

**The Rule of Law
in the
Federal Republic
of Germany**

**A STATEMENT BY
THE GERMAN NATIONAL SECTION
OF THE
INTERNATIONAL COMMISSION OF JURISTS**

**THE INTERNATIONAL COMMISSION OF JURISTS
GENEVA**

The answers to the Questionnaire submitted by the International Commission of Jurists were answered on behalf of the German Section of the Commission by its following members:

Professor Dr. PETER SCHNEIDER, Mainz	A. 1 - a) - c)
Professor Dr. THIEME, Saarbrücken	A. 2 - a) - b)
Professor Dr. GEIGER, Senatspräsident of the Federal Court and Judge of the Federal Constitutional Court, Karlsruhe	A. 2 - c) - d)
Generalbundesanwalt Dr. GÜDE, Karlsruhe	A. 3 - a) - e) and E. 1 - 3
Professor Dr. SCHÜHLY, Freiburg	A. 4 - a) - e)
Dr. RUDOLF KATZ, Vice President of the Federal Constitutional Court, Karlsruhe	B. 1 - 3
Professor Dr. PETER SCHNEIDER, Mainz and Assistant Referendar H. WALLAU, Mainz	B. 4 - 6
Dr. HECK, Judge of the Federal Constitutional Court and of the Federal Court, Karlsruhe	C. 1 - 5
Attorney Dr. ZUTT, Mannheim	D. 1 - 4

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for the German text, to

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A. ADMINISTRATIVE AUTHORITIES AND THE LAW

1. Legislative Power

a) *Have any administrative authorities the right to make laws by virtue of their own authority?*

The Executive is not competent to legislate in the formal sense of the word. Even in the event of a legislative emergency Constitution, Art. 81), it is – failing a majority in the *Bundestag* (Lower House) – empowered to pass an urgent Bill only with the concurrence of the *Bundesrat* (Upper House) [reserve of legality]. The case of legislative emergency has not arisen so far.

b) *Have any administrative authorities the right to make laws (or ordinances, decrees or regulations) by virtue of authority delegated to them by some other organ or organs of the State? If so, by what organ or organs of the State is such authority delegated?*

The power to lay down general legal norms belongs intrinsically to the Legislative. The latter can however delegate its competence to a certain extent to the Federal Administrative Authority or to the *Land* governments. Art. 80 (I) of the Constitution defines the conditions in which the Federal legislature can make a law empowering those same authorities to issue decrees. The contents, purpose and scope of such power must be defined in the law in question. The definition given in the Constitution excludes so-called enabling laws, in which the Legislative renounces its legislative powers as a whole in favour of the Executive, and so-called blank laws, in which the Legislative gives the Executive carte-blanche in certain spheres to take the necessary measures by issuing decrees. In such cases, the contents, purpose and scope of the authorization are not adequately defined.

From the very beginning the Federal Constitutional Court decided in favour of a relatively narrow interpretation of Art. 80 (I) of the Constitution. It expressed itself as follows in the first judgment it gave in connection with this matter (Decisions of the Federal Constitutional Court, Vol. I, page 14 ff.): – Parliament must not be able to divest itself of its responsibility as a legislative body by transferring part of the legislative power to the Government without having carefully considered and accurately defined the limits of the powers thus to be transferred. The Government, indeed, must not take the place of Parliament on the strength of an ill-defined warrant. The question whether the contents, purpose and limits of the warrant are sufficiently well defined can only be decided in each individual case; but the necessary

limitations are lacking if it does not clearly stipulate in what cases the warrant will be used and with what tendency, and what the contents of decrees issued on the strength of the warrant might be.

It thus appears that the legislator is competent to delegate law-making. Sub-delegation is not possible save where it is provided for in the law. In this case the transfer of the warrant requires a legal decree.

c. By what procedure (if any) and before what body (if any) can the legality of a law, ordinance, decree or regulation made by an administrative authority be determined?

Reviewing power of the legality of a law, ordinance, decree or regulation will lie especially with the judicial bodies by virtue of the judges' general right to put the law to a test. This refers to the power of the judge to test *incidenter* the legality of a decree in its formal and material aspects, that is, to review the validity of its promulgation and its compliance in substance with the law and with jurisprudence. Judicial review further includes the question of acts in excess of judgment and in misapplication of judgment. Should a judge decide that an ordinance is faulty, he does not annul it, but simply does not apply it in practice. The only authority competent to repeal such ordinance is its originator. In the rare cases where a decree violates Constitutional Law only, for instance, if the warrant is based on a Constitutional provision (Constitution, Art. 119), the Federal Constitutional Court is competent within the meaning of Art. 100 of the Basic Law. Review by the Constitutional Court also applies in the case of differences of opinion between Federal authorities as regards the interpretation of the Constitution. (Const., Art. 93, I, 1 in conjunction with paras. 13 (5) and 63 to 67 of the Law of 12 March 1951 on the Federal Constitutional Court), as well as in cases where a review of general norms is requested by Constitutional bodies at Federal or at *Land* level (Constitution, Art. 93, I, 2, in conjunction with the Law of 12 March 1951 on the Federal Constitutional Court).

Apart from the juridical instruments of review, the usual Parliamentary machinery should also be mentioned.

2. Activities (Other than Legislative) of Administrative Authorities

a) By what procedure (if any) can an administrative authority be compelled to carry out a duty which is imposed upon it by law?

Art. 19, para. 4 of the Constitution guarantees to everyone the right to appeal to the courts if he has been injured in his rights by the public authority.

1) In the case of violation of the law by the public authority in the exercise of its functions, the following remedies are available:

I. An action before the general administrative tribunals or before special administrative tribunals (Finance Tribunals, Social Tribunals), which enjoy the same personal and material independence as the regular courts. The action can be brought for performance of an obligation to which the plaintiff has a legal claim, if the administrative authority refuses to take action at all or if it explicitly refuses to carry out that duty.

II. For certain isolated claims, there is provision for an action to be brought before a civil court instead of an administrative tribunal. This applies, for instance, to claims for the granting of compensation for expropriation, and, in some *Länder*, to claims by civil servants.

III. In so far as the legal provisions covering the case of violation of obligation by the administrative authorities may still be insufficient in spite of this detailed regulation, Art. 19, para. 4 (2) of the Constitution always provides the possibility of appealing to the regular courts as an auxiliary measure.

IV. Apart from the possibility of appealing to the courts as provided for under I-III above, there is also the possibility of appealing to the administrative authorities themselves, and in particular to the higher authority of the department involved, which higher authority can through official channels enforce the performance of the obligation.

V. Finally, there is the right of access to Parliament with a petition. Parliament can discuss the matter and, by invoking its Parliamentary responsibility, compel the administration to fulfil its legal obligations.

2) If it is a case of an obligation violated by the administrative authority, not in the exercise of its public functions but in its capacity as subject of obligations under the Civil Code – which capacity it possesses like any other citizen – the authority in question can be summoned before the civil court in accordance with the general provisions of Civil Procedure.

3) Legal judgments pronounced against an administrative authority are enforceable. However, this possibility is limited in so far as a) execution in the case of a financial claim against the State takes place through administrative channels, and b) execution in the case of a financial claim against other corporations under public law requires the authorization of the State Control Authority, which however may not be refused but only serves to define the objects to be affected by the execution.

b) *By what procedure (if any) can an administrative authority be restrained from carrying out acts:*

- i: *in excess, or misapplication, of powers vested in it by law?*
- ii: *which would, if committed by a private individual, constitute a legal wrong?*

Under German law, cases under question b) are dealt with according to the same procedure as the non-fulfilment of an obligation imposed by law. The answers to question 2.a) therefore apply also to this question. In particular, the answer under a)1) above applies to question b) (i), and the answer a) 2) applies to question b) (ii).

c) *What remedies (if any) are available to the individual who has suffered damage as a result of acts of omission or commission falling under A 2) a and b above? In particular:*

- i. *against whom (e.g., the wrongdoing agent, the responsible organ or the State)?*
- ii. *if against or concerning the State or a State organ, does the complainant have the same facilities for making good his case that he would have against another private individual or where the State or a State organ was not concerned (e.g., compulsory production of State documents as evidence)?*

Under German law, the citizen has the following rights:

1) He has a "contractual" title (for thirty years) to compensation for the full damage (including lost profits), if the administrative authority – acting legally *ab initio* – has deprived him of a piece or pieces of property and taken same into official custody ("custody relationship"), or if the administrative authority has in the same way deprived him of the power to exercise other valuable rights ("trustee relationship"), or if the administrative authority has established, unilaterally or with the citizen's agreement, a special power relationship between him and the State with specific maintenance obligations towards him (e.g. the status of the civil servant, of the prisoner in custody, etc.), and the authority now, within this "quasi-contractual relationship", fails wrongfully (deliberately or by negligence) totally or partly to fulfil one of its duties under the heading of "guardianship", "trusteeship" or "social welfare", and thereby causes the citizen to suffer material damage. Such title is not defined by law, but has been developed by the courts by analogy to the provisions of the Civil Code.

2) The citizen who has suffered damage through a measure taken by an administrative authority has furthermore the right of action (within three years) in accordance with the provisions of section 839 of the Civil Code, under the following conditions:

a) The behaviour (by acts of commission or omission) of the departmental official or employee concerned or of the official responsible for the faulty organization of the department or for supervision of that department must be in the form of a violation of one of his official duties which is also his *duty towards the wronged citizen* (as opposed to official duties which have been laid down exclusively in the general "public interest"). The administration of justice has so greatly extended in the field of an agent's "official duties towards a third party" that nowadays that notion includes in practice every instance of behaviour which runs counter to the law, which constitutes in particular an excess of the authority legally held by the official ("the department"), or which can be qualified as a "misapplication of judgment" or as an action in "excess of judgment".

b) The official duty towards the third party must have been violated *wrongfully* (deliberately or by negligence – slight negligence suffices).

c) The wrongful violation of official duty must have caused *damage to property*. There is also compensation for loss of profit. In the case of damage to health, furthermore, compensation may be claimed in accordance with the general rules.

3) The citizen whose property (real estate, commercial enterprise, any other property rights or legal claims of financial value) was subjected by an administrative authority to objectively illegal interference (i.e. not necessarily wrongfully) in a way resulting in devaluation of the property from the economic point of view (difference between the value of the property before and after the said interference), has a claim to compensation for this loss of property, a "claim to compensation for interference amounting to expropriation". Thus the claim does not extend to the loss of profit. This claim is not expressly defined by law but has been evolved by the administration of justice during the development of compensation regulations under expropriation law. There is a corresponding effect in the so-called "claim for sacrifice" which exists, *inter alia*, if an administrative authority interferes illegally with the personal freedom or the health or the life of a citizen and the latter is compelled to incur expense in order to regain his personal freedom or his health. The "claim for sacrifice" does not bear on any damage but only leads to indemnification for the *sacrifice of property* the injured party has had to make owing to illegal interference by the authorities. The "compensation claim" and the "claim for sacrifice" lapse after thirty years.

c) (i). Regarding the three situations mentioned in the question, no claim can be raised against an individual official (exception: a notary is personally responsible for infringement of his official

duty), and never against an administrative authority, but fundamentally against the *State* or against another corporation of public law (municipality, *Kreis*, University, etc.). Thus, the legally responsible authority is established in the first case according to the body to which the commission or omission of the department is to be attributed under applicable state law; as a rule the determining factor is which body has set up the department. In the second case, liability attaches in principle to the body which employs the agent who has infringed his official duty. In the third case, responsibility rests with the body which has benefited from the infringement or, where such benefit cannot be ascertained, with whichever body is accountable for the official's action.

c) (ii). In general the position of the citizen who claims compensation for damage from the State (or from another body) is no worse than his position when he claims compensation from a private individual. However, the following special aspects should be borne in mind:

1. *Under substantive law* there exists in the case no claim for compensation for infringement of official duty by *negligence* wherever the complainant can claim compensation for the damage from a third party (a private individual); likewise the action does not lie if the complainant has neglected to avoid suffering the damage by making use of legal remedies (complaint, action in avoidance, etc.).

2. *Under procedural law*, for *part* of the claims – in as much as the legal regulations of the *Länder* are not uniform – action before a Civil Court must be preceded by a so-called “action for redress”. This means that the claim must first be dealt with under a special administrative procedure and only if this has failed can the claim be submitted to a court. Apart from this, court cases dealing with such claims against the State are subject to exactly the same provisions as apply in civil cases between private individuals.

d) *By what body or bodies are the remedies available under A. 2 c) above determined?*

The basis for the claims in question is provided by a statutory law or a custom with equal standing. Applicable procedural provisions are also contained exclusively in statutes. Thus the body competent to introduce changes (additions, amendments, deletions) in existing legal provisions is the Legislature (Parliament and other constitutional bodies that participate in legislative procedure), and not the Government or the administrative authorities. However, as already remarked in a different connection, court decisions have substantially contributed to the favourable consideration of claims.

3. Administrative Authorities and Criminal Prosecutions

a) *What person or body is ultimately responsible for the initiation or discontinuance of criminal proceedings?*

The body which initiates Criminal Prosecutions for all actions liable to prosecution and punishment by a court is the Office of the Public Prosecutor (Code of Criminal Procedure, paras. 152 (2) and 160 (1)). This office is responsible for the legality and regularity of the preliminary proceedings which start at the time suspicion of an indictable offence arises and end with the suspension of proceedings or with the formal accusation (Code of Criminal Procedure, paras. 151 ff., 158ff., 170 ff.). It alone is competent to commit for trial (monopoly of accusation: Code of Criminal Procedure, para. 152 (1)). The power of administrative authorities to commit for trial (formerly Code of Criminal Procedure, para. 424) has been abolished.

There are a limited number of exceptions to the principle that the Public Prosecution is the body responsible for criminal prosecutions. Thus, particularly in the case of tax offences, the finance authorities have a considerable number of rights and duties in connection with the criminal proceedings (Tax Regulations of 1919, paras. 440 ff.). The right of indictment of the finance authority (Tax Regulations, para. 472 (2)) however is but a subsidiary right, available after Public Prosecution rejected an application for the prosecution of a tax offence. Prosecution, of the so-called administrative wrongs, of irregularities which do not constitute true criminal acts, but are offences against regulations for the establishment and maintenance of order, is placed by the Economic Criminal Law of 9 July 1954 and the Law on Irregularities of 25 March 1952 in the hands of the administrative authorities, which prosecute such acts after a conscientious examination (principle of opportunity) and must punish them with a fine.

b) *Does such a person or body enjoy a discretion in the exercise of the powers given under a) above?*

The Public Prosecution enjoys no discretion in deciding whether to indict. It is indeed subject to the *principle of legality* (obligation to prosecute) of para. 152 of the Code of Criminal Procedure. According to this, the Public Prosecution is *bound*, unless otherwise provided for by law, to intervene in all acts subject to prosecution and punishment by a court provided that there is sufficient factual evidence. The principle of legality is safeguarded by the judicial procedure of enforcing an indictment (Code of Criminal Procedure, para. 171 ff.) which is available to the injured complainant, and by penal sanctions (Criminal Code, paras. 336, 341, 344, 346). In its essentials, legality is sacrificed to expediency only with reference to trivial offences.

The Public Prosecution, which is a body organized as a monocratic hierarchy – so that persons assisting the chief official act as his deputies (Law on the Constitution of Courts of 27 January 1877, para. 144), and he has the right of devolution and substitution in respect of all prosecuting officials in his district (*ibid.*, para. 145) – falls under the supervision and direction of the Ministry of Justice (*ibid.*, para. 147). All officials of the Public Prosecution are bound by the directives received from their superiors (*ibid.*, para. 146). In view of this organization of the Public Prosecution and its subjection to internal directives, any possible influence of the Legal Administration on prosecutions is limited in law to the matters which the Prosecution may decide after conscientious examination and which arise mainly in the field of technical and tactical, non-legal questions. Only directives issued according to law are binding. The judicial departments themselves, including the Minister of Justice, are subject to the *principle of legality* to the same extent as the Public Prosecution. Directives which run counter to the principle of legality or which, if followed, would result in a punishable abuse of office (Criminal Code, paras. 336, 341, 344, 346), are therefore not binding. Furthermore, the attitude of the prosecutor in a case towards the factual result of the trial is not subject to the right of directive.

c) *For what period can the authority responsible for criminal prosecutions hold an accused person in confinement without recourse to the Court?*

The Public Prosecution cannot hold anyone in confinement longer than until the day following arrest without recourse to the Court. (Constitution, Art. 104; Code of Criminal Procedure, paras. 114b, 128).

d) *In the procedure applicable to criminal trials does the prosecutor have the same rights and duties, as regards presentation of the case and production of evidence, as the accused person?*

The Prosecution has at all stages of the trial an *official* position as a State organ and as such has the duty to use its judicial position to promote the truth and to achieve justice, and to do this also *for the benefit* of the accused (Code of Criminal Procedure, para. 160(2). Without prejudice to this official position, for which the Code of Criminal Procedure makes allowances (e.g. in paras. 194, 196, 231, 236, 247), that Code moves a very long way from the principle of “equality of weapons”, of equal rights for the Prosecution and the accused. This applies in particular to the *presentation of the case* (paras. 136, 136a, 137, 149, 166, 169, 181, 190 (2), 192, 193, 201, 215, 216, 143 (3), 257, 258 (1) (3)) and to the *submission of evidence* (paras. 166, 169, 193, 195, 201, 208, 215, 216, 219, 220, 222, 224, 225, 239, 240 (2), 244 (3–6), 245, 246). However, in its search for the truth, the Court has got to extend

in its official capacity its search for evidence – independently of motions by parties – to all facts and evidence that are of significance for its judgment (Code of Criminal Procedure, para. 244 (2)).

e) What person or body (if any) can pardon or suspend the sentence of a convicted person?

1. *Right of pardon.* The right of pardon normally comprises, for the Federal Republic as well as for the *Länder*, the power to remit, reduce or change legally imposed punishments, additional punishments and incidental punishments such as costs, or to cancel their execution entirely.

The right of pardon at Federal level is exercised by the President of the Federal Republic. In the *Länder* the right of pardon is exercised in most cases by the *Land* Prime Minister, but in some instances by the *Land* Government or by the Senate.

2. *Quashing of judgments.* Whatever the sentence of a Criminal Court may have been, the sentenced person may use the existing legal remedies to appeal to higher Courts to review the sentence. The only exceptions to this are judgments pronounced by the Federal Court of Justice and the Higher *Land* Courts in those matters for which they are competent in first and last instance (Law on the Constitution of the Courts, paras. 120, 134). There is no appeal against these judgments.

4. The Legal Position of the Police

Introduction

The term “police” has no unambiguous meaning in German Constitutional Law. It is applied equally well to an administrative function and to an administrative organization. As an administrative function, “police” means the public task, which belongs mainly to the State, of maintaining law and order, of protecting legally recognized property and in particular of protecting the State itself. This task is stated in the provisions of the Police Laws (e.g., para. 10 II, 17 of the former Prussian General Law of the *Land*, para. 14 of the Prussian Law on Police Administration of 1931, and para. 1 of the Baden-Württemberg Police Law of 1955).

As an organizational designation, the word “police” is again used with various meanings in Germany today. The most significant distinction is that between “administrative police authorities” and “executive police authorities”. The administrative police authorities (also called simply “police authorities”) lay down the measures to be carried out by the police in the execution of its task in specific cases (“police instruction”) or in general (“police directive”). The executive police

authorities (also called police units) have the duty to implement the measures ordered and, in certain conditions, to act under their own initiative to ensure the immediate success of the police tasks. There is a tendency to reserve expressions like "police service", "police official" or simply "police" to the executive police authorities and officials, and no longer to apply the designation of "police" to the administrative police authorities, but rather to call these "administrative authorities", "public order authorities", "offices of law and order", etc.

It is a peculiarity of German law that, according to the provisions of the Code of Criminal Procedure, the police has to co-operate in criminal prosecutions. Under para. 163 of the Code of Criminal Procedure, all police units (police authorities) and police officials shall investigate criminal acts, shall take all the necessary immediate steps to avoid prejudging the case, and shall communicate the results of their enquiries to the prosecuting authorities. According to paras. 161, 189 of the Code of Criminal Procedure they shall also satisfy all requests from or instructions of the public prosecutor or of the examining magistrate.

According to para. 152 of the Law on the Constitution of Courts, police officials can be formally nominated as auxiliaries of the Prosecution; in such case, their actions as a whole are under the supervision of the prosecuting authorities.

As to which of its meanings applies to the word "police" in the questionnaire, "police" here is evidently to be understood in the organizational sense, namely "police service" and "executive police authorities".

a) What organ of the State is ultimately responsible for the conduct of the Police?

The police is part of the Executive. Its organization and its subordination to the Government used to vary in the different *Länder* and now again vary considerably. Nowadays the police in the *Länder* of the Federal Republic is mostly a State institution, i.e. the executive police authorities and officials are appointed and supervised by the State. In some *Länder*, however, there are also executive police forces that are not State but municipal institutions; but in their case as in that of the State executive police authorities, responsibility for the behaviour of the police rests ultimately with the State supervisory and directing authorities – e.g. administrative districts, and, in the last instance, with the Minister of the Interior – who enjoy the necessary powers of direction. As the police executive belongs fundamentally to the competence of the *Länder*, responsibility for the police rests with the Minister of the Interior of each *Land*. The Federal Government has its own police executive to a limited extent, e.g. the border-guard police.

b) What powers of arrest and confinement of accused persons are available to the police which are not accorded to the ordinary citizen?

As the police of the Federal Republic carries out sovereign functions, it has powers of arrest and confinement which are not accorded to the ordinary citizen. These powers are however precisely laid down by law. According to the Constitutional principles, any action of the police directed against the person (or property) of a citizen is permissible only where sanctioned by a law (Federal or *Land* law). With reference to the police acting as an auxiliary of the public prosecutor, mention should be made here of the Code of Criminal Procedure. A police official may arrest "provisionally" only if the requirements of para. 127 of the Code of Criminal Procedure have been complied with, and, in accordance with para. 128, he must bring the arrested person before a judge without delay. For the ordinary fields of activity of the police, the *Land* police laws lay down the powers of the police with regard to arrest and confinement. At any event, such powers are only temporary and for short duration, and are subject without exception to judicial supervision, which according Art. 104 of the Constitution, must be provided without delay in each relevant case.

A police official may use direct force against the person in strictly defined circumstances (e.g. overcoming resistance). Such use of force is the last resort (cf. para. 34 of the Baden-Württemberg Police Law). As soon as it has led to an arrest, the limitations imposed by para. 104 of the Constitution have to be considered.

c) What powers of search and other means of gathering evidence (e.g., wire-tapping) are available to the police which are not accorded to the ordinary citizen?

In the matter of searches and other means of gathering evidence, the police again has powers which are not accorded to ordinary citizens. Those who feel injured by such measures may appeal to the administrative courts, or, if the police has acted as an auxiliary organ of the Public Prosecution in connection with a trial, to the prosecuting authorities, and, finally, to the ordinary courts.

The police has no authority to tap telephone lines. This would run counter to the principles of Art. 10 of the Constitution and could be declared permissible in clearly defined conditions only through a statute in accordance with Art. 19 of the Constitution.

d) What limits, directly by a legal prohibition or indirectly by exclusion of the evidence so obtained, are imposed on the methods employed by the police to obtain information or to extract confessions?

As regards the question of limits imposed on the methods applied by the police to obtain information or extract confession, the matter

depends on whether the police is acting as an auxiliary organ of the Prosecution or in its own police field.

In the first case the police is bound to the observance of para. 136a of the Code of Criminal Procedure, which states:

“The freedom of decision and freedom of action of the accused may not be influenced by ill-treatment, by fatigue, by corporal punishment, by the use of medicines, by torture, by deception, or by hypnosis.

Force may be used only in so far as criminal procedure allows it. Threats of measures unauthorized under criminal procedure and the promise of an advantage not provided for by law are forbidden.

Measures that can influence the memory or the judgment of the accused are not allowed.

The prohibition of paragraphs 1 and 2 applies irrespective of any agreement on the part of the accused. Statements made following a violation of this prohibition may not be taken into account even if the accused agrees to their being used.”

These provisions of para. 136a are also made applicable to the examination of witnesses by para. 69 of the Code of Criminal Procedure.

In strictly police matters, the police has at its disposal for gathering evidence only such powers as are available to every citizen; however, the police may summon a person when this is necessary to get a clear picture of the circumstances in a concrete case and the facts indicate that that person can provide relevant evidence. In addition, the police can obtain information from the authorities and official departments.

Force is not permitted in connection with these matters and may therefore not be used to extract confessions. Thus, for instance, the Baden-Württemberg Police Law (para. 29 (1)) states:

“The police may not use force to obtain a statement during an interrogation”.

In sub-para. 2 of this paragraph 29, the provisions of para. 136a and the other protective stipulations of the Code of Criminal Procedure are expressly extended to pure police interrogation. Under this law, indirect force such as the use of threats and the imposition of fines is also forbidden.

e) To what extent are the remedies dealt with in the answer to A. 2(c) above applicable in particular to the illegal acts or omissions of the police?

The remedies dealt with in A. 2(c) can also be applied to illegal acts or omissions of the police. However, the citizen does not always have a claim on police intervention (action), so that, in the case of omissions of the police contrary to their duty, there is normally no provision for an enforceable claim before an administrative court; but damages may be claimed under the provisions of para. 839 of the Civil Code in conjunction with Art. 34 of the Constitution.

B. THE LEGISLATIVE AND THE LAW

Limitations of Lawmaking Power of the Legislative

1. *What legal limitations (if any) restrict the power of the legislative to make laws? In what instrument are these limitations defined? To what extent do you consider these limitations essential to the Rule of Law?*

a) According to Art. 20, para. 3 of the Constitution, legislation is tied to the constitutional order; according to Art. 1, para. 3 of the Constitution, the *rights of man* in particular, which also belong to the Constitutional Order, bind the legislative as well as the executive authority and the judiciary as an *inviolable right*.

b) According to Art. 79, para. 3 of the Constitution, no modification of the Constitution can be permitted which affects the organization of the Federation in *Lander*, the fundamental co-operation of the *Lander* in the legislation, and the basic principles of the *rights of man* as well as those of the *sovereignty of the people* (in the sense that the authority of the State emanates from the people), of the *separation of powers*, and of the *primacy of constitutional legislation* over ordinary legislation.

c) According to Art. 79, para. 1 of the Constitution, the Constitution can only be amended – in so far as this is at all permissible under the above-mentioned provision of Art. 79, para. 3 – by a law which explicitly amends, or adds to, the text of the Constitution. According to Art. 79, para. 2 of the Constitution, such law requires the approval of two-thirds of the members of the Lower House and two-thirds of those of the Upper House.

However, in the case of international agreements leading to a peace treaty, or preparations for a peace treaty, or to the liquidation a régime of occupation, or which are designed to serve the defence of the Federal Republic, whereas it must be ascertained that the stipulations of the Constitution do not oppose the conclusion and implementation of those agreements, this requirement will be satisfied, according to Art. 79 para. (2) of the Constitution, by supplementing the text of the Constitution, such supplementary statement being limited to this particular classification. This restrictive prescription – which gives the legislator amending the Constitution the right of authentic interpretation of the Constitution, and the legal validity of which is therefore the subject of an action pending before the Federal Constitutional Court for alleged elimination of the Constitutional Court, competent under the separation of powers – was incorporated into the Constitution by the Constitution Amendment Act of 26 March 1954 (Federal Law Gazette, Pt. I, p. 45).

d) According to Art. 19(2) of the Constitution, even if a fundamental law may be restricted under the provisions of the articles of the Constitution that deal with the Constitution itself, such fundamental law may in no case be altered *in its essence*. In so far as the Constitution allows a fundamental law to be restricted by a law or on grounds of a law, such law, according to Art. 19, para. 1(1) of the Constitution must be of general and not of specific application. According to Art. 19, para. 1(2) of the Constitution, any law that restricts a fundamental law must name the fundamental law in question and quote this article.

The limitations referred to are significant for the Rule of Law, because the Parliamentary majority is thus limited in its freedom of decision and the minority cannot be completely overridden. The value of these limitations from the viewpoint of the Rule of Law rests furthermore in the fact that in legislation for the preservation of freedom of the individual and of the inviolability of a given group of persons, as well as for the maintenance of the security of justice which serves the freedom of the individual, certain principles of law must always be respected and certain formalities observed.

2. *By what procedure and before what body can laws of the legislative which are inconsistent with the limitations discussed in B. 1 above be declared invalid?*

Laws of the legislative which are inconsistent with the provisions discussed at B. 1 can be declared *unconstitutional* and thus invalid by the Federal Constitutional Court. Their validity can be determined:

a) By the so-called *legal norm review procedure* (according to Art. 93, para. 1(2) of the Constitution, in conjunction with paras. 13(6) and 76 of the Law on the Federal Constitutional Court) if, following differences of opinion or doubts on the agreement in matter and form between Federal Law or *Land* Law and the Constitution, or on the agreement between *Land* Law and Federal Law, proceedings have been introduced for the constitutional review of one or more legal prescriptions at the request of the Federal Government, or of one-third of the members of the Lower House.

b) By the so-called *positive law review procedure* (according to Art. 100, para. 1 of the Constitution in conjunction with paras. 13(11) and 80 of the Law on the Constitutional Court), if a Court decrees that a given law on the validity of which its decision depends is in fact unconstitutional and therefore suspends its proceedings and submits the documents relevant to the constitutionality of the law to the Federal Constitutional Court for its decision.

c) By the so-called *departmental dispute* (according to Art. 93, para. 1(1) of the Constitution in conjunction with paras. 13(5) and 63 of the

Law on the Constitutional Court) on the interpretation of the Constitution with reference to disputes on the extent of the rights and duties of a senior Federal organ or of the other parties endowed with rights of their own by the Constitution or by the standing orders of a senior Federal organ, and in the dispute between Federal Government and *Länder* (according to Art. 93, para. 1(3) of the Constitution in conjunction with paras. 13(7) and 68 of the Law on the Constitutional Court) in the event of differences of opinion on the rights and duties of the Federal Government and the *Länder*, particularly with reference to the application of Federal Law in the *Länder* and to the exercise of Federal supervision, if the Federal Constitutional Court makes use of the possibilities offered by the provisions of para. 67(3) of the Law on the Federal Constitutional Court and incorporates in its findings a decision on a question of law affecting the interpretation of the disputed stipulation of the Constitution, on which depends the question whether the contested measure or omission of the opponent of the application does or does not violate a provision of the Constitution.

d) by the procedure of *Constitutional complaint* (according to paras. 90 ff. of the law on the Federal Constitutional Court in conjunction with the prescription of Art. 93, para. 2 of the Basic Law), in which, apart from its jurisdiction under the Constitution in cases otherwise assigned to it by Federal Laws, the Federal Constitutional Court takes action if the Constitutional complaint (according to paras. 93(3) and 95(3) of the Law on the Federal Constitutional Court) is aimed *directly against a law*. According to the jurisdiction of the Constitutional Court, such Constitutional complaint is possible only if the complainant is injured by the disputed law itself, actually and directly – but not through an executive act – in a basic right or in a right (the equality of all Germans as citizens, electoral rights, the right to a fair trial and rights guaranteed when in custody).

3. *Is a particular procedure laid down for the revision of the limitations mentioned in B. 1 above? Can this procedure be circumvented (e.g., by increasing the size of the legislative to provide a two-thirds or three-fourths majority)?*

The Constitution provides no special procedure for the revision of the limitations mentioned in B. 1, apart from the procedure for the amendment of such limitations. For the amendment of limitations, the procedure of *Constitutional Amendments* is available as briefly described in B. 1.c) above.

The procedure for Constitutional revision, which the Constitution prohibits in the cases mentioned in B. 1.b), can be circumvented at the best by a “*detour in international law*” if the provision of Art. 79, para. 1(2) of the Constitution quoted in B. 1(c) is applicable. This possibility of a “*detour in international law*” is available by, *inter alia*,

an application to the Constitutional Court mentioned at B. 1.c).

There is no other possible "detour in international law" to circumvent the prohibition of Constitutional amendments contained in Art. 79, para. 3 of the Constitution or the procedure for permissible amendments to the Constitution constitutionally provided for under Art. 79, para. 1 of the Constitution, since, according to a decision of the First Chamber of the Federal Constitutional Court (1 BvF 1-52 of 30 July 1952), in the case of international agreements with the force of law, under Art. 52, para. 2 of the Constitution a review of the law is permissible even though the legislative procedure has run its course through the endorsement of the law by the Federal President and its publication. This ensures that laws on international treaties can be examined by the Constitutional Court as regards their compliance with the Constitution before they come into force, so that disagreement between International Law and internal Constitutional Law will be prevented to a very great extent – possibly avoiding the need of the above-mentioned "detour in international law".

Powers over Members and Public

4. *What powers has the legislative to punish* a) *its own members*
b) *members of the general public?*

In the Federal Republic of Germany the Legislative has no true powers to punish in the sense of awarding penal sentences. Such powers belong exclusively to the judiciary, which, under Art. 92 of the Constitution, is provided with judges enjoying special guarantees of independence by virtue of Art. 97 of the Constitution.

The jurisdiction of the ordinary courts in all criminal matters is laid down in the Law on the Constitution of Courts of 27 January 1877, in particular by paras. 24, 25, 28, 73, 80, 120 and 134. The geographical competence is determined by the Code of Criminal Procedure of 1 February 1877. Changes in jurisdiction and venue can be effected by simple law (e.g. by setting up courts with special fields of jurisdiction, such as military courts), but in each case the exclusive jurisdiction of judges is constitutionally guaranteed by Art. 92 in conjunction with Art. 101, para. 1(2) of the Constitution. Nobody may be withdrawn from the jurisdiction of his lawful judge. In this respect the legislator is also bound for the future, as this constitutional guarantee can be counted among the essential conditions of existence (under Art. 79(3) of the Constitution of a constitutional State with separation of powers.

The Speaker of the Lower House alone has certain powers of imposing fines, under para. 7 in conjunction with paras. 40–45 of the House Standing Orders of 28 January 1952.

- a) According to para. 42 of the Stading Orders, the Speaker can expel a Member from the Chamber for the duration of a session for

a gross breach of discipline. There is no need for a previous call to order. The speaker must announce before the end of the session for how many working days the Member is excluded (up to a maximum of 30 working days). This exclusion applies to Committee meetings as well. Under para. 42(5), the excluded Member must pay into the funds of the House, for each working day a fine amounting to one-thirtieth of his expense allowance.

Before the next session of the House the Member concerned can enter a substantiated written protest against his exclusion, and the House will vote on it in the same session without discussion.

b) Even the Speaker has no powers to punish outsiders (members of the public, and non-Parliamentary participants in a session). But in view of disciplinary powers he can have them expelled in the event of disturbance (paras. 7 and 45).

5. *What powers has the legislative to examine under oath: a) its own members; b) members of the general public?*

The Lower House often has to make certain inquiries in order to carry out its task. The organ it uses for this purpose is the Committee of Inquiry. Under Art. 44 of the Basic Law the Lower House has at all times the right – and, if requested by one-fourth of its Members, the duty – to set up a Committee of Inquiry. The House cannot constitute itself into a committee of inquiry. Although it will control the inquiry, the House can have it carried out only through a special functional organ.

In order to answer the questions raised, the Committee of Inquiry must hear witnesses. The corresponding prescriptions laid down for criminal cases are applied. In view of the standard provisions of the Code of Criminal Procedure for criminal cases, the examination under oath of Members and non-members is permitted. Here, Members enjoy no special protection. However, they retain their right to refuse to give evidence (under para. 53, (1(4)) of the Code of Criminal Procedure) on persons who have confided facts to them in the same capacity, or on those facts themselves.

Powers similar to those of the Committee of Inquiry are held by the so-called Standing Committee, which protects the rights of the Lower House vis-à-vis the Federal Government between two electoral periods, and by the Defence Committee in the field of national defence (Constitution, Arts, 45 and 45a, para. 2).

6. *In what respects does the procedure adopted under B. 4 and 5 differ from the procedure followed in the ordinary Courts?*

a) The procedure adopted under B. 4 cannot be compared with that followed in the criminal courts since these award penal sentences whereas here it is simply a matter of disciplinary measures.

b) The procedure adopted under B. 5 is materially different from that followed in the ordinary Courts in that here the inquiry serves simply for the preparation of political measures and not to bring about a decision in an individual case. The task of a commission of inquiry is, for instance, to investigate abuses and their causes in order to ascertain the necessity of legislative measures and to exercise administrative supervision.

In view of the reference to relevant prescriptions, there exists in essential points a similarity of form with criminal procedure. Greater protection is given only to the secrecy of mail and telecommunications. Neither may the Committee of Inquiry interfere with this basic right in cases where the Code of Criminal Procedure allows such interference in a criminal investigation (Constitution, Art. 44, para. 2).

C. THE JUDICIARY AND THE LAW

Introduction

The main principles of the administration of justice are contained in the Constitution, and especially in Section IX (Art. 92 ff.). Special attention should be called to the following:

a) The courts are fundamentally authorities of the *Länder*; Art. 92 of the Constitution authorizes the Federal Republic to have only a limited number of Federal courts: the Federal Constitutional Court, the Supreme Federal Court (not yet in existence) and the so-called "Higher Federal Courts" (Review Courts)². As against that, the Federal Republic has extensive legislative powers in connection with the constitution of courts and court procedure (Basic Law, Art. 74 (1)), and this applies to *Länder* courts as well. Apart from the Federal Rules of Procedure, the Law on the Constitution of Courts of 27 January 1877 (revised edition of 20 September 1950 – Federal Law Gazette 455) is of special significance. The application of Federal laws has brought about a close dovetailing of the Federal courts with those of the *Länder*.

b) The Constitution aims at five different branches of justice: under Art. 96, para. 1 of the Basic Law, separate "Higher Federal Courts" are to be set up for the respective fields of ordinary, administrative, finance, labour and social jurisdiction.

The coexistence of several higher Federal courts corresponds to the setting up of *Länder* courts in the lower instances: in all *Länder* there are ordinary courts for civil and criminal matters and in addition special administrative, finance, labour and social tribunals.

c) Above these courts and tribunals is the Federal Constitutional Court, competent for constitutional matters. The *Länder* also have their Constitutional Courts. Their scope of activity, their internal organization and their procedure are matters for the legislative in each *Land*.

Selection, Dismissal and Promotion of Judges

1. *By whom are the judges appointed?*³

a) *Federal judges*: The appointment of judges of the Supreme Federal Court is decided jointly by the Federal Minister of Justice and a spe-

¹ The special conditions existing in the Saar and in West Berlin are not dealt with in this study.

² In addition, the Federal Republic can set up special federal disciplinary courts for federal officials and judges, and federal service courts (and in certain cases military penal courts) for disciplinary proceedings against military personnel (Constitution Art. 96, par. 3; and para. 96a). Details of these lie outside the scope of this report.

³ This refers only to the appointment of professional judges; for the appointment of lay assessors, cf. C. 4 b) below.

cial committee for the selection of judges, which consists of the *Land* Ministers of Justice and an equal number of Members selected by the Lower House (Constitution, Art. 95, para. 3). The same applies under Art. 96, para. 2 of the Constitution to the appointment of judges of the higher Federal courts, with the proviso that instead of the Federal and *Land* Ministers of Justice the committee includes the Ministers responsible for the corresponding fields.

The formal appointment is made by the Federal President. Details are dealt with by the Law on the Selection of Judges of 25 August 1950 (Federal Law Gazette 368). It should be mentioned that the special committee for the selection of judges decides by simple majority in a secret ballot (*loc. cit.*, para. 12).

b) For *Länder* judges the Constitution limits itself to general directives. Art. 98, para. 4 of the Constitution empowers the *Länder* to order that the appointment of judges will be decided by the *Land* Minister of Justice acting jointly with a committee for the selection of judges, the internal organization and procedure of this committee being left to the *Land* legislative; for judges or other than ordinary courts the *Land* Minister responsible for the respective matter takes the place of the *Land* Minister of Justice. Several *Länder* have made use of this right.¹ In accordance with Federal laws on labour and social jurisdiction, the appointment of professional judges is decided with the co-operation of special selection committees; in the case of labour tribunals these committees consist of representatives of the trade unions, the employees' associations and the labour judiciary, in equal numbers (Law on Labour Tribunals, para. 18, 36); in the case of social tribunals of the first instance, the committees consist of representatives of the insured, of the employers, of those entitled to assistance, of persons in charge of aid to war victims, and of the Social Justice Administration (Law on Social Tribunals, para. 11). In other cases judges of the *Länder* are nominated partly by the *Land* government, partly by the Prime Minister (or the State President) or by the Minister of Justice; sometimes there are provisions for a consultation of the courts or their presidents in some form or other.²

c) Differences in respect of the appointment of Constitutional Court Judges:

¹ *Berlin*: Constitution, Art. 69; Law of 4 August 1954; Law Gazette 470.

Bremen: Constitution, Art. 136; para. 1; Law on Selection of Judges of 18 December 1953, Law Gazette 119.

Hamburg: Constitution, Art. 63; Law on Selection of Judges of 8 July 1952; Law Gazette 137.

Hessen: Constitution, Art. 127, Law on Selection of Judges of 6 March 1954; Law Gazette 26.

Rhineland-Palatinate: Constitution, Art. 132.

² E.g. Paras. 5(1) and 12 of the Law on Administrative Tribunals for the *Länder* of the former US Zone of Occupation.

aa) Judges of the *Federal Constitutional Court* are selected, under Art. 94 of the Constitution, half by a committee of the Lower House and half by the Upper House. In order to prevent the *Bundestag* majority from monopolizing the election, each electing body must decide by a two-thirds majority; if this majority is not reached and a vacancy thus remains unfilled for two months, the Federal Constitutional Court must make a proposal by simple majority in full assembly, which proposal however in no way affects the requirement for a two-thirds majority vote and is not binding on the electoral organs. The formal appointment is, here again, made by the Federal President (for details, cf. paras. 5-10 of the Law on the Federal Constitutional Court as amended by the Law of 21 July 1956, Federal Law Gazette, Part I, 662).

bb) The organization of the *Constitutional Courts of the Länder* varies widely according to their different jurisdictions. Their members (partly professional judges and partly lay assessors) are regularly elected by the legislative bodies (*Land Diets*), generally for a definite number of years;¹ in some cases a senior judge presides *ex officio*²) or belongs to the court as a member³). Individual members are also nominated by the Government.⁴

2. Under what conditions can they be dismissed?

Here again the fundamental principles are contained in the Constitution. The functional and personal independence of all judges is guaranteed in Art. 97 of the Constitution. Para. 1 of this Article lays down the principle of material independence: judges are independent and subject only to the law. Para. 2 of this Article guarantees the personal independence of judges by a number of provisions:

a) Professional judges are generally appointed *for life*, but appointment for a definite number of years is provided for by law in the case of various judicial posts, for instance, for some of the judges of the Federal Constitutional Court (8 years). Furthermore, appointments for a limited term may be made provisionally or to meet temporary urgent requirements (e.g. in the case of a judge's sickness); but such appointments may not be terminated before the stipulated time.⁵

¹ Bad-Württ., Art. 168; Bav., Art. 68; Berlin, Art. 72; Bremen, Art. 139; Hamburg, Art. 65; Hessen, Art. 130; Lower Saxony, Art. 42; North-Rhine-Westphalia, Art. 76; Rhineland-Palatinate, Art. 134. (The Articles quoted belong in each case to the relevant *Land* Constitution).

² Hamburg, Rhineland-Palatinate.

³ Bremen, North-Rhine-Westphalia.

⁴ Hamburg: two judges appointed by the Senate.

⁵ Law on the Constitution of Courts, paras. 10 and 70. The Law on Labour Tribunals prescribes that professional judges of Labour Tribunals of the First Instance shall be appointed for at least one year; but after three years in office they shall be appointed for life (*loc. cit.*, para. 18(4)). Similarly, Hesse Constitution, Art. 172(2).

b) Judges are fundamentally *irremovable*. Judges permanently appointed as professional judges cannot therefore be dismissed against their will, nor suspended, transferred or retired, before expiry of their term of office, except by judicial decision. Such judicial decision may be given:

aa) in an ordinary criminal court by sentencing to penal servitude, forfeiture of honour, or incapacity to hold office (paras. 48 and 189 of the Federal Law on Civil Servants of 14 June 1953, Federal Law Gazette, Part I, 551, and the corresponding provisions in the *Länder*);

bb) in a departmental disciplinary action, in which the disciplinary court must consist exclusively of judges (paras. 108 and 110 of the Federal Disciplinary Ordinance of 28 November 1952, Federal Law Gazette, Part I, 749, 761, and the corresponding provisions in the *Länder*);

cc) in a so-called "judge's trial". Under Art. 92, para. 2 of the Constitution a Federal Judge who has offended against the principles of the Constitution or against the constitutional order of a *Land* can be transferred to another office or retired, and, in the case of premeditation, he may even be dismissed. The decision is taken by the Federal Constitutional Court by a two-thirds majority on a motion from the Lower House. Under Art. 93, para. 5 of the Constitution the *Länder* can make corresponding regulations concerning the *Land* judges; this has been done in most *Länder*¹. In the case of *Land* judges the decision is also taken by the Federal Constitutional Court. In the case of judges of the *Federal Constitutional Court* there are special provisions (for details, cf. para. 105 of the Law on the Federal Constitutional Court).

c) Furthermore, in the event of reorganization of the courts or of the judicial districts, judges may be transferred to another court or removed from office, but only with retention of their full pay Constitution, Art. 97, para. 2)3(). Such organizational changes however must be supported by a law (decision of the Federal Constitutional Court of 10 June 1953; Decisions of the Federal Court, 2, 307). This applies both to Federal and to *Land* judges.

d) Finally, Art. 97, para. 2 of the Constitution allows the introduction of *age limits* for the judges. In the case of Federal judges this age

¹ Bad-Württ.: Const. Art. 66(3); NRW: Const. Art. 73;
Bremen: " " 136(3); Schl.-Holst. " " 36(2);
Hessen " " 127(4); Berlin: " " 72(2);
Hamburg: " " 63(3,4); Lower-Sax.: " " 40;
Rh.-Palat: " " 136

limit is 68 years;¹ age limits introduced by the *Länder* for their judges vary between 65 and 70 years.

2. (*Subsidiary question*). *Have any judges in fact been dismissed in the last ten years? (Give particulars, if possible).*

According to information so far available there has been no dismissal of any Federal judge. Among judges of the *Länder* there have been eight cases, all from ordinary jurisdiction, to which indeed most judges belong. Particulars are as follows:

- a) In five cases judges were sentenced to dismissal as a disciplinary measure for offences committed in the course of their duty;
- b) In another case a judge was retired during an administrative investigation against him for fraudulent non-payment of fares, and was then only sentenced to a reduction of retirement pay;
- c) In a further case the appointment of a judge was declared null and void since, on appointment, he had concealed the fact that he had already received a prison sentence of several months for homosexuality and had again committed homosexual offences before his appointment;
- d) Finally, one judge was retired against his will because of unfitness for duty due to sickness.

Further to a) above, the reasons for dismissal were:

In one case, homosexuality and an uncontrolled and unworthy behaviour in human relations.

In two cases, financial unreliability: in one of these cases, unrestrained contracting of debts with most lawyers of the district and with judges of the commercial tribunal; in the other case, subsequent discovery of embezzlement of clients' moneys during the period spent as barrister before being appointed judge (this dismissal is only provisional, as the disciplinary action has not yet been legally concluded).

In one case, participation in the persecution of Jews (the man concerned was a member of the S. A. and was dispatched against his will to take part in the arrest of Jews on 9 November 1938; in the opinion of the disciplinary tribunal he should have more energetically refused to be involved.)

In one case, pro-Communist activities whilst a prisoner of war of the Russians, thus endangering his fellow-prisoners.

3. *By whom are judges promoted?*

a) As the higher Federal Courts are all courts of final instance, appointment as a Federal judge usually means the final stage in a ca-

¹ "Third Law on the Age Limit of Judges of the Higher Federal Courts and Members of the Federal Court of Accounts" of 28 November 1956 (Federal Law Gazette, Part I, 884).

reer; the problem of promotion does not exist for Federal judges. The appointment of a Federal judge as President of a Higher Federal Court, or as Chairman of one of the Chambers which deliver the judgments of these courts, is made by the Federal President on the proposal of the Federal Minister of Justice or of the competent Federal Minister, without participation of a committee for the selection of judges.

b) For the very numerous *Länder* judges promotion constitutes a major problem. The question of who promotes the judge is decided by the *Länder* laws; as a rule it is the same authority that appoints them.

4. What personal qualifications are required of judges? To what extent do laymen participate in the judicial process? What professional guidance are they given?

Some of the qualifications required of judges are so self-evident that they are explicitly mentioned neither in the Constitution nor in the Law (blameless reputation, German citizenship, knowledge of the German language).

a) For professional judges of the ordinary courts, the so-called "qualification for judge's office" is required. It is awarded following two examinations: the first examination is taken at the end of a University course of at least six semesters, and the second after practical preparation during 3½ or 4 years in courts of justice, or training under public prosecution or barristers, or in State or municipal departments if required (Law on the Constitution of Courts, para 2). In the case of judges of the administrative tribunals, the "qualification for the higher administrative service" is sufficient; this is also awarded following two examinations, taken likewise at the end of a University course and following several years' training. In general, a candidate for a permanent appointment as a professional judge must first serve a probationary period as "Assessor".

Apart from this every judge must offer a guarantee that he will carry out his functions in a democratic spirit. Although this is not always explicitly prescribed, it is made evident by the oath to be taken by every judge and by the fact that an offence can lead to a "judge's trial" and possibly to dismissal (cf. 2 b) cc) above).

In detail:

i) All Federal judges must be at least 35 years of age. To this must be added special qualification: Judges of the Federal Court of Justice and of the Federal Labour Tribunal must both have the "qualification for judge's office" while the latter must have, in addition, special knowledge and experience in the fields of labour

law and working conditions (Law on Labour Tribunals, para. 42). In the case of judges of Administrative and Finance Tribunals concerned with public law, the "qualification for higher administrative service" is generally considered on par with the "qualification for judgeship", but special additional technical knowledge is required; thus the judge of the Federal Administrative Tribunal must have had at least three years' administrative experience, and one half of these judges must also have had three years' experience as judges in an administrative tribunal (Law on the Federal Administrative Tribunals, para. 3); in the Federal Finance Tribunal one half of the judges must have the "qualification for judgeship", and the remainder the "qualification for higher administrative service" or three years' experience as professional members of a finance tribunal (Law on the Federal Finance Tribunal of 29 June 1950; Federal Law Gazette, 257).

ii) Similar personal and special qualifications are required of professional judges in the *Länder*; the usual requirement is the "qualification for judgeship" in the case of administrative and finance-tribunal judges this may be replaced by the "qualification for higher administrative service" and in some cases special knowledge and experience in the relevant specialized field is also necessary. Judges of labour and social tribunals of first instance form an exception: in their case it is sufficient that the candidate has acquired all-round knowledge and experience during at least five years' activity (Law on Labour Tribunals, para. 18; Law on Social Tribunals, para. 9 II).

b) Participation of laymen: In the Federal Republic laymen play an important part in the judicial process. Their participation usually takes the form of lay assessors' courts, in which lay assessors sit with the judge as full members of the court and with the same voting rights as the professional judges in reaching a verdict. Trials by jury in the Anglo-American pattern – in which a jury judges the facts alone and without participation of professional judges – are unknown in the Federal Republic.

Naturally the participation of lay assessors will occur mainly in the lower courts, which have to judge questions of fact. Consequently in the Federal Courts – which are essentially restricted, as courts of last instance, to the decision of questions of law – lay assessors will be found only in isolated cases, for instance in connection with agricultural matters¹ and with labour and social matters.² As against this, lay

¹ Federal Agricultural Judges: Para. 2 of the Law of 21 July 1953 on court procedure in agricultural matters. Federal Law Gazette, I, 667, as revised by the Law of 27 July 1957, Law Gazette I, 861.

² Federal Labour judges: paras. 41 ff. of the Law on Labour Tribunals; Federal Social Judge: paras. 38 and 40 of the Law on Social Tribunals.

assessors are used very frequently in the lower instances: apart from the lay assessors and jurors who participate in all criminal cases in the first instance and sometimes in appeals as well, mention should also be made of the judges in the commercial divisions of the *Land* courts and the judges of the agricultural tribunals. In the case of labour and social tribunals lay assessors are co-opted at all levels. In the administrative tribunals,¹ the organization of which is a *Land* matter, the participation of lay assessors is allowed for everywhere in first instance tribunals and in some cases in second instance tribunals.² The same applies to the finance tribunals.

In one part of *Land* Baden-Württemberg there exist petty courts³ consisting of laymen, to try trivial offences; this cannot be dealt with here at any greater length.

The conditions governing the selection of lay assessors and the nature of their functions are as varied as their tasks. They all have to take the oath and are all, like the professional judges, independent in their functions as lay judges and subject only to law. In so far as they were selected in view of their specialized knowledge or their special understanding of the litigants' interests, they are usually appointed for several years; during their time of office they can be dismissed only under the same conditions as the professional judges. Organizations have wide-ranging rights to propose candidates for selection as lay judges; the appointment itself is made in some cases by the administration of justice or the executive department concerned, in others by the presidents of the courts or the courts themselves. Lay assessors and jurors of criminal courts are selected according to a special procedure: the required number of lay assessors and jurors are selected every two years by a two-thirds majority of a committee of trusted persons formed at the lower court under the chairmanship of the district judge, from lists of candidates drawn up by the municipal representatives. The order of their participation in court sessions is decided by lot.

Provisions for the *training* of lay judges are not laid down anywhere. Such training is left to the political parties, private associations or the respective department of the administration. In certain circumstances it is left to the courts themselves.⁴

¹ Law on Administrative Tribunals in the *Länder* of the former US Zone of Occupation, paras. 11, 13-15. Ordinance No. 165 on Administrative Jurisdiction in the British Zone of Occupation of 15 September 1948, paras. 3 and 18.

² Reich Tax Regulations, Para. 48, and, for the *Länder* of the British Zone, Bavaria and Hessen, the corresponding *Land* regulations (Kühn, Tax Regulations, 4th Ed., 1956; preamble to paras. 47-51 of the Tax Regulations, and Appendix 8).

³ Law No. 241 (of the former land Baden-Württemberg) on Petty Courts of 29 March 1949 (Government Gazette 47).

⁴ For lay judges of social tribunals, the periodical "Social Justice" publishes a special monthly supplement, "The Social Judge".

5. *By what legal instruments are the conditions laid down in C (1-4 inclusive) guaranteed? Is any special procedure required to change them?*

As already stated in the introduction, the main principles of the organization of courts in the Federal Republic of Germany are laid down in the Constitution. This cannot be amended without great difficulties. The amendment procedure is dealt with in Art. 79 of the Constitution. The details of the organization of courts are mostly laid down by federal laws, which can be amended freely by the Federal legislative.

Federal laws also govern the organization of courts in the *Länder*. These courts are also subject to Federal laws and have hardly any possibility of bringing about any changes. *Länder* laws play only a subordinate part.

Federal and *Länder* laws, however, must remain within the framework of the Constitution and the Federal Constitutional Court can inquire whether they agree with its provisions. Should the Federal Constitutional Court's findings be in the negative, the court shall declare the contested provisions to be null and void.¹

¹ In one case the Federal Constitutional Court has already denied the quality of court a special administrative court set up by Federal law (the Grievance Committees under the Law for Immediate Relief), and declared null and void that part of the law that related to it (judgement of 9 November 1955 – Decisions of the Federal Constitutional Court, 4, 331). In a number of other cases the Federal Constitutional Court has examined attacks against the constitutionality of laws, but rejected them as groundless; thus in the case of the divisions for building-land matters at the *Länder* courts, which decide with the co-operation of administrative judges on the legality of expropriations and the fairness of compensation (Decisions of the Federal Constitutional Court, 4, 387; with reference to the medical professional courts of Lower Saxony, see Decisions of the Federal Constitutional Court, 4, 74).

D. THE LEGAL PROFESSION AND THE LAW

Introduction

The legal profession has two essential functions:

1) As counsel, a lawyer has the task of representing the individual vis-à-vis the State, of asserting the individual's rights before the State's courts, and – in criminal matters – of affording the individual the protection of the law against the State authorities (i.e. the Prosecution).

At the same time, however, the lawyer is always "called upon to co-operate in the administration of justice" and is therefore always responsible to justice and responsible for justice.

This double role of the lawyer makes it particularly difficult, but also urgently necessary, to regulate the legal profession by law. In his role as counsel for the individual, the barrister needs the entire protection of the law; as a collaborator in the administration of justice he must satisfy public demand for special integrity in the fulfilment of his functions.

In Germany, seen in the light of the historical development of German law, the lawyer has always appeared to be much more of an auxiliary of the court than he is in other countries. In the field of civil matters, which is by far the more important, the use of a lawyer is compulsory; representation of the parties by a lawyer is not only recommended by expediency, it is required by law.

2) The marginal notes refer to a) the prescription of the Württemberg-Baden Lawyers' Regulations of 4 March 1948 (Official Gazette, p. 101), quoted here as an example of the current Lawyers' Regulations of the various *Länder* ("L. R.") which are identical in their essentials and b) a draft of Federal Lawyers' Regulations ("Draft").

Admission, Supervision and Expulsion

1. *What person or body is responsible for admission to, supervision of, and expulsion from, the practising legal profession?*

a. The granting, refusal, and withdrawal of admission rest with the competent *Länder* departments of justice, i.e., according to the Federal principle, they are matters for each *Land* Government.¹ The professional body of lawyers, viz.: the committee of the local lawyers' association, has an advisory role which in individual cases has the practical effect of equal standing.

¹ L. R. para. 3. Draft, para. 20.

A candidate who has fulfilled certain conditions has a legal claim to admission to the legal profession.¹ Decisions of the State on an admission are open to review by the administrative tribunals upon request of the candidate.² (The regulations under consideration provide for review by a court of honour.)

b. Supervision proper rests with the lawyers' association.³ It is exercised on the one hand by the committee elected by the lawyers' association and on the other by the courts of honour which exist within the same associations.

According to the present state of the law these courts of honour consist of members of the committee of the lawyers' association and meet in accordance with a special procedure.⁴ The courts of honour can punish violations of professional duty with warnings, reprimands and fines.⁵

Suspension can only be pronounced by the courts of honour, except when prohibition to exercise the profession is a necessary consequence of a sentence awarded in an ordinary criminal court or the result of fraudulent admission.

2. What factors (if any), other than the professional ability and moral rectitude of the lawyer in question and the extent to which the supply of lawyers is adequate to the demand, are allowed to influence the decisions made by the person or body mentioned in D. 1 above?

As quite rightly indicated in the question, the factors that play a decisive part in the measures mentioned in D. 1 above are first of all professional ability (insufficient background, physical and mental unsuitability) and moral rectitude (previous convictions, punishable behaviour, violation of professional duty;⁶ refusal of admission because the candidate is deprived by a court order of full control over his property also comes under this heading).

Apart from reasons of this kind, admission can be refused or withdrawn if the candidate carries out activities that are irreconcilable with the character and dignity of the legal profession,⁷ furthermore such admission is basically impossible if the candidate is a judge or a civil servant.⁸

These rules, and especially the first mentioned, help to settle the question of employed lawyers, which will be referred to again later. Admission of a lawyer is impossible if he works – even in a legal and advisory capacity – exclusively for his employer without having an

¹ L. R. para. 4, sub-paras. 1, 4. Draft, para. 18.

² Draft, para. 23, 49.

³ L. R. para. 49. Draft, para. 86–87.

⁴ L. R. para. 67. Draft, para. 104.

⁵ L. R. para. 63. Draft, para. 116.

⁶ L. R. para. 5 ff. Draft, para. 19.

⁷ Draft, para. 19 (8a, 10).

⁸ L. R. para. 5(4).

additional opportunity of working as an independent lawyer. This stresses the necessity of independence of the lawyer from his client.

The future regulations provide furthermore that admission will be refused if the candidate has been guilty of behaviour that shows him unworthy to exercise the profession of lawyer¹ or if the candidate has behaved in such a way that there are grounds for concern lest, as a lawyer, he may endanger the administration of justice or the interests of the litigants.²

The general terms in which these grounds for refusal of admission are formulated leave considerable discretion to the State, but this is compensated by the possibility of legal review by a court of honour.³

For admission to an individual court – which must be obtained in addition to admission to the legal profession generally⁴ – there are certain secondary rules to be observed in connection with residence and physical presence (maintenance of a domicile and an office; arrangements for a *locum tenens* when absent, etc.).⁵

It should be stressed that the question of the supply of lawyers does not influence the decisions mentioned in D. 1.⁶ This principle is stated explicitly in the current legislation and in the draft regulations under consideration.⁷

Limitations of Freedom to Represent Clients

3. *Subject to what limitations, directly imposed by the law or indirect (as, for example, by the threat of a diminution in his future practice) is a lawyer free to advise his client and to plead on his behalf in judicial proceedings?*

a. There are limitations imposed by the professional obligations laid down by law, and in some cases their violation can be a punishable offence. Under these limitations a lawyer may not accept a brief

- if disloyal behaviour is imputed to him;
- if he has already advised or represented another party with opposing interests in the same case;⁸
- if he has already taken part in the same case as judge or as representative of State interests.

The future Lawyers' Regulations shall provide in addition for the explicit rule that a lawyer must return a brief if he was to be tied by his client's instructions to such an extent that he would lose the freedom

¹ Draft, para. 19(5).

² Draft, para. 19(6).

³ Draft, para. 23.

⁴ L. R. para. 14–15.

⁵ Draft, para. 32.

⁶ L. R. para. 4(a).

⁷ Draft, para. 18(2), paras. 19, 32(2).

⁸ L. R. para. 31, Draft, para. 57.

of acting according to his duty – a rule already contained implicitly in the general principles of the profession.¹ In this connection there is a provision that a lawyer may not take charge of a case if he stands in a permanent professional relationship with his client (Lawyers' Regulations of 1 July 1878). This prohibition affects the legal advisers (*Syndikusanwälte*) of firms etc. referred to above. A lawyer whose contractual relationship with his employer still allows him to practice as an independent lawyer and who thus may be admitted in spite of the limitations quoted at D. 2 above, may not however represent his employer *in court*, because in court a lawyer's independence from his client is particularly important.

b) A limitation regarding appearance in court is contained in para. 78 of the Code of Civil Procedure, according to which the parties in civil cases before the *Länder* courts and all courts of higher instance must be represented by a lawyer who has been admitted to the respective court.

c) In criminal matters there is no such geographical limitation. But here again the court may forbid a lawyer to undertake the defence if he is strongly suspected of having been involved in the alleged offence, if the lawyer is himself to be material witness and finally – in accordance with the general rules of the profession – if it is to be feared that, through the defence of other accused, the lawyer may find himself in a conflict of interests (Code of Criminal Procedure, para. 138).

Special problems – particularly in connection with political offences, as, for example, treason trials – arise out of the political and constitutional confusion which still exists between West and East Germany. West German courts have had to deal in particular with the question whether lawyers from the Soviet-occupied zone could appear before West German courts as defence counsel in trials for political offences. The problem is that, although lawyers of the Soviet zone are "lawyers admitted to a German court" according to the letter of the law, both parts of Germany have already moved, so far apart politically that, for instance, treason may well have been committed to the advantage of the one and to the disadvantage of the other part. The Federal Court of Justice, in such a case, has ordered the exclusion of an East-Zone lawyer from the defence, pointing out the urgent need of secrecy in such trials and the necessity of finding a solution to the problems which result from the "unnatural condition of the division of Germany" (Decisions of the Federal Court of Justice in Criminal Matters, 8-194).

d) Indirect restrictions can never be entirely eliminated by legislation. It will always be a matter for the personality of the individual lawyer

¹ Draft, para. 57(2).

to protect himself against such indirect restrictions. However, they are always looked upon as wrongs, and in certain circumstances even as punishable wrongs.

Refusal to Represent Clients

4. Under what circumstances is a lawyer permitted to refuse to accept or to relinquish a brief from a client?

A lawyer can always refuse to accept a brief without stating a reason.¹ It may be his duty to accept a brief only if he is assigned to a party by the court (e.g. under legal-aid arrangements). However, the lawyer must inform the defendant immediately of his refusal in order not to cause him any prejudice.² According to German professional custom, a lawyer can likewise in principle relinquish a brief, even without an important reason, but he still has the duty not to withdraw from the case untimely, and to abstain from doing anything that might prejudice the interests of his client.

¹ L. R. para. 30. Draft, para. 56, 59, 60.

² L. R. para. 30. Draft, para. 56(2).

E. THE INDIVIDUAL AND THE LEGAL PROCESS

Right to be Heard and Represented by Lawyer

1. *To what extent has the individual citizen a right to be heard on all matters, however determined, in which his life, liberty or property are concerned?*

The right to be heard by a court is laid down in the Constitution. According to Art. 103, para. 1 of the Constitution, "every individual has a right to a fair hearing before a court". This applies to all court cases, whatever their kind, and whatever may be the subject of the case. (This applies furthermore to all cases before administrative tribunals, at least when it is a question of deprivation or limitation of rights and privileges.)

A fair hearing means the constitutionally guaranteed right of both parties to be heard during the trial, and to hear the arguments of the opposing party.

In a case of violation of the right to a fair hearing, when all the normal judicial remedies as provided by law have been exhausted in vain, there remains the possibility of lodging a Constitutional complaint with the Federal Constitutional Court, which can cancel the judgment on that ground.

2. *To what extent has the individual citizen the right to legal advice and representation in the matters mentioned in E. 1 above?*

a) *Legal representation.* In civil disputes before the *Land* courts and all higher courts, the parties *must* be represented with full powers by a lawyer licensed by the competent court (trial with legal representation Code of Civil Procedure, para. 78, 1). Where representation by a lawyer is not compulsory, for instance before the lower courts (*Amtsgerichte*), the parties *may* be represented with powers of attorney by any person capable of suing and being sued (Code of Civil Procedure, para. 79).

In *criminal cases* the accused can use the services of a counsel of his choice at all stages of the trial (Code of Criminal Procedure, para. 137). The selected counsel have to be licensed lawyers or lecturers in law at German Universities. Other persons may only be selected with the approval of the court (Code of Criminal Procedure, para. 138). In certain important cases the assistance of counsel is *obligatory* and if none is chosen by the accused, the President of the court appoints one *ex officio* (Code of Criminal Procedure, paras. 140, 141, 145). The absence of a defence counsel in such cases is an absolute ground for revision and leads to the annulment of the sentence (Code of Criminal

Procedure, para. 338, 5). The wife or husband and the legal counsel of the accused must be admitted to the trial, and heard, if this is requested (Code of Criminal Procedure, para. 149).

In cases before the *administrative tribunals* the parties may be represented at all stages of the proceedings; representation is obligatory before the *Länder* Labour Tribunals and the Federal Labour Tribunal (Law on Labour Tribunals, para. 11).

Before the Federal Constitutional Court the parties may be represented at all stages by a licensed lawyer or by a University professor; in oral proceedings they must be so represented (Law on Federal Constitutional Court, para. 22).

b) *Legal advice.* The advising of the individual in a court case is essentially the task of his legal representative but does not concern the court, since the imparting of legal knowledge or advice on the one or the other party is incompatible with the court's duty of impartiality and objectivity. Without prejudice to this principle, the Code of Civil Procedure (para. 139) states with respect to civil cases that the President of the court must see that the parties acquire full information on all important facts and make all the relevant motions, and in particular that they supplement any insufficient information on the alleged facts and produce evidence. To this end, and as far as necessary, he has to discuss the circumstances of the case with the parties from the factual and the legal points of view, and ask them questions. He has further to point out to them the serious aspect of the issues to be considered, as seen from the official point of view.

This provision has been called the Magna Charta of Civil Procedure. With the addition of peculiarities that are incident to the individual procedures, it applies to all other court proceedings as well (e.g. Law on Labour Tribunals, para. 46; Law on Social Tribunals, paras. 106, 112, 202; Law on Administrative Tribunals, para. 34; Law on the Federal Constitutional Court, para. 26). Apart from that certain forms of legal advice are widely prescribed, as for instance on available legal remedies, and in criminal procedure, advice to the accused on any changes of the legal point of view (Code of Criminal Procedure, para. 265).

3. *To what extent is the right (if any) under E. 1 affected, if the individual has not the material means to secure the legal advice or representation necessary?*

The rules of Court Procedure generally contain a provision that legal advice and legal representation will not be affected by poverty. An indigent party will be granted legal aid and – under certain conditions – will be assigned a legal representative, usually an attorney, to protect his interests free of charge (Code of Civil Procedure, paras. 114 ff.; Law

o n Labour Tribunals, para. 11a; Law on Social Tribunals, paras. 183-202; Law on Administrative Tribunals, para. 133; British Military Government Ordinance 165, para. 107). In criminal procedure, in certain circumstances, the accused has the right to request counsel irrespective of his financial means (Code of Criminal Procedure, paras. 140, 141). Expenses are refunded in proceedings before the Finance Tribunals (Regulations for Lawyers, para. 319). In gratuitous proceedings before the Federal Constitutional Court reimbursement of necessary expenses may be made (Law on the Federal Constitutional Court, para. 34).

In cases where the granting of legal assistance to indigent persons, including the assigning of a counsel when necessary, is not explicitly laid down by law, the admissibility of such assistance is (inferred from the equality clause of Art. 3, para. 1 of the Constitution Decisions of the Federal Constitutional Court, 2, 336 ff., 340 f.).

