutional concepts of any one single Member State is already prohibited by the principle expressed in Art 6(3) EU, namely the equality of the 25 national constitutions.

Nor is it possible to simply project a common European denominator of national concepts onto the Union.[14] Every analogy and transfer must reflect the fact that the Union is not – according to the prevailing and convincing view – a state, but rather a new form of political and legal order.[15] The structuring principles must reflect this. A doctrine of European principles must therefore purify the content of the principles known from the national constitutions from those elements which apply only to a state.

Quite significantly in this respect, national constitutional law exhibits a far greater degree of political unity – that is, those phenomena which are traditionally subsumed under the term "political unity" – than does

---

derheiden et al (eds), Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts, 2001, 13.

[11] On the "memory function", *E. Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee, 2004, 4.

[12] *N. MacCormick*, Questioning Sovereignty. Law, State, and Nation in the European Commonwealth, 1999, 138 *et seq*.

[13] Moreover, the Union enjoys the power to impose duties on Member States, which is the core feature of federal constitutional law.

[14] Yet a comparative approach is most useful in this respect; for a fine example, see *Scudiero* (note 7).

[15] *J.H.H. Weiler*, Introduction: The Reformation of European constitutionalism, in: *id*, The Constitution of Europe, 1999, 221, at 221.

Union constitutional law, both conceptually and practically.[16] The exercise of power by the Union appears not as the will of a single sovereign, but rather as the common exercise of public power by various actors.[17] This idea underlies the very first normative enunciation of the Constitutional Treaty (Art I-1(1) CT-Conv; Art 1(1) CT-IGC): it founds a Union, "on which the Member States confer competences to attain objectives they have in common". Not only consensual and contractual elements and networks between various public authorities, but especially the prominence of the Member States and their peoples must decisively shape the understanding and concretisation of the structuring principles.

3. Constitutional Principles in View of Varying Sectoral Provisions

The principles set forth in Art 6(1) EU are valid for the whole of Union law. Yet numerous concretising figures are valid only in certain sectors, for instance the dual structure for democratic legitimation through the Council and Parliament. The Union's legal order reveals a significant fragmentation; the Constitutional Treaty mends this fragmentation to some extent (*eg* Art I-6 CT-Conv; Art 7 CT-IGC), but by no means in all areas.[18] This gives rise to doubts about the usefulness of an overarching doctrine of principles. It might even nurture the suspicion that a doctrine of principles is not the fruit of scholarly insight, but rather a policy instrument for more integration. Yet these doubts and suspicions are unfounded.

As the principles set forth in Art 6 EU apply to all areas of Union law, an overarching doctrine of principles built on Art 6 EU encompassing the entire primary law is a logical consequence. Unless *mis*interpreted as merely declaratory, the implementation of Art 6 EU in 1997 un-

---

[16] On the development of this concept, *T. Vesting*, Politische Einheitsbildung und technische Realisation, 1990, 23 *et seq*; *C. Möllers*, Staat als Argument, 2000, 230 *et seq*.

[17] This may explain the renaissance of contractual thinking in constitutional theory. See *G. Frankenberg*, The Return of the Contract, 12 King's College Law Journal (2001) 39; *I. Pernice/F.C. Mayer/S. Wernicke*, Renewing the European Social Contract, 12 King's College Law Journal (2001) 61.

[18] At a less abstract level, there are significant differences between individual sectors in all legal orders. See *A. Hanebeck*, Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber, 41 Der Staat (2002) 429.

avoidably requires its own expansion into a general doctrine of principles against which all areas of Union law and in particular the older layers of Community law must be assessed. Art 6 EU declares that the Union is "founded" on these principles. This contains an ambitious normative programme, the details of which probably only legal science and the courts are able to develop although the mentioned limitations of a doctrine of principles as applied to a concrete legal situation must be respected.

In view of the fragmentation within primary law it might appear problematic to determine which provisions may be understood as concretising abstract principles. Theoretically, both the co-decision procedure under Art 251 EC as well as the Council's autonomous decision-making competence under the requirement of unanimity (*eg* Art 308 EC) can be understood as realisations of the principle of democracy. Yet the co-decision procedure, conceived as the "standard" by the model of supranational federalism,[19] applies to ever more situations.[20] The Constitutional Treaty backs this thesis in Arts I-19(1), I-33(1) CT-Conv (Arts 20, 34(1) CT-IGC).

An overarching doctrine of principles targeted in this "standard" manner must not, however, downplay sectoral rules which follow different rationales. To do otherwise would infringe upon an important constitutional principle: Art 6(3) EU in conjunction with Art 48 EU clearly shows that the essential constitutional dynamics are to remain under the control of the respective national parliaments.[21]

---

[19] On the model of supranational federalism in detail, *A. von Bogdandy*, The European Union as a Supranational Federation, 6 Columbia Journal of European Law (2000) 27.

[20] See also *K. Lenaerts*, in: Sénat et Chambre des représentants de Belgique (eds), Les finalités de l'Union européenne (2001) 14, at 15.

[21] Opinion 2/94, *ECHR* [1996] ECR I-1763, paras 10 *et seq*; Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

II. Founding Principles of Supranational Authority

1. Equal Liberty

Art 6(1) EU names liberty as the first of the principles upon which the Union is founded.[22] This principle must transcend the various specific freedoms if it is to have an independent normative meaning, since the latter can be fully inferred from the words "respect for human rights and fundamental freedoms, and the rule of law", which appear later in this provision.[23] The fact that liberty is named separately should be understood as meaning that "liberty" is a principle which goes beyond the others. It cannot be reduced to the mere rejection of a social order based on privilege or of repressive forms of government, such as National Socialism, fascism, communism or other forms of authoritarianism. That would be a minimal reading.

Rather, it can be understood as a declaration that the liberty of the individual is the starting and reference point for all European law: everyone within the EU's jurisdiction is a free legal subject and all persons meet each other as legal equals in this legal order.[24] Conceptually it leads to an individualistic understanding of law and society.[25] This understanding of a person is by no means imposed by nature, but is rather the most important artefact of European history, fundamental for the self-understanding of most individuals in the Western world.

One may object that this liberty is the universal principle *par excellence*. This may well be. Yet, one must admit that this principle has by no means found a footing in all legal orders. And the law of the European Union is the only transnational legal order that effectively realises this principle in concrete legal relations on a broad scale.

---

[22] Art I-2 CT-Conv (Art 2 CT-IGC) places human dignity before liberty. According to a Kantian understanding, the latter is the immediate characteristic of the former and is sometimes even used as a synonym thereof. See *W. Kersting*, Wohlgeordnete Freiheit, 1993, 203 *et seq*.

[23] An independent meaning is not rarely disputed. See *S. Griller et al*, The Treaty of Amsterdam, 2000, 186.

[24] *G.F.W. Hegel*, Rechtsphilosophie, 1821, edn Moldenhauer and Michel 1970, § 4; *L. Siedentop*, Democracy in Europe, 2000, 200 *et seq*.

[25] *I. Kant*, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis, in: I. Kant, Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik, 1964, ed by K. Vorländer, 67, at 87; *E. Gellner*, Nationalismus und Moderne, 1983, reprinted 1991, 89.

In light of this 'liberty' principle, fundamental yet often technically (mis)understood concepts of European law become closely connected to the European constitutional tradition. The first is the concept of 'direct effect', according to which the individual is not only the object but also the subject of Union law. It is no coincidence that this idea initiated the transformation of the EC Treaties into a constitutional law for Europe.[26]

The principle of individual liberty has been a core element of integration theory from its earliest stages. W Hallstein understood European integration, with its tendency to a continental scope, as a significant expansion of the individual's space of autonomous action. The constitutional dimension of this expansion is based on the attribution of a constitutional function to private law, above all contract law: many consider private law as the systematic order of individual liberties.[27] Even though the early Community enacted practically no rules pertaining to private law, since its inception it has had an important private law dimension as it helped the individual to conclude contracts on a much wider scale. From this perspective, one can understand the fundamental importance of the market freedoms and competition law as well as Art 4(1) EC. After all, the goal of a free, autonomous, continental area cannot be realised within the respective Member States – such an area, thus, embodies a particular value of integration.[28]

This private autonomy has a particular significance in a heterogeneous political community of (nearly) continental scope such as the Union. The larger and more diverse a political community is, the harder it is to understand politics and law as instruments of free self-governance. Areas of private autonomy, thus, become all the more imperative.

Yet the concept of liberty would be misunderstood if one were to understand it only formally as private autonomy: such liberty is always in danger of being transformed into privilege.[29] True liberty can only be

---

[26] Case 26/62, *van Gend & Loos* [1963] ECR 1, at 12; *P. Pescatore*, The Doctrine of "Direct Effect", 8 EL Rev (1983) 155, at 158.

[27] *W. Hallstein*, Die Wiederherstellung des Privatrechts, 1 Schriften der Süddeutschen Juristen-Zeitung (1946) 530; *E.J. Mestmäcker*, Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts, 10 Rechtshistorisches Journal (1991) 177.

[28] Entscheidungen des Bundesverfassungsgerichts 89, 155 at 174; this explains the special importance of the economic constitution.

[29] *G.P. Calliess*, Die Zukunft der Privatautonomie, Jahrbuch junger Zivilrechtswissenschaftler 2000, 2001, 85, at 90 *et seq*.

conceived as the same liberty for all legal subjects. It is this conception of *equal liberty* that explains a most important line of the ECJ's case-law: equalising the legal status of the European legal order's subjects in view of a concrete freedom.[30] It finds expression in the case-law on discrimination, particularly with respect to freedom of movement of workers, the general prohibition of discrimination, rights deriving from Union citizenship[31] and the right of association.[32] This case-law shows the great potential for emancipation which this principle still contains after decades of integration.[33] It is from this perspective of equal liberty that the objective of establishing an area of freedom, security, and justice (Art 2 EU) is to be understood, rather than by narrowly focusing on its use for the single market.[34]

The criteria for accession to the EU according to Arts 49 and 7(1) EU (or Arts I-1(2), I-2, I-57 CT-Conv; Arts 1(2), 2, 58 CT-IGC) can be substantiated: a state's legal order and social culture must be founded on this conception of the individual and there must be no internal segregation, such as irreconcilable religious, ethnic or social divisions, that leads to legal inequality among individuals.[35]

---

[30] Accordingly, Art I-2 CT-Conv (Art 2 CT-IGC) counts equality as a value of its own. It remains open to discussion if this supplementation of liberty with dignity and equality leads to a modification of the concept of liberty. Following Kant, liberty is derived from dignity. Both terms may be used almost synonymously; see n 22. The combination of dignity with equality by the French concept of *égale dignité* highlights the intertwinement of the three concepts; see AG Stix-Hackl, Opinion of 18 March 2004 in Case C-36/02, *OMEGA* [2004] ECR I-0000, para 80. For criticism with regard to the possible attenuation of the content of dignity by the concept of *égale dignité*, see *M. Borowsky*, in: J. Meyer (ed), Kommentar zur Charta der Grundrechte der Europäischen Union, 2003, Art 1, paras 8 and 18.

[31] See n 143 and accompanying text.

[32] Path breaking, Case C-268/99, *Jany* [2001] ECR I-8615; Case C-162/00, *Pokrzeptowicz-Meyer* [2002] ECR I-1049; Cases 317/01 and 369/01, *Abatay* [2003] ECR I-0000; in detail, *M. Hofmann*, The Right to Establishment for Nationals of the European Union Associated Countries in the Recent Jurisprudence of the ECJ, 44 German Yearbook of International Law (2001) 469.

[33] *A. Somek*, A Constitution for Antidiscrimination: Exploring the Vanguard Moment of Community Law, 5 ELJ (1999) 243.

[34] In this sense, Cases C-187/01 and C-385/01, *Gözütok* [2003] ECR I-1345, paras 36 *et seq*.

[35] Explicitly so in Arts 1(2), 2 CT-Conv (Art 1(2), 2 CT-IGC).

2. The Rule of Law

The basic elements of the rule of law were the first aspects of European constitutional thought in the 1960s that have coalesced into principles of primary law. JH Kaiser declared programmatically in 1964 that the creation of a European state based on the rule of law is the task of our time.[36] Most legal systems subsume the pertinent elements under a term equal or similar to *Rechtsstaatlichkeit* or *l'État de droit*; almost all language versions of the Treaty similarly use terminology linked to the state. This terminology is imprecise, due to the inclusion of the element of statehood.[37] It seems more accurate to use the term "rule of law" (*prééminence du droit* or *Herrschaft des Rechts*) in the loaded sense of the word "law" as the ECJ has derived from Art 220 EC.[38] Establishing a culture of law has been of crucial importance to European development and integration.

a) A Community of Law

Perhaps the theoretical concept which has had the most far-reaching consequences for legal integration was that of the *Rechtsgemeinschaft*, "community of law",[39] the various elements of which establish *both* continuity *and* innovation with respect to national constitutional thought. As a principle it has had the greatest independent influence on the extensive legal development of the Treaties' content. Apparently, the responsible legal actors feel that, whereas issues of democracy must be left to the politicians, many aspects of the rule of law need not be.

A legal norm regulates social relationships. Its correlative (actual) effectiveness and non-partisan application are constitutive for the rule of

---

[36] *J.H. Kaiser*, Bewahrung und Veränderung demokratischer und rechtsstaatlicher Verfassungsstruktur in den internationalen Gemeinschaften, 23 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (1966) 1, at 33. There is thus a striking parallel to the constitutional developments of the 19th century; see *E.W. Böckenförde*, Recht, Staat, Freiheit, 1992, 143 *et seq*.

[37] *M. Zuleeg*, in: H. von der Groeben/J. Schwarze (eds), Vertrag über die Europäische Union, 2003, Art 1 EC, para 4.

[38] *J. Gerkrath*, L'émergence d'un droit constitutionnel pour l'Europe, 1997, 347.

[39] *W. Hallstein*, Die Europäische Gemeinschaft, 1979, 51 *et seq*; on the reception, see *M. Zuleeg*, Die Europäische Gemeinschaft als Rechtsgemeinschaft, Neue Juristische Wochenschrift (1994) 545; *Esteban* (note 1), at 154 *et seq*.

law. They are – in normative terms – the first expression of the legal equality of individuals.[40] The effectiveness of legal norms, at least in a functioning state, is usually beyond question. Due to the common origin of a state's authority to legislate and to enforce, this aspect of the rule of law is mostly a marginal topic or simply presumed to be self-evident. It is only with respect to the equal application of the law that this question enjoys any constitutional attention in the domestic legal orders.[41]

As Community law was public international law in origin, its first problem has been and still is precisely its effectiveness and equal application to social relationships. This is the first aspect of Hallstein's term "community of law": the EU is *only* a community of law and not also a community of coercion by means of its own.[42] The situation is therefore different than that of a state's legal system. In a transnational community of law the community's systemic interest in the effectiveness of its law and the individual's corresponding interest in the enforcement of a norm that benefits him or her are consonant: the legislator (EU) and the beneficiary (citizen) both need the nation-state's domestic courts. The relevant legal concepts, above all direct applicability,[43] primacy[44] as well as the principles of effective and uniform application ("equivalence"),[45] indissolubly serve both interests. The widespread assertion that European law "instrumentalises the individual" for the advance-

---

[40] *M. Nettesheim*, Der Grundsatz der einheitlichen Wirksamkeit des Gemeinschaftsrechts, in: A. Randelzhofer et al (eds), Gedächtnisschrift für E. Grabitz, 1995, 447, at 448 *et seq*.

[41] Art 3(1) German Basic Law; on the phenomenon of selective application as a legal problem, Entscheidungen des Bundesverfassungsgerichts 66, 331 at 335 *et seq*; 71, 354 at 362.

[42] *Hallstein* (note 39), at 53 *et seq*.

[43] Case 26/62, see n 26; Case C-8/81, *Becker* [1982] ECR 53, paras 29 *et seq*; *Pescatore* (note 26).

[44] Case 6/64, *Costa* [1964] ECR 585 at 593 *et seq*; Case 92/78, *Simmenthal v Commission* [1979] ECR 777, para 39; Case C-213/89, *Factortame* [1990] ECR I-2433, para 19; Case C-285/98, *Kreil* [2000] ECR I-69 (presuming primacy as unproblematic).

[45] Cases 205/82-215/82, *Deutsche Milchkontor* [1983] ECR 2633, para 22; Case C-261/95, *Palmisani* [1997] ECR I-4025, para 27; Case C-404/97, *Commission v Portugal* [2000] ECR I-4897, para 55; *S. Kadelbach*, Allgemeines Verwaltungsrecht unter europäischem Einfluß, 1999, 117 *et seq* and 267 *et seq*.

ment of European integration[46] (with the implicit reproach of an infringement of human dignity) expresses a misunderstanding of this basis of Community law.

Perhaps the Union is even more dependant on the rule of law than an established nation-state. When W Hallstein said that the Community is a *creation* of law,[47] this must be understood against the dominant understanding of the nation-state, which attributes to the nation-state a "prelegal substratum" (*eg* a people, an established organisation). One can contest the pre-existence of the state before the constitution[48] as well as the explication of integration solely by the binding force of law.[49] Yet the outstanding importance of a common law as a bond which embraces all Union citizens is, in view of the dearth of other integrating factors such as language or history, hardly contestable. Moreover, as already pointed out by de Tocqueville, the larger and freer a polity is the more it must rely on the law.[50] This is also recognised in political science.[51]

Some aspects of European law seem rigidly at odds with the European value of diversity. This is partially due to the difficulty of securing the effectiveness of transnational law that conflicts with national provisions or practice. In view of the degree of effectiveness already achieved and the development of principles that attribute constitutional weight to colliding interests, it is now possible to find more balanced solutions according to general doctrines on the collision of principles.[52]

---

46 *T. von Danwitz*, Verwaltungsrechtliches System und Europäische Integration, 1996, 175; *J. Masing*, Die Mobilisierung des Bürgers für die Durchsetzung des Rechts, 1997.

47 *Hallstein* (note 39), at 53; *U. Everling*, Bindung und Rahmen: Recht und Integration, in: W. Weidenfeld (ed), Die Identität Europas, 1985, 152.

48 Informative, *H. Schulze-Fielitz*, Grundsatzkontroversen in der deutschen Staatsrechtslehre nach 50 Jahren Grundgesetz, 32 Die Verwaltung (1999) 241.

49 *R. Dehousse/J.H.H. Weiler*, The legal dimension, in: W. Wallace (ed), The Dynamics of European Integration, 1990, 242.

50 *A. de Tocqueville*, Über die Demokratie in Amerika, 1835, reprinted 1985, 78 *et seq* and 99 *et seq*; *G. Bermann*, The Role of Law in the Functioning of Federal Systems, in: K. Nicolaidis/R. Howse (eds), The Federal Vision, 2001, 191.

51 *Siedentop* (note 24), at 94.

52 *Kadelbach* (note 45), at 270 *et seq*; *M. Zuleeg*, Deutsches und Europäisches Verwaltungsrecht – Wechselseitige Einwirkungen, 53 Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (1994) 154, at 165 *et seq*; *M.*

Law requires that conflicts be settled by an unbiased third party.[53] The principle of a community of law implies correspondingly that "neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, ... the Treaty established a complete system of legal remedies".[54] This is now reinforced by Art II-47(1) CT-Conv (Art 107 CT-IGC). The principle of comprehensive legal protection at the Community as well as at the Member State level has led to legal developments of the highest importance.[55] Against this background and in view of obvious loopholes in legal protection, the ECJ's restrictive interpretation of Art 230(4) EC seems unjustifiable.[56]

The rule of law is not uncontested.[57] Titles V and VI EU hardly live up to this principle. The European Council's role is particularly problematic. Although, legally speaking, it is an institution of the Union, its self-understanding is that of an institution operating outside the ambit

---

Zuleeg, Der rechtliche Zusammenhalt in der Europäischen Union, 2004, 104 *et seq*. For a rigid, pro-integration view, see *C. Kakouris*, Do the Member States Possess Judicial "Procedural" Autonomy?, 34 CML Rev (1997) 1389.

[53] *A. Kojève*, Esquisse d'une phénoménologie du droit, 1982, § 13.

[54] Case 294/83, *Les Verts v Parliament* [1986] ECR 1339, para 23; Case T-17/00 R, *Rothley et al v Parliament* [2000] ECR II-2085, para 54.

[55] *Kadelbach* (note 45), at 368 *et seq*; *D. Classen*, Die Europäisierung der Verwaltungsgerichtsbarkeit, 1996, 182 *et seq*; see *eg*, Case 222/84, *Johnston* [1986] ECR 1651, paras 13 *et seq*; Cases C-6/90 and 9/90, *Francovich* [1991] ECR I-5357, para 31; Case C-70/88, *Parliament v Council* [1990] ECR I-2041, paras 15 *et seq*; Case C-2/88 *Imm. Zwartveld* [1990] ECR I-3365, para 16.

[56] The approach taken in Case T-177/01, *Jégo-Quéré v Commission* [2002] ECR II-2365 *et seq*, paras 41 *et seq*, is to be welcomed; see also AG Jacobs, Opinion of 21 March 2002 in Case C-50/00 P, *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras 59 *et seq*. The ECJ, unfortunately, refused to follow the interpretation given by the CFI and the AG considering this step as requiring a Treaty amendment, Case C-50/00 P, *ibid*, paras 40 *et seq*, in particular para 45; see also the appeal judgement by the ECJ in Case C-263/02 P, *Commission v Jégo-Quéré* [2004] ECR I-0000, para 36; in detail, *S. Bitter*, Procedural Rights and the Enforcement of EC Law through Sanctions, in: A. Bodnar et al (eds), The Emerging Constitutional Law of the European Union, 2003, 15, at 29 *et seq*.

[57] For a pessimistic view on whether the "Community of law" is still a working premise to develop EU law, see *C. Joerges*, The Law in the Process of Constitutionalizing Europe, 4 EUI Working Paper LAW, 2002.

of the Union,[58] as demonstrated by its failure to proclaim the Charter of Fundamental Rights of the European Union. Similar to the king in the constitutional regimes of the 19th century, it is not answerable to any other institution and can do no wrong.[59] This institution, which often decisively shapes legislative projects, places itself outside the constitutional order and beyond legal and political responsibility.[60] The Constitutional Treaty remains most ambiguous in this respect. On the one hand, it squarely declares the European Council as an institution of the Union (Art I-18(2) CT-Conv; Art 19(1) CT-IGC). Yet it allows the European Council to elude many mechanisms of legal and political scrutiny (Arts I-20(1)(2), III-282(1) CT-Conv; Arts 21(1)(2), 376(1) CT-IGC)[61] and fortifies it, *eg*, through a more efficient presidency (Art I-21 CT-Conv; Art 22 CT-IGC).[62]

b) Principles of Protection for the Individual and of Rational Procedure

The principle of the rule of law contains numerous (sub-)principles that aim at the rational exercise of public power and protect qualified interests of its subjects.[63]

At an early stage of integration, much effort was dedicated for that reason to the principle of the separation of powers. This is hardly surprising: its importance emerges from Art 16 of the French Declaration of

---

58 *J.P. Jacqué*, in: H. von der Groeben/J. Schwarze (eds), Vertrag über die Europäische Union, Bd 1, 6. Aufl. 2003, Art 4 EU, para 5.

59 *C. von Rotteck*, Lehrbuch des Vernunftrechts und der Staatswissenschaften, 1840, reprinted 1964, vol 2, Lehrbuch der allgemeinen Staatslehren 249-251.

60 Case T-584/93, *Roujansky v Council* [1994] ECR II-585, para 12; Case C-253/94, *Roujansky v Council* [1995] ECR I-7, para 11; *R. Lauwaars*, Constitutionele Erosie, 1994, cited by *Gerkrath* (note 38), at 150.

61 Art 365 CT-IGC allows for a review of acts of the European Council which are intended to produce legal effects vis-à-vis third parties. Originally, the Convention had not foreseen a possibility to review acts of the European Council in Art III-270(1) CT-Conv. Interestingly, this fundamental change has been presented as merely technical in character, see Editorial and Legal Comments on the Draft Treaty Establishing a Constitution for Europe of 6 October 2003 <http://ue.eu.int/igcpdf/en/03/cg00/cg00004.en03.pdf> (8 April 2004).

62 For a constitutional classification of the European Council, see *F. Boschi Orlandini*, Principi costituzionali di struttura e Consiglio europeo, in: Scudiero (note 7), at 165.

63 *Hallstein* (note 39), at 55 *et seq*.

the Rights of Man and of the Citizen of 1789. In the 1950s the ECJ already used the principle of the separation of powers to protect the citizen and to rationalise the exercise of public power by the Community institutions.[64] Yet separation of powers has lost much of its meaning, probably because it could not adequately respond to certain issues.[65] More specific requirements replaced it, when the ECJ – and subsequently the CFI – developed, beginning in the late 1960s, principles for the protection of fundamental rights and rational procedure as well as principles of sound administration;[66] they are far more precise and effective.

The development of the numerous (sub-)principles which aim at a rationalisation of the exercise of public power and the protection of the individual is the one part of the constitutional development which has received the most scholarly dedication.[67] These principles display a high degree of differentiation[68] and development, as demonstrated not least by the Charter of Fundamental Rights of the European Union.[69] The relevant discussions show how a European doctrine of principles takes recourse to the developed repertoire of national fundamental rights, yet

---

64 Case 9/56, *Meroni v High Authority* [1957/58] ECR 133, at 152.

65 But see *H.-J. Seeler*, Die rechtsstaatliche Fundierung der EG-Entscheidungsstrukturen, Europarecht, 1990, 99; *K. Lenaerts*, Some Reflections on the Separation of Powers in the European Community, 28 CML Rev (1991) 11.

66 On the latter, Case T-54/99, *max.mobil v Commission* [2002] ECR II-313, para 48.

67 *A. Arnull*, The General Principles of EEC Law and the Individual, 1990; *I. Pernice*, Grundrechtsgehalte im Europäischen Gemeinschaftsrecht, 1979; *T. Schilling*, Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts, Europäische Grundrechte-Zeitschrift (2000) 3; *J. Schwarze*, European Administrative Law, 1992; *T. Tridimas*, The General Principles of EC Law, 1999; *J. Usher*, General Principles of EC Law, 1999; see also *J. Kühling*, in: von Bogdandy/Bast (note *).

68 On the level of protection, see *J. Limbach*, Die Kooperation der Gerichte in der zukünftigen europäischen Grundrechtsarchitektur, Europäische Grundrechte-Zeitschrift (2000) 217, at 219 *et seq*.

69 Charter of Fundamental Rights of the European Union, OJ C 364, 18.12.2000, 8; for its detailed interpretation, see *I. Pernice/F. Mayer*, in: E. Grabitz/M. Hilf (eds), Das Recht der Europäischen Union (looseleaf, last update 2003), after Art 6 EU; see also *Meyer* (note 30).

at the same time must take account of the Union's specific constitutional framework as a supranational authority.[70]

Although the improvement of the rule of law was not a core task of the European Convention, the Constitutional Treaty contains numerous elements that might provide for a better realisation of that principle.[71] It might even lead to a fundamental shift in the Union's legal order. In particular, Part II of the Constitutional Treaty, which incorporates the slightly changed Charter of Fundamental Rights, will raise the issue whether fundamental rights should be shifted from being simple constraints on the Union's public action to informing all public power, whether national or supranational.[72] The ECJ has already taken important steps in this direction. Whenever there is the faintest link to the Union, the ECJ requires the national legal orders to respect the European Convention on Human Rights and its Protocols as interpreted by the Strasbourg Court.[73]

A doctrine of principles has to regulate conflicts between the rule of law and other principles that such a development will produce. In particular, the various principles protecting diversity demand restraints on a principle- or value-based homogenisation through the judiciary.[74] Moreover, the specific features of the Union's organisational constitu-

---

70 *Weiler* (note 15), at 102 *et seq*.

71 *Eg*, the extension of judicial review to former "third pillar policies" (*argumentum e contrario* Art III-283 CT-Conv, Art 377 CT-IGC), the entrenchment of requirements for a rational exercise of public authority (*eg*, good administration, Art II-41 CT-Conv; Art 101 CT-IGC); transparency and publicness (Art I-49(1) and (2) CT-Conv; Art 50(1) and (2) CT-IGC); access to documents (Arts I-49(3), (4) and (5), II-42 CT-Conv; Art 50(3) and (4), 102 CT-IGC), the new order of legal instruments (Art I-32 CT-Conv; Art 33 CT-IGC).

72 In detail, *A. von Bogdandy*, The EU as a Human Rights Organization?, 37 CML Rev (2000) 1307.

73 Case C-60/00, *Carpenter* [2002] ECR I-6279, paras 41 *et seq*; Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk* [2003] ECR I-4989, paras 71 *et seq*; Case C-109/01, *Akrich* [2003] ECR I-0000, paras 58 *et seq*; Case C-101/01, *Lindqvist* [2003] ECR I-0000, para 90; Case C-117/01, *K.B.* [2004] ECR I-0000, paras 33 *et seq*; on this case-law in detail, *G. Britz*, Bedeutung der EMRK für nationale Verwaltungsgerichte und Behörden, Neue Zeitschrift für Verwaltungsrecht (2004) 173. In order to grasp its magnitude, this development has to be seen in relation to the equally activist case-law on Union citizenship; on the latter, see n 143 and accompanying text.

74 *Von Bogdandy* (note 72).

tion, for instance the lack of a constitutional founding authority organised at the Union level, must be taken into account when determining the principles' normative reach and depth. Considered in light of the full range of constitutional principles, expanding the reach and the depth of supranational fundamental rights in the current Union is by no means an unequivocally positive development, but rather a deeply ambiguous one.[75] Perhaps the ECJ is trying to respond to this danger by not developing its own fundamental rights case-law, but rather incorporating the ECHR's standards. Yet it is doubtful whether the ECHR is more responsive to issues of constitutional diversity and more acceptable for the national constitutional systems.

3. Democracy

a) Development and Basic Features

For over 30 years, legal science focused not on the principle of democracy, but rather on the rule of law. The thesis that the Community *should* have its own democratic legitimacy started to develop only as a *political* request of some and not as a legal principle. Until the 1990s the view was held that the supranational authority did not legally require democratic legitimacy beyond the general requirements for an international organisation.[76] Then, a rapid development took place which followed two different, albeit connected, paths: one, based on civil rights thinking, focusing on Union citizenship,[77] and another, based on institutional thinking, oriented toward the legitimacy of the Union's organisational set-up.

The development from political demand for an independent democratic legitimacy to *legal* principle has been arduous. Tellingly, even the 1976 Act concerning the election of the representatives of the Parliament by

---

[75] For details, see *S. Kadelbach* and *J. Kühling*, in: von Bogdandy/Bast (note *).

[76] *A. Randelzhofer*, Zum behaupteten Demokratiedefizit der Europäischen Gemeinschaft, in: P. Hommelhoff/P. Kirchhof (eds), Der Staatenverbund der Europäischen Union (1994) 39, at 40 *et seq*.

[77] This path will not be presented here; see in detail *S. Kadelbach*, in: von Bogdandy/Bast (note *).

direct universal suffrage does not contain the term "democracy".[78] Beginning in the 1980s, the ECJ very cautiously started to use the concept of democracy as a legal principle.[79] The Treaty of Maastricht then employed this term, although it mentions its role on the supranational level only in the 5th recital of the Preamble. With Art F EU Treaty in the Maastricht version democracy found its way into a Treaty text – yet not as a basis for the Union, but rather with a view to the Member States' political systems. The leap was not made until the Treaty of Amsterdam whose Art 6 EU then laid down that the principle of democracy also applies to the Union. This internal constitutional development is buttressed by external provisions. Of particular importance is Art 3 Protocol No 1 to the ECHR with its recent interpretation by the Strasbourg Court,[80] as well as – albeit less clearly – national provisions such as Art 23(1) German Basic Law.[81]

The Convention's draft of the Constitutional Treaty tried to make another leap, which, however, almost certainly would have failed. In selecting democracy as the theme of the introductory quotation,[82] the Convention's draft distinguished it as the highest value of the Union.

---

[78] Act concerning the election of the representatives of the Parliament by direct universal suffrage, OJ L 278, 8.10.1976, 1.

[79] The principle has been used very carefully and above all to strengthen existing provisions; see especially Case 138/79, *Roquette Frères v Council* [1980] ECR 3333, para 33; Case C-300/89, *Commission v Council* [1991] ECR I-2867, para 20; Case C-65/93, *Parliament v Council* [1995] ECR I-643, para 21; Case C-21/94, *Parliament v Council* [1995] ECR I-1827, para 17; Case C-392/95, *Parliament v Council* [1997] ECR I-3213, para 14. However, see the CFI judgement Case T-135/96, *UEAPME v Council* [1998] ECR II-2335, para 89, which interprets the principle of democracy with greater liberty. See *G. Britz/M. Schmidt*, Die institutionalisierte Mitwirkung der Sozialpartner an der Rechtsetzung der Europäischen Gemeinschaft, *Europarecht* (1999) 467, at 481 *et seq*; *K. Langenbucher*, Zur Zulässigkeit parlamentsersetzender Normgebungsverfahren im Europarecht, Zeitschrift für europäisches Privatrecht (2002) 265.

[80] ECHR, *Matthews v United Kingdom* Rep 1999-I 251; see *G. Ress*, Das Europäische Parlament als Gesetzgeber, Zeitschrift für Europarechtliche Studien (1999) 219, at 226.

[81] On similar provisions in other constitutions see *C. Grabenwarter*'s contribution, in: von Bogdandy/Bast (note *); also see *I. Pernice*, in: Dreier (note 4), Art 23, paras 9 *et seq*; on the requirements of Art 23 German Basic Law, see *ibid*, paras 49-57.

[82] The text reads as follows: "Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number."

This primacy, though, arose not solely from the prominent placement. The quotation comes from Pericles's funeral oration for the soldiers who died in the Peloponnesian War – in this speech, democracy is elevated as the value that even justifies sacrifice of human lives.[83] To suggest democracy as the Union's primary value is risky. Certainly, most Union citizens value democracy highly, yet the introductory use seemingly intimated that the Union – at least as the Convention's draft would have it – exists for the purpose of realising democratic ideals. Many citizens, however, may – and rightly so – believe that democracy's status in the Union is not fully satisfactory; moreover, considering the institutional alterations, the Constitutional Treaty is unlikely to significantly improve this democratic deficit. Thus, discord was likely between the most prominent declaration of the Convention's draft and the everyday experience of Union citizens. This would not have helped to foster identity. On the contrary, some might have seen the inconsistency as a deceptive manoeuvre, which fostered not identification but alienation and cynicism. Fortunately, the IGC deleted the reference to Thucydides' narrative thereby attenuating the seeming inconsistence. With the more classical approach of extending the co-decision procedure to more fields of EU action and the adoption of the more innovative – yet still not fully convincing – articles on the democratic life of the Union (Arts I-44 *et seq* CT-Conv; Arts 45 *et seq* CT-IGC), the IGC takes steps which might prove more successful than the overambitious Convention's draft.

The word "democracy" in Art 6 EU carries no definition. It has yet to be determined what the principle of democracy precisely means on the European level. Nothing depicts the uncertainties of how to understand the unional principle of democracy better than Part I Title VI and Part II Title V Constitutional Treaty. Under the headings "The Democratic Life of the Union" and "Citizens' Rights" respectively, a number of seemingly unconnected provisions are amassed; it will require a singular intellectual effort to reconstruct them as a meaningful whole.[84]

---

[83] *Thucydides*, History of the Peloponnesian War, II, 42 and II, 44. The idea that the readiness to make sacrifices is a key element to a collective identity is often found in US-American constitutional theory; for the viewpoint of a leading proponent of the "cultural study of law", see *P. Kahn*, American Hegemony and International Law, 1 Chicago JIL (2000) 1, at 8; see also *U. Haltern*, in: von Bogdandy/Bast (note *).

[84] For the first comprehensive effort, see *A. Peters*, European Democracy after the 2003 Convention, 41 CML Rev (2004) 37.

However, such innovative scholarship is needed anyway. More than for any other constitutional principle, it is beyond question that the principle of democracy requires a *specific* concretisation for the European Union and that any analogy to nation-state institutions must be carefully argued. A remarkably complex interdisciplinary discussion on European democracy has developed on the basis of this insight.[85]

From the perspective of a European doctrine of principles, the preliminary question of the possibility of democracy at the Union level can be simply neglected.[86] First, a doctrine of principles can hardly say anything about this question which rather belongs to the realm of political sociology. More importantly, the Union's constitutional law has normatively, and thus for a doctrine of principles resolutely, decided the question in Art 6(1) EU: democracy *is* a constitutional principle of the Union.

Yet, a European doctrine of principles has to define the unional principle of democracy. The easier part of that exercise is to discard inappropriate understandings which are prominent in numerous national legal discourses on the concretisation of the principle of democracy. This is particularly true for the theory which understands democracy as being the rule of "the people" in the sense of a "*Volk*" insofar as the term is to be understood in a substantive sense. Such an understanding would imply empirical bases that scarcely emerge at the European level. It would also be difficult to square with manifold provisions of the current Treaties (*eg* Arts 1(2) EU, 189 EC) although the substitution of the word

---

[85] For the identification of 64 positions on the European democracy problem, see *F. Schimmelpfennig*, Legitimate Rule in the European Union: The Academic Debate, 27 Tübinger Arbeitspapiere zur Internationalen Politik und Friedensforschung (1996), <http://www.uni-tuebingen.de/uni/spi/taps/tap27.htm> (8 April 2004).

[86] See *P. Graf Kielmansegg*, Integration und Demokratie, in: M. Jachtenfuchs/B. Kohler-Koch (eds), Europäische Integration, 1996, 47; *C. Offe*, Demokratie und Wohlfahrtsstaat, in: W. Streek (ed), Internationale Wirtschaft, nationale Demokratie, 1998, 99; *F. Scharpf*, Demokratieprobleme in der europäischen Mehrebenenpolitik, in: W. Merkel/A. Busch (eds), Demokratie in Ost und West, 1999, 672; *D. Grimm*, Does Europe Need a Constitution?, 1 ELJ (1995) 282; *D. Fuchs*, Demos und Nation in der Europäischen Union, in: H.-D. Klingemann/F. Neidhardt (eds), Zur Zukunft der Demokratie, 2000, 215, at 222 *et seq*; but see *M. Zuleeg*, Demokratie ohne Volk oder Demokratie der Völker?, in: J. Drexl et al (eds), Europäische Demokratie, 1999, 11; *J. Habermas*, Warum braucht Europa eine Verfassung?, 27 Die Zeit (2001), <http://www.zeit.de/2001/27/Politik/200127_verfassung_lang.html> (8 April 2004).

"peoples" with "citizens" in the Constitutional Treaty might point to a shift in this conception in its Arts I-1(1), I-19(2) and I-45(2) CT-Conv (Arts 1(1), 20(2), 46(2) CT-IGC). Of course it is possible to proceed formally and conceive "*das Volk*" as being the sum of all Union citizens,[87] yet even such a strategy to concretise the principle of democracy would create severe strains on other central Union principles, in particular Arts 1(2) and 6(3) EU and Art 189 EC. These norms suggest that the principle of democracy within the context of the Union must be concretised independently from the (pre-legal and problematic) concept of "people".[88]

As an alternative, the individual's opportunities to participate come into the foreground. PM Huber conceives the European principle of democracy as giving the individual through unional as well as national procedures a sufficiently effective opportunity to influence the basic decisions of European policy. The European principle of democracy thus contains an optimisation requirement insofar as it aims at the full utilisation of possibilities to participate at both levels.[89] This understanding of democracy does not necessarily require breaking with understandings developed under the national constitutions, but rather correlates with the civil rights understanding of democracy. This strategy of concretising the principle of democracy finds confirmation in the legal concept of Union citizenship (Art 17 EC).

Yet it would be a misunderstanding of the unional principle of democracy to place *only* the individual Union citizen in the centre. The Union does not negate the democratic organisation of the citizens in and by the Member States (Art 17(1) EC). Thus, alongside the Union citizens, the Member States' democratically organised peoples (Arts 1(2) and 6(3) EU, Art 189 EC) are to be active in the Union's decision-making process as organised associations. A concretisation strategy should build on these two textual elements: the current Treaties speak on the

---

[87] *A. Augustin*, Das Volk der Europäischen Union, 2000, 62, at 110 *et seq*.

[88] For a detailed analysis, see *S. Dellavalle*, Für einen normativen Begriff von Europa: Nationalstaat und europäische Einigung im Lichte der politischen Theorie, in: A. von Bogdandy (ed), Die Europäische Option, 1993, 217.

[89] *P.M. Huber*, Demokratie ohne Volk oder Demokratie der Völker? Zur Demokratiefähigkeit der Europäischen Union, in: Drexl *et al* (note 86), 27, at 55.

one hand of the peoples of the Member States and on the other hand of the Union's citizens insofar as the principle of democracy is at issue.[90]

The central elements which determine the Union's principle of democracy at this first level are thus named. The Union is based on a dual structure of legitimacy:[91] the totality of the Union's citizens *and* the peoples of the European Union as organised by their respective Member State constitutions.

At the conceptual level, the understanding of the unional principle of democracy suggests abandoning the conception of democracy as the self-determination of a people. Yet the Constitutional Treaty depicts the Union as such an instrument of self-determination.[92] This conception becomes implausible since the peoples of the Member States, as members of the Union, no longer exercise such self-determination (if they ever did). In addition, conceptions that consider democracy as an instrument of individual self-determination[93] do not have much of a chance for success within the Union context. On all levels the civil rights and control oriented conceptions of democracy appear more appropriate.[94]

---

[90] The Constitutional Treaty alters this picture: although "peoples" remains a constitutional concept, the Constitutional Treaty always uses the term "citizens" in the context of democracy. This should not, however, alter the concept of dual legitimacy, as already expressed in Art I-1(1) CT-Conv (Art 1(1) CT-IGC).

[91] On the model of dual legitimacy, see *A. Peters*, Elemente einer Theorie der Verfassung Europas, 2001, 556 *et seq*; see also *S. Oeter* and *P. Dann*, both in: von Bogdandy/Bast (note *).

[92] This is underlined by the 3rd recital of the Preamble (4th recital of the Convention's draft) which states that the peoples of Europe are determined, "united ever more closely, to forge a common destiny".

[93] *G. Frankenberg*, Die Verfassung der Republik, 1997, 148 *et seq* and *passim* tends in this direction; *J. Habermas*, Faktizität und Geltung, 1992, 532 *et seq* and *passim*; *I. Pernice*, Europäisches und nationales Verfassungsrecht, 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, 2000, 148, at 160.

[94] *Augustin* (note 87), at 246 *et seq*, 319 *et seq* and 388 *et seq*; *A. Wallrabenstein*, Das Verfassungsrecht der Staatsangehörigkeit, 1999, 138 *et seq*. The dichotomies used herein are developed in *A. von Bogdandy*, Democracy, Globalization, and the Path of International Law, 15 EJIL (2004) 885.

b) The Principle of Democracy and the Institutional Structure

Under almost all understandings of democracy, the most important element lies in the choice of the political personnel through free elections by the citizens. There is no reason why there should be a different starting point for the Union. Elections provide two lines of democratic legitimacy for the Union's organisational structure. These lines are institutionally represented respectively by the European Parliament, which is based on elections by the totality of the Union's citizens, and by the Council and the European Council, whose legitimacy is based on the Member States' democratically organised peoples. In the current constitutional situation there is a clear dominance of the line of legitimacy from the national parliaments, as shown in particular by Art 48 EU as well as the preponderance of the Council and the European Council in the Union's procedures. The Constitutional Treaty increases the relative weight of the EP, without, however, equalising the two lines of democratic legitimacy.

One may even doubt whether a principle of dual legitimacy as a concretisation of the principle of democracy can be formulated at all since the co-decision of the EP has by no means been incorporated into all areas of competence, nor do all important personnel decisions require its approval, nor are the other institutions answerable to it for all acts. Nevertheless, there is broad consensus that the EP's current scope of competences already permits the assumption of a principle of dual legitimacy.[95] The decision on appointments to the Commission and thus the "political motor of integration" is based on dual legitimacy pursuant to Art 214 EC (Art I-26 CT-Conv; Art 27 CT-IGC) as are not only the greater part of the legislative process pursuant to Art 251 EC (Art III-302 CT-Conv; Art 396 CT-IGC), but also the budget according to Art 272 EC (Arts I-55, III-310 CT-Conv; Arts 56, 404 CT-IGC) and the decision on accepting a new Member under Art 49 EU (Art I-57(2) CT-Conv; Art 58 CT-IGC).

Yet, in view of the current legal situation, the principle can only be understood as meaning that the democratic legitimacy of Union acts *can* be derived by way of the Council and the EP. The European legal system does *not*, however, specify *which* institution in any concrete case

---

[95] Entscheidungen des Bundesverfassungsgerichts 89, 155 at 184; see *A. von Bogdandy*, Das Leitbild der dualistischen Legitimation für die europäische Verfassungsentwicklung, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (2000) 284; see also above II 4.

must take a concrete decision.[96] The legitimacy of any specific act is a question of procedure, based on the relevant competence: for such sectoral regulation, the principle of democracy can promote stability but cannot modify procedure itself.[97] The demand to expand parliamentary powers remains in the political sphere; it can scarcely be based on the Union's principle of democracy.[98]

If the legal impact of the principle of democracy is limited, its implications are enormous. A transnational parliament can confer democratic legitimacy although it does not represent a people. Moreover, a *governmental* institution (*eg* the Council) is also able to do so. This contrasts sharply with national constitutional law, where such decisions are usually considered democratically problematic.[99] Even in federal constitutions the representative institutions of the sub-national governments are rarely acknowledged to have a role in conferring democratic legitimacy.[100] The idea of a *unitary* people is too strong.[101] The modification

---

[96] This is so notwithstanding the political demand that, at least in those areas in which the Council decides by majority decision, the Parliament should be involved by way of the co-decision procedure.

[97] The principle of democracy is thus not a criterion for the horizontal distribution of competences; see Case C-300/89, see n 79, paras 20 *et seq*; but see AG Tesauro, *ibid*, I-2892 *et seq*.

[98] However, the approach taken by the CFI in its judgement in Case T-353/00, *Le Pen v Parliament* [2003] ECR II-1729, paras 90 *et seq*, and by the President of the ECJ in his Order in Case C-208/03 P-R, *Le Pen v Parliament* [2003] I-7939, paras 95 *et seq*, is too cautious in that it rejected an autonomous, extensive right of Parliament to verify the vacancy of the seat of one of its members as not having separate legal effects. The reasoning is based on the state of Community law after the 1976 Act. The principle of democracy enshrined in Art 6(1) EU could and should have been of more significance in this regard. See *M. Nettesheim*, Juristenzeitung (2003) 952, at 954.

[99] On the discussion, see *A. von Bogdandy*, Gubernative Rechtsetzung, 2000, 108 *et seq*; *H.P. Ipsen*, Zur Exekutiv-Rechtsetzung in der Europäischen Gemeinschaft, in: P. Badura/R. Scholz (eds), Wege und Verfahren des Verfassungslebens: Festschrift für P. Lerche, 1993, 425; on the controversial democratic legitimacy of the German Federal Council, see *J. Jekewitz*, in: E. Denninger et al (eds), Alternativ-Kommentar zum Grundgesetz für die Bundesrepublik Deutschland, 2001, before Art 50 GG, para 11; *M. Bothe*, in: *ibid*, Art 20 paras 1-3, II (Bundesstaat), para 27; but see *H. Bauer*, in: Dreier (note 4), Art 50 GG, para 18.

[100] ECHR, see n 80, para 52.

of traditional strategies to realise democracy is especially evident at this juncture.

In Member States' constitutional law, the principle of democracy is further concretised by the parliament's specific position in the overall constitutional structure. At this point, European democracy remains hazy. One encounters an open situation, displaying this principle's lesser degree of development.

Some aspects should be briefly highlighted. One concern is whether and to what extent the system of European government is a parliamentary one.[102] Applied to the Union this concerns the relationship between the EP and the Commission. Legally the EP's control over the Commission's composition is, in certain respects, greater than that of the French National Assembly over the government.[103] Yet, whereas a semi-parliamentarian system of government has been realised on the weak French basis, nothing of the sort has occurred on the European level. It is quite conceivable that the Union's constitutive plurality prevents such a system from developing. Thus, the congressional model is also being discussed as an option for the EP.[104] It appears to be an empirically, constitutionally and politically open question, what form the European parliamentary system will finally take.[105]

The Parliament's lack of a right to legislative initiative might also become characteristic. It gives support to a conception grounded in the

---

[101] Similarly, *E.W. Böckenförde*, Sozialer Bundesstaat und parlamentarische Demokratie, in: J. Jekewitz (ed), Festschrift für F. Schäfer, 1980, 182, at 190.

[102] See *P. Dann*, in: von Bogdandy/Bast (note *).

[103] According to Art 8(1) French Constitution, the president nominates the prime minister; the prime minister's dependence on Parliament results from Art 49 in conjunction with the obligation to resign according to Art 50. The parliamentary competences contained in Art 214 EC are to some extent greater, yet the 2/3 quorum required for a motion of censure according to Art 201 EC is too high to establish a parliamentary system of government.

[104] *J. Coultrap*, From Parliamentarism to Pluralism, 11 Journal of Theoretical Politics (1999) 107; *S. Hix*, Elections, Parties and Institutional Design: A Comparative Perspective on European Union Democracy, 21 West European Politics, 1998, 19.

[105] On the issue of consociational democracy as a possible understanding, see *Peters* (note 84), at 83 *et seq*; see also *S. Oeter* and *P. Dann*, in: von Bogdandy/Bast (note *).

realistic parliamentary theories of the 20th century.[106] The lack of a right to legislative initiative can be construed in such a way that a society gives up the understanding of legislation as *self*-legislation, dear to important strands of democratic thinking.[107] The EP's whole organisation can be understood as a safeguard against the gubernative bureaucracy's becoming overly autonomous.[108] This conception points to a sober understanding of the principle of democracy but may have good prospects for that very reason. This fluidity shows that the ECJ has been wise not to use the principle of democracy for far-reaching developments of the law in the inter-institutional area, since, in contrast to the principle of the rule of law, sufficiently concretised strategies are needed.

c) Transparency, Participation, Deliberation and Flexibility

The principle of democracy, whether understood as an opportunity to participate, as a check on governmental abuse or as self-determination of the citizens, confronts greater challenges under the Union's organisational set-up than it does within the nation-state context. Greater *private* freedom in the Union is bought at the cost of less democratic self-determination. Contrasted with the nation-state, the Union's sheer size and constitutive diversity, the physical distance of the central institutions from most of the Union's citizens and the complexity of its Constitution, which can only be modestly reduced, are only some of the factors that place greater restrictions on the realisation of the principle of democracy by way of electing representative institutions. In light of this insight, further strategies for the realisation of the principle of democracy have received far greater attention than within the national context, where even the potential of such strategies is not always perceived. This is especially true of transparency, participation of those affected, deliberation and flexibility.

Sometimes the discussion about these concretising strategies appears to be carried by the hope that they might "compensate" for the Union's "democratic deficit". However, such considerations can only be useful

---

106 *Peters* (note 91), at 639; *M.G. Schmidt*, Demokratietheorien, 1995, 115 *et seq*.

107 See *Frankenberg* (note 93), *passim*, in particular 80 *et seq*; *A. Verhoeven*, The European Union in search of a democratic and constitutional theory, 2002, *passim*, in particular 34 *et seq*.

108 In more detail *P. Dann*, in: von Bogdandy/Bast (note *).

in the "political realm", but not in the constitutional context. There are no criteria as to how a deficit in electoral legitimacy could be legally offset.[109] Yet the following concepts permit remarkable strategies for the realisation of the principle of democracy.[110]

The transparency of governmental action, that is its comprehensibility and the possibility of attributing accountability, is only peripherally associated with the principle of democracy in the domestic context.[111] European constitutional law places itself at the forefront of constitutional development when it requires that decisions be "taken as openly as possible", *i.e.*, transparently. The Amsterdam Treaty first declared this, placing it prominently, namely in Art 1(2) EU. The specifically democratic meaning of transparency in European law was already to be found in the 17th Declaration to the Maastricht Treaty on the right to obtain information, which states that the decision-making procedure's transparency strengthens the institutions' democratic character. Art I-49 CT-Conv (Art 50 CT-IGC) confirms this understanding.

Transparency requires knowledge of the motives. From the beginning, Community law has recognised a duty to provide reasons even for legislative acts (Art 190 EEC Treaty, now Art 253 EC; Art I-37(2) CT-Conv; Art 38(2) CT-IGC), something which is hardly known in national legal orders.[112] Of course this duty was first conceived primarily from the perspective of the rule of law,[113] yet its relevance for the principle of democracy has meanwhile come to enjoy general acknowledgement.[114] The access to documents, which now also enjoys the dig-

---

[109] *E. Klein*, Die Kompetenz- und Rechtskompensation, Deutsches Verwaltungsblatt (1981) 661; *G. Britz/M. Schmidt*, Die institutionalisierte Mitwirkung der Sozialpartner an der Rechtsetzung der Europäischen Gemeinschaft, Europarecht (1999) 467, at 490 *et seq*.

[110] On the duty to provide reasons, *T. Müller-Ibold*, Die Begründungspflicht im europäischen Gemeinschaftsrecht und deutschen Recht, 1990, 53 *et seq*; on transparency, *G. Lübbe-Wolff*, Europäisches und nationales Verfassungsrecht, 60 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (2000) 246, at 278; on participation, *D. Curtin*, Postnational Democracy, 1997, 53 *et seq*.

[111] Expressly in *Lübbe-Wolff* (note 110), at 276 *et seq*.

[112] For a comparison, *von Bogdandy* (note 99), at 440 *et seq*.

[113] *H. Scheffler*, Die Pflicht zur Begründung von Maßnahmen nach den europäischen Gemeinschaftsverträgen, 1974, 44 *et seq* and 66 *et seq*.

[114] *Peters* (note 84), at 63 *et seq*; *id* (note 91), at 694 *et seq*; *Verhoeven* (note 107), at 268.

nity of being laid down in primary law in Art 255 EC, is also of great importance to the realisation of transparency. It has further become the subject of a considerable body of case-law,[115] which is slowly eroding the still powerful "tradition of secretiveness".[116] A further aspect is the openness of the Council's voting record on legislative measures.[117] The Constitutional Treaty develops these elements further with its provisions on the transparency of the institutions' proceedings and the access of the individual to the institutions' documents in Arts I-49, II-42, III-305 CT-Conv (Arts 50, 102, 399 CT-IGC).[118]

The second complex concerns forms of general political participation beyond elections. Popular consultations appear as an obvious instrument, and referenda have occasionally been used to legitimatise national decisions on European issues (such as accession to the Union or the ratification of amending treaties). To extend such instruments to the European level has been proposed for some time,[119] and the citizens' initiative figures among the innovations of the Constitutional Treaty (Art I-46(4) CT-Conv; Art 47(4) CT-IGC). It is, however, carefully circumscribed, and it is difficult to evaluate at this moment its possible importance as a way to give life to the democratic principle.

Whereas the Union has no experience with popular consultations, it has much experience in allowing special interests to intervene in the politi-

---

[115] Case C-349/99 P, *Commission v Arbeitsgemeinschaft Deutscher Tierzüchter* [1999] ECR I-6467; Cases C-174/98 P and C-189/98 P, *Netherlands et al v Commission* [2000] ECR I-1; Case C-41/00 P, *Interporc v Commission* [2003] ECR I-2125, para 39; Case T-309/97, *The Bavarian Lager Company v Commission* [1999] ECR II-3217; Case T-92/98, *Interporc Im- und Export v Commission* [1999] ECR II-3521; *S. Kadelbach*, Annotation, 38 CML Rev (2001) 179, at 186 *et seq*.

[116] *Committee of Independent Experts*, Second Report on Reform of the Commission, 10 September 1999, para 7.6.3, <http://www.europarl.eu.int/experts/default_en.htm> (8 April 2004).

[117] Art 207(3)(2) EC; in detail, *C. Sobotta*, Transparenz in den Rechtsetzungsverfahren der Europäischen Union, 2001, 144 *et seq* and 198 *et seq*; *Commission*, White Paper European Governance COM, 2001, 428 final, 25 July 2001, 15 *et seq*.

[118] In detail *Peters* (note 84), at 64 *et seq*.

[119] *H. Abromeit*, Ein Vorschlag zur Demokratisierung des europäischen Entscheidungssystems, Politische Vierteljahresschrift (1998) 80; *M. Zürn*, Über den Staat und die Demokratie im Europäischen Mehrebenensystem, Politische Vierteljahresschrift (1996) 27, at 49.

cal process. Comparative research between the Union and the independent regulatory agencies under the US Constitution has indicated that such participation of interested and affected parties might be a further avenue to realise the democratic principle.[120] Art I-46(1)-(3) CT-Conv (Art 47(1)-(3) CT-IGC) is based on this understanding, while such inclusion is still waiting to be generally recognised as a strategy for the realisation of the principle of democracy at the nation-state level.[121] There is, so far, no principle in primary law that requires the participation of interested and affected parties in the legislative process.[122] The relevant secondary legal provisions are nevertheless understood in this light.[123] This concretisation of the principle of democracy requires, however, much further elaboration. An interesting development in this regard is the use of the so-called "convention method" for the creation of fundamental European law, as was the case with the Charter of Fundamental Rights and the Constitutional Treaty. The instrument of the Convention allows for the inclusion of interested parties and experts in the law-making process.[124] Art IV-7(2) CT-Conv (Art 443(2) CT-IGC) now even introduces a compulsory Convention for the revision of the Constitutional Treaty.

The issue of how to guarantee political equality is still unanswered, as is the question of how to avoid political gridlock or the so-called 'agency capture' by strong, organised groups. A related approach sees the principle of democracy to be realised in the deliberative quality of supranational administrative co-operation.[125]

---

[120] Path breaking, *G. Majone*, Regulatory Legitimacy, in: G. Majone (ed), Regulating Europe, 1996, 284, in particular at 291. The Commission has displayed considerable interest; see *Commission* (note 117), at 13 *et seq*.

[121] For a comparison, *von Bogdandy* (note 99), at 67 *et seq* and 391 *et seq*.

[122] Case T-521/93, *Atlanta et al v Council and Commission* [1996] ECR II-1707, paras 70 *et seq*; Case C-104/97 P, *Atlanta v Council and Commission* [1999] ECR I-6983; *S. Peers*, WTO Dispute Settlement and Community Law, 26 EL Rev (2001) 605.

[123] *Commission* (note 117), at 19; see also *F.W. Scharpf*, European Governance: Common Concerns vs The Challenge of Diversity, 6 Jean Monnet Working Paper (2001).

[124] In detail, *J. Shaw*, Process, Responsibility and Inclusion in EU Constitutionalism, 9 ELJ (2003) 45.

[125] *C. Joerges/J. Neyer*, Vom intergouvernementalen Bargaining zu deliberativen politischen Prozessen, in: B. Kohler-Koch (ed), Regieren in entgrenzten

The most important task in this regard is making the Union more flexible, something which was introduced as a general strategy by the Treaty of Amsterdam and considerably expanded by the Treaty of Nice (Arts 40 *et seq*, 43 *et seq* EU, Arts 11 *et seq* EC) as well as the Constitutional Treaty (Arts I-43, III-322 CT-Conv; Arts 44, 416 CT-IGC). It allows a democratic national majority to be respected without, however, permitting this national majority, which is a European minority, to frustrate the will of the European majority. Yet, there are difficult questions of competitive equality in the internal market as well as of guaranteeing democratic responsibility in ever more complex decision-making processes – an area legal science has scarcely shed light on so far.[126] Also, the possibility to leave the Union, as foreseen in Art I-59 CT-Conv (Art 60 CT-IGC), upholds at least the prospect of national self-determination as an important aspect of democracy.[127]

d) Supranational Democracy: An Evaluation

The preceding considerations demonstrate that the principle of democracy is only slowly taking form at the European level, building on established conceptions while at the same time introducing a number of innovative accentuations and far-reaching modifications in order to make them acceptable for the European level.

The most important conceptual modification of established, national constitutional doctrine regards political unity, which most scholars consider foundational for the democratic constitutional state (even for the federal variant). The Union lacks such political unity; rather, it comprises discrete, nationally organised peoples and, thus, structurally related minorities without any majority.[128] This understanding finds its constitutional expression in the guarantee of respect for the Member

---

Räumen, 1998, 207; see also *C. Joerges/J. Falke* (eds), Das Ausschußwesen der Europäischen Union, 2000.

[126] *J. Wouters*, Constitutional Limits of Differentiation, in: B. de Witte/D. Hanf/E. Vos (eds), The Many Faces of Differentiation in EU Law, 2001, 301.

[127] On this provision, *I. Nicotra*, Il diritto di recesso e il Trattato che istituisce la Costituzione europea, in: A. Lucarelli/G. Buccino Grimaldi (eds), Studi sulla Costituzione europea, 2003, 447.

[128] *R.M. Lepsius*, Die Europäische Union als Herrschaftsverband eigener Prägung, in: C. Joerges/Y. Mény/J.H.H. Weiler (eds), What Kind of Constitution for What Kind of Polity?, 2000, 203, at 210.

States' peoples, the lack of will to found a state, the want of a comprehensive community of solidarity and defence (see, however, Arts I-40, I-42 CT-Conv; Arts 41, 43 CT-IGC) as well as the central role of the Council and the European Council in the decision-making process, to name a few.

Whereas in national constitutional law the principle of democracy – in the sense of the political equality of all citizens – greatly influences the organisational constitution,[129] the Union's constitutional organisation must place diversity at the same level.[130] It is this characteristic which explains and probably justifies, for example, some limitations placed on the principle of political equality[131] or the relative weakness of the EP. Perhaps these elements can even be seen as defining elements of a supranational understanding of democracy. However, the redefinition and emasculation of democratic equality in Art I-44 CT-Conv (Art 45 CT-IGC) can hardly be considered satisfactory.

Another legal question is whether the principle of democracy invites judicial activism. Within the organisational set-up and the inter-institutional relationships, in particular between the Council and the Parliament, judicial activism is only possible within the narrowest limits. Indeed, the Council is also dually legitimated to realise the principle of democracy, and nothing in unional constitutional law seems to prefer the EP's democratic legitimacy.[132] Judicial developments in the areas of transparency, participation by affected interests[133] and intra-institutional law[134] could be more significant.

---

[129] *K. Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 1999, paras 125 and 130.

[130] On this relationship, *G. Frankenberg*, in: Denninger (note 99), Art 20, paras 1-3, I (Republik), para 37; *C. Schmitt*, Verfassungslehre, 1928, 8th edn 1993, 388 *et seq*.

[131] The question concerns what the fundamental concept of democracy entails: equality, self-governance, qualified participation by the norm's addressee or elite competition?

[132] Such approaches in the ECHR's case-law (in particular ECHR, *Matthews v United Kingdom* Rep. 1999-I, 251 *et seq*) are not convincing under Union law.

[133] See the CFI's first attempts regarding the participation of special partners, Case T-135/96, see n 79, paras 88 *et seq*, critical *Britz/Schmidt* (note 79), at 491.

[134] See the CFI's approach, Cases T-222/99, T-327/99 and T-329/99, *Martinez et al v Parliament* [2001] ECR II-2823, para 195.

4. Solidarity

The last of modern Europe's classical, structural principles is solidarity. Its constitutional basis is not Art 6 EU, but rather Art 1(3) EU and Art 2 EC, which formulate it not as a (mere) principle, but as one of the Union's fundamental tasks. This was a noteworthy textual development. In the original formulation, Art 2 EEC Treaty called only for the closer relationship between the Member States, weakly reminiscent of the first Preamble, according to which the Treaty aimed at "an ever closer union among the peoples of Europe". Later developments approached the preamble's lofty goal. The Treaty of Maastricht introduced the current text. The substitution of the term "relations" with the term "solidarity" can be understood as a conceptual transition from a Union based on international relations to the Union as a federal polity. The centrality of solidarity is underscored by the Charter of Fundamental Rights of the European Union, which devotes an entire Title (Title IV) to this principle. The Constitutional Treaty goes, at least rhetorically, further down this road. According to the 2nd recital of its preamble (3rd recital of the Convention's draft), the reunited Europe acts "for the good of all its inhabitants, including the weakest and most deprived". As stated by Art I-2 CT-Conv (Art 2 CT-IGC), justice, solidarity and non-discrimination are defining features of the European society.[135] Based hereon, Art I-3(3)(2) CT-Conv (Art 3(3)(2) CT-IGC) commits the Union to pursuing the objective of social justice.[136]

However, the unional principle of solidarity contains elements beyond the conventional understanding. The Constitutional Treaty introduces in Art I-42 CT-Conv (Art 43 CT-IGC) a "solidarity clause" in cases of terrorist attacks or disasters: the community of defence is considered an issue of solidarity. Moreover, Part II Title IV on "Solidarity" lists "environmental protection" (Art II-37 CT-Conv; Art 97 CT-IGC) or "access to services of general economic interest" (Art II-36 CT-Conv; Art 96 CT-IGC). At the same time, the Constitutional Treaty attenuates the relevant wording of the Charter of Fundamental Rights in Art II-52(5) CT-Conv (Art 112(5) CT-IGC).

---

[135] The singular ("society") in Art I-2 can only be understood as the assumption that there is only one European society.

[136] These provisions are part of an attempt to depict a European social model in the Constitutional Treaty.

The principle of solidarity has for a long time not been the basis for much judicial activism.[137] However, it has served to reinforce important legal concepts: the community of law,[138] the principle of loyal co-operation,[139] the diverse mechanisms of redistribution,[140] European social law and certain aspects of the fundamental freedoms.[141] Recently, the principle of solidarity has been acquiring a much higher profile, being a key element of a most important line of the ECJ's case-law. The ECJ, perhaps in order to confute critical voices,[142] considers Union citizenship the "fundamental status" of Union citizens, which requires equal treatment with national citizens under national systems.[143] The ECJ bases this seminal decision explicitly on the assumption that there is "a certain degree of financial solidarity between nationals of a host Mem-

---

137 See Case C-149/96, *Portugal v Council* [1999] ECR I-8395, paras 83 *et seq*; Case 126/86, *Giménez Zaera* [1987] ECR 3697, para 11.

138 Case 39/72, *Commission v Italy* [1973] ECR 101, paras 24 *et seq*. Here, solidarity serves as the basis for founding the duty to obey the law. Apparently the ECJ felt that the formal legal duty needed a material basis.

139 Case C-72/95, *Kraaijefeld* [1996] ECR I-5403, para 58; Case C-165/91, *Van Munster* [1994] ECR I-4661, para 32; Case C-378/98, *Commission v Belgium* [2001] ECR I-5107, para 31.

140 This idea was introduced by Title V of the Single European Act, Arts 130a EEC Treaty *et seq*, now Arts 158 EC *et seq*. In modification of the original conception as expressed by Art 2 EEC Treaty this reveals that the single market does not automatically bring the same advantages to everyone. This idea speaks against a legal principle of *juste retour* regarding budgetary distributions; see *M. Lienemeyer*, Die Finanzverfassung der Europäischen Union, 2002, 263 *et seq*.

141 In detail, *T. Kingreen*, in: von Bogdandy/Bast (note *).

142 Outspoken, *J.H.H. Weiler*, The Selling of Europe, 3 Jean Monnet Working Paper (1996) 11: "little more than a cynical exercise in public relations."

143 Case C-184/99, *Grzelczyk* [2001] ECR I-6193, para 31; Case C-413/99, *Baumbast* [2002] ECR I-7091, para 82; see also the Opinion of AG Jacobs in Case C-85/96, *Martínez Sala* [1998] ECR I-2691, para 18; in detail, *Verhoeven* (note 107), at 180 *et seq*; *T. Kingreen*, Das Sozialstaatsprinzip im europäischen Verfassungsverbund, 2003, 414 *et seq*; *S. Kadelbach*, in: von Bogdandy/Bast (note *); for possible further developments in social democratic thinking, see *D. Scheuing*, Freizügigkeit als Unionsbürgerrecht, Europarecht, 2003, 744, at 770 *et seq*; AG Ruiz-Jarabo Colomer, Opinion of 11 December 2003 in Case C-386/02, *Baldinger* [2003] ECR I-0000, paras 45 *et seq*. On the ramifications of this case-law for the application of the Charter of Fundamental Rights, see *P. Eeckhout*, The EU Charter of Fundamental Rights and the Federal Question, 39 CML Rev (2002) 945, at 969 *et seq*.

ber State and nationals of other Member States".[144] It thereby takes the understanding of the principle much further than Art 2 EC which only refers to solidarity among Member States. Obviously, this principle as understood within the Union leaves the often meaningless international conception of solidarity far behind. Perhaps these different aspects of solidarity are covered by the as yet enigmatic "duties" of Art 17 EC.

Yet, the limits of the European community of solidarity in comparison to that of a nation-state can be discerned in the lack of a full defence community, the liability exclusions – slightly weakened by the Treaty of Nice – contained in Arts 100, 103 EC, the structure of net contributing and net receiving Member States as well as the relatively small volume of redistribution organised by and through the Union.[145]

A construction of Union law based on the principle of solidarity is particularly promising since the financial constitution is the Achilles' heel of a federal system. With the exception of Union citizenship, however, there are few studies on this subject.[146] Further legal scholarship could yield beneficial insight into the tensions between competitive and solidaristic federalism or between the welfare oriented aims of Art 2 EC and the liberal market orientation of Art 4(1) EC.

III. Concluding Remarks

This exposition has revealed to what extent a doctrine of the unional founding principles can build on established constitutional scholarship and also where innovation is still necessary. In some important issues, continuity is possible only based on still controversial understandings of national constitutional law. A European doctrine of principles re-

---

[144] Case C-184/99, see n 143, para 44.

[145] Council Dec 2000/597 EC, Euratom on the System of the Communities' Own Resources, OJ L 253, 07.10.2000, 42.

[146] *C. Tomuschat*, Solidarität in Europa, in: F. Capotorti et al (eds), Du droit international au droit de l'intégration: Liber Amicorum P. Pescatore, 1987, 729 *et seq*; *C. Calliess*, in: C. Calliess/M. Ruffert (eds), Kommentar zu EU- und EG-Vertrag, 2002, Art 1 EU, paras 44 *et seq*; *R. Bieber*, Solidarität als Verfassungsprinzip, in: A. von Bogdandy/S. Kadelbach (eds), Solidarität und Europäische Integration, 2002, 38 *et seq*; *Zuleeg* (note 52), at 153 *et seq*. However, recently an important monograph has been published, see *Kingreen* (note 143), in particular 422 *et seq* and 438 *et seq*.

mains a project that will occupy many legal scholars before a sufficient consensus emerges. Established doctrines concretise unional principles in only a few areas. Many principles remain largely abstract, or their nature as principles is even contested. Legal science's design for the European legal order on the basis of principles remains a programme for the future.

The Emergence of European Constitutional Law

*Ralph Alexander Lorz**

I. Introduction

The European Union is a unique entity. It has evolved over time into a community of nation-states whose characteristic features are unparalleled throughout the world. Starting out – in its original shape, consisting of the two specific European Communities on Coal and Steel and Atomic Energy and the more general European Economic Community – as the mere attempt to create an integrated economic area of the core states of Western Europe, it has first of all acquired an autonomous legal order of its own[1] which soon necessitated the invention of a completely new terminology to describe its peculiarities. The pivotal term within this invention is the notion of "supranationality"[2] which binds

* I am most grateful to Dipl.-Jur. *Maren Mueller* for her excellent preparation of this article.

1 ECJ, 05 February 1963 (26/62, *van Gend & Loos*), 1963, 3, 25 (German edition); *P.-C. Müller-Graff*, Europäische Verfassungsordnung – Notwendigkeit, Gestalt und Fortentwicklung, in: D. Scheuing, Europäische Verfassungsordnung, 2003, 11, 20.

2 *D. Grimm*, Braucht Europa eine Verfassung?, JZ 1995, 581, 586; *C. Koenig/A. Haratsch*, Europarecht, 4th ed. 2003, no. 13.

together two elements in particular that distinguish the European integration from all other similar developments in other regions of the globe: first, the possibility of majority decision-making that enables the Community organs to produce legislative acts even against the will of a minority of member states which will nevertheless be bound by these acts;[3] and second, the direct effect of large parts of Community law that allows the pertinent provisions to empower and obligate European citizens without any need for domestic implementation.[4] The creation of the European Union through the Maastricht Treaty has added the missing political dimensions, namely, the realms of Foreign and Security Policy on the one hand and Justice and Home Affairs on the other, and has created a new institutional roof[5] in order to unite these different political "pillars". That altogether delineates a political entity whose reach in general – taking into account the remarkable transfer of domestic competences to the European level – can easily be compared to that of a federal state, although some important distinctions remain: not the least of them being the fact that the two pillars added by the Maastricht Treaty do not share in the supranational character enjoyed by the original European Communities[6] that have now largely been reduced to one "European Community".

The sheer possibility of comparing the basic structures of the Union and its member states has already early sparked a discussion on whether the European Union yet possesses a "constitution" or whether it should be given one.[7] Especially in Germany – as might be typical of the academic discussions in this country – this debate has moreover taken on a very fundamental character: here the principal question is asked whether an entity like the European Union is at all capable of

---

3 *R. Streinz*, Europarecht, 6th ed. 2003, no. 116; *C. Koenig/A. Haratsch* (note 2), no. 13.

4 *C. Koenig/A. Haratsch* (note 2), no. 13; *R. Streinz* (note 3), no. 120.

5 *R. Streinz* (note 3), no. 41.

6 *C. Koenig/A. Haratsch* (note 2), no. 44.

7 *D. Grimm* (note 2), 586; and *C. Koenig*, Ist die Europäische Union verfassungsfähig?, ZEI-Report, October 1999, 8, at 8; both think the European Union does not and cannot have a constitution while other authors and European courts claim the Union already has a constitution, *e.g. I. Pernice*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), 148, at 153; *D. Thym,* European Constitutional Theory and the Post-Nice Process, in: M. Andenas/J. Usher, The Treaty of Nice and Beyond, 2003, 147, 166; ECJ, 23 April 1986 (294/83, *Les Verts*), no. 23.

having a constitution or whether the notion of a "constitution" should be reserved for the traditional nation-states.[8] The answer to this question obviously depends on the acceptance of the possibility to transfer the ideas of a constitution and constitutional law to non-state entities. This is a generally interesting theoretical problem that is not at all confined to the specific sphere of European integration; for instance, it might as well be asked whether the international community as such or in its topical organizational appearance through the United Nations could be conceived as a possible subject of constitutional structures. In the European context, however, this problem is particularly burning for two reasons: first, it is widely accepted today that the Union, its member states and their subnational entities together form a "multi-level system" of power distribution[9] that is both very densely and intricately intertwined and also characterized by a comprehensive set of common principles which might be able to serve as the basis of values that every constitutional order needs. Second, the old discussion on the capability of Europe to acquire a constitutional foundation has gained a new momentum through the recent convention process: even though the "Constitutional Treaty" proposed by this convention has for now been shelved due to its failure in the French and Dutch referenda,[10] the mere idea of giving Europe a constitution that has been lingering around for so long will continue to be seriously materialized in that document. Assuming that the current popular rejection of the Treaty will not be the end of the matter, it is therefore all the more urgent to answer the general question whether Europe can have a constitution before the next attempt is undertaken to give it a concrete one. To contribute to this answer is also the purpose of this report.

---

[8] *D. Grimm* (note 2), 581; *C. Koenig*, Anmerkungen zur Grundordnung der Europäischen Union und ihrem fehlenden „Verfassungsbedarf", NVwZ 1996, 549, at 549; *C. Degenhart*, Staatsrecht I, 21st ed. 2005, § 1 no. 18.

[9] *C. Joerges*, What is left of the European Economic Constitution? A melancholic eulogy, ELR 30 (2005), 461, 487; *I. Pernice*, Der Beitrag Walter Hallsteins zur Zukunft Europas, WHI-Paper 9/01, 5 *et seq*.; *I. Pernice* (note 7), 173; *D. Thym* (note 7), 155; *D. Tsatsos*, Die Europäische Unionsgrundordnung, 2002, 32.

[10] In referenda in May/June 2005 the French and Dutch citizens rejected the Draft of the Treaty on a Constitution for Europe; validation of the Treaty in the respective Member State would have required approval.

II. Starting Point: The Case Law

As seems to be normal in European law, one should first look to the case law of the European Court of Justice and the respective national courts in order to gain some assistance in finding this answer. The famous case of *Costa / E.N.E.L.* that has become a cornerstone of European law doctrine because it first established the prevalence of the European Community treaties over national law[11] is also the first case where the term "constitution" appears in an official statement. It was Advocate-General Maurice Lagrange who used it in his final pleadings, declaring that "the Treaty of Rome certainly in part has the character of a true constitution of the Community".[12] The Court of Justice itself took some more time to adopt this terminology. In 1977 it began speaking of an "internal Constitution of the Community",[13] but only in 1986 it also started using the expression "the basic constitutional charter, the Treaty",[14] characterizing the then-European Economic Community as a "community of law" for which the underlying treaty performed the functions of a constitution. In its legal opinion regarding the Treaty on the European Economic Area that was issued in 1991, the Court of Justice then unambiguously proclaimed:

> "By contrast, the Treaty on the European Economic Community, although concluded in the form of an agreement under public international law, nevertheless embodies the constitutional charter of a community of law. According to the standing case law of the Court, the Community Treaties have created a new legal order for which the member states have restricted their sovereign rights in more and more areas and whose legal subjects are not only the member states but also their citizens."[15]

Thus, following the European judiciary in this respect would leave no doubts about the general capability of the European Union to have a constitution; in fact, it would even eliminate all doubts that the Union already has a constitution. However, in the context of our analysis this

---

[11] ECJ, 15 July 1964 (6/64, *Costa / E.N.E.L.*), 1964, 1253, 1270 (German edition).

[12] Advocate-General *M. Lagrange*, Opinion concerning case 6/64, 1964, 585 (English special edition).

[13] ECJ, opinion 1/76, no. 12.

[14] ECJ, 23 April 1986 (294/83, *Les Verts*), no. 23.

[15] ECJ, opinion 1/91, no. 21.

case law can only serve as a starting point because the Court of Justice – unfortunately but as usual – does not really give reasons for these assumptions.

It might therefore be more helpful to look to the national courts for guidance, especially to the German ones – which is in any case a pivotal task of this report –, for Germany is, as stated above, probably the one of all member states where the corresponding debate is conducted in the most fundamental manner. However, not even the German Constitutional Court, which is otherwise famous for its reservations with regard to the absolute supremacy of European law,[16] has ever signalled that it would principally object to the European Union having a "constitution". Already in a judgment of 1967 the Constitutional Court qualified the European Economic Community as a "community of its own, standing in a process of continuing integration", and stated that the underlying Treaty "quasi constitutes the constitution of this community".[17] In the "Maastricht" judgment of 1993 the Court then started employing a more cautious terminology: by speaking of a "way towards further step-by-step integration of the European Community of Law" that would be opened by the Treaty in question, and by insisting on the continuing necessity of national parliamentary assent to every new major step forward within this integration process.[18] This would seem to exclude a totally autonomous constitutional development of the European Union; however, it does not rule out such a development at all, as long as a sufficient link between this development and the will of the parliaments of the member states is guaranteed. In any case, if one already attributes constitutional character to the founding treaties of the European Communities, this must all the more apply to the new Treaty on European Union, since the Communities according to Art. 1 Par. 3 of this Treaty simultaneously constitute the basis of the newly founded European Union.

To be sure, though, all these statements issued by European and national courts are but indications of a general acknowledgment of the possible existence of a "European Constitutional Law". The courts, however, never explicitly recognize or even define the precise contents of such a body of law. By contrast, they seem to use a terminology of

---

16 Cf., for instance, German Constitutional Court, BVerfGE 73, 339, 374 *et seq*.

17 German Constitutional Court, BVerfGE 22, 293, 296.

18 German Constitutional Court, BVerfGE 89, 155, 204.

their own when speaking of a "constitution" in connection with the European treaties. Thus, it will be necessary to deal with the fundamental theoretical objections against this possibility before the details of the ongoing constitutional process in Europe can be determined.

III. Fundamental Objections

The most fundamental objection against the utilization of constitutional terms in the context of the European Union stems from a specific view of the relationship between "constitution" and "state", namely, from an allegedly inseparable connection between these two phenomena.[19] Since it is not contentious that the European Union is not a state and does not even aim at becoming one,[20] an inseparable link between "constitution" and "state" would necessarily entail that the Union could not be allowed to have a "constitution" at least within the foreseeable future. The Constitutional Treaty tried to overcome this view by using the term "constitution" despite the fact that it did not at all try to newly found the Union as a federal state. It rather wanted to continue the Union as an integrated supranational community and thus as an independent organizational category.[21] The problem therefore boils down to the question whether such an institutional setting can be organized through a constitution or whether it must make use of a different instrument – the authors advocating the latter view consequently call for the continued use of the term "treaty" alone[22] or for the invention of a new description such as "statute".[23] It should be remarked, though, that these authors themselves split into two different political camps: the major part of them objects to a too lenient way of dealing with the term "constitution" and therefore wants to reserve this term for those pro-

---

19 *D. Grimm* (note 2), 586; *C. Koenig* (note 7), 8; *C. Koenig* (note 8), 549; *C. Degenhart* (note 8), § 1 no. 18.

20 Cf. *I. Pernice* (note 7), 150.

21 *M. Möstl*, Verfassung für Europa, 2005, 21.

22 *D. Grimm* (note 2), 586; *P. Huber*, Europäisches und nationales Verfassungsrecht, VVDStRL (2001), 194, 234. *D. Tsatsos* (note 9), 29 concedes that the Treaties fulfil constitutional functions but avoids the term "constitution" in that context; also *C. Möllers*, Verfassunggebende Gewalt, Verfassung, Konstitutionalisierung, in: A. von Bogdandy, Europäisches Verfassungsrecht, 2003, 1, at 53.

23 *C. Koenig* (note 8), 551 *et seq*.

cesses for which it has been created, *i.e.* for the fundamental decision of how to organize a state.[24] But there is also a group of academic writers who want to avoid this term precisely because they want to preserve the specific features of the European Union:[25] according to this view, the Union shall have the chance to develop into a direction different from the path that would lead to a federal state.

But what is so special about a state in contrast to a supranational organization that could justify the exclusive use of constitutional terms in its context? There are two specific traits which only a state does possess: first, the so-called "competence-competency",[26] *i.e.* the power to determine its own powers which might also – at least in part – be identified with the traditional notion of sovereignty; and second, the existence of a people that makes up the state and legitimizes its organization and institutions.[27] The other elements normally associated with a state, namely, territory and government, would by contrast be undoubtedly present at the European level.

As regards the power to determine its own competences, not even the most arduous European integrationists would claim that the Union has it. Art. 5 Par. 1 of the Treaty on the European Community makes pretty clear that the Community – nothing else is true for the Union – shall not have any other competences than those explicitly given to it in the Treaty. To be sure, the Community organs and especially the Court of Justice have over time developed a whole series of doctrinal instruments to make up for the apparent deficits of the Community that have arisen out of this general construction: among these instruments, the principle of "effet utile"[28] and the "implied powers" doctrine[29] have probably become the most widely used and famous ones. But not even the massive application of these doctrines and the open empowerments

---

[24] *D. Grimm* (note 2), 585; *C. Degenhart* (note 8), § 1 no. 18; *C. Koenig* (note 7), 8; *C. Koenig* (note 8), 549.

[25] *D. Tsatsos* (note 9), 29; *P. Huber* (note 22), 234 *et seq*.

[26] Cf. *C. Koenig* (note 7), 8; *C. Degenhart* (note 8), § 1 no. 18; *C. Koenig* (note 8), 551; *R. Streinz* (note 3), no. 121.

[27] *D. Grimm* (note 2), 586 highlights the absence of a European people as one of the major reasons for his position.

[28] *R. Streinz* (note 3), no. 498; *e.g.* ECJ, 19 November 1991 (6/90, 9/90, *Francovich*), no. 32.

[29] *R. Streinz* (note 3), no. 594; *e.g.* ECJ, 29 November 1956 (8/55, *Fédération Charbonnière*), 292, 299 (English special edition).

which the Treaty itself provides – in particular Art. 95 and 308 – could alter the fundamental result of this analysis: the member states have remained the "masters of the treaties" at least insofar as the European Union and Community organs always have to rely on a specific grant of powers by the member states if they want to make use of a certain competence.

The non-existence of a European "people" goes equally uncontested.[30] The Treaties on the European Union and Community both deliberately avoid speaking of one and instead mention the "peoples" of Europe that shall be brought together, *i.e.* the peoples of the respective member states. It is of course theoretically feasible to imagine a European people constituting itself – in a quasi-revolutionary act – by convening a European Constitutional Assembly and approving a constitutional document through a Europe-wide referendum. But for the time being, this possibility will certainly remain in the realm of theory. Even the Constitutional Treaty that is now still lying on the table continues to breathe the spirit of the old treaties insofar as its formulation and implementation has been totally left to the member states. The "Constitutional Convention" which drafted it was not elected in any way but established and put together by the Heads of State and Government of the member states. It was not at all empowered to create binding norms but rather confined to making suggestions that had no binding effect whatsoever, not even on the Intergovernmental Conference that followed, let alone the member states themselves. Above all, though, even if this "constitution" should ever enter into force, this will not happen through any truly "European" act but – as in the case of every normal treaty under public international law – through the regular ratification process in every member state according to its constitutional law.[31] There might be referenda in several member states – like the ones in France and the Netherlands that failed and would therefore certainly have to be repeated – to underline the peculiar importance of this treaty; but then again, it would only be the "peoples" of the respective member states which would provide the direct democratic legitimation of the European "constitution". Thus, it is easily understandable why so many authors especially in Germany – following the famous "Maastricht" judgment of the Constitutional Court – insist on the necessity of

---

[30] *P.-C. Müller-Graff* (note 1), 19 identifies concepts that refer to the idea of a people but denies that there is a European people at this point.

[31] Cf. *M. Möstl* (note 21), 18 *et seq*.

a "dual" legitimation of European power,[32] with the European Parliament just being one of the two required pillars, while the other one rests on the regular domestic chain of legitimation that starts from the peoples of the member states and then runs via the national parliaments.

But do all these observations compel the conclusion that the European Union cannot have a constitution? Of course, they buttress the argument that the Union and its structures are fundamentally different from those of a normal nation-state, and since constitutions have been historically devised to organize states only, this would also justify the close connection between the terms "constitution" and "state" that was mentioned above. But history, as important and informative as it may be, is usually not a compelling argument on how to deal with a totally new phenomenon. The European Union, as stated above, is a unique and unparalleled entity in today's world as well as from the viewpoint of history. One can therefore of course demand that a new category be created to fit this new development. But is this really necessary? – or would a comparison with the traditional structures rather reveal that the new phenomenon could find its place within these structures as well if they were just a little bit adjusted?

An important distinction to be drawn in that respect concerns the difference between *making* a constitution and *having* one. For the reasons previously explained, it would indeed be impossible for the European Union to give itself a constitution. As long as there is not one European people which could constitute a new sovereign entity, there will be no constitution-making power at the European level.[33] But the existence of a constitutional order does not necessarily presuppose an autonomous constitution-making power as its origin.[34] It is equally conceivable that a constitution is actually given to an entity by some external power. That might even happen within the traditional state system, whenever some dominating state – for instance, the colonial powers in relation to their colonies or the Allied Powers after World War II in relation to the

---

[32] German Constitutional Court, BVerfGE 89, 155, at 185; *C. Koenig* (note 7), 8; *D. Thym* (note 7), 163; *D. Grimm* (note 2), 586; *P.-C. Müller-Graff* (note 1), 24; *R. Streinz* (note 3), 41.

[33] Cf. *D. Grimm* (note 2), 586; and *C. Koenig* (note 7), 8 who therefore deny the ability of the European Union to give itself a constitution.

[34] *G. Roellecke*, Verfassunggebende Gewalt als Ideologie, JZ 1992, 929, at 934 interprets the construction of a «pouvoir constituant» as a mere instrument of public international law that helps explaining the phenomenon of constitution-building.

defeated Axis Powers – imposes a constitution on a newly independent state or at least reserves the final approval of such a constitution for itself. The legitimacy of the respective document might then depend on its subsequent acceptance by the people concerned but its constitutional quality as such cannot be seriously called into question.

If one transfers these thoughts to the situation of the European Union, it follows therefrom that it does not matter if the ultimate decision on the constitutional question rests with the member states. It is their free choice whether the Union should have a constitution – and if so, what kind of constitution it shall be – or a different basic legal instrument. But if the member states decide to let the Union have a constitution and if the document in question fulfils all indispensable requirements of one, there is no compelling reason why this will of the member states should not be respected.

IV. A Functional Approach?

Thus, our analysis starts out from the basic assumption that it is possible for non-state entities to have a constitution as well. To be sure, the historical connection between "constitution" and "state" is undisputed:[35] when the idea of a constitution was born, the state was basically the only institutionalized form of political power which had to be organized and restricted for the benefit of its citizens. But like any other term in law, the term "constitution" with its specific meaning and significance is subject to permanent development and not carved in stone for eternity.[36] If a constitution for a non-state entity like the European Union can be generally conceived, however, the question whether there really is something like "European Constitutional Law" depends on its conformity with the indispensable requirements of any constitution as mentioned above, *i.e.* on the functions a constitution has to fulfil.

---

[35] *P. Huber* (note 22), 198 *et seq*.; *I. Pernice* (note 7), 149. *C. Möllers* (note 22), 19 analyzes the term "constitution" against its historical background.

[36] *R. Zippelius*, Allgemeine Staatslehre, 14th ed. 2003, 57; *D. Tsatsos* (note 9), 32; *P. Huber* (note 22), 198 *et seq*.; *C. Möllers* (note 22), 2.

The catalogues of constitutional functions that can be found in academic writings[37] are too manifold to analyze them all here in detail. But it is feasible to distil a common essence out of all these compilations. The fundamental functions that appear – albeit in different shapes – in more or less every enumeration of this kind can be described as follows:

– *Organization*:[38] Every constitution is first of all an organizational statute. It has to set up institutions – the constitutional organs – and to delineate their competences as well as the procedures they have to observe when performing the basic tasks of any public power entity: lawmaking, executive action, judicial settlement of disputes. In a federal system of any kind, special emphasis must moreover be put on the distribution of competences between the federal power and the sub-federal levels.

– *Stability*:[39] The overarching requirement of any such public organization and thus also of its constitution is to provide stability and reliability for the people subject to its regulations. A constitution must therefore have binding force not only for the people but also for all institutions within the system, and its general implementation as well as its relative resistance against amendments and alterations must not be seriously in doubt.

– *Protection*:[40] The fundamental purpose of all states and roughly similar entities consists in the protection of their citizens. In addition to the ancient idea of protecting citizens against external dangers, all modern constitutions acknowledge that it is equally necessary to protect the citizens against internal misuse of the corresponding powers, *i.e.* against unjustified encroachments upon their personal liberties. This necessitates the guarantee of certain basic rights together with general principles of law and effective – not necessarily but often judicial – mechanisms to ensure a thorough respect for them.

– *Legitimation*:[41] At least in democratic systems, the constitution must also provide for an unbroken chain of legitimation leading from the

---

[37] *E.g. M. Möstl* (note 21), 19; *R. Zippelius* (note 36), 55; *P. Huber* (note 22), 199; *P.-C. Müller-Graff* (note 1), 21 *et seq*. – to mention only a few.

[38] *P.-C. Müller-Graff* (note 1), 23; *P. Huber* (note 22), 200 *et seq*.

[39] Cf. *P. Huber* (note 22), 202.

[40] *P. Huber* (note 22), 202; *P.-C. Müller-Graff* (note 1), 25; *M. Möstl* (note 21), 19.

[41] *M. Möstl* (note 21), 19; *P. Huber* (note 22), 206; *P.-C. Müller-Graff* (note 1), 24.

citizens to all constitutional organs and institutions. Since this kind of legitimacy – in a personal respect – is usually produced by elections and subsequent appointments, the constitution consequently has to define the pertinent procedures.

– *Setting of Goals:*[42] The necessity of legitimation, however, does not encompass the personal sphere only. It extends to setting the general goals and political parameters that are supposed to guide the entity as a whole. This is usually done by programmatic provisions in the constitution which lay the material cornerstones of orientation for the subsequent policy of the entity at issue.

– *Integration*: Finally, it is a central task of any state and comparable organization to care for the integration of all its citizens into society. This has been a major topic in German state theory in particular, dating all the way back to the famous "integration theory"[43] formulated by *Rudolf Smend* at the beginning of the last century. And it has been a major topic in all discussions on a united Europe from the very outset, since "integration" used to be a magic formula employed to overcome the historical frictions between the old European nation-states that had plunged the continent into two World Wars within thirty years.

Testing the current structures of the European Union – and those envisaged by the Constitutional Treaty – against this catalogue of essential constitutional functions yields the following result:

– In terms of *organization*, the constitutional function of the Treaties cannot be seriously doubted. If there is any part of the Treaties which – in their specific context – essentially performs the same tasks as the comparable rules in a state constitutional order, it is the comprehensive set of provisions on institutions and procedures – *i.e.* the organization – of Union and Community.[44] The Treaties establish the organs of these entities; they regulate their composition and the election or appointment of their officers; they allocate certain tasks and powers to each of these organs; and they regulate their interplay within the decision-mak-

---

[42] *P. Huber* (note 22), 204; *P.-C. Müller-Graff* (note 1), 22; *R. Zippelius* (note 36), 55.

[43] *R. Smend*, Die politische Gewalt im Verfassungsstaat und das Problem der Staatsform (1923), reprinted in: *R. Smend*, Staatsrechtliche Abhandlungen und andere Aufsätze, 1994, 68, at 85 *et seq*.; *R. Smend*, Das Recht der freien Meinungsäußerung, VVDStRL 4 (1928), 44, at 46 *et seq*.

[44] Even *D. Grimm* (note 2), 585 admits that the Treaties fulfil all major functions of a constitution in relation to European public authority.

ing procedures of all the traditional branches of government. Furthermore, as for example Art. 5 of the Treaty on the European Community aptly shows, they in principle delineate the competences of Union and Community especially in their relation to the member states which would be typical of a constitution in any federal state system.

– The Treaties and the primary law embodied in them also provide a sufficient degree of *stability*. Their binding force is undisputed[45] and generally respected by the member states; and because a consensus of all member states is needed to change them, they are probably much better protected against amendments and alterations than a "normal" state constitution. The organs of Union and Community, especially the Commission and the Court of Justice as "guardians of the treaties", moreover can and do ensure the implementation of their provisions in detail.[46] To be sure, the latter statement is not yet completely accurate, since especially in the realm of the Common Foreign and Security Policy the member states have more or less taken out these organs and instead left all the power with the Council. But as far as the "emergence" of a European Constitutional Law is concerned, this deficit is well compensated through the effective compulsory mechanisms that are available to the Commission and the Court of Justice within the "first pillar" of the Union, namely, the European Community.

– With regard to *protection* of the citizens against encroachments upon their personal liberties, this has traditionally been a weak point of the European legal order.[47] In Germany, the perception of this shortcoming has led the Federal Constitutional Court to establish its famous "Solange" case law, starting out from the assumption that as long as ("solange") this problem would persist, the national courts of the member states should be entitled to review legal acts of the Community under the auspices of their domestic guarantees of basic rights[48] – a position that, had it been embraced by the national courts of other member states, could well have endangered the legal unity of the Community as

---

45 ECJ, 05 February 1963 (26/62, *van Gend & Loos*), 1963, 3, at 24 *et seq*. (German edition); *R. Streinz* (note 3), no. 349.

46 Cf. *R. Streinz* (note 3), no. 294 *et seq*.; *C. Koenig/A. Haratsch* (note 2), no. 183.

47 See *C. Koenig/A. Haratsch* (note 2), no. 84 *et seq*., who delineate the development of the European protection of basic rights, explaining that the Treaties themselves do not contain a written catalogue of basic rights, but their protection was – and still is – developed by the ECJ.

48 German Constitutional Court, BVerfGE 37, 271, 285.

a whole. But fortunately, the European Court of Justice jumped in to fill that gap by deriving basic rights guarantees together with general principles of law from a comparison of the constitutional orders of the member states.[49] Originally, this was a purely judge-made law without any explicit basis in the codified texts. But apart from the fact that this approach is not totally uncommon within the European legal order – the Court of Justice has often been forced to develop new unwritten rules: another famous example for that would be the "Francovich" case law[50] that established member states' liability for violations of Community law –, it has been officially accepted by the member states when they inserted Art. 6 Par. 2 in the Treaty on European Union, stating that the Union should be obliged to respect the fundamental freedoms flowing from the constitutions of its member states as well as from the European Convention on Human Rights, and entrusting the corresponding supervision to the Court of Justice via Art. 46 of the same Treaty. This development in turn has prompted the German Constitutional Court – at least in fact – to give up its original claim that Community acts should be subject to review under national basic rights standards,[51] a move that is ample proof for the determination that the protection of the citizens' basic rights has meanwhile assumed an adequate position within the European legal system. It would reach its completion if the Constitutional Treaty were adopted, since this document would materially incorporate the comprehensive European Charter of Fundamental Rights promulgated at Nice in 2000 and procedurally open the gates for an all-encompassing judicial review.

– By contrast, the problem of *legitimation* will not go away even if the Constitutional Treaty sometime enters into force. Of course, the existing Treaties as well as the envisaged one take care of the legitimizing mechanisms and procedures mentioned above, but in the absence of a European people, this will not suffice. Again, it was the German Constitutional Court that spelled out this problem and simultaneously presented the solution: the European Union needs a "dual" legitimation, on the one hand through its own organs and their linkage to the citizens of the Union which is mainly provided by the elections to the Euro-

---

[49] *R. Streinz* (note 3), no. 354 *et seq*.; *C. Koenig/A. Haratsch* (note 2), no. 90 *et seq*.

[50] ECJ, 19 November 1991 (6/90, 9/90, *Francovich*).

[51] See first German Constitutional Court, BVerfGE 73, 339, 387; and basically closing the discussion BVerfGE 102, 147, 162 *et seq*.; cf. the comment by *R.A. Lorz*, EWiR 2001, 323.

pean Parliament but on the other hand – and equally important – through the national chains of legitimation which are necessarily connected with the national parliaments.[52] And the European Treaties – regardless of their nature and contents in detail – will by definition always be able to provide the first kind of legitimation only; thus, in this respect a certain deficit as to the corresponding constitutional function will remain.

– Contrary to this observation, the European Union obviously does not lack material orientation, policy guidelines and programmatic parameters, as they were mentioned with regard to the *setting of goals*. The European Treaties – and the Constitutional Treaty would not become an exception to this rule – generally overflow with provisions of this kind that always more or less make up the first chapter of the respective Treaty; they do so much more than most state constitutions. Consequently, the changes usually called for in this respect at the European level amount to a more restrictive approach in setting policy goals instead of adding even more.[53]

– Eventually, as regards *integration*, this principle seems so deeply entrenched in the whole notion of a European Union that the Treaties insofar speak for themselves. Integration is the overarching goal of the whole European process[54] and therefore governs the interpretation of basically all provisions of the primary law. However, regarding the integration of the citizens into one European society it must be noted that this process essentially faces the same obstacles as the strife for democratic legitimation dealt with above.

In sum, it can hardly be denied that from a functional perspective the European Treaties already now fulfil all major functions that are usually attributed to state constitutions.[55] But the functional approach, albeit a

---

[52] German Constitutional Court, BVerfGE 89, 155, 185; *C. Koenig* (note 7), 8; *D. Thym* (note 7), 163; *D. Grimm* (note 2), 586; *P.-C. Müller-Graff* (note 1), 24.

[53] Cf. *e.g. T. Oppermann*, Vom Nizza-Vertrag 2001 zum Europäischen Verfassungskonvent 2002/2003, DVBl. 2003, 1, 2.

[54] See the Preamble and Art. 43 lit. a EU. *C. Koenig* (note 8), 551 calls the European Union a "supranational integration community"; cf. also *C. Koenig/ A. Haratsch* (note 2), 30 *et seq*. concerning the process of European integration.

[55] Cf. just *D. Grimm* (note 2), 585 who is rather restrictive when it comes to identifying a European Constitution but has no doubts that the major constitutional functions are fulfilled by the Treaties at the European level.

very important starting point, is not yet the answer.[56] Another distinction drawn in some academic articles might help to explain that problem from a different angle. "Constitutionalism" in the here exclusively relevant Western sense can be divided into two pivotal strings: legal constitutionalism on the one hand and democratic constitutionalism on the other.[57] The first kind of constitutionalism is already strongly present at the European level, at least within the European Community. It has been largely realized through the case law of the European Court of Justice, especially through its early and universally accepted promulgations regarding the "direct effect" of Community law provisions in the national legal orders and the general supremacy of Community law.[58] It thus does not come as a surprise that one of the favourite characterisations of the European Community used by its supporters is that of a "community of law".[59] By contrast, the democratic constitutionalism within the European Union at least lacks one leg and therefore continues to need the crutches provided by the democratic procedures and domestic parliaments of the member states.[60] No other picture could illustrate better that European Constitutional Law is indeed "emerging", *i.e.* already existing but far from having completely surfaced.

V. The Case for Further Constitutionalization

At this point, the attempts to foster the process of "constitutionalizing" the European Union which have lastly culminated in the so far futile try of the Constitutional Treaty merit some further attention. It was

---

[56] See also *D. Thym* (note 7), 148.

[57] Cf. *D. Thym* (note 7), 150 *et seq*. concerning legal constitutionalism and 162 *et seq*. concerning democratic constitutionalism.

[58] ECJ, 15 July 1964 (6/64, *Costa / E.N.E.L.*), 1964, 1253, 1270 (German edition).; cf. *D. Thym* (note 7), 150 *et seq*.; *C. Koenig/A. Haratsch* (note 2), no. 57, 122.

[59] ECJ, 23 April 1986 (294/83, *Les Verts*), no. 23; ECJ, opinion 1/91, no. 21; German Constitutional Court, BVerfGE 89, 155, at 204; *A. von Bogdandy*, Europäische Prinzipienlehre, in: A. von Bogdandy, Europäisches Verfassungsrecht, 2003, 149, at 166 *et seq*.; *I. Pernice* (note 9), 5 *et seq*.

[60] German Constitutional Court, BVerfGE 89, 155, at 185; *C. Koenig* (note 7), 8; *D. Thym* (note 7), 163; *D. Grimm* (note 2), 586; *P.-C. Müller-Graff* (note 1), 24; *R. Streinz* (note 3), 41 – they all identify a necessary dual legitimation of European public power.

stated above that the Constitutional Treaty – and this would be true for any other attempt in this regard as well – could itself not resolve the problem of democratic legitimation and not overcome the lack of democratic constitutionalism, because without a European people the necessity of "dual" legitimation at both the European and the national levels will persist. But can there nevertheless be a case for pushing ahead with the project of a European Constitution? I tend to argue that there is one.

Three main arguments speak in favour of a formal constitutionalisation of the European Union, be it through the already existing Constitutional Treaty or otherwise. The first and less far-reaching one builds on the assumption that is also part of the core of this article: that the current European treaty system already possesses constitutional character from a functional perspective.[61] But the situation created by this system has meanwhile led to a widespread discomfort which could be overcome through a new constitutional project. The primary law embodied in the Treaties has in the course of time continuously expanded and simultaneously become more and more intricate and intransparent. Besides the fundamental principles and the necessary institutional and procedural regulations, it abounds with less important topics, which despite their minor relevance are spelled out in so much detail that lawyers and non-lawyers alike are hardly able to figure out the pivotal provisions, unless they have developed a real specialization in European law.[62] That makes for one of the worst failures a constitution can be accused of: it is impossible for the people to identify with this conglomerate of documents.[63] The creation of a new constitutional instrument, which would bring the legal cornerstones of the Union together – and be itself reduced to them –, could therefore essentially enhance the transparency of the European system, sharpen public consciousness as to the importance and the unique character of the European project and strengthen its power to convince the European citizens. Unfortunately, the Constitutional Treaty, albeit certainly a major improvement compared with the topical situation, falls itself short of this goal – and this shortcoming might at least be part of the explanation why it has failed in popular referenda.

---

[61] *M. Möstl* (note 21), 19; *R. Zippelius* (note 36), 58; *P. Huber* (note 22), 199; *P.-C. Müller-Graff* (note 1), 21 *et seq*. *D. Tsatsos* (note 9), 29 at least discerns elements of constitutional quality in the Treaties.

[62] *D. Tsatsos* (note 9), 29; *T. Oppermann* (note 53), 2; *D. Thym* (note 7), 178.

[63] *T. Oppermann* (note 53), 2.

The second idea behind the move for a European Constitution stems from the original vision of European integration and thus is far more ambitious: it aims at a real act of constitution-making precisely in order to let the Union make another qualitative leap forward:[64] in the direction of a federal state or at least a quasi-federal system, entailing the hope that such a quasi-revolutionary act of "creating Europe anew" would also overcome the persisting deficits of the Union, for instance with regard to its democratic legitimation mentioned above, a codified protection of human rights and comprehensive judicial review of all possible actions of the Union, especially those undertaken outside the realm of the existing European Community. And again, the Constitutional Treaty would certainly contribute to overcome these deficits but fall short of reaching the ultimate goal – to cite a popular saying in Germany, it is "neither fish nor meat".

The third argument starts from a very different point: from the undisputed analytical determination that the European Union – despite its lack of "competence-competency" noted above – has meanwhile acquired so many competences and so much power which to a large extent affects the European citizens directly, that it really comes close to a federal state, at least with regard to its practical impact on the life of European individuals.[65] And since it is one of the pre-eminent tasks of any constitution to order and restrain this kind of public power, the Union can be said to be not only capable of having a constitution but even in a pressing need of one.[66] The European integration has proceeded to a stage where the political entity in which we live cannot be understood from the perspective of the member states and their constitutions only. Especially in Germany, we are now confronted with a "multi-level system" of political organization, consisting of the sixteen states which form the Federal Republic ("Bundeslaender"), the Federal Republic of Germany itself and the European Union. It would there-

---

[64] Cf. *M. Möstl* (note 21), 18; *G. Hirsch*, Nizza: Ende einer Etappe, Beginn einer Epoche?, NJW 2001, 2677, 2678; *M. Stolleis*, Europa nach Nizza. Die historische Dimension, NJW 2002, 1022 *et seq*.

[65] Cf. *e.g. C. Koenig/A. Haratsch* (note 2), no. 284 *et seq*. on the direct effect of directives.

[66] *P.-C. Müller-Graff* (note 1), 16, at 21 states that, because the European Union exercises public authority, there is a coercive need for legitimation and control of that authority. *T. Oppermann* (note 53), 2 declares the current situation at the European level "the worst sort of constitution possible"; cf. also *M. Möstl* (note 21), 19 *et seq*.

fore be just consequent to devise and to speak of a "multi-level constitutional system" as well, where every level of political action corresponds with a layer of constitutional law of its own, *i.e.* in the German case: the states with their constitutions, the Federal Republic with its Basic Law, and the European Union with its founding treaties – or a new Constitutional Treaty, respectively.[67]

VI. The Role of the European Convention on Human Rights

Apart from the treaties which constitute the European Communities and the Union, it is also important to consider the European Convention on Human Rights from a constitutional perspective, especially because the European Charter of Fundamental Rights promulgated for the Union still lacks legally binding force, as has been explained above. Constitutional terms have already been used by many authors to describe the character of the Convention: it has been named a "complementary constitution",[68] a "part of the ordre public européen",[69] a "European human rights constitution"[70] and a "process of constitutionalization".[71] The European Court of Human Rights itself calls it a "constitutional instrument of European public order".[72] And its contents are

---

[67] Cf. *F. Balaguer Callejón*, Die Europäische Verfassung auf dem Weg zum europäischen Verfassungsrecht, in: P. Häberle, Jahrbuch des öffentlichen Rechts der Gegenwart 53 (2005), 401, at 407.

[68] *T. Läufer*, Zur künftigen Verfassung der Europäischen Union – Notwendigkeit einer offenen Debatte, in: R. Hrbek/M. Jopp/B. Lippert/W. Wessels: Die Europäische Union als Prozeß, 1998, 564, at 567 speaks of the European system as a complementary constitutional order that integrates the common elements of the constitutions of the member states – a method that the European Convention on Human Rights uses as well; cf. *I. Pernice*, Kompetenzabgrenzung im Europäischen Verfassungsverbund, JZ 2000, 866, at 871.

[69] *P. Häberle*, Gemeineuropäisches Verfassungsrecht, EuGRZ 1991, 261 *et seq*.

[70] Cf. *C. Grabenwarter*, Europäisches und nationales Verfassungsrecht, VVDStRL 60 (2001), 290, at 327.

[71] *C. Walter*, Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozeß, ZaöRV 1999, 961 *et seq*.

[72] ECHR, 04 March 1991 (*Chrysostomos, Papachrysostomou, Loizidou / Turkey*), no. 21.

of a constitutional character indeed, albeit limited to the field of basic rights and the rule of law whose provisions, as stated above, perform only one of the most essential constitutional functions;[73] it establishes the cornerstones of a democratic state under the rule of law and endowed with mechanisms for the protection of minorities according to the best European traditions. Since on the one hand it is lacking the national peculiarities that form part of all domestic constitutional catalogues of basic rights, while on the other hand it embodies specific common traits of the European constitutional development in general which are not necessarily spelled out in every national constitution, it has been able to set up a Europe-wide minimum standard of human rights guarantees[74] that is binding on all its member states like, for instance, the basic rights in the German Basic Law are binding on all organs of the states which make up the Federal Republic of Germany. Insofar it very much resembles the corresponding parts of the national constitutions.

It might therefore be most appropriate to speak of the European Convention on Human Rights as an "accessory constitution"[75] under public international law. For it is and remains a treaty under public international law but a special one: because it is able to have a direct impact on the constitutional orders of its member states.[76] This impact becomes most obvious through the fact that the interpretation of national basic rights guarantees by the courts of the member states is meanwhile heavily influenced by the understanding which the European Court of Human Rights gives to corresponding guarantees in the Convention. Moreover, the provisions of the Convention are at least partially able to set aside or invalidate national laws, and even where this is not a formal consequence of its application, it often prompts national legislatures as well as domestic courts to adjust their legislative and adjudicative measures accordingly. Through all these mechanisms, the constitutional orders of all member states have been more or less opened for the application of the norms of the Convention. In particular, the Convention

---

[73] *P. Huber* (note 22), 202 *et seq.*; *P.-C. Müller-Graff* (note 1), 25; *M. Möstl* (note 21), 19.

[74] *C. Grabenwarter* (note 70), 327; *R. Uerpmann*, Völkerrechtliche Nebenverfassungen, in: A. von Bogdandy, Europäisches Verfassungsrecht, 2003, 339, at 341.

[75] *R. Uerpmann* (note 74), 341.

[76] Cf. *C. Grabenwarter* (note 70), 317 *et seq.*; *C. Koenig/A. Haratsch* (note 2), no. 23.

takes on the task of filling gaps in the national constitutional systems for the protection of basic rights.[77] But in order to fulfil this function, it must be treated and interpreted in a manner that comes at least close to the way national constitutions are dealt with. As a consequence, there are no longer any decisive differences as to the quality of its guarantees in comparison with those of the national constitutions.

At the level of the European Union, the Convention moreover allows to largely forego comparative constitutional analyses since, as its preamble clearly expresses, it is itself an expression of common constitutional traditions of its member states. That brings us to the especially interesting relationship between the Convention and the law of the Union. Art. 6 Par. 2 of the Treaty on European Union which states that the Union shall respect the rights contained in the Convention as "general principles of Community law", is perhaps the most important example of the autonomous incorporation of a public international law instrument into a different legal order.[78] However, its precise reach has so far stayed in a legal twilight zone. It obligates the Union to steer a kind of middle course: on the one hand, it clearly establishes that the Union shall consider itself bound to the contents of the Convention, but on the other hand, it keeps the Union free from being subject to any kind of external conditions, including review of its actions by the European Court of Human Rights. The potential tensions between this Court and the European Court of Justice that have already arisen in this regard cannot be discussed in detail here – they might explain, though, why the Court of Justice still hesitates to call the Convention a "constitutional instrument": it rather prefers to talk about its "special relevance" for Community law[79] in a more neutral fashion.

Nevertheless, in the context of the Union the term "accessory constitution" is probably an even more adequate characterization of the Convention than in its connection with the national constitutional systems. For unlike these systems, the Union, as stated above, does not yet have a written catalogue of basic rights that would enjoy legally binding force although the Constitutional Treaty aimed at changing that situation. For the time being, however, Art. 6 Par. 2 of the Treaty on Euro-

---

[77] *C. Grabenwarter* (note 70), 344; *R. Uerpmann* (note 74), 341; *R. Streinz* (note 3), no. 57d.

[78] *R. Uerpmann* (note 74), 365; cf. *C. Grabenwarter* (note 70), 325 *et seq*.

[79] ECJ, 17 October 1989 (97-99/87, *Dow Chemical Ibérica / Commission*), no. 10: "particular relevance"; ECJ, 29 May 1997 (C-299/95, *Kremzow / Austria*), no. 14: "special significance".

pean Union and the general principles of law which the Court of Justice has derived from the Convention and the constitutional systems of the member states is all that exists. Under the fundamental assumption of this article that the European Treaties in general perform constitutional functions, the codified basis of the important function to protect the citizens of the Union against encroachments upon their personal liberties thus seems to be particularly weak and far less autonomous than those of the other functions. Here the Convention is even more required than elsewhere to fill a gap in the constitutional order of the Union and therefore to perform "accessory" constitutional tasks.[80]

VII. Conclusions

After all, the term "multilevel constitutionalism" that has already been mentioned above and is meanwhile recited by more and more authors[81] indeed seems to be most appropriate to characterize the European legal order altogether. It emphasizes the most important point: the now almost inseparable linkage between the various levels at which today's European citizen is confronted with public power entities whose actions must be regulated and restrained by norms bearing an essentially constitutional character. For instance, a European Union citizen in Germany at least faces the following levels of directly applicable regulations: municipal law of the city or county where he or she lives, state law of the pertinent "Bundesland", national law of the Federal Republic of Germany, the law of the European Union and finally public international law, especially the European Convention on Human Rights. Within all these spheres, policy goals are defined and competences and procedures established to pursue them through legal means which requires some kind of constitutional norms at each of these levels. And these norms have in the meantime become so closely intertwined that any meaningful assessment of a citizen's legal situation requires to look at all of them alike. So it would no longer make sense to call only a part of these norms "constitutional" and to use a distinct term for norms displaying identical structures just because they are stemming from different realms.

---

[80] *C. Grabenwarter* (note 70), 344; *R. Uerpmann* (note 74), 341.

[81] *C. Joerges* (note 9), 487; *I. Pernice* (note 9), 5 *et seq*.; *I. Pernice* (note 7), 173; *D. Thym* (note 7), 155; *D. Tsatsos* (note 9), 32; *P. Huber* (note 22), 208 *et seq*.

With regard to the treaties forming the basis of the European Union, an additional aspect buttresses this argument: they may well be read as expressing a truly new and specifically European "contrat social".[82] This is an idea that lies at the very heart of all constitutional traditions developed in Europe: in the European nation-states, constitution-making has always been of a contractual nature.[83] It used to reflect compromises on the distribution of power within the society and for that purpose had to establish mechanisms of power control as well; later the democratic element was added. The Constitutional Treaty for the European Union would just represent a new step within this longstanding common tradition: it was designed to confirm the existing consensus and to develop it a bit further.[84] An interpretation not only of this Treaty but of its predecessors as well as being expressions of a European "contrat social" therefore seems conceivable. And it would also be advisable since this would make it possible to transgress the still dominating idea of a legal constitutionalism mentioned above: it would spell out the idea that European law is not only directly applicable to the citizens of the member states but can also be traced back to them.[85] This would take the requirement of "dual" legitimation seriously: by establishing a European "contrat social" besides the contracts already existing at the national constitutional levels, both these constitutional orders would enjoy the same theoretical basis for legitimacy, and their relationship would be non-hierarchical[86] which would best fit the previously explained idea of a "multilevel constitutionalism".

To be sure, all these models should not conceal the fact that it will still be a long journey for Europe to acquire a constitution in the strictly normative or technical sense. The European Constitutional Law which – if one follows the basic idea of this article – currently exists results from an interplay of the national constitutions – and the European

---

82 *I. Pernice* (note 7), 167; *D. Thym* (note 7), 155 *et seq*.; *L. Kühnhardt*, Auf dem Weg zum europäischen Verfassungspatriotismus, in: M. Höreth/C. Janowski/L. Kühnhardt, Die Europäische Verfassung, 2005, 1, 28.

83 See *L. Kühnhardt* (note 82), 28.

84 *D. Thym* (note 7), 166; *M. Möstl* (note 21), 20; *P.-C. Müller-Graff* (note 1), 31. *I. Pernice*, Nach dem Gipfel von Brüssel: Ist die „Verfassung für Europa" gescheitert?, WHI-Paper 2/04, 4 calls the Constitutional Treaty a progress insofar as it names things the way they are.

85 *I. Pernice* (note 7), 163 *et seq*.; *D. Thym* (note 7), 157.

86 *D. Thym* (note 7), 157; *I. Pernice* (note 7), 185; *P. Huber* (note 22), 208 *et seq*.

Convention on Human Rights – with the constitutional elements contained in the Treaties on the European Union and Communities.[87] Assuming that the acquisition of a constitution in the comprehensive sense would be a desirable goal – which will of course be supported by European integrationists only –, the title of this article therefore again proves correct: European Constitutional Law is emerging, but this process is far from being completed.[88] Nevertheless, unless the term "constitution" is reserved for the final instrument that fits the strict normative ideal – a position that is not advocated here for the reasons stated above –, one can at least speak of a European Constitutional Law "in statu nascendi". In connection with the national constitutions which themselves are also located at different levels of constitutional development,[89] this altogether yields the picture of a European "Constitutional Community".[90]

The determination that the emergence of European Constitutional Law is an ongoing process eventually entails another important consequence: somehow it should be made clear that despite all similarities between this law and the traditional state constitutions a crucial distinction persists: the latter have, by and large, already completed the process that in the European case is still under way. And although the thrust of this article has been throughout in favour of a constitutional quality of the European Treaties, this recognition should admonish us to remain cautious in calling them a "constitution" without caveat. It also teaches us that the fulfilment of constitutional functions alone might not suffice to overcome any reservation that could be made against using this term. For doing so would equal "constitution" in the European context with the topical status quo of European integration in the respective moment and not take into account its procedural nature. It might therefore be more appropriate to use the term "constitutionalization" in order to describe the development of the European framework.[91] This constitutionalization must be regarded as an evolutionary process in which various actors take part to enhance the

---

87 Cf. *F. Balaguer Callejón* (note 67), 407; *M. Möstl* (note 21), 19; *P. Huber* (note 22), 199; *P.-C. Müller-Graff* (note 1), 21 *et seq*.

88 See also *C. Joerges* (note 9), 488.

89 Cf. *F. Balaguer Callejón* (note 67), 408.

90 *D. Thym* (note 7), 157; *I. Pernice* (note 7), 185; *P. Huber* (note 22), 208 *et seq*.; *F. Balaguer Callejón* (note 67), 407.

91 Cf. *C. Möllers* (note 22), 53.

autonomous character of the European legal order and to loosen or even cut its links with the intergovernmental actions of the member states. As examples of this evolution, one can point to the Charter of Fundamental Rights or to the gradual acknowledgment of common constitutional principles.[92] Especially the latter example, however, also marks a pivotal difference between this process and the classical state constitutions: "Constitutionalization" in this sense need not be based on a deliberate political choice;[93] in fact, the major part of it will occur as a more or less spontaneous process driven forward by a variety of independent actors. It thus characterizes the peculiarities of the emerging European Constitutional Law better than the term "constitution" itself, which for historical reasons always seems to point to a consciously made constitution-making decision. This would even remain true if the Constitutional Treaty were to be adopted, because this Treaty only *appears* to be a decision of the latter kind, whereas a closer look at it reveals that it is merely another step in the mentioned evolutionary process: it mostly repeats existing norms or just codifies developments which are already under way.

In sum, there certainly is a phenomenon emerging that may be called European Constitutional Law, and it is more a process than a status, which distinguishes it from the traditional constitutional law of nation-states. However, bearing this difference in mind, the manifold similarities between these two legal realms with regard to the functions performed by them[94] justifies at least using the terminology of classical constitutional law, even if the term "constitution" itself might be avoided to escape the pitfalls that are automatically associated with it and to emphasize another important point: European Constitutional Law does not emanate from a single comprehensive document;[95] it rather resembles a patchwork consisting of various pieces, including the founding treaties of the European Union and its Communities as well as the European Convention on Human Rights and the common principles that can be discovered in state constitutions all across Europe.[96] None of these instruments alone would be able to serve as a constitu-

---

92 For the latter, see *e.g. P. Häberle* (note 69).

93 Cf. *C. Möllers* (note 22), 47 *et seq*.

94 *M. Möstl* (note 21), 19; *R. Zippelius* (note 36), 58; *P. Huber* (note 22), 199; *P.-C. Müller-Graff* (note 1), 21 *et seq*.

95 *T. Oppermann* (note 53), 2.

96 *R. Uerpmann* (note 74), 368; *C. Grabenwarter* (note 70), 327.

tion in the original sense, they all cover a part of the necessary constitutional functions only; but taken together they constitute an impressive constitutional framework as well as a basis on which a process of further constitutionalization can be built.

The Legal Position of Migrants – German Report

*Jürgen Bast**

Introduction: Who Qualifies as 'Migrant' in the German Context?

A report on the legal position of migrants has to first clarify who, in the context particular to Germany, should be regarded as a 'migrant'. A definition of the term could be based on the assumption that migration, or more specifically international migration, is a social phenomenon involving people who, at least once in their lifetime and for whatever reasons, made the decision to move across an international border in order to relocate in a country different from their origin. For the purpose of this report, this definition seems overly inclusive, for two reasons. First, German nationals are not a proper subject of investigation, although they statistically form the largest migrating nationality per year – both with respect to expatriation and repatriation.[1] Taking into account that

* I am grateful to Alison Pennington, Heidelberg/Pennsylvania, who assisted me both in language and substantive matters.

[1] *Beauftragte der Bundesregierung für Migration und Flüchtlinge*, Daten – Fakten – Trends: Migrationsgeschehen (Stand: 2004), at 29; available at http://www.integrationsbeauftragte.de/download/Modul_1_Migrationsgeschehen.pdf.

international law and German constitutional law guarantee them an unrestricted right to leave and return,[2] the legal regime that is relevant to them would not be of significant interest here. There is one caveat to this preclusion. The term 'Germans' as defined in Art. 116 Basic Law (*Grundgesetz*, the German Constitution) includes ethnic Germans living abroad who actually do not hold German nationality. These Germans and their relatives obtain German nationality with their recognition under a statutory procedure, which occurs immediately after their arrival. They are usually not covered by statistical data on the migrant population. Nevertheless, in sociological terms they should be considered migrants proper, and hence be included in this report.

Second, not all non-citizens residing in Germany fit into the above definition. Among the 6,717,115 registered aliens staying in Germany on December 31, 2004, a significant number had come to Germany decades ago, or was even born in the country and has thus never made a personal experience of migrating. The average duration of stay (minors included) was 16.1 years.[3] One out of five foreign nationals, or 1.4 million people, was born in Germany and has not yet acquired German nationality.[4] The majority of these second- or third-generation aliens are descendants of migrant workers who, in the 1950s and 1960s, had been recruited from countries such as Turkey, Yugoslavia, Italy, Greece, Portugal, Spain, or Morocco. The numbers of aliens steadily increased until the mid-1990s, despite the fact that the Federal Republic, as early as in 1973, had officially adopted a policy of non-immigration. In 1997, the figures reached a climax of 7.4 million people, or 9.0% of the resident population. German policy towards non-citizens for a long time was largely based on the assumption of return, and German nationality law did not provide for a *ius soli* principle.[5] Only in recent years has Germany started to develop more comprehensive integration and naturali-

---

2 See, *inter alia*, Art. 2(2) and Art. 3 Protocol No 4 to the ECHR; the right to re-entry is implied in Art. 11 Basic Law, see Federal Constitutional Court, in: Decisions vol. 2, 266, 273.

3 *Bundesamt für Migration und Flüchtlinge*, Ausländer- und Flüchtlingszahlen (August 19, 2005), at 76; available at <http://www.bamf.de/cln_043/nn_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-auslaender-fluechtlinge,templateId=raw,property=publicationFile.pdf/statistik-auslaender-fluechtlinge.pdf>.

4 Id., at 78.

5 For a policy analysis, see *S. Green*, The Politics of Exclusion: Institutions and Immigration Policy in Contemporary Germany, 2004.

zation policies *vis-à-vis* aliens who are long-term residents, eventually recognizing that Germany is (or at least *was*) a country of immigration. Hence, although it could well be argued that the legal position of non-German nationals raises questions of minorities and migration law alike,[6] this report will address the legal position of all main categories of aliens residing in Germany.

1. The Structure of Legal Regulation of Migrant's Status: the Emergence of a Multi-Level System of Migration Law

1.1. Current Dynamics

German migration law is in a state of transition. On January 1, 2005, after years of intense political struggle,[7] Germany witnessed the entry into force of a package of new immigration laws called *Zuwanderungsgesetz* (the term *Zuwanderung* is a neologism chosen in order to avoid the contested term *Einwanderung*, meaning 'immigration'). As its centerpiece, the package comprises the Residence Act (*Aufenthaltsgesetz*)[8] which replaces the Aliens Act (*Ausländergesetz*) in force since 1990, and the Freedom of Movement Act (*Freizügigkeitsgesetz/EU*) which substitutes the former act dealing with the legal position of Union citizens.[9]

However, experts are of the opinion that the *Zuwanderungsgesetz* represents only a provisional solution.[10] Next to economic needs, which

---

[6] See *G. Sasse/E.R. Thielemann*, A Research Agenda for the Study of Migrants and Minorities in Europe, Journal of Common Market Studies 43 (2005), 655.

[7] See *St. Angenendt/I. Kruse*, Migrations- und Integrationspolitik in Deutschland 2002–2003, in: Bade et al. (ed.), Migrationsreport 2004, 2004, 175.

[8] All acts and executive rules referred to in this report are available at the web-site of the Federal Ministry of Justice: <http://www.gesetze-im-internet.de/bundesrecht/GESAMT_index.html>. Official translations are not available to my knowledge.

[9] For a comprehensive overview, see *B. Huber*, Das Zuwanderungsgesetz, Neue Zeitschrift für Verwaltungsrecht 2005, 1; as to the previous legal situation, see *Th. Groß*, Germany, in: Higgins (ed.), Migration and Asylum Law and Policy in the European Union: FIDE 2004 National Reports, 2004, 111.

[10] See *G. Renner*, Vom Ausländerrecht zum Zuwanderungsrecht, Zeitschrift für Ausländerrecht und Ausländerpolitik (ZAR) 2004, 266.

are likely to call for a more open approach to labor migration in the future, the main cause of reform is the Europeanization of migration law. With the amendments of the Treaty of Amsterdam, the European Union acquired the powers to legislate on most aspects of migration law, and has in fact started to do so.[11] At the time of this writing, most EU Council directives enacted in the initial five years period are yet to be transposed into German law; further steps towards a common European asylum and migration policy are envisioned.[12] This development is also transforming the relationship of national and international law. Not only is the EU itself increasingly active in concluding international agreements relating to migration, such as readmission or association agreements. EU law also determines how its Member States have to comply with their international obligations in the field of migration law, in particular with human rights aspects such as *non-refoulement* of persons in need for protection, family unity, and the rights of long-term residents.[13] Germany will become more and more integrated in a multilevel system of migration law governing a common European migration space. Within this framework, one State's discretion to decide on the admission of migrants, as generally recognized under international law, is curtailed by decisions adopted at other levels with the participation of this State.

1.2. German Migration Laws, according to their Rank within the Legal Order

1.2.1. Constitutional Law

The German constitutional document of 1949 (the Basic Law) contains some provisions of direct relevance to migrants. Against the back-

---

[11] The new developments are covered by the *European Journal of Migration and Law* (EJML), see recently *St. Peers*, Key Legislative Developments on Migration in the European Union, EJML 7 (2005), 87; for a comparative impact assessment, see *K. Hailbronner*, European Immigration and Asylum Law, Irish Journal of European Law 11 (2004), 281.

[12] See European Council, 'The Hague Programme: strengthening freedom, security and justice in the European Union', [2005] OJ C 53, 1.

[13] See *J. Fitzpatrick*, The Human Rights of Migrants, in: Aleinikoff/Chetail (eds.), Migration and International Legal Norms, 2003, 169; *K. Jastram*, Family Unity, *ibid*., 185.

ground of Germany's history of dictatorship, the Basic Law guarantees an individual right to political asylum. After amendments made in 1993, the new Art. 16a Basic Law, however, authorizes several restrictions as to access to that right.[14] Other fundamental rights, in particular the rights to life and the integrity of the person (Art. 2(2) Basic Law) and to protection of marriage and family (Art. 6(1) Basic Law), come into play when legal barriers to deportations are concerned. To a certain extent, Art. 6(1) Basic Law guarantees a right to family reunion in Germany.[15]

1.2.2. Parliamentary Legislation

There are various pieces of federal parliamentary legislation that are relevant to German migration law. The main acts are: the Residence Act (*Aufenthaltsgesetz*) which contains the general rules for the admission of alien migrants; the Freedom of Movement Act (*Freizügigkeitsgesetz*) which defines a separate legal regime for Union citizens and their relatives; the Act on Asylum Procedures (*Asylverfahrensgesetz*) which determines the processing of applications for asylum or other forms of international protection; the Act on Benefits for Asylum Seekers (*Asylbewerberleistungsgesetz*) providing for a separate regime of social assistance for persons admitted on a temporary basis; the Federal Act on Displaced Persons (*Bundesvertriebenengesetz*) governing the situation of ethnic Germans living abroad; and, the Nationality Act (*Staatsangehörigkeitsgesetz*) which defines the conditions for acquiring German nationality via naturalization or birth. All of these acts were either introduced or substantially amended by the *Zuwanderungsgesetz* of 2004.

1.2.3. Rule-Making by the Federal Government

To a greater extent than is common in German public law, the said acts authorize the federal government to enact executive rules (so-called *Rechtsverordnungen*, 'regulations of law'), which are strictly binding rules for the implementation of, and partly also for the derogation from, a parliamentary act. The consent of the *Bundesrat*, the second chamber of the federal Parliament which is composed of the regional states' governments, is regularly needed. The three main examples of *Rechtsverordnungen* are the Residence Regulation (*Aufenthaltsverord-*

[14] See below, section 3.3.5.

[15] See below, section 3.3.2.

nung) implementing the Residence Act, the Employment Regulation (*Beschäftigungsverordnung*) concerning access of migrants from abroad to the German labor market, and the Employment Procedure Regulation (*Beschäftigungsverfahrensverordnung*) providing the rules for labor market access of resident migrants (*Bundesrat* consent is not needed here).

A second type of federal executive orders, ranking below those mentioned previously, are general administrative rules (*Allgemeine Verwaltungsvorschriften*). These guidelines for the application of the law are binding on the administration but cannot create new rights or duties, or bind the courts. Again, the assent of the *Bundesrat* is required. As of now, there are no general administrative rules with respect to the new law. There are only the Provisional Guidelines for the Application of the Residence Act and the Freedom of Movement Act, issued by the Federal Ministry of the Interior on December 22, 2004. Although these Provisional Guidelines are non-binding, they may nevertheless have a major impact on the practice of the local Aliens Offices in dealing with the new law.

1.2.4. Rule-Making by the Länder *Governments*

Taking into account that German migration policies are almost exhaustively regulated by federal laws and regulations, there is little room for legislation by the regional states, the *Länder*. The main role of the *Länder* in migration law is thus application and enforcement of the law.[16] There is, however, some room for the *Länder* governments to adopt a particular policy within the framework laid down in federal law and to this end, issue the respective circulars to the local Aliens Offices.

Yet another form of executive rule-making should be cited here. The Residence Act provides some legal bases for general decisions to be adopted by the Minister of the Interior of the respective *Land*. These ministerial orders, *e.g.*, define the conditions for issuing residence permits on humanitarian grounds, or declare a temporary deportation stop for certain migrant groups.[17] In practice, these types of decisions are adopted unanimously at the meetings of the 17-headed 'Conference of the Ministers and Senators of the Interior'. It is thus one of the power

---

16 See below, section 3.2.

17 See below, sections 3.3.6. and 3.3.7.

centers of German migration law although it is not a constitutional body in the strict sense.

2. Legal Conceptions Used in National Legislation: 'Alien' as the Basic Concept of German Migration Law

2.1. Aliens

The terms 'migrant' or 'immigrant' are largely unknown in German law and do not refer to a specific legal concept. The Residence Act only refers to *Zuwanderung* ('immigration') as the social phenomenon which is to be controlled and restricted by way of this Act. The basic term and concept of German migration law is *Ausländer* ('alien', or 'alien national', yet with less pejorative connotations than the English term). Decades ago, the term *Ausländer* replaced the term *Fremder* (equating both to 'foreigner' and 'stranger'), which is still used in Austrian law. As defined in § 2(1) Residence Act, an alien is a person who is not a German in the sense of Art. 116 Basic Law. All non-German nationals and stateless persons are aliens, except for ethnic Germans living abroad and people holding dual nationality of which German is one.

2.2. Union Citizens

A *Unionsbürger* ('Union citizen') as referred to in the Freedom of Movement Act is a national of another Member State of the European Union (§ 1 of this Act). This definition designates a particular sub-set of aliens and therefore does not fully correspond to that in Art. 17 EC Treaty, which also comprises German nationals. Under the conditions set out in the Freedom of Movement Act, non-German EU nationals and their relatives qualify as *Freizügigkeitsberechtigte* ('persons entitled to freedom of movement'). This concept also applies to family members who are not themselves Union citizens. For the purposes of the Freedom of Movement Act, nationals of a state party of the European Economic Area Agreement (EEA nationals, *i.e.*, of Iceland, Liechtenstein, and Norway) are equal to Union citizens (§ 12 Freedom of Movement Act). Swiss nationals, however, are still governed by the Residence Act, although they are exempted from the residence permit requirement, in accordance with the Freedom of Movement Agreement concluded with

Switzerland by the EC and its members in 1999 (see § 29 Residence Regulation).

2.3. Refugees

The term *Flüchtling* ('refugee') is used when German law directly refers to the status under the Geneva Refugee Convention. For historical reasons, German migration law is based on a two-tier system of implementing this Convention. Refugee status is recognized either for *Asylberechtigte* ('persons entitled to asylum') or persons whose expulsion is prohibited for grounds contained in the Refugee Convention. An asylee proper is an alien entitled to protection as *politisch Verfolgter* ('a person persecuted on political grounds') according to Art. 16a(1) Basic Law, which under narrow conditions guarantees a fundamental right to asylum. Other persons who qualify for refugee status are referred to as *Personen, denen die in § 60 Absatz 1 des Aufenthaltsgesetzes bezeichneten Gefahren drohen* ('persons under the threat of dangers indicated in § 60(1) Residence Act'), which is the provision replicating the wording of the *non-refoulement* clause of Art. 33(1) of the Refugee Convention. The term 'subsidiary protection' is not used in German law, although the concept itself is reflected in § 60(2)–(7) Residence Act. In these paragraphs, an alien who is not granted refugee status but nevertheless, under international or constitutional law, enjoys protection against forced return to a particular state is referred to as *Ausländer, der nicht abgeschoben werden darf* ('an alien who must not be deported').

2.4. Migrant Workers

The term 'migrant worker' has no direct correspondent in German migration law. The closest equivalent is the notion of *Aufenthalt zum Zweck der Erwerbstätigkeit* ('residence for purposes of employment'). The term *Erwerbstätigkeit* includes activities as a self-employed person as well as *Beschäftigung* ('employment' in the narrow sense, *i.e.* non-independent work). A residence permit granted for other purposes, however, may also authorize an alien to employment, in which case the beneficiary constitutes a migrant worker in the sense of the relevant international conventions, as well.

2.5. Illegal Residents

There are no particular provisions in German law dealing with the status of undocumented migrants. Although in political discourses they are often called *Illegale* ('illegal persons'), the legal concept of *illegaler Aufenthalt* ('illegal stay') has a broader meaning. It circumscribes the position of all aliens, be they documented or non-documented, who are under the obligation to leave due to the absence of a necessary residence permit. Even if the deportation of an alien has proven to be impossible for factual or legal grounds, his/her further stay is technically deemed illegal. According to § 60a Residence Act, the person concerned receives a document certifying that his/her deportation is temporarily suspended, the so-called *Duldung* ('toleration'). As opposed to other forms of illegal entry or stay, tolerated residence does not constitute a criminal offence.

3. Acquiring the Status of Migrant: a Plurality of Residence Permits

3.1. The Types of Residence Permits Under the Residence Act

Under the Residence Act, three main types of permits exist: the visa (*Visum*), the Residence Authorization (*Aufenthaltserlaubnis*), and the Establishment Authorization (*Niederlassungserlaubnis*). Moreover, under the Freedom of Movement Act, family members who are non-EU or non-EEA nationals receive an EU-Residence Authorization (*Aufenthaltserlaubnis/EU*), proving their entitlement to free movement. In addition to these residence permits proper, there are the Residence Leave (*Aufenthaltsgestattung*), which is issued to asylum seekers and allows them to remain during the process of deciding their application, and the Certificate of Toleration (*Bescheinigung der Duldung*), which is issued to persons whose deportation is temporarily suspended.

According to § 5 Residence Act, certain requirements apply to all three main types of permits, subject to certain exceptions in the context of family reunification and, more broadly, in cases of persons seeking international protection. As a general rule, an applicant must hold a valid passport, his/her identity and nationality must be clear, and none of the grounds for issuing an expulsion decision must be on hand, *e.g.*, a sig-

nificant criminal record.[18] Admission is almost always barred if the person concerned is suspected to be engaged in terrorist activities, pursues or appeals for violent political action, or otherwise constitutes a serious threat to public security. Moreover, the alien must have sufficient means of living at his/her disposal in order not to become a burden on the social assistance system. If the application is filed while staying in Germany, the person must have entered with the "necessary visa" (§ 5(2) Residence Act). This excludes, *inter alia*, persons entering with a tourist visa then applying for a Residence Authorization for employment purposes. If, however, the alien is entitled to a residence permit anyway, the requirement for carrying out the visa procedure can be waived.

A *visa* is a residence permit issued by a German authority before entry. It is provided in either the form of a Schengen or of a national visa (§ 6 Residence Act). Short-stay Schengen visas are issued in accordance with EU law, in particular the Visa Regulation No 539/2001 and the Schengen Implementation Agreement. For national visas for intended stays of more than three months, the rules for granting a Residence Authorization or an Establishment Authorization apply.

The *Residence Authorization* is limited in time and granted only in connection with the pursuit of a particular purpose. Such residence purposes are enumerated in the Residence Act, and include educational purposes (§§ 16–17), purposes of employment (§§ 18–21), residence for international law, humanitarian, or political grounds (§§ 22–26), and residence on family grounds, in particular family reunification (§§ 27–36). The time limit depends on the purpose and the circumstances of the individual case. Further constraints may be attached to a Residence Authorization, in particular with respect to the movement within the German territory or access to the labor market, subject to specific provisions in the Residence Act and a proportionality test. The renewal of a Residence Authorization is possible if the reasons for granting it persist.

The *Establishment Authorization* is unlimited in time and gives full access to employment. Attaching any constraints to this permit is prohibited, except for possible restrictions of political activity.[19] As a rule, a person applying for an Establishment Authorization must have been holding a Residence Authorization for a minimum of five years. Among the further requirements for being entitled to an Establishment

---

18 On that grounds, see below, section 6.1.

19 See below, section 4.2.1.

Authorization, as set out in § 9 Residence Act, two are particularly noteworthy. First, the applicant has to demonstrate sufficient German language skills and basic knowledge of German society and legal order. Both can be proven by successfully taking part in an integration course program, which is one of the novelties of the Residence Act.[20] Second, the applicant must have been contributing to a payroll based pension scheme for a minimum of sixty months. This requirement, which was also introduced by the Residence Act, may lead to a considerable extension of the actual waiting period, especially if one takes into account the high level of unemployment in Germany among the migrant population in particular. In derogating from the above prerequisites for an Establishment Authorization, the Residence Act provides for some mitigation with respect to internationally protected persons. Specifically, recognized refugees receive an Establishment Authorization after three years of holding a Residence Authorization if the need for protection persists (§ 26(3) Residence Act). Other instances of mitigation are foreseen in the context of family reunion, *e.g.*, for spouses of Germans after three years of holding a Residence Authorization (§ 28(2) Residence Act). If special political interests of the Federal Republic so require and once a general decision on the ministerial level was made to that end, members of certain migrant groups may even be granted an Establishment Authorization on the very first day (§ 23(2) Residence Act).

As a rule, an application for a residence permit is decided on a discretionary basis, which implies the need for taking into account the general interests of the Federal Republic and the individual circumstances of the case at hand. In a variety of clauses, however, the Residence Act establishes an enforceable right to receive a residence permit, leaving no room for the exercise of administrative discretion. This concerns, in particular, recognized refugees, certain constellations of family reunification, second- and third-generation minors, and (as discussed above) the right to receive an Establishment Authorization for aliens who reside on a long-term basis and are sufficiently integrated in German society.

---

[20] See below, section 4.3.

3.2. Administrative Procedures and Legal Review

German principles of federalism require federal laws and regulations to be executed by the sixteen regional states, the *Länder.* Consequentially, most administrative decisions of German migration law are made by local Aliens Offices (*Ausländerbehörden*) under the guidance and supervision of the *Länder* governments. In cases where an administrative appeal is admissible, the appeal is also decided at the *Länder* level. Judicial review is exercised by the district's administrative court of first instance and the *Land's* administrative high court, acting as a court of appeal. In cases of particular importance or when divergent decisions have been issued by the administrative high courts, the matter may be appealed, on grounds of law only, to the Federal Administrative Court in Leipzig, whose decisions are final. In extraordinary cases, the person concerned may eventually bring a constitutional complaint to the Federal Constitutional Court in Karlsruhe, claiming that his/her fundamental rights have been infringed.

Only as an exception are federal authorities involved in administrative decision-making. In migration law, one can distinguish three main instances. First, the determination of refugee status is centralized at the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*). It sits in Nürnberg and has satellite offices at every larger reception facility. This Federal Office has the responsibility for determining whether a person is persecuted on political grounds, is under the threat of dangers indicated in § 60(1) Residence Act, or must not be deported for other reasons relating to his/her country of origin. Except for border area cases, it is also competent for determining whether Germany is responsible for examining an asylum application in accordance with the Dublin Regulation No 343/2000.[21] The determinations of the Federal Office are binding on the local Aliens Office, which grants or refuses a residence permit or a toleration. Judicial review of the determinations of the Federal Office is available under more restrictive conditions and in an expedited procedure, in particular when the application is considered manifestly unfounded or the 'safe third country' exemption applies.[22] A suit can be filed with the administrative court in the district where the Federal Office's satellite office is located.

---

[21] See below, section 3.3.5.

[22] See below, section 3.3.5.

The second example of federal agency involvement is the visa procedure. Visa applications are examined and decided by the diplomatic or consular representations abroad, *i.e.* within the authority of the Federal Minister of Foreign Affairs. In cases of visas for intended stays of more than three months, however, the Aliens Office of the district where the alien will habitually reside has to give its assent before the visa is issued (§ 31 Residence Regulation). Legal review is exercised by the Administrative Court and the Administrative High Court of Berlin, where the ministry is seated.

Third, when a residence permit is issued for educational or employment purposes, or when access to the labor market is authorized at a later date, the Federal Agency for Labor regularly has to give its internal assent prior to the decision of the Aliens Office. The Federal Agency for Labor is acting under the instructions of the Federal Minister of Labor and within a framework laid down in executive rules. The Federal Agency holds local branches in every labor market district. An action against a failure to consent can be brought before the administrative courts by challenging the ensuing Aliens Office's decision to refuse the requested residence permit or to lift the ban on employment.[23] The Federal Agency is involved in the case as an intervening party.

Other examples of the federal administration's involvement include the responsibilities of the Federal Police for guarding the borders and for immediate deportations in cases of illegal border-crossing. They also include the extraordinary power of the Federal Minister of the Interior to issue deportation orders against terror suspects, according to § 58a(2) Residence Act. In the latter case, legal review is exercised by the Federal Administrative Court, acting as a court of first and last instance.[24]

---

[23] See *R. Marx*, Rechtsschutz gegen aufenthaltsrechtliche Versagung der Erlaubnis zur Erwerbstätigkeit, ZAR 2005, 48.

[24] See *Ch. Tams*, Die Abschiebungsanordnung nach § 58a Aufenthaltsgesetz, Deutsches Verwaltungsblatt 2005, 1482; *K. Sperlich*, Abschiebungsanordnung gemäß § 58a AufenthG und effektiver Rechtsschutz, Informationsbrief Ausländerrecht (InfAuslR) 2005, 250.

3.3. The Main Groups of Migrants in Germany, according to their Legal Status

In the following section, this report will give a review on the different channels of migration to Germany. The main groups are considered, according to their legal status. The list, however, is not meant to be exhaustive.

3.3.1. Union Citizens and their Relatives

The largest group of migrants living in Germany with a more or less unified legal status consists of non-German Union citizens. By the end of 2003, 25% of aliens were nationals of an EU Member State.[25] These figures increased to 34% after accession of ten new Member States in 2004, the largest new nationality being Polish (4% of all aliens). The most prevalent nationality is still Italian (8%), followed by Greek (5%).[26]

Not much needs to be said here with respect to German law, since the legal regime of Union citizens is almost exclusively predetermined by EU law, in particular by the provisions on freedom of movement (Art. 18, 39, 43 and 49 EC Treaty), the non-discrimination clause of Art. 12 EC Treaty, and the various pieces of EC legislation enacted for implementing them. Outstanding among the latter is Directive 2004/38/EC on the right of Union citizens and their family members to move and reside freely within the Union territory, which is to be transposed by April 30, 2006. The Freedom of Movement Act anticipated some of the innovations of Directive 2004/38/EC, although further amendments are required to bring German law fully in line with the Directive. The Freedom of Movement Act already abolished the obligation of a Union citizen to apply for a – at any rate declaratory – residence permit. Henceforth, the local Registry Office issues a non-formal certification of the right to reside when the Union citizen registers his/her relocation with that office (an obligation which also pertains to Germans). As required by the Directive, Union citizens and their relatives acquire a right of quasi-permanent residence after five years,

---

[25] *Beauftragte der Bundesregierung für Migration und Flüchtlinge*, Daten – Fakten – Trends: Strukturdaten der ausländischen Bevölkerung (Stand: 2004), at 18; available at <http://www.integrationsbeauftragte.de/download/Strukturdaten.pdf>.

[26] Ausländer- und Flüchtlingszahlen (note 3), at 75.

which is independent of any economic activity or of having sufficient resources. Residing as a person entitled to freedom of movement under the Freedom of Movement Act implies an unrestricted right to employment.

Some problems, however, are likely to remain. The first problem concerns the still possible restrictions on the right of residence on grounds of public policy. In that respect, the Freedom of Movement Act brought about amendments that were meant to bring the contested German practice of expelling Union citizens in line with EU law requirements.[27] Second, it remains to be seen how German authorities will apply § 5(4) Freedom of Movement Act, which, on a non-systematic basis, allows for a review of whether a person still satisfies the conditions for freedom of movement. This could actually endanger the residence status of persons who rely on social assistance but have not yet passed the five years threshold. In this regard, the Directive provides the Member State with a considerable degree of discretion in stating that the person may not become "an unreasonable burden on the social assistance system" (Art. 14(1) Directive 2004/38).

Another crucial point is the legal position of family members who are not nationals of an EU Member State. EU law guarantees them a derived right of residence when accompanying or joining the Union citizen (Art. 6(2) Directive 2004/38/EC). This will at least require that the necessary condition of residing with the Union citizen, as yet foreseen in § 2(1) Freedom of Movement Act, be abolished.[28] A third-country family member's right of entry may be subjected to a visa requirement (Art. 5(2) Directive 2004/38/EC). The European Court of Justice, however, made plain that a family member's rights of entry and residence must not depend on the formalities of a visa procedure.[29] One may thus question whether the visa requirement of § 2(4) Freedom of Movement Act and the limited exceptions to it under the Residence Act[30] are in conformity with EU law. Finally, a loophole exists with respect to third-country nationals who are family members of a German. The

---

27 See below, section 6.2.

28 *K. Hailbronner*, Neue Richtlinie zur Freizügigkeit der Unionsbürger, ZAR 2004, 259, 263.

29 EJC, Case C-459/99, *MRAX*, [2003] ECR I-6591; Case C-157/03, *Commission v. Spain*, [2005] ECR I-2911.

30 For details, see *O. Maor*, Die Visabestimmungen der Aufenthaltsverordnung, ZAR 2005, 185.

Freedom of Movement Act does not apply, since Germans are not Union citizens in the sense of that act. Under the applicable Residence Act, however, the scope of the right to family reunion is framed more restrictively. It excludes subsequent immigration of relatives in the ascending line, except for extraordinary hardship cases (§§ 28 and 36 Residence Act). German law fails to acknowledge that in certain constellations a Union citizen is able to invoke an EU law-based right to family reunification against his/her own state, in particular when the Union citizen has exercised free movement rights and then returns to his/her country.[31]

3.3.2. Long-Term Residents and their Relatives

The majority of aliens in Germany are long-term residents. By the end of 2004, 61% of them have stayed in the country for at least ten years (75% of Turkish nationals, and 60% of the nationals of Serbia and Montenegro, just to mention the two largest non-EU nationalities[32]). 34% of all aliens have lived in Germany for at least twenty years, 20% even for thirty years.[33] These figures reflect the worker recruitment of the 1950s and 1960s, and the subsequent immigration of family members since the 1970s. To a certain extent, they also mirror the refugee influx of the 1980s and 1990s resulting, *e.g.*, from civil wars in Turkey/Kurdistan and Yugoslavia. The bulk of aliens in Germany, however, are former migrant workers and their descendents who either do not qualify for naturalization to German nationality or, for various reasons, do not apply for it.

The legal status of long-term alien residents differs widely. By the end of 2003, 48% of all aliens held an unlimited residence permit.[34] Pursuant

---

[31] See ECJ, Case C-370/90, *Singh*, [1992] ECR I-4265, para. 19 *et seq.*; Case C-109/01, *Akrich*, [2003] ECR I-9607, para. 47 *et seq.*; for an analysis of the German law, see *A. Fischer-Lescano*, Nachzugsrechte von Drittstaatsangehörigen Familienmitgliedern deutscher Unionsbürger, ZAR 2005, 288.

[32] The proportion is even higher among the Spanish, Greek, and Italian nationals (78–80%), who has meanwhile indiscriminately become Union citizens due to EU enlargement. All data taken from: Ausländer- und Flüchtlingszahlen (note 3), at 76.

[33] Id.

[34] An *Aufenthaltsberechtigung* (11%), an *unbefristete Aufenthaltserlaubnis* (28%), or an *unbefristete Aufenthaltserlaubnis–EU* (9%), according to the ty-

to § 101(1) Residence Act, these permits are classified as valid Establishment Authorizations under the new law; the reinforced integration requirements do not apply retroactively. Union citizens, and EEA or Swiss nationals, are henceforth freed from the need for a permit. Yet, 22% of all aliens, *i.e.* close to 1.5 million people, were holding a limited residence permit under the former Aliens Act which ensured them a semi-secured residence status.[35] Of them, 65% lived in Germany for at least five years, 38% for ten years or longer. Their permits are acknowledged as Residence Authorizations according to the new law. In order to receive an Establishment Authorization, only basic language skills and no pension scheme contributions are required (§ 104(2) Residence Act).[36]

Of particular concern is the situation of persons who have stayed in Germany on a long-term basis without qualifying for a residence permit. At the end of 2003, some 227,000 aliens were only tolerated in Germany, which means that their deportation was temporarily suspended. Of them, 62% had arrived at least five years ago.[37] Among the Serb and Montenegrin population in Germany, which includes different ethnic groups from Kosovo, 11% of those who had lived in Germany for ten years or more still hold a short-term Certificate of Toleration.[38] Reacting to this situation, the German legislature intended to overcome the long-standing practice of issuing 'chains of tolerations' (*Kettenduldungen*). According to § 25(5) Residence Act, the Aliens Office can issue a Residence Authorization if, for the foreseeable future, an alien is unable to leave through no fault of his/her own. A Residence Authorization should (notably not: shall) be issued if the deportation is suspended for eighteen months. Much will depend on how this clause is

---

pology of the law as it stood before January 1, 2005. Source: Strukturdaten (note 25), at 25.

35 These figures neither include recognized refugees who did not qualify as persons entitled to asylum, nor persons with a subsidiary protection status. For both, the Aliens Act offered a limited residence permit called *Aufenthaltsbefugnis*. By the end of 2003, 4% of all aliens were holding that type of permit. Source: Strukturdaten (note 25), at 25.

36 For a discussion of the transitional arrangements, see *K. Dienelt*, Die Anrechnung von Voraufenthaltszeiten zur Erlangung einer Niederlassungserlaubnis, InfAuslR 2005, 247.

37 Strukturdaten (note 25), at 25.

38 Strukturdaten (note 25), at 24.

interpreted in practice. First reports indicate a rather restrictive approach of the *Länder* administrations.[39]

For obvious reasons, the rules on family reunification are of great importance to aliens who reside on a long-term basis. Between 1999 and 2003, an average of 78,000 persons per year had been admitted to Germany to unite with their spouses or parents. Of the 76,000 visas issued for that purpose in 2003, 33% were granted to spouses of an alien, 44% to spouses of a German, and the rest were newly arriving children.[40] Aliens who hold an Establishment Authorization, or have held a Residence Authorization for at least five years, are entitled to sponsor their spouse; the same holds true for recognized refugees (§ 30 Residence Act). After two years of cohabitation in Germany, alien spouses acquire an independent right of residence (§ 31). For the purposes of family reunification, registered partnerships of same-sex couples are treated as equivalent to marriage (§ 27(2)). Unmarried minors are entitled to a Residence Authorization when accompanying their parents (§ 32(1)). Subsequent immigration of minors is permitted if the persons having the care and custody themselves hold a residence permit. In cases of minors above the age of fifteen, however, it must be proven that the child meets certain integration requirements, *e.g.*, by speaking German (§ 32(2)). When a child is born in Germany but nonetheless does not acquire the German nationality, a Residence Authorization is granted ex officio if the mother holds a Residence Authorization or an Establishment Authorization (§ 33).[41] Once a minor who is legally residing in Germany attains full age, he/she acquires an independent right of residence (§ 34). Collateral relatives or family members in the ascending line do not have a right to family unity in Germany, except for particular hardship cases (§ 36).

These regulations on family reunification reflect the legislature's human rights obligations as stipulated in Art. 6(1) Basic Law and Art. 8 ECHR. Both provisions guarantee everyone a right to respect for his

---

[39] *R. Göbel-Zimmermann*, Die Erteilung eines Aufenthaltstitels aus humanitären Gründen nach § 25 Abs. 4 und 5 AufenthG, ZAR 2005, 275; see also *G. Benassi*, Zur praktischen Bedeutung des § 25 Abs. 4 und 5 AufenthG, InfAuslR 2005, 357.

[40] Migrationsgeschehen (note 1), at 31.

[41] In a recent judgment, however, the Federal Constitutional Court held that this provision constitutes an unjustified discrimination on grounds of sex and thus violates Art. 3(3) Basic Law: Case 2 BvR 524/01 (Judgment of October 25, 2005, nyr).

family life. According to the German courts, however, the constitutional protection for marriage and family (*Ehe und Familie*) is limited to married couples and minor children, whereas the case-law of the Strasbourg Human Rights Court operates on the basis of a broader family concept.[42] The Residence Act's provisions are subject to reform in order to implement the Directive 2003/86/EC on the right to family reunification, which Germany failed to transpose in a timely manner by October 3, 2005. The aforementioned integration requirement of § 32(2) Residence Act is likely to persist, since it is covered by an explicit derogation in Art. 4(1) of the Directive 2003/86/EC, which was incorporated into the text at the request of the German delegation.

3.3.3. Migrant Workers of Turkish Nationality and their Relatives

The single largest alien nationality in Germany is Turkish: by December 2004, they formed 26% of the alien population, or a total of over 1.7 million people.[43] Most of them have resided in Germany on a long-term basis or were actually born in Germany. The legal position of the Turkish population differs from that of other nationals because they potentially benefit from the Association Agreement of 1963, concluded between Turkey on the one hand, and the EEC and its Member States on the other ('Ankara Agreement'). Of particular significance is Decision No 1/80 of September 19, 1980. This decision was adopted by the Association Council, a joint decision-making body of the contracting parties which is, *inter alia*, mandated to progressively implement the free movement of workers. Three clauses of Decision No 1/80 are noteworthy here. Art. 6(1) states that a Turkish worker, duly registered as belonging to the labor force of a Member State, shall enjoy free access to the labor market after four years of legal employment. Art. 7 provides that any family member who has been authorized to join the worker shall be entitled to take up an employment after he/she has been legally resident for at least three years; children who have completed a course of vocational training in the host country shall have immediate access to the labor market, provided one of their parents has been legally employed for at least three years. Art. 14(1) authorizes national limitations on these rights for reasons of public policy, public security, or public health – the very same formula as applicable to Union citizens. In its

---

42 See, *e.g.*, ECtHR, *Marckx v. Belgium*, [1979] Series A No 31, 21.

43 Ausländer- und Flüchtlingszahlen (note 3), at 76.

landmark *Sevince* judgment of 1990, the European Court of Justice held that the rights to employment granted in Decision No 1/80 imply a duty on the side of the Member State to recognize the persons concerned as legal residents; moreover, the provisions granting these EU law-based rights shall have direct effect.[44] In a series of cases, the ECJ further clarified the content of Decision No 1/80. For instance, it held that the phrase "have been authorized to join" also covers persons that were born and have always resided in the host country.[45] The ECJ also held that the concomitant right of residence implied in Art. 7 does not depend on the continuing existence of the conditions for access to this right. It persists unless the person concerned constitutes a genuine and serious threat to public interests mentioned in Art. 14, or has left the territory of the host State for a significant length of time without legitimate reason.[46] Notably, under Art. 7 there is no requirement of being registered as belonging to the labor force or of having worked for a certain period.[47]

This case-law has a huge impact on the legal position of the Turkish population in Germany. A large number of first- and second-generation migrants meets the requirements stipulated in Art. 6 or 7 of Decision No 1/80, and therefore has a right to reside that is independent of national law. Exact figures are unknown because there is no legal procedure for certifying these rights. The question generally only arises when German authorities intend to expel a Turkish national for public policy reasons.[48] The Residence Act, in its § 4(1) and § 50(1), for the first time acknowledged that a right to reside in Germany can either follow from holding a residence permit or from the Ankara Agreement. One has to admit, however, that this agreement and the Association Council decisions only fragmentarily regulate the legal status of the Turkish nationals. These nationals do not enjoy a right to enter and move freely within the Union territory. The decision on the first admission of a Turkish migrant worker and on the conditions for reuniting with family members is still up to the Member States. In that respect, Directive 2003/86/EC on the right to family reunification, Directive

---

44 ECJ, Case C-192/89, *Sevince*, [1990] ECR I-3461, para. 15.

45 ECJ, Case C-467/02, *Cetinkaya*, [2004] ECR I-10895, para. 34.

46 ECJ, Case C-329/97, *Ergat*, [2000] I-1487, paras. 40 and 48.

47 ECJ, Case C-373/03, *Aydinli*, [2005] ECR I-0000, para. 29 (Judgment of July 7, 2005, nyr).

48 See below, section 6.2.

2003/109/EC concerning the status of third-country nationals who are long-term residents (to be transposed by January 23, 2006 at the latest), and Association Council Decision No 1/80 will henceforth mutually complement each other.

3.3.4. Admission for Purposes of Employment

The provisions on issuing a residence permit for employment purposes distinguish between unskilled, skilled, and high-skilled employees (§ 18(3), § 18(4), and § 19 respectively), and self-employed persons (§ 21 Residence Act). Admission of unskilled laborers is strict as to requiring an executive rule or an inter-state agreement regulating access to employment. On the basis of the equivalent provisions of the former Aliens Act, German authorities granted in 2003 close to 320,000 short-term residence permits to seasonal or carnival laborers, mainly from Eastern and Southeastern Europe. 90% of the seasonal laborers were employed in agriculture and forestry, 7% worked in the hotel and catering industry.[49] Moreover, some 44,000 contract laborers of foreign companies have been admitted on the basis of bilateral agreements with Central and Eastern European countries and Turkey.[50]

Admission of skilled workers for employment purposes is typically only available through executive rule which defines the occupational groups for which the general ban on labor recruitment is lifted. The relevant Employment Regulation identifies a limited number of such occupations, including language teachers, specialty cooks, social workers, and nursing staff (§§ 25 *et seq.* Employment Regulation).

Special rules apply to highly qualified employees. According to § 19(1) Residence Act, an Establishment Authorizations may be granted if the person concerned has sufficient resources and will probably integrate into German society. § 19(2) Residence Act enumerates a non-exhaustive list of professions to which this privilege applies, namely scientists with special expertise (No 1), teachers or academic assistants with specially recognized functions (No 2), and specialists or executives with high professional experience and a yearly income over 84,600 Euro (No 3).

Admission of a self-employed person is based on an evaluation of whether a positive impact on the economy is expected and adequate fi-

---

[49] Migrationsgeschehen (note 1), at 20.

[50] Migrationsgeschehen (note 1), at 19.

nancing of the enterprise is ensured. The required economic demand is proven under the cumulative conditions of investing one million Euro and creating ten jobs (§ 21(1) Residence Act). A Residence Authorization for self-employed activity may also be granted if preferential treatment is foreseen in international agreements (§ 21(2) Residence Act). This is currently the case for nationals of Bulgaria, the Dominican Republic, Indonesia, Iran, Japan, the Philippines, Romania, Sri Lanka, Switzerland, the U.S.A., and Turkey.[51]

3.3.5. Persons with Refugees Status or Other Forms of International Protection

Over the last fifteen years, the issue of asylum and refugee protection was subject to intense political debate, and German law has witnessed major changes. In the beginning of the 1990s, the numbers of asylum applications increased to a climax of almost 440,000 in 1992. German policymakers felt pressure to adopt a more restrictive approach. In 1993, the legislature amended the German Constitution in order to limit the access to asylum, which was – and still is – guaranteed as a fundamental constitutional right. The new Art. 16a Basic Law allows for the incorporation of the concepts of 'safe third country' and 'safe country of origin', for limiting access to the courts, and for mutual recognition of asylum decisions as foreseen in the Dublin Convention of 1990. All these concepts were implemented in the Act on Asylum Procedures (*Asylverfahrensgesetz*).[52] Asylum applications dropped to 130,000 in 1993 and in the meantime have reached the lowest level since 1984 (less than 36,000 in 2004).[53] Recognition rates as to refugee status were and are low. Of the 200,000 applications decided by the Federal Office in 1995, 9% of asylum seekers were recognized as asylee pursuant to Art. 16a Basic Law, another 2.5% of applicants were recognized as Geneva Convention refugees, and 1.8% were granted subsidiary pro-

---

[51] See No 21.2. of the Provisional Guidelines for the Application of the Residence Act, issued by the Federal Ministry of the Interior, 22. December 2004.

[52] Moreover, the Act on Benefits for Asylum Seekers was introduced, see below, section 4.2.3.

[53] *Bundesamt für Migration und Flüchtlinge*, Migration und Asyl (August 19, 2005), at 19; available at <http://www.bamf.de/cln_043/nn_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-migration-asyl,templateId=raw,property=publicationFile.pdf/statistik-migration-asyl.pdf>.

tection. For the 62,000 decisions issued in 2004, the respective figures are 1.5%, 1.8%, and 1.6%.[54] Not included in the above statistics, however, is the number of asylum seekers who filed a successful appeal and have been granted refugee status or subsidiary protection through a court decision. No statistical data is available as to that aspect.

As already noted,[55] refugee protection in Germany depends on a two-tier system. Besides the 'first class asylum' ('*großes Asyl*') based on the Constitution which requires the persecution to occur on political grounds by a state or quasi-state actor, there is the 'second class asylum' ('*kleines Asyl*') for other refugees. The main consequence of this distinction was that persons entitled to 'first class asylum' received an unlimited residence permit, whereas persons who must not be deported for reasons qualifying them as refugees under the Geneva Convention received a limited residence permit specially designed for that purpose (the so-called *Aufenthaltsbefugnis*). With a view to the draft EC Directive on minimum standards for the qualification as refugees, already on the table in Brussels, political consensus among the parties in Germany was eventually reached that the distinction between first and second class asylum should be leveled. Under the Residence Act, both kinds of refugees at first receive a (limited, but privileged) Residence Authorization, which after three years is to be replaced by an (unlimited) Establishment Authorization when a mandatory review has verified that the need for protection persists.[56] For all practical purposes, and for the purpose of transposing the qualification Directive 2004/83/EC (in the meantime adopted), the difference between the two sources of refugee status in Germany has become meaningless.

Another change concerns the definition of the concept of refugee. Under the Aliens Act, the Federal Administrative Court held that even for 'second class asylum' a danger of persecution attributable to a state, or at least a quasi-state actor, is required.[57] As opposed to the practice of most Geneva Convention state parties, and contrary to the interpreta-

---

[54] Figures taken from *Bundesamt für Migration und Flüchtlinge*, Statistik aktuell (August 19, 2005), at 6; available at <http://www.bamf.de/cln_043/nn_564242/SharedDocs/Anlagen/DE/DasBAMF/Downloads/statistik-aktuell,templateId=raw,property=publicationFile.pdf/statistik-aktuell.pdf>.

[55] See above, section 2.3.

[56] As to international law's requirements for withdrawing refugee status, see *R. Marx*, Widerruf wider das Völkerrecht, InfAuslR 2005, 218.

[57] Federal Administrative Court, in: Decisions vol. 95, 42.

tive guidelines of UNHCR, Germany therefore adopted a narrow reading of its obligations under the Convention, which largely prevented civil war refugees and victims of gender-related persecution from refugee status.[58] In order to remedy this situation, and again, with a view to the draft qualification Directive, the legislature amended the law by explicitly stating that actors of persecution may also be non-state actors, and that persecution for reasons of membership of a social group may also be at hand if the threat is of a gender-specific nature (§ 60(1) Residence Act).[59] It can be thus estimated that the judiciary will have to change its approach, at the latest when the time-line for transposing Directive 2004/83/EC expires on October 10, 2006.[60]

Further changes to German refugee law result from the Dublin regime integrating the 25 EU members, Norway, Iceland, and in the future, Switzerland, into a system of mutual recognition of asylum decisions. Regulation No 343/2003 establishing the criteria and mechanisms for determining the State responsible for examining an asylum application (Dublin II Regulation), which replaced the Dublin Convention of 1990, has had an increasing impact on German law. In 2004, the Federal Office for Migration and Refugees in 6,939 cases called upon another Dublin State to take charge of or take back an asylum seeker, which amounts to 19.5% of new asylum claims in that year. In 3,328 cases, the applicant was in fact transferred to that State. In the same period, 8,581 requests were directed at Germany, and 4,150 persons were actually transferred.[61] Germany most frequently called upon Austria, Sweden, and France, whereas the most frequent calls were received from Sweden, France, and Norway.[62] According to the Federal Office, the increase in Dublin procedures is in particular due to the fact that the 'Eurodac' Regulation No 2725/2000 on the collection and comparison of fingerprints of asylum seekers is becoming more and more operative.[63]

---

58 See *G. Renner*, Nichtstaatliche und geschlechtsspezifische Verfolgung, AWR-Bulletin 2004, 47.

59 See *J. Duchrow*, Flüchtlingsrecht und Zuwanderungsgesetz unter Berücksichtigung der sog. Qualifikationsrichtlinie, ZAR 2004, 393.

60 See Administrative High Court Baden-Württemberg, Case A 3 S 358/05, in: Die Öffentliche Verwaltung 2005, 747 (duty to interpret in conformity with EU law not yet existing).

61 Migration und Asyl (note 53), at 39.

62 Id., at 37.

63 Id., at 35.

With respect to legal issues of how to implement the Dublin system in Germany, a number of open questions remain. It is contested, *e.g.*, whether the 'safe third country' exemption can cumulatively be used in a Dublin procedure (§§ 26a(1) and 29(3) Act on Asylum Procedures, respectively). If so – and the Federal Office in fact operates on that assumption – the stricter rule of immediate deportation would apply, preventing the applicant from voluntarily leaving the country, although Art. 9 Dublin II Regulation seems open to this choice.[64] Other legal issues concern the legality of further detention when delays occur in the inter-state communication, and the condition for exercising discretion, under Art. 3(2) Dublin II Regulation, to examine an asylum application even if such examination is not required under the criteria of the Regulation.

Finally, some words should be added to the concept of subsidiary protection as defined in Directive 2004/83/EC (yet to be transposed). § 60 Residence Act mentions different categories of legal barriers to deportation which seem to match the grounds for subsidiary protection as required by Art. 7 of the Directive, namely torture (§ 60, para. 2), death penalty (para. 3), guarantees of the European Convention of Human Rights (para. 5), and a concrete danger of a serious risk for life, personal integrity, or freedom (para. 7).[65] According to § 25(3) Residence Act, the persons concerned shall, as a rule, receive a Residence Authorization as long as the threat persists. The legal status is weaker than that of recognized refugees, *e.g.*, with respect to labor market access and family reunion. An Establishment Authorization can be granted after seven years, subject to the general requirements for that permit (§ 26(4) Residence Act).

---

[64] As yet, neither have higher administrative courts spoken on that issue, nor has the ECJ. For a first instance ruling, see Administrative Court Darmstadt, Case 5 E 403/04.A, in: InfAuslR 2005, 495 (immediate deportation contradicts EU law).

[65] As to the situation under the Aliens Act, see *K. Hailbronner*, Comparative Legal Study on Subsidiary Protection – Germany, in: Bouteillet-Paquet (ed.), Subsidiary Protection of Refugees in the European Union, 2002, 491.

3.3.6. Persons whose Deportation Is Temporarily Suspended (So-Called Toleration)

The toleration has, albeit somewhat against the spirit of the law, transformed into a residence title of its own.[66] This particularly concerns persons whose application for asylum was rejected but who are nevertheless unwilling or unable to leave the country. There are two routes for issuing a Certification of Toleration, as foreseen in § 60a Residence Act. The Ministers of the Interior of the German *Länder*, individually or collectively, can order a temporary stop of deportations with regard to a group of aliens. For a deportation stop order exceeding six months, the consent of the Federal Minister is needed. In the absence of such an order, a toleration is to be granted by the local Aliens Office if the deportation of an individual is impossible for legal or factual grounds. Legal barriers against deportation may be constituted by human rights law in cases of illness, a serious danger of suicide, or a compelling need to take care for a family member. Factual barriers include unsettled identity, lack of necessary travel documents, or non-cooperation by the country of origin. Non-cooperation on the part of the alien does not preclude him/her from being entitled to a toleration, although it most likely prevents a Residence Authorization from being issued. A tolerated person may be granted access to the labor market after his/her deportation has been suspended for one year through no fault of his/her own, subject to discretionary assent of the Federal Agency for Labor (§§ 10, 11 Employment Procedure Regulation).[67]

A further innovation of the Residence Act, to be mentioned in this context, is § 23a, which calls upon the *Länder* governments to establish within their respective jurisdiction a so-called hardship case commission (*Härtefallkommission*). This commission shall recommend the grant of a residence permit to a person whose further residence is justified on humanitarian or personal grounds, although the legal requirements for a permit are not met. The final decision of the *Land's* Minister of the Interior is entirely discretionary.[68]

---

[66] See above, section 3.3.2.

[67] See *J. Zühlcke*, Die Zulassung von geduldeten Ausländern zur Ausübung einer Beschäftigung, ZAR 2005, 317; *H. Leineweber*, Die Beschäftigung von geduldeten Ausländern seit Inkrafttreten des Zuwanderungsgesetzes, InfAuslR 2005, 302.

[68] See *Th. Groß*, Zuwanderung aus humanitären Gründen, ZAR 2005, 61, 65 *et seq*.

3.3.7. Admission of Migrant Groups on the Basis of Political Discretion

Besides the highly regulated channels of admission under administrative discretion, the Residence Act provides for some instances of admission on purely political grounds. In the absence of an international law obligation, political discretion to admit an alien is typically allocated at the ministerial level and largely preempted from judicial review.

According to § 22 Residence Act, the Federal Minister of the Interior has the power to declare that admitting a particular person from abroad is necessary to protect political interests of the Federal Republic. The Minister's decision is binding on the local Aliens Office. The practical impact of the equivalent provision of the former Aliens Act was low.

The *Länder* Ministers of the Interior possess a comparable power with respect to groups of aliens, to order admission either from abroad or of persons already staying in Germany. § 23(1) Residence Act provides a legal basis for general decisions that define the framework for Residence Authorizations for the protection of political interests of the Federal Republic, or for humanitarian or international law grounds. Such a ministerial order must have the consent of the Federal Minister, so that in practice bipartisan political agreement within the Conference of the Ministers and Senators of the Interior needs to be reached. This clause provides a possible basis for the regularization of successively tolerated persons, and arguably also of illegal immigrants. Its predecessor was used, *e.g.*, with respect to certain persons from Bosnia-Herzegovina and the Federation of Yugoslavia staying in Germany.[69] § 23(1) also replaced the section of the Aliens Act providing for temporary admission of persons fleeing war and civil war situations, which has only been used once for Albanian Kosovo refugees.[70]

The main example of permanent admission on political grounds concerns Jewish emigrants from the territory of the former Soviet Union.[71] German policymakers, in 1991, decided to foster Jewish immigration in order to strengthen the Jewish communities in Germany. It was agreed that the existing Act on Refugees Admitted Under Humanitarian Relief Programs (so-called *Kontingentflüchtlingsgesetz*) should be applied in an analogous fashion, although the beneficiaries are not refugees in the

---

[69] *Hailbronner*, Subsidiary Protection (note 65), at 499, 513 and 521 *et seq*.

[70] Id., at 497.

[71] See *E. Weizsäcker*, Jüdische Migranten im geltenden deutschen Staatsangehörigkeits- und Ausländerrecht, ZAR 2004, 93.

sense of the Geneva Convention.[72] Between 1993 and 2003 some 180,000 Jewish people migrated to Germany under that program.[73] Meanwhile, the Residence Act provides a proper legal basis for this type of immigration policy. According to § 23(2), a ministerial order of admission pursuant to § 23(1) Residence Act may determine that special political interests of the Federal Republic require Establishment Authorizations to be issued even for newly arriving immigrants.

3.3.8. Ethnic Germans and their Relatives

Another facet of German immigration policy is located within a completely different legal framework. Reacting to the special situation after World War II, the German Constitution of 1949 established, in Art. 116(1) Basic Law, the category of Germans without German nationality (so-called *Statusdeutsche*). This legal concept referred to the millions of refugees and displaced persons of German ethnic origin who were forced to migrate from their homes in what later became the 'communist bloc'.[74] Their legal status, including the right to be admitted and naturalized, is determined in the Federal Act on Displaced Persons (*Bundesvertriebenengesetz*) and the Nationality Act (*Staatsangehörigkeitsgesetz*), which were both subject to amendments in the recent years.

Of continuing importance as a source of migration is the status of a 'late resettler' (*Spätaussiedler*). This status for people of German origin living in particular areas in (South-)Eastern Europe and Central Asia was created in 1993, after Germany had faced increasing immigration of 'resettlers' (*Aussiedler*) from these areas in the late 1980s, with peaks of about 380,000 and 400,000 in 1989 and 1990, respectively. Between 1990 and 2003, close to 2.4 million '(late) resettlers' migrated to Germany. With the 1993 amendments the numbers fell, down to 73,000 new arrivals in 2003. Of them, 99% came from successor states of the Soviet Union, in particular the Russian Federation and Kazakhstan.[75]

---

[72] For a critical view, see *J. Raabe*, Rechtswidrige Verwaltungspraxis bei der Zuwanderung jüdischer Emigranten aus der ehemaligen Sowjetunion?, ZAR 2004, 410.

[73] Migrationsgeschehen (note 1), at 16.

[74] For an overview, see *G. Lübbe-Wolff*, in: Dreier (ed.), Grundgesetz: Kommentar vol. III, comments on Art. 116 Basic Law, para. 11 *et seq.*

[75] All figures taken from: Migrationsgeschehen (note 1), at 15.

In order to be recognized as a 'late resettler' and thus as a German in the sense of the Basic Law, applicants must prove that they are facing substantial disadvantages due to their ethnic affiliation, except for persons living within the territory of the former Soviet Union, who basically only have to prove their German origin. Persons born after December 31, 1992, are excluded from recognition. Spouses and descendants have a right to join their sponsor irrespective of their ethnic affiliation, though since 2005 non-German spouses and children have to demonstrate basic German language skills. The person concerned acquires German nationality with a final certification of his/her status after arrival in Germany (§ 7 Nationality Act, as amended in 1999). The same holds true for non-German family members that are included in the recognition proceeding (§ 4(3) Act on Displaced Persons). Since 'late resettlers' enjoy full citizen's rights, the legal position of these migrants hardly differs from domestic Germans. The Federal Constitutional Court, however, upheld temporary restrictions on the right to freely move within German territory, as protected by Art. 11 Basic Law, in order to share, among the units of the state, the financial burden for housing, social assistance, and integration measures.[76] 'Late resettlers' and their family members have a right to take part in an integration course program at no charge (§ 9 Act on Displaced Persons).[77]

3.3.9. Undocumented Migrants

There is no precise figure as to the number of undocumented aliens in Germany, though estimates range from half a million to over one million.[78] German policymakers have always been very reluctant with respect to regularization programs for illegal immigrants.[79] According to § 95(1) Residence Act, illegal entry to or stay within the German territory constitutes a criminal offence. Aiding and abetting the above is pe-

---

[76] *Bundesverfassungsgericht*, Case 1 BvR 1266/00, in: Neue Zeitschrift für Verwaltungsrecht 2005, 797.

[77] On these courses, see below, section 4.3.

[78] *K. Schönwälder/D. Vogel/G. Sciortino*, Migration und Illegalität in Deutschland: AKI Forschungsbilanz 1, 2004, at 27, available at <http://www.wz-berlin.de/zkd/aki/files/aki_illegalitaetsbericht.pdf>; *J. Alt*, Illegal in Deutschland, 1999, 50.

[79] See *K. Hailbronner*, The Regularisation of Illegal Immigrants in Germany, in: de Bruycker (ed.), Les régularisations des étrangers illégaux dans L'Union européenne, 2000, 251.

nalized, also for Germans; exceptions for humanitarian motives are not foreseen.

4. Guarantees of Migrants' Status: Graded Integration into the German System of Social and Political Rights

4.1. Sources of Fundamental Rights Guarantees for Migrants

German public law is to a large degree shaped by the fundamental rights as they are guaranteed in the Basic Law. Therefore, differential treatment of, or legal regimes specially designed for, aliens are particularly likely in areas where the Basic Law does not provide for equal protection of everyone within its ambit. In contrast to guarantees such as freedom of religion, freedom of speech, access to justice, or right to property, certain fundamental rights are exclusively for Germans. These rights of citizens include freedom of assembly (Art. 8(1) Basic Law), freedom of association (Art. 9(1)), freedom of movement within the German territory (Art. 11(1)), freedom of occupation (Art. 12(1)), and protection from extradition (Art. 16(2)). In these respects, aliens only enjoy the weaker protection of Art. 2(1) Basic Law, which stipulates a subsidiary right that protects the free development of one's personality and thereby prohibits arbitrary treatment by a public authority. Additional human rights protection follows from provisions of the ECHR. In the context of citizen's rights, one can also cite the right to vote and stand as a candidate in elections at the different levels of the German state. The equal treatment clauses of Art. 3 Basic Law do not contain a prohibition of discriminations on grounds of nationality, although other grounds such as 'race' or 'descent', as well as the general 'equality before the law' clause, may come into play in some situations.

As a matter of principle, 'illegal persons' are entitled to basic rights as guaranteed by the German Constitution and international human rights law as well. Access to a court for enforcing these rights is, in reality, almost always precluded.

4.2. Restrictions to Political and Social Rights

As previously noted, the rights of citizens reveal those fields in which aliens are accorded special treatment. The freedom of occupation,

which in the present context relates to the question of access to the labor market, is dealt with in a separate section.[80] The right to remain in the country under almost all circumstances, a right which is not guaranteed to aliens and which constitutes a fundamental difference between citizens and aliens, is the subject of the final section.[81]

4.2.1. Political Rights

With regard to political rights, one should highlight the fact that aliens are entirely precluded from taking part in elections. In two remarkable judgments, the Federal Constitutional Court held that "the people", referred to in Art. 20(2) Basic Law as the sole source of public power comprises only Germans in the sense of Art. 116 Basic Law. The *Länder* legislatures are thus prevented from extending to aliens the right to vote or stand as a candidate in local elections.[82] The exception to this rule is Union citizens. According to the explicit provision of Art. 28(1) Basic Law, Union citizens are eligible to vote and be elected in county and municipal elections.

With respect to the rights to freely assemble and associate, the federal legislature has only cautiously made use of the authorization to impose specific restrictions on aliens. As a general rule, aliens possess these rights under the same conditions as Germans. A special registration procedure applies to an association, though, if the majority of its members are aliens. The rules for 'alien associations' have recently been tightened in the context of anti-Islamist measures. Henceforth, an 'alien association' whose political aims contradict the German Constitution is not immune from being banned by relying on privileged protection for religious activities – a privilege that is still in force for German religious associations.[83] In addition, an alien's political activity can be restricted on the basis of an individual decision by the Aliens Office (§ 47 Residence Act).

---

80 See below, section 5.

81 See below, section 6.

82 Federal Constitutional Court, in: Decisions vol. 83, 37, and vol. 83, 60.

83 The Federal Constitutional Court upheld this differentiation, Case 1 BvR 536/03 (Verbot des 'Kalifatstaats'), in: Neue Juristische Wochenschrift 2004, 47.

4.2.2. Freedom of Movement

The Residence Act and the Act on Asylum Procedures provide for several limitations as to moving within Germany. For people holding a Residence Authorization, the obligation to reside within a particular district or regional state can be imposed at any time if this decision is justified by a legitimate aim and withstands a proportionality test (§ 12(2) Residence Act). Territorial restrictions are exceedingly strict *vis-à-vis* persons who are only tolerated or asylum seekers. According to § 61(1) Residence Act, an alien whose obligation to leave has been determined must reside within the territory of a particular regional state; further restrictions are possible. The territorial scope of a Residence Leave for asylum seekers is *per se* limited to the district of the responsible Aliens Office (§ 56(1) Act on Asylum Procedures). Administrative fines can be imposed if the asylum seeker leaves this district without prior authorization. This German practice is enabled by Art. 7 of Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers.

4.2.3. Access to the Welfare System

The issue of alien's access to Germany's systems of social security is all-too complex to be dealt with in this report. Some remarks have to suffice. Major parts of the German welfare state are based on mandatory contributions to social insurance systems. They operate on a non-discriminatory basis as to the nationality of the insured person. Problems particular to aliens arise from the fact that these systems are connected to employment, so that legal barriers as to labor market access also pertain to social security.[84] Other social benefits, however, are non-contributory (*i.e.*, tax-based), such as various family benefits, grants for vocational training, or the basic social assistance. Here the question regularly arises as to whether and under which conditions aliens are entitled to benefits. The relevant laws distinguish between different categories of aliens, according to their legal status under the Residence Act or the Freedom of Movement Act. The Federal Constitutional Court held, however, that excluding certain migrants from Child Allowance (*Kindergeld*) and Child-Raising Allowance (*Erziehungsgeld*) solely on the basis of their residence permit violates the equal treatment clause of the Constitution. A particular permit may not, according to the Court,

[84] See below, section 5.1.

sufficiently reveal whether an alien will only reside on a temporary basis or not. Moreover, the Court held that deterring unwanted migrants from entering the country is, in itself, not a justification for the unequal treatment of residing aliens.[85] A separate system of social assistance is foreseen for asylum seekers, tolerated persons, and certain aliens holding a Residence Authorization granted for humanitarian grounds – the Act on Benefits for Asylum Seekers. For a period of up to 36 months, these temporarily admitted aliens are barred from access to the regular system of social assistance.

4.3. The New Integration Policy

The *Zuwanderungsgesetz* added a new facet to German migration law by introducing a section on 'promotion of integration' (§§ 43–45 Residence Act). Henceforth, the economic, cultural, and social integration of aliens who are going to reside in Germany on a continuing basis shall be promoted. The main tool for achieving this aim is the integration course program, conducted under the authority of the Federal Office for Migration and Refugees.[86] An integration course is offered to newly arriving aliens or 'late resettlers', which consists of a language course and an 'orientation course'. The latter is supposed to provide knowledge about Germany's legal order, culture, and history (§ 43 Residence Act). The details are subject to a federal executive order (*Integrationskursverordnung*). According to this regulation, one course comprises 630 lessons (600 language, 30 'orientation'). A participation fee of 1 Euro per lesson is levied.

In legal terms, the integration course program is a double-edged instrument.[87] On the one hand, it is an *entitlement* to participate for aliens who had been admitted for employment purposes (except for high-skilled workers), for the purpose of family reunification, on political grounds according to § 23(2) Residence Act, or as recognized refugees.

---

[85] Federal Constitutional Court, Case 1 BvL 4/97 et al. (Kindergeld), in: Neue Zeitschrift für Verwaltungsrecht 2005, 201. The European Court of Human Rights drew the same conclusions from Art. 8 and 14 ECHR, see ECtHR, *Okpiszh v Germany*, Appl. No 59140/00 (Judgment of October 25, 2005, nyr).

[86] For an overview, see *Ch. Hauschild*, Die Integrationskurse des Bundes, ZAR 2005, 56.

[87] For a sceptical view, see *B. Huber*, Die geplante ausländerrechtliche Pflicht zur Teilnahme an Integrationskursen, ZAR 2004, 86.

The right to participate does not extend to, *inter alia*, Union citizens and their family members, aliens who are admitted on a temporary basis, minors who attend a German school, and persons who demonstrate sufficient language or social skills (§ 44 Residence Act). On the other hand, participation in an integration course program is *obligatory* for those entitled to participation, unless he/she has the ability to communicate in German, at least in a simple manner. Participation is also mandatory on the basis of an individual decision by the Aliens Office if a 'particular need for integration' is detected (§ 44a Residence Act). An alien who does not fulfill his/her obligation may be at a disadvantage with respect to his/her future legal status. According to § 8(3) Residence Act, the Aliens Office shall take this fact into account when the alien applies for a discretionary renewal of his/her Residence Authorization. Moreover, in order to be entitled to naturalization an alien must, among other prerequisites, have been a legal resident for a minimum of eight years. This threshold is lowered to seven years if a certificate proves his/her successful participation in an integration course (§ 10(3) Nationality Act).

5. The Migrant and the Employer: Immigration Policy from a Labor Market Perspective

5.1. Alien's Access to the Labor Market: Involvement of the Federal Agency for Labor

Access of alien workers to the German labor market has expanded slightly with the recent implementation of the *Zuwanderungsgesetz.* The new law constitutes a modification on the virtual ban on recruitment of foreign labor that had been in place since 1973, in particular with respect to high-skilled workers. The Residence Act now explicitly provides for the entry of aliens into the labor market to address the demands of the market and to reduce unemployment within Germany in an effective manner (§ 18(1)). However, in reality, access continues to be limited and highly regulated, and the extent to which the new law will satisfy future economic demands remains questionable.

Pursuant to § 4(2) Residence Act an alien must not take up an employment unless provided for by his/her residence permit. Some permits allow for unrestricted access to employment, such as a Residence Authorization granted for family reunion with a German (§ 28(5) Resi-

dence Act), or any kind of Establishment Authorization (§ 9(1) Residence Act). In other cases, the local Aliens Office decides on the scope of permission when issuing the individual residence permit. An authorization of employment may be (and often is) limited in time and to a particular employer, occupation, or district.

A grant of access to the labor market regularly requires the assent of the Federal Agency for Labor, unless the Residence Act itself or an executive rule eliminates this requirement as to particular occupations, residence purposes, or nationals.[88] According to § 39 Residence Act, the Federal Agency's consent is based on a determination that the employment will not have a negative impact on the German labor market and that no privileged employees are available for the position. Privileged persons are Germans and aliens with an unrestricted right to employment, such as Union citizens from the old Member States, EEA, Maltese, Cypriote or Swiss nationals, or Turkish nationals benefiting from Decision No 1/80.[89] Alternatively, an assessment of the market segment concerned may lead to the conclusion that the employment is economically and politically acceptable. In all cases, the Federal Agency's assent is based on an employer guarantee that employment conditions are comparable to those provided to German nationals. Pursuant to executive rule however, certain types of employment do not require consent due to the fact that they will unlikely have a negative impact on the labor market or the employment opportunities of privileged employees.[90] Examples of these types of employment include: mandatory internships in the context of academic learning; some executives and managers; professors, academics and teachers; renowned artists and athletes, etc.

The number of employment permits[91] issued since 2000 has continued to decrease (2000: 1,083,268; 2001: 1,054,526; 2002: 945,073; 2003:

---

88 See above, sections 3.2. and 3.3.4.

89 EU nationals from the new Member States other than Malta or Cyprus enjoy second-range privileged access to the German labor market, in accordance with the transitional arrangements in the Act of Accession (see § 39(6) Residence Act). For these Union citizens, a system of issuing employment permits is still in force.

90 See §§ 1–16 Employment Regulation; §§ 1–4 Employment Procedure Regulation.

91 Before 2005, there was a two-fold application process, in which the applicant submitted separate applications to two government agencies for a residence permit and an employment permit. The two-fold process was recently replaced with a single internal process ('one-stop-government').

886,386), mainly due to the rise in unemployment. A total of 873,470 employer requests for foreign workers were approved in 2004, although in some cases the same individual could have come to Germany several times, as with the seasonal worker program.[92] Only 14% of the permits were not contingent on the market and, therefore, unrestricted as to employment.[93]

5.2. The Employers' Stance on Future Immigration Policy

Throughout the recent debate on immigration reform, employer groups advocated for a more permanent system of migration for employment purposes in order to more effectively address Germany's economic difficulties and labor shortages.[94] One model adopted in an early draft of the Residence Act provided for a selection process based on a point system, similar to systems in Canada and Australia, in which a specified number of qualified workers based on criteria such as age, health, education, familial status, country of origin, language capacity and ties to Germany, would be admitted irrespective of the availability of a specific position in Germany. This system, however, was not incorporated into the final legislation. Moreover, employer advocates have stressed the need to expand recruitment programs, such as Germany's 'green card' program for IT specialists, to other industry areas with labor shortages.[95] In addition, they have emphasized the need to improve integration policies so that Germany can attract foreign talent away from other immigration countries.[96]

A further concern involves the capacity of the Federal Agency for Labor to evaluate aptly the needs of the labor market and as a result, to

---

92 See above, section 3.3.4.

93 All figures taken from *Bundesagentur für Arbeit*, Arbeitsmarkt 2004: Amtliche Nachrichten der Bundesagentur für Arbeit, 53. Jahrgang, Sondernummer (August 30, 2005), at 33; available at <http://www.pub.arbeitsamt.de/hst/services/statistik/000100/html/jahr/arbeitsmarkt_2004_gesamt.pdf>.

94 *Bundesverband der Deutschen Industrie*, Die 8 BDI Thesen zur Zuwanderungspolitik, 2001; *H.-O. Henkel*, Die Steuerung der Zuwanderung durch ein Zuwanderungsgesetz aus bevölkerungs- und wirtschaftspolitischer Sicht, ZAR 2003, 124.

95 BDI Thesen zur Zuwanderungspolitik (note 94).

96 Id.

provide proper consent or not with regard to individual applications. The task of the Federal Agency in this matter is significant and could threaten it with overload, thereby risking the issuance of bureaucratic, inaccurate decisions.[97]

5.3. Undocumented Migrants and the Issue of Illegal Employment

The above regulations reveal the highly regulated nature of aliens' entry into the German labor market. Some experts attribute the restrictive nature of the German labor market, in which entry is primarily based on contemporary market indicators and often only temporary, to producing a substantial number of undocumented migrants since many overstay their temporary visas.[98]

In the 1990s, Germany expanded the availability of restricted residency and work authorization for seasonal work and contract work, in reaction to the increase of unauthorized employment and the increase in the undocumented population from Eastern Europe in the agricultural sphere, in the hotel and restaurant industry, and in construction.[99] With the opportunity to employ workers legally, it was thought that industries would have the incentive to forego hiring undocumented workers and to pay taxes and social benefits on the employment.[100] In addition, in 2002, employment authorizations were made available to caretakers in private households, and private households were entitled to tax benefits for their employees in order to decrease the cost difference between legal and illegal employment.

---

[97] *K.F. Zimmermann/H. Hinte*, Zuwanderung und Arbeitsmarkt: Deutschland und Dänemark im Vergleich, 2005, 236.

[98] It is estimated, however, that only 13% of unlawful employment in Germany is engaged in by aliens. As a result, most infractions of unlawful employment involve German citizens: *Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration,* Bericht über die Lage der Ausländerinnen und Ausländer in Deutschland, 2005, 75.

[99] *Ph. Martin*, Bordering on Control: Combating Irregular Migration in North America and Europe, 2003, 51 *et seq.*

[100] See *Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*, Migrationsbericht 2003, at 52 *et seq.*; available at <http://www.Integrationsbeauftragte.de/download/Migrationsbericht_2003.pdf>.

On the other hand, a variety of controls exist that are designed to prevent the entry of unauthorized employees into the labor market.[101] Employers who hire unauthorized aliens face substantial sanctions, including monetary fines and imprisonment terms. Raids are also common as a result of tips received from the public (competitive businesses, neighbors, unions, those legally employed) or from other agencies. If detected in a position of unauthorized employment, the undocumented are most likely subject to detention, criminal charges for illegal stay, and deportation.

6. State Protective Measures: Graded Protection against Expulsion

Hardly any other part of German migration law is as complex as the rules on the termination of residence. This report can only give a roughly-textured review.

6.1. Expulsion and Deportation Decisions in German Law

According to general administrative law, one can distinguish between decisions imposing an obligation to act – that is, in the given context: the obligation to leave –, and their execution, that is, measures taken to enforce compliance.[102] The main type of a decision imposing the obligation to leave is the expulsion (*Ausweisung*), which is tantamount to a withdrawal of an existing residence permit. In the case of an asylum seeker, the temporary Residence Leave is automatically invalidated when the application is refused, so that the obligation to leave arises without a separate decision. The same holds true for persons who never held a valid residence permit, or whose permit has expired. The main enforcement measures are the threat of deportation (*Abschiebungsan-*

---

[101] For a comparative perspective, see *A. Díaz-Pedrosa*, A Tale of Competing Policies: The Creation of Havens for Illegal Immigrants and the Black Market Economy in the European Union, 37 Cornell International Law Journal (2004), 431, 474 *et seq*.

[102] For a review on the new law, see *H. Jakober*, Auf der Suche nach Änderungen im Bereich Aufenthaltsbeendigung und Ausweisung durch das Zuwanderungsgesetz, InfAuslR 2005, 97.

drohung) which fixes the ultimate date for leaving and can be combined with the expulsion, and the deportation (*Abschiebung*) itself, that is, the forced removal from the territory. As a rule, a threat of deportation must be issued prior to a deportation (even though the person might not be able to comply, *e.g.*, while being imprisoned). In cases such as illegal border-crossing, however, immediate deportation is provided. Once an expulsion decision has become definitive and the time-limit for leaving has expired, the decision to deport is not discretionary. If deportation is impossible for legal or factual grounds, the person is temporarily tolerated. According to § 11 Residence Act, an expelled or deported person must not return to Germany, at least not until the ban has been lifted.

The Residence Act maintained a particularity of German migration law, namely, that under certain conditions the Aliens Offices have no discretion as to issuing an expulsion decision. §§ 53–55 Residence Act distinguishes between mandatory expulsion (*zwingende Ausweisung*), expulsion as a rule (*Ausweisung im Regelfall*), and discretionary expulsion (*Ermessensausweisung*). A discretionary expulsion can be founded on a wide range of public policy concerns, which have to be balanced with other considerations such as the duration of stay and social ties to Germany. There is no room for such weighing of interests with respect to the other two types of expulsion. According to § 53 Residence Act, an alien is to be expelled when sentenced to a term of imprisonment of three years or more (the threshold is lower for certain offences, such as drug-related crimes, breach of the public peace, or organized migrant smuggling). § 54 Residence Act delineates conditions under which expulsion is mandatory unless an atypical case is at hand. The grounds for 'expulsion as a rule' include any term of imprisonment without parole, a sentence for organized migrant smuggling, having committed a drug-related crime or having breached the public peace (a sentence is not required), and being engaged, or having been engaged, in terrorist activities (a fact-based suspicion is sufficient).

To a certain extent, the inflexibility of these rules is mitigated by way of § 56 Residence Act, which provides for special protection against expulsion. Special protection is granted to recognized refugees (§ 56(1), No 5), to spouses or registered partners of Germans (No 4), and to some categories of aliens after five years of legal residence. The latter consist of persons holding an Establishment Authorization (No 1), persons holding a Residence Authorization who entered as a minor or were born in the country (No 2), and persons holding a Residence Authorization who are the spouse or the registered partner of an alien re-

ferred to in No 1 or No 2 (No 3). In these cases, "serious grounds" (*schwerwiegende Gründe*) of public policy must be raised in order to issue an expulsion decision. If grounds for mandatory expulsion are at hand, the person concerned shall as a rule be expelled; if the requirements for 'expulsion as a rule' are met, the decision shall be on a discretionary basis. Even higher hurdles are foreseen for minors holding a valid residence permit, and for adolescents (18 to 21 years) who grew up in the country and hold an Establishment Authorization. According to § 56(2) Residence Act, expulsion of these aliens is at any rate discretionary. In sum, German law provides for instances of protection from expulsion for persons with close links to Germany, but this is not an automatic result of any particular type of residence permit. In that event, the law is more open for the particularities of the individual case, including its human rights aspects.

6.2. Supranational and International Sources for Protection against Expulsion

However, German expulsion policy had some difficulties in complying with international and EU law requirements whenever national law does not provide for the exercise of discretion and thus a proper proportionality test.

A 'classical' type of protection is foreseen in international treaty law on the basis of reciprocity. This concerns, in particular, the Council of Europe's 'Convention on Establishment' of 1955, which requires that a national of a contracting state who has been lawfully residing for more than ten years enjoys special protection against expulsion. German courts held that in this case the "serious grounds of public policy" clause (now § 56(1) Residence Act) applies and expulsion shall be discretionary.[103]

More complicated are constellations for which international law establishes an absolute ban on forced return, as is the case, *e.g.*, with Art. 3 of the UN Convention against Torture and Art. 3 ECHR, which both require that no person shall be returned to a state where he/she would be in danger of being subjected to torture. When German law demands mandatory expulsion, these obligations can only be complied with by suspending the deportation of the expelled, that is, at the enforcement

[103] Federal Administrative Court, in: Decisions vol. 101, 247, at 260 *et seq*.

stage of the administrative procedure. It seems somewhat contradictory that one chapter of German migration law states a duty which another chapter prevents from becoming effective. Moreover, according to the case-law of the European Court of Human Rights, the removal of an alien may give rise to issues under Art. 8 ECHR and thus require a balancing of interests in accordance with Art. 8(2) ECHR,[104] which is not always possible under German expulsion law.

Finally, a grave conflict resulted from the German policy of expelling (and in fact deporting) Unions citizens and Turkish nationals benefiting from equivalent protection under the Ankara Agreement. It is settled case-law of the European Court of Justice that expulsion of a Union citizen for grounds of public policy must be based exclusively on the personal conduct of the individual concerned. The existence of a previous criminal conviction can justify an expulsion only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present and sufficiently serious threat to a requirement of public policy which affects one of the fundamental interests of society.[105] Consequentially, the ECJ held that the German system where the expulsion automatically follows a criminal conviction is not in line with EU law.[106] In August 2004, the Federal Administrative Court intervened by declaring that henceforth expulsion of Union citizens, or Turkish nationals benefiting from Art. 6 or 7 of Decision No 1/80, is only available through a discretionary decision. In addition, such a decision is subject to repeal until it becomes definitive, should a change in circumstances require a new prognosis as to whether there is a 'present threat'.[107] The Freedom of Movement Act eventually remedied the situation by removing Union citizens from the scope of the Residence Act's provision on expulsion. Under the new law, the termination of residence of a person entitled to the freedom of movement is only possible in compliance with the said requirements of EU law (§ 6

---

[104] See, *inter alia*, ECtHR, *Abdulaziz, Cabales and Balandali v. the United Kingdom*, [1985] Series A No 94; *Nasri v. France*, [1995] Series A No 320-B, para. 34 *et seq*.

[105] ECJ, Case 30/77, *Bouchereau*, [1977] ECR 1999, para. 35; Case C-348/96, *Calfa*, [1999] ECR I-11, para. 22 *et seq.*

[106] ECJ, Joined Cases C-482/01 and C-493/01, *Orfanopoulos*, [2004] ECR I-5257, para. 71.

[107] Federal Administrative Court, Cases 1 C 29.02 and 1 C 30.02, in: InfAuslR 2005, 18 and 26.

Freedom of Movement Act).[108] With respect to privileged Turkish nationals, however, German law is still silent as to equivalent protection. Whenever special protection from expulsion does not already follow from national law, the need for a discretionary decision, which gives full weight to the EU law-based rights involved, results from the primacy of EU law, rendering §§ 53 and 54 Residence Act inapplicable.[109]

In the years to come, yet another layer of supranational protection against expulsion will follow from the implementation of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.[110] According to its Art. 12, Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security. A decision to expel must not be founded on economic considerations and shall consider factors such as the duration of stay, the age of the person concerned, and links with the country of residence or the absence of links with the country of origin. These requirements are modeled after the case-law of the Human Rights Court in Strasbourg, though in future the Court of Justice in Luxembourg will give the binding interpretation as to their content.

---

[108] As to the impact of Directive 2004/38/EC, see *K. Hailbronner*, Die Unionsbürgerrichtlinie und der ordre public, ZAR 2004, 299, 302 *et seq*.

[109] For a summary of the current legal situation, see *H. Dörig*, Erhöhter Ausweisungsschutz für türkische Staatsangehörige, Deutsches Verwaltungsblatt 2005, 1221.

[110] See *Ch. Hauschild*, Neues europäisches Einwanderungsrecht: Das Daueraufenthaltsrecht von Drittstaatsangehörigen, ZAR 2003, 350.

Constitutional Referendum in Germany – Country Report

Markus Böckenförde

I. Introduction

Germany belongs to one of the few countries in the EU, which have so far no experience of national-wide referenda. The Basic Law (federal

constitution)[1] provides explicitly only for referenda on a federal level on changes to boundaries of the Länder[2] thereby restricting the right to participate to those residing in the affected Länder. The shadowy existence of referenda on a federal level is mainly accredited to the historical experiences with plebiscites. Hence, after having classified the notion "referendum" against "plebiscite", "petition for a referendum", "consultative referendum", etc. in order to guarantee a uniform understanding of the relevant terms in this report (II.), a closer look into Germany's history of constitutional referenda will be the starting point of this paper (III.). It is followed by the analysis of the provisions in the basic law that allows for a direct involvement of the people (IV.). Although the federal level does not offer many opportunities for direct democracy, Germans are not inexperienced in directly influencing governments through referenda. On the sub-level, all German Länder offer a quite developed direct involvement of their people in governing their respective areas. Hence, it seems to be worthwhile to provide a short insight into the options of a constitutional referendum of the Länder (V.).

II. Terminology

There is no consistent terminology in the German language with regard to the terms describing elements of direct democracy.[3] The following definition of terms does not strive to resolve this problem, but rather aims to provide an understanding in which way the author is applying the relevant terms in this paper, thereby considering the German context.

In a *referendum*, specific areas of political decision-making are submitted to popular vote for obligatory approval or rejection. The referendum is referred to as "*facultative*", if a prior act of initiation is required, and as *obligatory*, if it is strictly foreseen within a certain procedure. A

---

1 The German Basic Law (Grundgesetz / GG) is the equivalent to a national constitution with the specifics laid down in Art. 146 GG.

2 Länder are the largest sub-units in the federal system of Germany and equivalent to the states in the USA or the cantons in Switzerland.

3 *G. Jürgens*, Direkte Demokratie in den Bundesländern: Gemeinsamkeiten – Unterschiede – Erfahrungen; Vorbildfunktion für den Bund, Stuttgart 1993, 36 *et seq*.

referendum may be initiated by state-organs (*plea for referendum*) or by the people itself. A *"popular initiative"*[4] is the formal application of the citizens to the legislative body to deal with specific issues of political interest. Such an initiative may – and in most of the cases does – contain a legislative proposal. It requires a minimum – generally quite low – number of signatures. It does not yet lead directly to a referendum, but may be a mandatory first step to it. A *"petition for a referendum"*[5] may be filed by the citizens in order to bring a proposal of an issue of political decision-making to a referendum. Depending on whether a two or three-tiered approach applies, elements of an initiative and a petition may be combined in one act. Again, in most of the cases, a "popular initiative" or/and a "petition of referendum" is introduced to initiate the legislative process. In a *"consultative/advisory referendum"* a state-organ requests the people to share its view on a distinct politically important issue with it. The specific feature of consultative referendum is its non-binding nature. *Plebiscite* is the collective term for different forms of direct participation of the people in the process of political decision making.

III. Historical Overview

1. The Experience of Weimar

a) Options for a Referendum in the Constitution of Weimar

Being asked why the Basic Law does not offer more opportunities for a direct involvement of the people via referenda, the general statement refers to the "experiences of Weimar", the 14 years lasting phase of Germany's first democratic experience under the Constitution of Weimar. This constitution of 1919 offered several options to include the people in the legislative process, mainly integrated as an element of checks and balances between the executive and the legislative (horizontal level), but

---

[4] The equivalent terms in German language are „Volksinitiative", „Volksantrag" (Art. 71 of the Constitution of Saxony), Bürgerantrag (Art. 68 of the Constitution of Thuringia).

[5] The equivalent terms in German language are „Volksbegehren" or „Bürgerbegehren".

also within the legislative body itself between Reichstag (parliament) and Reichsrat (house of states) (vertical level):[6]

> A law passed by Reichstag has to be presented in a referendum, if the Reich president decides so, within the period of one month (Art. 73 (1)).
>
> A law, the proclamation of which has been suspended because of a move supported by minimum one third of the members of Reichstag has to be presented in a referendum, if one twentieth of the enfranchised voters demand so (Art. 73 (2)).
>
> The Reichsrat was entitled to object to laws passed by Reichstag. If this objection could not be resolved, the Reich president at his discretion could call for a referendum or let the proposed law die. If the Reichstag voted to overrule the Reichsrat's objection by a two thirds majority, the Reich president was obligated to either proclaim the law into force or to call for a referendum (Art. 74 (3)).
>
> If Reichstag decided on a constitutional amendment against Reichsrat objection, the Reich president may not proclaim the amendment, if Reichsrat, within a period of two weeks, demands a plebiscite to be held (Art. 76 (3))
>
> The Reich President can be deposed by plebiscite, which has to be suggested by the Reichstag. This Reichstag decision requires a majority of two thirds of the votes. Such a decision bars the Reich President from continued exercise of his office (Art. 43 (2)).

Besides, a referendum also has to be held if one tenth of the enfranchised voters demand a law draft to be presented (Art. 73 (3)).[7] If the law draft includes a constitutional amendment, the majority of the enfranchised voters is required in order for the amendment to pass (Art. 76 (1)). Under specific circumstances, a referendum also had to be held for the transfer of state territory within the Reich or the formation of new states within the Reich.[8] In any case, the referenda provided for in the constitution are only facultative ones.

---

[6] *R. Schiffers*, Schlechte Weimarer Erfahrungen?, in: H.H. v. Arnim (ed.), Direkte Demokratie, Berlin 2000, 52.

[7] In order for a referendum petition to be approved, a law draft must be prepared. It has to be presented to Reichstag by the government, accompanied by the latter's comment. The plebiscite will not be held, if the law draft in question has been accepted unaltered by Reichstag.

[8] See Art. 18 (1) and (2): The transfer of state territory within the Reich, the formation of new states within the Reich is conducted by a Reich law amending

b) Constitutional Referenda in the Praxis of Weimar

State organs did not make use of their power to involve the people directly in the legislative procedure. Not a single plea for referendum was initiated by either the Reich president, Reichstag or Reichsrat. The people itself were more active and filed a petition for a referendum in eight cases out of which two led to a referendum. None of them had been successful; both failed to overcome the threshold of the majority of enfranchised voters to participate. However, in both cases more than 90% of the participating voters opted in favor of the relevant law.[9]

The view of some members of the Parliamentary Council[10] and scholars to justify the reluctance of introducing elements of direct democracy into the Basic Law with the "experience of Weimar" is mainly based on two lines of reasoning: First, the plebiscitary elements had a degenerating and disintegrating effect for the democratic live and had therefore been responsible for its decomposition.[11] Second, the unsuccessfulness

---

the constitution. If the concerned states agree, a simple Reich law may suffice. A simple Reich law may also suffice, if one of the concerned states does not agree, yet the territorial alteration or new formation is demanded by popular will or necessary because of a superseding Reich interest. Popular will has to be established by plebiscite. The Reich government may order a plebiscite, if one third of the enfranchised inhabitants in the area to be separated demands so. Three fifth of the votes handed in, and at least the majority of the population are necessary in order to decide on the alteration of territory. Even if only the separation of a part of a Prussian administration district, a Bavarian circle or a respective territorial unit in another state is concerned, the will of the population of the entire unit has to be determined.

[9] See in general: *O. Jung*, Direkte Demokratie in der Weimarer Republik. Die Fälle „Aufwertung", „Fürstenenteignung", „Panzerkreuzverbot" und „Young-Plan", 1989.

[10] See *O. Jung*, Grundgesetz und Volksentscheid – Die Entscheidungen des Parlamentarischen Rats gegen Formen Direkter Demokratie, 1994, 293.

[11] *C.-H. Obst*, Chancen direkter Demokratie in der Bundesrepublik Deutschland – Zulässigkeit und politische Konsequenzen, 1986, 101 (also quoting *Heuss*, a member of the Parliamentary Council); *K. Stern*, Verfassung und Verfassungsreform in der Bundesrepublik Deutschland, 1973, 23; *W. Schömbohm*, Repräsentative und plebiszitäre Elemente in westlichen Demokratien, in: Konrad Adenauer Stiftung (ed.), Herrschaftsmodelle und ihre Verwirklichung, 1971.

of the referenda had proven the inefficacy of direct democracy.[12] However, both statements have not yet been confirmed by empirical studies.[13]

Instead, with regard to the first one, a careful analysis conducted by *C.-H. Obst* indicates that at least no objectively revisable data are available to establish a link between the referenda held and an escalation of political radicalization. Of course, those parties that were about to disintegrate the Republic of Weimar also attempted to strengthen their commitment through referenda, especially at the end of the 1920s.[14] However, as can be seen in the probably most emotionally campaigned referendum against the "Young-Plan,"[15] the NSDAP and the DNVP as initiating parties did not succeed in mobilizing at least half of their voters of the elections before and after the referendum. This is even more surprising since the referendum was held only two months after the "Black Tuesday" of 29th October 1929,[16] at the time of the great depression that offered a broad potential to mobilize peoples by emotions.[17]

Concerning the second statement, one has to consider the antiplebiscitary setting in which the elements of direct democracy were embedded. The following insight may illustrate the headwind to which referenda were exposed: First, a measure had been applied pursuant to which all referenda required a quorum of the majority of enfranchised voters to participate, thereby turning the exception to a general rule. The Constitution foresaw this quorum according to Art. 75 and Art. 76 (2) in cases of overriding a Reichstag decision or amending the constitu-

---

[12] *H. Schneider*, Volksabstimmung in der rechtsstaatlichen Demokratie, in: O. Bachof (ed.), Forschungen und Berichte aus dem öffentlichen Recht, Gedächtnisschrift für Walter Jellinek, 1955, 158.

[13] *C.-H. Obst* (note 11), 102.

[14] *R. Schiffers* (note 6), 5.

[15] The Young Plan was a program for the settlement of German reparation debts after World War I. It was presented by the committee headed (1929-30) by Owen D. Young and was meant to supersede the Dawes Plan whose requirements of huge annual payments could not be met by Germany. Although the Young Plan offered a substantial alleviation for Germany, the nationalist-parties regarded it nevertheless as an unjustified restraint for Germany.

[16] This day went down in history as "Black Friday", a major stock market crash on New York's Wall Street that marks the beginning of a world-wide economic crisis.

[17] *C.-H. Obst* (note 11), 109.

tion. A systematic interpretation[18] of the constitutional text suggests to regard the requirements of § 21 of the Gesetz über den Volksentscheid[19] as exhaustive.[20] As a consequence of this practice, opponents of the proposed bill could and did focus on convincing people to abstain from the ballot instead of mobilising them to vote in line with their ideas.[21] The effect was a *de facto* abrogation of the secrecy of the ballot as guaranteed in Art. 125 of the constitution. Each voter going to the ballot-box was presumed to vote in favour of the bill.[22] Additionally, scrutiny-courts permitted parties in a process an access to the list of participants of the referendum that included name, profession and address.[23]

Finally, one should not forget that the parliamentarians and not the people through a referendum provided Hitler with the legalistic glint of his despotism, by passing the "Ermächtigungsgesetz"[24] in early 1933.[25]

2. The Decision of the Parliamentary Council

The final reluctance of the majority of Members of the Parliamentary Council, who sat between 1948/49 did not emanate from the experi-

---

18 With regard to the plain wording, Art. 75 may also apply for the ordinary referendum initiated by the people since it only took place if the proposed bill was not adopted by the Reichstag. However, one may ask for what reason Art. 76 (2) requires this quorum for amending the constitution by popular vote, which also only takes place if the Reichstag had not adopted the amendment before.

19 "Law on Plebiscite" (translated by the author).

20 § 21 states that only the majority of voters is required (regardless the quorum of participation). It should be taken into account that the filing of a petition for a referendum needs the support of 10% of the enfranchised voters (in proposing a law draft).

21 *R. Schiffers* (note 6), 62.

22 In the referendum concerning the expropriation of princes 39,3% participated, 36,4 % voted in favour and 1,5% against the proposed law; wit regard to the Young Plan 14,9% participated, 13,8 % voted "yes", 0,8% voted "no". See *C.-H. Obst* (note 11), 128.

23 *C.-H. Obst* (note 11), 118.

24 Gesetz zur Behebung der Not von Volk und Reich vom 24. März 1933, RGBl. 1933 I, 141.

25 See the comment of *A. Arndt*, StenoProBT, 3. Wp. 1499.

ences of the Länder-Constitutions adopted in 1946/1947. All thirteen of them included elements of direct democracy similar to those of the Weimar Constitution.[26] Also different drafts tabled before and during the sessions of the Parliamentary Council included these elements. However, specific dynamics allowed those who were against plebiscitary elements to get the upper hand.[27]

IV. Constitutional Referendum and the Basic Law (GG)

The Basic Law foresees in its Art. 20 (2) that the people shall exercise the state authority which is entirely vested in it not only by elections but also by other votes. Only one specific provision in the Basic Law envisages the latter way of exercising state authority:[28] For the revisions of the division of the existing territories of the Länder, Art. 29 GG[29] requires a federal law, which must be confirmed by referendum. In addition, Art. 146 GG states that "This Basic Law […] shall cease to apply on the day on which a constitution freely adopted by the German people takes effect." But this highly contested provision might not be considered as an element of direct democracy *within* the Basic Law.

Although there is some agreement that the Basic Law is open for other means of direct democracy,[30] it is heavily debated whether their introduction requires an amendment of the Basic Law or whether an ordinary law would be sufficient. One side argues that Art. 20 (2) GG has

---

[26] Baden, Bavaria, Brandenburg, Bremen, Mecklenburg-Western Pomerania, Rhineland-Palatinate, Saarland, Saxonia, Saxony-Anhalt, Thuringia, Wuerttemberg-Baden, Wuerttemberg-Hohenzollern. All of them had provisions on a referendum and on a petition for a referendum. See *C. Gebhardt*, Direkte Demokratie im parlamentarischen System – Bürgerbegehren und Bürgerentscheid in Bayern, 2000, 56.

[27] See in detail: *O. Jung* (note 10), 252 *et seq.*

[28] Both of them will be analysed in greater detail below.

[29] Artt. 118 GG and 118 lit. a) GG provide an exception of this requirement for specific areas.

[30] The different views of those issues are presented in: *K. Bugiel*, Volkswille und repräsentative Entscheidung – Zulässigkeit und Zweckmäßigkeit von Volksabstimmungen nach dem Grundgesetz, 1991, 443 *et seq*.

to be read as an authorisation of the legislative body to do so[31] whereas the other side implies an exhaustive regulation of the Basic Law through the existence of Art. 29 GG as a specific case.[32] The latter side is faced with some reproaches concerning the consistency of its view: One obvious criticism may be the irrelevance of mentioning "other votes" in Art. 20 (2) GG if the introduction of additional elements of direct democracy requires a constitutional amendment anyway. However, the autonomous legal value of the notion "other votes" lies in the "Ewigkeitsgarantie" of Art. 79 (3) GG which makes reference to Art. 20 GG.[33] Hence, if (without the supplement of "other votes") Art. 20 (2) GG was to be read as a clear decision for a purely representative model of democracy, this elementary constitutional principle would remain unchangeable. More substantial is the criticism that Art. 20 (2) GG and Art. 29 GG do not refer to the same addressee making the latter not a specific application of the former. Whereas Art. 20 (2) GG refers to the people as the collectivity of citizens on the federal level, Art. 29 GG[34] instead focuses on the citizens of the affected Länder only.[35]

Although Art. 29 GG and Art. 146 GG are analysed in more detail below, we may already conclude at this stage that – save the revision of internal borders as laid down in Art. 18 Weimar Constitution – none of the elements of direct democracy as set out in the Weimar Constitution

---

31 *E.-W. Fuß*, Die Nichtigerklärung der Volksbefragungsgesetze von Hamburg und Bremen, in: Archiv des öffentlichen Rechts 1958, 394; *W. Schürmann*, Unmittelbare Demokratie in Bayern und im Bund im Vergleich zur Schweiz, München 1961, 98; *C. Graf v. Pestalozza*, Der Popularvorbehalt – Direkte Demokratie in Deutschland, 1981, 12.

32 *H.-W. Arndt/W. Rudolf*, Öffentliches Recht. Grundriß für das Studium der Rechts- und Wirtschaftswissenschaften, 3rd ed. München 1981, 29 and 43; *K. Fell*, Plebiszitäre Einrichtungen im gegenwärtigen deutschen Staatsrecht, Bonn 1964, 165 *et seq.; D. Grimm*, Das Grundgesetz nach 40 Jahren, Neue Juristische Wochenschrift 1989, S. 1306.

33 Art. 79 (3) GG reads: "(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible." See *H. v. Mangoldt* and *F. Klein*.

34 At least after its amendment in 1976 any kind of federal wide participation was removed.

35 *K. Bugiel*, Volkswille und repräsentative Entscheidung – Zulässigkeit und Zweckmäßigkeit von Volksabstimmungen nach dem Grundgesetz, 1991, 119.

survived. *The only way to amend the Basic Law is by a 2/3 majority of both legislative bodies (Art. 79 (2) GG).* There is also neither a petition for referendum nor a referendum in the federal legislative arena.

1. The Referendum in order to Change Internal Borders

a) Genesis and Purpose of Art. 29 GG

Art. 29 GG allows for the redivision of the federal territory by altering the borders of the existing Länder. It is not only one of the longest articles in the Basic Law, but also one that had been considerably redrafted over the time. Originally, Art. 29 GG foresaw a mandatory and temporally limited mandate for the delimitation of the new Länder. Being aware that the Länder after World War II were mainly formed on the drawing table within the different zones of occupation, the idea behind this provision was to permit the creation of Länder according to regional, historical, and cultural ties as well as economic efficiency and viability.[36] However the envisaged general delimitation stagnated.[37] Although several petitions were filed and a few referenda held,[38] only the south western area of Germany was finally restructured.

---

[36] *M. Herdegen*, Neugliederung des Bundesgebietes im Spannungsfeld zwischen staatsrechtlicher Kontinuität und Effizienzerwartung, in: K. Bohr (ed.), Föderalismus – demokratische Struktur für Deutschland und Europa, 1992, 125. *H. Hofmann*, Die Entwicklung des Grundgesetzes nach 1945, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts, Vol. 1, 3rd ed. Heidelberg 2003, § 9, para. 87.

[37] The occupying powers were quite reluctant with the constitutional mandate of Art. 29 and suspended this provision until the coming into force of the "Deutschlandvertrag" in 1955. However the American and French Governments agreed that in the south western area of Germany a delimitation was desirable and supported the inclusion of Art. 118 GG as a specific provision for that region. In a referendum held in 1951 the majority of 69,7% voted in favour of the new state Baden-Wuerttemberg. However, already in 1956 a petition was filed for the separation of the old state "Baden". Only after an amendment of Art. 29 GG in 1969 by explicitly inserting that the referendum had to be held in 1970, it took place. At that time, more than 80% voted for the perpetuation of the *status quo*.

[38] In 1956, shortly after the entrance into force of the "Deutschlandvertrag", eight petitions for a referendum had been filed, six of them were successful. But it was not before 1975 before at least three of them were held. Two (reestablishment of the state of Oldenburg and the state of Schaumburg-Lippe, both of

It is sometimes questioned whether Art. 29 GG is an element of direct democracy in distinction to representative democracy or rather an element of the right to self-determination within a federal system comprising the idea of a shared sovereignty between the federal level and the Länder with the consequence that the people of a Land has to be asked before its territory is altered.[39] However, it is undoubted that Art. 29 encompasses a constitutional referendum and is therefore of relevance to this paper.

b) Elements of Direct Democracy in Art. 29 GG

(1) The Referendum Pursuant to Art. 29 (2) GG

In the present form of Art. 29 GG, the initiative to revise the existing division is generally vested with the federal parliament, but is subject to the approval of the people of the affected Länder. The required quorum as laid down in Art. 29 (3) and (6) GG is multilayered, two different majorities and the absence of a veto is required:

> "(3) […] [3rd sentence] The proposal to establish a new Land or a Land with redefined boundaries shall take effect if the change is approved by a majority in the future territory of such Land and by a majority in the territories or parts of territories of an affected Land taken together whose affiliation with a Land is to be changed in the same way. [4th sentence] The proposal shall not take effect if within the territory of any of the affected Länder a majority reject the change; however, such rejection shall be of no consequence if in any part of the territory whose affiliation with the affected Land is to be changed a two-thirds majority approves the change, unless it is re-

---

them part of Lower Saxony) were successful but the federal legislator ignored the outcome of the referenda arguing that the criteria of Art. 29 (1) (economic efficiency) was not met. This was in line with Art. 29 (4) GG in its revised form from 1969 to 1976. In 1994, together with the latest revision of Art. 29 GG, Art. 118 a GG was inserted. It permits to revise the division of the territory comprising Berlin and Brandenburg by agreement between the two Länder with the participation of their inhabitants who are entitled to vote. Thus, a federal law is not required. Such an agreement was set up in 1995 and accepted by the people of Berlin, but not by those of Brandenburg.

[39] In this direction the Federal Constitutional Court in BVerfGE 5, 34 at 41. *H. Hofmann*, Verfassungsrechtliche Sicherung der parlamentarischen Demokratie – Zur Garantie des institutionellen Willensbildungs- und Entscheidungsprozesses, in: A. Randelzhofer/W. Süß (eds.), Konsens und Konflikt, 1986, 285.

> jected by a two-thirds majority in the territory of the affected Land as a whole."
>
> "(6) A majority in a referendum or in an advisory referendum shall consist of a majority of the votes cast, provided that it amounts to at least one quarter of those entitled to vote in Bundestag elections. […]"

Art. 29 (3) requires (a) a majority in the future territory, hence in the newly created areas (3rd sentence). A Land with redefined boundaries thereby refers to the expanding Land only, but not to the downsized Land. The latter's interests are protected by the right to veto (4th sentence). Additionally, (b) a majority within the area that is about to be shifted is necessary (3rd sentence). Finally, (c) the majority of each of the affected (former) Länder is required (4th sentence). Hover, this veto-power of the old Länder may be outvoted by a 2/3 majority of the area described above in (b) if not a 2/3 majority of the (old) Land that is to be downsized objects.[40]

(2) The Right to Initiate the Process of a New Delimitation – a Popular Initiative

Only under exceptional circumstances, Art. 29 (4) GG provides the right to initiate a new delimitation to the inhabitants of a specific area:

> "(4) If in any clearly defined and contiguous residential and economic area located in two or more Länder and having at least one million inhabitants one tenth of those entitled to vote in Bundestag elections petition for the inclusion of that area in a single Land, a federal law shall specify within two years whether the change shall be made in accordance with paragraph (2) of this Article or that an advisory referendum shall be held in the affected Länder."

However, the right to initiate the process of revising the existing division only obliges the federal legislator to give attention to the issue within two years, but not to pass a bill corresponding to the ideas of the initiators that then will be subject to a referendum. It may introduce other proposals, reject the proposal at all or initiate an advisory referendum. Hence, the right to initiate the process does neither amount to a petition for referendum nor to a popular initiative as defined above.

---

[40] *J. Dietlein*, in: R. Dolzer/K. Vogel/K. Graßhof (eds.), Bonner Kommentar, 2005, Art. 29 paras 57-59; *T. Maunz/R. Herzog*, in: T. Maunz/G. Dürig, Grundgesetz Kommentar, 2005, Art. 29 paras 59-69.

Whatever majority involved, the issue at hand cannot be brought forward to a referendum without the consent of the legislative body. Art. 29 (6) in conjunction with § 21 (1) lit. a) of the Law to Art. 29 (6) GG[41] determine that an unsuccessful initiative may only be repeated after five years.

(3) The Advisory Referendum in Art. 29 (5) GG

The purpose of the advisory referendum is to establish whether the law that proposes up to two new options how to change the present division meet the voters' approval. If a majority votes in favour of one of the proposed options, a federal law has to determine whether the suggested delimitation should take place.

(4) The Anticipated Referendum

If the advisory referendum reaches a qualified majority as set out in the 3rd and 4th sentences of Art. 29 (3), the federal legislator has to pass a respective law. A referendum as required in Art. 29 (2) is not necessary any more. Hence, the advisory non-binding referendum might change to an anticipated binding one if the qualified majority is obtained.

2. The Referendum to Replace the Basic Law – Art. 146 GG[42]

Art. 146 GG is regarded as one of the most contested provisions in the Basic Law.[43] Whereas for one side this provision became obsolete after unification since it was exclusively aimed for that purpose,[44] the other side reads the provision in a way providing a twofold purpose out of

---

41 Art. 29 Abs. 6 of 30 July 1979, BGBl. I, 1317.

42 Art. 146 GG reads: This Basic Law, *which since the achievement of the unity and freedom of Germany applies to the entire German people*, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect. The italic written part was added in 1990.

43 *D. Heckmann*, Geltungskraft und Geltungsverlust von Normen, 1997, 422.

44 *J. Isensee*, Das Grundgesetz zwischen Endgültigkeitsanspruch und Ablösungsklausel, in: K. Stern (ed.), Deutsche Wiedervereinigung, Vol. I, 1991, 66 *et seq*.

which one is still valid.[45] Without entering in a detailed analysis of that discussion, it seems awkward to consider a norm obsolete because of the unification that was amended by a descriptive and clarifying element during the process of unification.[46] The provision is considered to be a German unicum, emerged from the special situation after World War II. Although it comes close to the provision in the Swiss constitution providing for a complete revision of the present constitution,[47] the dogmatic roots are different: Art. 146 GG focuses on the option of replacing the provisional "Basic Law" by a "constitution". It is considered necessary in order to overcome in a legally sound manner the "Ewigkeitsgarantie" of Art. 79 (3) GG of the provisional Basic Law.[48] However, Art. 146 GG remains silent how to activate this process. Since the right to initiate the processes is not granted to the people anywhere in the Basic Law, an implementation law is required. Some scholars even feel the legislator to be obliged to pass such a law for a constitutional norm that is generally capable to be implemented but not yet executable.[49]

V. Constitutional Referendum in the Constitutions of the Länder[50]

By now, all Länder have in one way or the other constitutional referenda in their constitution. Since Art. 20 (2) GG mentions "other votes" besides elections as one means to exercise state authority, those elements of direct democracy are in line with the general principles set

---

45 *H. Dreier*, in: H. Dreier (ed.), Grundgesetz-Kommentar, Vol. 3, 2000, Art. 146.

46 *H. Meyer*, Art. 146 GG. Ein unerfüllter Verfassungsauftrag?, in: H.H. von Arnim, Direkte Demokratie, 2000, 78.

47 See Art. 193 of the Swiss constitution.

48 *H. Dreier* (note 45), para. 3.

49 *H. Meyer* (note 46), 82.

50 The names of the constitutions of the Länder are abbreviated in the following: Baden-Wuerttemberg (BaWü), Bavaria (Bav), Berlin (Berl.), Brandenburg (Bbg.), Bremen (Brem.), Hamburg (Hamb.), Hesse (Hess.), Lower Saxony (L. S.) Mecklenburg-Western Pomerania (MWP), North Rhine-Westphalia (NRW), Rhineland-Palatinate (RP), Saarland (Saarl.), Saxonia (Sax.), Saxony-Anhalt (Sax. Anh.), Schleswig Holstein (S.-H.); Thuringia (Thur.).

forth in the Basic Law, as required by Art. 28 (1) GG.[51] In this final chapter, the following elements of direct democracy are analysed: dissolving of Parliament before the expiry of a legislative term (1); initiation of legislation / petition for a referendum / referendum (2); amendments to the constitution (3).

1. Dissolving of Parliament before the Expiry of a Legislative Term

The Parliaments of Baden-Wuerttemberg, Bavaria, Berlin, Bremen, Rhineland-Palatinate and Brandenburg may be dissolved by the people. The petition has to be filed by up to 20% of those entitled to vote[52] in Parliament's election. The quorum by which the referendum becomes effective varies from the majority of those entitled to vote[53] to a majority of voters if 25% of those entitled to vote participate.[54]

North Rhine-Westphalia provides for an indirect involvement of the people: If a law initiated by the government is rejected by parliament, the government may ask for a referendum. In case of the required quorum is attained, the law passes and government has the option to dissolve parliament.[55]

---

[51] Art. 28 I GG reads: "The constitutional order in the Länder must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law. […]"

[52] Art. 63 (3) Berl.; Art. 70 (c) Brem.; Baden-Wuerttemberg requires 1/6th of those entitled to vote (Art. 42 (2)), the other Länder name absolute figures (Bavaria (population: 12,4 million): one million (Art. 18 (3)); Brandenburg (population: 2,6 million), 150.000 inhabitants to initiate and 200.000 persons entitled to vote to file a petition (Artt. 76 (1) and 77 (3)); Rhinland Palantinate (population: 4 million) 300.000 (Art. 109 (3)).

[53] Art. 42 (2) BaWü.

[54] Bremen (Art. 72 (1)), Rhineland-Palatinate (Art. 109 (4). In between is Brandenburg (Art. 76 (1)) and Berlin with a majority of voters of 50% of those entitled to vote participate (Art. 63 (3)).

[55] Art. 35 (2) in conjunction with Art. 68 (3).

2. Initiation of Legislation / Petition for a Referendum / Referendum

All constitutions of the Länder offer the people to get involved in the process of legislation. Three different approaches are to be distinguished: In some Länder, a three-step approach (popular initiative – petition for a referendum – referendum) is mandatory,[56] others offer a two tier-approach only (petition for referendum – referendum),[57] and a third group of Länder permits both ways.[58] The advantage of a popular initiative at the outset of a legislative process is the opportunity to raise awareness in parliament with regard to a specific issue at relatively low cost. In average only 1%-2% of those entitled to vote are required for such an initiative.[59] The disadvantage is the extended duration of the process demanding a higher stamina for those who initiated it. In Berlin and Brandenburg the popular initiative may be raised by 90.000 or 20.000 *inhabitants* respectively.[60] Here, the right is not only granted to citizens, but to inhabitants regardless of their nationality. Some scholars therefore question the constitutionality of this provision with regard to Art. 28 (1) GG in conjunction with Art. 20 (2) GG. A legislative process that is initiated and insofar predefined by other actors than the people (or its representatives) could undermine its state authority.[61] With regard to Brandenburg,[62] it should not be forgotten that the initiative is only the first of three steps and in both succeeding ones, only citizens are admitted to participate. Hence, to consider Art. 76 (1) Bbg. as unconstitutional by referring to the decision of the German Federal Constitutional Court concerning the suffrage of foreigners at a local level[63] does not seem to be appropriate.[64] There, foreigners would have

---

56 Brandenburg, Hamburg, Saarland, Saxony, Schleswig-Holstein.

57 Baden-Wuerttemberg, Bavaria, Bremen, Hesse.

58 Berlin, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saxony Anhalt, Thuringia.

59 In most constitutions absolute figures are named, so only a rough estimation can be given. The exception is Thuringia with 6% of those entitled to vote.

60 Art. 61 (1) Berl.; Art. 76 (1) Bbg.

61 *U. Karpen*, Plebiszitäre Elemente in der repräsentativen Demokratie ? – Eine Studie zur Verfassung des Landes Brandenburg, in: Juristische Arbeitsblätter 1993, 112.

62 Berlin belongs to that group of Länder which does not link the popular initiative to the petition for a referendum.

63 BVerfGE 83, 37 (55 *et seq.*).

been directly involved in the making of a governmental organ that exercises state authority, whereas Art. 76 (1) Bbg. does not create such a link but rather obliges parliament to give attention to a proposal.

The petition for a referendum followed by a referendum is foreseen in all sixteen constitutions. It is either the initial step to get to a referendum or the second tier succeeding the initiative. It generally has to be accompanied by a reasoned and detailed draft bill. The required quora differ considerable from Land to Land thereby ranging between 20%[65] and 5%[66] of those entitled to vote. If parliament does not support the draft bill, a referendum on it must be initiated. Generally parliament has the right to introduce a draft Bill of its own to be voted on simultaneously.[67]

In all Länder the referendum requires an approval of the majority of votes.[68] Most constitutions have built in an additional threshold demanding that the majority of votes corresponds to 15%,[69] 20%,[70] 25%,[71] 33%,[72] or even 50%[73] of those entitled to vote for parliamentary election.[74] In Berlin, Art. 62 (1) explicitly regulates that only one petition for a referendum on any one subject is admissible within one legislative period.

3. The Plea for Referendum

Some Länder permit either the government or the parliament to submit a draft bill for referendum. In Baden-Wuerttemberg, the government

---

64 However in this way *U. Karpen* (note 61), 112.

65 *E.g.* Hesse (Art. 124 (1)), North Rhine-Westphalia (Art. 68 (1)), Saarland (Art. 99 (2)).

66 Schleswig-Holstein (Art. 42 (1)); Hamburg (Art. 50 (2)).

67 *E.g.* Art. 63 (1) Berlin.

68 *E.g.*: Art. 60 (5) BaWü; Art. 63 (2) Berl.; Art. 78 (2) Bbg; Art. 50 (3) Hbg.

69 Art. 68 (4) NRW.

70 Art. 50 (3) Hbg.

71 Art. 42 (4) S.-H.; Art. 49 (2) L. S.; Art. 78 (2) Bbg.; Art. 81 (3) Sax. Anh.

72 Art. 60 (4) MWP; Art. 60 (5) BaWü; Art. 82 (6) Thur.

73 Art. 100 (3) Saarl.

74 *E.g.* Saarland (Art. 100 (3)), Hesse (Art. 124 (3)), Saxony (Art. 72 (4)) do not have a threshold criteria.

may submit either a law passed by parliament before its promulgation for referendum if requested by 1/3 of members of parliament[75] or a law initiated by it but rejected by parliament if requested by 1/3 of members of parliament.[76] Additionally, if the majority of members of parliament so decides, a law amending the constitution is to be submitted for referendum. This option offers a way to circumvent the qualified 2/3 majority of amending the constitution and helps to avoid politically caused deadlocks in parliament.[77] The same possibility is provided by Art. 70 (1) lit. a) in Bremen. Both, the constitution of Bremen and the one of Saxony-Anhalt, allow parliament to submit draft bills for referendum instead of passing them itself.[78] One may question whether such a competence really supports the system of a representative democracy, permitting the legislative body to elude its prime responsibility.

In Rhineland-Palatinate, 1/3 of the members of parliament may request to suspend a passed but not yet promulgated law in order to offer the people to initiate a referendum on that law.[79] Under this specific circumstances the quorum for a petition for referendum is 150.000 (corresponds to 5% of those entitled to vote) instead of 300.000 as required by an ordinary petition for referendum pursuant to Art. 109 RP.[80] In contrast to the similar provision in Baden-Wuerttemberg, the question whether or not a referendum will take place does not depend on the discretion of the government but rather on the will of the people. Both provisions however have in common that a minority in parliament is given the chance to block the promulgation of a law with the support of the people.

The constitution of North Rhine-Westphalia offers a peculiar provision of involving the people in governmental matters: If a bill introduced by the government is rejected by parliament, the government may submit the bill for referendum. If the people vote in favour of the bill, the government has the option to dissolve Parliament. However in case of be-

---

75 Art. 60 (2) BaWü. However, the referendum remained undone, if 2/3 of the members of parliament pass the law again.

76 Art. 59 (3) BaWü.

77 Art. 64 (3) BaWü. This provision can also be found in Saxony (Art. 74 (3)).

78 Art. 70 (1) lit. b) Brem. and Art. 81 (4) Sax. Anh.

79 Art. 114 RP.

80 Art. 115 RP.

ing rejected by the people, the government has to step down.[81] Hence the submission for referendum is linked with a call for a vote of confidence and is a creative way out of a political crisis between government and parliament.

4. Amendment of the Constitution

Also with regard to the amendment of the constitution, a bouquet of different options is offered by the sixteen constitutions. Some Länder do not foresee any participation of the people in the process of amending the constitution.[82] Others, in contrast, require in addition to the qualified majority in parliament an obligatory referendum for each amendment of the constitution.[83] In Bremen, an amendment of the constitution having an impact on the principles laid down in Artt. 143, 144, 145 (1), and 147 or on the constituencies of Bremen and Bremerhaven (Art. 75) demands either unanimity in parliament or a referendum.[84] Generally, however, the process of initiating and conducting the referendum on constitutional amendments resembles the one with regard to ordinary laws with the one exception that higher quora of approval are required. Hence, the constitution may be altered by the parliament or through referendum, alternatively but not cumulatively. The highest standard is set by a 2/3 majority which simultaneously have to amount to the majority of those entitled to vote.[85] Other constitutions require a majority of those entitled to vote.[86] An additional option is provided for in North Rhine-Westphalia: If parliament fails to get the necessary 2/3 majority, government or parliament may submit the bill of the constitutional amendment for referendum.

---

81 Art. 68 (4) NRW.

82 Saxony Anhalt (Art. 78 (2)); Berlin (Art. 62 (5)); Saarland (Art. 101 (1)).

83 Bavaria requires a qualified 2/3 majority in parliament (Art. 75 (2)), whereas Hesse requires the majority of members of parliament (Art. 123 (2)).

84 Art. 125 (4) Brem.

85 Art. 78 (3) Bbg; Art. 60 (4) MWP; Art. 50 (3) Hamb.; Art. 42 (4) S.-H.; Art. 68 (3) NRW.

86 Art. 72 (2) Brem.; Art. 49 (2) L. S.; Art. 64 (3) BaWü; Art. 83 (2) Thur.

E-Government – Country Report on Germany

*Thomas Fetzer**

I. Introduction

It is fair to say that the 1990s brought about a revolution comparable to the industrial revolution of the 19th century.[1] We have been witnessing a

* I would like to thank stud. iur. Karen Andress for her expert language assistance. All quoted websites were checked on January, 2nd 2006.

multimedia revolution which has significant social and legal effects on the individual and society as a whole. In the contemporary world we are increasingly accustomed to writing electronic mail instead of handwritten letters. We shop for books at amazon.com instead of visiting the bookstore. We communicate with our business partners by Internet telephony instead of flying to New York, Singapore or Sydney. The flea market of today is eBay.

The question is why most of us hesitate to file their tax declarations online and prefer to drown in piles of forms instead? How can the success of email, ecommerce and e-business in several areas – despite the temporary stagnation that followed the explosive start – be explained compared to the subordinated role of e-government? Is it due to an insufficient amount of supplied e-government solutions? Or are there enough offers that are just ignored by the public? Or is the legal framework for e-business superior to that for e-government? The legal requirements for e-government are unquestionably distinct, more demanding than those for ecommerce.

These legal requirements pertain to the question whether or not the implementation of electronic communication devices is permissible. Their use in ecommerce and e-business is the direct result of entrepreneurial activity and can typically be justified by efficiency gains,[2] whereas efficiency is merely one of several relevant aspects within e-government.[3] In contrast, legal aspects play a paramount role when it comes to the permissibility of e-government employment: the use of electronic communication devices can be regulated by statutory and/or constitutional law, especially in regard to citizen access to governmental information.[4] Statutes and constitutional provisions can also limit the use of electronic communication devices, namely in regard to the exchange of

---

1 *Fetzer*, Die Besteuerung des Electronic Commerce im Internet, Frankfurt 2000, 1; U.S. Department of Commerce, The emerging digital economy, 3, (<http://www.ecommerce.gov>).

2 *Browning/Zupan*, Microeconomics, 8th ed. 2004, Application 1.2.

3 *Büllesbach*, eGovernment – Sackgasse oder Erfolgsstory, DVBl. 2005, 605, 606.

4 The Freedom of Information Act of the State of Schleswig-Holstein for example requires the state government to use the Internet for certain publications. See *Fetzer*, Freedom of Information Act Schleswig-Holstein, § XX, in: Fluck/Theuer, Informationsfreiheitsrecht.

information between administrative agencies through which the data protection rights of citizens could be affected.[5]

Another issue of great relevance is the question concerning the form and mode of use of electronic communication devices in order to secure the possibility of legally binding activity. The existing standards for e-government and e-commerce differ, as they do in other administrative activities, namely regarding the compliance with formal requirements.[6]

This article will analyze the importance of e-government in the Federal Republic of Germany and the hereto currently effective legal framework. Firstly, the typical understanding of e-government in Germany will be illustrated for this purpose (II.), followed by an inspection of the current status of e-government in Germany in an international comparison (III.). The extent to which e-government presents a priority in German politics will then be discussed (IV.), and subsequently the developments and initiatives by the federal government, the state governments and municipalities will be summarized (V.) and concluded by an overview of possible legal challenges and/or solutions for e-government in Germany (VI.). After the description of two successful e-government applications (VII.), a brief outlook on the perspectives of e-government will be given (VIII.).

II. What Is e-Government?

One must first define the term e-government in order to evaluate its importance and legal implications in Germany; though there have been many attempts to define e-government,[7] the most commonly used gen-

---

[5] *Gola/Schomerus*, BDSG – Bundesdatenschutzgesetz, 8th ed. 2005, § 1, No. 8.

[6] Bundesamt für Sicherheit in der Informationstechnik, E-Government-Handbuch, Modul Rechtliche Rahmenbedingungen für E-Government, 1, online available at <http://www.e-government-handbuch.de/>.

[7] *Büllesbach* (note 3), 605, 606; *Schliesky*, E-Government – Schlüssel zur Verwaltungsmodernisierung oder Angriff auf bewährte Verwaltungsstrukturen?, LKV 2005, 89; *Schliesky*, Verfassungsrechtliche Rahmenbedingungen des E-Government, DÖV 2004, 809; *Hill*, eGovernment – Mode oder Chance zur nachhaltigen Modernisierung der Verwaltung?, BayVBl. 2003, 737; *Geis*, Elektronische Kommunikation mit der öffentlichen Verwaltung, K&R 2003, 21; *Schuppan/Reichard*, eGovernment: Von der Mode zur Modernisierung, LKV 2002, 105; *Heckmann*, E-Government im Verwaltungsalltag, K&R 2003, 425;

eral definition is the so-called "Speyer-definition,"[8] named after the University for Public Administration at Speyer, Germany. According to its research, e-government is "the business activity of public administrative agencies in correlation with the governance and administration reliant upon information and communication techniques under participation of citizens and internal administrative communication partners."[9] E-government therefore includes a political and democratic dimension through the use of the term "governance" (also occasionally referred to as e-democracy) as well as an administrative dimension through the use of the term "administration" (also known as e-administration).

Nonetheless, the term e-government is often reduced to the second aspect of the Speyer-definition in legal discussions.[10] There are two developments which account for this phenomenon:

Firstly, the term e-government is employed in all significant initiatives which result in a propagation of electronic information and communication devices for public purposes. The latest initiative on e-government, Deutschland-Online, for example, understands e-government as "the foundation for a service-orientated *public administration*."[11] The recently created coalition agreement between the CDU/CSU and the SPD also defines e-government as "the implementation of central and significant IT-supported processes within the prevalent *state services* for both business and the individual."[12]

In addition to and closely related to the aforementioned, electronic administration plays a far more important role in Germany than elec-

---

Peters, E-Government – eine kleine Tour d'horizon, CR 2003, 68; *Schmitz*, Die Regelungen der elektronischen Kommunikation im Verwaltungsverfahrensgesetz, DÖV 2005, 885; *Dietlein/Heinemann*, eGovernment und elektronischer Verwaltungsakt, NWVBl. 2005, 53.

[8] *Hill*, (note 7), 737.

[9] *Von Lucke/Reinermann*, Speyerer Definition von Electronic Government, in: Reinermann/von Lucke, Electronic Government in Deutschland, Speyerer Forschungsberichte 226, 2002, 1.

[10] *Haug*, Grundwissen Internetrecht, 2005, No. 629.

[11] <http://www.deutschland-online.de/Englisch/Dokumente/Broschure_english.pdf>

[12] Coalition agreement between CDU, CSU and SPD November 11th, 2005, <http://www.bundesregierung.de/Anlage921232/Der+gesamte+Koalitionsvertrag+im+Worlaut+.pdf>

tronic governance. The latter is mainly limited to providing electronic access to state information, such as parliamentary protocols, in order to lay the groundwork for an increase in citizen participation with regard to democratic processes. The active involvement of citizens by electronic means – such as the so-called e-voting during elections – has, however, not yet taken place to a noticeable extent in Germany.[13]

For this article the term e-government will therefore mainly be used in the sense of its employment as an information and communication device within administrative activity in this discussion, in accordance with its practical use.

III. The Current Status of e-Government in Germany in an International Comparison

E-government globally takes part in political agendas, and its growing importance in political discussions has unsurprisingly led to an increase in the number of surveys and studies on e-government in recent years.[14] Most of these surveys, which are conducted by public as well as private institutions, hold state rankings. If one assumes a full reliability of such rankings, it can be stated that e-government in Germany is currently excellent. Depending on the specific research focus and the applied methodology Germany takes a top position in almost all major rankings, both in general examinations of e-government concepts and studies on the specific use of e-government applications, such as websites of the specific agencies.

In a study conducted by the renowned Brown University in the United States, Germany ranked 5th out of 198 analyzed countries, outrun only by Taiwan, the United States, Monaco and Australia.[15] The study analyzed national government websites such as executive office websites, those of legislative offices, judicial offices and major agencies serving

---

[13] *Haug* (note 10), No. 632. For more information see also *Trenkelbach*, Internetfreiheit. Die Europäische Menschenrechtskonvention als "Living Instrument" vor neuen Herausforderungen?, 2004.

[14] *E.g.* Accenture, E-Government 2004, <http://www.accenture.com/>; West, Global E-Government 2004, <http://www.InsidePolitics.org/egovtdata.html/>.

[15] West, Global E-Government 2004, <http://www.InsidePolitics.org/egovtdata.html/>.

crucial functions of government such as health, human services, taxation, education, interior economic development administration, natural resources, foreign affairs, foreign investment, transportation, military, tourism, and business regulation. The European Commission also conducted a study concerning e-government in Europe which led to a comparable result in a European-wide context, since Germany ranked on a top position there, too.[16] Finally, a private survey conducted by the consulting company Accenture shows that the importance of e-government is already on a high level and is still increasing at a significant rate.[17]

The difficulties which arise from such studies are all but unknown: they merely provide a snapshot excerpt of reality and often find themselves questioned as to the objectivity of their results.[18] The outstanding upward development of e-government in Germany (at least at the federal level) shall therefore be illustrated and backed by another indicator:[19] the actual use of e-government in Germany can be measured by the number of times the central online resource, www.bund.de is accessed. With a mere 6 million users in 2001, the online portal registered over 25 million users by 2004.[20] Considering the fact that the German population consists of about 80 million people, though, of which each individual is very likely to come in contact with the public administration at least once every year, this figure also clearly indicates that e-government yet has a long path ahead of it before it finds general acceptance within the population.

---

16 Cap Gemini, eEurope 2004, <http://www.de.capgemini.com/>.

17 Accenture, E-Government 2004, 52, <http://www.accenture.com/>.

18 *Büllesbach* (note 3), 605, 606.

19 The municipal level provides an entirely different picture in this context. As noted by *Büllesbach*, DVBl 2005, 605, Germany has not occupied any of the top positions at the municipal level so far. Yet he rightfully points out the fact that this is much less a result of the quality of the electronically available municipal procedures than it is a result of the remarkably locally organized German administrative structures. This locality has suppressed the need for e-government solutions compared to countries with larger, more centrally organized administrations.

20 BundOnline2005, Implementation plan 2004, 25. <http://www.wms.bundonline.bund.de/cln_027/lang_de/nn_1286/Content/99__shareddocs/Publikationen/Oeffentlichkeitsarbeit/Umsetzungsplan/implementation__Plan__2004,templateId=raw,property=publicationFile.pdf/implementation_Plan_2004.pdf>.

IV. The Significance of e-Government within the Political Agenda

In contrast to its significance for the individual, e-government has been widely pursued as part of the political agenda in recent years, though the importance of e-government varies at the federal, state and municipal level.

At the federal level, the topic of e-government was already addressed by the former red-green coalition, as the BundOnline2005 initiative shows.[21] The newly formed CDU/CSU and SPD coalition is striving for what seems to be a continuation of the initiated path, as far as one can tell only a few months into the legislative period. The coalition agreement itself contains an avowal to e-government,[22] for it is seen as the groundwork for a comprehensive administrative reform bearing the title "Staat Modern" (= The Modern State).[23] Its main purpose is to create more modern and efficient administrative structures combined with cutbacks on bureaucracy.

From the state and municipal perspectives, on the other hand, e-government is anything but homogenous. There seems to be a certain degree of fear that e-government will automatically involve significant initial investments with which infrastructural improvement and know-how would have to be financed.[24] There have been no studies on that issue. However, it seems that E-government is therefore neglected in those states and municipalities which lack the financial means compared to its prioritized position in the wealthier areas of the country.

V. Policy Initiatives on e-Government

The primary motor of e-government development has therefore usually been the federal government, which has helped to further develop the

---

[21] <http://www.bundonline2005.de/>.

[22] Coalition agreement between CDU, CSU and SPD November 11th, 2005, <http://www.bundesregierung.de/Anlage921232/Der+gesamte+Koalitionsvertrag+im+Worlaut+.pdf>.

[23] <http://www.staat-modern.de/>.

[24] *Heckmann* (note 7), 425, 426.

implementation of electronic information and communication devices within the administration through several initiatives of its own.

1. The "BundOnline2005" Initiative

The so far most successful e-government initiative named "Bund Online2005" was created at the federal level in 2001.[25] Its purpose was to facilitate citizen and corporation access to services of federal administrative agencies while making it more cost-efficient. The then governing red-green coalition committed itself to provide online access to all services of federal administrative agencies in the year 2001. As a first step toward this goal, 376 federal services were identified and qualified suitable to be provided online, and work on making their accessibility possible by 2005 was begun.

By August 2005, almost 6 months ahead of schedule, the federal government had reached this goal, thus making all federal administrative services available to citizens through a central web portal named bund.de.[26] This portal is divided into three main parts bearing the titles "Citizens", "Science and Business", and "Administration". Each of these sections of the web portal is organized around life events, business areas, fields of activity, and other areas. Life events are typical events and topics, such as "Labour and Profession", "Construction", and "Retirement" – for which citizens need information and services provided by the public administration.[27] The "Science and Business" section is organized around business areas, such as "Foreign Trade", "Public Promotion", or "Patent and Trademark Law". Typical fields of activity of the target group "Administration and Institutions" are, for example, "Controlling", "Organization", and "Knowledge Management". Moreover, the job vacancies of the public administration, public invitations to tender, forms, and contact details of public authorities are popular sections, for which demand is especially high. The supply within the different areas ranges from mere imparting of information and form downloads to full processing of administrative procedures over the internet.

---

25 <http://www.bundonline2005.de/>; <http://www.wmsbundonline.de/>.

26 <http://www.bund.de/>.

27 <http://www.bund.de/nn_174028/Fremdsprachen/Struktur/EN/Startseite-en-knoten.html__nnn=true>.

Moreover, the web portal www.bund.de is the gateway to foreign-language services and online information from the German Federal Administration.[28] Its multilingual section includes portals with selected topics in English, French, Spanish, Russian, Chinese, and Japanese. These multilingual portals are obviously intended for non-native German speakers who may wish to reside and/or work in Germany (either temporarily or permanently), yet they are also intended for use by foreign companies with business relations in Germany.[29]

2. Media@Komm and Media@Komm-Transfer

As a federally structured state, German legislative and administrative competences are not only assigned to the federal level by the constitution, but also to the state level and in some cases even to the municipalities.[30] The administrative powers are mainly divided between the federal and state governments,[31] though the municipalities are granted the right to self-administration by Art. 28 para. 2 Basic Law (Grundgesetz).[32]

Generally speaking, Art. 83 Basic Law provides that, unless otherwise stated or permitted, the states execute not only state but also federal statutes on their own.[33] Consequently, there are some federal authorities at the upper level but relatively few at the middle level and almost none at the lower level.[34] On the other hand, the number of state authorities that execute federal statutes or state statutes is enormous. A quantitative analysis shows that the state administrative authorities have a practical importance that is at least as high as the importance of federal administrative authorities.

---

28 <http://www.bund.de/nn_174028/Fremdsprachen/Struktur/EN/Startseite-en-knoten.html__nnn=true>.

29 <http://www.bund.de/nn_174028/Fremdsprachen/Struktur/EN/Startseite-en-knoten.html__nnn=true>.

30 For more information see *Singh*, German Administrative Law in Common Law Perspective, 2001, 33.

31 *Singh* (note 30), 34.

32 *Singh* (note 30), 37.

33 *Singh* (note 30), 34.

34 *Singh* (note 30), 34.

This division of administrative competences has some crucial consequences for the introduction and promotion of e-government in Germany: Firstly, the administrative powers are not exercised by one homogenous institution. Instead, citizens face the executive branch on federal, state and municipal levels. This means that federal e-government initiatives like BundOnline2005 only cover a fraction of administrative action which affects citizens. Secondly, and maybe more importantly, the federal state's ability to regulate and to introduce e-government on the state or municipal levels is quite limited. Art. 84 para. 1 Basic Law provides that even if states execute federal statutes it is within the authority of the states to create the required agencies and procedural rules for the execution of these statutes.[35] This also makes it more difficult for the federal government to proscribe the promotion of e-government on the state and municipal levels in a legally binding way. Hence, two further projects have been initiated in order to avoid disruptions and to coordinate the state and municipal e-government projects. The first of these initiatives, Media@Komm,[36] coordinates the e-government efforts on a municipal level, while the second initiative, named DeutschlandOnline,[37] coordinates e-government initiatives on all three levels.

The Media@Komm initiative, which was also initiated by the red-green coalition, was intended to improve the implementation of information and communication technology at the municipal level.[38] The former Labour and Economy Ministry had already started a contest bearing the name Media@Komm back in 1998, an incentive measure in which cities and communities were to develop long-term promising e-government solutions. The goal was to find comprehensive e-government concepts for multimedia services under the use of electronic digital signatures. The three top candidates out of the 136 participating cities and communities included Bremen, Esslingen (in the state of Baden-Wuerttemberg), and the Nuremberg city group, whose projects took an impressive "virtual city hall" approach:

Bremen, for instance, developed a concept under the name BOS (Bremen Online Service) which provided the opportunity to process confi-

---

35 Art. 84 Basic Law.

36 <http://www.mediakomm-transfer.de/>.

37 <http://www.mediakomm-transfer.de/>.

38 <http://www.mediakomm-transfer.de/Content/en/Homepage/Homepage__node.html__nnn=true/>.

dential and legally binding online transactions safely without any mediation between administration, citizens, and companies. In addition to this, services were offered electronically and categorized by nine different typical phases, such as "Relocation and Residence", "Scholastics", "Homeownership", and "Public procurement."[39]

Esslingen's project, on the other hand, had a completely different objective. Its purpose was not to make services available in an electronic form, but rather to improve the participation possibilities of citizens. The employed concept included providing a broad scope of information to citizens as the groundwork for an increased democratic participation. The core of the project was a virtual marketplace in which a company register, a job market and a citizen/investor information service, among other things, could be found.[40]

Lastly, the Nuremberg city group was exemplary for the introduction of e-government concepts which encompass more than one city, thus forming regional e-government solutions which provide a sort of electronic intermunicipal collaboration unknown up to that point.[41]

The Media@Komm contest brought about the Media@Komm-Transfer Project,[42] which was led by the Federal Ministry of Economy. It pursued the further development of those concepts created during the Media@Komm contest. At the same time, a platform for municipal and regional e-government initiatives was to be formed, which enables the creation of uniform standards and advanced the transfer of best-practice examples.

3. Deutschland-Online

As shown here, the federal government, states and municipalities have all launched various e-government projects. In order to achieve an integrated e-government structure, the federal government, states and the municipalities decided to develop the joint e-government strategy

---

39 <http://www.mediakomm-transfer.de/Content/de/Homepage/Media_40Komm/Preistr_C3_A4ger/Bremen/Bremen__node.html/>.

40 <http://www.mediakomm-transfer.de/Content/de/Homepage/Media_40Komm/Preistr_C3_A4ger/Esslingen/Esslingen__node.html/>.

41 <http://www.mediakomm-transfer.de/Content/de/Homepage/Media_40Komm/Preistr_C3_A4ger/N_C3_BCrnberg/N_C3_BCrnberg__node.html/>.

42 <http://www.mediakomm-transfer.de/>.

"Deutschland-Online" in the summer of 2003.[43] The aforementioned web portal www.bund.de also provides a platform for this initiative.

The primary objective of Deutschland-Online is to collectively network the federal government, state and municipal web portals, provide access to online administrative services, create common infrastructures and standards, as well as improve the internal administrative know-how transfer. This should modernize administrative procedures and avoid cost-intensive parallel developments. The chancellor and the state governors decided on four binding target marks for Deutschland-Online on June 17, 2004, which are planned to be fulfilled by 2008.[44] The targets include the installation of electronic communication and overall access to it at all federal, state and municipal agencies by the end of 2005. Also, all Deutschland-Online goals which were decided on in 2003 are to be realized by the end of 2006, and by late 2007 all agencies will intercommunicate electronically; it is planned to implement all administrative services online to Deutschland-Online by the end of the year 2008.

Measures in order to achieve these goals include the availability of electronic services, the combination of federal, state, and municipal e-government web portals, the creation of common infrastructures in order to secure the interoperability of different services and the creation of common technological standards.[45]

Because it affects the executive branch on all three levels (federal, state, and municipal), the Deutschland-Online initiative has therefore been the most comprehensive e-government initiative in Germany thus far.

VI. Legal Implications of e-Government

The integration of electronic information and communication devices into administrative transactions has led to numerous legal questions: What exactly does an agency have to provide on the internet in terms of content? Is an agency liable for the linking to other contents on its own web portal? How should an agency deal with citizens' personal data on the Internet? Should agencies be allowed to simply exchange citizens'

---

43 <http://www.deutschland-online.de/>.

44 <http://www.deutschland-online.de/Ziele/ziele.htm/>.

45 <http://www.deutschland-online.de/Englisch/Dokumente/Broschure_english.pdf/>.

personal information? Can agencies keep electronic files? Must they also accept electronic payment forms?

A comprehensive inspection of all these legal queries would certainly exceed the assigned space of this contribution. Hence, the following statements will focus on the core of the issue, which applies to all forms of public administration and forms the basis of nearly all e-government applications.

Above all, the requirements for the implementation of electronic forms of administrative procedures will be inspected. This question divides itself into three aspects: first, the question concerning which requirements exist for the admissibility of electronic forms in administrative procedures; second, under which circumstances electronic statements can be received validly in administrative procedures. Lastly, the requirements for the admissibility of replacing written form through electronic form will be discussed. The latter especially concerns the question whether the handwritten signature can be replaced by an electronic signature and yet retain its legally binding effect.

1. Electronic Communication in Administrative Procedures

Although the administrative competences in Germany are divided between federal, state and municipal entities, the question whether electronic forms should be admissible or not can be answered uniformly due to the high comparability of administrative transactions on all three levels. The legal basis for the admissibility of such a uniform discussion of the implementation of electronic information and communication devices in administrative procedures can be found in the administrative procedure acts (*Verwaltungsverfahrensgesetze, VwVfG*). Though there is not only one statute which applies to both federal and state administration activities, but rather a federal administrative procedure act which applies to the administrative operations of federal agencies (*Bundesverwaltungsverfahrensgesetz – VwVfG*[46]), and many state administrative procedure acts (*Landesverwaltungsverfahrensgesetze*) which apply to each of the state administration agencies. The latter, however, nearly always correspond with the federal statutes, sometimes even in

[46] Federal Administrative Procedure Act – Verwaltungsverfahrensgesetz v. 25. Mai 1976, BGBl. I 1976, 1253, zuletzt geändert mit Gesetz v. 5.5.2004, BGBl. I 2004, 718.

their numeration.[47] Some states either simply adopted the federal statutes by passing identical state laws,[48] others passed laws which refer to the federal statutes, while yet others took over the federal statutes into their own administrative procedure acts.[49] As a result, the following discussions will allude to federal law, unless explicitly otherwise noted, though they also apply to state and municipal laws.

2. Admissibility of Electronic Form

The administrative procedure act contains the principle of informality in § 10 VwVfG. This principle states that administrative procedures are not bound to any specific form, unless other (more specialized) provisions order a specific form for a specific procedure. Electronic communication, especially communication by e-mail, has therefore always been admissible in administrative procedures.[50] This applies both to communication between agencies and citizens as well as communication among agencies.[51] Even the most common form of administrative activity, the administrative act as described in § 35 VwVfG, was seen as permitted to be enacted electronically under certain circumstances.[52]

a) Opening Electronic Access

The implementation of electronic information and communication devices presented difficulties under the original administrative procedure act. It was especially still unsettled under which circumstances agencies and citizens are obliged to accept the use of electronic communication devices as legally binding and which requirements are necessary for the

---

47 *Maurer*, Allgemeines Verwaltungsrecht, 15th ed. 2004, 108.

48 *Maurer* (note 47), 109.

49 *Maurer* (note 47), 110.

50 Bundesamt für Sicherheit in der Informationstechnik, E-Government-Handbuch, Modul Rechtliche Rahmenbedingungen für E-Government, 51, online available at <http://www.e-government-handbuch.de/>.

51 Bundesamt für Sicherheit in der Informationstechnik, E-Government-Handbuch, Modul Rechtliche Rahmenbedingungen für E-Government, 51, online available at <http://www.e-government-handbuch.de/>.

52 *Dietlein/Heinemann* (note 7), 53, 54.

implementation of electronic forms in cases which typically required written form.[53]

Legal scholars partly proposed a solution to this legal uncertainty which consisted of an analogue application of civil statutes.[54] The German legislator had already converted EC legal commands[55] in the year 2001 by creating § 126a BGB (German Civil Code) and § 292a ZPO (Civil Procedure Code), two statutes which equalized traditional handwritten and certain electronic signature types. § 126a provides that a statutorily commanded written form may be substituted with an electronic form if the electronic document contains a qualified electronic signature which fulfils the requirements of the signature act (*Signaturgesetz*). § 292a ZPO complements this by assuming the authenticity of such electronically signed documents. Since most scholars considered such an analogue application of civil law statutes onto administrative procedures inadmissible,[56] the German legislator decided to create separate provisions for administrative procedures. This was achieved through the 3rd administrative statute reform in 2002, which led to changes in the administrative procedure act and some other special regulations.[57]

The most elementary provision within the administrative procedure laws is § 3a VwVfG (*Verwaltungsverfahrensgesetz*). As in civil law, administrative law also associates the legally binding character of declarations with the question whether or not the recipient actually has received a declaration or not (in a legal sense).[58] § 3a para.1 VwVfG provides that legally binding electronic communication between an agency and a citizen is only rightful when the recipient enables the actual reception of those documents, thus opening up a recipient accessibility. The mere and sole fact that a recipient may dispose of the necessary technological apparatus in order to receive electronic documents, how-

---

53 *Dietlein/Heinemann* (note 7), 53, 54.

54 *Geis*, NVwZ 2002, 385, 386.

55 Directive 1999/93/EC on a Community framework for electronic signatures, of 13 December 1999, ABl. EG 2000, L13, 12.

56 For further information see *Dietlein/Heinemann* (note 7), 53, 54.

57 3rd Administrative Procedure Act reform – Drittes Gesetz zur Änderung verwaltungsrechtlicher Vorschriften, 21.8.2002, BGBl. I 2002, 3322.

58 *Kopp/Ramsauer*, Verwaltungsverfahrensgesetz, 8th ed. 2003, § 3a, No. 1.

ever, will typically not suffice.[59] It must also be evident that an electronic access has been opened.[60]

Which requirements such a recipient accessibility is subject to cannot be answered homogeneously. The current prevailing opinion assumes that a citizen does not open an accessibility to receive documents by simply inserting his e-mail address onto a letterhead.[61] The arguments for that assumption lie in a reference to the fact that most citizens use the internet for private purposes and do not regularly control incoming documents in their inboxes.[62] § 3a VwVfG, however, succumbs to those who do open a recipient accessibility to the duty of regular e-mail income control.[63] For the typical citizen, one can therefore only assume a recipient accessibility if he has explicitly agreed to use his e-mail address as the form of document reception. This, however, does not apply to those persons who also give out their e-mail address as part of their business letterheads. Under certain circumstances, it can be assumed that these persons have opened an electronic access without an explicit agreement.[64] The most typical example for this group of persons is the attorney who adds an e-mail address to the law firm's letterhead. The prevailing opinion in the literature would consider this to be – unless otherwise evident – a recipient accessibility disclosure on the part of the attorney; he can therefore automatically receive legally binding declarations. For agencies, it is merely necessary for them to add the e-mail address to their letterhead or to simply name it on their website in order for a declaration to reach them in a legally binding way.[65]

Another question which is yet to be settled is whether agencies are also obliged to disclose an electronic accessibility. Most scholars partly assume that § 3a VwVfG simply entitles the right to open an electronic access.[66] A duty to do so, on the other hand, cannot be directly interpreted out of § 3a VwVfG. As a matter of fact, one cannot simply deduce a legal duty to disclose electronic access from the wording of § 3a

---

59 *Kopp/Ramsauer* (note 58), § 3a, No. 9.

60 *Kopp/Ramsauer* (note 58), § 3a, No. 9.

61 *Kopp/Ramsauer* (note 58), § 3a, No. 11.

62 *Kopp/Ramsauer* (note 58), § 3a, No. 10.

63 *Kopp/Ramsauer* (note 58), § 3a, No. 11.

64 *Kopp/Ramsauer* (note 58), § 3a, No. 12.

65 *Kopp/Ramsauer* (note 58), § 3a, No. 12.

66 *Kopp/Ramsauer* (note 58), § 3a, No. 8.

VwVfG. It therefore remains mostly at the discretion of the agency whether or not it desires to open up an electronic access.[67] This range of discretion will decrease as electronic communication devices become more popular,[68] although there are no known cases in which an agency has refused to disclose an electronic accessibility in the case of its imminent necessity.

b) Factual Access of Electronic Declarations

If accessing electronic communication has been made possible in this manner, there is a second question which poses itself: which requirements are necessary in order for an electronic declaration to legally reach and affect a recipient? The answer to this question typically lies in § 130 BGB, which can be applied in an analogue way.[69] According to this provision a declaration has reached the recipient (in a legally binding way) when it reaches the recipient's control sphere to the extent that he is able to take notice of the declaration at any point in time he desires. Applying this to electronic declarations, they are received by the recipient once they have been saved in the recipient's server in a manner which enables the recipient to retrieve them at any point in time.[70]

§ 41 para. 2 VwVfG contains a special regulation for the broader area of administrative acts, stating that an electronic administrative act is regarded as having effectively been received by the recipient after 3 days of having been dispatched; the only exception to this rule is permitted in the case of a later factual arrival of the document.[71] The burden of proof for the reception of a legally relevant statement is always carried by the agency.[72]

---

67 *Kopp/Ramsauer* (note 58), § 3a, No. 8.

68 *Kopp/Ramsauer* (note 58), § 3a, No. 8.

69 *Dietlein/Heinemann* (note 7), 53, 55.

70 *Dietlein/Heinemann* (note 7), 53, 55.

71 *Dietlein/Heinemann* (note 7), 53, 55.

72 See Art. 41 para. 2 VwVfG.

3. Replacement of Written Form through Electronic Form

As already discussed, the principle of informality in administrative procedures only applies when there are no specific statutes which order otherwise. Similar to private law, administrative procedure often requires a written form for many legally binding activities. The most important characteristic of written form is the necessity of a handwritten signature by the person who is to be legally affected by the document.[73] This especially applies to those cases which have a special effect on the participants. Written form requirements tend to have several functions in these cases:[74] on the one hand they are meant to ensure that a statement originated from the signatory (authenticity function), on the other hand they facilitate the unequivocal identification of a signatory (identification function). Also, they are intended to permanently embody and guarantee its legibility (perpetuation function) and facilitate proving legal relations (evidence function). Furthermore, they are meant to secure a distinction between legally binding declarations and mere drafts (distinguishing function) and advert the parties as to the legally binding effect of the declaration (warning function).

If the written form is to be replaced by electronic forms, it must be guaranteed that all functions of the written form are contained within the specifically applied electronic form; in other words, the electronic form must have parallel functions which are legally admissible.

The requirements for electronic forms were laid down by the Signature Act *(Signaturgesetz*[75]*)* in 2001. The signature act implemented the European directive on electronic signatures into national law.[76]

The signature act distinguishes between different levels of security for electronic signatures: at the lowest level are the so-called basic electronic signatures, which do not need to fulfil any further specific requirements. Since these are not well-suited for legally binding transactions and therefore are barely relevant for administrative activities they

---

[73] *Dietlein/Heinemann* (note 7), 53, 54.

[74] *Kopp/Ramsauer* (note 58), § 3a, No. 15.

[75] Signature Act – Gesetz über Rahmenbedingungen für elektronische Signaturen – Signaturgesetz, 22.05.2001, zuletzt geändert durch Gesetz v. 07.07.2005, BGBl. I 2005, 1970.

[76] Directive 1999/93/EC on a Community framework for electronic signatures, of 13 December 1999, ABl. EG 2000, L13, 12.

will no further be discussed at this point.[77] The second level of security contains the qualified electronic signatures as mentioned in § 2 Nr. 3 signature act. Qualified electronic signatures must rest upon a certificate issued by a certification provider and fulfil certain requirements which are contained in §§ 5-14 signature act. The certificate must, above all, remain revisable for the duration of its validity plus an additional five years after expiration of its validity. Lastly, the highest security level offers qualified electronic signatures by an accredited provider as ordered in §§ 2 Nr. 3, 15 signature act. These signatures must generally fulfil the same requirements as qualified signatures. However, in this case the signature provider must also undergo a preliminary test conducted by an agency, in which the compliance with all requirements of the signature act is examined.[78]

The 3rd reformational law on administrative statutes brought a general equality clause with it, which was laid down in § 3a para. 2 VwVfG.[79] According to it, a statutorily ordered electronic form can generally replace written form if the electronic document is marked with a qualified electronic signature in the sense of the signature act. An exception from this rule is permissible only if a statute has explicitly forbidden the use of electronic form in a specific case.[80] The implementation of such a general clause as in § 3a para. 2 VwVfG has made a comprehensive adaptation of all administrative statutes superfluous. Adaptations were necessary in specific administrative statutes, however, only if the legislator intended to explicitly bar the application of an electronic form. One such exception can be found in administrative acts, which can only be issued electronically if a durable revision of the (rightfully) certified electronic signature can be guaranteed according to § 37 para. 4 VwVfG. Only accredited qualified electronic signatures fulfil this requirement today.[81]

---

77 Bundesamt für Sicherheit in der Informationstechnik, E-Government-Handbuch, Modul Rechtliche Rahmenbedingungen für E-Government, 14, online available at <http://www.e-government-handbuch.de/>.

78 Art. 15 Signature Act.

79 *Dietlein/Heinemann* (note 7), 53, 54.

80 *Dietlein/Heinemann* (note 7), 53, 55.

81 Bundesamt für Sicherheit in der Informationstechnik, E-Government-Handbuch, Modul Rechtliche Rahmenbedingungen für E-Government, 52, online available at <http://www.e-government-handbuch.de/>.

If the electronic form is not explicitly prohibited by statute, one can assume that it is generally admissible for all declarations which required a written form in the past to be declared electronically under use of a qualified electronic signature.

The question whether the administration is allowed to demand a qualified accredited signature from individual citizens has yet to be settled.[82] The prevailing opinion argues in favour of such a disposition by stating that § 3a para. 2 VwVfG only sets a minimal standard.[83] The statute does not have an absolute character, which is why the administration should be permitted to demand higher standards in individual cases.[84] There are, however, problematic points in this argumentation, for certain historic, systematic and teleological aspects oppose it. From a historical point of view it can be stated that § 3a VwVfG is a statute which was passed after the signature act. The legislator therefore already knew the difference between qualified electronic signatures and qualified accredited electronic signatures, yet only the term qualified signature was inserted into § 3a VwVfG. Contemplating the European fundamentals of the signature act it seems doubtful to what extent the requirement of a qualified certified electronic signature is compatible with them.[85] Lastly, it is also barely combinable with the purpose of the implementation of electronic communication into the administrative routine to demand accredited qualified signatures when the legislator itself saw the application of mere qualified signatures as sufficient. Accredited qualified signatures are also unnecessarily laborious and costly for its users, and since the accreditation process brings along additional costs for the signature certificate provider, accredited qualified signatures are usually significantly more expensive than qualified ones. Therefore, the application of qualified signatures should suffice for administrative activity as long as there are no drastic security objections hindering the possibility of their use.

---

[82] Bundesamt für Sicherheit in der Informationstechnik, E-Government-Handbuch, Modul Rechtliche Rahmenbedingungen für E-Government, 53, online available at <http://www.e-government-handbuch.de/>.

[83] *Dietlein/Heinemann* (note 7), 53, 57.

[84] *Dietlein/Heinemann* (note 7), 53, 57.

[85] A.A. *Dietlein/Heinemann* (note 7), 53, 57.

4. Transmission Difficulties

Despite the technological standardization in the field of electronic signatures, problems can arise in conveying certain electronic documents. Herein lies the purpose of § 3a para. 3 VwVfG; the appeasal of these difficulties can be solved with the creation of this balanced statute. If an administrative agency obtains an electronic document which it is unable to open, it must immediately send it back to the return address with a note conveying its technical standards. If, on the other hand, a citizen is unable to open an electronic document which he has obtained from an agency, the agency is obliged to resend it electronically or in written form.

5. Summary

The 3rd reformational statute on administrative law led to an adaptation of the administrative procedure act to the demands of legally binding electronic communication. It is now generally possible for the administration and citizens to communicate with one another electronically, even if a written form was previously required. The handwritten signature can now be replaced by a qualified electronic signature; this legal reform has largely contributed to the advancement of e-government in Germany.

VII. E-Government Applications in Practice

The creation of secure legal frameworks was one of the fundamental factors which spurred the actual realization and integration of the aforementioned initiatives led by the federal and state governments as well as the municipalities into daily administration routines. The quantity of these realizations has escalated remarkably. The web portal www.bund.de alone currently offers nearly 400 federal services online. At this point, two e-government applications shall be presented which can be regarded as exemplary. They do not limit themselves to mere electronic informational conveyances or simple form downloads, but rather offer integrated online solutions for the complete electronic processing of administrative procedures. The first of these applications bears the name “ELSTER”, a project which allows financial administra-

tive services, namely tax declarations to be filed electronically.[86] The other project which will be presented here is named "E-Vergabe" and basically consists of a platform for public procurement, in which federal, state and municipal procurement procedures can be electronically processed.[87]

1. ELSTER

ELSTER is the acronym for "Electronic tax declarations" ("*ELektronische STeuerERklärung*") and serves as a platform for the electronic processing of financial administrative procedures.[88] The operation of ElsterOnline is currently still limited to only 10 of the German states (Bavaria, Berlin, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Saxony and Saxony-Anhalt, Schleswig-Holstein, Thuringia). The full functionality of the ElsterOnline web portal has been offered since January 1, 2006.

As one of the first e-government applications in Germany the Elster project forms one of the milestones of e-government. Elster was, in fact, launched on January 1, 1999. In the early days of the project, Elster merely provided a platform for the electronic transmission of income tax declarations, and the filing of a traditional paper tax declaration was still required in addition to the electronic form. Elster therefore had no real effect on the reduction of paperwork, which was its main purpose. The only true advantage for Elster users was the privileged treatment they received from tax authorities, which reduced the processing time. In the early days of Elster, there was no possibility of substituting written signatures with electronic signatures; since the German tax statutes require taxpayers to personally sign their tax declaration forms, taxpayers were forced to hand in paper forms in addition to electronic forms. With the introduction of the electronic signature by the Electronic Signature Act,[89] however, the need for a personal signature and the legal obligation to print out tax declarations has become dispensable. Tax-

---

[86] <http://www.elster.de/>.

[87] <http://www.e-vergabe.bund.de/>.

[88] <https://www.elster.de/pro_infoeng.php/>.

[89] Signature Act – Gesetz über Rahmenbedingungen für elektronische Signaturen – Signaturgesetz, 22.05.2001, zuletzt geändert durch Gesetz v. 07.07.2005, BGBl. I 2005, 1970.

payers were then enabled to use a qualified electronic signature for tax purposes, too. Since then, Elster has made it possible for citizens and companies to fully communicate with the tax authorities online. Moreover, new services have been added to Elster over the last few years. The possibilities of submitting wage tax returns and provisional VAT returns as well as the possibility of annual VAT returns and other types of taxes have been introduced.[90]

The electronic filing of tax declarations has great advantages for taxpayers and the tax administration. Elster's main advantage for the administration is the fact that it now receives all relevant data in electronic form, thus facilitating the processing of data and shortening the overall processing time. The shortening of processing time is overall beneficial to taxpayers; moreover, taxpayers obtain 24/7 access to the tax authorities, making them widely independent from opening hours.

Taxpayers seem to be highly appreciative of these advantages so far. Since the introduction of Elster, the number of taxpayers who use Elster has steadily increased, the total number having exceeded 1 million electronic filings for the first time in 2003.[91] Elster's practical relevance is even more significant for VAT tax returns, of which more than 10 million were submitted electronically in the year 2003.[92] The latest achievement has been the possibility to transmit data relating to certificates of wage tax deductions, which was introduced in January of 2004.

Apart from the possibility of full electronic communication between the tax authorities and taxpayers, Elster also serves as a platform for the exchange of information between different tax departments and tax service agencies at the federal and state levels. A software known as ElsterFT (Elster File Transfer) was developed for the safe electronic exchange of data, and is used to transfer data from the motor vehicle admissions agency to the tax agencies among other things.

Elster's ultimate goal is to create a comprehensive online web portal that gives taxpayers, companies and tax authorities the possibility to communicate without the use of paper.[93] The taxpayer will, for example, be able to call up virtual wage tax cards and change certain personal data. At the same time, the taxpayer has the option of allowing his em-

---

90 <https://www.elster.de/pro_infoeng.php/>.

91 <https://www.elster.de/pro_infoeng.php/>.

92 <https://www.elster.de/pro_infoeng.php/>.

93 <https://www.elster.de/pro_infoeng.php/>.

ployer to electronically access the virtual wage tax card, enabling the employer to thus obtain the new basis of assessment quickly and easily.

2. E-Procurement

On the federal level, Elster is certainly the most prominent example of a successful e-government initiative. There is, however, another online application which has recently been receiving more attention: e-procurement. European law and federal statutes command public authorities to issue an invitation to tender if they want to purchase goods or services.[94] Public acquisition plans can be advertised in several different procurement procedures. Agencies are mainly obliged to publicly procure their advertisements, since this creates the greatest amount of contention. Whether or not the actual procurement procedure is subject to national or European law depends on the estimated contract value. A European-wide contract invitation to tender must follow when certain contract values are surpassed. This applies to all public constituents at the federal, state and municipal levels. An invitation to tender must also be publicly announced in order to enable the participation of potential bidders in the procedure. Some of the German states have gone over to publishing these invitations to tender on the Internet (besides the traditional paper form) for some time now.[95] Some states even offered potential bidders the additional possibility to electronically participate in the advertisement procedure.[96]

In order to create a single platform for all of these public procurement procedures, the "E-Vergabe" project was initiated as a division of the above mentioned BundOnline2005 initiative.[97] The purpose of E-Vergabe is to begin full electronic transactions for public procurement by 2006. For administrative agencies, this procedure is advantageous because all relevant data is obtained electronically, allowing for swift data processing and a rapid allocation procedure. The bidders in a procure-

---

94 <http://www.bescha.bund.de/media/files/publikationen/englisch_online.pdf/>.

95 <http://www.bescha.bund.de/media/files/publikationen/englisch_online.pdf/>.

96 For Baden-Wuerttemberg <http://e-vergabe.lzp.de/>.

97 <http://www.e-vergabe.bund.de/>; <http://www.bescha.bund.de/media/files/publikationen/englisch_online.pdf/>.

ment procedure no longer have to fill out and file complicated and tedious forms, but rather obtain the possibility to file these electronically. The only requirement in order to do so is that the bidder purchases a card reader and a qualified electronic signature.

Besides the traditional procurement, there is also the possibility of researching all federal public invitations to tender at http://www.e-vergabe.bund.de/. Some of the German states and parishes have also decided to advertise over this particular platform. Currently, there are 32 allocating offices connected to the system which execute about 1000 procurement procedures online.[98] The website also offers the possibility of bidding/tendering online by means of a fully electronic transaction without any type of document filing requirements for the procedure.

VIII. Executive Summary and Outlook

Elster and E-Vergabe are good examples which illustrate the fact that e-government has begun to establish itself and become a part of functioning reality in Germany. The advantages of e-government are indisputable: while its use leads to a reduction of bureaucratic obstacles and efficiency gains, it also contributes to an increased transparency of administrative activity.[99] This is, among other reasons, why e-government is highly pursued in the German political agenda. Numerous initiatives, especially on the federal level have led to interim e-government applications which permit the fully electronic transaction of administrative procedures. Elster and e-Vergabe are merely two examples of functioning e-government. Their success rests partly upon the fact that the legislator arranged for legal certainty by adapting the administrative procedure statutes and some other specific statutes. As in private law it is now possible to electronically submit legally binding declarations in administrative procedures.

The answer to the initially posed question why e-government has had so little success compared to e-commerce thus seems to lie less on the side of the executive branch, for the government has undertaken significant efforts to develop and provide legally secure e-government application. The problem therefore lies more on the demand side: citizens often fail to take advantage of offered e-government applications in

---

98 <http://www.e-vergabe.bund.de/>.

99 *Büllesbach* (note 7), 605, 606; *Heckmann* (note 7), 425.

many areas, mostly due to ignorance of their existence. They often do not know that these possibilities exist, nor do they realize what advantage e-government can bring – prior to writing this article, I myself was oblivious to many of the offered e-government applications.

However, there are also in fact many reservations to come in contact with e-government applications, some of which are a matter of age and/or confidence with technological applications. Yet both causes can be eliminated by comprehensive educational and informational work by the executive branch. The main point of criticism for German e-government therefore has to be the lack of knowledge about e-government which prevails within the population; yet the increasing acceptance of e-government in the near future to the point that its popularity becomes comparable to that of e-commerce is beyond all question.

Quangos – An Unknown Species in German Public Law? German Report on the Rule-making Power of Independent Administrative Agencies

*Kristian Fischer**

I. What Are Quangos and where Do They Exist?

Quangos are not specifically mentioned in the German Constitution, nor can the term be found directly in the administrative acts of the Fed-

* The author thanks stud. iur. Karen Andress for her expert language assistance.

eral government and its states. Textbooks and law journal articles on Administrative or Constitutional Law very rarely mention Quangos.[1] Are Quangos therefore an unknown species in German Public Law? Compared to Germany, the picture in the United Kingdom seems to be totally different. It is said that there are hundreds, if not thousands of Quangos within the British Government. It is therefore not surprising that the term "Quangos" – short for quasi-autonomous non-governmental organisations – was invented in the United Kingdom. At first, "non-governmental" was understood in a literal sense and restricted to private organizations. Nowadays, Quangos are seen as part of the government in a broad sense (*e.g.* in terms of funding, appointment and function), yet hold an independent status within the governmental structure to a greater or lesser extent. Therefore, "non-governmental" is typically defined as "non-ministerial" or "non-departmental", and the term Non-Departmental Public Bodies is more often used to describe the phenomenon of independent administrative organizations or agencies.[2]

This approach shall be the starting point for the following observations on German Public Law. We have to ask: Are there independent administrative agencies in Germany? And more specifically: Do those agencies have rule-making power? Since administrative agencies are – *per definitionem* – part of the executive branch of the government, we are dealing solely with the regulatory powers of the administration. It must be emphasized that the German Public Law does not grant any inherent rule-making powers to the executive. Rule-making powers of the executive are always derived from the legislature.[3] This taken into consideration, the executive has the right to exercise the regulatory powers delegated by legislature and laid down in a law of parliament. Two kinds of "executive legislation" have to be distinguished: *Rechtsverord-*

---

[1] One of the few exceptions is *G.F. Schuppert*, „Quangos" als Trabanten des Verwaltungssystems, Die Öffentliche Verwaltung 1981, 153.

[2] For a list of Non-Departmental Public Bodies see the document of the Cabinet Office "Public Bodies 2005" (<http://www.cabinetoffice.gov.uk>; see also <http://www.civilservice.gov.uk>). *P. Cane*, Administrative Law, 4th ed., 2004, 421, notes that the "activities of these bodies typically fall outside the scope of the doctrine of ministerial responsibility". *F.F. Ridley*, Die Wiedererfindung des Staates – Reinventing British Government, Die Öffentliche Verwaltung 1995, 569, at 576 states that it is not possible to translate terms (like Quangos) that describe the structure of the British Government.

[3] See *M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/85.

nungen (ordinances) and *Satzungen* (charters). Ordinances and charters are – as we will discuss later – governed by different legal provisions, and there are strict constitutional boundaries for the use of "executive legislation".

II. Are there Independent Administrative Agencies with Rule-making Powers in Germany?

1. Direct Administration

a) Concept

To answer the question whether there are independent administrative agencies with rule-making powers in Germany we have to take a closer look at the organisational structure of the German administration.[4] Traditionally, the administrative organisation is based on a very tight hierarchy. Within the Federal as well as the state governments the German administration has different levels, always with the ministries at the top and with subordinated authorities at the middle and lower levels. The ministries determine the organisational structure, are responsible for the appointment of personnel, and control the decisions of the subordinated authorities. This branch of the German administration is called *unmittelbare Staatsverwaltung*, which can be translated as direct administration. It's a top-down-concept of command and control. The subordinated authorities depend on the ministries and typically lack rule-making power. On the other hand the ministers have the right to promulgate ordinances if empowered to do so by a law of parliament (Art. 80 *Grundgesetz* (*GG*), the German Constitution).[5]

---

[4] For a description of the structure of the German Administration see *W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 1 *et seq*.

[5] The enactment of ordinances and charters has to be distinguished from internal administrative regulations (*Verwaltungsvorschriften*), which are basically instructions from superior administrative agencies to lower ones. They constitute the so-called "internal administrative law", meaning that they develop no external legal effect on citizens. However, it must be noted that the field of environmental law provides exceptions to this rule (*R. Sparwasser/R. Engel/A. Vosskuhle*, Umweltrecht, 5th ed., 2003, 59) which can often lead to increasingly complicated distinctions and the danger of form misuse (*M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/153 *et seq*.).

Within the direct administration, administrative entities can be independent in organisational terms. There are several forms of organisational independence, namely the creation of independent Federal Authorities, which will further be discussed in the next section. Apart from this, the typical organisational structure of the German Administration is somewhat loosened, mainly through specialised organisational forms with the purpose of supporting authorities, both at the federal and state level. An example worthy of mentioning are pluralistic boards or committees whose main function is to provide external expertise, thus aiding the governmental bodies in their tasks. The Federal Statistical Office (*Statistisches Bundesamt*), for example, is assigned an advisory board which is partly composed of labour union representatives and environmental association members (§ 4 of the Federal Statistics Act (*Bundesstatistikgesetz*)). Those boards operate independently, in terms that they are not subject to ministerial instructions. This is also the case for the federally appointed Central Ethics Committee for Stem Cell Research (*Zentrale Ethik-Kommission für Stammzellenforschung*),[6] which not only advises, but also issues statements to the authorities with regard to legal questions pertaining to the Stem Cell Act (*Stammzellgesetz*).[7]

b) The Federal Authorities

The so-called *Bundesoberbehörden* (Federal Authorities) also form part of the direct administration at the federal level (Art. 87 III 1 GG). Important examples include the *Umweltbundesamt* (Federal Environmental Agency), the *Bundesnetzagentur* (Federal Network Agency), the *Bundeskartellamt* (Federal Cartel Office), the *Bundesprüfstelle für jugendgefährdende Schriften* (Federal Inspection and Rating Agency on Youth-endangering Publications) or the *Bundesagentur für Arbeit* (Federal Labour Agency). The Federal Authorities are established by formal legislation, affiliated to a specific Federal ministry and funded by the Federal Government; at the same time, they acquire and uphold a

---

[6] Concerning the Ethics Commissions in general see *K. Sobota*, Die Ethik-Kommission – Ein neues Instrument des Verwaltungsrechts?, Archiv des öffentlichen Rechts 121 (1996), 229 *et seq*.

[7] Due to the fact that those commissions and advisory boards do not hold any type of rule-making power they will not further be elaborated on at this point.

certain degree of autonomy.[8] That is to say: Although the Federal Authorities are integrated into the administrative system, "non-ministerial spaces" can exist wherever the authorities are not bound by ministerial instructions.

As a general rule, however, it can be assumed that the independent federal agencies are bound by and subject to the instructions of their respective ministers.[9] Therefore, the Federal Cartel Office and the Federal Network Agency are subject to general instructions of the Federal Minister of Economics and Labour (§ 52 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) and § 117 Telecommunications Act (*Telekommunikationsgesetz*)). On the other hand, an example for a Federal Authority which is not subject to ministerial instructions is the *Bundesprüfstelle für jugendgefährdende Schriften*. § 10 of the relevant Act dealing with the propagation of youth-endangering publications (*Gesetz über die Verbreitung jugendgefährdender Schriften*) states: "The members of the Federal Inspection and Rating Agency on Youth-endangering Publications are not subject to instructions".[10] Another example is the Federal Commissioner for the Records of the National Security Service of the Former German Democratic Republic (*Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*), who also constitutes a Federal Authority (§ 35 I Stasi Records Act (*Stasi-Unterlagengesetz*)) and is independent in the exertion of his/her duties and solely subject to the law (§ 35 V Stasi Records Act).[11] It can therefore be concluded that the Federal Authorities are (contrary to the general rule of adherence to hierarchical structures) partly entitled to an independent decision-making competence.

Consequently, the question at hand is whether the Federal Authorities can hold a rule-making power. In most of the cases the Federal Authorities have no rule-making power at all; in fact, they are mostly em-

---

8 *H. Dreier*, Hierarchische Verwaltung im demokratischen Staat, 1991, 246 *et seq*.

9 *P. Lerche*, in: Maunz/Dürig, Grundgesetz V, Art. 87/184; *M. Jestaedt*, in: Umbach/Clemens, Grundgesetz II, 2002, Art. 87/102; *M. Burgi*, in: v. Mangoldt /Klein/Starck, Das Bonner Grundgesetz III, 4th ed., 2001, Art. 87/127.

10 Cf. also BVerfGE 83, 130, at 150.

11 For more examples see *H. Dreier*, Hierarchische Verwaltung im demokratischen Staat, 1991, 247.

ployed for law enforcement purposes.[12] An example at hand would be the Agency for Commercial Transport (*Bundesamt für Güterverkehr*), which constitutes an independent Federal Authority within the operational sphere of the Federal Transport Ministry and carries out administrative duties in the transport field assigned to it (§ 11 Commercial Transport Act (*Güterkraftverkehrsgesetz*)). The enactment of ordinances for the execution of this act, on the other hand, falls into the scope of the Federal Transportation Ministry, the *Bundesministerium für Verkehr, Bau und Stadtentwicklung* (see § 23 Commercial Transport Act). As mentioned above, there are federal agencies which are not subject to ministerial instructions, *i.e.* the Federal Inspection and Rating Agency on Youth-endangering Publications or the Federal Commissioner for the Records of the National Security Service of the Former German Democratic Republic. While this independence applies to administrative duties and decision-making processes for individual cases, it does not apply to rule-making power.

The Federal Authorities are granted a regulatory power only in some, very rare cases. The legal basis is Art. 80 GG, which deals with the rule-making by ordinances. In general, the right to enact ordinances can be conferred only to the three specifically mentioned organs in Art. 80 I 1 GG: the *Bundesregierung* (which consists of the chancellor and the ministers), the *Bundesminister* (Federal Ministers) or the *Landesregierungen* (state governments which consist of a state prime minister and other ministers). Nonetheless, parliament laws which delegate rule-making power to one of those three organs may authorise the relevant organ to sub-delegate the right to enact ordinances (Art. 80 I 4 GG).[13] The sub-delegation can also arise in relation to federal authorities, *i.e.*

---

[12] In other cases the Federal Authorities provide technical and/or scientific support as part of their administrative tasks. The Federal Institute for Risk Assessment (*Bundesinstitut für Risikobewertung*), for instance, provides expertise concerning consumer protection and food safety. The Robert-Koch Institute also provides scientific expertise, namely the provision of recommendations for preventive measures regarding the assessment, treatment and propagation of contagious diseases and other health issues, as determined by § 4 II Infection Defence Act (*Infektionsschutzgesetz*).

[13] The question whether the secondary delegate must specifically be mentioned in the law which allows the sub-delegation is highly disputed (see *M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/258; *M. Brenner*, in: v. Mangoldt/Klein/Starck, Das Bonner Grundgesetz III, 4th ed., 2001, Art. 80/53, 54).

the Federal Labour Agency.[14] For example, the Federal Minister of Economics and Labour sub-delegated the power to enact ordinances in the field of telecommunication (to be more precise: concerning fees) to the Federal Network Agency (§§ 142 II, § 144 IV of the Telecommunications Act and § 1 *TKG-Übertragungsverordnung*). At the same time, the sub-delegation was restricted to the extent that the issue, change and repeal of ordinances by the Federal Network Agency must occur under consent with the Federal Ministry for Economics and Labour as well as the Federal Ministry of Finance. This clearly shows that the Federal Network Agency's rule-making room for manoeuvre is limited to the issue of ordinances, a form of legislation which is always derived from and shaped by laws of parliament. It is imperative to note that a Federal Authority may not exceed its delegated rule-making power or otherwise contradict formal parliamentary legislation.

Moreover, Art. 80 I 2 GG lays down the constitutional limitations for the delegation of regulatory powers: The content, purpose and scope of the power to enact ordinances must be specified in the statutory source passed by parliament. The autonomous regulatory power of the Federal Authorities is therefore always limited within this context. Art. 80 I 2 GG therefore pinpoints the significant role of parliamentary legislation and the function of ordinance enactments; the executive branch is not intended to dispose of an independent rule-making capacity, but rather supplement, substantiate and complement already existing statutes in order to relieve the parliament.[15] The constitutional principle on the *Parlamentsvorbehalt*[16] upholds a similar thought in stating the obligation of parliament to reserve all significant normative decision-making power for itself, insofar excluding any possibility of the use of rule-making power by the executive branch.[17]

Therefore, the Federal Authorities are the closest thing to Quangos the German system of direct administration can offer. But the Federal Au-

---

[14] *M. Sachs*, in: Sachs, Grundgesetz, 3rd ed., 2003, Art. 80/32; *M. Brenner,* in: v. Mangoldt/Klein/Starck, Das Bonner Grundgesetz III, 4th ed., 2001, Art. 80/55.

[15] See *M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/60.

[16] In detail regarding the relationship between Art. 80 I 2 GG and the *Parlamentsvorbehalt*: *M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/89 *et seq*.

[17] See BVerfGE 40, 237, 249; BVerfGE 58, 257, 268 *et seq*.; BVerfGE 61, 260, at 275; BVerfGE 77, 170, at 230; *F. Ossenbühl*, in: Isensee/Kirchhof, Handbuch des Staatsrechts, Bd. III, 2. Aufl., § 62 Rdnr. 41 *et seq*.

thorities cannot generally be described as independent administrative agencies with rule-making power. According to Art. 87 III 1 GG the parliamentary legislator is empowered to found and structure Federal Authorities at his discretion; in doing so, the Federal Authorities may also be granted the capacity to issue ordinances by means of sub-delegation (as described above). During this process, it can be arranged for Federal Authorities to obtain a certain degree of independence from ministerial influence, though it must be kept in mind that the delegation remains subject to the strict constitutional commandments of Art. 80 I GG. Within this context it must be noted, as will be discussed later, that there are also constitutional boundaries to the independisation of administrative entities (see 3 b)).

2. Indirect Administration

a) Concept

The indirect administration (*mittelbare Staatsverwaltung*) is characterized by an organisational separation from the strict hierarchy of the direct administration. In this case, the administrative entities are independent to the extent that they own full legal capacity; administrative behaviour or action is also automatically legally attributed to them (not the Federal Government or the State Government). Two examples of indirect administration which will be discussed more detailed are the corporate bodies under public law (*Körperschaften des öffentlichen Rechts*) and the public law institutions (*Anstalten des öffentlichen Rechts*). Apart from this, the public trusts (*Stiftungen des öffentlichen Rechts*, *e.g. Stiftung Preußischer Kulturbesitz*) also make up additional organisational forms of indirect administration. At the national level, corporate bodies under public law, public law institutions and public trusts can be established next to Federal Authorities on the grounds of Art. 87 III 1 GG.[18] Also, private law entities which have been assigned to perform administrative duties are seen as part of the indirect administration. But it is doubtful if the private law entities can be granted a certain degree of rule-making power.[19]

---

[18] For example, the Federal Attorney Chamber was founded on the grounds of Art. 87 III 1 GG.

[19] The possibility of private entities being designated sub-delegates is usually discarded because Art. 80 GG merely rules the delegation of rule-making

b) Corporate Bodies Under Public Law

The main characteristic of corporate bodies under public law is that they are founded by sovereign act and – while based on membership – remain independent from membership changes. The purpose of their establishment consists in the fulfillment of specific public tasks. The most important examples of corporate bodies under public law are the municipalities and other forms of local government. Apart from this, there are other forms of corporate bodies under public law such as chambers of commerce and industry, social security agencies, universities and professional bodies (such as medical councils and bar councils). One distinguishing feature of the aforementioned (though not of all) corporate bodies under public law is the principle of self-administration, which states that bar councils or chambers of commerce and industry are allowed to manage their own tasks. They are, to this extent, autonomous and capable of enacting charters (even though they are subject to legal supervision by the government). The corporate bodies under public law maintain a certain range of possibilities as to the enactment of charters, yet the rule-making power of self-administering bodies is typically limited to rules which concern their own administrative chores or duties. The professional bodies, for instance, can therefore only regulate the behaviour of members of the profession. This characteristic results directly from the principle of self-administration, which prohibits the self-administering bodies from enacting general, universally applicable regulations.[20]

c) Public Law Institutions

The term public law institution can be defined (based on Otto Mayer's 19th century understanding) as the sum of all personal and factual means which are held and employed by a public administrative executive carrier with the intent to and purpose of fulfilling public purposes over extensive periods of time. At the federal level, the Federal Reconstruction

---

authority between the legislative and executive branches (*M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/259; *M. Brenner*, in: v. Mangoldt/Klein/Starck, Das Bonner Grundgesetz III, 4th ed., 2001, Art. 80/55). And the power to issue charters is restricted to the self-administering entities (*M. Nierhaus*, in: Kommentar zum Bonner Grundgesetz, Art. 80 I/259).

[20] This is questioned by *W. Kluth*, Funktionale Selbstverwaltung, 1997, 504 *et seq*.

Loan Institution (*Kreditanstalt für Wiederaufbau*) can serve as an example, as well as the German National Library (*Die Deutsche Bibliothek*) or the newly founded German Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*).[21] On the municipal level, public schools and hospitals are worthy of mentioning as examples of public bodies which lack legal capacity, yet are formally structured as public law institutions. They therefore possess no rule-making power; merely the institution's carrier may dispose of rule-making power, for it is able to enact special ordinances under certain circumstances.[22] It must be kept in mind, though, that this rule-making capacity is also limited to regulating internal legal relationships.

Public law institutions are not only limited to specific rule-making capacities; they are also typically subject to ministerial instructions, though deviations from this principle exist. The German Federal Bank (*Deutsche Bundesbank*), for instance, was liberated from subjection to any instructions by the federal government through the Act on the Federal Bank (*Bundesbankgesetz*), thus allowing it to exert the power delegated to it by the Act independently as part of the European System of Central Banks (see § 12 of the Act on the Federal Bank and also Art. 108 EC[23]). The purpose is to secure the existence of an independent institution responsible for monetary and currency policies.[24] The public broadcasting companies also have an independent position combined with a certain degree of government support, yet they are not bound by government orders. This structure is intended to ensure the neutrality

---

[21] BGBl. I 2002, 1310.

[22] *W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 380.

[23] Art. 108 EC provides: "When exercising the powers and carrying out the tasks and duties conferred upon them by this Treaty and the Statute of the ESCB, neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Community institutions or bodies, from any government of a Member State or from any other body. The Community institutions and bodies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks".

[24] *H. Dreier*, Hierarchische Verwaltung im demokratischen Staat, 1991, 243 *et seq*.; see also *W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 362.

and independence of the broadcasting systems.[25] An internal pluralistic concept of the broadcasting organisation is therefore necessary according to constitutional law in order to achieve a broad representation of diverse social groups within the management bodies of the public broadcasting corporations, which execute their tasks on a trustee basis.[26]

3. Maxims and Boundaries of Administrative Body Independisation

a) Principles

The German administrative organisation has recently been undergoing a process of decentralisation, by which the administrative entities are more or less gaining an independent status from their respective ministries. An independent administration, not subject to ministerial instructions is therefore clearly identifiable. This regards independent Federal Authorities as well as corporate bodies under public law and public law institutions. Given this background it becomes clear why the term "Quangos" has failed to gain any notable significance in the German legal system: German law has developed a variety of public law organisational types which are responsible for the execution of administrative tasks, making the term "Quangos" dispensable.

There are various forms of the independisation of administrative entities. In the case of a reduction of ministerial control to a minimum or complete abstinence thereof, the respective administrative body will gain independence in decision-making. This independence can be institutionalised, as in the case of the Federal Budget Authority (*Bundesrechnungshof*, see Art. 114 II 1 GG) or the German Federal Bank.[27] The liberation from ministerial instructions can pertain to or be limited to specific questions requiring special expertise, such as the Ethics Com-

---

[25] *H. Dreier*, Hierarchische Verwaltung im demokratischen Staat, 1991, 240 *et seq*.; *W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 362 *et seq*.

[26] See BVerfGE 57, 295, at 319 *et seq*.; BVerfGE 73, 118, at 152 *et seq*.; also *T. Groß*, Das Kollegialprinzip in der Verwaltungsorganisation, 1999, 210 *et seq*.

[27] *W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 331.

missions,[28] or address individual issues, as in the decisions on the Federal Inspection and Rating Agency on Youth-endangering Publications. Furthermore, the independisation of administrative bodies can have a "personal dimension". If a ministry abstains from appointing the director of an agency, it automatically gains a so-called "personal independence". Lastly, a "financial independence" of administrative bodies is conceivable. This aspect deals with the funding of the administrative body.

There are various reasons for the independisation of administrative entities and its effects, above all the authorisation of "instructionless spheres" (those areas of administrative activity which are not subject to any sort of instruction by the ministries). The main and most worthy of mentioning is the possibility of conducting technical specialisation and creating expert rather than political decision-making. Also, the possibility of an administrative agency (such as the Federal Budget Authority) performing independent duties similar to jurisdiction is only conceivable if an independisation has taken place.[29] Other reasons are: the grant of self-administration, as in the case of professional bodies; the protection of constitutional rights, as in the case of public broadcasting companies and universities; and the safeguarding of decision-making on social and cultural values, as in the case of the Federal Inspection and Rating Agency on Youth-endangering Publications. Nonetheless, there are less advantageous effects produced by the independisation of administrative bodies, namely the danger of diverging or contradictory administrative decisions and an increasing ineffectiveness of supervisory mechanisms.

b) Constitutional Boundaries

Though there may be plausible arguments in favour of the independisation of administrative bodies, it must also be taken into consideration that this process would be subject to the boundaries determined by constitutional law. The jurisdiction of the Federal Constitutional Court (*Bundesverfassungsgericht*)[30] has repeatedly stated that "instructionless

---

[28] *W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 331.

[29] *K. Stern*, Das Staatsrecht der Bundesrepublik Deutschland II, 279.

[30] BVerfGE 9, 268, at 279 *et seq*. on instructionless spheres within personal representations; BVerfGE 83, 130, at 150 on the liberation from instructions in

spheres" within the administration are not necessarily illegitimate, as long as they uphold the constitutional principles, mainly the principle of democracy.[31]

In taking a closer look at the Court's statement, its background becomes clear: it is derived from the basic democratic principle in Art. 20 II 2 GG, which states that all power in the state is held by the people. The Court deduces from this principle that any governmental activity with decision-making characteristics must require democratic legitimation;[32] parliamentary elections put the power of the people into practice,[33] and it is the election which legitimates the formation of the government. The power of the government to give instructions to the subordinated administrative authorities forms the continuation of this legitimation chain. In short: the independisation of administrative entities inevitably results in a reduction of democratic legitimation, because it depends on the subjection to instructional orders within the ministerial bureaucracy.

However, not every liberation from ministerial instructions constitutes a breach of democratic principles.[34] Certain administrative bodies obtain constitutionally supported "instructionless spheres"; examples would be the German Federal Bank (*Deutsche Bundesbank*), the Budget Authorities (*Rechnungshöfe*) at the federal and state levels, the public broadcasting companies and the universities.[35] Aside from this, the Federal Constitutional Court has permitted deviations from the principle of instructional dependence when and if the instructionless performance of duties by an administrative body has little or no politi-

---

the case of the Federal Inspection and Rating Agency on Youth-endangering Publications. See also BVerwG, NJW 1973, 865, at 865.

31 The literature often demands stricter requirements for the independisation process and will only admit such independisations if such a process is essential to the respective issue at hand, or if there are significant objective reasons in its favour, see *K. Stern*, Das Staatsrecht der Bundesrepublik Deutschland II, 279; *P. Lerche*, in: Maunz/Dürig, Grundgesetz V, Art. 86/70; less critical *G.F. Schuppert*, Die Öffentliche Verwaltung 1981, 153, at 158. Extensive on this topic: *W. Müller*, Ministerialfreie Räume, Juristische Schulung 1985, 497 *et seq*.

32 BVerfGE 107, 59, at 87; BVerfGE 83, at 60, 71, 73.

33 BVerfGE 83, 60, at 71 *et seq*.

34 In BVerfGE 83, 60, at 72 and BVerfGE 106, 64, at 74 the court states that a certain level of legitimation is necessary.

35 *T. Puhl*, in: Isensee/Kirchhof, Handbuch des Staatsrechts III, 3rd ed., 2005, § 48/44.

cal significance.[36] On the other hand, executive tasks of a certain political importance cannot be withdrawn from parliamentary decision-making power at any time.[37] If such tasks were assigned to agencies which are fully independent from the government and parliament, it would be impossible for the government to take up its assigned responsibilities; moreover, the lack of control would lead to an illegitimate direct involvement of these independent agencies in the federal administration.

Apart from attributing the necessity for increased control of administrative bodies to the political significance of the task itself, the Federal Constitutional Court has also regarded an administrative task's prestructurisation in terms of form and content as a main criteria.[38] An "instructionless sphere" is therefore only possible within a very narrow administrative decision-making range. In contrast, the existence of an area of administrative discretion commands for an instructional dependency in order to guard democratic principles. Consequently, instructionless spheres will emerge in adjudication, but not in rule-making, for the administering body typically disposes of a much wider range of manoeuvre within the latter.

A peculiar case can be found in the case of self-administration. It is disputable whether its democratic legitimacy results from its membership embodiment, which leads to a participation in self-administering activity. Here it is the members who handle the organisation and legitimate its activity; thus the sum of all members can be seen as the legitimating subject.[39] It is also questionable whether the democratic legitimacy requirement applies to the above mentioned advisory boards and brain trusts, such as the Central Ethics Committee for Stem Cell Research. Since these are also composed of representatives from a variety of interest groups – *i.e.* labour union representatives and environmental association members in the advisory board of the Federal Statistical

---

[36] BVerfGE 83, 130, at 150. On page 149, the court states that the appointment of the members of the Federal Inspection and Rating Agency on Youth-endangering Publications by the competent minister leads to a democratic legitimation. See also BVerfGE 106, 64, at 73.

[37] BVerfGE 9, 268, at 282.

[38] BVerfGE 83, 60, at 74.

[39] *W. Kluth*, Funktionale Selbstverwaltung, 1997, 369 *et seq.*; *M. Burgi*, in: Erichsen/Ehlers, Allgemeines Verwaltungsrecht, 12th ed., 2002, § 52/25; but see also *H. Dreier*, Hierarchische Verwaltung im demokratischen Staat, 1991, 274 *et seq.*, BVerfGE 83, 60, at 75 and BVerfGE 106, 64, at 77.

Office –, there is actually a lack of democratic legitimacy in this case. But according to the Federal Constitutional Court they do not require a formal democratic legitimacy, if the activity of the brain trusts limits itself to a merely advisory function with no possibility of participating in administrative decision-making.[40]

Adjacent to the democratic principle, two more constitutional aspects of the independisation of administrative bodies shall be mentioned. When and if the legislation power is to be conferred to the executive branch, a breach of the constitutional principle on the separation of powers (Art. 20 II 2 GG) will emerge. As Art. 80 I GG perfectly illustrates by conferring certain legislative powers to the executive branch (ordinance enactment), the separation of powers is not strictly transposed in the *Grundgesetz*. But it can be discussed whether the bestowal of rule-making powers to independent agencies would present an even greater deviation from the constitutional principle that legislative power is regularly held by parliament. Secondly, one should note that the independisation of administrative bodies requires a parliamentary decision. The so-called *institutioneller Gesetzesvorbehalt* demands that basic institutional changes of the administrative structure of government have to be decided by a law of parliament. The purpose of institutional legal restraints is to prevent different public administrative fields from diffusing and detaching themselves from the hierarchically democratic controlling mechanisms.[41]

---

[40] BVerfGE 83, 60, at 74.

[41] *H. Dreier*, Hierarchische Verwaltung im demokratischen Staat, 1991, 285 *et seq*., who also states that the law of parliament has to provide organisational, procedural and substantive standards for independent administrative authorities and their decision-making process; see also *P. Lerche*, in: Maunz/Dürig, Grundgesetz V, Art. 86/70, *T. Groß*, Das Kollegialprinzip in der Verwaltungsorganisation, 1999, 240 *et seq*. and a recent decision of the Federal Constitutional Court in BVerfGE 111, 191, at 216 *et seq*.

III. The Agency Approach in the European Community and the U.S.

1. European Community Law

If we now take a look at the European Community law we can observe the creation of numerous European Community institutions whose existence was not provided for by the EU and EC Treaty. These include the European Environmental Agency[42] and the European Aviation Safety Agency.[43] In a Communication dated December 11, 2002 on the operating framework for European regulatory agencies,[44] the Commission distinguishes between two forms of agencies, executive agencies and regulatory agencies. While executive agencies are responsible for purely managerial tasks – such as assisting with the implementation of Community programs –, regulatory agencies are required to be "actively involved in exercising the executive function".[45] The Commission also distinguishes between different types of regulatory agencies. Some agencies – such as the European Food Safety Agency – merely issue opinions; others, however, have the power to issue legally binding individual decisions in individual cases; the latter applies to the European Aviation Safety Agency. Therefore, the European Community is basically receptive to the establishment of European agencies and the delegation of decision-making powers to the latter. This receptiveness has frequently been put into practice in the past. The extent to which this is possible can be assessed on the basis of European Court of Justice precedents.

The European Court of Justice's Meroni judgments of 1958 play a key role in determining the legitimacy of European agencies. They concerned the legitimacy of delegating powers to a non-Treaty institution,[46]

---

[42] Regulation (EC) No. 1592/2002 dated July 15, 2002.

[43] Regulation (EEC) No. 1210/90 dated May 7, 1990. Other examples of agencies are contained in the Communication from the Commission entitled "The operating framework for European Regulatory Agencies", COM (2002) 718 final, 3, footnote 3.

[44] COM (2002) 718 final.

[45] Communication from the Commission, COM (2002) 718 final, 4. Furthermore, the Commission notes that all agencies have legal personality and all have a certain degree of organisational and financial autonomy (COM (2002) 718 final, 3, 7).

[46] European Court of Justice, vol. V (1958), 11 *et seq*. and 53 *et seq*.

and the European Court of Justice ruled this transfer of authority to be legally admissible in principle, but at the same time stipulated certain criteria for the legitimacy of delegating powers: *(1)* The Court of Justice first states that the decision "could not confer upon the authority receiving the delegation powers different from those which the delegating authority itself received under the Treaty".[47] This means that the Commission may delegate decision-making powers only if and to the extent that it is itself in possession of the relevant powers. *(2)* In formal terms, the delegating authority must "take an express decision transferring them".[48] In addition, "such delegations of powers ... can only relate to clearly defined executive powers, the use of which must be entirely subject to the supervision of the High Authority".[49] The Meroni judgments are also interpreted as meaning that decisions of the non-Treaty institution must be subject to review by the Court of Justice under the same conditions as those of the delegating organ.[50] *(3)* Substantively, the Court of Justice differentiates according to whether precisely delimited executive powers are delegated or powers to be executed as the agency sees fit. The Court of Justice states:

> "The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.
>
> A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility. ...
>
> The objectives set out in Article 3 are binding not only on the high authority, but on the "institutions of the Community ... within the limits of their respective powers, in the common interest". From that provision there can be seen in the balance of powers which is characteristic of the institutional structure of the Community a fun-

---

47 European Court of Justice, vol. V (1958), 11, at 40.

48 European Court of Justice, vol. V (1958), 11, at 42.

49 European Court of Justice, vol. V (1958), 11, at 44.

50 Cf. European Court of Justice, vol. V (1958), 11, at 40.

> damental guarantee granted by the Treaty in particular to the undertakings and associations of undertakings to which it applies.
>
> To delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established to effect and supervise the exercise of such power each within the limits of its own authority, would render that guarantee ineffective".[51]

An analysis of European Court of Justice precedents thus shows that the court of justice's starting point is the basic legitimacy of delegating decision-making powers to Community authorities. However, the European Court of Justice permits the delegation of decision-making powers to European authorities only if certain criteria are met. The European Court of Justice's Meroni Judgements hail from 1958 and the "pioneering" days of the European Communities, making a full validity of the Meroni jurisdiction doubtful today. At the time, the European Communities constituted a much more fragile legal entity than is the case today. The danger that the power structure agreed upon by the Member States might be displaced by additional agencies not provided for by Treaty was more imminent. Therefore, the Court of Justice rightly found that restrictions on the admissibility of agencies were legitimate because of the danger that new agencies might shift the balance of power prevailing between the various European institutions.

The situation has changed significantly since those early years of the European Communities.[52] In the course of more than four decades, the relationship between the European institutions has stabilised to the point where delegation of decision-making powers to an agency in a narrowly defined area is highly unlikely to result in an appreciable shift in power in favour of a specific institution.[53] Furthermore, it must be

---

[51] European Court of Justice, vol. V (1958), 11, at 43 *et seq*.

[52] Cf. *M. Berger*, Vertraglich nicht vorgesehene Einrichtungen des Gemeinschaftsrechts mit eigener Rechtspersönlichkeit, 1999, 84 *et seq*.

[53] Elements contributing to the changed situation since the days of the Meroni decision include the following: The responsibilities assumed by the European Community have expanded continuously and become more strictly differentiated. Whereas the scope of the Community was narrowly defined during its initial years and decades, its tasks have burgeoned in the interim. The institutions provided for by Treaty see themselves faced with an ever increasing workload. This workload has increased significantly since the Meroni decision. Agencies called upon to deal with a specific specialist field can help relieve the workload of the Community institutions. Furthermore, they can also provide a

remembered that the sole basis of the Court of Justice precedents are the above-mentioned Meroni rulings from 1958. The Court of Justice has not explicitly stated its opinion on the issue of the legitimacy of delegating powers to agencies since that period. Nor indeed did it have to, as the Meroni decisions had a "traumatic impact".[54] In the aftermath of the Meroni rulings, the European Communities delegated decision-making powers to non-Treaty institutions in rare cases only, but these delegations did not make it to the Court of Justice. Only recent years have brought about an increasing number of agencies built up by the European Communities.

The following conclusion can be stated: the continued validity of the Meroni jurisdiction is by all means contestable. While the Meroni decisions have not been questioned by the Court of Justice, they have also not been explicitly reaffirmed for almost 50 years now. At the very least, however, the steady expansion of the tasks assumed by the European Community forbids an extensive interpretation of the Meroni criteria. However, it must be emphasized that the Meroni rulings provide indications as to where to draw the lines when it comes to delegating decision-making powers to agencies. The Court of Justice explicitly states that a decision cannot be consigned to an agency's "discretionary power". Thus, the European Court of Justice[55] opposed the delegation of powers with the following argument: "They imply a wide margin of discretion and are as such the outcome of the exercise of a discretionary power which tends to reconcile the many requirements of a complex and varied economic policy". This expresses the fact that the Court of Justice's concerns refer to the delegation of powers that would have implications for general policy.[56]

---

source of greater expertise and hence ensure that specific tasks are performed more efficiently.

54 *C.D. Ehlermann*, EuR 1973, 194, at 198.

55 European Court of Justice, vol. V (1958), 11, at 46.

56 Cf. *M. Berger*, Vertraglich nicht vorgesehene Einrichtungen des Gemeinschaftsrechts mit eigener Rechtspersönlichkeit, 1999, 88 *et seq*.

2. United States Law

In the U.S., the topic of agency rule-making constitutes a significant part of administrative law.[57] The key term in this context, "delegation doctrine" (or "nondelegation doctrine") refers to the circumstances under which the legislative power might be delegated to administrative agencies. The starting point for the discussion is U.S. Const. Art. I, § 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives". But that does not mean that the legislative power of Congress is exclusive. It has been established by various Supreme Court decisions[58] that Congress can delegate portions of legislative powers to agencies. In its jurisdiction, the Supreme Court accepted a very broad delegation of legislative powers to the executive, and thus rejected a strict concept regarding the separation of powers. The Supreme Court has found that a delegation of legislative powers is unconstitutional only in very selected cases and early decisions; *e.g.* in *Panama Refining Co. v. Ryan*,[59] where Supreme Court Judge *Cardozo* in his dissenting opinion laid down the fundament for a more flexible approach: "Under these decisions the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government …".[60] Of course, there are limitations to the delegation of legislative powers. Especially the idea that Congress should make the primary and important social choices[61] can be found in several Supreme Court decisions; *e.g.* in *Arizona v. California*,[62] in the statement "that the fundamental issues in our society will be made not by appointed officials but by the

---

[57] *A.C. Aman/W.T. Mayton*, Administrative Law, 1998, cover in Part One, pages 7 to 118, the legislative power in agencies.

[58] See *Mistretta v. United States*, 488 U.S. 361, at 368 *et seq*. (1989). Earlier decisions include: *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939); *Yakus v. United States*, 321 U.S. 414 (1944); *Arizona v. California*, 373 U.S. 546 (1963).

[59] 293 U.S. 388 (1935). Another example is *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[60] 293 U.S. 388, 440 (1935).

[61] Industrial Union Dept., *AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 685 *et seq*. (1980).

[62] 373 U.S. 546, at 626 (1963).

body immediately responsible to the people"; or in *National Cable Television Ass., Inc. v. United States*,[63] that "Congress is not permitted to advocate or to transfer to other essential legislative functions with which it is … vested".

IV. Concluding Remarks

The term "Quangos" can neither be found in the German Constitution nor in the German administrative acts. Furthermore, an agency approach in the sense of a rule-making power of independent agencies is alien to the German legal system. The German administrative structure is rather a predominantly hierarchical one, though various independisation attempts have begun to emerge. These are mainly characterised by more or less prevalent concessions to loosen administrative entities from ministerial bodies; the manner in which they become more independent is through the attainment of a certain degree of organisational autonomy, especially in the form of liberation from ministerial instructions. This freedom of instructions which leads to an independence of those agencies which enjoy it, however, is not usually accompanied by a transfer of rule-making power. Rule-making power is only attained in the exceptional cases in which a self-administering body may enact charters concerning its own business. The constitutional boundaries of the independisation of administrative bodies thus result from the principle of democracy.

The German Constitution sets high standards and requirements for the concession of any rule-making power to the executive branch. Art. 80 I GG specifically indicates the constitution's intent to concede a mere deduced rule-making power to the executive branch. The executive branch's room for manoeuvre is therefore reduced to the point that the laws of parliament which concede rule-making powers must contain a high level of certainty in terms of content, range and purpose (Art. 80 I 2 GG); moreover, significant decision-making is exclusively a power reserved for parliament (*Parlamentsvorbehalt*). The parliament's rule-making prerogative is also evident within the self-administering charter

[63] 415 U.S. 336, at 342 (1974).

enactments. Here, the rule-making power rests upon statutory conferments of autonomy.[64]

Taking a comparative look at the agency approach of the European Community, one will detect a close connection between the agencies and the community institutions. The capacities of the agencies are always deduced from these community institutions, and though a delegation of decision-making powers to these agencies is conceivable within narrow limits, such delegations would encounter legal opposition if it involves the concession of discretionary and political powers or the assessment of complex economic issues. In the opinion of the European Commission, agencies shall perform executive functions, yet they are not entitled to any sort of legislative powers.[65] A rule-making activity by the agencies is therefore only conceivable within the area of implementing legislation.[66] Interesting is also the fact that the legal difficulties mainly arise in regard to the balance of powers within the institutional structure of the Community.[67]

In contrast, the rule-making capacity of U.S. agencies is much broader than anything known to the German and European legal systems. The American legal system widely abstains from substantially limiting the delegation of legislative power to agencies.[68] Could the American

---

[64] Note that charters – which are to be seen as deduced legal sources – also require at least a general legitimate authorisation. Note also that Art. 80 GG does *not* apply to charter enactments (BVerfGE 21, 54, at 62; 49, 343, at 362).

[65] Communication from the Commission, COM (2002) 718 final, 8: "These agencies may, for example, be empowered to adopt individual decisions in a clearly specified area of Community legislation but not legislative measures of general application, although their decision-making practices might result in codifying certain standards".

[66] For a discussion of the legal aspects of the implementing legislation of the EC: *H.-W. Rengeling*, What participation rights do substance manufacturers have in relation to the adoption of EU rules relating to substances? – Summary –, 2002.

[67] Cf. the above mentioned Meroni rulings (European Court of Justice, vol. V (1958), 11, at 43 *et seq*.), and also the Communication from the Commission, COM (2002) 718 final, 5 *et seq*.

[68] This does not mean that administrative agencies are conceded limitless rule-making powers which they can freely dispose of. The U.S. legal system also contains approaches which limit rule-making power, as manifested in the Benzene Case ruled by the Supreme Court: The Occupational Safety and Health Administration tried to reduce carcinogens in the workplace by an extensive interpretation in the Occupational Safety and Health Act, but the Su-

agency model – that is, agencies with wide-ranging rule-making capacities – be introduced to the German legal system?[69] Would it be possible to create an agency (comparable to the Environmental Protection Agency in the U.S.) which possesses extensive rule-making capacities in the area of environmental law? First of all, one must hold the thought that agency legislation would only be possible in the form of ordinances by means of sub-delegation, in accordance with Art. 80 I 4 GG. Furthermore, the constitutional boundaries (Art. 80 I 2 GG, the *Parlamentsvorbehalt* and the principle of democracy) would still have to be abided by. This would, however, automatically lead to a significant constriction of agencies' manoeuvring room despite a rule-making capacity.

There are several potent arguments in favour of the expansion of executive rule-making capacities. First of all, the performance of legislative duties by the administration would greatly relieve an often overwhelmed parliament. Secondly, decision-making costs within the executive branch would be lower than in the legislative branch. Thirdly, special agencies – like the Environmental Protection Agency, which employs scientists and technicians – would be able to use their expertise;[70] therefore, the delegation of certain tasks to agencies makes sense in highly specialised technical areas requiring advanced expertise.[71] Also, it is advantageous that those agency decisions are based on purely techni-

---

preme Court narrowed the competences of the Administration down; Industrial Union Dept., *AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, at 646 (1980): "If the Act had not required that the risk from a toxic substance be quantified sufficiently to enable the Secretary to characterize it as significant in an understandable way, the statute would make such a "sweeping delegation of legislative power" that it might be unconstitutional". Furthermore, an agency has always to show that it "has … genuinely engaged in reasoned decision-making" (*Greater Boston Television Corp. v. FCC*, 444 F.2d 841, at 851 (D.C. Cir. 1970)).

69 It is worth mentioning that the German law doesn't have a *numerus clausus* of legal forms of administrative bodies (*W. Kluth*, in: Wolff/Bachof/Stober, Verwaltungsrecht III, 5th ed., 2004, 243). Concerning Art. 87 III GG it is disputed whether this provision contains an exclusive list of organisational forms (see *M. Jestaedt*, in: Umbach/Clemens, Grundgesetz II, 2002, Art. 87 Rdnr. 106).

70 In *Mistretta v. United States*, 488 U.S. 361, at 368 *et seq*. (1989), the Supreme Court explains that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives".

71 Communication from the Commission, COM (2002) 718 final, 5, at 8.

cal evaluations and are not influenced by political considerations.[72] Fourthly, a delegation of legislative powers to administrative agencies creates a useful flexibility (*e.g.* in fields where technology is rapidly developing, such as in environmental controls), and it enables prompt (re)actions in situations when parliament is not in session or the legislative process in Parliament is lagging.

In order to attenuate any misgivings on a generous expansion of rule-making capacities within independent administrative agencies, procedural safeguards could be installed. In this regard, it is wise to take a look at the American legal system. Its citizen participation in internal administrative matters, especially in rule-making processes,[73] can contribute to a slimming of the democratic deficit which results from the independisation of administrative carriers.[74] In order to guarantee the rule-making prerogative of parliament, the "report and wait"-process could be implemented. This process consists of an obligation by the administrative body to submit already decided but yet ineffective rules to parliament; the parliament, in turn, is obliged to react within a certain time limit and holds the power to prevent the enactment of the rule by means of legislative action. There are evident similarities to the so-called sunset laws, which are confined to a certain period of time and whose continuation requires legislative action. Alternative forms of controlling mechanisms, *i.e.* report duties, are also being discussed for the German legal system.[75] On the European level, the Commission of the European Communities notes "that the agencies' activities need to be fully transparent";[76] and that it is necessary to implement an admin-

---

[72] Communication from the Commission, COM (2002) 718 final, 5; see also *T. Groß*, Das Kollegialprinzip in der Verwaltungsorganisation, 1999, 152.

[73] The Administrative Procedure Act (APA) provides that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments …" (5 U.S.C.A. § 553(c)). The participation of private law entities especially becomes evident in the field of negotiated rule-making; on that topic see the Negotiated Rulemaking Act (5 U.S.C.A. §§ 563-570) and *S. Schnöckel*, "Negotiated Rulemaking" in den USA und normvertretende Absprachen in Deutschland, 2005.

[74] The personnel management, such as the appointment of managerial bodies by Parliament, also contributes to the strengthening of democratic legitimacy.

[75] *G.F. Schuppert*, Die Öffentliche Verwaltung 1981, 153, 159; cf. also *T. Puhl*, in: J. Isensee/P. Kirchhof, Handbuch des Staatsrechts III, § 48/45.

[76] Communication from the Commission, COM (2002) 718 final, 5.

istrative, political, financial and judicial supervision of the agency actions.[77] Based on the aforementioned principles, a wider use of Quangos within German Public Law might make sense. But a fear that we will have an "overpopulation" of Quangos is unsubstantiated due to the limited room for manoeuvre provided by the Constitution.

[77] Communication from the Commission, COM (2002) 718 final, 13.

Progress and the Precautionary Principle in Administrative Law – Country Report on Germany

*Dirk Hanschel**

---

* The author wishes to thank Dr. Greg Taylor for his helpful comments and remarks.

I. Introduction

Precautionary action is an increasingly important paradigm of legal standard-setting in International, European and in domestic law.[1] Although its exact content as a general principle is still disputed,[2] the precautionary principle (*Vorsorgeprinzip*) plays an important role in German administrative law, which is strongly influenced by European, German Constitutional and statutory law.[3] In Germany, which is considered to be its country of origin, the precautionary principle was mentioned for the first time in an environmental program of 1971 and in a definition of environmental policy provided by the federal gov-

---

1 On the rise of the precautionary principle in international environmental law see *E. Riedel*, Paradigmenwechsel im internationalen Umweltrecht, 1997, 245 *et seq.*; *S. Marr/A. Schwemer*, The Precautionary Principle in German Environmental Law, The Yearbook of European Environmental Law, 2003, Vol. 3, 126 *et seq.*, 146 *et seq.*; for an analysis of the precautionary principle as illustrated by EU chemicals law see *C. Calliess*, Zur Maßstabswirkung des Vorsorgeprinzips im Recht, VerwArch 2003, 389 *et seq.*, and more generally *C. Calliess*, Rechtsstaat und Umweltstaat, 2001, 197 *et seq.*; on the precautionary principle in EU law see generally *I. Appel*, Europas Sorge um die Vorsorge – zur Mitteilung der Europäischen Kommission über die Anwendbarkeit des Vorsorgeprinzips, NVwZ, 2001, 395 *et seq.*

2 *U. Di Fabio*, Voraussetzungen und Grenzen des umweltrechtlichen Vorsorgeprinzips, 1997, 820; *S. Marr/A. Schwemer* (note 1), 133; for the description of precaution as a meta-principle see *G. Lübbe-Wolff*, Präventiver Umweltschutz – Auftrag und Grenzen des Vorsorgeprinzips im deutschen und im europäischen Recht, 1998, 47; on the effect of legal principles see *Alexy*, Theorie der Grundrechte, 2nd edition, 1994, 75 *et seq.*

3 *P. Stoll*, Sicherheit als Aufgabe von Staat und Gesellschaft, 2003, 319; *R. Wahl/I. Appel*, Prävention und Vorsorge: Von der Staatsaufgabe zur rechtlichen Ausgestaltung, in: Wahl (ed.), Prävention und Vorsorge – Von der Staatsaufgabe zu den verwaltungsrechtlichen Instrumenten, 1995, 1 *et seq.*; for the multiplicity of regulatory levels see *M. Böhm*, Risikoregulierung und Risikokommunikation als interdisziplinäres Problem, NVwZ 2005, 612 *et seq.*

ernment in 1976 – a long time before this principle came to life on the international agenda.[4] This approach was further developed and refined in the subsequent years.[5] Thus, environmental reports dating from 1990 and 1992 named the terms of "danger prevention" (*Gefahrenabwehr*), "risk precaution" (*Risikovorsorge*) and "future precaution" (*Zukunftsvorsorge*) as elements of the precautionary principle.[6] Due to scandals concerning BSE, hormones in meat, food products modified by the use of gene technology, as well as the discussion of risks and dangers emanating from the use of nuclear energy, chemicals, and recently from pandemics like SARS as well as from terrorism, etc., the precautionary principle has expanded from the classical field of environmental protection and technology to many other areas.[7]

Questions concerning the binding legal character of the relevant norms containing the precautionary principle, their contents and their applicability play an important role.[8] When looking at German administrative law, it is important not to treat these questions in a generalist way, but to answer them with respect to every particular legal sector and factual situation, since the precautionary principle may manifest itself in many different facets.[9] Relevant rules can be found in such diverse areas as the Federal Pollutants Control Act (*Bundesimmissionsschutzgesetz*), the Atomic Energy Act (*Atomgesetz*), the Gene Technology Act (*Gentechnologiegesetz*), and food and nutrition as well as insurance and technology law. The task of this article will thus be twofold: First, it will ana-

---

4 *S. Werner*, Das Vorsorgeprinzip – Grundlagen, Maßstäbe und Begrenzungen, in: UPR 2001, 336; Bundestags-Drucksache 6/2710, 9 *et seq.*; Bundestags-Drucksache 7/5684, 8; *U. Di Fabio* (note 2), 810; *G. Günther*, Umweltvorsorge und Umwelthaftung, 2003, 27.

5 *S. Werner* (note 4), 336.

6 *S. Werner* (note 4), 336; Bundestags-Drucksache 11/7168, 267; *Bundesumweltamt*: Umweltschutz in Deutschland – Nationalbericht der Bundesrepublik Deutschland für die Konferenz der Vereinten Nationen über Umwelt und Entwicklung in Brasilien im Juni 1992, 1992, 1192, 74.

7 *C. Calliess*, Vorsorgeprinzip und Beweislastverteilung im Verwaltungsrecht, DVBl. 2001, 1725; *U. Gundert-Remy/K. Henning*, Aktuelle Probleme des gesundheitlichen Verbraucherschutzes, WiVerw 2004, 129 *et seq.*; *B. Stüer*, Umweltrechtliche Fachtagung der Gesellschaft für Umweltrecht – Umweltprüfung und Risikoregulierung, DVBl. 2004, 1534.

8 *P. Stoll* (note 3), 319.

9 *F. Ossenbühl*, Vorsorge als Rechtsprinzip im Gesundheits-, Arbeits- und Umweltschutz, NVwZ 1986, 164; *S. Marr/A. Schwemer* (note 1), 133.

lyse the existing requirements for administrative action set up by Constitutional and statutory law. Second, the question will be examined how the administration deals, within its remaining margin of appreciation (*Beurteilungsspielraum*) and scope of discretion (*Ermessensspielraum*), with situations of uncertainty and risk, and how this relates to the classical task of danger prevention as envisaged by police law.

II. The Concept of Precautionary Action

1. Material Content and Limits of the Precautionary Principle in German Law

For many years the necessity to reflect on the conditions and limits of the precautionary principle has become apparent.[10] Being a binding, but rather abstract legal concept it has been adapted to many different circumstances and largely depends on its concrete realization through various statutes.[11] § 4 of the legal expert draft of a General Part of an Environmental Code (*Umweltgesetzbuch – Allgemeiner Teil – Entwurf – UGB-AT-E*) defines the precautionary principle as the requirement to strive towards precluding preventable or unforeseeable environmental degradation by adequate measures, in particular by long-term planning and by emission limitations according to the technical state of the art.[12] § 5 (1) of the Draft of the Commission on the Creation of an Environmental Code (*UBG-KomE*) in a more all-encompassing way maintains the necessity to prevent or reduce risks to the environment and human health, in particular by farsighted measures, by planning and by adequately applied technical measures.[13] § 5 (2) states that "precaution serves the protection of sensitive constituents of the balance of nature".[14] Although these draft laws have not been enacted yet, they pro-

---

[10] *F. Ossenbühl* (note 9), 166 *et seq.*; *M. Kloepfer*, Umweltschutz- und Verfassungsrecht, DVBl. 1988, 305 *et seq.*

[11] *S. Marr/A. Schwemer* (note 1), 133; for an overview on the function of legal principles and on a typology concerning the precautionary principle see *U. Di Fabio* (note 2), 813 *et seq.*

[12] *M. Kloepfer*, Gesetzgebung im Rechtsstaat, in: VVDStRL, 1982, Vol. 40, 138 *et seq.*; *W. Hoppe/M. Beckmann/P. Kauch*, Umweltrecht, 2000.

[13] *W. Hoppe/M. Beckmann/P. Kauch* (note 12), Rn. 134.

[14] *S. Marr/A. Schwemer* (note 1), 138.

vide a good basis for understanding the nature of the precautionary principle.[15]

From a scientific point of view, risks are assessed by multiplying the probability of damage by the severity of that damage.[16] In German law there is a discussion whether the precautionary principle should only be understood as precaution against risks or additionally as requiring precautions to ensure the preservation of resources, which is related to the term "sustainable development".[17] Risk precaution basically means shifting the classical notion of danger prevention towards areas where a danger does not yet exist, although it appears very hard in practice to differentiate between the two situations.[18] Some authors identify a certain tendency of police law, which traditionally has dealt with dangers, to increasingly adopt the structure of risk administration.[19] According to a statement of *Di Fabio*, "the great 'softener' of the precautionary principle has for a long time infiltrated the field of danger prevention".[20] Others state that the precautionary principle does not aim at achieving something other than danger prevention, but that it requires different instruments and follows different categories.[21]

However, the distinction between the two terms of risk precaution and danger prevention remains important in German law, since they are

---

15 *M. Böhm* (note 3), 613.

16 *U. Gundert-Remy/K. Henning* (note 7), 122.

17 *U. Di Fabio*, Gefahr, Vorsorge, Risiko: Die Gefahrenabwehr unter dem Einfluss des Vorsorgeprinzips, in: Jura 1996, 566, at 570 *et seq.*; *G. Lübbe-Wolff* (note 2), 53 *et seq.*, mentions preventive action on the basis of uncertainty and the non-exploitation of critical load thresholds as two main aspects of the precautionary principle; for the aspect of resource precaution see also *P. Stoll* (note 3), 323 *et seq.*

18 *P. Stoll* (note 3), 322; *R. Wahl/I. Appel* (note 3), 72 *et seq.*; *W. Köck*, Risikovorsorge als Staatsaufgabe, AöR 121 (1996) 16 *et seq.*; *B. Stüer* (note 7), 1535; *W. Hoppe/M. Beckmann/P. Kauch* (note 12), 40; *U. Di Fabio* (note 17), 566 *et seq.*, who deals with the borderline situations of a suspected danger (*Gefahrenverdacht*), apparent danger (*Anscheinsgefahr*) and fictitious danger (*Scheingefahr*); see further *M. Böhm* (note 3), 612, who claims that the legally necessary distinction between danger and precaution has led to substantial difficulties of differentiation.

19 *M. Brenner/A. Nehrig*, Das Risiko im öffentlichen Recht, DÖV 2003, 1030; *R. Pitschas*, Polizeirecht im kooperativen Staat, DÖV 2002, 221 *et seq.*

20 *U. Di Fabio* (note 17), 566 (569); *C. Calliess* (note 1), 168.

21 *G. Lübbe-Wolff* (note 2), 51 *et seq.*

connected to very different ideas concerning the balancing of interests and to different yardsticks of proportionality.[22] Furthermore, provisions containing the precautionary principle usually do not confer rights upon individuals.[23] While in 1985 *Murswiek* still claimed that risk as opposed to danger was not a legal term, this situation has since then changed dramatically.[24] Thus, many new legal statutes have incorporated the term "risk", and in administrative law manifold approaches of "risk law" have been developed.[25] While a clear-cut definition has still not been found, there is a consensus that risk may be characterized as a situation which, presupposing an undisturbed chain of events, will *potentially* lead to environmental degradation.[26] In turn, a danger is defined as a situation which will, with a sufficient *probability*, cause damage to legally protected goods of public security, if the cause of action is not impeded.[27] Thus, a prognosis or a rule of experience is applied on a subjective-evaluative basis, whereby the threshold concerning the required degree of probability is lower when the feared damage is more severe, and vice versa.[28] In these cases, as opposed to cases of risk precaution, *locus standi* is granted even to persons not directly affected by

---

[22] *P. Stoll* (note 3), 322; *N. de Sadeleer*, The Enforcement of the Precautionary Principle by German, French and Belgian Courts, RECIEL 9 (2) 2000, 144 *et seq.*; *W. Hoppe/M. Beckmann/P. Kauch* (note 12), 40; *S. Marr/A. Schwemer* (note 1), 134, who call the distinction of danger prevention, risk prevention and residual risk the German three step safety concept; BVerwGE 69, 37, at 62; 72, 300, at 315; for attempts to distinguish the two notions see further *J. Gelbert*, Die Risikobewältigung im Lebensmittelrecht auf internationaler, europäischer und nationaler Ebene, 2001, 19 *et seq.*; *P. Hansmersman*, Risikovorsorge im Spannungsfeld von Gesundheitsschutz und freiem Warenverkehr. – Dargestellt am Beispiel der Entsorgung radioaktiver Abfälle, 2005, 7 *et seq.*

[23] *W. Hoppe/M. Beckmann/P. Kauch* (note 12), 40; BVerwGE 65, 313 (320); OVG Lüneburg, Decision of 28.2.1985 – 7 B 64/84 –; an exception is atomic energy law, where precaution and risk precaution are interconnected in § 7 II Nr. 3 AtG, see *W. Hoppe/M. Beckmann /P. Kauch* (note 12), 40; BVerwGE 72, 300, at 315.

[24] *D. Murswiek*, Staatliche Verantwortung 1985, 80; *C. Calliess* (note 1), 163.

[25] *C. Calliess* (note 1), 163.

[26] *C. Calliess* (note 1), 163; *J. Gelbert* (note 22), 17.

[27] BVerwGE 45, 51 (57); *C. Calliess* (note 1), 155; *J. Gelbert* (note 22), 15 *et seq.*

[28] *C. Calliess* (note 1), 156; see further *S. Marr/A. Schwemer* (note 1), 134.

an administrative authorization.[29] This conception clearly reaches its limits in the field of environmental law and related fields of precautionary action, where a high degree of insecurity can be observed and the probability of dangers cannot always be calculated.[30] While the notion of "caution" may be associated with danger prevention, "precaution" appears to be the appropriate term for risk management.[31] If one understands precaution as being logically prior to danger prevention, its aim may be considered as even preventing the occurrence of danger instead of the damage itself.[32]

2. The Limits of Precaution: the Residual Risk

The first sentence of the final report of the Commission for the Restructuring of Procedures and Structures of Risk Assessment and Standard Setting in Health Related Environmental Protection in the Federal Republic of Germany (so-called "Risk Commission") reads: "Life without risk is inconceivable".[33] The limit of precautionary action on the basis of uncertainty is therefore, according to this opinion, the so-called residual risk (*Restrisiko*).[34] Strictly speaking, the residual risk concerns three categories: risks beyond the limits of human recognition, risks the realization of which can be excluded on the basis of common sense, and finally risks containing an uncertainty as to the potentially resulting damage and the probability of their realization.[35] As a consequence of the *Kalkar decision* of the German Federal Constitutional Court, the residual risk denominates the field below the legally required minimum standard, which is legally accepted.[36] The notion of a residual risk results from the necessity to evaluate and assess in a normative way which of the numerous risks existing in a certain situation must be ac-

---

29 *S. Marr/A. Schwemer* (note 1), 134 *et seq.*

30 *C. Calliess* (note 1), 157 f; *W. Köck* (note 18), 17 *et seq.*; *K. Ladeur*, Risikowissen und Risikoentscheidung, KritV 1991, 241 *et seq.*, rightly states that this means arriving at decisions by taking into account the lack of knowledge.

31 *F. Ossenbühl* (note 9), 161, at 162 *et seq.*; *C. Calliess* (note 1), 169.

32 *C. Calliess* (note 1), 169.

33 *M. Böhm* (note 3), 609.

34 *S. Marr/A. Schwemer* (note 1), 135; BVerfGE 49, 143.

35 *C. Calliess* (note 1), 164 *et seq.*

36 BVerfGE 49, 89 (143).

cepted and which ones shall be tackled.[37] According to the *Kalkar decision*, such an evaluation has to be undertaken on the basis of common sense.[38] This doctrine states that one cannot demand the elimination of all risks, as that is not possible within the limits of human recognition and would render any technological progress impossible.[39] If according to the current scientific and technological state of the art the occurrence of damage appears practically impossible, the residual risk has to be accepted as being beyond human recognition and thus as a socially adequate burden.[40]

III. The Requirements for Precautionary Action in German Constitutional Law

In 1994, Art. 20a was inserted into the German Basic Law (*Grundgesetz – GG*). This article defines environmental protection as a so-called "public aim" (*Staatszielbestimmung*), and, in the eyes of many scholars, entails the precautionary principle at least in a rudimentary fashion.[41] The provision protects the environment as the basis of life, with special regard to the rights of future generations, which includes the notion of risk precaution.[42] Furthermore, there are certain protective duties resulting from the basic rights in the Constitution, such as human dignity,

---

[37] *C. Calliess* (note 1), 164.

[38] *Calliess* (note 1), 164; *K. Schachtschneider*, Der Rechtsbegriff „Stand der Wissenschaft und Technik" im Atom- und Immissionsschutzrecht, in: Thieme (ed.), Umweltschutz im Recht 1988, 81, at 100 *et seq.*, especially at 109 *et seq.*

[39] BVerfGE 49, 89, at 143; *C. Calliess* (note 1), 164.

[40] BVerfGE 49, 89, at 143.

[41] *C. Calliess* (note 1), 182; *K. Waechter*, Umweltschutz als Staatsziel, NuR 1996, 321 *et seq.*; *P. Stoll* (note 3), 321; *S. Werner* (note 4), 336; *M. Kloepfer*, Umweltschutz als Verfassungsrecht: Zum neuen Art. 20a GG, 1996, 73 *et seq.*; *D. Murswiek*, Staatsziel Umweltschutz (Art. 20a GG), NVwZ 1996, 222 *et seq.*

[42] *W. Köck*, Grundzüge des Risikomanagements im Umweltrecht, in: v. Bora (ed.): Rechtliches Risikomanagement, 1999, 129, who derives from the protective duties that the State has to ensure security; see further *M. Brenner/ A. Nehrig* (note 19), 1027.

the right to life, the right to health, property, etc. (Art. 1 (1), 2 (1) and 14 GG).[43]

The main difference is that Art. 20a GG, as opposed to the above mentioned Constitutional rights, does not express an individual claim right, but merely a protective mandate (*Schutzauftrag*) requiring the legislator to respect certain minimum environmental standards without defining their content in a concrete form.[44] In addition to this mandate function, Art. 20a GG also provides a justification function, which is derived from the former.[45] Furthermore, Art. 20a GG is directed to the executive, which uses this provision for the interpretation of statutory law, in particular in relation to general clauses and undefined legal terms, as well as discretionary and planning decisions.[46] In relation to planning decisions, Art. 20a GG may be called an optimization requirement (*Optimierungsgebot*).[47] Since the administration is responsible for concrete environmental protection measures on the ground level, it is expected to contribute particularly to the realization of this norm.[48] To the extent that a legal authorization is not required by the rule of law, Art. 20a GG may in some cases even oblige the administration to act in favour of the environment without such an authorization.[49] Finally, a violation of this norm can be claimed in the so-called objection procedure (*Einwendungsverfahren*), *e.g.* as provided by § 10 (4), (6) of the Federal Pollutants Control Act (*Bundesimmissionsschutzgesetz* –

---

43 *M. Brenner/A. Nehrig* (note 19), 1027; *W. Köck* (note 18), 13 *et seq.*; *S. Marr/A. Schwemer* (note 1), 136.

44 *S. Werner* (note 4), 336; *M. Kloepfer*, Umweltrecht, 2004, § 3, Rn. 38; *S. Marr/A. Schwemer* (note 1), 136.

45 *G. Lübbe-Wolff* (note 2), 62 *et seq.*, 66 *et seq.*, who claims that justiciability of the precautionary principle is stronger concerning the justification function than concerning the mandating function; see further on this question *C. Calliess* (note 1), 244.

46 *M. Kloepfer* (note 41), 75; *D. Murswiek* (note 41), 229; *K. Waechter* (note 41), 323.

47 BVerwG, NJW 1986, 82; *D. Murswiek* (note 41), 229; for the characterisation of principles as optimization requirements see *R. Alexy* (note 2), 75 *et seq.*

48 *M. Kloepfer* (note 41), 75; *E. Riedel* (1999): Rechtliche Optimierungsgebote oder Rahmensetzungen für das Verwaltungshandeln, in: VVdStRL 58, 1996, 177 *et seq.*

49 *M. Kloepfer* (note 41), 75 *et seq.*

BimSchG), and the explanation of discretionary and planning decisions needs to display in what way Art. 20a GG is respected by them.[50]

According to the Federal Constitutional Court, the scope of protective duties following from the German Basic Law depends on the nature and degree of the endangerment as well as the significance and vulnerability of the legal good to be protected.[51] Furthermore, colliding public interests and private legal goods play an important role.[52] However, legal protective duties cannot oblige a State to ensure complete risk prevention.[53] This would contravene the principle of proportionality and disregard the fact that there is no such thing as absolute technical safety.[54] Thus, while protective duties exist in the field of risk precaution, they are more restricted than in the field of danger prevention.[55] The courts consider it sufficient if precautions exist to the extent that according to the state of the art damage can be practically excluded,[56] leaving an area of socially acceptable residual risk.[57]

IV. The Requirements for Precautionary Action in German Statutory Law

1. Conceptual Issues

As expressed by Art. 20a GG, the precautionary principle is put into operation mainly through statutory provisions dealing with specific areas.[58] As a general concept, environmental legislation is oriented towards the traditional structure of police law, thus being based on the terms of danger prevention, causal link and responsible disturber (*ver-*

---

[50] *D. Murswiek* (note 41), 230.

[51] BVerfGE 49, 89, at 182.

[52] BVerfGE 77, 170, at 214 *et seq.*; 79, 174, at 202.

[53] BVerfGE 49, 89, at 140 *et seq.*

[54] *M. Brenner/A. Nehrig* (note 19), 1027.

[55] *M. Brenner/A. Nehrig* (note 19), 1027.

[56] BVerfGE 49, 89, at 143; BVerfGE 53, 30, at 59; BVerwGE 72, 300, at 316.

[57] *M. Brenner/A. Nehrig* (note 19), 1027; for the most prominent German court decisions on the precautionary principle see *S. Marr/A. Schwemer* (note 1), 142 *et seq.*; *N. de Sadeleer* (note 22), 144 *et seq.*

[58] *U. Di Fabio* (note 17), 571.

antwortlicher Störer).[59] As a consequence, the doctrinal construct of a preventive prohibition with an authorization option (*präventives Verbot mit Erlaubnisvorbehalt*) was coined and used in this field. The requirement of a legal basis for individual rights limitations is provided through general authorization clauses in the various police laws of the German *Länder*.[60]

Limitations exceeding the scope of danger prevention require a specific legal basis.[61] In order to deal with situations that can only be captured by instruments of risk precaution, new approaches had to be developed.[62] A principal aspect of these approaches is to integrate external scientific and technical knowledge into the process. On the statutory level the integration of external knowledge is managed through so-called technology clauses, by dynamic referrals and the determination of threshold values; on the level of administrative procedure the problem of uncertainty is mainly addressed by granting a margin of appreciation and discretion.[63] In order for the administration to be able to react flexibly to the speed of technological development and to the corresponding proliferation of risks, the relevant norms need to provide a sufficient degree of abstraction.[64] The law of risk administration thus resorts to undefined legal terms (*unbestimmte Rechtsbegriffe*), containing vague elements which require an assessment or even a prognosis in the individual case to be put into concrete terms.[65]

---

[59] *C. Calliess* (note 1), 154.

[60] *C. Calliess* (note 1), 154; the *Länder* are the German State entities below the level of the federation (*Bund*).

[61] *C. Calliess* (note 1), 155.

[62] On the deficits of risk regulations and risk communication see *M. Böhm* (note 3), 610 *et seq.*; on the function of administrative authorizations in the light of the precautionary principle see *R. Wahl/G. Hermes/K. Sach*, Genehmigung zwischen Bestandsschutz und Flexibilität, in: Wahl (ed.), Prävention und Vorsorge – Von der Staatsaufgabe zu den verwaltungsrechtlichen Instrumenten, 217 *et seq.*

[63] *M. Brenner/A. Nehrig* (note 19), 1028; *A. v. Bora*, Mehr Optionen und gesteigertes Risiko – Zur Stellung des Rechts in der Risikogesellschaft, 1999, 16; *A. Roßnagel*, Risikobewertung im Recht, in: Bizer/Koch (eds.), Sicherheit, Vielfalt, Solidarität. Ein neues Paradigma des Verfassungsrechts, 1998, 76 *et seq.*

[64] *M. Brenner/A. Nehrig* (note 19), 1028.

[65] *M. Brenner/A. Nehrig* (note 19), 1028; for the difficulties of risk assessment see *A. Roßnagel* (note 63), 75 *et seq.*

2. Relevant Rules of Administrative Procedure and Administrative Court Procedure relating to the Burden of Proof

§ 24 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*) lays down the principle of public investigation, according to which it is the task of the competent authorities to settle the question whether a situation may result in damage, if necessary by resorting to a scientific expert's opinion.[66] In case of an administrative procedure, the courts, according to §§ 86, 108 (1) 1 of the Administrative Court Procedure Act (*Verwaltungsgerichtsordnung – VwGO*), have to investigate a case and to hear and assess the necessary evidence.[67] As a matter of principle, the burden of proof is divided according to the existing material legal basis and the traditional definitions and rules.[68] The courts thus examine the case by using scientifically approved knowledge and experience concerning the question whether a danger or a suspected danger exists.[69] Merely asserted dangers without any options to provide evidence for them are usually not considered.[70] Generally, the State has to be able to prove the existence of a danger.[71]

However, there are new tendencies concerning the division of the burden of proof in several court decisions, in particular concerning gene technology and so-called electro-smog due to emissions from mobile telecommunication poles.[72] Some courts have lowered the standard of probability applied for the purpose of danger prevention by stating that the effects of electro-smog constitute a potential danger for human health or at least a considerable molestation – even though a definite assessment and fixing of a threshold are currently not possible, and scientists claim that further research is desirable.[73] Other courts have solved the problem by maintaining that an undisputed necessity of further re-

---

66 *C. Calliess* (note 7), 1728.

67 *C. Calliess* (note 7), 1728.

68 *C. Calliess* (note 7), 1729.

69 *C. Calliess* (note 7), 1729; see for example OVG Lüneburg, NVwZ 1995, 917 (918); VGH Kassel, NVwZ 1995, 919, 921.

70 *C. Calliess* (note 7), 1729; OVG Lüneburg, NVwZ 1995, 917, at 919.

71 *C. Calliess* (note 7), 1729.

72 *C. Calliess* (note 7), 1729; *C. Calliess* (note 1), 226 *et seq.*; *S. Marr/A. Schwemer* (note 1), 144 *et seq.*; see further *A. Wahlfels*, Mobilfunkanlagen zwischen Rechtsstreit, Vorsorge und Selbstverpflichtung, UPR 2003, 653 *et seq.*

73 *C. Calliess* (note 7), 1729; VG Gießen, ZUR 1994, 146 (147).

search leads to a situation of uncertainty and thus to unclear evidence, thus constituting a *non liquet* situation.[74] Applying the precautionary principle for new, potentially dangerous technologies, courts shifted the burden of proof at least partly to the operating companies and added a kind of safety buffer on top of the internationally recognized legal threshold values.[75] In its decision on gene technology, the Higher Administrative Court in Kassel pursued an even further-reaching approach, which was later used by other courts dealing with electrosmog: It claimed that new technologies are prohibited – as long as the legislator does not pass specific statutes taking due account of the risks emanating from them – according to fundamental protective duties and an established doctrine stating that substantial decisions have to be taken by the legislator itself (*Wesentlichkeitstheorie*).[76] Thus, in relying on the protective duty resulting from Art. 2 (2) 1 GG, the courts construed a preventive prohibition with an authorization option.[77]

However, this approach is rather disputed both in the case law and in scholarly opinion. The strongest precautionary approach would be constituted by a complete shift of the burden of proof at the expense of economic freedom, which is expressed by the formula "in dubio pro securitate" and based on the fundamental protective duties.[78] The majority of scholars, however, deal with this question in a more differentiated way:[79] They propose a shift of the burden of proof concerning empirical evidence that a risk source is capable of causing damage. Thus, the operator of an installation causing a chemical, physical or other interference with ecosystems or the biosphere has to prove to a certain degree of certainty that this interference is harmless. The precondition is

---

74 *C. Calliess* (note 7), 1730; VGH Kassel, NVwZ 1997, 89 and NVwZ 1995, 1010, at 1014; likewise OVG Lüneburg, NVwZ 1994, 390 and OVG Münster, NVwZ 1993, 1116.

75 *C. Calliess* (note 7), 1730; VGH Kassel, NVwZ 1995, 1010, at 1014 *et seq.*; different though VGH München, NVwZ 1994, 919, at 921.

76 *C. Calliess* (note 7), 1730; VGH Kassel, NJW 1990, 336 *et seq.*; VG Gelsenkirchen, ZUR 1993, 119 *et seq.*; different though VGH Kassel, NVwZ, 1995, 1010 (1014 *et seq.*).

77 *C. Calliess* (note 7), 1730; *R. Wahl/J. Masing*, JZ 1990, 553.

78 *C. Calliess* (note 7), 1730; *K. Schachtschneider* (note 38), 81, at 120 *et seq.*; *T. O'Riordan/J. Cameron/A. Jordan*, The Evolution of the Precautionary Principle, in: O'Riordan/Cameron/Jordan, Re-interpreting the Precautionary Principle, 2001, 9, at 20.

79 See *C. Calliess* (note 7), 1731 with further references.

that there are concrete and plausible hypotheses about the causal relationship concerning individual risk sources. In a nutshell, a legal doctrine has evolved containing a rebuttable presumption of dangerousness (*widerlegbare Gefährlichkeitsvermutung*), which the causer of a risk has to rebut in order to be granted an authorization.[80]

3. The Draft of a General Environmental Code

Apart from the above mentioned definition of the precautionary principle, the legal expert draft of a General Part of an Environmental Code (*UGB-AT*), which has, however, not entered into force, introduces risk as a legal term.[81] According to § 1 UGB-AT, the statute aims at the protection of the environment including the mitigation of environmental risks and the defence against environmental dangers. § 2 (6) UGB-AT defines an environmental risk as the possibility of an occurring environmental degradation, as far as it is not excluded as a matter of common sense. Environmental danger is the environmental risk which, when taking account of the probability of its occurrence and the potential damage, is not acceptable. § 72 UGB-AT contains a general clause for administrative action according to which the authorities may take measures if an environmental danger or an environmental risk exists. While the administration is obliged to act in cases of an existing danger, it is merely authorized to do so in the case of an environmental risk. Risk as a legal term includes both situations where the necessary probability is not achieved and situations of uncertainty.[82]

4. The Federal Pollutants Control Act

The idea of precautionary action is strongly manifested in the provisions on pollutants control, in particular in §§ 1, 4 (1) 1 and 5 (1) Nr. 2 of the Federal Pollutants Control Act (*Bundesimmissionsschutzgesetz* –

---

[80] *C. Calliess* (note 7), 1731; *E. Rehbinder*, Grenzen und Chancen einer ökologischen Umorientierung des Rechts, 1989, 10 *et seq.*; *A. Reich*, Gefahr – Risiko – Restrisiko. Das Vorsorgeprinzip am Beispiel des Immissionsschutzrechts, 1989, 201 *et seq.*; *G. Lübbe-Wolff* (note 2), 47, at 64 *et seq.*

[81] *C. Calliess* (note 1), 166.

[82] *C. Calliess* (note 1), 166 *et seq.*

BImSchG).[83] § 1 BImSchG names precaution against harmful effects on the environment as one of the central purposes of this statute. § 4 (1) 1 BImSchG requires permissions for installations which by their structure or operation are particularly capable of generating harmful environmental effects, or of endangering, causing disturbance or considerable inconvenience to the public or neighbourhood. § 5 (1) Nr. 2 formulates a precautionary requirement for the field of clean air, which has to be safeguarded when setting up and operating installations, in particular by measures of emission control on the basis of the technical *status quo*.[84] This provision has been amended by the so-called *Artikelgesetz* dealing with precaution against "various dangers" and an obligation to prevent accidents that do not qualify as dangers.[85] § 5 (1) Nr. 1 BImSchG contains an absolute protective duty against the expected emissions within the range of an installation.[86] This is put into concrete terms by the Technical Instruction concerning Air (*TA Luft*).[87] The administration has to take these criteria into consideration when granting operation permits.[88] However, it appears to be quite undisputed that § 5 (1) 1 Nr. 1 BImSchG is rather dealing with dangers than with precautionary measures, since the wording covers "harmful effects and other dangers", while Nr. 2 expressly deals with "precaution".[89] § 3 (6) BImSchG defines the technical state of the art as a state of advanced procedures, installations or modes of operation.[90] The Federal Constitutional Court considers the yardstick concerning what is allowed or mandatory to have shifted towards the frontier of technical development, whereas the aspects of a general recognition and practical suit-

---

[83] See for example *G. Günther* (note 4), 36 *et seq.*; *S. Marr/A. Schwemer* (note 1), 136; on the mentioning of the precautionary principle in the regulations (*Bundesimmissionsschutzverordnungen*) that put the statute in concrete terms see for example *A. Wahlfels*, (note 72), 653 *et seq.*; *A. Begemann/J. Vogel*, Auswirkungen der novellierten Verordnung über Großfeuerungs- und Gasturbinenanlagen auf bestehende Raffineriestandorte, NVwZ, 2005, 632 *et seq.*

[84] *C. Calliess* (note 1), 182.

[85] *S. Marr/A. Schwemer* (note 1), 137.

[86] *S. Calliess* (note 1), 182 *et seq.*

[87] *C. Calliess* (note 1), 182 *et seq.*; *S.Marr/A. Schwemer* (note 1), 138; *R. Wahl/I. Appel* (note 3), 147 *et seq.*

[88] *S. Marr/A. Schwemer* (note 1), 136.

[89] *S. Marr/A. Schwemer* (note 1), 137.

[90] *C. Calliess* (note 1), 182.

ability of a technology alone are not decisive for determining the state of the art.[91]

The BImSchG does not only deal with risk precaution, but also with resource preservation, expressing the idea of an economical use of resources. The Federal Administrative Court considers the precautionary principle to be a long-term concept geared towards a uniform and equitable implementation, thus stressing the idea of planning and economic use.[92] It is questionable whether the precautionary principle includes a duty of risk minimization, but there is certainly no unlimited duty of that kind.[93] The *TA Luft* mostly applies emission standards according to the technical state of the art, while a test of risk proportionality is particularly used on dangerous substances.[94] The Federal Administrative Court has ruled that the mere allocation of narrowly defined individual emission targets contravenes the precautionary principle: Emission standards must, through their equitable application on all emitters, enforce air quality standards, which, notwithstanding concrete emission situations, generally justify the expectation to avoid dangerous situations potentially creating harmful environmental effects.[95]

5. The Atomic Energy Act

The precautionary principle is furthermore dealt with by the Atomic Energy Act (*Atomgesetz – AtG*).[96] According to § 7 (2) Nr. 3 AtG the authorization for a nuclear power plant may only be granted if necessary precautionary measures against damage potentially resulting from the setting up and the operation of an installation are taken.[97] Before the *Whyl decision* of the Federal Administrative Court, an authorization concerning nuclear power plants was granted on the basis of the notion

---

[91] BVerfGE 49, 89, at 135; *C. Calliess* (note 1), 182.

[92] BVerwG, NVwZ 1995, 994, at 995; as a further decision on § 5 I Nr. 1 see VGH Baden-Württemberg, DÖV 2002, 871 *et seq.*

[93] *C. Calliess* (note 1), 185.

[94] *C. Calliess* (note 1), 185.

[95] *C. Calliess* (note 1), 185.

[96] *G. Roller*, „Auslegungsüberschreitende Ereignisse" und atomrechtliche Schadensvorsorge, VA 2004, 63 *et seq.*

[97] *C. Calliess* (note 1), 186; for the debate on the exact meaning of the scope "precaution against damages" see *G. Günther* (note 4), 42 *et seq.*

of danger prevention instead of risk precaution.[98] A well-determined concept of possible cases of emergency exceeding the capacity of the installation (*Auslegungsstörfälle*) was created and established on the substatutory level.[99] Since then, it has been firmly established that § 7 (2) Nr. 3 AtG in fact deals primarily with precaution against damages.[100] While the provision does not distinguish between danger prevention and precaution, it differentiates between compulsory precaution including classical danger prevention and discretionary precaution for optimization purposes.[101]

The Federal Administrative Court has explicitly rejected the application of the danger terminology as emanating from police law.[102] In the *Stade decision* the Federal Administrative Court still ruled that the precautionary principle as laid down in atomic energy law only protects against probable dangers and risks.[103] By contrast, in the *Whyl decision* the Court decided: "Precaution" as used in § 7 (2) Nr. 3 AtG does not allow delaying protective measures until a given current situation will, according to the doctrine of causality, lead to other harmful situations and events.[104] The administration must not rule out potential damage simply because certain causes and connections can neither be confirmed nor negated, so that they do not constitute a danger, but rather a suspected danger or a potential for concern (*Besorgnispotential*).[105] However, the legislator is not required to enact laws precluding an endangering of individual rights with absolute certainty, as long as these dangers or risks may be precluded on the basis of common sense and thus need to be accepted as socially acceptable burdens by all citizens.[106] This was

---

98 *G. Roller* (note 96), 64 *et seq.*

99 *G. Roller* (note 96), 65.

100 *C. Calliess* (note 1), 186.

101 *C. Calliess* (note 1), 187; *S. Marr/A. Schwemer* (note 1), 139.

102 *G. Roller* (note 96), 67; BVerwGE 72, 300, at 315; a different stance was taken by the lower instance court, VGH Mannheim, DVBl. 1982, 967.

103 BVerwGE 61, 256, 264 *et seq.*, 267; *E. Rehbinder*, Prinzipien des Umweltrechts in der Rechtsprechung des Bundesverwaltungsgerichts: das Vorsorgeprinzip als Beispiel, in: Franßen, Everhardt et al. (eds.): Bürger – Richter – Staat – Festschrift für Horst Sendler, Präsident des BVerwG zum Abschied aus seinem Amt, 1991, 269 *et seq.*, 274.

104 BVerwGE 72, 300, at 315 *et seq.*; see further *E. Rehbinder* (note 103), 274.

105 BVerwGE 72, 300, at 315 *et seq.*

106 BVerwGE 72, 300, at 315 *et seq.*

confirmed in the *Krümmel decision* by the Federal Administrative Court which confirmed a permit on the ground that the potential leukaemia risk in the surroundings of the power plant was too remote.[107] Finally, the Court ruled that as opposed to § 5 (1) Nr. 2 BImSchG, § 7 (2) Nr. 3 AtG entails *locus standi* even for claimants not directly affected by a decision.[108]

The administration had to implement the above mentioned case law by adapting its safety concept through various forms of sub-statutory provisions.[109] The result of this is a four-level concept, level one and two dealing with interference prevention, level three dealing with interference control and level four with risk reduction concerning accidents exceeding the capacity of the installation.[110] Since all four levels deal with danger *and* risk precaution, it appears very difficult to draw a clear line between the two terms.[111]

6. The Gene Technology Act

The Gene Technology Act (*Gentechnikgesetz – GenTG*) deals with the risk potential of gene technology and the release of organisms modified through it. § 1 Nr. 1 GenTG stresses the necessity of precautionary measures for the protection of life and health of human beings, animals and plants against potential risks. § 6 (1) GenTG adds that precautionary measures have to be applied on the basis of a risk assessment. While § 6 (1) and (2) GenTG differentiate between risk precaution and danger prevention,[112] this distinction is not always upheld in the other provisions such as §§ 7 (1) and § 16 (1) Nr. 3 GenTG.[113] For example § 7 (1) simply distinguishes between "no risks, small risks, moderate risks and high risks".[114] As a consequence of an assessment by a commission of experts on biological safety a high precautionary standard was estab-

---

[107] *S. Marr/A. Schwemer* (note 1), 142.

[108] *S. Marr/A. Schwemer* (note 1), 139.

[109] *G. Roller* (note 96), 70 *et seq.*; *Ossenbühl* (note 9), 65.

[110] *G. Roller* (note 96), 70.

[111] *G. Roller* (note 96), 82 *et seq.*

[112] *S. Marr/A. Schwemer* (note 1), 140.

[113] *C. Calliess* (note 1), 189; *G. Günther* (note 4), 38 *et seq.*

[114] *S. Marr/A. Schwemer* (note 1), 140 *et seq.*

lished granting (as opposed to the Federal Pollutants Control Act) *locus standi* even to claimants not directly affected by a measure.[115]

7. The Environmental Impact Assessment Act

§ 1 of the Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung – UVPG*) states that certain projects require, for purposes of environmental protection, an assessment of their effects on the environment at an early stage and in an all-encompassing way. According to § 2 (1) 2 UVPG, all effects of projects concerning human beings, animals and plants, soil, water, air, climate and landscape (including the interactions of each of those) have to be assessed. The environmental impact assessment (*Umweltverträglichkeitsprüfung*) must be integrated into existing administrative procedure thus constituting a part of all decision-making processes on the admissibility of specific projects (§ 2 (1) 1 UVPG).[116] The approach of integrated environmental protection is based on the notion of a stable ecosystem and specific systems contained in it, such as water, air, etc.[117] The UVPG is strongly influenced by European law, *e.g.* by Directive 86/337 EEC on the assessment of the effects of certain public and private projects on the environment as modified by Directive 97/11 EC.[118]

8. Consumer Health Protection

The field of consumer health protection is strongly dominated by European law, *i.e.* by Regulation 178/2002 EC dealing with food (to be applied by the national authorities and courts since 1/1/2005), Directive 88/378 EEC dealing with the safety of toys, and Directive 2001/95 EC dealing with the safety of products (both implemented by the Act on Tools and Products Safety in 2004).[119] Additives for food are regulated

---

[115] *S. Marr/A. Schwemer* (note 1), 140 *et seq.*

[116] *C. Calliess* (note 1), 189.

[117] *C. Calliess* (note 1), 190.

[118] *G. Schmidt-Eichstaedt*, Die Umweltverträglichkeitsprüfung vor der Reform: die Folgen für das Bau- und Planungsrecht, UPR 11+12 2000, 401 *et seq.*

[119] *U. Gundert-Remy/K. Henning* (note 7), 116 *et seq.*; see furthermore Regulation 1642/2003.

by Directive 89/107 EEC, while sweeteners and colourings are specifically dealt with by Directives 94/36 and 96/8 EC.[120] Regulation 178/2002 was implemented by the creation of a new Food and Feed Products Code (*Lebens- und Futtermittelgesetzbuch*).[121] All the pertinent regulations and directives, as well as the measures implementing them in German law, deal with the mitigation of risks, dangers and hazards to consumer health, *e.g.* by licensing or notification procedures, by prohibitions, standard-setting, threshold values and by limited authorizations.[122] Thus Regulation 178/2002 contains elements of risk analysis and, in Art. 7, it establishes the precautionary principle.[123] Furthermore, duties of notification, warning and withdrawal of products are mentioned.[124] From a scientific point of view, the requirements of proof should be much lower in cases of risks that may lead to a severe, sometimes even irreversible damage to human health.[125] In such cases the precautionary principle needs to be stressed in a particular way.

9. The Chemicals Act

§§ 1 and 17 of the Chemicals Act (*Chemikaliengesetz – ChemG*) deal with precautionary action. Producers of new substances are obliged to register and, under §§ 6 and 7 ChemG, to pass on information concerning various issues such as the description of substance features, procedures of evidence, potentially harmful effects emanating from the use of substances or other known effects on human beings or the environment.[126] By the passing of the Chemicals Act in 1980 the legislator had consciously decided against an authorization procedure and in favour of a mere registration procedure, thus balancing responsibility between

---

120 *U. Gundert-Remy/K. Henning* (note 7), 117.

121 *W. Schroeder/M. Kraus*, Das neue Lebensmittelrecht – Europarechtliche Grundlagen und Konsequenzen für das deutsche Recht, EuZW, 2005, 423 *et seq.*

122 *U. Gundert-Remy/K. Henning* (note 7), 117 *et seq.*; for a definition of the term "hazard" see *Gelbert* (note 22), 25 *et seq.*

123 For the exact requirements see *W. Schroeder/M. Kraus* (note 121), 424.

124 *W. Schroeder/M. Kraus* (note 121), 426.

125 *U. Gundert-Remy/K. Henning* (note 7), 127.

126 *M. Brenner/A. Nehrig* (note 19), 1027.

the producers and the State.[127] According to § 17 ChemG, prohibitions and restrictions may be issued by regulation, as far as this is necessary to fulfil the purposes of § 1, so that the burden of argumentation rests primarily with the State.[128] However, with the introduction of the precautionary principle in 1990 a shift of the burden of proof to the producers was achieved, so that the State merely remains responsible for arguing a *suspected* danger.[129] Risk assessment by the administration still has to be carried out, but this does not amount to a comprehensive assessment anymore.[130]

Like the area of consumer health protection, chemicals law is strongly influenced by European law, which has recently begun to undergo major reforms.[131] Thus, German chemicals law, which has already been influenced by Directives 67/548, 88/379, 76/769 EEC and by Regulation 793/93, will be governed by a new Community Directive based on Art. 249 (2) EC and creating a direct effect in the member States.[132] The core of the Commission White Paper of February 2001 is the setting up of a system called REACH (Registration, Evaluation and Authorization of Chemicals), which will transfer the tasks of risk assessment and risk management mainly to the producers and importers as well as to the so-called downstream users of substances.[133] By the introduction of an admission procedure for potentially particularly hazardous substances (*besonders besorgniserregende Substanzen*) the burden of proof will be shifted towards the producers.[134] Contrary to the present chemicals law in Germany, the national authorities will not be competent to deal with the elements of REACH, so that the issue of national risk management will almost completely be shifted to the Community level.[135]

---

[127] *H. von Holleben/G. Schmidt*, Beweislastumkehr im Chemikalienrecht, NVwZ 2002, Heft 5, 532 *et seq.*

[128] *H. von Holleben/G. Schmidt* (note 127), 534.

[129] *H. von Holleben/G. Schmidt* (note 127), 534.

[130] *H. von Holleben/G. Schmidt* (note 127), 534.

[131] See *C. Calliess* (note 1), 399 *et seq.*; *H. von Holleben/G. Schmidt* (note 127), 532 *et seq.*

[132] *B. Stüer* (note 7), 1535.

[133] *B. Stüer* (note 7), 1535; *H. von Holleben/G. Schmidt* (note 127), 532.

[134] *B. Stüer* (note 7), 1535.

[135] *B. Stüer* (note 7), 1535; *H. Holleben/G. Schmidt* (note 127), 533 *et seq.*

10. The Fight against Terrorism and Disaster Management

The Anti-Terrorism Act (*Terrorismusbekämpfungsgesetz*) was enacted on 9 January 2002 as a reaction to the attacks of 11 September 2001.[136] It is debatable to what extent this Act may be understood as a measure of danger prevention or rather as precautionary action.[137] After the end of the East-West conflict the field of civil defence had lost a lot of importance and substance.[138] However, due to the fight against terrorism, the occurrence of global pandemics and other transboundary threats it is currently experiencing a kind of "renaissance".[139] Civil defence is divided between federal, State and local authorities and is geared towards cooperation with foreign authorities.[140] It deals with disaster prevention and disaster management, which shows that the precautionary principle plays an important role.[141]

Generally, one may differentiate between manageable and non-manageable disasters.[142] Four phases of civil defence can be distinguished: disaster analysis, disaster assessment, disaster governance, and disaster communication.[143] However, there is no clear administrative pattern for the recognition and management of disasters.[144] Furthermore, the competencies between the different national and international authorities are not clearly divided.[145] Therefore, a better information management is necessary, both within the administration and between the administration and civil society.[146]

---

136 See *W. Hetzer*, Terrorabwehr im Rechtsstaat, ZRP 2005, Vol. 4, 132 *et seq.*

137 *W. Hetzer* (note 136), 132 *et seq.*

138 *R. Stober/S. Eisenmenger*, Katastrophenverwaltungsrecht – Zur Renaissance eines vernachlässigten Rechtsgebiets, NVwZ 2005, Vol. 2, 121 *et seq.*

139 *R. Stober/S. Eisenmenger* (note 138), 121 *et seq.*

140 *R. Stober/S. Eisenmenger* (note 138), 121 *et seq.*

141 *R. Stober/S. Eisenmenger* (note 138), 121 *et seq.*

142 *R. Stober/S. Eisenmenger* (note 138), 127.

143 *R. Stober/S. Eisenmenger* (note 138), 129.

144 *R. Stober/S. Eisenmenger* (note 138), 121.

145 *R. Stober/S. Eisenmenger* (note 138), 121.

146 *R. Stober/S. Eisenmenger* (note 138), 130; on the concept of an administrative partnership as a means of cooperative security precaution see *R. Pitschas*, Neues Verwaltungsrecht im partnerschaftlichen Rechtsstaat? – Zum Wandel von Handlungsverantwortung und -formen der öffentlichen Verwaltung am

11. Other Areas

Duties of environmental precaution also play a role under the Environmental Liability Act (*Umwelthaftungsgesetz – UmweltHG*). According to § 6 (3) UmweltHG the fulfilment of those duties has to be proven by the operator of installations potentially causing damage, in order to avoid the presumption of having caused the damage.[147]

While the term of precaution is nowhere mentioned in the Water Budget Act (*Wasserhaushaltsgesetz – WHG*), §§ 1a, 7 a I WHG come very close to realizing this principle by keeping water pollution as low as possible, by requiring the protection of the body of water in its ecological and in its usage function and by focusing on the technical state of the art.[148]

A further area is waste disposal dealing with the precautionary principle in §§ 4 (1), 22 of the Economic Cycle and Waste Act (*Kreislaufwirtschafts- und Abfallgesetz – KrW-/AbfG*) and in § 5 (1) Nr. 3 BImSchG.[149]

§ 7 of the Federal Soil Protection Act (*Bundesbodenschutzgesetz – BbodSchG*) requires the enactment of precautionary measures against the occurrence of harmful changes to the soil.[150]

Finally, the field of nature conservation shall be mentioned, where the precautionary principle is found in §§ 13 and 14 Federal Nature Conservation Act (*Bundesnaturschutzgesetz – BNatSchG*).[151]

Beispiel der Vorsorge für innere Sicherheit in Deutschland, DÖV 2004, 231 *et seq.*

147 *G. Günther* (note 4), 197 *et seq.*

148 *G. Günther* (note 4), 40 *et seq.*; *C. Calliess* (note 1), 192 *et seq.*

149 *C. Calliess* (note 7), 1726; *C. Calliess* (note 1), 193 *et seq.*

150 *G. Günther* (note 4), 37 *et seq.*

151 *C. Calliess* (note 1), 194 *et seq.*

V. Consequences for the Precautionary Principle as Applied in Administrative Law

In the light of the provisions analysed above the implementation of the precautionary principle by the administration shall be scrutinized in greater detail.

1. The Phases of Risk Administration

Risk administration is rooted in the traditional rules on danger prevention.[152] However, while danger prevention deals with the prevention of recognizable dangers, risk administration involves the task of taking decisions on the basis of uncertainty, which has clear consequences for the decision-making process.[153] From a scientific point of view, three stages of risk analysis can be distinguished: risk assessment, risk management and risk communication.[154] While risk communication is "the exchange of information and opinions concerning risk and risk related factors" and thus presents an aspect which is relevant to all phases of risk administration,[155] risk assessment and risk management constitute different phases of risk administration and will therefore be discussed in greater detail in the following section.

a) Risk Assessment

The first step of risk assessment is risk analysis, which is regulated by specific provisions usually providing for far-reaching duties of cooperation imposed on the enterprises concerned and a right of information granted to the authorities.[156] Second, the authorities need to assess the

---

[152] *M. Brenner/A. Nehrig* (note 19), 1027.

[153] *M. Brenner/A. Nehrig* (note 19), 1027.

[154] *U. Gundert-Remy/K. Henning* (note 7), 122 *et seq.*; for a likewise differentiation by the EU-Commission see *S. Werner* (note 4), 338 *et seq.*

[155] Definition given by the FAO/WHO 1998 Application of Risk Communication to Food Standards and Safety Matters, Report of the Joint FAO/WHO Expert Consultation, Rome, Italy, 2-6 February 1998; *U. Gundert-Remy/K. Henning* (note 7), 125.

[156] *M. Brenner/A. Nehrig* (note 19), 1027.

analysed risk.[157] Due to the principles of equality and proportionality, the administration is held to rely on all obtainable sources of recognition[158] and to carry out a comparative risk assessment.[159] The yardstick for comparison can be different technical concepts, types of installations, energy sources or materials, etc.[160] Uncertainty and lack of information lead to rather complex processes of information gathering and assessment, as well as to difficult problems of balanced decision-making, causing an increasing challenge for the administration.[161]

Risk administration also has to deal with the danger of overlooking existing dangers. The increasing dependence of administrative decisions on scientific assessments has led to the creation of specific scientific authorities serving the administration of cooperative decision-making systems.[162] They are supposed to integrate external know-how into the decision-making procedure and to focus the flow of information.[163] One recent example is the setting up of the Federal Institute for Risk Assessment, which assesses and communicates risks in the areas of consumer protection and food security.[164] The related Federal Agency for Consumer Protection and Food Security considers options for action under its mandate.[165] Similar competencies are vested in the Federal Agency for Pharmaceutical and Medical Products, the Federal Agency for Protection against Radiation, the Federal Agency for Protection in the Workplace and Labour Medicine and the Federal Health Office, all of which have functions of central coordination, assessment and decision-making and are inter-positioned between the regular authorities and private actors embarking on potentially hazardous activities.[166] This allows feeding external knowledge of private companies and scientific and technical experts into the administrative procedure. A further instrument of connecting expertise and administrative decision-making is

---

157 *M. Brenner/A. Nehrig* (note 19), 1027.

158 *U. Di Fabio* (note 2), 820 *et seq.*

159 *M. Brenner/A. Nehrig* (note 19), 1027; *U. Di Fabio* (note 2), 824 *et seq.*

160 *M. Brenner/A. Nehrig* (note 19), 1027; *U. Di Fabio* (note 17), 566, at 573.

161 *M. Brenner/A. Nehrig* (note 19), 1027.

162 *M. Brenner/A. Nehrig* (note 19), 1028.

163 *M. Brenner/A. Nehrig* (note 19), 1028.

164 *M. Brenner/A. Nehrig* (note 19), 1028.

165 *M. Brenner/A. Nehrig* (note 19), 1028.

166 *M. Brenner/A. Nehrig* (note 19), 1028.

the development of so-called safety philosophies, such as the above-described concept existing for atomic energy law.[167]

b) Risk Management: Wide Margins of Appreciation and Discretion

Risk management means taking a decision on how to deal with the assessed risk.[168] Since the statutory provisions often contain undefined legal terms and sometimes a whole array of possible legal consequences, they leave the administration with a lot of scope both as to the ascertaining and assessment of facts (margin of appreciation) and the choice of the adequate decision (margin of discretion).[169] In order to be able to make vague provisions operative in the individual case, a high degree of scientific and technological knowledge is required.[170] The executive thus resorts increasingly to the sub-statutory regulation of risk-standards, *i.e.* administrative regulations putting the statutes in concrete form (*normkonkretisierende Verwaltungsvorschriften*).[171] These are standardising administrative regulations, which – as opposed to other regulations that constitute mere internal administrative law without external effect – are meant to be binding for the courts within their confinements, so that the administration and the courts merely have to check whether these standards are still up to date.[172] Thus, judicial supervision of these norms is limited to the correct application of the regulation, without extending to its contents.[173]

---

[167] *A. Roßnagel* (note 63), 79 *et seq.*

[168] *U. Gundert-Remy/K. Henning* (note 7), 124 *et seq.*

[169] *M. Brenner/A. Nehrig* (note 19), 1029; *Stoll* (note 3), 325; *A. Roßnagel* (note 63), 79 *et seq.*; BVerfGE 49, 89, at 135; BVerwGE 61, 256, at 263; 72, 300, at 316; 80, 207, at 217.

[170] *M. Brenner/A. Nehrig* (note 19), 1028.

[171] *M. Brenner/A. Nehrig* (note 19), 1029.

[172] *M. Brenner/A. Nehrig* (note 19), 1029, who mention the example of an administrative regulation passed on the basis of § 48 BImSchG such as the technical instruction concerning air (TA Luft); on the binding effect of norm-specifying administrative regulations see *K. Faßbender*, Neues zur Bindungswirkung normkonkretisierender Verwaltungsvorschriften, UPR 2002, 15 *et seq.*; *R. Uerpmann*, Normkonkretisierende Verwaltungsvorschriften im System staatlicher Handlungsformen, Bay.VBl. 2000, 705 *et seq.*

[173] *M. Brenner/A. Nehrig* (note 19), 1029.

A further means of filling gaps left in statutory regulation is to establish decision-making procedures relying on experts' opinions, or to institutionalise methods and pluralist interests.[174] Judicial review of the resulting decisions is, according to one view, again limited in that it has to allow a margin of appreciation by the administration.[175] The exact limits of a reduced judicial review, however, are highly disputed in German administrative law und require a case-by-case analysis.[176] Since the *Whyl decision* of the Federal Administrative Court it has become clear at least for atomic energy law that the authorities bear the responsibility for risk assessment.[177] This concerns in particular its content, while judicial review may check the data gathering and the question whether the assessment has been sufficiently careful.[178] In other fields, *e.g.* the law on pollutants control, the legal situation is considerably less clear.[179]

2. Specific Requirements of Risk Administration

The rule of law demands that, particularly when individual rights are concerned, the high degree of leeway granted to risk administration is compensated by certain formal requirements.

---

[174] *M. Brenner/A. Nehrig* (note 19), 1029, mentioning the example of § 25 VII of the Pharmaceutical Products Code (*Arzneimittelgesetz – AMG*), which determines the setting up of commissions by the competent higher federal authorities which are supposed to deal with products not requiring a prescription and which may participate in the decision-making processes.

[175] *M. Brenner/A. Nehrig* (note 19), 1029; *U. Di Fabio*, Das Arzneimittelrecht als Repräsentant der Risikoverwaltung, Die Verwaltung 1994, 357; different though BVerwGE 81, 12, at 17.

[176] See for example *M. Brenner/A. Nehrig* (note 19), 1029.

[177] *M. Brenner/A. Nehrig* (note 19), 1029 *et seq.*; BVerwGE 106, 115 *et seq.*

[178] *M. Brenner/A. Nehrig* (note 19), 1030; BVerwGE 106, 115 *et seq.*

[179] *M. Brenner/A. Nehrig* (note 19), 1030; *M. Ohms*, Behördliche Risikoabschätzung im Lichte von „Artikelgesetz" und Störfallverordnung, UPR 2001, 87 *et seq.*; concerning gene technology see *R. Kroh*, Risikobeurteilung im Gentechnikrecht – Einschätzungsspielraum der Behörde und verwaltungsgerichtliche Kontrolle, DVBl. 2000, 102 *et seq.*

a) Requirement of Argumentation and Clear Determination

One of these requirements is the necessity of a particularly detailed explanation of the decisions.[180] The more leeway is granted to the legislator or the competent authorities, the more substantial the argumentation needs to be.[181] The explanation needs to detail the reasons, the purpose and the form of precautionary action.[182] The argumentation may, to the available extent, rely on the technical *status quo* and the maintenance of certain standards or threshold values.[183] Furthermore, for reasons of legal certainty, precautionary measures need to be clearly determined.[184]

b) Requirements of Proportionality and Risk Comparison

In the field of risk administration, the principle of proportionality gains a special importance.[185] However, due to the existing factual uncertainty it is rather difficult to apply the proportionality test on risk assessment.[186] The Federal Administrative Court has tried to solve this problem by applying the so-called "expanded proportionality test", which is a weaker and more generalized version of the normal proportionality test.[187] According to the Federal Constitutional Court the aptness of a measure is sufficiently shown if it is potentially able in an abstract way to achieve the desired aim.[188] This allows for an overall assessment *e.g.*

---

[180] *U. Di Fabio* (note 17), 573; *F. Ossenbühl* (note 9), 167; for the necessity to give reasons for discretionary decisions see generally *R. Dolzer*, Zum Begründungsgebot im geltenden Verwaltungsrecht, DÖV 1985, 9 *et seq.*; concerning the consequences for legal review see *R. Dechsling*: Rechtsschutz und Begründungspflicht, DÖV 1985, 714 *et seq.*; see further *U. Di Fabio* (note 2), 827 *et seq.*

[181] *U. Di Fabio* (note 17), 573.

[182] *U. Di Fabio* (note 17), 573; *P. Stoll* (note 3), 325; *C. Calliess* (note 1), 207 *et seq.*

[183] *U. Di Fabio* (note 17), 574.

[184] *F. Ossenbühl* (note 9), 167.

[185] *U. Di Fabio* (note 2), 830; *F. Ossenbühl* (note 9), 167; *G. Lübbe-Wolff* (note 2), 62 ff; *S. Marr/A. Schwemer* (note 1), 139.

[186] *U. Di Fabio* (note 2), 831.

[187] *U. Di Fabio* (note 2), 831; *F. Ossenbühl*, NVwZ 1986, 161 (168).

[188] BVerfGE 67, 157, at 175.

of annual emissions in Germany, abstracting from the circumstances of the concrete case.[189] Thus, the proportionality test is basically reduced to a mere equal treatment check.[190] Long-term concepts of protection geared towards their uniform and continuous implementation thus replace the proportionality test in the individual case.[191] In addition to the proportionality test, some authors advocate the comparison of different risks as a means of justification of precautionary action.[192]

c) Requirement of Establishing Accountability

The administration has to establish the existence of a link of accountability. Since the classical causality model of danger prevention does not function here, the administration is left with a rather wide margin of discretion.[193] Thus, a permission may be rejected on the grounds that the addressee of the prohibition is emitting substances or otherwise undertaking an activity which is generally capable of endangering the fulfilment of the precautionary aim.[194]

d) Requirement of Administrative Review

One important feature of risk decisions is their provisional character.[195] If the State is allowed to limit the freedom of action on the basis of an uncertain factual situation, it has to reconsider its decision when better knowledge becomes available.[196] This includes a revision of so-called "experimental law".[197] The Federal Constitutional Court has decided in the so-called *Werkverkehrsentscheidung* and the *Mitbestimmungsentscheidung* that the legislator may enact experimental laws and evaluate

---

189 *Salzwedel* (1983), 27 *et seq.*; *F. Ossenbühl* (note 9), 167.

190 *F. Ossenbühl* (note 9), 168.

191 *F. Ossenbühl* (note 9), 168.

192 See *P. Stoll* (note 3), 326; *U. Di Fabio* (note 2), 824 *et seq.*

193 *C. Calliess* (note 1), 242 *et seq.*

194 *C. Calliess* (note 1), 242 *et seq.*; on the function of permissions see generally *R. Wahl/G. Hermes/K. Sach* (note 62), 217 *et seq.*

195 *U. Di Fabio* (note 2), 823.

196 *U. Di Fabio* (note 2), 823.

197 *U. Di Fabio* (note 2), 823; *M. Kloepfer* (note 12), 91 *et seq.*; *H. Horn*, Experimentelle Gesetzgebung unter dem Grundgesetz, 1989, 20 *et seq.*

the experiences gained through them in adequate periods.[198] Since a clear-cut purpose of the rights limitation cannot be defined due to the existing uncertainty, balancing the importance of that purpose against the form and degree of limitation is a difficult enterprise. In the case of emission control, the Federal Administrative Court has ruled that the degree of precaution needs to be proportional to the risk potential of emissions which the precautionary measure intends to prevent.[199] While this is certainly a reduction of judicial control intensity, it is a necessary corollary of an effective implementation of the precautionary principle.[200]

VI. The Future

In spite of a promising expansion of the precautionary principle in various fields of law, there are some deficits remaining in the present forms of risk regulation and administration. These have been addressed by the Risk Commission:[201] First, it suggests the clear separation of risk estimation, risk assessment and risk management.[202] Second, a special importance is given to risk communication, *i.e.* information, dialogue and participation in decision-making.[203] Third, the setting up of a risk council with functions of initiation, coordination, negotiation, information and advice is proposed.[204] Fourth, a legal draft for standard-setting in the field of human health and environmental protection is suggested, which settles important questions of terminology and establishes material criteria for standard-setting.[205] Furthermore the draft should set up

---

198 BVerfGE 16, 147, at 188; 50, 290, at 335.

199 *F. Ossenbühl* (note 9), 168.

200 For a discussion of this issue see *F. Ossenbühl* (note 9), 168.

201 *M. Böhm* (note 3), 609 *et seq.*

202 *M. Böhm* (note 3), 609 *et seq.*

203 *M. Böhm* (note 3), 609 *et seq.*

204 *M. Böhm* (note 3), 609 *et seq.*; on the establishment of scientific committees in relation to legal certainty and the precautionary principle see further *M. Montoro Chiner*, Rechtssicherheit, Vorsorgeprinzip und wissenschaftliche Ausschüsse, ZÖR 2004, Vol. 59, 1 *et seq.*; the setting up of such a council might help to institutionalize necessary processes of learning how to deal with risks, see *A. Roßnagel* (note 63), 84 *et seq.*

205 *M. Böhm* (note 3), 609 *et seq.*

basic structures for decision-making, such as the estimation and assessment of risks, the documentation of all stages of procedure, as well as giving reasons for the decisions and displaying the scientific background including remaining insecurity; finally the applied standards and their reasons should be published and the public should be integrated in the decision-making process.[206] The implementation of the precautionary principle through risk administration could still be improved considerably in terms of coherence, effectiveness, efficiency and last, but not least legitimacy of decision-making. It remains to be seen to what extent the useful suggestions by the Risk Commission will be implemented. Obligations such as those laid down in Art. 8 of the Aarhus Convention requiring the authorities to strive towards a better participation of the public in the drafting of legal standards, and in the EC-Directive issued in 2003/4 concerning public access to environmental information may help to create the necessary impetus for these changes.[207]

[206] *M. Böhm* (note 3), 609 *et seq.*; on the necessity to subdue technical norms to greater democratic procedural requirements see also *E. Denninger*, Verfassungsrechtliche Anforderungen an die Normsetzung im Umwelt- und Technikrecht, 1990, 120 *et seq.*; *A. Roßnagel* (note 63), 83 *et seq.*; *R. Pitschas* (note 146), 231 *et seq.*

[207] See *M. Böhm* (note 3), 613.

Legal Means for Eliminating Corruption in the Public Service

*Sebastian Graf von Kielmansegg**

As in many countries, corruption is a matter of growing concern in Germany. It is especially corruption in the public service which is perceived as a potential menace for the rule of law and economic prosperity. However, one of the difficulties in dealing with this topic is that the precise meaning of "corruption" is unclear. In German legal language, "corruption" is not a technical term and does not appear in the definitions of the various criminal offences related to this topic. Some com-

* The author wishes to thank *Prof. Dr. Lothar Kuhlen* for his helpful comments and *Tina and Andreas Lach* for their advice on the subtleties of the English language.

mentators suggest a wide understanding that covers any abuse of entrusted power for the sake of a personal advantage.[1] In a narrower sense, corruption means a situation where a person (especially an official) makes his conduct (especially a decision) the object of an exchange (especially the offer of some kind of personal advantage) although the rules of the underlying normative system do not permit such a deal.[2] It is this narrower sense of corruption, which will be used in this report.

I. The Factual and Legal Context

1. The Occurrence of Corruption in Germany – Spotlights and Statistics

A considerable number of scandals involving corruption have attracted the attention of the public during the last few years.[3] These instances as well as statistical evidence suggest that it is the level of local authorities which is affected most by corruption. Local authorities are responsible for granting numerous official permits, as well as for a large proportion of public procurement and other contracts. Moreover, they offer chargeable services such as water supply or waste disposal. All of these activities have attracted a considerable degree of corruption. The construction sector, including road construction, is of particular relevance in this context. Systematic bribery of officials in building authorities has been reported repeatedly in many municipalities. The most infamous example is Frankfurt am Main where in 1987 and the following years, it was revealed that virtually the complete building administration of the city was infected by corruption. One of the greatest corruption scandals in recent years concerned the waste disposal sector and the construction of waste incineration plants in Cologne and North Rhine-Westphalia.

---

[1] *E.g.* the NGO Transparency International, <http://www.transparency.de>.

[2] Cf. *R. Zimmerling,* Politische Korruption: begrifflich-theoretische Einordnung, in: *U. von Alemann* (ed.), Dimensionen politischer Korruption, 2005, 79.

[3] For an overall analysis of corruption in Germany see *B. Bannenberg,* Korruption in Deutschland und ihre strafrechtliche Kontrolle, 2002, 51 *et seq.*; *H.R. Claussen/ H. Ostendorf:* Korruption im öffentlichen Dienst, 2nd ed. 2002; *H. Fiebig/ H. Junker,* Korruption und Untreue im Öffentlichen Dienst, 2nd ed. 2004, 49 *et seq.*

Criminal statistics on corruption offences show that in recent years about one third of suspects on the donor side belonged to the construction sector, although in 2004 their number dropped to 11%.[4] On the recipient side, in the same year 11.2% of suspects were officials in building authorities;[5] 21.2% belonged to the water supply-sector,[6] and 25.1% to other local authorities.[7] 73% of investigated cases where the public administration was the target of corrupt activities concerned the placing of public contracts.[8] A further 8.5 % were aimed at the grant of official permits.[9]

In addition, a considerable number of corruption cases have troubled the health sector. Due to its very complex structures, its high degree of regulation and the enormous annual turnover, this sector offers a good breeding ground for corruption at different levels. It is estimated that possibly up to 3-10% of expenditure[10] in the health sector originate from corrupt or fraudulent activities. In 2004, 14.8% of suspects on the recipient side belonged to the health sector.[11] The most notorious example is the cardiac valve scandal *(Herzklappenskandal)* of the 1990s, which involved the large-scale use of overpriced medical products for heart operations.

---

4 *Bundeskriminalamt,* Bundeslagebild Korruption 2004, 38, available on <http://www.bka.de>. Figures of the preceding years: 18.3% in 2000; 30% in 2001; 32% in 2002; 34% in 2003.

5 *Ibid*., 33. Figures of the preceding years: 20.9% in 2000; 25.4% in 2001; 10.7% in 2002; 18.7% in 2003.

6 *Ibid*. Figures of the preceding year: 5.2% in 2002; 10.5% in 2003; not separately listed in the preceding reports.

7 *Ibid*. Figures of the preceding years: 17% in 2000; 7.6% in 2001; 6.4% in 2002; 13.6% in 2003.

8 *Ibid*., 29. Figures of the preceding years: 46.2% in 2000; 47.4% in 2001; 63.9% in 2002; 54% in 2003.

9 *Ibid*. Figures of the preceding years: 8% in 2000; 11% in 2001; 5.9% in 2002; 12.3% in 2003.

10 *Transparency Deutschland,* Transparenzmängel, Korruption und Betrug im deutschen Gesundheitswesen, 2005, 4, available on <http://www.transparency.de/fileadmin/pdfs/intern/AG_Gesundheit/Gesundheitspapier_Version_05.pdf>.

11 *Bundeskriminalamt,* Bundeslagebild Korruption 2004 (note 4), 30. Figures of the preceding years: 16.2% in 2000; 15.5% in 2001; 34.3% in 2002; 18.8% in 2003.

The assessment of corruption in higher politics at *Länder* or federal level has to be approached with some care. It seems that specific political decisions have only been (successfully) "bought" on rare occasions. In 2004, only 1.5% of investigated cases concerned corruption targeting the political level.[12] However, severe allegations of this kind have been raised in the context of at least two spectacular scandals. They concerned the export of armoured vehicles to Saudi Arabia and the sale of the East German *Leuna*-refinery and of the oil-company *Minol* to the French *Elf-Acquitaine*, both in the early 1990s. In the first case, a state secretary in the Defence Ministry was sentenced on the charge of tax evasion and illegally accepting advantages. However, the court – relying on a statement from the former chancellor *Helmut Kohl* – came to the conclusion that the bribed state secretary had had no influence on the actual decision to export the vehicles. Moreover, no corrupt behaviour on the side of the involved politicians could be established. Corrupt practices of a similar nature also became evident in the *Leuna*-affair, however it could not be confirmed that they had spread to the level of the responsible politicians.

More significant than direct bribery is the problem of general interconnections between politicians and the economy. There have been numerous media-reports about politicians having received personal advantages from public or private companies and entrepreneurs who have, for example, financed expensive holidays, flight tickets or birthday parties. The so-called "*Amigo*"-affair of 1993 is a particularly notorious example. In this affair, the Bavarian Prime Minister, *Max Streibl*, had to resign over allegations that he had influenced the placing of state aids and procurement contracts for the benefit of a friend who had previously paid for his private holidays. The term "amigo" has become proverbial for sleaze and inappropriate interconnections between politics and economy.

Closely related to this topic is also the aspect of additional activities and income of parliamentarians. Such additional activities are quite common and, in principle, permitted. However, the rules on disclosure are not always obeyed. Moreover, in a couple of cases parliamentarians have received salaries from private enterprises without adequate consideration.[13] A considerable number of politicians and parliamentarians are

---

[12] *Ibid*., 29. Figures of the preceding years: less than 1% in 2003; no cases in 2000 - 2002.

[13] In 2004, two high-ranking politicians from the Christian Democratic Party (CDU) had to resign from their party offices because of payments re-

under contract or occasionally act as consultants for private companies and public relations-agencies – both during and after the end of their term of office. In some instances, this has led to strong political criticism and to the resignation of the politicians concerned.[14] The case of *Agnes Hürland-Brüning*, state secretary in the defence ministry from 1987 to 1991, who worked subsequently as a "consultant" for the defence industry and was involved in the *Leuna*-affair, was especially delicate.

A significant and seemingly constant problem is the financing of political parties. More than any other institution, political parties are perceived by the public as being corrupt.[15] In recent years, it has mainly been the aspect of private donations and their disclosure which has raised attention. In particular, the *Christian Democratic Party (CDU)* was shaken by a major scandal. For years, party leaders and officials had systematically collected large amounts of donations without disclosing them properly. To a great extent they were placed in trust accounts in Switzerland and Liechtenstein and then channelled back as needed. The revelation of this practice led to several criminal convictions. A number of high-ranking party officials were forced to resign, while the CDU had to pay back more than € 20 million of public party funding. Similarly, in the Cologne waste incineration scandal the Social Democratic Party received considerable donations from the interested entrepreneur. Fictitious receipts for shares of these amounts were issued to party members in order to get around the obligation of having to disclose these donations.

Of course, cases of corruption have also occurred in the private economy. However, it is corruption in the public sector that has attracted the most attention and is watched with the deepest distrust. Corruption does in fact appear to affect predominantly the public sector. Criminal statistics of the last years show that almost 90% of all investigated acts

---

ceived from the electricity supplier RWE. In 2005, it was revealed that for years members of the *Bundestag* and of the *Landtag* of Lower-Saxony had been on the pay-roll of *Volkswagen*.

[14] In 2002, for example, defence minister *Rudolf Scharping* lost his office after it had been revealed that he had received high payments from a public relations-manager. However, in reality, his dismissal had deeper political causes.

[15] Transparency International, Global Corruption Barometer 2005, available on <http://www.transparency.de/Globales_Korruptionsbarometer.361.0.html#1560>.

of corruption were aimed at the public sector;[16] almost 80% of suspects on the recipient side were members of the public service.[17] In most of these cases it was the general public administration which was the target of corruption (75.6% of all investigated cases in 2004).[18] The judicial sector is affected too, but to a much lesser extent. In 2004, only 8.1% of all investigated cases belonged to this category.[19] Most of them concerned police authorities and penal administration, and in many cases the attempt to bribe an official had failed. Corruption of judges and prosecutors is virtually unknown.[20] Finally, the political level is – as far as criminal statistics are concerned – practically irrelevant as a target of corruption. However, the numerous affairs indicated above have inflicted considerable damage to public confidence in the integrity of political decision-making.

It is difficult to come to a reliable estimation of the total scale of corruption in Germany. The "corruption perceptions index", published annually by the NGO "Transparency International", provides some evidence. In 2005, Germany was rated 8.2 points (10 being the optimum) – a result which lies within the average of EU-Member States but ahead of that of the United States or Japan.[21] Ratings from the last ten years have come to similar results and thus do not indicate a reliable trend to the better or worse. Moreover, the corruption perceptions index is not based on objective facts but on the subjective perception of business people and country analysts.

Some conclusions can be drawn from various criminal statistics. However, these statistics have to be used with care because they are based on different and sometimes incomplete data. In all statistics, figures of corruption offences are quite low – at least as long as collateral offences like fraud, breaches of trust or tax evasion are not taken into account. The police criminal statistics *(Polizeiliche Kriminalstatistik)* for 2004

---

16 *Bundeskriminalamt:* Bundeslagebild Korruption 2004 (note 4), 29.

17 *Ibid*., 36.

18 *Ibid*, 29. Figures of the preceding years: 71.7 % in 2000; 74 % in 2001; 79 % in 2002 and 2003.

19 *Ibid*. Figures of the preceding years: 17 % in 2000; 14.6 % in 2001; 6.3 % in 2002; 8.3 % in 2003.

20 *Claussen/Ostendorf* (note 3), 18.

21 *Transparency International,* Corruption Perceptions Index 2005, available on <http://www.transparency.org/cpi/2005/cpi2005.sources.en.html>.

mention 2,330 investigated corruption offences[22] committed by 2,293 perpetrators.[23] This corresponds to 0.05% of all investigated offences in 2004. Similarly, the "situation report on corruption" *(Bundeslagebild Korruption)* for the year 2004 records 1,207 cases of police investigation[24] dealing with 7,610 corruption-offences.[25] The number of court proceedings is even smaller. In 2003, judgments against only 503 accused persons were passed; 377 of these persons were found guilty.[26]

These statistical results are not very meaningful. It is clear that the undisclosed figure of undetected cases is much higher, although no data is available for a reliable estimation of their actual number. A significant weakness of these statistics is also that they do not allow a trend to be derived in the development of corruption because the changing annual figures depend primarily on the intensity of investigation and on the dimension of cases investigated at the time. What can be said, however, is that corruption in Germany has reached a significant scale and that it often occurs in the form of structural networks undermining free competition in certain sectors. However, no "systemic corruption" of or-

---

22 This is the lowest figure of the last 10 years; the highest figure was 5,223 offences in the year 2000. Cf. *Bundeskriminalamt:* Polizeiliche Kriminalstatistik 2004, 213, available on <http://www.bka.de>, and Bundeslagebild Korruption 2004 (note 4), 84.

23 *Ibid*. The lowest figure amounted to 1,448 suspects in the year 1994; the highest figure was 4,593 suspects in the year 2000.

24 Bundeslagebild Korruption 2004 (note 4), 12. The lowest figure amounted to 258 cases in 1994, the highest figure to 1,683 cases in 2002. The "situation report on corruption" *(Bundeslagebild Korruption)* has been published annually by the Federal Criminal Police Office *(Bundeskriminalamt)* since 1994. It is based on the legal evaluation at the beginning of investigations. By contrast, police criminal statistics are based on the legal evaluation at the end of police investigations, when cases are handed over to the prosecution authorities. This explains why the two statistics come to somewhat different results.

25 *Ibid*., 13. The lowest figure was 6,743 offences in 1994; the highest figure was 15,968 offences in 2002.

26 *Statistisches Bundesamt,* Fachserie 10 Reihe 3 (Rechtspflege, Strafverfolgung), 2003, 38 *et seq.* Reports for the preceding years have come to similar results. However, these figures do not include criminal proceedings in the East German *Länder* because they have not yet established a comprehensive statistical measurement of criminal proceedings. Moreover, the cited statistics do not take into account judgments which are primarily based on other offences (such as fraud etc.), even if a corruption offence has also been committed.

ganized crime undermining the political system has been observed as yet.[27]

2. The Legal Framework and the Scope of this Report

Since the late 1990s a number of legislative and administrative steps have been taken to deal with the problem of corruption. The most important changes in criminal and administrative law have been brought about by the Act on the Fight against Corruption *(Korruptionsbekämpfungsgesetz)* of 1997.[28] Moreover, Germany has signed several international conventions in this field: The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997,[29] the EU Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union of 1997,[30] the United Nations Convention against Corruption of 2003,[31] and the Council of Europe Criminal and Civil Law Conventions on Corruption of 1999.[32] Germany is a member of the Group of States against Corruption (GRECO) which has been set up within the framework of the Council of Europe in order to monitor and evaluate the steps taken in combating corruption. The UN convention and the two conventions of the Council of Europe, however, have not yet been ratified by Germany.

As it is corruption *in the public service* which is the topic of this report, it should be briefly clarified what is meant by this concept. In German legal language, the term "public service" is used with different meanings in different contexts.[33] Most of the relevant norms do not use the term

---

27 *Claussen/Ostendorf* (note 3), 17 *et seq.*

28 Federal Law Gazette 1997 I, 2038 *et seq.*

29 <http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html#text>.

30 OJ EC 1997, C 195.

31 <http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf>.

32 <http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp>.

33 *P. Kunig,* Das Recht des öffentlichen Dienstes, in: *E. Schmidt-Aßmann* (ed.), Besonderes Verwaltungsrecht, 13th ed. 2005, 735 *et seq.*

at all. Instead, German law distinguishes between different categories of public officials with partly overlapping functions:[34]

- *Beamte* (approximately 35% of the public service): Civil servants with a particular status governed by public law; this status is characterized by a specific relationship of service and allegiance.
- *Angestellte und Arbeiter im Öffentlichen Dienst* (approximately 60% of the public service): Employees and workers in the public service (in the following: public employees); their status is governed by private law employment contracts and collective tariff agreements.
- Judges.
- Members of the Armed Forces.

All of these groups are governed by different statutes, administrative rules and (in the case of public employees) agreements. Moreover, it is necessary to distinguish between public officials at federal, regional and local level. Rules on the public service are to be found at each level. Finally, the term "public service" is not limited to the administrative machinery directly under state-control. It also includes civil servants and employees of legally independent corporations established under public law.

This report includes all categories of public officials at all three levels. In spite of the multitude of legal bases, the rules relevant for the fight against corruption are, to a large extent, very much alike. Criminal law falls within the legislative competence of the federation and applies, therefore, without distinction to public officials at federal, regional and local level. Moreover, the criminal offences dealing specifically with corruption in the public service essentially cover all mentioned categories of public officials. Administrative law rules on the other hand fall within the competence of both the federation and the *Länder.* Each level is responsible for its own public officials, the municipal level falling within the law-making competence of the *Länder*. Due to a federal framework competence,[35] the various statutes and administrative rules are to a large extent identical or at least similar to each other. The same can be said about the collective tariff and employment agreements for

---

[34] In 2004, there were 1.69 million civil servants (including judges), 2.8 million public employees and 188.000 professional soldiers in the public service. See *Statistisches Bundesamt,* <http://www.destatis.de/basis/d/fist/fist04.php.>

[35] Art. 75 no. 1 Basic Law.

the public service because they are – with some exceptions – jointly negotiated and concluded by all public employers.

However, a number of aspects remain completely outside the federal jurisdiction – in particular the internal structures and procedures of the public service and of the investigating authorities at *Länder* and municipal level. *Länder* activities in this field are co-ordinated by the Standing Conference of the Ministers of the Interior which has adopted a joint Programme for Preventing and Fighting Corruption in 1996 and regularly draws up implementation reports. Nevertheless, some differences remain. Therefore, this report cannot give a complete account of all relevant rules and measures, but concentrates on the federal level and the most important trends in the *Länder* and municipalities.

No general statement can be made on public enterprises with purely commercial activities, nor on other publicly owned but formally privatised corporations. In many instances, but not always, these corporations apply the collective tariff and employment agreements for the public service, including the provisions relevant for corrupt conduct.

Political parties as well as members of parliaments and governments, finally, do not belong to the public service *stricto sensu*. Nevertheless, they are included in this report because political decision-making is a matter of the public sector and therefore both highly relevant and closely related to other forms of public decision-making.

II. The Legal Mechanisms for the Fight against Corruption in the Public Service

1. Rules Safeguarding Institutions

Corruption is a phenomenon which impairs the integrity of the affected public institutions. It therefore follows that the primary aim of legal rules dealing with corruption is to safeguard these institutions and their integrity. The bulk of these rules concern the public administration, while others are focussed on the integrity of political decision-making.

a) Rules Safeguarding Public Administration

(1) Criminal Law

In the German Criminal Code *(Strafgesetzbuch)* there are a number of criminal offences such as fraud, money laundering or breach of trust which are related to corruption. Active and passive bribery in business transactions is a criminal offence, too. All these offences are, in principle, applicable to cases concerning or involving the public service. However, it is sections 331-338 of the Criminal Code which specifically deal with corruption in the public service. Sections 331-334 provide a definition of the criminal offences, while the other sections contain supplementary rules. The system laid down in these provisions rests on two basic distinctions. First of all activities on the donor and on the recipient side[36] are dealt with separately – the recipient side in sections 331 and 332, the donor side in sections 333 and 334. Activities on both sides are punishable, although the punishment intended for the recipient side (*i.e.*: the public official) is in some cases more severe than for the donor side. Apart from this aspect the distinction is rather a technical one. The criminal offences as defined in sections 331-334 cover the whole process of giving and taking, and they do so in a congruent manner. Every activity which is punishable on the one side has a counterpart on the other side which is punishable, too.

The second and more significant distinction is made according to the legality or illegality of the public act resulting from the corruption. If corruption aims at a conduct which is – as such – in violation of the public official's duties, this offence is punished as active or passive bribery ("*Bestechung*" on the donor side, section 334; "*Bestechlichkeit*" on the recipient side, section 332). On the other hand, corruption remains punishable even if the resulting conduct does not violate the public official's duties – *i.e.*: It is punishable even if the resulting conduct remains within the limits of the law and is, in the case of a margin of discretion, not based on improper considerations. This kind of corruption is referred to as "granting" or "accepting an advantage" ("*Vorteilsgewährung*" on the donor side, section 333; "*Vorteilsannahme*" on the recipi-

[36] This distinction is often referred to as active and passive corruption. However, this circumscription is misleading because it can also be the "passive" (recipient) side which takes the initiative and is active in that sense.

ent side, section 331).[37] However, punishment in this case is less severe than in the case of bribery. Technically speaking, *granting* and *accepting an advantage* constitute the basic offences, while active and passive bribery is aggravated by the illegality of the resulting conduct. The fact that corruption is a criminal offence regardless of the legality or illegality of the resulting public act clearly shows that the purpose of these provisions is to protect the institutional integrity of public administration. This integrity is affected whenever administrative action is subject to improper deals, regardless of the outcome in the individual case.

For the same reason, the modes of committing the offences, as defined in sections 331-334, are relatively wide. For the offences of *granting an advantage* and active bribery on the donor side, it is sufficient to offer, grant or agree upon an advantage to a public official. It is not necessary for the accomplishment of the offence that the public official accepts the offer or carries out the expected conduct. Likewise, for the offences of *accepting an advantage* and passive bribery on the recipient side, it is sufficient for the public official to request or accept an advantage or the offer of an advantage. Again, for the accomplishment of the offence it is not necessary that the public official carries out the expected conduct, nor that he intends to do so.[38]

The advantage in question may be material or immaterial. Significantly, the offences have been extended in 1997 to cover advantages intended not for the public official himself but for third persons, *e.g.* a donation for a political party.[39] In addition, all offences require a so-called *"Unrechtsvereinbarung"* – an (at least implicit and intended) agreement between the donor and the recipient that the advantage is granted *in consideration* for a certain conduct on the part of the public official. This conduct may lie either in the future or in the past. In the cases of active and passive bribery this agreement must refer to a rather precisely defined official act of the public official. Originally, the same condition applied to the offences of *granting* and *accepting an advantage*, and it still does as far as the corruption of judges is concerned. However, for

---

[37] However, the donor side-offence of "granting an advantage" (section 333) is younger than the others. It has been introduced by the criminal law reform in 1974.

[38] Cf. Federal Court of Justice, Decisions in criminal matters (BGHSt), vol. 15, 88, and the wording of section 332, para 3 Criminal Code.

[39] Before this amendment, the courts had attempted to catch such cases by construing an indirect advantage for the public official – a practice which had, however, its limits and was not undisputed.

all other public officials it was relaxed significantly in 1997. Since then, for these offences the advantage merely has to be agreed in consideration for the discharge of the public official's duties in general. Thus, no direct link between the offer or acceptance of the advantage and a *specific* conduct needs to be established – and indeed, facilitation of proof has been one of the motives for widening the scope of these offences.[40] To put it differently: Unlike active and passive bribery, and apart from judges, the offences of *granting* and *accepting an advantage* include corruption aimed at gaining the general good will of public officials.

The wide definition of corruption offences since the reform of 1997 is problematic because it appears to cover behaviour which is clearly not criminal. In view of this, the Christian Democratic Party in 2004 has tabled an initiative to redraft the offences of *granting* and *accepting an advantage* in order to clarify their outer limits.[41] Meanwhile, courts and commentators attempt to find the right balance by way of careful interpretation. Thus, any cases in which the advantage is not granted in consideration but as an altruistic donation or as a *means* for a certain conduct – *e.g.* private funding of research at public universities – are excluded. Similarly, cases in which the advantage cannot be regarded as improper, especially where it is provided for by the law – *e.g.* public services offered for fees – are also excluded. The same applies to minor advantages, in particular courtesy presents which are socially regarded as appropriate.[42] Moreover, *granting* and *accepting an advantage* is justified if it is approved by the superior authority.[43]

Sections 331 - 334 of the Criminal Code deal with corruption in the public service. Therefore, their scope of application is limited to cases with a public official on the recipient side. More precisely, they require *"Amtsträger"* or *"für den öffentlichen Dienst besonders Verpflichtete"* as recipients. These terms cover all civil servants *(Beamte),* and they also include other employees of authorities exercising public functions

---

[40] Critical against this „overstretch" *M. Deiters,* Die UN-Konvention gegen Korruption – Wegweiser für eine Revision der deutschen Strafvorschriften?, in *Alemann* (note 2), 432 *et seq.*

[41] Bundestagsdrucksache 15/4144.

[42] Cf. *L. Kuhlen,* Section 331 Criminal Code, in: Kindhäuser/Neumann/Paeffgen (eds.), Kommentar zum StGB, 2nd ed. 2005, figures 78 *et seq.*

[43] Sections 331 and 333, paras 3 Criminal Code. This does, for obvious reasons, not apply to active or passive bribery.

– including formally privatised but publicly owned corporations.[44] Judges are covered, too. The military is partly subject to a special statutory regulation. Officers and non-commissioned officers have the same status as civil servants. The same applies to the ranks with regards to active or passive bribery. However, ranks are not liable as recipients in the offence of *accepting an advantage*, while the criminal liability on the side of the donor *(granting an advantage)* remains untouched.[45]

The offences as defined in the Criminal Code only safeguard the German public service. However, to a certain extent their scope of application has been extended to foreign officials. In implementation of the EU Convention on the Fight against Corruption,[46] the so-called EU Bribery Act of 1998 has extended the offences of active and passive bribery to civil servants and judges of the European Communities and of all EU-Member States.[47] Similarly, in implementation of the OECD Convention on Combating Bribery,[48] the so-called "International Bribery Act" of 1998 has extended the scope of the offence of active bribery to cases with civil servants, judges or soldiers of foreign states or international organisations on the recipient side.[49]

(2) Administrative Law

Civil servants *(Beamte)* are subject to a number of statutory rules prescribing their duties and proper conduct. Some of these rules prohibit, in very general terms, corrupt behaviour. Thus, civil servants have to

---

[44] Cf. the definitions in section 11 para 1 no. 2 and 4 Criminal Code. Not included are employees of public enterprises which exercise purely commercial functions.

[45] Section 48 Military Penal Code *(Wehrstrafgesetz)* and sections 331 - 334 Criminal Code.

[46] Note 30.

[47] *EU-Bestechungsgesetz*, Federal Law Gazette II 1998, 2340. This extension does not apply to the offences of *granting* or *accepting an advantage*, nor does it apply to advantages for conduct lying in the past.

[48] Note 29.

[49] *Gesetz zur Bekämpfung internationaler Bestechung,* section 1, Federal Law Gazette II 1998, 2327. Again, this extension does not apply to the offences of *granting* or *accepting an advantage,* nor to advantages for conduct lying in the past. Unlike the EU Bribery Act, the International Bribery Act does not establish criminal liability of the foreign officials themselves (passive bribery).

perform their duties in an impartial, just and selfless manner. Their conduct must correspond to what is necessary to preserve the general respect for and confidence in the public service.[50] Equivalent rules apply to judges,[51] soldiers[52] and – to a certain extent – to other public employees.[53] Furthermore, public officials will be excluded from an administrative procedure if they are in some way personally concerned or potentially biased.[54]

More specifically, it is prohibited for all categories of public officials to accept rewards or gifts in connection with their duties.[55] Exceptions have to be authorised by the superior authority. For civil servants, judges and soldiers this prohibition expressly persists after they have left the public service. Guidelines adopted at federal and *Länder* level specify the scope and meaning of this prohibition. In general, the guidelines as well as the legal interpretation of the statutory norms[56] result in a rather extensive understanding of this prohibition. It covers all material or immaterial advantages granted to the public official by reason of his office, as opposed to gifts of a private nature. Beyond this general nexus, no direct link between the advantage and a specific conduct of

---

[50] Federal Civil Service Act *(Bundesbeamtengesetz)*, sections 52 and 54. For civil servants of the *Länder,* the same duties are laid down in sections 35, 36 of the Framework Act on the Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and in the Civil Service Acts of the *Länder*, *e.g.* sections 70, 73 of the Civil Service Act Baden-Württemberg.

[51] Sections 46 and 71 Judiciary Act *(Richtergesetz).* Cf. also *Kunig* (note 33), 808 *et seq.*

[52] Section 17 para 2 Military Act *(Soldatengesetz).*

[53] Cf. the relevant tariff agreements, in particular section 8 para 1 *Bundesangestelltentarifvertrag* and section 8 para 8 *Manteltarifvertrag für Arbeiterinnen und Arbeiter des Bundes und der Länder*.

[54] Administrative Procedures Act *(Verwaltungsverfahrensgesetz),* sections 20 and 21.

[55] Federal Civil Service Act *(Bundesbeamtengesetz),* section 70. For civil servants of the *Länder,* see section 43 of the Framework Act on the Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and the various Civil Service Acts of the *Länder*, *e.g.* section 89 of the Civil Service Act Baden-Württemberg. See also sections 46 and 71 Judiciary Act *(Richtergesetz)*; section 19 Military Act *(Soldatengesetz)*, and for other public employees the relevant tariff agreements (section 10 *Bundesangestelltentarifvertrag* and section 12 *Manteltarifvertrag für Arbeiterinnen und Arbeiter des Bundes und der Länder*).

[56] Cf. *Claussen/ Ostendorf* (note 3), 37 *et seq.*

the public official is required. In some instances, an implicit approval by the superior authority may be presumed – in particular in cases of ordinary business lunches or gifts of low value (according to federal guidelines up to € 25). However, in the latter case the public official is sometimes under a duty to inform his superior about the gift.[57]

Moreover, civil servants do not have the right to engage in additional activities without approval from the superior authority. The approval has to be denied if the activity might compromise official interests – in particular the civil servant's impartiality or the reputation of the public administration. As an exception to this rule, no approval (although sometimes a notification) is required for a number of activities which are regarded by law as generally appropriate. This includes, in particular, most activities without remuneration.[58]

Conflicts of interest may also appear when a public official leaves the public service and moves to the private sector. Retired civil servants, and former civil servants benefiting from retirement pensions, are subject to certain restrictions for a period of three or five years after retirement from the service, depending on the circumstances. During this period, they have a duty to report any new employment or economic activities related to their former service. Again, the superior authority has to prohibit such an employment if official interests might be compromised.[59] However, no such post-employment restriction and control-mechanism is in place for civil servants who move to the private sector before they retire. In such cases, the former civil servant merely remains bound to secrecy and, thus, is not free to disclose information received in his official capacity.[60] It appears that in practice only very

---

[57] This is the case for civil servants of the federation, but not in all *Länder*.

[58] Federal Civil Service Act *(Bundesbeamtengesetz),* sections 65, 66, and *Bundesnebentätigkeitsverordnung*, section 5. For civil servants of the *Länder,* see section 42 of the Framework Act on the Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and the various Civil Service Acts of the *Länder*, *e.g.* sections 83, 84 of the Civil Service Act Baden-Württemberg. Cf. also *Kunig* (note 33), 806 *et seq.*

[59] Federal Civil Service Act *(Bundesbeamtengesetz),* section 69a. For civil servants of the *Länder,* see section 42a of the Framework Act on the Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and the various Civil Service Acts of the *Länder*, *e.g.* section 88a of the Civil Service Act Baden-Württemberg.

[60] Federal Civil Service Act *(Bundesbeamtengesetz),* section 61 para 1. For civil servants of the *Länder,* see section 39 para 1 of the Framework Act on the

few public officials leave the public service before their retirement in order to take up new employment. Nevertheless, it is sometimes recommended to close this gap by introducing clear rules on conflicts of interest for such situations.[61]

The same rules apply to additional and subsequent activities of judges[62] and soldiers.[63] Similarly, other public employees need to have additional activities approved by their public employer; however, apart from their duty to secrecy, they are not subject to restrictions after they have left the public service.[64]

Administrative regulations adopted at federal, *Länder* and municipal level specify the rules of the statutory framework. The guidelines concerning gratuities and gifts have already been mentioned. Further regulations have been put in place with more general codes of conduct designed to prevent and eliminate corruption.[65] In addition, they provide for a number of structural changes, including regular risk assessments, staff rotation, co-decision mechanisms in vulnerable departments, and the enhancement of transparency of internal procedures. Other administrative regulations deal with the aspect of private promotion and sponsoring of public administration.[66] Under the federal regulations, such private financing is prohibited for all public activities which interfere with civil liberties *(Eingriffsverwaltung).* In other fields such as culture, education, science, or public relations, sponsoring is permissi-

---

Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and the various Civil Service Acts of the *Länder*, *e.g.* section 79 para 1 of the Civil Service Act Baden-Württemberg.

61 GRECO Evaluation Report on Germany, July 2005, figures 36 and 45, available on <http://www.greco.coe.int>.

62 Sections 41, 46 and 71 Judiciary Act *(Richtergesetz).*

63 Sections 20 and 20a Military Act *(Soldatengesetz).* However, rules for conscripts are less strict.

64 Sections 9 para 4 and 11 *Bundesangestelltentarifvertrag* and sections 11 para 4 and 13 *Manteltarifvertrag für Arbeiterinnen und Arbeiter des Bundes und der Länder*.

65 See for example the Federal Government Directive concerning the Prevention of Corruption in the Federal Administration *(Richtlinie der Bundesregierung zur Korruptionsprävention in der Bundesverwaltung)* of July 30th 2004.

66 See in particular the General Administrative Regulation to Promote Activities of the Federal Government through Contributions from the Private Sector *(Allgemeine Verwaltungsvorschrift zur Förderung von Tätigkeiten des Bundes durch Leistungen Privater)* of July 7th 2003.

ble. However, it must be guaranteed that the sponsoring does not influence, nor appear to influence, the conduct of public administration. No consideration other than the mentioning of the sponsor is admissible. Moreover, the sponsoring must be approved by the superior authority and in 2004 laid open to the public.

Finally, beyond the rules of conduct for the public service itself, transparency is a crucial instrument for keeping corruption in check. It does not only facilitate supervision by the higher authorities, but also enables the public and the media to exercise a controlling function. However, German administrative law traditionally is rather restrictive in this respect. Under the Administrative Procedures Act, access to files is only available to the applicant and other parties to the relevant administrative procedure, and only to the extent necessary to assert their legal interests.[67] It is only four of the *Länder* and since 2006 the federation which have changed this approach and adopted "Freedom of Information Acts". This legislation enables public access to information on administrative procedures without the need to establish a specific legal interest.[68] This is generally seen as a promising step in the fight against corruption.

b) Rules Safeguarding the Integrity of Political Decision-Making

(1) General Rules of Criminal Law

Turning to the integrity of political decision-making, government and parliament come to the fore. Members neither of government nor of parliament are regarded as belonging to the public service. Therefore, they are not automatically subject to all the provisions mentioned above.

For the purpose of the criminal offences in sections 331 - 334 of the Criminal Code, ministers and the Chancellor are *"Amtsträger"* and,

---

[67] Administrative Procedures Act *(Verwaltungsverfahrensgesetz),* section 29.

[68] *Informationsfreiheitsgesetz des Bundes* of 5th September 2005, Federal Law Gazette I, 2722 *et seq.* The *Länder* which have enacted similar laws are Berlin, Schleswig-Holstein, Brandenburg and North Rhine-Westphalia; in Hamburg, a Draft Freedom of Information Act is under discussion. Of course, even under this legislation access to files of the public administration remains subject to a number of exceptions. Critical under this aspect *M. Kloepfer/K. von Lewinski,* DVBl 120 (2005), 1280 *et seq.*

thus, have the same status as public officials.[69] This means that active or passive bribery and *granting/accepting an advantage* with members of government on the recipient side are punishable under the same conditions as with other public officials.

Parliamentarians, by contrast, do not have this status. Thus, bribery etc. of members of a parliament is not punishable under sections 331 - 334 of the Criminal Code. Instead, in 1994 it has been made a specific offence laid down in section 108e of the Criminal Code. However, the scope of this offence is much narrower. It is limited to buying votes for a specific ballot or election in Parliament.[70] Thus, like bribery it requires an agreement that the advantage is granted in consideration for a *specific* official conduct; but in addition, it must be a *certain type* of conduct, namely the (future) act of voting in the plenum or parliamentary committees. Advantages granted for other (*e.g.* preparatory) parliamentary activities are not covered by this offence, nor advantages merely offered for the general exercise of the mandate. As a consequence of its narrow scope, no cases of this offence have been reported so far.[71] Its counterpart in section 108b of the Criminal Code, the offence of active or passive bribery of electors, is of similar insignificance.

This privilege of parliamentarians in comparison with public officials and members of government is widely criticized. In particular, it is in contradiction with the UN Convention against Corruption which does not distinguish between public officials holding legislative, executive or administrative offices.[72] Moreover, there is a remarkable inconsistency in the status of national and foreign parliamentarians. In 1998, active bribery with parliamentarians of foreign countries and of international organisations on the recipient side has been made a criminal offence. It is laid down in section 2 of the "International Bribery Act" which has been passed in implementation of the 1997 OECD Convention.[73] This offence covers advantages offered or granted in consideration not just

---

[69] Section 11 para 1 no. 2 lit. b Criminal Code and section 1 *Bundesministergesetz*.

[70] Section 108e Criminal Code covers parliaments at all levels – from the European Parliament down to local parliaments.

[71] *M. Wiehen,* Nationale Strategien zur Bekämpfung der politischen Korruption, 410 *et seq.*, in: *Alemann* (note 2).

[72] Art. 2 lit. a and 15 of the Convention. For a detailed analysis see *A. van Aaken,* ZaöRV 65 (2005), 423 *et seq.*

[73] Notes 29 and 49.

for voting behaviour but for *any* (specific) mandate-related act in the future. It is difficult to find arguments for this discrepancy. It is therefore widely agreed that the offence of bribery of national parliamentarians should be adjusted to the equivalent offences concerning public officials and foreign parliamentarians.

(2) Further Rules of Conduct for Politicians

The above-mentioned provisions of administrative law prescribing the duties of civil servants and other public employees are not applicable to members of governments or parliaments at federal or *Länder* level. As far as members of governments are concerned, their status and duties are laid down in their oath of office and in specific statutes.[74] Members of the federal government are not allowed to exercise any additional occupation or profession, including membership in boards of supervision of business enterprises. However, the latter may be authorized by the federal parliament *(Bundestag)*. Unlike for civil servants, it is not prohibited for ministers to accept gifts granted in relation to their office. However, in each case they have to give notice to the cabinet which will then decide on how to deal with it. This duty also applies to former ministers. No restrictions are imposed on ministers to take up activities after they have left office, although they remain bound to observe secrecy. This is consequential because members of government have a term of office which is necessarily and as a matter of principle of a limited time frame. Therefore, they should generally have the certainty that they can choose a new occupation freely when their tenure has expired. Nevertheless, the swiftness often shown by former ministers and chancellors in signing lucrative contracts with private enterprises may be regarded with some concern. A certain waiting period for new employments is being called for by some commentators but has not been adopted as yet.

Rules for parliamentarians are somewhat more liberal. The *Bundestag* and regional parliaments *(Landtage)* have adopted codes of conduct, usually as an annex to their standing orders.[75] Despite some differences

[74] For the federal level see the Federal Ministers Act *(Bundesministergesetz)*, in particular sections 5 and 6.

[75] The rules of conduct for Members of the Bundestag are laid down partly in section 44a Members of Parliament Act *(Abgeordnetengesetz)* and partly in Annex 1 to the Standing Orders of Parliament *(Geschäftsordnung des Bundestages)*.

in detail, they are by and large quite similar. They all rest on the notion that parliaments, in order to preserve their roots in society, should not be fully professionalized. Thus, parliamentarians may continue to exercise their former professions.[76] More generally, they are not precluded from pursuing additional occupations beside their mandate. Nor are they – with the exception of the *Land* Bremen[77] – legally excluded from parliamentary votes or deliberations in which, due to such an activity, they are potentially biased. However, they remain bound to their constitutional duty to base their decisions purely on their own conscience and not on any considerations of personal advantage. This duty is confirmed by the code of conduct for Members of the *Bundestag* which states that, apart from the allowances provided by the law, parliamentarians must not accept any payments for the exercise of their mandate.[78] This does not only mean that they are not entitled to sell their parliamentary activities. It also follows from this rule that it is illegal for Members of the *Bundestag* to accept a payment without adequate economic consideration because then it must be deemed to be granted purely for the (benevolent) exercise of the mandate.[79] This prohibition applies, for example, to parliamentarians formally employed and remunerated by an enterprise without actually working for it. Moreover, seven *Länder*-constitutions provide for impeachment proceedings in the case of members of parliament abusing their position with a view to profit.[80]

Within these outer limits, it is not legal prohibitions and incompatibilities, but transparency and political control which have been chosen as the appropriate mechanisms.[81] Parliamentary codes of conducts at federal and *Länder* level establish notification as well as publication requirements. These rules have been modified and tightened frequently in

---

[76] The only exception to this rule has its roots in the separation of powers. Civil servants and other public employees, judges and soldiers may be elected members of parliament, but their function as a public official rests during this time. Cf. Members of Parliament Act *(Abgeordnetengesetz)*, sections 5 - 8.

[77] Art. 84 of the Constitution of Bremen.

[78] Members of Parliament Act *(Abgeordnetengesetz),* section 44a para 2.

[79] Cf. Decisions of the German Constitutional Court (BVerfGE), vol. 40, 296 *et seq.* Since 2005, this prohibition is explicitly stated in section 44a para 2 Members of Parliament Act *(Abgeordnetengesetz).*

[80] This is the case in Bavaria, Baden-Württemberg, Saarland, Lower Saxony, Bremen, Hamburg and Brandenburg.

[81] *van Aaken* (note 72), 430 *et seq.*

recent years – the code of conduct for Members of the *Bundestag* most recently in 2005. According to these rules, Members of the *Bundestag* have to notify their former and current professional occupations, memberships in boards of supervision, and similar activities to the Chairman.[82] Most of this information is published in the official handbook and on the website of the *Bundestag*.[83] The respective earnings from these additional activities have to be notified if they exceed € 1,000 per month or € 10,000 per year. Since 2005 they also have to be published though only by way of identifying the income bracket to which they belong – a duty which is under scrutiny of the Constitutional Court at the time of writing. Admittedly, the rules currently in force still leave some room for more subtle forms of influence and delicate interconnections between politics and economy which are not caught by the criminal offence of bribing parliamentarians either. What has been achieved so far, however, is a degree of transparency that makes it increasingly difficult to hide these interconnections from the public.

Similarly, donations for the political work of a member of parliament remain largely permissible. Obviously, it may be difficult to distinguish between illegal payments made in consideration for the exercise of the mandate, and legal donations given in order to facilitate political work. The latter are merely subject to provisions safeguarding a certain degree of transparency. Thus, Members of the *Bundestag* have to keep a record of such donations. If they exceed € 5,000, donation and donor have to be notified to the Chairman; donations from the same donor accumulating to more than € 10,000 per year will be published by the Chairman.[84]

---

[82] Members of Parliament Act *(Abgeordnetengesetz),* section 44a para 4; Standing Orders of Parliament *(Geschäftsordnung des Bundestages),* Annex 1, sections 1 and 2. No notification is required for expert opinions, publications and lectures as long as the respective earnings do not exceed the amount of € 1,000 per month or € 10,000 per year.

[83] Members of Parliament Act *(Abgeordnetengesetz),* section 44a para 4; Standing Orders of Parliament *(Geschäftsordnung des Bundestages),* Annex 1, section 3.

[84] Standing Orders of Parliament *(Geschäftsordnung des Bundestages),* Annex 1, section 4. A number of inadmissible donations are determined by reference to the rules concerning political parties, laid down in section 25 para 2 of the Political Parties Act *(Parteiengesetz).* For a brief description of these rules see below.

(3) Financing of Political Parties

The financing of political parties is another aspect of potential corruption of the political decision-making process. On the one hand, there is a danger of unrestrained self-service of political parties at the expense of public funds. On the other hand, it is undesirable that political parties be excessively dependent on private sponsors and thus open to the influence of individual interests and pressure groups. It is this second aspect which is of interest in our context.

In a number of judgments, the Constitutional Court has established a delicate balance between public and private funding which has been implemented in the Political Parties Act *(Parteiengesetz).*[85] According to these rules, the financing of political parties rests essentially on three pillars: public funding, membership fees and private donations. In particular, public funding must not exceed the amount of revenues flowing from the other two sources.[86] Thus, private donations are seen as a legitimate and necessary element of the financing of political parties which forces them to preserve their roots in society.

However, the ambivalence of such donations cannot be denied. The scandal of the Christian Democratic Party in the late 1990s has deepened public distrust in the integrity of political parties and caused a number of changes in the law. Political parties still have the right to accept donations, however with certain exceptions. Inadmissible are, in particular, donations recognisably granted in consideration for or expectation of a specific economic or political advantage; furthermore donations exceeding € 500 in cases where the identity of the donor cannot be ascertained; donations from public enterprises; and donations from abroad. Moreover, donations exceeding an amount of € 1,000 may not be given in cash.[87] Finally, following a ruling of the Constitutional Court,[88] tax deductibility of party-donations has been abolished for

---

[85] See, in particular, Decisions of the German Constitutional Court (BVerfGE), vol. 85, 264 *et seq.*; *A. Römmele,* Partei- und Wahlkampfspenden – Erfahrungen aus der BRD und den USA, 384 *et seq.*, in: *Alemann* (note 2).

[86] Political Parties Act *(Parteiengesetz),*section 18 para 5.

[87] *Ibid*., section 25.

[88] Note 85.

corporations and significantly cut down for individuals in order to comply with the principle of equal treatment.[89]

Beyond these limits, party donations remain permissible. However, they have been subjected to an increasing degree of transparency. Political parties have to draw up yearly reports on the origin and use of their financial means. These reports have to be audited and then passed on to the Chairman of the *Bundestag*. They have, among other information, to list all donations accumulating to more than € 10,000 per donator and year, including name and address of the donator. Moreover, single donations exceeding € 50,000 have to be notified immediately to the Chairman who will publish them.[90]

Critics argue that these limits and requirements are still insufficient.[91] What can be said at least is that, in the past, party officials have shown a remarkable inventiveness in finding loopholes, sometimes to the point of plainly illegal practices. Therefore, it seems likely that the rules on the financing of political parties will remain a matter of further debate and modifications.

2. Rules Safeguarding Transactions

The provisions discussed above have as their primary objective the protection of the institutional integrity of the public service or political decision-making, although they incidentally should also secure the fairness and appropriateness of individual transactions made with the public service. For other rules the opposite applies: They primarily aim at safeguarding individual transactions, however in doing so have the incidental effect of protecting the institutional integrity of the public service. The most important rules of this kind are those on the award of public works, supply and service contracts – a subject matter especially affected by corruption.

This complex set of rules is scattered over numerous statutes, regulations and internal orders at federal, regional and local level, and is, moreover, heavily influenced by European directives. In essence, they

---

[89] Currently, party-donations are tax-deductible up to an amount of € 1,650 per year (or € 3,300 for couples), section 10b para 2 Income Tax Act *(Einkommenssteuergesetz).*

[90] Political Parties Act *(Parteiengesetz),* sections 23 *et seq.*, 25 para 3.

[91] *Wiehen,* (note 71), 397 *et seq.*

all rest on the principle that the award of contracts by the public purse has to be preceded by a public invitation for tenders. This very principle already provides some protection against corruption because it renders manipulation more difficult than in such cases where public contracts are placed without a competitive procedure. For public contracts of a value exceeding a certain threshold,[92] federal law obliges all contracting public authorities to carry out such a public tender procedure.[93] There remain a number of exceptions. However, they are well defined by the law. For public contracts below these thresholds, budgetary law at federal and *Länder* level lays down the same principle, but with the much more general qualification that the nature of the contract or specific circumstances may justify an exception.[94] This qualification has been generously exploited by public authorities in order to avoid the bureaucratic strain and inflexibility connected with a public tender procedure. Thus, it has been criticised that, in some areas of administration, public tender procedures have become the exception rather than the rule.[95] In order to reverse this trend, administrative regulations adopted by the responsible ministries, stress the importance of public tender procedures and the strict requirements for justifying any exception.[96]

However, public tender procedures themselves are vulnerable to corruption. In spite of the very detailed rules on the procedure, manipulations can occur at all stages from project planning to the award of the contract and the settlement of accounts. In order to reduce this risk, responsibilities for the different stages of the procedure are increasingly split between different officials or departments. Superior authorities are expressly called on to exercise their supervisory functions and to check tender procedures at regular intervals for indications of manipulation.[97]

---

[92] *E.g.* € 200,000 for ordinary supply and service contracts; € 5 million for works contracts. See *Vergabeverordnung der Bundesregierung*, section 2, Federal Law Gazette 2003 I, 169 *et seq.*, and 2005 I, 2676 *et seq.*

[93] Act against Restrictions of Competition *(Gesetz gegen Wettbewerbsbeschränkungen),* section 101 para 6, Federal Law Gazette 2005 I, 2114 and 2676 *et seq.*

[94] See, for example, *Haushaltsgrundsätzegesetz*, section 30; *Bundeshaushaltsordnung*, section 55; *Landeshaushaltsordnung* Baden-Württemberg, section 55; *Gemeindehaushaltsverordnung* Baden-Württemberg, section 31.

[95] *Wiehen,* (note 71), 416.

[96] *E.g.* the Directive on the Prevention of Corruption in the Federal Administration (note 65), clause 11.

[97] *Ibid.*

As elsewhere, transparency is of particular importance for eliminating corruption in the context of the award of public contracts. The tenderer for a public contract with a value exceeding the above-mentioned threshold defined by federal law[98] has the possibility of initiating a review of the award decision by an award-chamber. In this review proceeding, the applicant has the right to inspect the files, except on important grounds of refusal such as the competitors' business secrets.[99] This position is somewhat more favourable than the restricted access to files granted under the general rules of the Administrative Procedures Act. Nevertheless, the above-mentioned "Freedom of Information Acts" adopted by the federation and four *Länder* go a significant step further.[100] By granting access to files of the administration to everyone, they subject tender procedures to public control and thus enhance the chance of disclosing manipulative practices.

Other rules do not address the public service itself but the tenderers as potential wrongdoers. Besides cases of tenderers directly corrupting a public official, a significant problem is caused by anti-competitive agreements between several tenderers who manipulate the public tender procedure by arranging over-priced offers. Such illegal practices, originally merely sanctioned as administrative offences, have been made a criminal offence in 1997 under section 298 of the Criminal Code.

However, criminal liability is a means of limited effect, not least because there is no criminal liability of legal persons in Germany. Therefore, economic consequences are a necessary additional instrument for preventing corruption. A deterrent consequence of this kind is the exclusion of enterprises from the future award of public contracts. Under the general rules governing public tender procedures, such an exclusion is permissible in cases of severe misconduct which cast doubt on the tenderer's reliability.[101] Ministerial regulations at federal and *Länder* level require state authorities more or less strictly to make use of this possibility, in particular in relation to tenderers known for corrupt practices.

---

98 Note 92.

99 Act against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen,* note 93), section 111.

100 Note 68.

101 Rules on the Award and Content of Works Contracts (VOB), Part A, section 8 clause 5 para 1 lit c, and section 25 clause 1; Rules on the Award and Content of Supply and Service Contracts (VOL), Part A, section 7 clause 5 lit c, and section 25 clause 1; Rules on the Award and Content of Professional Supply and Service Contracts (VOF), section 11 lit b and c.

For such a temporary debarment (usually between six months and five years) to be imposed, overwhelming evidence for the commitment of corruption offences is required, although no criminal conviction is necessary. In eight of the sixteen *Länder,* registers ("black lists") of such tenderers have been established which provide the relevant information to contracting authorities.[102]

For a number of reasons this state of affairs is still unsatisfactory. Ministerial regulations are, by their very nature, not binding on independent local authorities, which, therefore, follow their own guidelines. This in turn contributes to the considerable diversity of rules and practices concerning the award of public contracts. Similarly, the multitude of regional registers, based on different criteria and procedures and largely limited to regional input, is less than ideal for the purposes of clarity and a reliable information flow between contracting authorities. No federal register has been established so far. Finally, it should not be forgotten that the entry in a black list and the debarment from the award of public contracts has serious economic consequences for a tenderer and may constitute an interference with his fundamental rights and the rule of law. Therefore, it is doubtful whether under constitutional law it is sufficient to base such a delicate matter purely on ministerial regulations.

In response to some aspects of this criticism, the *Länder* Hamburg and North Rhine-Westphalia have recently adopted statutory legal bases for corruption registers and the relevant procedures.[103] A similar initiative at federal level failed in 2002. A new bill has been drafted and presented in 2004/2005 by the Federal Ministry of Economics and Labour, however the legislative procedure was interrupted by the following elections.[104] Thus, at the time of writing the issue of a federal corruption register is still on the agenda.

The approach of reducing the economic attractiveness of corruption has also been followed by certain changes in the law of taxation. Originally, tax laws – based on the principle of value neutrality – allowed for a de-

---

[102] Corruption registers are kept in Baden-Württemberg, Bavaria, Rhineland-Palatinate, Hessen, North Rhine-Westphalia, Lower Saxony, Bremen and Hamburg. In Berlin, the introduction of a corruption register is on the legislative agenda at the time of writing.

[103] Act on the Establishment of a Corruption Register of 18th February 2004 (Hamburg); Act on the Fight against Corruption of 16th December 2004 (North Rhine-Westphalia). For Berlin see note 102.

[104] Cf. *J. Stoye,* ZRP 2005, 265 *et seq.*

duction of all kinds of business expenditure, including bribes. Since then, the law of taxation has been brought more into line with the values and rules of conduct laid down in the rest of the legal order. In 1996, the deduction of business expenses was excluded in cases where they had led to a criminal conviction. In a further step, the requirement of a criminal conviction was dropped in 1999. Since then, deductibility of business expenditure constituting a criminal or administrative offence has been abolished.[105]

3. The Investigation of Potential Corruption

a) Investigating Authorities

Corruption affects many areas of law, and, accordingly, investigation lies within the responsibility of several authorities dealing with specific legal aspects of corruption. There is no central economic fraud authority with a comprehensive competence to investigate cases of corruption.

In so far as corruption constitutes a criminal offence, investigation is conducted by the public prosecution services and by the police – both of them being *Länder* authorities. In view of the complexity of many cases and of the networks behind them, and also of the specific knowledge and experience necessary to deal with economy-related crimes, the majority of the *Länder* have built up central police units specialized on corruption offences. Public prosecution services often have specialized departments, too, though not always with a centralized competence for the whole *Land*. Integrated investigation units for corruption offences where public prosecutors, police officers and other specialists work together under the same roof are regarded as being most effective. This model has been implemented so far in the *Länder* Schleswig-Holstein, Brandenburg and Sachsen.[106]

Within the administration it is primarily up to superiors and superior authorities to prevent and eliminate corruption. It seems that this supervision has long been neglected.[107] However, administrative regula-

---

[105] Income Tax Act *(Einkommenssteuergesetz),* section 4 para 5 sentence 1 no. 10. See also *Bannenberg* (note 3), 26.

[106] *R. Thiel,* Die Ressourcen der Korruptionsbekämpfung in Deutschland. Dokumentation für Transparency International Deutschland, available on <http://www.transparency.de/Schwerpunktstellen_bei_Staatsa.423.0.html>.

[107] *Bannenberg* (note 3), 246 *et seq.*

tions now expressly call for a vigilant control. Moreover, if a public official is suspected of having violated his duties, his superior or the superior authority will conduct a disciplinary proceeding in order to investigate the facts and possibly to impose disciplinary sanctions. However, the hierarchical structure of the public service is not always favourable to an effective uncovering of corruption. Public officials are under a duty to report suspicions of corruption to their immediate superior but they have no direct access to the prosecution services. It is only the head of the agency that has the right and usually the duty to inform the prosecution services as well as the highest service authority.[108] This procedure tends to slow down investigations and to reduce the protection of so-called "whistleblowers" against possible retaliation.[109] This problem has partly been addressed by the establishment of contact persons throughout the public administration.[110] These contact persons may be approached immediately – and often anonymously – by a public official or any other person. However, they have no investigative powers of their own, and apart from a few exceptions they have no right to inform the prosecution services directly. Finally, besides the ordinary process of supervision and the contact person procedure, regular internal audits have been introduced for many public authorities.

External control of the management of public finance is exercised by independent courts of audit at federal and *Länder* level (*Bundesrechnungshof* and *Landesrechnungshöfe*), as well as by special audit offices for local authorities. Financial control includes cases where public funds have been wasted as a consequence of corrupt practice and structures. Nevertheless, the courts of audit tend to treat the elimination of corruption as a matter largely outside of their responsibility and hesitate to co-operate closely with the prosecution services. As a result of this, the information flow between these two institutions is widely regarded as insufficient.[111]

---

[108] Cf. Directive concerning the Prevention of Corruption in the Federal Administration (note 65), clause 10.1.

[109] Cf. the criticism in the GRECO Evaluation Report on Germany (note 61), figures 39 *et seq.* and 47 *et seq.*

[110] Cf. Directive concerning the Prevention of Corruption in the Federal Administration (note 65), clause 5.

[111] *Wiehen* (note 71), 421; *Bannenberg* (note 3) , 258 *et seq.* Less critical *Fiebig/Junker* (note 3), 160.

Finally, revenue authorities and tax investigation services are of some importance, because corruption is often accompanied by tax offences. The Income Tax Act obliges tax authorities on the one hand and courts, public prosecution offices and administrative authorities on the other hand, to inform each other of any facts indicating that a criminal, administrative or tax offence has been committed.[112]

In order to promote co-operation between investigating authorities, many *Länder* have established joint working groups or similar task forces. In some instances, like in Hamburg, they act as central investigation units. Mostly, however, they are rather responsible for developing and co-ordinating preventive strategies, as well as for improving the information flow and providing points of contact for the public and public officials.

b) Procedures and Penalties

In so far as corrupt conduct constitutes a criminal offence, it will be investigated, prosecuted and tried according to the general rules of the Code of Criminal Procedure. In cases of active and passive bribery of public officials, investigative competences include bugging operations,[113] though strangely enough no telephone surveillance.[114] Otherwise, there are no special procedural rules concerning corruption in the public service.

Penalties provided for the offences of *granting* or *accepting an advantage* (sections 333 and 331 of the Criminal Code) are identical for the public official on the recipient side and the individual on the donor side. They receive either a pecuniary penalty or a prison sentence of up to three years, or in cases involving a judge on the recipient side of up to five years. For active and passive bribery (sections 334 and 332 of the Criminal Code), the maximum sentence is five years.[115] As far as the minimum sentence for bribery is concerned, however, the law distinguishes between three months for the donor side and six months for the

---

[112] Income Tax Act *(Einkommenssteuergesetz),* section 4 para 5 sentence 1 no. 10.

[113] Code of Criminal Procedure, section 100c para 1 no. 3 lit. a.

[114] See the criticism of *B. Bannenberg/ W. Schaupensteiner,* Korruption in Deutschland, 2004, 212.

[115] For a judge on the recipient side (passive bribery), the maximum sentence is ten years.

public official on the recipient side. In cases of lesser severity, a pecuniary penalty is also possible. Finally, in particularly severe cases of active or passive bribery, the sentence is up to ten years.[116]

In addition to the pecuniary fine or prison sentence, the Criminal Code provides that proceeds of crime – *e.g.* the bribe paid to a public official – are subject to forfeiture *(Verfall)*. For a number of offences, the requirements of proof for this mechanism have been somewhat relaxed. Such an order of extended forfeiture shall be issued when the *circumstances justify the assumption* that the objects or assets in question were acquired as a result of *any* criminal offence. In 1997, the applicability of this mechanism has been extended to particularly severe cases of active and passive bribery.[117]

Besides their criminal liability, civil servants are subject to disciplinary sanctions imposed by the employing authority.[118] These sanctions safeguard the civil servant's duties in relation to his public employer – duties such as those mentioned above relating to impartial conduct, additional activities or the acceptance of rewards and gifts. Any culpable violation of these duties is a disciplinary offence.[119] Disciplinary sanctions for such offences include reprimands, pecuniary fines, a reduction of salaries and the removal from service.[120] The choice between these sanctions is not regulated in detail by the law. However, sanctions have to remain within the limits of proportionality.

Obviously, criminal and disciplinary offences often overlap. To a certain extent, criminal proceedings take precedence over disciplinary proceedings relating to the same matter. Disciplinary proceedings, in particular, normally have to be suspended if a public charge is brought in the same matter against the public official. When they are resumed, the factual results of the criminal proceeding are binding for the further procedure. Moreover, in cases of prior criminal convictions, discipli-

---

116 Section 335 Criminal Code.

117 *I.e.* bribery committed by criminal organised groups, or persons acting "quasi-professionally". See sections 302, 338 and 73d Criminal Code.

118 For other public employees the general rules of labour law apply.

119 Federal Civil Service Act *(Bundesbeamtengesetz)*, section 77. For civil servants of the *Länder,* see section 45 of the Framework Act on the Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and *e.g.* section 95 of the Civil Service Acts Baden-Württemberg.

120 Federal Act on Disciplinary Proceedings *(Bundesdisziplinargesetz),* section 5.

nary sanctions should generally not be imposed unless such an additional punishment is necessary.[121] However, in all other respects, criminal and disciplinary sanctions are independent and do not exclude each other. It might be added that criminal sentences of one year or more for an intentionally committed offence automatically lead to a removal from service.[122]

As far as the award of public contracts is concerned, there are two additional aspects which have already been touched upon. The debarment of tenderers, sometimes supported by "black lists", is technically speaking not a punitive measure for past misconduct but rather serves to protect future public tender procedures from an unreliable tenderer. Incidentally, however, it also works as a deterrent sanction. Secondly, the position of competing tenderers has been strengthened by the right to challenge the award decision if the value of the contract exceeds a certain threshold.[123] In the interest of legal certainty, the award chamber cannot quash a contract which has already been awarded. However, in such a case the unsuccessful competitor may have a claim in damages against the contracting authority. The amount of damages is limited to the costs incurred through the participation in the tender procedure.[124] Moreover, in order to guarantee effective remedies, the contracting authority is under a duty to inform all tenderers of the intended award decision at least two weeks in advance.[125]

Finally, the issue of appropriate sanctions is very controversial in relation to corruption in the political decision-making process. Rules on the financing of political parties have been tightened once more after the scandal of the Christian Democratic Party in the 1990s. Fines imposed on the parties constitute the main sanction. If a party accepts a donation illegally, or if its yearly accounting report is incorrect or incomplete, the party is liable to pay a fine which is twice or three times

---

121 *Ibid*., sections 14, 22, 23 and 57.

122 Federal Civil Service Act *(Bundesbeamtengesetz)*, section 48. For civil servants of the *Länder,* the same duties are laid down in section 24 of the Framework Act on the Law Applicable to Civil Servants *(Beamtenrechtsrahmengesetz)* and in the Civil Service Acts of the *Länder*, *e.g.* section 66 of the Civil Service Act Baden-Württemberg.

123 See above note 98.

124 Act against Restrictions of Competition *(Gesetz gegen Wettbewerbsbeschränkungen,* note 93), sections 114 and 126.

125 *Vergabeverordnung der Bundesregierung* (note 92), section 13.

the incorrect amount.[126] The fine is imposed by the Chairman of the *Bundestag*. An individual liability of the responsible party officials, on the other hand, has only just been introduced in 2002. Nowadays it constitutes a criminal offence to draw up and hand in incorrect accounting reports, to split up donations into several smaller amounts or to get around the rules on disclosure by withholding donations from the treasurer of the party.[127]

Enforcement of the codes of conduct for parliamentarians was, until recently, much weaker. The only sanction available for a violation of these rules was its publication by the Chairman of the *Bundestag* or of the respective regional parliament.[128] The lack of stronger sanctions has been widely regarded as unsatisfactory. In 2005, the code of conduct for Members of the *Bundestag* has been amended to the effect that the Chair may impose a fine for violations of the duty to notify and publish additional activities and earnings.[129] Moreover, the issue arose as to whether parliamentarians have to remit illegal additional earnings to the state. In a couple of *Länder,* legislation to this effect is in place, and in 2005, in the context of the VW-scandal in Lower Saxony, this rule was applied for the first time by a court.[130] In the meantime, an equivalent provision has also been inserted into the code of conduct for Members of the *Bundestag.*[131]

III. Conclusion

Although there is no reason to doubt the integrity of the German public service in general, it cannot be denied that corruption has reached a

---

[126] Political Parties Act *(Parteiengesetz),* sections 31b and 31c.

[127] *Ibid*., section 31d.

[128] Annex 1 to the Standing Orders of Parliament *(Geschäftsordnung des Bundestages)*, section 8 para 2.

[129] Members of Parliament Act *(Abgeordnetengesetz)*, section 44a para 4; Annex 1 to the Standing Orders of Parliament *(Geschäftsordnung des Bundestages)*, section 8 para 4.

[130] Judgment of the Administrative Court Braunschweig of 16.11.2005, cases 1 A 162/05 and 1 A 163/05.

[131] Members of Parliament Act *(Abgeordnetengesetz)*, section 44a para 3; Annex 1 to the Standing Orders of Parliament *(Geschäftsordnung des Bundestages)*, section 8 para 5.

significant scale. A number of important legislative and administrative steps have been taken in recent years in order to safeguard public institutions and transactions against this threat. They have improved the legal framework for eliminating corruption in the public service, but some weaknesses have not been removed as yet.

As far as corruption in the public administration is concerned, offences and sanctions as laid down in the Criminal Code are adequate. They capture all relevant kinds of behaviour deserving punishment and are, if at all, rather too wide than too narrow in scope. Similarly, the administrative law rules of conduct for public officials and the legal possibilities to enforce them through supervision and disciplinary procedures can generally be regarded as sufficient. A certain gap is left by the lack of post-employment restrictions for civil servants who move to the private sector before their retirement. It seems, however, that this lack is of little practical relevance. Instead, the main deficiencies are of a structural and procedural rather than of a normative nature. Obviously, structures and procedures within the public service are crucial for an effective prevention and uncovering of corruption. Some changes have been brought about, but these reforms are still in a state of flux and have not reached the same standard in every *Land* or municipality. In spite of some efforts, co-ordination and the information flow between the *Länder* as well as between the different investigating authorities proves to be difficult. Public prosecution services and the police operate increasingly in specialized units, but due to insufficient capacities the scope and intensity of investigations remain limited. Prosecution is impeded by the exclusion of telephone surveillance from the range of admissible investigation methods, and the possibilities for protecting whistleblowers are insufficient. Control through the public, in turn, is impeded by restrictions on the access to administrative files which are still in place in most of the *Länder*. Finally, as to the award of public contracts a major deficiency lies in the lack of a federal-wide, statutory based corruption register which allows for a reliable debarment of tenderers guilty of corrupt practices.

Rules on potential corruption in the political decision-making process call for more fundamental questions. Thus, it is rightly criticized that there are no restrictions or waiting periods for members of governments to take up new employments after their tenure has expired. As to members of parliaments, the main criticism points at the fact that corruption of parliamentarians remains largely outside the scope of criminal offences, because the offence of bribery of parliamentarians is limited to buying votes. This privilege can hardly be upheld, in particular

since bribery of *foreign* parliamentarians has been made a much wider offence in 1997. Therefore it is desirable to extend the offence of bribery of parliamentarians so as to catch the buying of *any kind* of mandate-related acts. A further matter of debate are the rules on more subtle forms of influencing political decision-making, *i.e.* on additional activities and income of parliamentarians, and on the financing of political parties. With good reasons, in both cases the law relies mainly on transparency and political control rather than on incompatibilities and prohibitions. However, the degree of transparency and the available sanctions are crucial for the success and credibility of this approach. Recent reforms have, once more, tightened both duties and sanctions. The current standard seems reasonable, although some loopholes have remained.

The fight against corruption in the public service is an ongoing process, and legal means are but a part of it. Despite some deficiencies, the rules in place seem by and large suitable for this purpose – provided that they are applied with the necessary resolve and supported by the necessary investigation capacities.

Characteristics of International Administration in Crisis Areas – A German Perspective

Thilo Marauhn

I. Factual Background

After the end of the Cold War the international community strengthened its operational capacities to deal with acts of aggression, breaches of and threats to the peace, primarily within but not limited to the framework of the United Nations Charter. While post-1989 UN Security Council practice still does not fully conform to the original intentions of the Charter's drafters,[1] it has come much closer to the underly-

[1] Article 43 of the UN Charter, in the eyes of the drafters of the Charter, was one of the cornerstones of the system of collective security; cf. *J.A. Frowein/N. Krisch*, in: B. Simma (ed.), The Charter of the United Nations, 2002, Article 43, 760 *et seq*. and *D.J. Scheffer*, United Nations Peace Operations and Prospects for a Standby Force, Cornell International Law Journal 28 (1995), 649-660.

ing concept of collective security.[2] However, being impressed by the short-term success of the enforcement measures adopted against Iraq, the Security Council and the international community at large seem to have overestimated their "interventionist" capacities *vis-à-vis* existing and emerging crises. For a relatively short period the Council adopted an increasing number of resolutions based on Chapter VII of the Charter, thereby also raising ever more expectations worldwide. Soon, however, the UN and its member states had to realize that their capacities were limited. Rather than intervening in ever more different conflicts they started to re-consider carefully some of the concepts developed at the time of the Cold War, namely, conflict prevention and peacekeeping.[3] It was against this complex background that post-conflict peacebuilding came to the fore.[4]

Given its context, international governance in post-conflict situations can be closely linked to various forms of peacekeeping while, at the same time, it must be considered to be categorically different. This fundamental difference between traditional peacekeeping[5] and more refined forms of international administration in crisis areas is best reflected in the concept of "trusteeship administration".[6] The terminology illus-

---

[2] For a discussion of related practice of the Security Council see *D. Malone*, The Security Council in the post-Cold War Era, New York University Journal of International Law & Politics 35 (2003), 487-517.

[3] *K. Klingenburg*, From Conflict Management to Conflict Prevention: Challenge and Opportunity for the United Nations, in: S.N. MacFarlane (ed.), Peacekeeping at a Crossroads, 1997, 209-224.

[4] Cf. *W. Kühne*, Post-Conflict Peacebuilding: Tasks, Experiences, Lessons Learned and Recommendations for Practical Solutions, in: H.-W. Krumwiede, Civil Wars, 2000, 95-104.

[5] For an overview see *E. Suy*, United Nations Peacekeeping System, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. IV, 2000, 1143-1149. On second-generation peacekeeping see *S.R. Ratner*, The New UN Peacekeeping: Building peace in Lands of Conflict after the Cold War, 1995, at 21-24.

[6] This concept has recently been intensely debated. See *R. Caplan*, A New Trusteeship? The International Administration of War-torn Territories, Adelphi Paper no. 341, 2002, *M. Bothe/T. Marauhn*, UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration, in: C. Tomuschat (ed.), Kosovo and the International Community. A Legal Assessment, 2002, 217, at 222-230, and *R. Wolfrum*, International Administration in Post-Conflict Situations by the United Nations

trates that such international administration is not necessarily performed as an end in itself but may serve a third party interest, above all, the population inhabiting the area under administration.[7] This understanding imposes various limits[8] on the international administration of territories and provides tentative criteria for its legality and legitimacy. This also means that not all cases of international administration in crisis areas can be treated alike. There are major differences between post-conflict governance in Bosnia, Kosovo and East Timor on the one hand, and Afghanistan on the other; Iraq even forms a third category. The cases of former Yugoslavia and East Timor are UN administrations, with comprehensive powers conferred upon the administrators, and established on the basis of a Security Council resolution.[9] In the case of Afghanistan, the UN has primarily acted as a mediator and supporter of processes initiated by the intervening coalition. The post-conflict process rather resembles a polycentric network[10] than a hierarchical UN-based administration.[11] The situation in Iraq, finally, is even more different. A military intervention close to illegality[12] has been followed by

---

and Other International Actors, Max Planck Yearbook of United Nations Law 9 (2005), 649-696.

7 *Bothe/Marauhn* (note 6), at 223 and 236.

8 *Bothe/Marauhn* (note 6), at 235-239.

9 See UN SC Res. 1244 (1999) and 1272 (1999).

10 *T. Marauhn*, Konfliktfolgenbewältigung in Afghanistan zwischen Utopie und Pragmatismus, Archiv des Völkerrechts 40 (2002), 480, at 507-509; *M. Bothe/ A. Fischer-Lescano*, Protego et obligo. Afghanistan and the Paradox of Sovereignty, German Law Journal 3 (2002), no. 9.

11 See UN SC Res. 1378 (2001) ("strong support for the efforts of the Afghan people to establish a new and transitional administration"), 1383 (2001) ("Endorses the Agreement on provisional arrangements in Afghanistan"), and subsequent resolutions. The Bonn Agreement of 5 December 2001 is included in UN Doc. S/2001/1154.

12 The US-led intervention has stimulated a broad international debate on its legality and on the applicable rules of international law. See, among others, *E. de Wet*, The Illegality of the Use of Force against Iraq Subsequent to the Adoption of Resolution 687 (1991), Humanitäres Völkerrecht 16 (2003), 125-132, *R. Wolfrum*, The Attack of September 11, 2001, the Wars against the Taliban and Iraq. Is there a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?, Max Planck Yearbook of United Nations Law 7 (2003), 1-78, *J.A. Frowein*, Is Public International Law Dead?, German Yearbook of International Law 46 (2003), 9-16, and *J. Brunnée/*

more or less traditional military occupation which has only received some recognition by the United Nations (in particular with regard to the establishment of democratic governance, etc.) but not their full support.[13]

These differences have to be borne in mind when assessing German attitudes *vis-à-vis* the international administration of and in crisis areas. However, first some characteristic features of Germany's foreign and security policy have to be considered. In contrast to a number of other countries, in Germany, international activities of its military and police forces were above all a constitutional issue, both in legal and political terms. In light of Germany's acts of aggression in the context of two World Wars, taking into account Nazi dictatorship after 1933, and given the existence of two German states after World War II, the Federal Republic always was reluctant to get involved in military activities outside NATO territorial defence in Europe. It was only after the end of the Cold War and German (re-) unification that the question came up whether Germany, given its strong economy, should take up a wider range of international responsibilities, including military and police activities. In avoiding constitutional reform, which was perceived to be difficult because of political differences between the two major political parties, the Federal government decided to get involved in the security-side of peacekeeping activities in Namibia by deploying border police rather than the military.[14] Similarly, Germany subsequently participated in a number of other UN activities of a more or less administrative character (or second generation peacekeeping) with police rather than military forces.[15] This was, however, only considered second best. It

---

S.J. Toope, The Use of Force: International Law after Iraq, The International and Comparative Law Quarterly, 53 (2004), 785-806.

[13] See UN SC Res. 1483 (2003), 1500 (2003), 1511 (2003). For a closer analysis see *T. Marauhn*, Konfliktfolgenbewältigung statt Legalisierung. Die Vereinten Nationen nach dem Irak-Krieg, Vereinte Nationen 51 (2003), 113-120, and *R. Wolfrum*, Iraq – from Belligerent Occupation to Iraqi Exercise of Sovereignty. Foreign Power versus International Community Interference, Max Planck Yearbook of United Nations Law 9 (2005), 1-45.

[14] Between 1989 and 1990 Germany sent a unit of volunteers of the Federal Border Guard to Namibia to participate in UNTAG operations; see *G. Brenke*, Die Rolle der Bundesrepublik im Namibia-Konflikt, Aus Politik und Zeitgeschichte (1990), 24-32.

[15] For an overview see Auswärtiges Amt (ed.), 25 Years of German Participation in United Nations Peacekeeping Operations, 1998.

was quite clear that, in the long run, the constitutional dimension would re-surface.

Following a non-military approach with regard to peacekeeping it was not until the increasing tensions in the Balkans that Germany had to address the constitutional question of military activities outside NATO territorial defence. Since constitutional agreement still seemed to be difficult to achieve, the Federal Government decided to participate in military enforcement action in the Adriatic Sea without constitutional amendment, thereby giving rise to a case brought before the Federal Constitutional Court. With the 1994 ruling of the Court,[16] laying down various criteria for "out of area" military activities of the armed forces, Germany could eventually take on a much more active security-related role in international relations than before.

Since 1994 Germany's involvement in peacekeeping, peace enforcement and peacebuilding activities has become fairly impressive. In 2005,[17] 2,080 military personnel were involved in ISAF/Afghanistan, 3,320 military personnel in KFOR/Kosovo and 1,130 military personnel in EUFOR/Bosnia. In addition, there was military involvement on a more modest scale in Sudan (UNMIS), Ethiopia/Eritrea (UNIMEE), Sierra Leone (UNAMSIL) and Georgia (UNOMIG). Police participation is strongest in Kosovo (UNMIK) and Bosnia (EUPM), with 336 personnel, but also extends to Côte d'Ivoire (UNOCI), Liberia (UNMIL) and Georgia (UNOMIG). Civilian personnel is involved in Sudan (UNMIS), Haiti (MINUSTAH), Iraq (UNAM), Liberia (UNMIL), Congo (MONUC), Kosovo (UNMIK), Georgia (UNOMIG), Lebanon (UNIFIL), India/Pakistan (UNMOGIP), East Timor (UNOTIL), Afghanistan (UNAMA), Central African Republic (BONUCA), Israel/Palestine (UNSCO), as well as in OSCE missions to Serbia, Montenegro, Kosovo, Croatia, Bosnia, Moldova, Georgia, Skopje, Byelorussia, Uzbekistan, Azerbaijan, Armenia, Ukraine, Kazakhstan, Kirgistan, Turkmenistan, and Albania, and finally in EU missions to Macedonia, Bosnia, and the broader Balkans. While each of the above-mentioned civilian components tends to be rather small, the scope of Germany's

---

[16] BVerfGE 90, 286; for an analysis and a comment see *G. Nolte*, Bundeswehreinsätze in kollektiven Sicherheitssystemen – Zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 54 (1994), 652-685

[17] Data are based upon the website of the Center for International Peace Operations <http://www.zif-berlin.org/en/Analysis_and_Lessons_Learned/Information_Resources/German_Personnel_in_Peace_Operations.html>.

overall involvement in international activities (with a strong focus on international administration in crisis areas) is impressive. It is noteworthy that Germany primarily participates through the United Nations, additionally, in the context of the OSCE and the European Union.

In the following, I will first address the legal and institutional framework under German law (II.), then, briefly highlight the German debate on the international legality and legitimacy of international administration in crisis areas (III.), before illustrating links to development co-operation (IV.) and sketching a few perspectives (V.).

II. The Legal and Institutional Framework Under German Law

1. The 1994 Constitutional Court Ruling

As a consequence of a lack of agreement between the two major parliamentary factions and political parties (CDU/CSU and SPD) about constitutional reform[18] towards clear-cut provisions on participation of German military in operations "out of area" (*i.e.* outside NATO territorial defence), the Federal Government decided to participate in UN and NATO sponsored activities towards the Balkans, irrespective of doubts regarding the interpretation of the German Basic Law.[19] In response, not only the then opposition (SPD) brought a case before the Federal Constitutional Court (questioning the constitutionality of such involvement), but also the liberal FDP, then being involved in the Federal coalition government. This unique procedural background illustrates the wide-spread perception that a solid legal basis was indispen-

---

[18] According to Article 79, para. 1, of the Basic Law, "This Basic Law may be amended only by a law expressly amending or supplementing its text. In the case of an international treaty respecting a peace settlement, the preparation of a peace settlement, or the phasing out of an occupation regime, or designed to promote the defense of the Federal Republic, it shall be sufficient, for the purpose of making clear that the provisions of this Basic Law do not preclude the conclusion and entry into force of the treaty, to add language to the Basic Law that merely makes this clarification."

[19] The debate at this point in time is summarized by *D.-E. Khan/ M. Zöckler*, Germans to the Front? Or Le malade imaginaire, EJIL 3 (1992), 163-177.

sable if Germany was to participate in further international military and police activities.

The Federal Constitutional Court, in what may be described as "creative" jurisprudence,[20] did not only rule on the constitutionality of the activities in question (thereby clarifying the interpretation of Articles 87a, para. 2, and 24, para. 2, of the Basic Law[21]), but also developed criteria and procedures to be applied in future cases. These criteria primarily dealt with parliamentary participation in the decision-making process. In short, the Court ruled that the Basic Law allows participation of German military forces in activities linked to a system of collective security on the basis of Article 24, para. 2, of the Basic Law. While addressing UN sponsored activities in the first place, meanwhile, it seems to be accepted – from the perspective of constitutional law – that German armed forces may also participate in other types of international activities provided such actions can be considered to be broadly within the framework of public international law[22] (bearing in mind Article 26 of the Basic Law[23]). In order to keep the balance of power within German foreign politics, the Federal Constitutional Court further required the Federal Government to inform the Federal Parliament (*i.e.* the *Deutsche Bundestag*) in some detail about the envisaged activities and to seek parliamentary approval thereof. Such parliamentary approval must – as a rule – be *ex ante*, not *ex post*, and it includes the right of the *Bundestag* to terminate such action under certain conditions. While thereby confirming a prerogative of the Federal Government, parliamentary approval is indispensable. However, parliamentary approval does not require a qualified but only a simple majority.

---

[20] For a discussion of the ruling's impact see *C. Lutze*, Der Parlamentsvorbehalt beim Einsatz bewaffneter Streitkräfte, DÖV 56 (2003), 972-980.

[21] Article 24, para. 2, of the Basic Law reads: "With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world." Article 87a, para. 2, of the Basic Law stipulates: "Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law".

[22] See BVerfGE 100, 266; 104, 151; 108, 34.

[23] Article 26, para. 1, of the Basic Law reads: "Acts tending to and undertaken with intent to disturb the peaceful relations between nations, especially to prepare for a war of aggression, shall be unconstitutional. They shall be made a criminal offense".

The ruling met with some criticism, in particular, because of the lack of a solid textual basis for the Court's finding that parliamentary approval is necessary. Nevertheless, all major political parties accepted this as a basis for Germany's international military involvement. With the SPD/Green coalition government the number of related international activities increased dramatically, giving rise, eventually, to the first post-World War II war-fighting involvement of German armed forces.[24]

As far as police and civilian components are concerned, no parallel parliamentary authorization is required by German constitutional law. However, in light of the fact that mostly military, police and civilian activities overlap, all activities involving a military component have been put before the *Bundestag*. The Federal Constitutional Court has confirmed its position later-on and accepted pertinent government policies as constitutional.

2. The 2005 Federal Law on Parliamentary Approval of International Deployment of German Armed Forces

In its 1994 ruling, the Federal Constitutional Court had already requested the legislator to develop, on the basis of its ruling, criteria on the format and the extent of parliamentary approval. While the *Bundestag*, in the meantime, dealt with about 50 cases and indeed authorized deployment of German armed forces within the context of international military action, it proved to be rather difficult to find agreement among the major political parties on such a federal law. While academia and NGOs pushed for pertinent legislation, it took until March 2004 that a potentially successful parliamentary initiative was launched. The parliamentary majority, sponsoring the then SPD/Green coalition government, in December 2004 finally adopted the law, which eventually entered into force on 24 March 2005.[25]

---

[24] For a critical review of "Operation Allied Force" from the perspective of public international law, see *H. Neuhold*, Collective Security after "Operation Allied Force", Max Planck Yearbook of United Nations Law 4 (2000), 73-106. See also *P. Dreist*, Humanitäre Intervention – Zur Rechtmäßigkeit der NATO-Operation ALLIED FORCE, Humanitäres Völkerrecht 15 (2002), 68-77.

[25] BGBl. 2005 I, 775; for an analysis see *D. Wiefelspütz*, Das Parlamentsbeteiligungsgesetz vom 18.3.2005, Neue Zeitschrift für Verwaltungsrecht 2005, 496-500.

The Federal Law on Parliamentary Approval of International Deployment of German Armed Forces more or less confirms the ruling of the Federal Constitutional Court, which on the basis of Section 31 of the Federal Constitutional Court Act[26] was binding anyway. This has led commentators to criticize the new law for being largely declaratory in character.[27] Irrespective of this criticism, the new law is helpful as it provides a set of readable criteria for parliamentary decisions and a transparent starting point for further developments.

First stating the general principle that international deployment of German armed forces necessitates approval by the *Bundestag*, Section 2 of the Law includes a definition of deployment, excluding preparatory measures and purely humanitarian action. Section 3 lays down the minimum content of the Federal Government's submission to the Bundestag and explicitly states that the Bundestag can only accept or reject the submission. The Bundestag is not competent to modify the scope of the envisaged deployment in substance (Section 3, para. 3). In cases of minor impact (or of low intensity), a simplified procedure is provided for by Section 4. Such procedure applies only if armed force is limited to acts of self-defence of the soldiers involved and if the number of soldiers is small (Section 4, paras. 2 and 3). In cases of particular urgency, Section 5 of the Law provides for *ex post*-authorization. Section 6 requires continuous government reporting to the *Bundestag*. Should an extension of the mission be necessary, in principle, the same procedure applies as in the case of the original authorization. However, Section 7, para. 2, provides that an extension shall be deemed to have been authorized after a relatively short period of time. Finally, Section 8 stipulates that the authorization can be withdrawn by the *Bundestag*, without, however, answering the difficult question on the conditions and time-limits for such withdrawal.

An evaluation of the Law must start with a comparison of the 1994 ruling of the Federal Constitutional Court and the substance of the new Law. As already indicated, the Law does not go far beyond the constitutional limits outlined by the Federal Constitutional Court. One may even argue that it fails to develop the necessary details depending on the different types of military deployments although such details were al-

---

[26] Section 31, para. 1, of the Federal Constitutional Court Act stipulates: „The decisions of the Federal Constitutional Court shall be binding upon Federal and Land constitutional organs as well as on all courts and authorities".

[27] *F. Schröder*, Das neue Parlamentsbeteiligungsgesetz, Neue Juristische Wochenschrift 2005, 1401-1404.

ready pointed at in the 1994 ruling.[28] This may justify an assessment of the new Law as not really necessary (some even argue that it is superfluous). If the new Law does not go beyond the 1994 ruling, then several questions have to be raised in respect of the hierarchy of norms: Does the Law benefit from the fact that the Court's ruling is an authoritative interpretation of the Basic Law? What is the relationship between the new Law and the Constitution? And what eventually is the character of parliamentary decisions based upon the Law? Obviously, those decisions enjoy a *sui generis* character. Most important, but unanswered, from the perspective of the individual to be deployed, is the more serious question as to his or her status. Bearing in mind the different situations that such a person may be confronted with, there should have been some statutory provisions to achieve a greater degree of clarity as to this person's legal status, not only but also from the perspective of civil service legislation and international humanitarian law.

3. Institutional Setting and Action Plan "Civilian Crisis Prevention"

What seems to be more creative and forward orientated than the 2005 Law on parliamentary approval of international deployment of German armed forces is the strategy adopted by the German Federal Government with regard to the broader agenda of conflict prevention. While the issue as such has long been a focus of foreign policy, the changing nature of numerous conflicts after the end of the Cold War necessitates a fresh look at conflict prevention. The challenges which are most pressing in this regard result from the increasing number of regional conflicts and failing states, from the proliferation of weapons of mass destruction and the spread of trans-national terrorism, from organised crime and the privatisation of violence, and many other sources.

The German Federal Government has realized that crisis prevention must be part of its broader concept of security with a need to adopt an integrative approach. Such approach must include not only foreign, security and development policy, but also economic, financial and environmental issues. Recognition thereof has led to efforts to re-arrange administrative structures accordingly. The political focus of these efforts today is the Action Plan "Civilian Crisis Prevention, Conflict

[28] This criticism was voiced by the German parliamentary opposition at the time, the CDU; cf. BT-Drs. 15/4264, at p. 6.

Resolution and Post-Conflict Peacebuilding."[29] The Plan was adopted in May 2004. It builds on the changing nature of conflicts, draws pertinent conclusions with regard to Germany's approach to crisis prevention, and identifies not only fields of action but specific initiatives to be implemented over a period of five to ten years.

What the Federal Government aims at is to improve its coordinating crisis prevention policy and make it more coherent. Crisis prevention, at least according to the Action Plan, is to be developed into a guideline for, and a task that involves all fields of national policy. By September 2004, an Interministerial Steering Group for civilian crisis prevention was established and charged with implementing the various measures contained in the Action Plan. This committee includes representatives from all Federal Ministries. It is headed by the Federal Foreign Office Commissioner for Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peace-Building. In 2006, the Interministerial Steering Group will report to the German *Bundestag* on the progress that has been achieved in the field of civilian crisis prevention.

So far, the Action Plan has hardly been discussed from the perspective of international law.[30] If doing so, however, it can be illustrated that the Plan includes some elements of traditional conflict prevention as they emerged in public international law, and builds upon and extends them towards a more comprehensive approach, including post-conflict peacebuilding. Modern public international law, as it has developed over time, does not only provide the tools for the making and enforcement of rules in international relations but *ipso facto* also serves conflict prevention.[31] In the course of the 19th century, academia and practice realized that there was a need to develop specific (and more refined) instruments of conflict prevention and for the peaceful settlement of disputes, ranging from negotiation and mediation to arbitral and judicial settlement. These strategies have been included in Chapter VI of the UN Charter. They have been further developed in light of a broader va-

---

[29] <http://www.auswaertiges-amt.de/www/en/infoservice/download/pdf/friedenspolitik/AP%20EN.pdf>.

[30] *T. Marauhn*, Der Aktionsplan Krisenprävention der Bundesregierung aus völkerrechtlicher Perspektive, Die Friedenswarte 79 (2004), 299-312.

[31] *P. Schneider*, „Frieden durch Recht". Von der Eingehung des Krieges zur gewaltfreien Konfliktbeilegung, Sicherheit und Frieden 18 (2000), 54-66.

riety of conflicts, actors, and policies, emerging over time, in particular, towards the end of the 20th century.[32]

This process was supported, stimulated and sometimes initiated by the United Nations. Recent institutional reforms within the UN are ample evidence thereof, including the UN Interdepartmental Framework for Co-ordination on Early Warning and Preventive Action, the Joint UNDP/DPA Programme on Building National Capacity for Conflict Prevention, and the High-Level Panel on Threats, Challenges and Change.[33] Apart from these institutional developments, a lot of conceptual work has been done within the framework of the UN, including the UN Secretary-General's report on "Prevention of armed conflict"[34] aiming at a translation of the "rhetoric of conflict prevention into concrete action."[35] Trends and tendencies can also be taken from the "Interim report of the Secretary-General on the prevention of armed conflict."[36] Moving from "early warning" to "early action", these developments pinpoint the need to rely not only on military options but to develop a broad variety of legitimate interventions. This has to be considered against the background that states today are reluctant to intervene and thus tend to downplay existing dangers and risks. The crisis in Darfur is a sad example to this end.[37]

The German Federal Government's Action Plan and its institutional backbone thus fit into the general policies which have been developed in international law over time. Pertinent policies are all based on the comprehensive prohibition of force in international relations as embodied in Article 2, para. 4, of the UN Charter. Unfortunately, the German Action Plan does not explicitly refer to this starting point, which would have been important in particular in light of the weakening of the pro-

---

[32] See *Marauhn* (note 30), at 301.

[33] For further information on those institutional developments see <http://www.un.org/Depts/dpa/prev_dip/fr_preventive_action.htm>.

[34] UN Doc. A/55/985 (= UN Doc. S/2001/574); UN Doc. A/55/985/Corr. 1 (= UN Doc. S/2001/574/Corr. 1).

[35] UN Doc. A/55/985, at p. 3.

[36] UN Doc. A/58/365 (= UN Doc. S/2003/888).

[37] See *N.J. Udombana*, When Neutrality is a Sin. The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan, Human Rights Quarterly 27 (2005), 1149-1199. But see also *P. Alston*, The Darfur Commission as a Model for Future Responses to Crisis Situations, Journal of International Criminal Justice 3 (2005), 600-607.

hibition in light of recent developments such as Kosovo and Iraq.[38] While a reinforcement of the prohibition of the use of force is missing within the Action Plan, the remainder follows a convincing line, moving from the obligation to peacefully settle disputes, across preventive arms control and disarmament, towards what is termed co-operative and supplementary measures.[39] The Action Plan thus extends the scope of crisis prevention and moves towards an integrated system of post-conflict peacebuilding and preventive action.

III. The Legitimacy of International Administration in Crisis Areas Under Public International Law

Addressing the question of whether, in Germany, international administrations of crisis areas are generally perceived as legitimate under public international law necessitates a dual assessment: a political and an academic one. In the light of the broader international debate, it is, however, relatively difficult to attribute parts of the discussion to individual governments and (national) authors. The following remarks thus are limited to indications which may be drawn from participation of Germany in international administrations and from comments by German academics.

1. Political Assessment

Considering carefully the involvement of the Federal Republic of Germany in related international activities, it is noteworthy that there is a notable reluctance to participate in peace enforcement activities. Such activities seem to be considered as legitimate only if exercised either on the basis of clear UN authority, or on a solid argument of self-defence.[40] Slightly ambiguous was the approach to the air strikes against former

---

38 See my criticism, *Marauhn* (note 30), at 304-305.

39 Cf. *Marauhn* (note 30), at 310-312.

40 This may serve as an explanation for German participation in Operation Enduring Freedom; nevertheless, a lot of criticism has been voiced against Germany's contribution to the operation, see *C. Fischer/ A. Fischer-Lescano*, Enduring Freedom für Entsendebeschlüsse?, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 85 (2001), 113-144.

Yugoslavia which Germany participated in, without, however, either UN authority or an argument of self-defence. Most commentators will recall the position adopted by both the Minister of Defence and the Foreign Minister in the *Bundestag* on the occasion of such air strikes. While *prima facie* the attitude towards the US-led military intervention into Iraq was clear – at least from a political perspective – it is today also considered ambiguous by some, not only because Germany continued to provide military bases to the United States and its Allies but also in light of recent newspaper reports which suggest an involvement of German intelligence in the intervention.[41]

Apart from such still modest involvement in peace enforcement activities, Germany, from the very beginning of related activities in former Yugoslavia, building upon experiences in second-generation peacebuilding, focused on participation in the international administration of crisis areas. This participation – from the perspective of the Government – is considered as legitimate on the basis of UN authority, less so on the basis of (implied) consent. It may be stressed that Germany hosted the Bonn Afghanistan Conference and thereby sought to support the role of the UN in re-building Afghanistan.[42] Also, German involvement in rebuilding Iraq has been and is linked to related UN activities. While the Government is not outspoken on the legal basis for such involvement, it may be inferred from its policies, that UN authority is at least considered to provide a sufficiently solid basis for such participation.

It may be added that the German Government obviously considers international administrative efforts as adhering to the principles of good governance. Building upon national experiences Germany is advocating a particular rule of law-based model of international administration within the UN as well as the European Union. This is not only reflected in the German Federal Government's Plan of Action but can also be drawn from pertinent statements in the UN and in general. It should, however, be stressed that such approach is closely linked to Germany's policies of development co-operation.

---

[41] "German Intelligence Gave U.S. Iraqi Defense Plan, Report Says", New York Times of 27 February 2006.

[42] For an analysis of the Bonn Agreement see *Marauhn* (note 10), at 491-496.

2. Academic Debate

The academic debate in Germany on international administration in crisis areas has been an ongoing one from the turn of the century. While bearing in mind its historical precedents, such international administration was considered as a fairly new dimension in conflict management,[43] and there were numerous efforts to re-conceptualise such international administration. It would go beyond the scope of this contribution to illustrate the debate *in toto*. Hence, I will concentrate on a few aspects which – as far as I can see – seem to be more or less accepted as providing a legitimate basis for international administration in crisis areas.

Most of the recent cases of international administration of crisis areas have been developed within the UN framework. Within the UN system it is the Security Council mandating such administration and the Secretary-General exercising such authority. These policies are based upon and emerge from second-generation peacekeeping. Some authors put forward the idea that the difference between more extensive types of peacekeeping and international administration can be best illustrated referring to the concept of trust.[44] Such idea is linked up to the overall purpose of international administration in crisis areas which is not to pursue grand objectives such as spreading democracy around the globe but a much more modest one: the maintenance of international peace and security.[45] While this is the overall objective, a number of sub-objectives are pursued by the UN, in particular when looking at Kosovo and East Timor. They range from stabilizing territories which form part of another state and whose future status is not yet agreed upon; they call for autonomy and meaningful self-administration; and there is even a reference to the right of self-determination.[46] Considering all this

---

[43] Cf. *Bothe/Marauhn* (note 6), at 217. For further analyses from a German perspective see *J.A. Frowein*, Die Notstandsverwaltung von Gebieten durch die Vereinten Nationen, in: H.W. Arndt *et al* (eds.), Völkerrecht und deutsches Recht. Festschrift für Walter Rudolf, 2001, 43-54; *C. Stahn*, International Territorial Administration in the Former Yugoslavia, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 61 (2001), 105-172; *M. Ruffert*, The Administration of Kosovo and East-Timor by the International Community, International and Comparative Law Quarterly 50 (2001), 555-573.

[44] *Bothe/Marauhn* (note 6), at 222-230.

[45] *Bothe/Marauhn* (note 6), at 223.

[46] On Kosovo see UN SC Res. 1160 (1998); 1199 (1998); 1203 (1998); 1239 (1999) and 1244 (1999), paras. 10, 19 and Annex II.

from the perspective of trusteeship administration means administration by an international organisation, with a view to maintain international peace and security, respecting self-determination as far as possible, but establishing a more or less comprehensive system in terms of legislative, executive and judicial powers.[47] Thus, this type of (modern trusteeship) administration enjoys a twofold legal basis: local and municipal law and UN law are closely inter-related, thus establishing an administration of a dual nature, being a local institution and an international organ at the same time.[48]

It is against this background that – apart from relying upon the consent of the territorial state as a possible legal basis – a Chapter VII perspective can be easily taken in the context of such international administrations. It is Chapter VII with all its enforcement powers providing a solid legal basis for all outside interferences directed at the maintenance of international peace and security, in particular when being as comprehensive as in the cases of Kosovo and East Timor. The fact that one may, by way of reference, also derive some input from other Chapters of the UN Charter does not fundamentally alter this. However, such legal basis also brings about some inherent (!) limitations of international administration in crisis areas as trusteeship administration. Based on the purpose of such administration, functional limitations must be borne in mind: (1) As soon as international peace and security have been re-established and no relevant threat remains, any international administration must come to an end.[49] (2) Since such administration is exercised both in the interest and on behalf of the international community but also – at least conceptually – in the interest of the inhabitants of the territory concerned, the UN are not only accountable to its members but also to the population under administration. Further limitations can be derived from international human rights law and the principle of democratic governance, emerging from the right of self-determination.[50]

While the above applies to UN-based international administration in crisis areas, it cannot be ignored that with developments in Afghanistan and Iraq, a new dimension has made any legal assessment more complex. This already became a salient issue in the context of Afghanistan,

---

47 *Bothe/Marauhn* (note 6), at 224-228.

48 For a detailed account see *Ruffert* (note 43), sub III.1.

49 *Bothe/Marauhn* (note 6), at 236.

50 Cf. *Stahn* (note 43), sub II.1.a.

but it is now obvious with regard to Iraq. In all cases where military intervention has not been initiated nor even authorized by the UN itself, the organization is reluctant to take on an international administration of the same intensity as in the cases of Kosovo and East Timor. This does not only have political consequences but it also affects the legal basis and perhaps even the legality of such administration.

In the case of Afghanistan, the consensual element must be considered essential. It is on the basis of the Bonn agreement that the involvement of the UN was secured and the whole process is not one of comprehensive trusteeship administration, neither in degree nor in form. Rather, it is a multi-layered approach with some input from the UN, but primarily based on consent of the new authorities in Afghanistan which have been provided with democratic legitimacy at least *ex post*.[51]

The case of Iraq is even more complex because it must also take into account the law of military occupation.[52] Given the character of the US-led intervention in Iraq, the subsequent occupation of the country is best approached from the traditional concept of military occupation, at least as a starting point. Such occupation, however, is subject to a number of limitations, primarily on the basis of international humanitarian law. These limitations have so far not been modified to an extent that they can be considered to be irrelevant. They include the obligation, not to totally modify the system of government within the occupied territory. Any claim to a right of governmental change or democratic change is thus doubtful from the very start. In the case of Iraq, democratization can thus only be developed on the basis of UN input or on the basis of true self-determination of the people of Iraq. The first option might rely on UN Security Council resolutions which – while neither providing *ex post*-legality nor *ex post*-legitimacy to the intervention – are limited to expressing support towards the development of new governmental structures in Iraq after [!] the intervention.[53] As far as the second option is concerned, recent developments after the Iraqi elections have illustrated that this is far from easy to argue.

---

[51] On this complex interrelationship see *T.D. Bosi*, Post-Conflict Reconstruction: The United Nations' Involvement in Afghanistan, New York Law School Journal of Human Rights 19 (2003), 819-831.

[52] For a full analysis see *Wolfrum* (note 6), 1-45; *S. Oeter*, Post-Conflict Peacebuilding – Völkerrechtliche Aspekte der Friedenskonsolidierung, Friedenswarte 80 (2005), 41, at 48-50.

[53] See *Marauhn* (note 13), at 118-120.

In sum, the academic debate seems to reflect a consensus that international administration of crisis areas is best based on UN authority and legitimacy. Such authority can be supplemented by the consent of the territorial state, but not necessarily by the laws of occupation. It may be added that states should be careful to modify the rules applicable to military occupation, since international relations illustrate that long-term stability can rarely be achieved through institutional changes promoted by an occupying power.

IV. Linkages to Development Co-operation

The Federal Government's Action Plan illustrates a clear interrelationship between post-conflict peacebuilding and international administration in crisis areas on the one hand and long-term objectives of development co-operation. Germany follows a programmatic approach towards rebuilding governmental infrastructure in developing countries with a strong focus on technical and administrative expertise provided with respect to the rule of law[54] and good governance.[55]

While this policy has now for the first time been formally and conceptually integrated into the Action Plan and related institutional rearrangements, a note of caution must be voiced as to its implementation. Recent experiences in development co-operation have demonstrated that constitution-drafting and constitution-development are highly important but will not be sustainable if they lack administrative and cultural underpinnings. Any long-term policy must be drafted and implemented "high-end", and it must bear in mind who is the final recipient of the outside interference. While modern national constitutions are normally considered to be binding upon all branches of government, steps must be taken to make human rights, democracy and the rule of law operational at the level of the ordinary citizen. Since all this cannot be achieved at the same moment in time, issues of sequencing are of utmost importance.

---

[54] On the importance of the rule of law see, *e.g.*, OECD, The DAC Guidelines. Helping Prevent Violent Conflict, 2001.

[55] See Good Governance, Ein Positionspapier des BMZ, BMZ-Spezial Nr. 044 / Juni 2002; <http://www.bmz.de/de/service/infothek/fach/spezial/spezial044/a90.pdf>.

Germany's concept of "*Rechtsstaat*" has not only gained an enormous amount of support but it has also attracted much attention around the globe, since it is much broader than the Anglo-Saxon "rule of law" concept.[56] However, "*Rechtsstaat*" must be more than a political agenda if it is to be sustainable. Thus, it is necessary to identify elements of "*Rechtsstaat*" which can be effectively implemented step-by-step. These elements include the accountability of governments, transparency, the justice sector, but above all the development of administrative structures and administrative law ensuring the translation of "*Rechtsstaat*" into instruments which are comprehensible and visible to the ordinary citizen. German development co-operation is undergoing a process to gradually attain this objective. Conceptual work has been done in this regard with respect to a broad number of fields, including democracy-related elements such as participation, transparency, and culture.

V. Perspectives

While this input is far from being comprehensive, it has sought to highlight certain developments emerging from recent German practice and policies. Summing up those trends, the following can be identified:

(1) German participation in international administration of crisis areas has become a high-profile foreign policy activity in recent years. (2) Germany has developed a constitutional and legal framework for deployment of armed forces in crisis areas. (3) The Federal Government's Action Plan "Civilian Crisis Prevention" provides an institutional setting and a policy framework directed at a comprehensive approach towards post-conflict peacebuilding and crisis prevention alike. (4) The German Federal Government and a broad number of academics consider UN authorization as the best possible basis of legitimacy for international administration in crisis areas; consent of the territorial state and the right of self-determination may provide supplementary authority, less, however, the law of military occupation. (5) In order to be sustainable, a long-term perspective on post-conflict peacebuilding must be developed. German participation in international administra-

[56] For a comparative approach see *R. Grote*, Rule of law, Rechtsstaat and "Etat de droit", in: C. Starck (ed.), Constitutionalism, Universalism and Democracy, 1999, 269-306.

tion of crisis areas is typically linked up with its development co-operation.

As a basis for a comparative assessment the above remarks must be considered from a policy and a law perspective alike. It would be an overestimation of legal analysis to draw purely legal conclusions from the above remarks. They are embedded in a political process that is still ongoing. If, however, international administration in crisis areas is to remain a useful tool of the international community in post-conflict peacebuilding then there is, indeed, a need to develop a more coherent policy and legal framework to this end. Such framework, apart from addressing the above questions, must also deal with two long-term issues: Is there a need to re-think the traditional approach towards the law of military occupation or is this still adequate? What is the status of civilian personnel, both from a national as well as from an international perspective? Both questions are, in particular, relevant for international administration of crisis areas outside the scope of UN activities. While such administration remains preferable within the UN context, it would be unrealistic to expect this to be the standard option for the future, both for political reasons and in light of the limited resources available.

Constitutional Guarantees of Judicial Independence in Germany

Anja Seibert-Fohr

I. Introduction: The Legal Framework

Judicial independence constitutes one of the fundamental principles of the German Constitution.[1] The status and structure of the judiciary is

[1] BVerfGE 2, 307, at 320; 87, 68, at 85. For the guarantee of judicial independence in Germany generally, see *e.g. J. Limbach*, Im Namen des Volkes –

elaborated in Chapter XI (Articles 92-104) of the Constitution, the so-called Basic Law ("Grundgesetz"). Article 97 guarantees the independence of judges.[2] It reads:

> (1) Judges shall be independent and subject only to the law.
>
> (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

This guarantee applies to federal and state ("Land") judges alike since the German judiciary is mixed, being composed of state and federal courts.[3] While the highest courts are federal courts,[4] the courts of first instance and courts of appeal[5] are state courts. As a general rule, judgements from the highest state courts may be appealed to the supreme federal courts provided they concern significant cases. Judicial independence of state judges is also guaranteed by the constitutions of the

---

Macht und Verantwortung der Richter, 1999, 89-104; *A. Baer*, Die Unabhängigkeit der Richter in der Bundesrepublik Deutschland und in der DDR, 1999; *J. Zätzsch*, Richterliche Unabhängigkeit und Richterauswahl in den USA und Deutschland; *J. Limbach*, Die richterliche Unabhängigkeit – ihre Bedeutung für den Rechtsstaat, Neue Justiz 1995, 281; *F. Lansnicker*, Richteramt in Deutschland, 1996. See also *K. Eichenberger*, Die richterliche Unabhängigkeit als staatsrechtliches Problem, 1960.

[2] Judicial independence, furthermore, is implicitly guaranteed by Article 20 and 92 Basic Law. For the status of judges see *G. Barbey*, Der Status des Richters, in: J. Isensee/ P. Kirchhof (eds.), Handbuch des Staatsrechts, Vol. III, 2nd ed., 1996, 815-857; *Niebler*, Die Stellung des Richters in der Bundesrepublik Deutschland, DRiZ 1981, 281.

[3] Accordingly, judges employed either by the federal government or the state. See § 3 DRiG.

[4] Article 95 Basic Law. See also Art. 96 for other federal courts.

[5] This includes the courts of second and third instance, namely "Landgerichte" and "Oberlandesgerichte" for civil litigation and criminal proceedings.

states which copy verbatim or analogously repeat Article 97 (1) Basic Law.[6]

The legal status of federal and state judges is specified in federal laws, namely the "Federal Judges Act" ("Deutsches Richtergesetz": DRiG) and the "Judicature Act" ("Gerichtsverfassungsgesetz": GVG) which, along with other legal acts, provides the basis for procedural law in Germany.[7] Both acts reproduce almost verbatim Article 95 (1) Basic Law and provide for specific safeguards of judicial independence.[8] With respect to state judges this law only provides for framework provisions. Their legal status is set out in the various state constitutions and further regulated by special state laws pursuant to paragraph 3 of Article 98 Basic Law.

II. The Elements of Judicial Independence in Germany

Judicial independence is commonly regarded as an institutional safeguard for the judiciary as such, not as a right or privilege for the individual judge.[9] It is a genuine feature of the judiciary mandated by the rule of law[10] and the separation of powers[11] and serves the protection of the parties to a conflict. This has important structural and substantive implications for the organization and the powers of the judiciary.

The guarantee of judicial independence is directed against all government bodies, primarily against the legislative and executive branches. Whether it includes a protection against interference by the public is

---

6 Art. 65 (2) Bad-Württ Verf; Art. 85 Bay Verf; Art. 63 (1) Berlin Verf; Art. 135 (1) Brem Verf; Art. 62 (1) Hamb. Verf; Art. 126 (2) Hess Verf; Art. 39 (3) Niedersachs Verf; Art. 121 Rheinl.-Pfalz Verf; Art. 110 Saar Verf; Art. 36 (1) SchlHLandessatzung; Art. 108 (1) Brand Verf; Art. 76 (1) Meckl-Vorp. Verf.; Art. 55 (2) Sachs.Verf; Art. 83 (2) Sachs-Anh Verf; Art. 86 (2) Thür Verf.

7 See Chapter IV "Deutsches Richtergesetz" (§§ 25 *et seq*.).

8 § 1 GVG; § 25 DRiG.

9 BVerfGE 27, 211, at 217; 48, 246 at 263. *J. Wittmann*, Richterliche Unabhängigkeit – Freiheit und Verantwortung, in: Hans-Detlef Horn (ed.), Recht im Pluralismus, Festschrift für Walter Schmitt Glaeser zum 70. Geburtstag, 2003, 363, at 366.

10 Art. 20 (2) Basic Law.

11 See *S. Detterbeck*, Art. 97, in: M. Sachs/ U. Battis (eds.), Grundgesetz-Kommentar, 3rd ed., 2003, 1563 (Rn.1).

controversial.[12] There is no rule on contempt of court such as in the United Kingdom which protects the court from pressure by the media.

Despite the prominence of the substantive guarantee of judicial independence in the German Constitution, there are only weak sanctions.[13] A judge, however, may challenge interference with judicial independence in an individual complaint before the Federal Constitutional Court.[14]

Judicial independence traditionally has been interpreted to comprise three elements: substantive independence, structural independence and personal independence. They are protected by different provisions of the German Constitution and federal legislation. In the following the protection of these elements under German law shall be elaborated. Specific aspects of judicial independence, such as appointment and dismissal, will be discussed in the second part.

1. Substantive Independence

Substantive independence is guaranteed by Article 97 (1) Basic Law and applies, pursuant to the Federal Constitutional Court, to all those exercising judicial power including lay judges.[15] It requires that the judge in her or his decision-making process is only bound by law, not by any determination or other means of influence by other parties. This applies not only *vis-à-vis* the litigants[16] but also *vis-à-vis* the entire government. In particular, substantive independence guarantees freedom from instruction,[17] freedom of action, and freedom of insight.[18] Even indirect

---

12 *R. Wassermann* (ed.), Kommentar zum Grundgesetz für die Bundesrepublik Deutschland (Alternativ Kommentar), 2nd ed., Vol. 2, 1989, Art. 97, Rn. 86 ff.

13 § 29 DRiG; § 839 (2), 1 BGB. For the latter see *T. Tombrink*, Der Richter und seine Richter – Fragen der Amtshaftung für richterliche Entscheidungen, DRiZ, 2002, 296.

14 BVerfGE 12, 81, at 88; 55, 372, at 391. See also § 26 (3) DRiG.

15 BVerfGE 26, 185, at 201.

16 The freedom from interference by parties may not be compromised on the basis of a legal enactment. BVerfGE 21, 139, at 146; 26, 141, at 154; 30, 149, at 153.

17 BVerfGE 3, 214, at 224; 27, 321, at 322; 87, 68, at 85.

means of influence,[19] such as recommendations, solicitations and suggestions, and psychological influence are not allowed.[20] Protected are all actions concerning judicial functions including activities in the preparation and execution of decisions. Even scheduling, summons, and policing measures may not be interfered with.[21] For example, once a hearing has been scheduled by a single sitting judge, the chief justice may not contact the counsel with the intent to reschedule the hearing.[22]

In order to avoid indirect influence, criminal, civil and disciplinary responsibility for judicial action is limited.[23] As § 26 (1) Federal Judges Act ("Deutsches Richtergesetz") stipulates, judges are only subject to disciplinary supervision as long as it does not interfere with judicial independence. Judges may only be prosecuted for perversion of justice with respect to adjudication in case of a fundamental violation of the administration of justice.[24] With respect to civil liability, only a breach of duty which constitutes a crime provides the basis for damages with respect to adjudication.[25]

a) Independence from the Legislature

Judicial independence *vis-à-vis* the legislature[26] does not relieve the judiciary from compliance with the law. As stipulated by Article 97 (1), the judge is subject to the law. But the legislative branch may not interfere with individual cases by enacting case-specific legislation.[27] Neither

---

18 *W. Meyer*, in: I. v. Münch/ P. Kunig (ed.), Grundgesetz-Kommentar, Vol. 3, 4/5th ed., 2003, Art. 97, 705 (Rn.8).

19 BVerfGE 12, 81, at 88; 26, 79, at 93 and 96; 38, 1, at 21.

20 BGHZ 57, 344, at 348. *C. D. Classen*, in: H. v. Mangoldt/ F. Klein/ C. Starck (eds.), Das Bonner Grundgesetz, Kommentar, Vol. 3, 2001, Rn. 18.

21 *D. Leuze*, Richterliche Unabhängigkeit, DÖD 4/2005, 78, at 79.

22 BGH, NJW-RR 2002, 574, at 575.

23 Whether adjudication can at all provide the basis for disciplinary action is contested. *O. R. Kisse/ H. Mayer*, Gerichtsverfassungsgesetz, 4th ed., 2005, § 1 GVG, Rn. 202.

24 § 339 StGB. This requires a conscientious and grave breach of the law. BGHSt 32, 363; 40, 40; 44, 258.

25 § 839 (2), 1 BGB. See BGHZ 50, 19.

26 BVerfGE 12, 67, at 71; 38, 1, at 21.

27 *S. Detterbeck*, in: Sachs (note 11), Rn.12.

may the parliament adopt decisions which put a judge under pressure to decide a case one way or the other.[28] A call to boycott the execution of a decision would also be impermissible. This, however, does not mean that members of parliament are prevented from criticizing judgements.[29]

b) Independence from the Executive

The judiciary is to be free from any interference by the executive in the exercise of judicial functions. Instructions to decide a case one way or the other,[30] adoption of administrative regulations with this intent or any other form of influence,[31] such as organizational entanglement, is impermissible.[32]

In order to determine which executive measures are permissible, the Federal Constitutional Court distinguishes between the inner sphere of judicial exercise and the outer sphere. With respect to the core judicial functions, which are functions directly related to the finding of justice,[33] any interference is impermissible. Among the protected core functions are not only judgements, but also procedural measures taken in preparation of a decision or subsequently.[34] This includes the maintenance of law and order during hearings,[35] transcripts,[36] recusal,[37] taking of evidence[38] and the evaluation of potential settlements.[39] The impermissible

---

28 *Ibid*. Rn.12.

29 For this issue see *R. Mishra*, Zulässigkeit und Grenzen amtlicher Urteilsschelte, 1997; *G. Kisker*, Zur Reaktion von Parlament und Exekutive auf „unerwünschte" Urteile, NJW 1981, 889.

30 BVerfGE 14, 56, at 69; 26, 186, at 198; 27, 312, at 322; 31, 137, at 140; 36, 174, at 185; 60, 175, at 214.

31 BVerfGE 26, 79, at 92 *et seq*.; 55, 372, at 389.

32 But the merger of the ministry of justice and the ministry of the interior in North Rhine-Westphalia was not considered to be impermissible by the competent court. VerfGH NW NJW 1999, 1243 *et seq.*

33 Included are optional cognisance and the allocation of cases.

34 BGHZ 42, 163, at 169.

35 BGHZ 67, 184, at 188.

36 BGHZ 67, 184, at 188.

37 BGHZ 77, 70, at 72.

38 BGHZ 71, 9, at 11.

interference with judicial core functions is of particular relevance for the disciplinary supervision of judges[40] and will be elaborated below together with the permissible disciplinary measures regarding the outer sphere of judicial activity.

c) Independence within the Judiciary

Substantive independence according to the Federal Constitutional Court even applies within the judicial branch.[41] The competent judge or bench alone has to decide the case on the basis of the applicable law. The judge is protected against internal interventions unless there is a legal mandate to perform such judicial functions. For example, a chief justice may not change the judgement of a judge sitting singly.[42]

Judges are free in their decision-making and only bound by the law, that is the constitution, legislation and other forms of legal regulation.[43] Pursuant to Germany's civil law tradition they are not obliged to follow prior jurisprudence. Though a judge may not decide arbitrarily he is not bound by the prevailing interpretation of the law by other courts.[44] According to the Federal Constitutional Court, as a result of the constitutional principle of judicial independence adjudication in Germany is not uniform.[45] The only substantive control permissible is the one exercised by higher courts on appeal. But no disciplinary measures are allowed which allude to purportedly wrongful decision-making.

---

39 BGHZ 47, 275, at 284 *et seq.*

40 See below at 3.

41 BVerfG, NJW 1996, 2149, at 2150 *et seq.*

42 BVerfG, NJW 1996, 2149, at 2150.

43 Decrees are binding if they comply with the constitutional empowerment. BVerfGE 18, 52, at 59; 19, 17, at 31 *et seq.*

44 BVerfGE 87, 278; 78, 123, at 126. For the definition of arbitrariness see BVerfGE 62, 189, at 192; 86, 59, at 62. There are, however, exceptions provided in the law, such as § 31 (1) and (2) BVerfGG (Law on the Federal Constitutional Court).

45 BVerfGE 87, 278.

2. Structural Independence

Structural independence of the judiciary requires a structural separation from the other branches of government and is guaranteed by the second sentence of Article 20 (2) Basic Law.[46] The organization of the courts, therefore, needs to be independent. Entanglement with administrative or legislative functions is to be avoided. Pursuant to § 4 Federal Judges Act ("Deutsches Richtergesetz") judges are not allowed to exercise legislative or executive functions simultaneously with judicial functions excluding tasks of court administration.[47] In practice, however, it has been tolerated when judges take over unsalaried avocational municipal functions.[48]

3. Personal Independence

Personal independence further supplements substantive independence by protecting the judge as a person against external interventions.[49] This concerns the access to the profession, as well as the working and living conditions of judges. Personal independence is in part guaranteed by Article 97 (2) and 98 Basic Law. Article 97 (2) prohibits any avoidable influence on the status of judges[50] and guarantees an adequate remuneration fixed by law.[51] Further guarantees of personal independence are to be found in the Federal Judges Act (DRiG). As a general rule, there is life tenure for judges with full-time positions on condition of good behavior which is only terminated at a set retirement age.[52] No recall or transfer is permissible without consent.

---

[46] See also § 1 GVG. An alternative basis for structural independence is foreseen in Art. 92 and 95 Basic Law.

[47] See also Art. 97 Basic Law which requires the division of judicial and administrative functions.

[48] *E. Schmidt-Jorzig*, Aufgabe, Stellung und Funktion des Richters im demokratischen Rechtsstaat, NJW 1991, 2377, at 2381. In order to justify these double-functions, the argument is made that § 36 DRiG only mentions incompatibility with membership in federal or state parliament.

[49] BVerfGE 14, 56, at 69.

[50] BVerfGE 12, 81, at 88.

[51] BVerfGE 12, 81, at 88.

[52] Art. 97 (2) Basic Law. See also below at. V.1.

Though Article 97 (2) Basic Law applies only to judges with full-time positions,[53] the Federal Constitutional Court has held that other judges (such as auxiliary judges, law clerks and lay judges) need to be protected personally so that their substantive independence is guaranteed.[54] Personal independence of lay judges is explicitly protected by § 44 (2) Federal Judges Act (DRiG). Without consent a judge may only be removed from office before the expiry of his or her term by a court in accordance with the law. The status of judges is further elaborated on in §§ 8- 24 Federal Judges Act which regulate the appointment of judges and the termination of office.

III. Appointment of Judges

1. The Necessary Qualifications for Judicial Appointment

As a general rule, pursuant to Article 33 (2) Basic Law "[e]very German shall be equally eligible for any public office according to his aptitude, qualifications, and professional achievements."[55] The necessary qualifications for full-time judges are set out in § 5 Federal Judges Act (DRiG) which requires the completion of legal university studies with the first degree in law and legal training for an overall period of two years at a civil court, the prosecutor's office or a penal court, with the government, in a lawyer's office and in an elective position[56] followed by the second state examination. At least two of the four years of legal studies need to be conducted in Germany.[57] These common rules are further regulated by state laws. Additional requirements for the appointment of judges are as follows: the applicant has German citizenship, advocates the free democratic basic order of the Federal Republic of Germany and

---

[53] Full-time judges may not exercise functions other than judicial ones and occupy a permanent position.

[54] Legal basis is the principle of Art. 33 (5) Basic Law. BVerfGE 12, 81 (88). But see BVerfGE 14, 56, at 71 *et seq.*

[55] See also § 38 (1) DRiG. For the appointment of judges in general see *S. Khorrami*, Das Einstellungs-und Beförderungsverfahren englischer und deutscher Richter, 2005.

[56] § 5 b DRiG.

[57] § 5 a (1) DRiG.

has the necessary social competence for being a judge.[58] Rules on the appointment of state judges are further to be found in the constitutions of the states.[59]

2. The Selection and Appointment Process

In general, the selection process for full-time judges is initiated by an application, and selection is based on eligibility, qualification and professional performance.[60] In order to take office a judge needs to be appointed. The judges are appointed by the head of state or a competent government agency. Appointment is made by means of an official document.[61]

The selection and appointment process varies from court to court. Half of the judges of the *Federal Constitutional Court* are elected by the "Bundestag" (federal parliament) and half by the "Bundesrat" (state chamber).[62] The court is made up of federal judges and other members who, however, may not be members of the "Bundestag", of the "Bundesrat", of the Federal Government, or of any of the corresponding bodies of a state ("Land").[63] For the selection a two-thirds majority is necessary.[64] This has led to a practice where the political parties repre-

---

[58] § 9 DRiG.

[59] See *e.g.* Art. 69 Berlin Verf; Art. 136 Brem Verf; Art. 63 Hamb. Verf; Art. 127 Hess Verf; Art. 122 (1) and 126 (1) Rheinl.-Pfalz Verf; Art. 111 Saar Verf.

[60] Art. 33 (2) and 60 Basic Law; Art. 51 BadWürttVerf.; Art. 69 Berl Verf.; Art. 63 (1) Hbg. Verf.; Art. 29 II Nds Verf; Art. 31 SchlH Verf.

[61] § 17 DRiG.

[62] Art. 94 Basic Law, see also BVerfGG.

[63] Art. 94 (1) Basic Law.

[64] § 6 V und § 7 BVerfGG. They read:

Article 6

(1) The judges to be elected by the Bundestag shall be elected indirectly.

(2) The Bundestag shall, by proportional representation, elect a twelve-man electoral committee for the Federal Constitutional Court judges. Each parliamentary group may propose candidates for the committee. The number of candidates elected on each list shall be calculated from the total number of votes cast for each list in accordance with the d'Hondt method. The members shall be elected in the sequence in which their names appear on the list. If a member of

sented in the federal parliament nominate their candidates in turn with the result that an equilibrium of political ideologies is represented at the court. While the "Bundesrat" elects the judges directly, a parliamentary electoral committee of twelve members who are elected by the "Bundestag" (representing the strength of the political parties represented in the federal parliament) are entrusted with the selection of judges on behalf of the "Bundestag."[65] The fact that in practice candidates are chosen who are close to the nominating party has been subject to criticism, but the mode of selection has not been invalidated by the Federal Constitutional Court.[66] Three judges of each of the two panels of the court are elected among the judges of the five supreme federal courts of justice. Those elected are appointed by the Federal President.[67] Each judge takes an oath binding her or him as an impartial judge to observe faithfully at all times the Basic Law of the Federal Republic of Germany and to perform conscientiously the judicial duties towards others.[68]

The *supreme federal courts* – the Federal Court of Justice, the Federal Administrative Court, the Federal Finance Court, the Federal Labour Court, and the Federal Social Court – are chosen jointly by the compe-

---

the electoral committee retires or is unable to perform his functions, he shall be replaced by the next member on the same list.

(3) The eldest member of the electoral committee shall immediately with one week's notice call a meeting of the committee to elect the judges and shall chair the meeting, which shall continue until all of them have been elected.

(4) The members of the electoral committee are obliged to maintain secrecy about the personal circumstances of candidates which become known to them as a result of their activities in the committee as well as about discussions hereon in the committee and the voting.

(5) To be elected, a judge shall require at least eight votes.

Article 7

The judges to be elected by the Bundesrat shall be elected with two thirds of the votes of the Bundesrat.

[65] § 6 BVerfGG. For the question whether this procedure is compatible with Art. 94 (1) and for reform proposals see *S. Koch*, Die Wahl der Richter des BVerfG, ZRP 1996, 41-44.

[66] BVerfGE 40, 356 *et seq.*; 65, 153, at 154 *et seq.* See also *A. Voßkuhle*, in: H. v. Mangoldt/ F. Klein/ C. Starck (eds.), Das Bonner Grundgesetz, Kommentar, Vol. 3, 2001, Art. 94, Rn. 14-15.

[67] § 10 BVerfGG.

[68] Article 11 of the Law on the FCC (BVerfGG).

tent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag.[69]

The appointment process for federal courts differs from the one applicable to state judges. The election of *state court judges* is regulated by special Land laws.[70] The Federal Constitution provides that Land judges may be chosen jointly by the Land Minister of Justice and a committee for the selection of judges.[71] Due to the state competence to regulate the selection process, the procedures differ considerably from state to state.[72] There are the following models: Some states provide for mandatory participation of the judges council ("Präsidialrat"). Others require a joint appointment by the competent minister and a conciliation committee if the judges council objects. In several states a judicial appointments commission has been established which either appoints on its own or together with the competent minister. Not only does the procedure vary but also the composition of judicial selection committees. The judges sitting on these committees are either elected by the judges or the state parliament from proposal lists by the judges. In some states the judges on the committee are empowered to prevent appointments.

Some systems provide for a quorum, so that a judge may only be elected on the basis of a compromise between the political parties. It is, however, doubtful whether this concept adequately serves the interest of judicial independence, because in practice the quorum requirement often leads to political deals.[73] Accordingly, criticism has been voiced as to the influence of political motivations in the appointment process which concerns not only the Federal Constitutional Court but also the highest federal courts.[74] According to the Federal Constitutional Court,

---

69 Art. 95 (2) Basic Law. See also § 2 *seq.* RiWahlG.

70 See Art. 98 (3) Basic Law.

71 Art. 98 (4) Basic Law.

72 For a detailed overview see *J. Schmidt-Räntsch*, Deutsches Richtergesetz, Kommentar, 5th ed., 1995, § 8, paras 4-15. For the necessary parameters of judicial selection on the basis of the Basic Law, see *E.-W. Böckenförde*, Verfassungsfragen der Richterwahl, 1974.

73 *E. Schmidt-Jorzig* (note 48), 2382.

74 *E. Schmidt-Jorzig* (note 48), 2381; *A. Emmerlich*, FAZ 6.2.1986, at 9; *B. Erhard*, FAZ 10.2.1986, at 9; *B. Erhard*, Gedanken zur Wahl der Richter des Bundesverfassungsgerichts und der obersten Gerichtshöfe des Bundes, in: F.

election of state constitutional judges by simple majority in state parliament does not interfere with judicial independence.[75]

IV. Independence of Judges while in Office

1. Judicial Tenure

One aspect of personal independence is the appointment for life until retirement which is usually at the age of 65.[76] As a general rule, judges should be full-time and in a permanent position.[77] They are assigned to a specific court.[78] Other judges who do not enjoy full personal independence may only be hired to the extent that there are compelling reasons, such as the training of judges.[79] Trainees are appointed as temporary judges. Temporary appointment is only allowed on the basis of a legal act and only for functions specified by law.[80] Judges on a tenure track are appointed on probation for at least three years and need to be appointed for life after five years in office.[81]

Specific rules apply to the *Federal Constitutional Court*: The term of office of the judges of this court is twelve years without the possibility of re-election. In any case, the term ends when a judge reaches the age of 68.[82] A judge may ask to be released from service at any time. Before the expiry of her or his term a judge of the Federal Constitutional Court may be involuntarily retired or dismissed only in pursuance of a plenary decision which is subject to stringent conditions.[83] No such decision has yet been taken.

Klein (ed.), Der Bundesfinanzhof und seine Rechtsprechung, Festschrift für H. Wallis, 1985, 35, at 41 *et seq.*

75 BVerfG, NJW 1999, 638, at 640.

76 § 10 DRiG; § 15 VwGO.

77 Art. 97 (2) Basic Law; BVerfGE 87, 68, at 85.

78 § 27 (1) DRiG.

79 There is also an option to appoint judges with a specific task for two years provided they are on tenure track. § 14 DRiG.

80 § 11 DRiG.

81 §§ 10, 12 DRiG.

82 § 4 BVerfGG.

83 § 105 BVerfGG.

2. The Scope of Judges' Authority and Powers

Pursuant to Article 92 (1) Basic Law:

> "The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder."

Judicial Power may only be exercised by the courts as an institution and is no exercise of personal power.[84] Accordingly, the protection of personal independence does not seek to serve the judge as an individual, but the interest of justice.

Nonetheless, the protection of judicial independence in Germany is far-reaching in the interpretation of the courts.[85] According to the Federal Court of Justice personal independence even protects the judge from the regulation of working hours. Apart from the court proceedings she or he is free to choose her or his working time and location. The Federal Court of Justice elaborated that the judge in the decision-making process should also be free from all contextual and atmospheric constraints.[86] If presence at court is not required by the proceedings a judge is free to work whenever and wherever desired.[87]

In order to ensure judicial independence, the Federal Judges Act also imposes obligations on the judges. At the swearing-in a judge has to undertake to exercise her or his powers in accordance with the Basic Law and the laws of Germany, to judge in the best of his or her conscience without respect of person and to serve only verity and justice.[88] This oath demonstrates that personal independence not only concerns the protection against interference from outside. It also requires an inner independence which is the responsibility of the judge her- or himself.[89] Judges are required to be impartial, unbiased and open for different positions which enables them to scrutinize and evaluate the submis-

---

[84] *G. Barbey* (note 2), at 824.

[85] For the scope of judicial powers, see the part on substantive independence above.

[86] BGHZ 113, 36 = NJW 1991, 1103.

[87] BVerwG DÖV 1981, 632; BVerwGE 78, 211; BGH NJW 1991, 1103. Critical *K. Redeker*, Justizgewährungspflicht des Staates versus richterliche Unabhängigkeit?, NJW 2000, 2796.

[88] § 38 (1) DRiG.

[89] *E. G. Mahrenholz* DRiZ 1991, 433 *et seq.*; *E. Benda*, Bemerkungen zur richterlichen Unabhängigkeit, DRiZ 1975, 166.

sions of the parties.[90] The Federal Constitutional Court regularly refers to the concepts of impartiality, neutrality and distance.[91]

There is a duty of political restraint for judges pursuant to Article 39 Federal Judges Act (DRiG). Judges must act in and outside their office, including in political activities, in a manner which does not jeopardize their independence. This duty is considered to be a safeguard of judicial independence rather than interference therewith.[92] The duty of restraint in public statements and collective expressions of opinion has been subject to controversy[93] and various judicial disputes.[94]

3. Independence and Disciplinary Supervision

In order to ensure that judges act dutifully, they are subject to disciplinary supervision, provided the principle of substantive independence is guaranteed.[95] The underlying rationale is the right of access to justice.[96] Supervision includes monitoring and correction. Judges may be reproached with the performance of their official functions and admonished to undelayed and orderly execution unless this interferes with a judge's substantive independence.[97] If a judge considers a measure of supervision to be in conflict with his or her independence, the matter is referred to a competent court for decision.[98] Even measures by the su-

---

90 *G. Barbey*, (note 2), 832.

91 BVerfGE 21, 139, at 146; 26, 141, at 154.

92 § 39 DRiG.

93 *W. Rudolf*, Meinungs- und Pressefreiheit in der „verwaltungsrechtlichen Sonderverbindung" der Soldaten, Beamten und Richter, in: P. Selmer (ed.), Gedächtnisschrift für Wolfgang Martens, 1987, 199.

94 See *e.g.* BVerfG, in: NJW 1983, 2691.

95 BVerfG, DRiZ 1975, 284. See also § 26 (1) DRiG. *H. Grimm*, Richterliche Unabhängigkeit und Dienstaufsicht in der Rechtsprechung des Bundesgerichtshofs 1972; *G. Pfeiffer*, Zum Spannungsverhältnis richterlicher Unabhängigkeit – Dienstaufsicht – Justizgewährungspflicht, in: A. R. Lang (ed.), Festschrift für K. Bengl, 1984, 85.

96 *H.-J. Papier*, Die richterliche Unabhängigkeit und ihre Schranken, NJW 2001, 1089, at 1091.

97 § 26 (2) DRiG.

98 § 26 (3) DRiG.

pervisory board with an indirect impact on the judicial function may be challenged.[99]

As indicated above, there may not be any interference with the *core judicial functions*.[100] Even indirect instructions or psychological influence having an effect on the finding of justice are impermissible.[101] There has only been one case in which an intervention by disciplinary supervision was allowed in case of a manifestly erroneous decision by a judge contrary to the law. In this case the judge had ordered counsel forcibly expelled from the courtroom in violation of the Judicature Act (§§ 177, 178 GVG).[102] Consequently, there was no room to object disciplinary measures on the basis of judicial independence as a rule of law principle. With respect to scheduling, a judge may not be called upon to deal with specific proceedings first.[103] To ask a judge to prioritize based on efficiency and in keeping with the rules, however, is allowed.[104]

On the other hand, functions concerning the *outer sphere of a judge's activities* being remote from adjudication are subject to disciplinary supervision.[105] This includes the manner and form of decisions even if the decision itself is in the exercise of a core judicial function.[106] Measures to ensure the orderly course of business are permissible.[107] For example, the timeliness of the setting of a court hearing may be subject to supervision.[108] A judge may be called upon to explain the excessive duration of court proceedings.[109] Non-judicial functions, such as administrative

---

99 BGHZ 90, 40, at 48 *et seq.*

100 See II.1.b. The distinction between core and outer sphere functions has not gone unchallenged. According to the critics, the distinction is not clear and there should not be an interference with core judicial functions in the case of manifest errors. *N. Achterberg*, Die richterliche Unabhängigkeit im Spiegel der Dienstgerichtsbarkeit, NJW 1985, 3041, at 3045.

101 BGHZ 42, 163, at 169 *et seq.*; 70, 1, at 4; 90, 41, at 43 *et seq.*

102 BGHZ 67, 184, at 187 *et seq.*

103 BGH, NJW 1987, 1197, at 1198.

104 BGH, NJW 1998, 421, at 422.

105 BGHZ 42, 163, at 169; BGH, NJW-RR 2001, 498, at 499.

106 BGHZ 67, 184, at 187; 90, 41, at 45.

107 BGHZ 90, 41, at 45.

108 BGH, DRiZ 1997, 467, at 468.

109 BGH, DRiZ 1991, 20, at 21.

tasks[110] and private conduct, are not protected by judicial independence and therefore also subject to supervision, provided they have an impact on the official duty of a judge.[111] Also permissible are personal reviews[112] and the prosecution for perversion of justice.

4. The Financial Independence of Judges

There is a guarantee of adequate income provided by law.[113] A number of basic guarantees concerning remuneration and pension have been elaborated by the German Constitutional Court in order to ensure personal independence.[114]

V. Dismissal and Transfer of Judges from Office

Another aspect of personal independence is that judges appointed to full-time positions may not in principle be removed from office or transferred to another court against their will.[115] Measures of similar effect, for example excluding a judge from judicial functions by allocation of duties, are also impermissible.[116] Permissible measures on the basis of law include, however, temporary suspension in formal disciplinary proceedings.[117]

1. Grounds of Dismissal

Article 97 (2) Basic Law provides:

---

[110] See § 4 (2) No. 1 DRiG.

[111] BGH, DRiZ 1977, 215 *et seq.*

[112] BVerwGE 62, 135, at 138; BGH NJW 1988, 419 *et seq.*

[113] BVerfGE 12, 81, at 88; 23, 321, at 325; 26, 79; 26, 141, at 157; 32, 199; 56, 146.

[114] BVerfGE 8, 1, at 17 *et seq.*; 11, 203, at 215 *et seq.*; 44, 249, at 265 *et seq.*; 56, 146, at 164 *et seq.*; 56, 353, at 359; 61, 43, at 58 *et seq.*

[115] BVerfGE 14, 56, at 70; 26, 186, at 198 *et seq.* See also § 21 DRiG.

[116] BVerfGE 17, 252, at 259, 262.

[117] BVerfG, NJW 1996, 2149, at 2150.

> Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.

The principles of irremovability and immovability apply to federal and state judges alike. Apart from Article 97 (2) Basic Law some state constitutions have also incorporated this guarantee.[118]

The *reasons for dismissal* are specified in the Federal Judges Act (§ 21 DRiG). The reasons are predominantly formal and seek to ensure the independent status of the judge by *inter alia* preventing incompatibility. Employment in a different public service, entry into the armed forces as a soldier and loss of German citizenship regularly result in *automatic* dismissal. A judge is to be released in the following cases: a judge refuses to take the necessary oath pursuant to § 38 Federal Judges Act; is a member of parliament;[119] reaches the retirement age or becomes unfit for service;[120] becomes a resident of a foreign country without permission; or upon request.[121] These reasons reflect the necessary requirements for the appointment of judges.[122]

Dismissal on the basis of a *judicial decision* is provided for if a judge is sentenced to at least one year imprisonment for the commission of a wilful crime, if a judge is sentenced for treason, endangering the democratic legal order or endangering German national security, if a judgement denies a judge's professional capability for public office or in case of forfeiture of civil rights pursuant to Article 18 Basic Law.[123]

---

[118] See *e.g.* Art. 66 (1) Bad-Württ Verf; Art. 87 Bay Verf; Art. 137 Brem Verf; Art. 128 Hess Verf; Art. 122 (2-4) Rheinl.-Pfalz Verf; Art. 111 Saar Verf. For the issue of immovability see *R. Gröschner*, Reichweite richterlicher Inmovibilität im Verfassungsstaat des Grundgesetzes, 2005.

[119] See § 36 DRiG.

[120] See § 34 DRiG.

[121] § 21 (2) DRiG. For the release of judges on probation and those assigned for a specific task, see §§ 22, 23 DRiG.

[122] See above III.1.

[123] § 24 DRiG.

Finally, the Federal Constitution provides for *judicial impeachment*. Article 98 (2) of the Basic Law reads:

> If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order him dismissed.

Pursuant to Article 98 (5), the states may enact corresponding provisions with respect to state judges. The states have exercised this competence in their constitutions.[124] The decision in cases of judicial impeachment rests with the Federal Constitutional Court.[125]

A judge may be barred from performing judicial functions without, however, terminating her or his status only for the reasons specified by § 30 Federal Judges Act (DRiG).[126] This form of removal or transfer of a full-time judge or temporary judge without written consent is permissible on the basis of a final judicial decision in case of impeachment pursuant to Article 98 (2) and (5) Basic Law, in a judicial disciplinary action, in the interest of administration of justice[127] or upon change of the judicial structure.[128]

2. The Body Authorized to Dismiss Judges and to Make Final Decisions on Disciplinary Measures

As a general rule, judges may only be dismissed on the basis of a court decision. There is a specific chamber at the Federal Court of Justice for matters of supervision over federal judges ("Dienstgericht").[129] It renders final decisions in disciplinary proceedings, on transfer of judges, dismissal, and retirement due to disablement and decides appeals

---

[124] See *e.g.* Art. 66 (2) Bad-Württ Verf; Art.63 (3), (4) Hamb. Verf; Art. 40 Niedersachs Verf; Art. 73 Nordrh.-Westf Verf; Art. 123 Rheinl.-Pfalz Verf; Art. 36 (2) SchlHLandessatzung.

[125] Art. 98 (5) Basic Law.

[126] *J. Schmidt-Räntsch* (note 72), § 30, para 9.

[127] See § 31 DRiG.

[128] See § 32 DRiG.

[129] § 61 DRiG.

against secondment and on complaints against disciplinary measures allegedly interfering with judicial independence.[130] The chamber also decides on revision against decisions by state disciplinary courts.[131] In the interest of judicial independence the term "disciplinary measures" is interpreted broadly to encompass also measures by the supervisory board having indirect influence on the judicial function.[132] Any measure which has the potential to influence a judge's professional conduct may be subject to challenge. For example, a press interview by the minister of justice which is critical of a judge's professional or private conduct could have an effect on his or her independence.

VI. Conclusion

Judicial independence in Germany has led to far-reaching protection of the judiciary. While the basic principles are laid down in the Federal Constitution and elaborated in several state and federal laws, courts have specified the exact parameters and scope of judicial independence. Several cases, such as the impermissibility of regulating a judge's working hours, may lead one to question whether the notion of judicial independence has been overly stretched. Accordingly there have been voices which call for a reassessment and a concentration on the constitutional guarantees.[133] After all, judicial independence is not a privilege or an end in itself. Its purpose is to preserve the rule of law.

Grave encroachments upon judicial independence are isolated events. Judicial independence has most often been raised as a defense against supervisory measures. In general, there is less interference by the other branches of government than by the judiciary itself.[134]

A current issue with respect to judicial independence is the introduction of modern oversith mechanisms to ensure efficiency. The underlying idea is to make use of business management techniques in the ad-

---

130 § 62 DRiG.

131 §§ 62 (2), 77 DRiG.

132 BGHZ 93, 238, at 241.

133 *G. Barbey*, (note 2), 828; *E. Schmidt-Jorzig*, (note 48), 2377 *et seq.*

134 *S. Haberland*, Problemfelder für die richterliche Unabhängigkeit, DRiZ 2002, 301, at 310.

ministration of justice and the budget in order to enhance its output.[135] The planned restructuring of the court work routine has been subject to controversial discussion.[136]

[135] See *e.g. C. Schütz*, Der ökonomisierte Richter: Gewaltenteilung und richterliche Unabhängigkeit als Grenzen Neuer Steuerungsmodelle in den Gerichten, 2005; *U. Mäurer*, Justiz – Aufbruch oder Abbruch? – Ressourceneinsatz und Arbeitsleistung der Justiz, DRiZ 2000, 65, at 66; B. *Kramer*, Modernisierung der Justiz: Das Neue Steuerungsmodell, NJW 2001, 3449 *et seq.*; *K. F. Röhl*, Justiz als Wirtschaftsunternehmen, DRiZ 2000, 220-230; *W. Hoffmann-Riem (ed.),* Reform der Justizverwaltung – Ein Beitrag zum modernen Rechtsstaat, 1998.

[136] *H. Schulze-Fielitz*, in: H. Dreier (ed.), Grundgesetz-Kommentar, Vol. 3, 2000, Art 97, Rn. 35.

List of Contributors

1. Jürgen Bast, Dr. iur., Dipl.-Soz., Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany)
2. Markus Böckenförde, Dr. iur., LL.M., Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany)
3. Armin von Bogdandy, Dr. iur., Professor of Law, Managing Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany)
4. Thomas Fetzer, Dr. iur., LL.M. (Vanderbilt), Senior Research Fellow, University of Mannheim, Faculty of Law and Economics (Germany)
5. Kristian Fischer, Dr. iur., Professor of Law, University of Mannheim, Faculty of Law and Economics (Germany)
6. Dirk Hanschel, Dr. iur., M.C.L. (Mannheim/Adelaide), Senior Research Fellow, University of Mannheim, Faculty of Law and Economics (Germany)
7. Sebastian Graf von Kielmannsegg, Dr. iur, Senior Research Fellow, University of Mannheim, Faculty of Law and Economics (Germany)
8. Ralph Alexander Lorz, Dr. iur., Professor of Law, LL.M. (Harvard), Attorney-at-Law (New York), Chair of German and Foreign Public Law, European Law and Public International Law, Heinrich Heine University, Duesseldorf (Germany)
9. Thilo Marauhn, Dr. iur, Professor of Law, Chair for Public Law, Public International Law and European Law, Justus-Liebig-University, Gießen (Germany)
10. Anja Seibert-Fohr, S.J.D. (Dr. iur.), LL.M. (GWU), Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg (Germany)

Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht

Hrsg.: A. von Bogdandy, R. Wolfrum

Bde. 27–59 erschienen im Carl Heymanns Verlag KG Köln, Berlin (Bestellung an: Max-Planck-Institut für Völkerrecht, Im Neuenheimer Feld 535, 69120 Heidelberg); ab Band 60 im Springer Berlin, Heidelberg, New York, London, Paris, Tokyo, Hong Kong, Barcelona

---

188 Eibe *Riedel*, Rüdiger *Wolfrum* (eds.): **Recent Trends in German and European Constitutional Law.** 2006. VII, 289 Seiten. Geb. € 74,95

184 Jürgen *Bast:* **Grundbegriffe der Handlungsformen der EU.** 2006. XXI, 485 Seiten. Geb. € 94,95

183 Uwe *Säuberlich:* **Die außervertragliche Haftung im Gemeinschaftsrecht.** 2005. XV, 314 Seiten. Geb. € 74,95

182 Florian *von Alemann:* **Die Handlungsform der interinstitutionellen Vereinbarung.** 2006. XVI, 518 Seiten. Geb. € 94,95

180 Jeanine *Bucherer:* **Die Vereinbarkeit von Militärgerichten mit dem Recht auf ein faires Verfahren gemäß Art. 6 Abs. 1 EMRK, Art. 8 Abs. 1 AMRK und Art. 14 Abs. 1 des UN-Paktes über bürgerliche und politische Rechte.** 2005. XVIII, 307 Seiten. Geb. € 74,95

179 Annette *Simon:* **UN-Schutzzonen – Ein Schutzinstrument für verfolgte Personen?** 2005. XXI, 322 Seiten. Geb. € 74,95

178 Petra *Minnerop:* **Paria-Staaten im Völkerrecht?** 2004. XXIII, 579 Seiten. Geb. € 99,95

177 Rüdiger *Wolfrum,* Volker *Röben* (eds.): **Developments of International Law in Treaty Making.** 2005. VIII, 632 Seiten. Geb. € 99,95 zzgl. landesüblicher MwSt.

176 Christiane *Höhn:* **Zwischen Menschenrechten und Konfliktprävention. Der Minderheitenschutz im Rahmen der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE).** 2005. XX, 418 Seiten. Geb. € 84,95

175 Nele *Matz:* **Wege zur Koordinierung völkerrechtlicher Verträge. Völkervertragsrechtliche und institutionelle Ansätze.** 2005. XXIV, 423 Seiten. Geb. € 84,95

174 Jochen Abr. *Frowein:* **Völkerrecht – Menschenrechte – Verfassungsfragen Deutschlands und Europas. Ausgewählte Schriften.** Hrsg. von Matthias *Hartwig*, Georg *Nolte*, Stefan *Oeter*, Christian *Walter.* 2004. VIII, 732 Seiten. Geb. € 119,95

173 Oliver *Dörr* (Hrsg.): **Ein Rechtslehrer in Berlin. Symposium für Albrecht Randelzhofer.** 2004. VII, 117 Seiten. Geb. € 54,95

172 Lars-Jörgen *Geburtig:* **Konkurrentenrechtsschutz aus Art. 88 Abs. 3 Satz 3 EGV. Am Beispiel von Steuervergünstigungen.** 2004. XVII, 412 Seiten (4 Seiten English Summary). Geb. € 84,95

171 Markus *Böckenförde:* **Grüne Gentechnik und Welthandel. Das Biosafety-Protokoll und seine Auswirkungen auf das Regime der WTO.** 2004. XXIX, 620 Seiten. Geb. € 99,95

170 Anja *v. Hahn:* **Traditionelles Wissen indigener und lokaler Gemeinschaften zwischen geistigen Eigentumsrechten und der *public domain.*** 2004. XXV, 415 Seiten. Geb. 84,95

169 Christian *Walter,* Silja *Vöneky,* Volker *Röben,* Frank *Schorkopf* (eds.): **Terrorism as a Challenge for National and International Law: Security versus Liberty?** 2004. XI, 1484 Seiten. Geb. € 169,95 zzgl. landesüblicher MwSt.

168 Kathrin *Osteneck:* **Die Umsetzung von UN-Wirtschaftssanktionen durch die Europäische Gemeinschaft.** 2004. XXXIX, 579 Seiten. Geb. € 99,95

167 Stephan *Sina:* **Der völkerrechtliche Status des Westjordanlandes und des Gaza-Streifens nach den Osloer Verträgen.** 2004. XXI, 410 Seiten. Geb. € 84,95

166 Philipp *Dann:* **Parlamente im Exekutivföderalismus.** 2004. XXIII, 474 Seiten. Geb. € 89,95

165 Rüdiger *Wolfrum* (Hrsg.): **Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz.** 2003. VIII, 299 Seiten. Geb. € 74,95

164 *Rüdiger Wolfrum, Nele Matz:* **Conflicts in International Environmental Law.** 2003. XI, 213 Seiten. Geb. € 64,95 zzgl. landesüblicher MwSt.

163 Adam *Bodnar,* Michał *Kowalski,* Karen *Raible,* Frank *Schorkopf* (eds.): **The Emerging Constitutional Law of the European Union.** 2003. IX, 595 Seiten. Geb. € 99,95 zzgl. landesüblicher MwSt.

162 Jochen Abr. *Frowein,* Klaus *Scharioth,* Ingo *Winkelmann,* Rüdiger *Wolfrum* (Hrsg.): **Verhandeln für den Frieden/Negotiating for Peace. Liber Amicorum Tono Eitel.** 2003. XIII, 866 Seiten. Geb. € 129,95

161 Michaela *Fries:* **Die Bedeutung von Artikel 5 (f) der Rassendiskriminierungskonvention** im deutschen Recht. 2003. XIX, 429 Seiten. Geb. € 84,95

160 Helen *Keller:* **Rezeption des Völkerrechts.** 2003. XXXV, 855 Seiten. Geb. € 129,95

159 Cordula *Dröge:* **Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention.** 2003. XX, 432 Seiten. Geb. € 89,95

158 Dagmar *Richter:* **Sprachenordnung und Minderheitenschutz im schweizerischen Bundesstaat.** 2005. LIV, 1315 Seiten. Geb. € 179,95

157 Thomas *Giegerich:* **Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung.** 2003. LXV, 1534 Seiten. Geb. € 199,95

156 Julia *Sommer:* **Verwaltungskooperation am Beispiel administrativer Informationsverfahren im Europäischen Umweltrecht.** 2003. XXX, 891 Seiten. Geb. € 129,95

155 Frank *Schorkopf:* **Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich – Möglichkeiten und Grenzen einer „streitbaren Demokratie" auf europäischer Ebene.** 2002. XIII, 217 Seiten. Geb. € 64,95

154 *Hanri Mostert:* **The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany.** 2002. XXV, 643 Seiten. Geb. € 99,95 zzgl. landesüblicher MwSt.

153 Stefan *Ohlhoff:* **Methoden der Konfliktbewältigung bei grenzüberschreitenden Umweltproblemen im Wandel.** 2003. XXX, 651 Seiten. Geb. € 99,95

152 Hans-Joachim *Cremer*, Thomas *Giegerich*, Dagmar *Richter*, Andreas *Zimmermann* (Hrsg.): **Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger.** 2002. XVI, 1483 Seiten. Geb. € 199,–

151 Nico *Krisch:* **Selbstverteidigung und kollektive Sicherheit.** 2001. VIII, 449 Seiten. Geb. € 84,95

150 Beate *Schulte zu Sodingen:* **Der völkerrechtliche Schutz der Wälder: nationale Souveränität, multilaterale Schutzkonzepte und unilaterale Regelungsansätze.** 2002. XXXI, 575 Seiten. Geb. € 99,95

149 Mahendra *Singh:* **German Administrative Law in Common Law Perspective.** 2001. XXXI, 377 Seiten. Geb. € 79,95 zzgl. landesüblicher MwSt.

148 Utz *Remlinger:* **Die Einwirkung des Gemeinschaftsrechts auf die Rückabwicklung rechtswidriger Beihilfeverhältnisse.** 2001. XXVI, 393 Seiten. Geb. € 84,95

147 *Dagmar Patricia Stroh:* **Die nationale Zusammenarbeit mit den Internationalen Strafgerichtstribunalen für das ehemalige Jugoslawien und für Ruanda.** 2002. XXVII, 395 Seiten. Geb. € 84,95

146 Rainer *Grote*, Thilo *Marauhn* (Hrsg.): **Religionsfreiheit zwischen individueller Selbstbestimmung, Minderheitenschutz und Staatskirchenrecht – Völker- und verfassungsrechtliche Perspektiven.** 2001. VIII, 632 Seiten. Geb. € 99,95

145 Silja *Vöneky:* **Die Fortgeltung des Umweltvölkerrechts in internationalen bewaffneten Konflikten.** 2001. XXVIII, 593 Seiten. Geb. € 99,95

144 Niels *Krüger:* **Anwendbarkeit von Umweltschutzverträgen in der Antarktis.** 2000. XXII, 360 Seiten. Geb. € 79,95