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The West German Administrative Procedure Act: A Study In Administrative Decision Making*

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I. Introduction

The West German Administrative Procedure Act¹ (the *Verwaltungsverfahrensgesetz* or *VwVfG*) was passed by the German legislature in 1976 to help regulate the legal relationship between administrative agencies and citizens, further guarantee citizens access to the administrative decision making process, and lend a necessary degree of clarity and unity to a complex procedural area.² Fundamentally different than American administrative law, German administrative law is principally the law of public administration and is wholly a function of the executive branch.³ Because of the complexities of German administrative law, which is divided into general and special administrative law areas, it was not possible to codify all procedural elements in one act.⁴ Additional hurdles to complete uni-

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1. *Verwaltungsverfahrensgesetz* [VwVfG] of May 25, 1976, *Bundesgesetzblatt* [BGB1] I 1253 (W. Ger., amended July 2, 1976).

2. C. ULE & H-W LAUBINGER, *VERWALTUNGSVERFAHRENSRECHT* 21-24 (1977).

3. For discussion of German administrative law in English, see Albert, *The Constitutional Supervision of Administrative Agencies in the Federal Republic of Germany: Similarities and Contrasts with American Law*, 53 S. CAL. L. REV. 583 (1980); Linde, *The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany*, 53 S. CAL. L. REV. 601 (1980); Lorenz, *The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany*, 53 S. CAL. L. REV. 543 (1980) [hereinafter cited as Lorenz]; Pakuscher, *Administrative Law in Germany—Citizen v. State*, 16 AM. J. COMP. L. 309 (1968).

4. German general administrative law contains all fundamental principles of administrative law. While governed by general administrative law principles, each of the special administrative law areas contains unique additional procedural and substantive law elements. Because of the technical nature of many of these special administrative law areas, it was not possible to unite all procedural elements in one law. The special administrative law areas include police, public official, municipality, social security, tax and finance, construction, and environmental law areas. See ACHTERBERG, *ALLEGEMEINES VERWALTUNGSRECHT* 13-19

fication were posed by the West German federalist structure, which expressly allocates governmental power between federal and state bodies.⁵ For these reasons the legislature fashioned a general approach in the VwVfG, preferring to state fundamental principles of administrative procedure which, although widely applicable, may be supplemented or replaced by alternative procedures specified in other laws. Nevertheless, the VwVfG is a good statement of current German administrative practice.

This Article examines the VwVfG, which forms an essential element in the German model of administrative decision making and provides valuable insight into the nature of administrative decision making in Germany. The first section of this Article discusses the history surrounding codification of administrative procedure in Germany, the subject and scope of the VwVfG, and the role the VwVfG plays within the overall German administrative law structure. The second section identifies the four procedural mechanisms provided for by the VwVfG to reach administrative decisions. The final section reviews administrative and judicial remedies available to contest final administrative acts.

II. History, Subject, and Role of the VwVfG

A. *History of the VwVfG*

The VwVfG was the product of a sustained effort initiated in the late 1950's to simplify, order, and unify German administrative procedure and core substantive concepts of administrative law.⁶ Sixteen years prior to enactment of the VwVfG, the German legislature

(1982) [hereinafter cited as ACHTERBERG].

5. The German constitution or Grundgesetz carefully divides governmental power between federal and state levels. While federal government powers are specifically enumerated, the state governments may legislate in all areas not expressly delegated to the federal government. GRUNDGESETZ [GG] art. 70 (W. Ger. 1949, amended 1976). Article 73 specifically enumerates the exclusive federal powers, which include foreign affairs and defense, granting of citizenship, printing of money, and control over the mails, rail, and air traffic. Article 74 enumerates the concurrent powers of the federal and state governments, which include powers over civil and criminal law, rights of association and assembly, courts, attorneys, and persons.

The Grundgesetz further distributes the administrative power to execute laws and supervise administrative agencies between the federal and state levels. Article 87 enumerates the exclusive federal administrative areas, which include foreign service, federal taxes and finances, and the mails, while article 86 provides for federal control over federal agencies. In addition to administering their own affairs, the states may execute federal law—either under federal supervision (article 84), or by commission of the federal government (article 85). Article 84 also provides that the states shall generally have control over state administrative agencies. Finally, article 28(2) of the Grundgesetz guarantees the right of self-administration to municipalities and communities, a right with important administrative law consequences.

6. H. KNACK, VERWALTUNGSVERFAHRENSGESETZ (KOMMENTAR) 51-56 (2d ed. 1982) [hereinafter cited as KNACK]; C. ULE & H-W LAUBINGER, VERWALTUNGSVERFAHRENSRECHT 27-32 (2d ed. 1979).

had passed the Administrative Court Act⁷ (Verwaltungsgerichtordnung or VwGO), which regulates the structure and procedures of administrative courts. Because the VwGO also governs administrative and judicial review of final administrative acts, it was necessary to adopt an administrative procedure act in order to complete codification of the administrative decision making process.

Before the VwVfG became law, German administrative procedure consisted mainly of judicially determined case law. Relying on this body of case law, the VwVfG essentially codifies existing administrative practice as developed by courts and leading commentators.⁸ The VwVfG contains few new principles of administrative law.

As the first step in the codification process, the VwVfG was conceived as a model with which states and separate administrative branches could integrate their practice.⁹ Indeed, the federal government hoped that the VwVfG would unify the field within an eight-year period, a goal which has been partially realized.¹⁰ In addition to unification the VwVfG was intended to relieve the legislature from the burden of providing detailed procedural regulations for every substantive law enacted. An additional objective was to clarify administrative procedure, making it easier for administrative agencies, officials, practicing lawyers, and citizens to understand administrative practice and their respective rights and obligations. Finally, the VwVfG was intended to solidify rights of individuals vis-à-vis the administrative process.¹¹

7. Verwaltungsgerichtordnung [VwGO] of January 21, 1960; Bundesgesetzblatt [BGBI] I 17 (W. Ger., amended 1981).

8. KNACK, *supra* note 6, at 51; P. STELKINS, H. BONK & K. LEONHARDT, VERWALTUNGSVERFAHRENSGESETZ (KOMMENTAR) 49 (1978) [hereinafter cited as STELKINS, BONK & LEONHARDT].

9. For discussion of the history and background surrounding the codification of German administrative procedure, see STELKINS, BONK & LEONHARDT, *supra* note 8, at 47-68; ULE & LAUBINGER, *supra* note 6, at 26-32; H. WOLFF & O. BACHOF, VERWALTUNGSRECHT III 323-24 (4th ed. 1978) [hereinafter cited as WOLFF & BACHOF]; Badura, *Das Verwaltungsverfahren* in ALLGEMEINES VERWALTUNGSRECHT 243, 245-50, (2d ed., 1977) [hereinafter cited as Badura].

10. Drucksachen des Deutschen Bundestages [BT-Drucks 7/4494] at 13 (W. Ger. 1975).

The goal of unifying the field within eight years has been partially accomplished through the states' subsequent adoption of administrative procedure acts substantially mirroring the provisions of the federal act. *See, e.g.*, Verwaltungsverfahrensgesetz für das Land Nordrhein-Westfalen [VwVfGNW] of December 21, 1976, Gesetz-und Verordnungsblatt NW 438.

Unification of distinct areas of administrative law has been less successful because of the complexities and differences in subject matter, a problem which was foreseen by the legislature when it made the VwVfG subordinate to specific laws. *See* VwVfG §1. Section 2 of the VwVfG lists exceptions to the Act, which include tax, patent, and social security law. At present, no further attempts to unify administrative procedure are envisioned. The only current unification movement concerns procedure in the administrative courts. Interview with Professor Norbert Achterberg, in Münster, West Germany (May 19, 1983).

11. ULE & LAUBINGER, *supra* note 2, at 22-25.

B. Subject of the VwVfG

Administrative law has a broad meaning in Germany as it covers the field of public law administration. Within this broad field, the VwVfG regulates only administrative activities as they affect the general public in matters of public law, the body of law which governs the relationship between the state and its citizens. Specifically, section 9 of the VwVfG states: "Administrative procedure in the sense of this law is the externally-affecting activity of executive agencies, which are directed toward the testing of requirements, preparation and issuance of administrative acts or conclusion of public law contracts; it includes the issuance of administrative acts or conclusion of public law contracts."¹²

Both "public law contracts" and "administrative acts" are terms of art in German law. A "public law contract" is an agreement concerning a matter of public law; it will not be considered extensively in this Article.¹³ An "administrative act" is defined in section 35 of the VwVfG as

*every disposition, decision, or other official measure, which is reached by an agency to regulate a single case in the area of public law and which is directed toward an immediate, external legal effect. A general disposition is an administrative act, which is directed toward general criterion or a defined or definable circle of people or which affects public property or its use.*¹⁴

Only official measures conforming to this broad definition are considered "administrative acts." Such administrative acts include the granting of or refusal to grant a permit, license, or concession to an

12. The German text reads:

Das Verwaltungsverfahren im Sinne dieses Gesetzes ist die nach aussen wirkende Tätigkeit der Behörden, die auf die Prüfung der Voraussetzungen, die Vorbereitung und den Erlass eines Verwaltungsaktes oder auf den Abschluss eines öffentlich-rechtlichen Vertrages gerichtet ist; es schliesst den Erlass des Verwaltungsaktes oder den Abschluss des öffentlich-rechtlichen Vertrages ein.

For further discussion of the definition of administrative procedure adopted in the VwVfG, see KNACK, *supra* note 6, at 156-62; ULE & LAUBINGER, *supra* note 6, at 108-11.

13. As a rule, one of the parties in a public law contract must be a public law entity, while the other party may be another public law entity, public or private institution, or private individual. Common examples of public law contracts are agreements between municipalities over a common public law matter, such as traffic, construction, or police and safety, or agreements between an administrative body and private individuals over subsidies or financial grants. For further discussion of public law contracts, see ACHTERBERG, *supra* note 4, at 392-405; ULE & LAUBINGER, *supra* note 2, at 270-309.

14. VwVfG § 35 (emphasis added). The German text provides:

Verwaltungsakt ist jede Verfügung, Entscheidung oder andere hoheitliche Massnahme, die eine Behörde zur Regelung eines Einzelfalles auf dem Gebiet des öffentlichen Rechts trifft und die auf unmittelbare Rechtswirkung nach aussen gerichtet ist. Allgemeinverfügung ist ein Verwaltungsakt, der sich an einen nach allgemeinen Merkmalen bestimmten oder bestimmbar Personenkreis richtet oder die öffentlich-rechtliche Eigenschaft einer Sache oder ihre Benutzung durch die Allgemeinheit betrifft.

individual, association, or firm; the creation of a public works plan; the ordering of expropriation of property; and the determination of procedural orders regarding, for example, a question of proof.¹⁵ In most cases, however, an administrative act is some kind of finally enacted measure regulating a legal relationship, such as an order not to undertake or desist from specific conduct.

The administrative act is a key concept in the German law of administrative procedure. Because it is the end product of the administrative process, an administrative act provides a focal point for both administrative agencies and affected parties in reaching a decision. Once promulgated, an administrative act may also serve as the object of a citizen's complaint.¹⁶ As is apparent from the above definition, the VwVfG is directed toward regulation of a single case rather than issuance of regulations or directives intended to cover more general situations.¹⁷ Expressed in American administrative law terms, the VwVfG is akin to adjudication, not rulemaking. Indeed, in view of the hierarchy of administrative legal norms in German law, which, in order of descending importance, consists of the Basic Law (Grundgesetz), formal laws, regulations, and administrative acts, the VwVfG treats the most basic norm. The administrative act thus governs the relationship between the executive and individuals at its most fundamental level.

The scope of the VwVfG, as defined in section 1, binds only administrative agencies or like public law bodies. At the federal level, the VwVfG applies to the public law administrative activities of federal agencies, bodies, institutions, and foundations. Similarly, unless federal regulations specify otherwise, it applies at the state

15. See generally KNACK, *supra* note 6, at 385-86.

16. See *id.* at 384-85; STELKINS, BONK & LEONHARDT, *supra* note 8, at 284-86.

17. The issuance of regulations, or rulemaking, is a carefully delegated legislative power and is subject to strict control. According to article 80 of the Grundgesetz, only the federal and state governments and federal ministers can issue regulations; any further delegation of this power must be specifically authorized by statute. In delegating this power the legislature must specify the content, purpose, and dimensions of the authorization in the enabling statute. See, e.g., Judgment of July 18, 1972, Bundesverfassungsgericht [BVerfG], W. Ger., 33 BVerfGE 303, 316-17. How precise this delegation must be depends on individual cases. Where the regulation will impact significantly on individuals' rights, the authorization must be very explicit. See, e.g., Judgment of June 22, 1977, BVerfG, W. Ger., 45 BVerfGE 400, 417-18 (In educational matters the legislature must itself determine the essential decisions, and not leave these to the administrative agency.); *accord*, Judgment of Jan. 1, 1976, BVerfG, W. Ger., 41 BVerfGE 251, 259-60; Judgment of July 18, 1972, BVerfG, W. Ger., 33 BVerfGE 303, 333; Judgment of Nov. 15, 1974, BVerwG, W. Ger., 47 BVerwGE 201; Judgment of Nov. 15, 1974, BVerwG, W. Ger., 47 BVerwGE 47. In other cases the authorization may be less apparent. At a minimum, however, the statutory content and purpose of the measure must be evident. See ACHTERBERG, *supra* note 4, at 319; Lorenz, *supra* note 3, at 555-56.

While reference must be made to the enabling statute, no specific procedure is necessary for the issuance of regulations. ACHTERBERG, *supra* note 4, at 320. Upon issuance, regulations must be published in the agency's official publication before taking legal effect. GG art. 82. Challenges to regulations may be brought in the constitutional and administrative courts, depending on the nature of the issue involved. ACHTERBERG, *supra* note 4, at 317-29.

level to state agencies, municipalities, or other state public law entities when these state entities either execute federal law under commission of the federal government or on their own initiative.¹⁸ The subsidiary function of the VwVfG is a constituent element of the act; the act applies only when other laws or regulations do not authorize alternative procedures.¹⁹

C. *Role of the VwVfG Within the Administrative Structure*

Within the overall German administrative law structure, the VwVfG helps adjust the relationship between the executive agency and citizens with respect to decisions in particular cases. As such, the VwVfG is only one—though arguably the most important—mechanism for assuring responsible administrative decision making. Extensive internal administrative²⁰ and external judicial²¹ control mechanisms provide citizens with additional opportunities to challenge decisions made by the agency. Furthermore, concrete constitutional, legal, and legislative norms constrain executive agencies to act within clearly delineated legal parameters. Foremost among these, the principle of supremacy of the law (Rechtsstaat) obligates

18. The German text reads:

(1) Dieses Gesetz gilt für die öffentlich-rechtliche Verwaltungstätigkeit der Behörden.

1. des Bundes, der bundesunmittelbaren Körperschaften, Anstalten und Stiftungen des öffentlichen Rechts,
2. der Länder, der Gemeinden und Gemeindeverbände, der sonstigen der Aufsicht des Landes unterstehenden juristischen Personen des öffentlichen Rechts, wenn sie Bundesrecht im Auftrag des Bundes ausführen, soweit nicht Rechtsvorschriften des Bundes inhaltsgleiche oder entgegenstehende Bestimmungen enthalten.

(2) wenn die Länder Bundesrecht . . . als eigene Angelegenheit ausführen, soweit nicht Rechtsvorschriften des Bundes inhaltsgleiche oder entgegenstehende Bestimmungen enthalten. . . .

Restriction of the VwVfG's application to federal agencies or law is a result of the Grundgesetz's allocation of governmental power between federal and state levels. *See supra* note 5. Because article 84 of the Grundgesetz guarantees state control of state administrative apparatus in most cases, it was crucially important for the states to have adopted administrative procedure acts modeled on the federal Act (VwVfG) in order to achieve any unity in the field. *See supra* note 9.

The foregoing delineation of the VwVfG's application is also, probably, the best definition of the German term "Behörde," for which there is no real translatable counterpart in English. Unlike the independent American administrative agency, the German administrative agency is a fully integrated part of the executive branch. Thus, "Behörde" really refers to the whole range of public law executive agencies and officials ("Behörde im Sinne dieses Gesetzes ist jede Stelle, die Aufgaben der öffentlichen Verwaltung wahrnimmt"). For the sake of simplicity, the author will employ the term administrative or executive agency to describe Behörde.

19. VwVfG § 1. The VwVfG is actually a mixture of procedural and substantive elements. Thus, in addition to procedural rules, the VwVfG contains substantive provisions covering the definition of an administrative act, §§ 35-42; control of administrative discretion, § 40; public law contracts, §§ 54-62; and the participation of lay persons in the administrative process, §§ 81-87.

20. *See infra* notes 182-236 and accompanying text.

21. *See infra* notes 237-61 and accompanying text.

the state to adhere to legal principles, realize justice, and create a climate of reliable and certain legal expectations.²²

The Rechtsstaat principle requires executive agencies to undertake actions which remain within the bounds of the law and possess specific constitutional or legislative authorization, especially when executive actions encroach upon individual rights.²³ Moreover, specific constitutional rights, such as the equal rights clause—which obligates executive agencies to treat like cases equally—further limits agency discretion.²⁴ Finally, an elaborate internal code of conduct within the agencies themselves helps assure compliance with the law.²⁵ Thus, while important, the VwVfG is not the sole means of guaranteeing reasoned administrative decision making.

22. ACHTERBERG, *supra* note 4, at 73-74. The Rechtsstaat principle (principle of supremacy of the law) is further characterized by a state which possesses a catalog of basic human rights, precise definition of legal norms, preserve of the law (Vorbehalt des Gesetzes) which obligates administrative agencies to act only when authorized by law, and the principle of proportionality (Verhältnismäßigkeitsprinzips) which obligates the state to undertake measures only to the degree necessary to solve particular problems and in a manner which will have the least impact on individual rights. *Id.* at 74-77.

Other fundamental norms include the principle of the social state (Sozialstaatsprinzips), which commands the state to realize social justice and operate efficiently and to achieve democracy and federalism. *Id.* at 77-90.

23. The principle that administrative actions must conform to the law (Gesetzsmäßigkeitsprinzips) is actually a more concrete application of the Rechtsstaat principle.

The most recent interpretation of the second prong of the Gesetzsmäßigkeit principle, the legal preserve (Vorbehalt des Gesetzes), compels the legislature to make all fundamental decisions concerning essential areas of life. In a manner similar to the landmark United States Supreme Court decision in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519 (1978), the Federal Constitutional Court determined that the legislature must decide all essential questions with respect to nuclear power, including licensing requirements, risk-assumption, and the use of fissionable materials. Judgment of Aug. 8, 1978, BVerfG, W. Ger., 1979 *Deutsche Verwaltungsblätter* [DVB] 47. Similarly explicit legislative delegation governs educational matters, see *supra* note 17. Implementation of these decisions, however, must be left to the appropriate administrative agency. The precise scope of what is "essential" in other areas must await further judicial exposition. For discussion of the "theory of essentials," see ACHTERBERG, *supra* note 4, at 267-68; Lorenz, *supra* note 3, at 559-62.

24. GG art. 3. The equal rights clause has important consequences for the administrative apparatus. Because the clause obligates executive agencies to treat like cases equally, there is a corresponding reduction in administrative discretion. Indeed, the executive agency is "self-bound" by its actions. A violation of the equal rights clause can lead to invalidation of the administrative action.

Other constitutional rights with important ramifications for the executive agency include the article 1 protection of human dignity, which the state is obligated to respect; the article 2 right to free development of one's personality, which can have important consequences in educational, professional, and other personal decisions; the article 5(3) guarantee of freedom of teaching and research; the article 17 right of free petition; and the article 33 right of free access to all public offices.

25. The organizational law of executive agencies is a distinct area of German administrative law (Organisationsrecht). The organizational law encompasses strict regulation of subject matter jurisdiction, organizational relations, management and supervisory channels, cooperation among departments and agencies, and rights of civil servants. Indeed, the activities of administrative officials are subject to extensive internal controls manifested by instructions, directives, and guidelines issued by supervisory and superior levels of officials within an agency. ACHTERBERG, *supra* note 4, at 159-95; Lorenz, *supra* note 3, at 549.

III. Types of Administrative Procedures Authorized by the VwVfG

The object of the VwVfG is to guarantee an effective and reliable mechanism for reaching administrative decisions while assuring the rights of affected parties. Accordingly, executive agencies should evaluate all pertinent facts, provide affected persons with an opportunity to be heard, and coordinate their activities with those of other administrative departments and bodies.²⁶ To accomplish these goals, four types of procedures are enumerated in the VwVfG: informal, formal, planning, and mass procedures.

A. *Informal Procedure*

German administrative procedure generally operates in an informal manner. Formal procedures take place only when specifically authorized by law or regulation.²⁷ The informal procedure is "informal" in that the time, form, and content of a proceeding are substantially unregulated. For example, informal proceedings mandate no specific form for filing a petition to initiate a proceeding. Similarly, there is no requirement for an oral hearing and no specific form for issuing a final decision.²⁸ An agency thus has a relatively free hand to conduct an informal procedure in the manner it determines necessary to reach a satisfactory and expeditious result. Of course, the agency must still preserve the fundamental rights of participants and remain within the bounds of the law. On balance, however, efficient decision making is the preeminent goal of an informal procedure.²⁹

Since informal procedures are the most common form of administrative proceeding in German law, they are used to decide a wide range of matters. Police, public safety, and traffic measures are products of informal procedures as are the granting of most permits, directives, licenses, concessions, and subsidies. Informal procedures are generally employed to enact public measures designed to safeguard general societal interests (*e.g.*, traffic rules) and to dispense specific dispositions to individuals (*e.g.*, building permits or trade and business permits). In contrast, formal procedures are used to decide issues of more substantial importance or public interest.³⁰ Despite differences in the type of circumstances addressed by informal and formal procedures, most fundamental principles of administrative law employed in informal procedures apply with equal force to for-

26. Badura, *supra* note 9, at 263-64.

27. VwVfG § 10.

28. KNACK, *supra* note 6, at 167.

29. *Id.* at 151.

30. See *infra* notes 71-81 and accompanying text.

mal procedures.³¹

1. *Initiation of a Procedure.*—Most informal procedures are not initiated by petitioners requesting specific action. Instead, they are initiated by an agency itself, in accordance with its legally granted discretion to consider and realize the public interest.³² As expressed in section 22 of the VwVfG, an agency generally determines whether and when to initiate an administrative proceeding, the nature of the procedure, and the legal measure to result. Agency discretion, however, must yield to regulations specifying that either the agency must take up the matter or initiation of a procedure must follow when a petition is filed. While matters involving public interest, such as public safety and police measures, traffic regulations, or decisions concerning the right to assemble are typically the product of agency initiated procedures, an agency is obligated to initiate procedures upon individual requests in matters involving building permits, trade or commercial permits and licenses, water usage rights, passports or citizenship privileges, and state subsidies.³³ Petitioners may request an agency to grant a desired action or performance after satisfying certain statutory requirements. An agency is obligated to act on such requests.

2. *The Procedure.*—Once an informal procedure is initiated, an agency has authority to investigate the matter in the degree and manner it determines appropriate for reaching a satisfactory conclusion.³⁴ In exercising this wide investigatory discretion, an agency can determine the depth of its inquiry and the means of proof necessary to gather information and reach a determination expeditiously. For example, an agency may hear and evaluate all interested parties, witnesses, and expert opinions; obtain opinions of interested administrative departments and bodies; and demand all necessary documents, reports, deeds, or other relevant papers.³⁵ The precise nature of the inquiry will, of course, depend on the matter being investigated.

As a rule, participants may influence an informal procedure only in so far as they must be given an opportunity to assert relevant facts or means of proof.³⁶ Unless permitted by the agency, partici-

31. ACHTERBERG, *supra* note 4, at 417.

32. KNACK, *supra* note 6, at 251.

33. *Id.* at 253; Badura, *supra* note 9, at 260-61. *See also* Judgment of May 9, 1973, BVerfG, W. Ger., 35 BVerfGE 65, 77 (granting of building permit).

34. VwVfG § 24.

35. *Id.* § 26. There is also provision for the rendering of an oath to witnesses. However, this evidentiary tool is utilized only when ordered by law or regulation and other means of proof have been applied and demonstrated to be inadequate. *Id.* § 27.

36. *Id.* § 26(2). For further discussion of the scope of hearing rights, *see infra* notes 49-

pants are not allowed to question witnesses or partake in the proceeding, as they may in formal procedures.³⁷ An agency is not bound by evidence produced by participants and is free to consider all sources of information.

Participants are not bound by any procedural burden of proof. Participants bear only a substantive burden of proof in the sense that if they, or others, fail to come forward with enough persuasive information to justify a measure, they will not realize their objective.³⁸ Likewise, a party contesting a specific action must illustrate that the action is unwarranted. An agency also incurs a substantive burden of proof when it issues an act which will have a detrimental impact on specific persons. It must justify the act in the face of the negative consequences.

In conducting its examination, an agency must guard against prejudicial proceedings, remedy all nonconforming matters, and advise participants with regard to all ambiguous or unclear issues. In order to guard against prejudice in the proceeding, an agency should insure that statutorily excluded persons do not participate³⁹ and prevent any prejudicial party or interest from playing a role.⁴⁰ In order to remedy errors, an agency should correct reports and petitions containing false information and insure that all unorganized documents are properly filed. Finally, an agency should clarify all issues which are confusing and advise individuals of their rights when necessary for their protection.⁴¹ Administrative officials thus act not only as agents of the state, but also as assistants to uninformed citizens.⁴² An agency is generally obligated to safeguard the procedural rights of participants.

3. *Individual Procedural Rights.*—All citizens have a right to participate in administrative procedures as long as their rights are involved and they possess legal capacity.⁴³ Natural and legal persons, associations or societies, and agencies possess legal capacity and may participate.⁴⁴ The term “participants,” as defined in the VwVfG, in-

⁵⁹ and accompanying text.

37. See *infra* notes 95-98 and accompanying text.

38. ACHTERBERG, *supra* note 4, at 420-21; Badura, *supra* note 9, at 266.

39. VwVfG § 20. By terms of section 20, excluded persons may not assist the administrative agencies in issuing official actions. Statutorily excluded persons include, among others, the participants themselves, legal representatives of participants, or anyone who has given expert testimony in the proceeding.

40. VwVfG § 21. The determination as to whether prejudice exists in the proceedings is decided according to an objective standard. KNACK, *supra* note 6, at 246-47.

41. VwVfG § 25.

42. KNACK, *supra* note 6, at 275-76.

43. Derived from the Rechtsstaat principle, see *supra* notes 22-23 and accompanying text, participatory rights guarantee, at a minimum, a right to be heard. VwVfG § 28.

44. *Id.* §§ 11-12.

cludes petitioners, their opponents, individuals to whom an administrative act is directed or will be directed, persons who conclude or will conclude a public law contract with an agency, and third parties whose rights will be affected by an administrative action.⁴⁵

Because third parties are entitled to participate in proceedings, they must be summoned by an agency when their interests are implicated by a proposed action.⁴⁶ The issuance of a building permit for a factory, for example, may necessitate summoning neighbors whose interests may be affected by the factory's construction. Determining who are participants is of essential importance because participants are entitled to hearing and other procedural rights.⁴⁷ Participants are entitled to assert only their own interests, however, and not those of parties who are not formally represented.⁴⁸

(a) *Opportunity to be heard.*—Before an administrative act can be issued which will encroach upon the rights of a person, the person must be given an opportunity to assert factors which may affect the decision.⁴⁹ This right guarantees only the opportunity to be heard, however; it is incumbent upon individuals themselves to exercise the right. Moreover, the right extends only to measures which impact negatively; administrative acts with positive consequences can be issued without hearing relevant parties.⁵⁰

The extent of the opportunity to be heard which must be afforded to participants generally lies within an agency's discretion and is commensurate with the nature of the participants' interests.⁵¹

45. *Id.* § 13.

46. *Id.* § 13(2). Third parties are summoned by delivery of a letter or, where large numbers are involved, via public notice.

47. Badura, *supra* note 9, at 264.

48. The highest German administrative court, the federal administrative court (Bundesverwaltungsgericht), articulated this standing requirement clearly in a case involving plaintiffs' complaints concerning air pollution emanating from a sulphur factory, which had been granted a permit for operation. The court stated, "Whether other persons would have raised objections . . . is insignificant. For the plaintiff can only complain of the violation of their own rights, and not represent the interests of others through their complaint." Judgment of Mar. 29, 1966, BVerwG, W. Ger., 24 BVerwGE 23, 30.

49. VwVfG § 28(1). *See also* Judgment of Nov. 12, 1975, BVerwG, W. Ger., 49 BVerwGE 348. The question as to whether the section 28 right of an opportunity to be heard in an administrative hearing is derived from the broader constitutional guarantee of access to the courts, GG art. 103(1), is disputed. The prevailing opinion is that the right to an administrative hearing follows from the constitutional norm, since it is an axiomatic Rechtsstaat principle that individuals have a right to challenge in the courts actions which impact on their rights. The scope of this right certainly encompasses administrative actions. *See generally* ACHTERBERG, *supra* note 4, at 417-19; *id.* n. 14; KNACK, *supra* note 6, at 301-02.

This would also seem to be the opinion of the Federal Constitutional Court, which has stated that persons "are . . . not only objects . . . of decisions, but must be given an opportunity to assert their interests before a decision is reached which will impact on their interests, so that they may influence the proceeding and its result." Judgment of Jan. 8, 1959, BVerfG, W. Ger., 9 BVerfGE 89, 95 (citation omitted).

50. ULE & LAUBINGER, *supra* note 6, at 122-23.

51. WOLFF & BACHOF, *supra* note 9, at 337; Badura, *supra* note 9, at 267.

At a minimum, an agency must provide participants with an opportunity to assert relevant factual matters which bear on the decision. A written opportunity may suffice.⁵² An oral hearing is necessary only when specified by law. Otherwise, its use is discretionary.⁵³ More extensive hearing rights entail opportunities for participants to comment on witness testimony and documentary evidence.⁵⁴

Although they serve an important function, administrative hearings play an auxiliary role in comparison to their American counterparts.⁵⁵ This is especially true with regard to the informal procedure where, in contrast to formal procedures, an administrative hearing serves more to inform the agency than to guarantee an individual's rights to a hearing.⁵⁶ In practice, administrative agencies will often issue measures without hearing affected parties. The lack of an adequate hearing, though a procedural error, may be remedied in subsequent administrative or judicial proceedings; in fact, this is frequently the practice.⁵⁷ Even when the lack of an adequate hearing has not been remedied, a final decision will stand if no other substantive decision could have been reached.⁵⁸ Under certain narrow circumstances, the hearing may be foregone altogether.⁵⁹

52. For example, in a federal administrative court decision, Judgment of Jan. 24, 1965, 20 BVerwGE 160 (1965), a mayor challenged but lost his recall by the city council. Claiming that his hearing rights had been violated because he had been afforded only a written opportunity to be heard, the court responded as follows:

[A]ccording to fundamental principles, this right [to a legal hearing] is satisfied in administrative proceedings, when the affected party has an opportunity to comment on the intended administrative measure and its foundation. Where, as here, there is no special legal regulation providing for the type of hearing, it is sufficient that the affected party have an opportunity to assert his concerns regarding the measure by written means. A right to an oral hearing does not principally exist.

Id. at 166.

53. ACHTERBERG, *supra* note 4, at 418; *id.* n. 17.

54. ULE & LAUBINGER, *supra* note 6, at 123.

55. Lorenz, *supra* note 3, at 552. For discussion of judicial exposition of the scope of administrative hearing rights, see Martens, *Die Rechtsprechung zum Verwaltungsverfahrenrecht* in 1 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT [NVwZ] 13, 13-16 (Feb. 15, 1982).

56. KNACK, *supra* note 6, at 302, 305.

57. VwVfG § 45. See, e.g., Judgment of Aug. 18, 1977, BVerwG, W. Ger., 54 BVerwGE 276, 279-80 (violation of right to individual hearing in matter concerning mother's entitlement to pregnancy leave and benefits is not essential error leading to invalidity of administrative act, and may be cured in subsequent administrative review proceeding); Judgment of Nov. 5, 1975, BVerwG, W. Ger., 49 BVerwGE 307, 309 (violation of individual hearing rights in proceeding to determine conscientious objector status from military service may be rectified in subsequent judicial proceeding); Judgment of July 13, 1967, BVerwG, W. Ger., 27 BVerwGE 295 (violation of individual's hearing rights and entitlement to physical examination in proceeding to determine induction into military service may be remedied in subsequent administrative or judicial proceeding). For discussion of the "curing" procedure, see *infra* notes 197-208 and accompanying text.

58. VwVfG § 46.

59. A hearing may be foregone altogether when in specific cases circumstances exist which threaten the public interest and therefore necessitate an immediate decision; threaten the timely progress of the proceeding; make the hearing unnecessary because participants have already made their concerns known; or would disrupt the agency's issuance of general disposi-

(b) *Right of inspection.*—Participants have the right to inspect relevant testimony, documents, and records of the proceedings in so far as is necessary to ascertain or defend their rights.⁶⁰ This right, however, is not one of complete access to records, as the right is available only to the extent necessary to protect and defend individual rights. In exercising the right, participants may be allowed to examine written statements of other participants and witnesses, other means of proof, and agency opinions, statements, or actions—though this latter source is available only within the agency's discretion.⁶¹ The right of inspection extends, moreover, only to final documents or reports, and not to drafts, notes, or other preparatory materials. Under certain narrow circumstances, the right may be limited.⁶² Yet the right may never be so extensively curtailed so as to deny participants' access to documents which affect their essential legal interests.⁶³

(c) *Right to confidentiality.*—A final procedural right is that of confidentiality—all participants are assured that their personal, business or trade secrets and confidences will not be disclosed by administrative officials absent authorization.⁶⁴ Disclosure of such information is possible only when authorized by all participants, specified in particular laws or regulations, or after the agency's careful determination that disclosure is necessary to facilitate more important interests.⁶⁵ This right is essential to facilitate full disclosure of all relevant information. The general rule that administrative proceedings involving an oral hearing are open only to direct participants and not members of the general public further assures confidentiality.⁶⁶

4. *The Decision.*—An agency makes its final determination at

tions or administrative acts designed for mass distributions. *Id.* § 28(2)-(3).

60. *Id.* § 29(1). See generally Judgment of Aug. 23, 1968, BVerwG, W. Ger., 154. The provision of inspection rights had been a particularly disputed question before the adoption of section 29. Opponents feared that providing the right would excessively hinder the operation of administrative agencies. However, the argument that inspection rights were necessary to facilitate hearing rights ultimately proved persuasive. See Badura, *supra* note 9, at 267-68.

Although not expressly provided for in the VwVfG, interested third parties also are entitled to inspection rights in so far as their interests are implicated. Generally, they must enter the proceedings as participants in the sense of section 13, thus entitling them to the right. Where there is no other means of preserving their interests, however, they may be granted inspection rights. See 30 BVerwGE 154.

61. Badura, *supra* note 9, at 268.

62. Inspection rights may be limited when the agency determines that access to the record would: (1) damage the agency's ability to function; (2) harm the public good; or (3) detrimentally affect the confidentiality interests of participants or third parties. VwVfG § 29(2).

63. WOLFF & BACHOF, *supra* note 9, at 339.

64. VwVfG § 30.

65. ULE & LAUBINGER, *supra* note 2, at 101. For example, it may be necessary to disclose one confidentiality in order to preserve the rights of another individual.

66. WOLFF & BACHOF, *supra* note 9, at 340.

the conclusion of the hearing. In making the determination, officials are free to consider all sources of proof: documentary and testimonial evidence; behavior and demeanor of witnesses and participants; and their own impressions regarding the evidence.⁶⁷

The conclusion of an informal procedure is not specifically regulated. The close of a proceeding is usually marked by the issuance of an administrative act or other official measure, though the nonissuance of an official action could equally signal the termination of a proceeding.⁶⁸ Unlike formal procedures, an agency is not obligated to inform participants that the proceeding will terminate in a manner other than the issuance of an administrative act or other official measure.⁶⁹ In further contrast to formal procedures, when an administrative act has been issued and a participant desires to challenge it, he must first exhaust available administrative remedies before pursuing judicial avenues of relief.⁷⁰

B. Formal Procedures

While informal procedures are the rule in German administrative law, formal procedures are the exception, applicable only when authorized by specific laws or regulations.⁷¹ The more comprehensive formal procedures are necessary when an administrative determination involves especially important public concerns or particularly affects the interests of individual citizens.⁷² For example, formal procedures are prescribed for the construction of public works projects, like highways⁷³ or airports,⁷⁴ the determination of waterway rights,⁷⁵ the granting of state pension benefits,⁷⁶ and, the dispensation of permits for erection of power plants⁷⁷ and facilities for nuclear power.⁷⁸ Although the VwVfG contains regulations governing the prototype

67. ULE & LAUBINGER, *supra* note 2, at 119.

68. *Id.* at 94-95.

69. See VwVfG §§ 69(3), 74(1).

70. See *infra* notes 182-83 and accompanying text.

71. VwVfG § 63(1).

72. WOLFF & BACHOF, *supra* note 9, at 348.

73. Bundesfernstrassengesetz [BFernStrG] (federal highway law) §§ 17-18, 1953 Bundesgesetzblatt [BGBl] I 903 (W. Ger., amended 1974, 1980).

74. Bundesluftverkehrsgesetz [BluftVG] (federal air traffic law) § 8 1981 Bundesgesetzblatt [BGBl] I 61 (W. Ger.).

75. Gesetz zur Ordnung des Wasserhaushalts [Wasserhaushaltsgesetz or WHG] (law for the regulation of water budgets) §§ 8-9, 14 1957, Bundesgesetzblatt [BGBl] I 1110, 1386 (W. Ger., amended 1976, 1980).

76. Reichsversicherungsordnung [RVO] (insurance act) § 1569a, 1911 Reichsgesetzblatt [RGBl] 509 (W. Ger., amended 1983).

77. Gesetz zur Förderung der Energiewirtschaft (law for support of energy economy) 1935 Reichsgesetzblatt [RGBl] I 1451 (W. Ger., amended 1977).

78. Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren [Atomgesetz or AtomG] (law for the peaceful use of atomic energy and protection against its dangers) §§ 7, 9, 1959 Bundesgesetzblatt [BGBl] I 814 (W. Ger., amended 1976, 1980).

formal procedure, these may be replaced by alternative regulations specified in particular laws.⁷⁹ In addition, the VwVfG prescribes a special formal procedure called the planning procedure to establish public works plans⁸⁰ and promulgate regulations governing formal proceedings before committees.⁸¹

The primary difference between formal procedures and informal procedures is that formal procedures require public notice of proceedings, oral hearings, issuance of written decisions containing explicit rationales, and an expedited mechanism for contesting final determinations. As long as these provisions do not specify alternative practices, the remaining parts of the VwVfG apply.⁸²

1. *Initiation of Formal Procedures.*—In most cases, formal procedures commence upon the filing of a formal petition requesting an agency to issue an administrative act or undertake other official actions.⁸³ A petitioner must disclose the factual and legal grounds for his request and attach any relevant documents to the petition.⁸⁴

79. As noted previously, though foreseen as a model law, the VwVfG has not entirely replaced the need for laws specifying alternative procedures. See *supra* notes 9-10 and accompanying text. See, e.g., Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge [Bundes-Immissionsschutzgesetz or BImSchuG] (law for protection from harmful environmental effects through air pollution, noise, vibrations, and similar occurrences or federal environmental protection law) §§ 4-21, 1974 Bundesgesetzblatt [BGBl] I 721 (W. Ger., amended 1974, 1976, 1980) (procedure for granting of permits for erection of facilities which may cause harmful environmental effects); Bundesbaugesetz [BBauG] (federal construction law) § 104, (1960) Bundesgesetzblatt [BGBl] I 341 (W. Ger., amended 1976, 1979) (procedure for expropriation of private property for federal construction purposes); Wehrpflichtgesetz [WpflG] (military service law) § 19, (1956) Bundesgesetzblatt [BGBl] I 651 (W. Ger., amended 1972, 1973, 1974, 1975, 1976, 1980) (military examination proceedings). For description of the substantive content of the permit procedure in the federal environmental law [BImSchuG], see Curry, *Air Pollution in West Germany*, 49 U. CHI. L. REV. 355, 356-74 (1982).

Because the VwVfG came into existence relatively recently, only one law, the Bundesberggesetz [BBergG] (federal mining law) §§ 36, 105, (1980) Bundesgesetzblatt [BGBl] I 1310 (W. Ger.), explicitly mandates application of the VwVfG formal procedure provisions. Laws taking effect prior to the adoption of the VwVfG have been held to apply the VwVfG provisions by analogy. Judgment of Apr. 10, 1978, BVerwG, W. Ger., 55 BVerwGE 299, 304.

80. See *infra* notes 107-67 and accompanying text.

81. See VwVfG § 71. Procedures before committees include the determination of conscientious objector status concerning military service, see WpflG §§ 16(2), 18, 26(3), and the determination of the list of restricted literature for the protection of youth, see Gesetz über die Verbreitung jugendgefährdender Schriften [GjS] (law concerning the distribution of literature dangerous to youth) §§ 8-10, 12-15, 1953 Bundesgesetzblatt [BGBl] I 377 (W. Ger., amended 1961) (procedure for determining whether certain literature threatens the morals of youth). For further discussion of the committee procedure, see ACHTERBERG, *supra* note 4, at 423-26; KNACK, *supra* note 6, at 780-82; ULE & LAUBINGER, *supra* note 2, at 148-50.

82. VwVfG § 63(2).

83. *Id.* § 64. In contrast to the informal procedure, the filing of a petition is more explicitly regulated in the formal procedure. The petition must be signed and filed. Other means of communication, e.g., telephone or telegraph, are not acceptable. See ULE & LAUBINGER, *supra* note 2, at 135-36.

84. *Id.* at 136. Because the petitioner must disclose the legal controversy in his petition, he must attach all documents which bear on the dispute. The failure to fulfill this requirement may result in the agency's staying of the proceeding until the petitioner satisfies the condition.

Upon fulfillment of these conditions, the agency must give public notice that a formal procedure will take place. Public notice is rendered via publication in an official agency publication and the local newspaper in the area which will be affected by the agency's ultimate determination.⁸⁵

2. *Necessity of an Oral Hearing.*—The oral hearing is the key element of the formal procedures.⁸⁶ Oral hearings are required to afford participants a fuller opportunity to assert their interests and to insure full consideration of all relevant factors bearing on the decision. Oral hearings are designed to facilitate communication between executive agencies and citizens concerning enactment of official measures. Because of their importance, failure to provide an adequate oral hearing generally results in invalidation of resulting administrative actions.⁸⁷

An agency must give public notice that a hearing will take place at least two weeks in advance in both an official administrative publication and the appropriate local newspaper.⁸⁸ In addition, an agency must invite all participants and interested third parties to partake in the hearing.⁸⁹ Only under certain limited circumstances can an agency proceed to decision without participation of all interested persons.⁹⁰ Where possible, the agency should undertake to reach all pertinent legal measures in one proceeding.⁹¹

As a rule, the oral hearing is not open to the general public but only to participants.⁹² Because an administrative proceeding, unlike a judicial one, does not involve decision making by a neutral third party, public attendance is not deemed essential.⁹³

Before proceeding with the actual hearing, a hearing officer must discuss the procedure with the participants to insure that all

85. VwVfG § 63(3).

86. *Id.* § 67(1).

87. *Id.* § 44(1); Judgment of Nov. 12, 1975, BVerwG, W. Ger., 49 BVerwGE 348.

88. VwVfG § 67(1).

89. *Id.* Personal invitations to participate in the proceeding must be sent to interested persons. Where more than 300 participants are involved, public notice may be used. Public notice must be given at least two weeks prior to the hearing and may be rendered via an official agency publication and the local newspaper of the affected area.

90. *Id.* § 67(2). These conditions exist when the agency has already discussed the matter with all concerned participants, no objections have been raised either against the proposed measure or the agency's decision to forego an oral hearing, or the public interest demands an immediate decision.

91. *Id.* § 67(3). The attempt to concentrate as many legal measures as possible in one proceeding is a result of time, cost, and economic considerations.

92. *Id.* § 68(1). Other than administrative officials and participants, the hearing is open only to legal interns or members of the general public who have obtained permission from officials and whose presence has not been objected to by participants.

93. ULE & LAUBINGER, *supra* note 2, at 144. A further distinction thought persuasive in Germany is that, in contrast to judicial proceedings, administrative proceedings involve the execution of administrative policy—a task distinctly within the competence of the executive.

formal motions are in order and properly filed, all statements are complete, and all parties understand the matter at issue.⁹⁴ This process is necessary to assure that participants are fully aware of their rights.

Standard rules of civil procedure apply at the hearing, which require witnesses to testify and cooperate in the proceeding.⁹⁵ All participants must be given an opportunity to assert their interests before a formal decision is reached.⁹⁶ Although all individuals must be given an opportunity to be heard, oral hearings are not required if a written statement will suffice. An agency has discretion to determine what means of communication are necessary.⁹⁷ Furthermore, participants are guaranteed only an opportunity to be heard; failure to exercise this right does not result in invalidation of official acts. Other hearing rights include the right to question witnesses and review all written statements and other means of proof, which better assure inclusion of participants' concerns in the decision making process.⁹⁸ In further contrast to informal proceedings, individual hearing rights may not be limited.⁹⁹

At the conclusion of a hearing, the hearing officer must assemble and publish a written notice containing the following information:

- (1) the date and place of the hearing,
- (2) the names of the hearing officer, participants, and witnesses who appeared,
- (3) the issues which were decided and motions which were filed in regard thereto,
- (4) the material content of witnesses' statements, and
- (5) the conclusions reached regarding the demeanor of witnesses.¹⁰⁰

3. *The Decision.*—The VwVfG specifies that a decision may result only from an agency's careful consideration of all pertinent factors. An agency may not rely solely upon the oral hearing, but

94. VwVfG § 68(2).

95. The governing civil procedure requirements obligate witnesses and experts to testify. Zivilprozessordnung [ZPO] (civil procedure act) §§ 402-403, 408-409, 1877 Reichsgesetzblatt [RGBl] 83 (W. Ger., amended 1983). Where witnesses decline to testify, administrative officials can obtain the testimony by visiting the witnesses' homes. *Id.* §§ 376, 383-385, 403. While officials cannot force witnesses to testify, refusal to testify can lead to a judicial proceeding to determine the question as to whether the refusal is justified. *Id.* § 387. Where the witness does not have a valid reason for refusing to testify, he may be ordered to testify by the courts. *Id.* §§ 390, 409. When necessary, officials may also render an oath to witnesses. *Id.* §§ 391, 402.

96. VwVfG § 66.

97. KNACK, *supra* note 6, at 759.

98. Judgment of Nov. 11, 1975, BVerwG, W. Ger., 49 BVerwGE 348.

99. VwVfG § 66; ULE & LAUBINGER, *supra* note 6, at 167.

100. *Id.* § 68(4).

must also consider written statements, documents, and other means of proof.¹⁰¹ The common result of formal procedures is an administrative act which determines the legal relationship between citizens and the state. An administrative act must be written, founded on an explicit rationale, and delivered to the participants.¹⁰² An administrative act takes effect two weeks after its publication in an official agency publication.¹⁰³ If an agency concludes a proceeding in a manner other than issuance of an administrative act, this decision must be communicated to participants so that they are aware that the proceeding has been terminated.¹⁰⁴

Official publication of an administrative act signals the close of a formal administrative procedure. Participants who feel aggrieved by an administrative act may then pursue judicial remedies by filing complaints in the administrative courts. Unlike informal procedures, no administrative hearing is necessary as a prerequisite to pursuing judicial relief; administrative acts may be appealed directly to administrative courts.¹⁰⁵ The more exacting demands of formal procedures better insure careful, reasoned administrative decision making.¹⁰⁶

C. *The Planning Procedure*

A special type of formal procedure is necessary to establish official planning programs (Planfeststellungsverfahren), which usually involve public works projects. Establishment of plans means "an ordered sequence of measures by a public administrative body to determine and coordinate the intentions or aims regarding a specific area, so long as a public interest exists therein and so far as . . . the concrete usage is authorized by legal ordinance or administrative act."¹⁰⁷ These plans usually involve the erection and alteration of highways or streets,¹⁰⁸ waterways,¹⁰⁹ or railway lines,¹¹⁰ but may also

101. *Id.* § 69(1).

102. *Id.* § 69(2). The rendering of an explicit rationale may be foregone only when: (1) an issued administrative act does not impact on the rights of any individuals; (2) affected persons are already aware of the rationale supporting the measure; (3) the administrative act is dispensed to a large number of persons and a rationale is not necessary to support the measure; (4) regulations so order; or (5) a general disposition is issued and publicly communicated. *Id.* § 39(2).

Public notice may replace individual delivery when more than 300 participants are involved. The public notice must contain a description of the relevant portions of the administrative act and instructions on available avenues of contesting the decision. *Id.* § 69(2).

103. *Id.*

104. *Id.* § 69(3).

105. *Id.* § 70. For discussion of judicial remedies, see *infra* notes 238-62 and accompanying text.

106. ACHTERBERG, *supra* note 4, at 423.

107. WOLFF & BACHOF, *supra* note 9, at 357.

108. BFernStrG §§ 17-18. See also Judgment of June 21, 1976, BVerwG, W. Ger., 51 BVerwGE 6; Judgment of Feb. 14, 1975, BVerwG, W. Ger., 48 BVerwGE 56.

109. Bundeswasserstrassengesetz [WaStrG] (federal waterway law) §§ 14-23, 1968

include the construction of communication lines,¹¹¹ airports,¹¹² waste disposal facilities,¹¹³ pollution control facilities,¹¹⁴ nuclear energy plants,¹¹⁵ and other public projects. Despite the variety of subject matters covered, planning procedures form an essentially uniform legal institution.¹¹⁶ As with other formal procedures, planning procedures occur only when authorized by specific law or regulations.¹¹⁷

Planning procedures are intended to formulate entire programs in one procedure through a single agency.¹¹⁸ The procedure is designed to disclose the nature, condition, and execution of a plan and reach a decision after balancing competing administrative, public, and individual interests. The legal relationship between the affected parties is solidified in one administrative act. To accomplish these objectives, a planning procedure must progress through several stages: drafting, publication, public hearing, consultation, and formal hearing.

1. *Drafting.*—While it is possible for qualified civilians to draft plans, most plans are formulated by administrative agencies.¹¹⁹ According to the VwVfG, the entire planning process takes place within one administrative agency. Within this agency there should be a clearly defined separation of function. One level of officials is responsible for drafting a plan, another is responsible for hearing public comments concerning the draft, and still another is responsible for final formulation of the plan.¹²⁰ The separation of functions between the three levels is designed to insure a more careful internal

Bundesgesetzblatt [BGBl] II 173 (W. Ger., amended 1980).

110. Bundesbahngesetz (federal railway law) § 36, 1951 Bundesgesetzblatt [BGBl] I 955 (W. Ger., amended 1981); Gesetz über Kreuzungen von Eisenbahnen und Strassen (law concerning train and street intersections) 1971 Bundesgesetzblatt [BGBl] III 910-11 (W. Ger.). See also Judgment of Feb. 14, 1969, BVerwG, W. Ger., 31 BVerwGE 263.

111. Telegraphengesetz [TWG] (telegraph law) § 7, 1899 Reichsgesetzblatt [RGBl] 705 (W. Ger.); Gesetz zur Vereinfachung des Planverfahrens für Fernmeldelinien [TWVereinfG] (law for the simplification of the planning process for telegraph lines) 1935 Reichsgesetzblatt [RGBl] I 1177 (W. Ger.) (erection of telegraph lines).

112. BLuftVG § 8. See Judgment of July 7, 1978, BVerwG, W. Ger., 56 BVerwGE 110.

113. Abfallbeseitigungsgesetz [AbfG] (waste disposal law) §§ 7-8, 20, 1972 Bundesgesetzblatt [BGBl] 873 (W. Ger., amended 1977, 1982).

114. BImSchG §§ 4-21.

115. AtomG §§ 7, 9. See also Judgment of May 3, 1977, BVerfG, W. Ger., 53 BVerfGE 30 (review of permit procedure for granting of license to nuclear power reactor).

116. Badura, *supra* note 9, at 303.

117. VwVfG § 72.

118. ACHTERBERG, *supra* note 4, at 426.

119. ULE & LAUBINGER, *supra* note 2, at 152, 155.

120. The specific relationship between the officials responsible for drafting, hearing, and deciding a proposal depends on the organizational law governing a particular agency. While the VwVfG anticipates that the hearing officers will be on a lower organizational level than the drafting officials, the actual practice is the reverse. In some cases, the hearing and deciding officials are the same. ULE & LAUBINGER, *supra* note 2, at 155; WOLFF & BACHOF, *supra* note 9, at 359.

decision making process.

While formal laws must provide agencies with legal authority, define the task, and set guidelines for the exercise of discretion,¹²¹ the remainder of the planning exercise lies within an agency's discretion. Agencies thus possess a wide degree of "planning freedom."¹²² In formulating proposals, drafting officials typically aim to address all relevant concerns by including pertinent public, private, and technical considerations in the plan.

A proposed draft typically consists of a statement of intention supplemented with drawings, explanations, and other secondary materials.¹²³ A proposal must be sufficiently comprehensible for the general public and other administrative bodies to have a clear idea as to the intent and content of the plan and how their respective interests may be implicated. If a proposal is not understandable, it may be returned to the drafting officials for clarification.¹²⁴ When the proposal is comprehensible, the drafting officials deliver it to the next level of hearing officers, who conduct a public hearing on the proposal.¹²⁵ Delivery of a proposal to hearing officers marks the formal initiation of the planning procedure.

2. *Publication.*—Because the planning process supplants the normal administrative decision making process of other administrative departments, opinions must be solicited from the departments before a proposal is publicized.¹²⁶ These other administrative departments include both agencies with jurisdiction over different subjects and entities at different levels of the federalist structure. Interested public law bodies are given an opportunity to assert relevant technical opinions on the proposed plan.

After solicitation of alternate opinions, a hearing officer must display the proposal for public inspection for at least one month in the community affected by the proposed plan.¹²⁷ The publicized proposal must accurately represent the objectives of the plan.¹²⁸ Com-

121. Badura, *supra* note 9, at 304-05.

122. See, e.g., Judgment of July 7, 1978, BVerwG, W. Ger., 56 BVerwGE 110, 116 (the planning exercise by definition consists of a necessary degree of freedom and discretion); *accord* Judgment of Feb. 14, 1975, BVerwG, W. Ger., 48 BVerwGE 56, 59. For discussion of the nature of planning freedom in particular areas, see Judgment of Dec. 14, 1979, BVerwG, W. Ger., 59 BVerwGE 253 (1979) (construction of protective facility for railroad); Judgment of Feb. 10, 1978, BVerwG, W. Ger., 55 BVerwGE 220, 226 (consideration of impact of widening gravel pit on ground water and general water rights); Judgment of Apr. 15, 1977, BVerwG, W. Ger., 52 BVerwGE 237, 243; Judgment of July 5, 1974, BVerwG, W. Ger., 45 BVerwGE 309 (building and construction).

123. VwVfG § 73(1); ULE & LAUBINGER, *supra* note 6, at 188.

124. ULE & LAUBINGER, *supra* note 2, at 156.

125. WOLFF & BACHOF, *supra* note 9, at 359.

126. VwVfG § 73(2); KNACK, *supra* note 6, at 809.

127. VwVfG § 73(3).

128. ULE & LAUBINGER, *supra* note 2, at 157.

munities in which the proposed plan is to be displayed must announce the forthcoming display at least one week in advance. The announcement must include:

- (1) the time and place the proposal will be available for inspection;
- (2) notice that objections may be raised within a given time period;
- (3) notice that the proposal may be established without participation of parties who fail to raise timely objections and that late objections will not be considered; and
- (4) notice that persons raising objections can be publicly notified of the consultation period, and that delivery of a decision regarding objections can be replaced by public notice when more than 300 objectors are involved.¹²⁹

When errors regarding the time, place, and ability to raise objections appear in the public notice, the notice is defective and must be repeated.¹³⁰ Other errors have a less severe effect.¹³¹ Public display of a proposal may be foregone only when the circle of persons affected by the proposed plan is definitely known and these persons are given an opportunity to inspect the plan.¹³²

3. *Public Comment and Objection.*—All interested persons—natural and legal—must be given an opportunity to assert concerns over a proposed plan before a formal decision may be reached.¹³³ Objections are not limited to parties whose social and economic interests are involved in the proposed plan; anyone whose subjective rights are implicated may object.¹³⁴ An individual's ability to raise concerns by objecting to proposed measures which may affect personal interests satisfies the constitutional right to be heard.¹³⁵ In one leading constitutional case, the Federal Constitutional Court sustained the right of citizens to participate in a permit procedure for licensing a nuclear reactor because of the threat posed by the reactor to the citizens' well-being.¹³⁶ While the effects of this decision have not yet been determined, individuals must, at a minimum, be guaranteed an opportunity to articulate their concerns over proposed plans which may impact on their interests. The right to object,

129. VwVfG § 73(5).

130. ULE & LAUBINGER, *supra* note 2, at 158.

131. Failure to mention that late objections will not be considered results in the hearing of late objections; failure to mention the possibility of substitute public notice of decisions regarding objections similarly precludes public notice as a means of communication. *Id.* at 158.

132. VwVfG § 73(3).

133. *Id.* § 66(1).

134. *Id.* § 73(4); ULE & LAUBINGER, *supra* note 6, at 191.

135. ULE & LAUBINGER, *supra* note 6, at 193.

136. Judgment of May 3, 1977, BVerfG, W. Ger., 53 BVerfGE 30.

however, entails only *personal* interests, and not the interests of others.¹³⁷

Because of the number of objectors which may be involved in a proceeding, inspection rights lie within an agency's discretion and may be limited.¹³⁸ Objections may be raised within two weeks after conclusion of the public display period.¹³⁹ This period limits the number of objectors, a determination which may affect participation rights.¹⁴⁰ Objections should be in writing and should be delivered to either the hearing officers or the relevant community.¹⁴¹

The public comment period serves to reveal the general public's perception of a proposed plan. In particular, individual comments may highlight specific legal problems or unforeseen difficulties which need to be addressed.¹⁴² Comments thereby assist an agency by bringing unanticipated considerations to its attention.

4. *Consultation Period.*—The consultation period forms the core of the hearing phase. The purpose of the consultation period is to review a proposal in light of public objections and the opinions of other administrative bodies.¹⁴³ The process is designed to insure a sensible balance between competing public and private interests. This balance may be achieved by incorporating public comments directly into the plan, altering aspects of the plan in order to sidestep specific legal problems, erecting protective facilities to safeguard third party interests, or convincing parties to withdraw their objections.¹⁴⁴

The consultation period is actually a special type of oral hearing. The oral hearing provisions of the formal procedure apply in large part, guaranteeing a right to be heard to all persons who have raised timely objections.¹⁴⁵ Public notice of the consultation period must be given to drafting officials, objecting public bodies, and members of the general public who have objected—provided their numbers do not exceed 300.¹⁴⁶ Hearing officers must then hear public objections and discuss them with the objecting parties and drafting officials. Hearing officers may, in their discretion, hear untimely objections.

137. KNACK, *supra* note 6, at 814.

138. VwVfG § 72(1).

139. *Id.* § 73(4).

140. A formal objection must be filed in order to obtain participatory rights. Badura, *supra* note 9, at 306.

141. VwVfG § 73(4).

142. ULE & LAUBINGER, *supra* note 2, at 159-60. *See also* Judgment of Apr. 10, 1968, BVerwG, W. Ger., 29 BVerwGE 282, 284.

143. VwVfG § 73(6); ULE & LAUBINGER, *supra* note 6, at 196-97.

144. ACHTERBERG, *supra* note 4, at 427-28; ULE & LAUBINGER, *supra* note 6, at 197.

145. VwVfG § 73(6) (authorizing application of §§ 67-68).

146. *Id.*

Because the consultation period is so important, the VwVfG specifies that it must take place after the public comment period ends.¹⁴⁷ Only under narrow circumstances can the public consultation period be foregone.¹⁴⁸ At the end of the consultation period, hearing officers must issue a written opinion stating the results of the hearing. Within one month after the hearing's conclusion they must then deliver this opinion along with the plan, opinions of public bodies, and unresolved public objections to the officials responsible for putting the plan into final form.¹⁴⁹

5. *The Decision.*—Upon review of all relevant considerations, deciding officials determine the final form of the plan. In finalizing the plan, officials must resolve remaining objections. In this sense, officials act in a quasi-judicial capacity.¹⁵⁰ They may either dismiss these objections outright or recognize the validity of the objections by altering certain aspects of the plan. For example, the construction of a power plant may necessitate the erection of antipollution facilities in order to safeguard the interests of neighboring third parties.¹⁵¹ When determined to be prohibitively expensive or technologically infeasible, plans for the power plant may be abandoned. In cases where alterations are not possible, individuals may be entitled to monetary compensation.¹⁵² Regardless of how the agency resolves specific objections, it is obligated to consider and weigh them along with all other relevant factors in reaching a decision.¹⁵³

According to formal procedural regulations, the agency must issue a written decision, supported by an explicit rationale, which must then be delivered to participants of the oral hearing.¹⁵⁴ In addition, the final decision, along with information concerning available avenues of judicial appeal, must be displayed publicly for two weeks in

147. *Id.*

148. A consultation period may be foregone only when no formal objections to the plan have been raised or when the public interest necessitates an immediate decision. *See* ULE & LAUBINGER, *supra* note 2, at 161-62.

149. VwVfG § 73(9).

150. KNACK, *supra* note 6, at 830.

151. *See generally* Judgment of June 21, 1976, BVerwG, W. Ger., 51 BVerwGE 6 (consideration of whether to erect protective wall); Judgment of Feb. 14, 1975, BVerwG, W. Ger., 48 BVerwGE 56, 68 (erection of protective facilities generally).

152. KNACK, *supra* note 6, at 818; ULE & LAUBINGER, *supra* note 6, at 198-200.

153. Prevailing administrative law standards obligate the deciding officials to evaluate all pertinent factors in determining the final plan. *See, e.g.*, Judgment of July 7, 1978, BVerwG, W. Ger., 56 BVerwGE 110, 122, 126-28; Judgment of Feb. 10, 1978, BVerwG, W. Ger., 55 BVerwGE 220, 227. In determining the plan's final form, the officials' planning freedom is limited by internal administrative directives, the concrete proposal, statutory and legal standards, and the demands of evaluating and balancing all relevant considerations. *See* Judgment of July 7, 1978, BVerwG, W. Ger., 56 BVerwGE 110, 117; Judgment of Feb. 14, 1975, BVerwG, W. Ger., 48 BVerwGE 56, 59.

154. VwVfG § 74(1) (authorizing application of §§ 69-70).

the community in which the plan is to take effect.¹⁵⁵ At the end of this period, the plan is categorized as having provisional legal effect.

The legal character of the formulated plan is an administrative act.¹⁵⁶ By reason of the special planning procedure, however, this administrative act is unique. The typical administrative permits, dispensations, grants, or other official decisions which normally characterize the administrative process have been incorporated into the plan.¹⁵⁷ Thus, the planning procedure actually supplants the normal administrative decision making process. The plan orders in one administrative act all relevant public law relations.¹⁵⁸

Because of the careful procedure followed in issuing a plan as an administrative act, the standard administrative pre-judicial hearing may also be foregone in challenging the decision; challenges may be taken directly to the administrative courts.¹⁵⁹ Any individual who can establish that his rights have been violated may file a complaint in the administrative courts. Complaints must be filed within one month of the publication of the act. The right to challenge the act does not depend on whether an objection was raised previously.¹⁶⁰ Communities may also complain if they can establish that their planning authority has been impaired.¹⁶¹ Drafters of the plan may complain if they can prove that the issued act diverges significantly from their original intentions. Administrative agencies, however, do not have authority to complain, as they possess no rights.¹⁶² The filing of any of these complaints serves to suspend the legal effect of the administrative act.¹⁶³

If no complaints are filed within one month, the administrative act takes final legal effect, and all subsequent complaints are barred.¹⁶⁴ At this stage, adjustments to the administrative act can be made only where factors develop which were not foreseen during the planning process and which impact negatively. Persons negatively affected by the plan must notify the agency of unforeseen developments within three years of the time they first became aware of the problem, and they may do so up to thirty years from the time of the initiation of the plan. As with the settlement of objections, remedial

155. *Id.* §§ 74(4)-(5).

156. Judgment of June 3, 1971, BVerwG, W. Ger., 38 BVerwGE 152, 156.

157. VwVfG § 75(1); ULE & LAUBINGER, *supra* note 6, at 204.

158. ULE & LAUBINGER, *supra* note 6, at 203-04.

159. VwVfG § 74(1) (authorizing application of § 70).

160. VwGO § 74. *See also* ULE & LAUBINGER, *supra* note 2, at 168.

161. For the right of communities to complain, see Judgment of July 7, 1978, BVerwG, W. Ger., 56 BVerwGE 110, 135-37 (1978); Judgment of June 21, 1976, BVerwG, W. Ger., 51 BVerwGE 6, 14; Judgment of Feb. 14, 1969, BVerwG, W. Ger., 31 BVerwGE 263, 264-66. *See also* ULE & LAUBINGER, *supra* note 2, at 168.

162. Judgment of Feb. 14, 1969, BVerwG, W. Ger., 31 BVerwGE 263, 267.

163. VwGO § 80.

164. *Id.* § 75(2). *See also* ULE & LAUBINGER, *supra* note 2, at 170.

measures or compensation may be ordered where necessary.¹⁶⁵ If the plan is altered in any material manner, however, it fails to take legal effect and all or part of the planning procedure must be repeated.¹⁶⁶ If a plan is discarded completely, the relevant parties must be returned to the same legal condition as existed prior to the establishment of the plan.¹⁶⁷

D. Mass Procedures

A final procedural form in the German law is the so-called "mass procedure." The term "mass procedure" does not actually appear in either the VwVfG or other regulations, but has been applied so frequently in leading literature to describe procedures involving large numbers of participants that the "mass procedure" can be spoken of as a new form of administrative procedure.¹⁶⁸ How many participants must take part in the proceedings to constitute a "mass procedure" is unsettled. At a minimum there must be 50 participants; procedures involving the issuance of a license for a nuclear power reactor have involved more than 100,000 participants.¹⁶⁹

To attract such large number of participants, a mass procedure usually concerns a matter of vital public interest. Besides granting a license to nuclear power plants, other examples of mass procedure are the construction or expansion of an airport, oil refinery, or free-way.¹⁷⁰ The mass procedure has developed in response to the increased political activity of citizens in the 1970's. Some commentators consider the mass procedure to be the procedural form for the modern age.¹⁷¹

The mass procedure is not actually a distinct form of procedure. The term refers more to the number of participants involved than the actual content of the procedure. In actuality, a mass procedure may be an informal, formal, or planning procedure involving a large number of participants. Because the mass procedure is not really a distinct procedural form, no specific part of the VwVfG applies; rather, a variety of VwVfG provisions apply.

What is unique about mass procedure is its implementation of class representation and public notice as tools to assist the agency in expediting issues. In light of the number of participants involved,

165. VwVfG § 75(2)-(3). Remedial measures include the erection of protective facilities, see, e.g., Judgment of Feb. 14, 1975, BVerwG, W. Ger., 48 BVerwGE 56, 68, alteration of existing facilities, or the award of monetary damages. KNACK, *supra* note 6, at 862-65.

166. VwVfG § 76.

167. *Id.* § 77.

168. See, e.g., ACHTERBERG, *supra* note 4, at 428-29; ULE & LAUBINGER, *supra* note 6, at 210.

169. ACHTERBERG, *supra* note 4, at 428.

170. *Id.* at 428 n.66.

171. *Id.* at 428-29.

these two tools are essential to assure that all relevant public and private concerns are heard and that competing concerns can be weighed and, ultimately, incorporated into a final determination—all within reasonable economies of time and cost.

1. Common Representatives of a Class.—Common representatives for a class of participants may be appointed in one of two ways. Either the members of the class may appoint a representative or, where no representative is appointed, the hearing officer can designate a member of the class as representative. A class containing at least fifty members can designate one member as representative if the petitions concern a common theme.¹⁷² The common representative must be a natural person, and the petition must list his name, profession, and address. Where this information is not apparent, the agency may disregard the petitions, though it must give public notice of such action.¹⁷³

Where a group of more than fifty persons has filed petitions concerning a common theme without designating a representative, the agency can order the group to appoint one member as representative of the class, if the agency determines that the failure to do so would detrimentally affect the proceedings.¹⁷⁴ If the group is unable to agree on one member within a given period, then the agency may appoint a representative.

In either case, the representative is obligated to attend carefully to the interests of the class.¹⁷⁵ Though he is not bound by directives, the representative should consult regularly with the class. The representative may participate in all aspects of the proceedings; he is entitled to assert the interest of the class, exercise inspection rights by obtaining access to all pertinent documents, and be informed of relevant procedural decisions.¹⁷⁶ Remaining members of the class may participate in the proceeding only at the discretion of the agency. Unless specifically designated, however, the representative is not a legal agent of the class. The extent of his liability is determined according to normal civil law standards.¹⁷⁷ The representative is entitled to compensation for his services and may resign or be replaced at any time.¹⁷⁸

172. VwVfG § 17(1).

173. *Id.* § 17(2).

174. *Id.* § 18(1).

175. *Id.* § 19(1).

176. *Id.* §§ 19(1), 29(1).

177. ACHTERBERG, *supra* note 4, at 430. In general, the representative is legally liable only to the degree that he causes damage to the interests of the class. See Bürgerliches Gesetzbuch [BGB] (civil code) §§ 1833, 1897, 1915 (1896) Reichsgesetzblatt [RGBl] 195 (W. Ger., last amended 1983).

178. VwVfG §§ 17(3), 18(2), 19(3).

2. *Public Notice Measures.*—The use of public notice to inform participants and interested parties of pertinent procedural data is the second tool available to executive agencies in mass procedures. Agencies can use public notice to communicate data when more than 300 participants are involved in the proceeding.¹⁷⁹ Public notice is generally given in an official agency publication as well as in the local newspaper of the area in which the action is to take effect. Relevant procedural dates, times, and locations must be published at least two weeks in advance. Other important data, such as summons, announcements, and notifications may also be communicated by public means. Since public notice is essentially a tool for the agency, its use lies primarily within the agency's discretion.¹⁸⁰ In some cases, however, formal and planning procedures require the rendering of public notice.¹⁸¹

IV. Contesting Administrative Acts

Citizens may challenge final administrative acts by pursuing remedies through executive agencies or through the administrative courts. On an informal basis, a disgruntled citizen may complain either to the agency which issued the decision or to its supervisory board.¹⁸² This communication sets in motion an elaborate system of internal administrative controls which obligates the agency to review its decision and, where appropriate, avoid, alter, or annul errant administrative acts. On a formal basis, a citizen may file a claim for relief. For administrative acts reached through informal procedure, the complaint must be filed with the issuing agency, where a supervisory level of officials conducts a pre-judicial hearing (*Vorverfahren*) to test the legality and suitability (*Rechtmässigkeit* and *Zweckmässigkeit*) of the administrative act.

As a result of the pre-judicial hearing, the agency can dismiss

179. *Id.* § 17(4).

180. ACHTERBERG, *supra* note 4, at 430.

181. See VwVfG § 63(3) (public notice that formal procedure will take place); § 67(1) (public notice of oral hearing when more than 300 participants); § 69(2) (public notice of final administrative act when more than 300 participants); § 69(3) (public notice that formal procedure will end in manner other than the granting of an administrative act when more than 300 participants); § 72(2) (public notice that planning procedure will take place). See also *id.* §§ 73(5)-(6), 74(5).

182. There are a variety of informal methods for expressing grievances to administrative officials. A dissatisfied citizen may complain directly to the administrative agency which issued the measure (*Gegenvorstellung*). While the agency must investigate the grievance, it is not obligated to grant relief. Another possibility is for the citizen to lodge a complaint with the supervisory officials of the issuing agency (*Aufsichtbeschwerde*). Such a complaint may concern a legal question (*Fachaufsicht*) or the personal behavior of officials (*Dienstaufsicht*). While none of these grievance mechanisms is specifically regulated, they may lead to administrative relief. See *infra* notes 183-278 and accompanying text. Still another, more formal outlet is the filing of a petition requesting specific relief. Because the filing of a petition is a constitutional guarantee, see GG art. 17, anyone may petition any level of an agency. ACHTERBERG, *supra* note 4, at 455-56, 458-61.

the complaint as unfounded or decide to grant appropriate administrative relief by voiding, altering, or annulling the administrative act. If the agency fails to grant satisfactory relief, individuals may appeal the decision in the administrative courts. For administrative acts reached through the formal or planning procedures, a complaining party may pursue a judicial remedy immediately by filing the complaint in the appropriate administrative court.

A. *Internal Administrative Remedies*

The internal system of administrative self-control derives from German legal principles which bind executive agencies to the law. All official actions undertaken by an executive agency, including administrative acts, must comport with prevailing constitutional and legal standards.¹⁸³ By reason of these principles, an agency is obligated—upon request or self-cognizance—to reevaluate its decision and, where appropriate, void, cure, annul, or reinstitute a procedure to redetermine an administrative act. Administrative acts which contain especially serious errors may be voided; those which contain less serious errors may be remedied in a subsequent proceeding; those which violate legal norms or are no longer relevant due to changed circumstances may be recalled; and those which contain minor errors may be left standing where no other substantive decision could have been reached. While the determination of these remedies lies in the agency's discretion, legal standards can so limit agency discretion that the agency has essentially no choice other than to alter or annul a specific measure. The following discussion evaluates the various administrative remedies.

1. *Void Administrative Acts.*—Administrative acts are void (nichtig) when they suffer from especially serious defects which are apparent upon review of all relevant circumstances.¹⁸⁴ As stated in the VwVfG, some defects are so serious as to render administrative acts void per se. These are acts which:

- (1) though written, do not devulge the issuing agency,¹⁸⁵
- (2) according to regulations may only be issued with accompanying documents, and this condition is not fulfilled;¹⁸⁶

183. See *supra* notes 22-24 and accompanying text.

184. VwVfG § 44(1). For development and application of the test, see Judgment of July 16, 1970, BVerwG, W. Ger., 1971, *Neue Juristische Wochenschrift* [NJW] 578; Judgment of Apr. 13, 1967, BVerwG, W. Ger., 27 BVerwGE 295, 299; Judgment of Feb. 11, 1966, BVerwG, W. Ger., 23 BVerwGE 237, 238; Judgment of Oct. 7, 1964, BVerwG, W. Ger., 19 BVerwGE 284, 287.

185. The identity of the issuing agency is important, since citizens then know to whom to direct a protest. KNACK, *supra* note 6, at 545-46.

186. For example, granting citizenship depends on the fulfillment of certain testimonial requirements. In turn, citizenship is formally granted upon the deliverance of documents so

- (3) are issued by an agency which does not have jurisdiction over the subject matter;
- (4) cannot be executed because of technical or factual impossibilities;
- (5) require the commission of a crime or offense punishable by fine; or
- (6) violate social norms.¹⁸⁷

Other enumerated defects are so minor that they do not render an administrative act void per se. These involve the failure to obey venue requirements, the participation in the proceeding of certain excluded persons,¹⁸⁸ and the failure of designated committees, officials, or agencies to partake in the decision.¹⁸⁹

Between these two extremes the general test that administrative acts are void when they possess an especially serious error which is apparent from a review of all relevant circumstances must be considered.¹⁹⁰ This test focuses on the weight and importance of errors, and not their type.¹⁹¹ A review of agency experience and court decisions is necessary to obtain the full exposition of the test. In general it can be said that most errors of form,¹⁹² procedure, or hearing rights¹⁹³ will not lead to voidness, while errors involving the active participation of an interested party in the actual drafting and issuance of an act, nonparticipation of an essential party in the decision, absolute inability to comprehend the intent and content of an administrative act,¹⁹⁴ or serious substantive law questions will lead to nullifica-

stating. Reichs-und Staatsangehörigkeitsgesetz (citizenship law) § 16(1), 1913 Reichsgesetzblatt [RGBL] 583, III 102-1 (W. Ger.).

187. VwVfG § 44(2). The violation of social norms provision is based on BGB § 138(1), which invalidates legal measures that violate "good customs" (guten Sitten).

188. See *supra* note 39.

189. VwVfG § 44(3).

190. The test of VwVfG § 44(1) actually embodies two historical tests for determining the voidness of administrative acts. The "Schweretheorie" held administrative acts void when they suffered from an especially serious error. In the course of experience, judicial opinions categorized errors according to the nature of their seriousness. Subsequently, the "Evidenztheorie" (evidence theory) imposed on the Schweretheorie the added requirement that the error be apparent or "evident." ACHTERBERG, *supra* note 4, at 378-82.

Representative cases developing and applying the test include Judgment of Apr. 13, 1967, BVerwG, W. Ger., 27 BVerwGE 295, 299; Judgment of Feb. 11, 1966, BVerwG, W. Ger., 23 BVerwGE 237, 238; Judgment of Oct. 7, 1964, BVerwG, W. Ger., 19 BVerwGE 284, 287.

191. STELKINS, BONK & LEONHARDT, *supra* note 8, at 413.

192. See, e.g., Judgment of Feb. 11, 1966, BVerwG, W. Ger., 23 BVerwGE 237, 238 (conscientious objector from military service who is called to serve his alternative service in a hospital without having filed a required petition may challenge the administrative act, but the administrative act is not void).

193. See, e.g., Judgment of Apr. 13, 1967, W. Ger., BVerwG, W. Ger., 27 BVerwGE 295, 299 (failure to provide physical examination and hearing rights to individual reinducted into military service does not lead to voiding of administrative act, as the error can be remedied in a subsequent proceeding).

194. See, e.g., Judgment of Dec. 30, 1957, OVG Münster, W. Ger., 13 OVG 182 (administrative act which is so indefinite as not to be understandable is void).

tion.¹⁹⁵ Errors which are not serious enough to render administrative acts void may nevertheless be contested in administrative or judicial proceedings.¹⁹⁶

2. *Curing Defective Administrative Acts.*—A less severe remedy than voiding an administrative act is to “cure” (Heilung) it. An agency may cure administrative acts which contain certain errors of procedure and form so long as the agency takes the necessary remedial steps *before* the close of an administrative pre-judicial hearing or, in cases where such a hearing is not necessary, before the filing of a complaint in the administrative courts.¹⁹⁷ It is, of course, impossible to cure defects which render administrative acts void. Defects of a less severe nature, however, are curable.

As anticipated by the VwVfG, curable defects may result from the absence of required motions or petitions, deficient rationales for issued administrative acts, the failure to hear essential parties,¹⁹⁸ or the failure to obtain the participation and opinions of designated committees and agencies.¹⁹⁹ Other curable procedural errors may result from failure of affected parties to participate in the proceeding, lack of inspection rights, and inadequate investigation of the matter at issue.²⁰⁰ Specific laws or judicial decisions may specify still other curable defects. All such defects must be remedied within the appropriate time span; otherwise, affected parties may pursue judicial remedies, as courts may also remedy defective administrative acts.²⁰¹

On the other hand, even if a defective administrative act is not remedied, when no other substantive decision could have been reached the presence of procedural errors alone will not lead to a cancellation of the administrative act by the agencies or the courts.²⁰² The relevant inquiry is only whether the error produced a different legal decision than otherwise would have been reached. Application of this test serves to avoid unnecessary legal proceedings.

195. ULE & LAUBINGER, *supra* note 2, at 232-34.

196. *See, e.g.*, Judgment of Apr. 13, 1967, BVerwG, W. Ger., 27 BVerwGE 295; Judgment of Feb. 11, 1966, BVerwG, W. Ger., 23 BVerwGE 237 (1966).

197. VwVfG § 45(1)(2).

198. *See, e.g.*, Judgment of Aug. 18, 1977, BVerwG, W. Ger., 54 BVerwGE 276, 279-80 (violation of individual's right to a hearing is not an essential error which leads to nullification of the administrative act, as the error can be remedied in a subsequent pre-judicial hearing); Judgment of Nov. 5, 1975, BVerwG, W. Ger., 49 BVerwGE 307, 309 (lack of personal hearing may be cured by courts); Judgment of July 13, 1967, BVerwG, W. Ger., 27 BVerwGE 295 (violation of military inductee's right to a hearing may be cured up until issuance of induction notice).

199. *Id.* § 45(1).

200. STELKINS, BONK & LEONHARDT, *supra* note 8, at 424.

201. *See, e.g.*, Judgment of Nov. 5, 1975, BVerwG, W. Ger., 49 BVerwGE 307, 309; STELKINS, BONK & LEONHARDT, *supra* note 8, at 426.

202. VwVfG § 46. Only procedural errors which did not truly affect the substantive decision can withstand scrutiny. Errors of a substantive nature, of course, may lead to nullification or recall of the administrative act. *See generally* KNACK, *supra* note 6, at 565-69.

Another possibility for remedying defective administrative acts is to incorporate the substance of the "old" administrative act into a "new" administrative act which is free from error. This possibility may be instituted by agencies and, in some cases, by administrative courts. It is feasible, however, only when the new administrative act is directed toward the same goal and results from the same procedure as the old administrative act.²⁰³ The incorporation procedure is not possible when the new administrative act would misrepresent the intentions of the old administrative act,²⁰⁴ impose a more onerous burden on affected persons,²⁰⁵ or change an obligatory administrative act to a discretionary one.²⁰⁶ Since the incorporation process results in the issuance of a new administrative act, all interested parties are guaranteed the same hearing and opposition rights as they would be in an initial proceeding.²⁰⁷ In practice, the incorporation process has not been a popular remedy.²⁰⁸

3. *Revocation of Administrative Acts.*—Revocation of administrative acts (*Aufhebung*) by the issuing agency is possible in two circumstances: when the administrative act is contrary to prevailing legal norms, and when the administrative act, though legal, fails to address changed conditions. Because revocation of an administrative act involves a change in legal conditions, reliance interests of individual citizens are frequently implicated.²⁰⁹ Individuals who have relied on what was an effective administrative act may find their expectations frustrated; where the administrative act has brought about an advantage for them, they may stand to lose its benefit. For this reason revocation of an administrative act is generally possible only af-

203. VwVfG § 47(1). *See also* Judgment of Apr. 18, 1975, BVerwG, W. Ger., 48 BVerwGE 166, 168; Judgment of Nov. 11, 1960, BVerwG, W. Ger., 12 BVerwGE 9; Judgment of Nov. 8, 1961, OVG Münster, W. Ger., 17 OVGE 115.

204. *See, e.g.*, Judgment of Feb. 28, 1975, BVerwG, W. Ger., 1975 Neue Juristische Wochenschrift [NJW] 2309.

205. *See, e.g.*, Judgment of Jan. 16, 1964, BVerwG, W. Ger., 17 BVerwGE 363, 365; Judgment of Nov. 8, 1961, OVG Münster, W. Ger., 17 OVGE 115.

206. *See, e.g.*, Judgment of Feb. 28, 1975, BVerwG, W. Ger., 48 BVerwGE 81; Judgment of Dec. 13, 1962, BVerwG, W. Ger., 15 BVerwGE 196, 199.

207. VwVfG § 47(4).

208. Incorporation as a remedy has been rejected, for example, in Judgment of Apr. 18, 1975, BVerwG, W. Ger., 48 BVerwGE 166, 168 (business tax notice may be incorporated into tax order only under certain circumstances not present here); Judgment of Feb. 28, 1975, BVerwG, W. Ger., 48 BVerwGE 81 (refusal to grant digging permit may not be incorporated during revocation proceeding); Judgment of Jan. 16, 1964, BVerwG, W. Ger., 17 BVerwGE 363, 365 (prohibitive disposition may not be incorporated during revocation proceeding); Judgment of Dec. 13, 1962, BVerwG, W. Ger., 15 BVerwGE 196, 199 (refusal to reinstitute proceedings may not be incorporated into revocation proceedings). *But see* Judgment of Aug. 9, 1972, OVG Münster, W. Ger., 28 OVGE Münster 84, 89 (required performance notice may be incorporated into final, determinative contribution notice). *See generally* STELKINS, BONK & LEONHARDT, *supra* note 8, at 439.

209. The principle that citizens are entitled to rely on the legally enacted measures of the state follows from the Rechtsstaat principle, *see supra* notes 22-24 and accompanying text.

ter a careful weighing of the competing public and private interests. Where third party interests are involved, the issuing agency cannot recall the measure on its own initiative; these administrative acts may be annulled only in pre-judicial hearings or judicial proceedings where third parties can better assert their interests.²¹⁰

(a) *Revocation of illegal administrative acts.*—Derived from the principle that executive agencies are bound by the law, the revocation of illegal administrative acts (*Rücknahme*) is designed to restore a legal condition.²¹¹ A fundamental distinction must be made between administrative acts which render an advantage or a disadvantage, since the reliance interests of affected parties may differ. Illegal administrative acts which impose a burden on a party may be revoked by the issuing agency in its discretion at any time, and the revocation can relate back to a past date (*ex tunc*) or take effect in the future (*ex nunc*). Such wide discretion is possible since private reliance interests are not usually involved. Indeed, revocation of burdensome administrative acts actually places affected persons in a better condition. The public interest in the restoration of a legal condition is overriding.

In contrast, illegal administrative acts which bestow a benefit may be cancelled only under certain conditions. These administrative acts may be annulled only within one year of the time the agency first became aware of the illegality of the administrative act.²¹² A further distinction is necessary between administrative acts which bestow one-time or continuing financial and property benefits, and most other beneficial administrative acts. While the former beneficial administrative acts generally involve social security benefits or economic subsidies, the latter include permits, concessions, or grants of citizenship.²¹³

Administrative acts which bestow money or property benefits may not be cancelled so long as the affected person has relied on the benefit and his reliance interest is legally protectable.²¹⁴ As specified

210. VwVfG § 50. See also Judgment of Oct. 17, 1975, BVerwG, W. Ger., 49 BVerwGE 244 (construction law); Judgment of Aug. 23, 1974, BVerwG, W. Ger., 47 BVerwGE 19 (construction law); Judgment of Aug. 30, 1968, BVerwG, W. Ger., 30 BVerwGE 191 (economic subsidy law); Judgment of Dec. 30, 1959, BVerwG, W. Ger., 10 BVerwGE 91 (trade law).

211. ACHTERBERG, *supra* note 4, at 468.

212. VwVfG § 48(4).

213. ACHTERBERG, *supra* note 4, at 469; ULE & LAUBINGER, *supra* note 6, at 297.

214. VwVfG § 48(2). While principally derived from the Rechtsstaat principle, reliance interests may also follow from specific constitutional rights. The article 2 right to free development of one's personality, for example, has the creation of the material preconditions to a zone of "real" freedom as a component. Thus, administrative acts which provide material advantages—e.g., educational grants, see e.g., Judgment of Nov. 11, 1970, BVerwG, W. Ger., 36 BVerwGE 252; Judgment of July 6, 1966, BVerwG, W. Ger., 24 BVerwGE 264—may contribute to the development of an individual personality. Application of the article 3 equal

in the VwVfG, reliance interests are protectable when the affected party has already undertaken actions or expended resources which are no longer retrievable or are retrievable only under severe disadvantage.²¹⁵ For example, a party may have begun construction of a house in reliance on a building subsidy. On the other hand, an affected party may not claim a protectable reliance interest when he has obtained the benefit by acting in bad faith.²¹⁶ In these cases the agency can cancel the administrative act, even *ex tunc*.

Between these two extremes the agency must weigh the relevant public and private interests at issue in deciding whether to recall an administrative act.²¹⁷ Among the relevant considerations are: the type of procedure which produced the administrative act (the more formal the procedure, the harder to revoke the administrative act); the length of time in which the administrative act has been effective (the longer the time, the stronger the reliance interest);²¹⁸ the consequences of a cancellation (the more severe the consequences, the stronger the reliance interest); and the effect on the public interest—financial or otherwise.²¹⁹ Upon review of such considerations, the agency can then determine the appropriate relief.²²⁰ If despite private reliance interests the agency decides to cancel the administrative act, it can do so partially, totally, *ex tunc*, or *ex nunc*.²²¹ In

rights clause compels executive agencies to treat like cases equally. Thus, agencies cannot recall a measure if the recall will lead to an unequal legal situation between two parties. *See, e.g.*, Judgment of Feb. 8, 1967, BVerwG, W. Ger., 26 BVerwGE 153. Last, the article 14 guarantee of private property presents an obvious obstacle to state recall of property benefits. ACHTERBERG, *supra* note 4, at 469-72.

215. VwVfG § 48(2). On private reliance interests, see generally Judgment of Oct. 17, 1975, BVerwG, W. Ger., 49 BVerwGE 244; Judgment of Nov. 21, 1968, BVerwG, W. Ger., 31 BVerwGE 67, 69; Judgment of July 7, 1966, BVerwG, W. Ger., 24 BVerwGE 294, 299-300; Judgment of July 6, 1966, BVerwG, W. Ger., 24 BVerwGE 264; Judgment of Aug. 24, 1964, BVerwG, W. Ger., 19 BVerwGE 188; Judgment of Dec. 19, 1963, BVerwG, W. Ger., 17 BVerwGE 335.

216. A party may, for example, have obtained the desired administrative act by making false or incomplete statements, threatening witnesses, or exercising gross negligence in ignoring an obviously illegal administrative act. *See, e.g.*, Judgment of Oct. 25, 1968, BVerwG, W. Ger., 31 BVerwGE 1.

217. *See, e.g.*, Judgment of Aug. 12, 1977, BVerwG, W. Ger., 54 BVerwGE 257, 260; Judgment of Feb. 28, 1975, BVerwG, W. Ger., 48 BVerwGE 87, 92-94.

218. *See, e.g.*, Judgment of Nov. 11, 1970, BVerwG, W. Ger., 36 BVerwGE 252 (having pursued training in reliance of public educational subsidies plaintiff is entitled to continuation of subsidies in order to complete training); Judgment of Apr. 23, 1968, BVerwG, W. Ger., 29 BVerwGE 291 (reliance interest strong because of old age); Judgment of Aug. 30, 1961, BVerwG, W. Ger., 13 BVerwGE 28, 32-33 (relatively late recognition by agency that administrative act illegal and advanced age of recipient overcome public interest in restoration of legal condition).

219. ULE & LAUBINGER, *supra* note 6, at 299-300.

220. For general discussion of possible administrative remedies, see Judgment of June 4, 1970, BVerwG, W. Ger., 35 BVerwGE 234.

221. A cancellation of an administrative act *ex tunc* is possible when the administrative act was issued principally on account of a party's fault; *ex nunc* when on account of the agency's fault. *See, e.g.*, Judgment of Apr. 24, 1959, BVerwG, W. Ger., 8 BVerwGE 261, 269. STELKINS, BONK & LEONHARDT, *supra* note 8, at 454.

all of these cases the affected party may be entitled to compensation; where the amount determined by the agency is thought to be inadequate, claims for compensation may be pursued in the courts.²²²

As opposed to the careful considerations involved in determining whether an illegal administrative act which bestows a financial or property benefit may be recalled, illegal administrative acts which bestow other benefits—*e.g.*, permits or concessions—may always be recalled, regardless of reliance interests.²²³ Where appropriate, a party may be entitled to compensation.

(b) *Revocation of legal administrative acts.*—While the public interest in revoking illegal administrative acts lies in bringing administrative actions into conformity with the law, revocation of legal administrative acts (*Widerruf*) is designed to address changes in legal, social, or factual conditions. In recognition of this primary difference, the revocation of legal administrative acts can only be made effective *ex nunc*.²²⁴ While the recall of illegal administrative acts is the rule in administrative remedies, the cancellation of legal administrative acts—especially those bestowing a benefit—is a clear exception.

As with revocation of illegal administrative acts, revocation of legal administrative acts must occur within one year of the agency's awareness of the problem. Moreover, while detrimental acts can always be recalled so long as their revocation does not necessitate the issuance of another administrative act,²²⁵ legal administrative acts which bestow a benefit may be revoked only under the narrow circumstances listed in the *VwVfG*, and only when the remedy is in proportion to the circumstance to be adjusted.²²⁶ These administrative acts may be revoked only when:

- (1) revocation was provided for in regulations or the power has been reserved in the administrative act itself;
- (2) the administrative act was issued under the condition that the party fulfill a requirement and the party fails to so act;
- (3) the agency would not have issued the administrative act in the face of later-developing circumstances and the public interest may be protected only through revocation;²²⁷

222. *VwVfG* § 48(2), (6).

223. *Id.* § 48(3).

224. *Id.* § 49. See also Judgment of Apr. 26, 1968, BVerwG, W. Ger., 29 BVerwGE 314, 316-17.

225. *Id.* § 49(1).

226. See, *e.g.*, Judgment of Sept. 16, 1975, BVerwG, W. Ger., 49 BVerwGE 160, 168-69; Judgment of Jan. 27, 1967, BVerwG, W. Ger., 26 BVerwGE 131.

227. See, *e.g.*, Judgment of May 27, 1964, BVerwG, W. Ger., 18 BVerwGE 308 (change in factual situation allows for recall of social security benefits); Judgment of Jan. 31, 1964, BVerwG, W. Ger., 18 BVerwGE 36 (changed, disruptive behavior of individual granted research permit to use political archives justifies rescission of permit); Judgment of July 25,

- (4) the agency, by reason of a changed regulation, is not authorized to issue the administrative act, so long as the affected parties have not yet relied on the administrative act and the revocation of the administrative act is the only available means to protect the public interest; and
- (5) revocation is necessary to protect society against especially negative consequences.²²⁸

Since in cases (1) and (2) the administrative act was issued with a latent risk of being recalled, compensation for protectable reliance interests is provided for only in cases (3)-(5).²²⁹

4. *Reinstitution of Administrative Proceedings.*—A final remedy available to the issuing party is to reinstitute a proceeding in order to redetermine the administrative act (*Wiederaufgreifen*). This decision lies primarily in the discretion of the agency.²³⁰ Under specific conditions, however, the agency is obligated to reinstitute the proceeding. These conditions exist when an affected party files a petition within three months of his awareness that:

- (1) his underlying legal or factual condition has changed since the issuance of the administrative act;²³¹
- (2) he has new means of proof which could alter the administrative act to his benefit;²³² or
- (3) there exist grounds in accordance with section 580 of the Civil Procedure Law.²³³

Due to the equal rights clause, an agency may also be bound to reinstitute a proceeding when it has always done so in past circumstances.²³⁴

Petitions concerning the foregoing conditions are admissible

1950, OVG Münster, W. Ger., 3 OVGE 45 (housing officials may not recall grant to individual of permit for additional room simply because housing situation worsened since time of grant).

228. VwVfG § 49(2). Especially negative consequences for society cannot consist of simply financial concerns, but must include something in the nature of a catastrophe or emergency. KNACK, *supra* note 6, at 624-25. *See, e.g.*, Judgment of Oct. 26, 1966, BVerwG, W. Ger., 25 BVerwGE 191, 194.

229. VwVfG § 49(5).

230. *See, e.g.*, Judgment of Jan. 30, 1974, BVerwG, W. Ger., 44 BVerwGE 333, 336; Judgment of Jan. 6, 1972, BVerwG, W. Ger., 39 BVerwGE 231.

231. *See, e.g.*, Judgment of Apr. 4, 1968, BVerwG, W. Ger., 31 BVerwGE 112 (agency obligated to reinstitute proceeding because of change in internal guidelines); Judgment of July 16, 1964, BVerwG, W. Ger., 19 BVerwGE 153 (development of new official means of proof changes plaintiff's legal and factual condition).

232. *See, e.g.*, Judgment of Oct. 28, 1966, BVerwG, W. Ger., 25 BVerwGE 241; Judgment of May 12, 1966, BVerwG, W. Ger., 24 BVerwGE 115.

233. VwVfG § 51(1). According to section 580 of the Civil Procedure Code [ZPO], the agency is obligated to reinstitute the proceeding when means of proof which supported the administrative act are discovered to be false; when legal representatives, agents, or officials committed, or were forced to commit, punishable offenses in executing their duties; or when a judicial decision which the administrative act relied on is overruled.

234. *See, e.g.*, Judgment of Feb. 8, 1967, BVerwG, W. Ger., 26 BVerwGE 155.

only when the party filing the petition has not been grossly negligent in failing to discover the condition in the previous proceeding.²³⁵ Upon determining that all procedural points are in order, the agency may then reinstitute the proceeding. However, the agency is not obligated to alter its original decision.²³⁶

B. *Judicial Remedies*

Because the Grundgesetz guarantees judicial access to all individuals whose rights have been violated, administrative acts may be challenged in the courts as well as through administrative remedies.²³⁷ As the Federal Constitutional Court has stated: "No act of the executive which affects the rights of the citizens can be immune from judicial review."²³⁸ The guarantee of judicial review, like other fundamental principles of German law, is designed to insure the establishment of law as the supreme and guiding force in the exercise of state power over the citizen.

Resort to judicial process is generally initiated by a citizen filing a formal complaint in the appropriate court. As stated previously, formal complaints concerning administrative acts promulgated through informal procedures must be filed with the administrative agency which issued the administrative act, since the agency must

235. VwVfG § 51(2).

236. ACHTERBERG, *supra* note 4, at 480.

237. GG art. 19(4). Access to the administrative courts is further guaranteed specifically in VwGO § 40.

As with the fundamental distinction in German administrative law, see note 4 *supra*, the German administrative courts are divided between general and special subject matters. While the general administrative courts may hear all matters not otherwise assigned, the special administrative courts may hear only specific questions. They include special courts for social security, tax and finance, and patent questions.

Representative of the administrative court structure, the general administrative courts contain a three-tier level of appeal. At the lowest level is the (general) administrative court (Verwaltungsgericht), which possesses all jurisdiction not allocated specifically to the two higher courts. VwGO § 45. A judicial panel of three career and two lay judges hears the claims. *Id.* § 5. All regular career judges possess life tenure. *Id.* § 15. For general discussion of how German judges are selected, see Schram, *The Recruitment of Judges for the West German Federal Courts*, 21 AM. J. COMP. L. 691 (1973). At the next level is the state administrative court of appeals (Oberverwaltungsgericht), which has original jurisdiction over the testing of regulations and complaints concerning societies or associations; appellate jurisdiction over decisions of the administrative court. VwGO §§ 46-48. The judicial panel consists of two senates, usually made up of three career and two lay judges. *Id.* § 9. The final, and highest, level is the federal administrative court (Bundesverwaltungsgericht or BVerwG), which possesses original jurisdiction over complaints involving the federal and at least one state government, diplomatic affairs, and federal association law; appellate jurisdiction over decisions of the two lower courts. *Id.* § 50. The federal administrative court is divided into two senates of five career judges each. *Id.* § 10.

In theory, therefore, a disgruntled citizen can file a claim and obtain a decision in the administrative court, and then pursue appeals through the state administrative court of appeals and federal administrative court. For further discussion of the West German administrative court structure, see E. STEIN & P. HAY, *EUROPEAN COMMUNITY LAW & INSTITUTIONS* 122-26 (2d ed., 1976); Pakuscher, *Judicial Review of Executive Acts in Economic Affairs in Germany*, 20 J. PUB. L. 273, 283-287 (1971).

238. Judgment of Jan. 12, 1960, BVerfG, W. Ger., 10 BVerfGE 264, 267.

first conduct a special pre-judicial hearing. Formal complaints concerning administrative acts promulgated through formal or planning procedures may be filed directly in the administrative courts.

1. *The Pre-Judicial Hearing.*—Designed to test the legality and suitability (Rechtmässigkeit and Zweckmässigkeit) of the administrative act, the pre-judicial hearing (Vorverfahren) affords the administrative agency an additional opportunity to review its decision. Because completion of the pre-judicial hearing is a precondition to judicial remedies, the pre-judicial hearing also operates to unburden the courts as it filters out unnecessary proceedings.²³⁹ Barring unforeseen difficulties or procedural errors, the formal complaint must be filed within one month of the complainant's formal notice of the administrative act.²⁴⁰ The filing of the complaint operates to suspend the legal effect of the administrative act.²⁴¹

While the officials who issued the administrative act may be competent to review their original decision²⁴² in some cases, a supervisory level of hearing officers generally reviews the issuing officials' decision and determines the appropriate remedy. In testing the legality of the administrative act, hearing officers consider the complainant's objections and, where necessary, objections of affected third parties.²⁴³ Upon hearing and considering both objections and relevant evidence, the officers can determine that the complaint is admissible or inadmissible, founded or unfounded.²⁴⁴ In the event the officers determine that the complaint is admissible and founded, they can grant relief by implementing any of the internal administrative remedies previously discussed.²⁴⁵ Where the officers determine that

239. See Judgment of Oct. 28, 1975, BVerfG, W. Ger., 40 BVerfGE 237, 256-57; Judgment of May 9, 1973, BVerfG, W. Ger., 35 BVerfGE 65, 72, 76; Judgment of Mar. 21, 1979, BVerwG, W. Ger., 57 BVerwGE 342, 344, 347-48; Judgment of Feb. 7, 1963, BVerwG, W. Ger., 15 BVerwGE 306, 310. See also F. KOPP VERWALTUNGSGERICHTSORDNUNG (KOMMENTAR) 324 (3d ed. 1977).

240. VwGO § 70. Procedural errors which can lead to an extension of the one month filing period include the failure of an agency to render information concerning legal remedies or provide sufficient notice and complainants' misfiling of the complaint. ULE & LAUBINGER, *supra* note 2, at 187.

241. VwGO § 80.

242. KNACK, *supra* note 6, at 904, 916-20; A. KOEHLER, VERWALTUNGSGERICHTSORDNUNG (KOMMENTAR) 541 (1960) [hereinafter cited as KOEHLER]. While the issuing officers review the legality and suitability of the administrative act in the pre-judicial hearing, the hearing officers limit their review to the administrative act's legality. KNACK, *supra* note 6, at 904.

243. VwGO § 71. The objections of affected third parties are heard only when the pre-judicial hearing reveals a new, previously unknown issue which affects their rights. KNACK, *supra* note 6, at 909; KOEHLER, *supra* note 242, at 537.

244. C. ULE, VERWALTUNGSPROZESSRECHT 97 (6th ed. 1975) [hereinafter cited as ULE]. The agency is not bound by its original decision, but may principally determine the remedy deemed appropriate. See Judgment of Dec. 10, 1970, BVerwG, W. Ger., 37 BVerwGE 47, 52-53; Judgment of May 19, 1965, BVerwG, W. Ger., 21 BVerwGE 142.

245. VwGO § 72. For discussion of administrative remedies, see *supra* notes 183-237 and accompanying text.

the complaint is inadmissible or unfounded, a decree must be issued and delivered to the complainant listing the rationale for the rejection of the claim, available avenues of judicial appeal, and a determination as to who is to bear the costs involved.²⁴⁶ The issuance of such decree marks the end of the pre-judicial hearing; further appeals must be taken to the administrative courts.

The pre-judicial hearing has been successful in filtering complaints and thus relieving the courts of unnecessary proceedings. In the face of specific complaints, the agency has often changed its original decision in favor of the complainant.²⁴⁷ Other complainants often decide, for a variety of reasons (*e.g.*, time, expense, frustration), not to pursue further judicial remedies.

2. *Judicial Review.*—Formal judicial review of administrative acts may be commenced by filing a complaint in the administrative courts within one month of an administrative agency's issuance of a decree rejecting the claim. In cases where a pre-judicial hearing is not necessary, formal judicial review may be commenced by filing a complaint in the administrative courts within one month of notice of the administrative act.²⁴⁸ The complaint must designate the contested administrative act, the defendant (usually the agency issuing the act), and the specific relief requested, such as recalling the act, issuing an act which had previously not been granted, or clarifying a legal situation (declaratory relief).²⁴⁹ Pertinent facts and means of proof should also be listed.

Final decisions of the administrative agencies are generally subject to full judicial review.²⁵⁰ The scope of judicial review is limited

246. VwGO § 73. The party who loses—state or citizen—generally assumes the cost. ULE & LAUBINGER, *supra* note 2, at 190-93.

247. ULE, *supra* note 244, at 93. In fact, because of the many possibilities for granting administrative relief and prevailing judicial interpretations, the pre-judicial hearing generally results in a revocation or changing of an administrative act to petitioner's advantage. Changing an administrative act to an affected person's disadvantage is possible only when authorized specifically by law. *Id.* at 98. *See, e.g.*, Judgment of Nov. 12, 1976, BVerwG, W. Ger., 51 BVerwGE 310; Judgment of July 12, 1968, BVerwG, W. Ger., 30 BVerwGE 132, 134; Judgment of May 23, 1962, BVerwG, W. Ger., 14 BVerwGE 179.

248. VwGO § 74.

249. *Id.* §§ 78-79, 82. The admissibility of the complaint depends on the satisfaction of numerous procedural requirements. Foremost among these is the general admissibility clause, which states that access to the administrative courts is provided in all cases of a "public law dispute which is of a nonconstitutional nature, so long as the dispute is not specifically allocated through federal law to another court." VwGO § 40(1). ("Der Verwaltungsrechtsweg ist in allen öffentlichrechtlichen Streitigkeiten nichtverfassungsrechtlicher Art gegeben, soweit die Streitigkeiten nicht durch Bundesgesetz einem anderen Gericht ausdrücklich zugewiesen sind."). Other relevant procedural requirements include jurisdiction, *id.* §§ 45, 47, 48, 50, 52; participation and standing, *id.* §§ 61-62; and the summoning of interested third parties, *id.* § 65.

250. *See, e.g.*, Judgment of May 21, 1974, BVerwG, W. Ger., 45 BVerwGE 162 (court overrules agency determination that Greek national not qualified to practice as physician in Germany); Judgment of Dec. 16, 1971, BVerwG, W. Ger., 39 BVerwGE 197 (full judicial review of agency determination concerning threat of magazine to youth's morals); Judgment of

only in matters concerning education,²⁵¹ testing,²⁵² and judgments concerning competence of civil servants,²⁵³ areas in which administrative agencies have relatively free reign.

In reviewing administrative acts administrative courts employ a two-step test. At the first level, the court examines whether the administrative act possesses the necessary legal authority.²⁵⁴ An administrative act must be derived from statutory or regulatory authority. Lacking such authority, the act is contrary to law. At the second level, the court evaluates the agency's exercise of discretion. At this level the court investigates only whether the legal limits of discretion have been exceeded.²⁵⁵ Specifically, the court examines whether the agency evaluated all factual considerations, correctly applied pertinent legal standards, and disclosed its rationale.²⁵⁶ In making this determination, the court may decide that the agency's discretion was so limited by law or regulation in a particular case that only one decision was possible. On the other hand, the court may find that a given case presents a variety of available options. Thus, the inquiry then is whether the agency chose an option which has a basis in law.²⁵⁷ Under no circumstances, however, may the court substitute its decision for that of the agency.²⁵⁸

Upon considering the relevant factors the court decides whether the administrative act is legal. In the event the court decides the act is illegal, it is empowered to nullify the act and order appropriate relief.²⁵⁹ The court must issue its determination in a written decision

Apr. 22, 1966, BVerwG, W. Ger., 24 BVerwGE 60 (full judicial review of agency determination concerning qualification of house as historical landmark); Judgment of Jan. 28, 1966, BVerwG, W. Ger., 23 BVerwGE 194, 200-01 (judgment concerning film's rating subject to full judicial review, though expert opinion on film's artistic merit cannot be replaced by court).

251. See, e.g., Judgment of Oct. 1, 1971, BVerwG, W. Ger., 38 BVerwGE 322, 325; Judgment of Jan. 18, 1963, BVerwG, W. Ger., 15 BVerwGE 251, 254.

252. See, e.g., Judgment of May 7, 1971, BVerwG, W. Ger., 38 BVerwGE 105, 109 (examination committee possesses power and discretion to determine candidate's qualification for judgeship).

253. See, e.g., Judgment of Oct. 14, 1965, BVerwG, W. Ger., 22 BVerwGE 215 (agency determination concerning retired policeman's qualification for pension); Judgment of May 13, 1965, BVerwG, W. Ger., 21 BVerwGE 127 (agency appraisal of civil servant's job performance).

254. Lorenz, *supra* note 3, at 574-75. See generally Judgment of Nov. 12, 1958, BVerfG, W. Ger., 8 BVerfGE 276, 325; Judgment of Nov. 15, 1974, BVerwG, W. Ger., 47 BVerwGE 201.

255. VwGO § 114. See also ACHTERBERG, FÄLLE UND LÖSUNGEN (ALLGEMEINES VERWALTUNGSRECHT) 93-95 (1982); Lorenz, *supra* note 3, at 575.

256. See, e.g., Judgment of Dec. 16, 1971, BVerwG, W. Ger., 39 BVerwGE 197, 204; Judgment of Oct. 14, 1965, BVerwG, W. Ger., 22 BVerwGE 215, 217-18; Judgment of May 13, 1965, BVerwG, W. Ger., 21 BVerwGE 127, 130.

257. See E. EYERMANN & L. FRÖHLER, VERWALTUNGSGERICHTSORDNUNG (KOMMENTAR) 725-33 (7th ed. 1977).

258. See, e.g., Judgment of May 21, 1974, BVerwG, W. Ger., 45 BVerwGE 162, 169; Judgment of Oct. 14, 1965, BVerwG, W. Ger., 22 BVerwGE 215, 218; Judgment of Feb. 11, 1957, BVerwG, W. Ger., 4 BVerwGE 283, 284-85.

259. VwGO § 113.

containing both its rationale and instructions concerning further available judicial remedies.²⁶⁰ The decision of the general administrative court may then be appealed to the state administrative court of appeals and, in some cases, to the federal administrative court.²⁶¹

V. Conclusion

The West German Administrative Procedure Act provides a valuable guide to the German administrative decision making process. Authority to decide issues is delegated carefully by the legislature to the executive agencies; legal terms are precisely defined; different procedural mechanisms are provided for to address a range of circumstances; and the rights and obligations of both executive agencies and affected parties are specified. In addition, a range of administrative and judicial remedies are available to check the administrative decision making process. Perhaps because of its careful precision and substantial system of checks and balances, the German model of administrative decision making is well-accepted in Germany. In light of the apparent dissatisfaction with the American administrative decision making process,²⁶² the German model may well serve as a source of instruction.

260. *Id.* §§ 108, 117.

261. Decisions of the administrative court may always be appealed to the state administrative court of appeals. *See id.* §§ 124-31. Appeals to the federal administrative court are limited, however, and are available only when: (1) the question is of fundamental importance; (2) a decision of the lower courts deviates from a federal administrative court decision; or (3) a decision is founded on a gross procedural error. *Id.* §§ 132, 134.

262. *See, e.g.,* Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975); Rabin, *Administrative Law In Transition: A Discipline In Search of an Organizing Principle*, 72 NW. U.L. REV. 120 (1977); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978).