Articles

Government Assistance in the Exercise of Basic Rights (Procedure and Organization)

By Erhard Denninger[*]

A. Basic Rights Realization Under the Conditions of the Democratic and Social Welfare State

I. "Freedom from the State" and "Freedom through the State"

For a brief period – during the first half of the 1970s – it appeared as though the fundamental debate concerning the function of basic rights (to a certain extent an individual-oriented reprise of the Rechtsstaat-social state controversy of the 1950s and 1960s[1] was coming down to the alternatives "Basic Rights: (only) Defensive Rights" or "Basic Rights: (also) Rights to Participation and Claims to Performance"[2] Peter Häberle's demand (made at the 1971 Constitutional Law Teachers' Conference) that the base-line substantive legal status of basic rights be supplemented by a "*status activus processualis*" (in the sense of a "government-performative due process"), and the Federal Constitutional Court's (FCC's) first Numerus-Clausus decision (of 18 July 1972) and its Term Abortion decision (of 25 February 1975), with its recognition of the state's "comprehensive" duty to protect (and promote!)[3] unborn life, all mark advanced positions in theory and judicial

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[1] See ERNST FORSTHOFF, RECHTSSTAATLICHKEIT UND SOZIALSTAATLICHKEIT (1968).

[2] Outline of the development of basic law function in ERHARD DENNINGER, STAATSRECHT 2 (1979) 136 e, 162; also see, KOMMENTAR ZUM GRUNDGESETZ (REIHE ALTERNATIVKOMMENTARE), Before Art. 1 GG, Rn. 1-30.

[3] Decisions of the Federal Constitutional Court – 39 BVERFGE 1 (42).

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decision-making.[4] At the same time, new life was given to the discussion concerning "basic social rights" (such as the "right to work", "to shelter", "to education", "to social security", etc.), and new and expanded forms of social protection, in short: concerning the concretization of the social state principle.[5] Yet the welfare-state, "social-liberal" reform impulse soon ran up against political-economic limits: the "feasibility proviso" allowed the merely "ideal standard" character of subjective performance rights to become all too quickly apparent.[6]

From a political standpoint largely a failure, this reform discussion nevertheless showed its enduring value for basic rights theory (thanks to constitutional decisions concerned with preserving rule-continuity) during the late 70's and early 80's in two major respects: 1) the state's *objective-legal protective obligation* vis-à-vis basic rights interests – resting on the obligation to protect human dignity (Art. 1, para. 1, sentence 2 of the Basic Law (BL) and the binding of all government organs to the Basic Law (Art. 1, para. 3, BL) – is extended to *procedural regulations of all kinds*. At the same time, the subjective legal status of the basic right holder in procedures with the second or third governmental power (*i.e.*, the executive or the judiciary) is expanded. Konrad Hesse's representative and concentrated overview of the problem (given in this capacity as German State-reporter to the Fourth Conference of European Constitutional Courts in October 1978),[7] the decisions on § 7 AtomG (Statute on Nuclear Energy) (Kalkar, Aug. 8, 1978) and on compulsory real estate auctions (27 September 1978) (particularly the dissenting opinion of Judge Böhmer), the Mühlheim-Karlich decision of Dec. 20, 1979, the right of asylum decision of 25 February 1981, and the effectuation of the tenth book – on administrative procedure – of the Social Law Code of 18 August 1980 now mark the salient positions of the problematic in legal theory, judicial decision-making, and legislation.[8] The airplane-noise decision of the First

[4] Peter Häberle, *Grundrechte im Leistungsstaat*, (30) VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STRAATSRECHTSLEHRER (VVDStRL) 43 (1972); 33 BVERFGE 303 and 39 BVERFGE 1

[5] W. Schmidt, *Soziale Grundrechte im Verfassungsrecht der Bundesrepublik Deutschland* (1981), 9.; Bericht der Sachverständigenkommission,*Staatszielbestimmungen/Gesetzgebungsaufträge*, (1983), Rn. 75; D. Posser etR. Wassermann (ed.), *Freiheit in der sozialen Demokratie*, (1975)

[6] 33 BVERFGE 303 (333); Häberle, *supra*, note 4, 110, 138, thesis 34, now generally accepted.

[7] Konrad Hesse, *Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland*, EuGRZ 427, 343 (1978)

[8] Sequentially: 49 BVERFGE, 220 (228); 53 BVERFGE 30 (69) (dissenting opinion); 56 BVERFGE 216. From the literature, see especially: H. Bethge, *Grundrechtsverwirklichung und Grundrechtssicherung durch Organisation und Verfahren*, NJW 1 (1982); W. BLÜMEL, GRUNDRECHTSSCHUTZ DURCH VERFAHRENSGESTALTUNG, 23 (1982); H. GOERLICH, GRUNDRECHTE ALS VERFAHRENSGARANTIEN (1981); F. KOPP, VERFASSUNGSRECHT UND VERWALTUNGSVERFAHRENSRECHT (1971); H.W. Laubinger, *Grundrechtsschutz durch Gestaltung des Verwaltungsverfahrens*, 73 VERWALTUNGSARCHIV 60 (1982); D. Lorenz, *Grundrechte und Verfahrensordnungen*, NJW 865 (1977); *Der grundrechtliche Anspruch auf effektiven Rechtsschutz*, AöR 105 623 (1980); F. Ossenbühl, *Kernenergie im Spiegel des Verfassungsrechts*, DIE OFFENTLICHE VERWALTUNG (DÖV) 1 (1981); *Grundrechtsschutz im und durch Verfahrensrecht* 183, in FESTSCHRIFT FÜR EICHENBERGER (1982); K. Redeker, *Grundgesetzliche Rechte auf Verfahrensteilhabe*, NJW 1593 (1980); Ch. Starck,

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Senate (14 July 1981)[9] also belongs here thematically, because of the possible admission of a constitutional complaint against legislative omission (and despite the decision's largely hypothetical speculations).

Of course, the central idea behind this procedure-oriented basic rights interpretation (or – although this is not the same thing – this basic rights-oriented procedural rule interpretation), that is, the "relevance of procedure to basic rights" (more exactly: the notion that effective fulfillment belongs to the "essential components" of a basic right)[10] is a much older perception. It is therefore misleading to give the impression that the procedural relevance of basic rights was the fruit of an only recently undertaken broadening of the basic rights' meaning, or even a matter of their "functional transformation".[11] This view is partly correct, inasmuch as the FCC, when confronted with the question of effective fulfillment of the law, usually (but not always – BVerfGE 39, 276 (295)[12] focuses on effective protection of the law by the judge. The beginnings of the relevant chain of tradition with the Hamburg-dike regulation law decision (18 December 1968)[13] – "legal expropriation" due to reduction of possibilities for legal protection only allowable in exceptional cases – illustrates this. The "new" element in judicial decisions since the Mühlheim-Kärlich decision (1979) is the strong emphasis on basic rights relevance also for "pre-judicial" administrative procedure.[14]

The possibility that a substantive basic right could be affected by different modes of procedural structuring, and the resulting demand for procedural and organizational regulations conforming to the basic rights, are therefore not peculiar to the (in the modern sense) "performing", "planning", and steering administration. It is equally valid for the "classical" intervening and ordering administration, and thus for the defensive function of the basic right as an expression of the *status negativus*. An effective protection of the basic right in this status demands, as procedural complements of the substantive legal status, not only a "right to a fair procedure" or the "claim to fair procedural conduct", but effective individual granting of legal protection as is today derived from Art. 19 para. 4, BL.[15] This however is not represented as a mere omission (of an intervention into the

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STAATLICHE ORGANISATION UND STAATLICHE FINANZIERUNG ALS HILFEN ZU GRUNDRECHTSVERWIRKLICHUNGEN?, 480 (1976).

[9] 56 BVERFGE 54

[10] 39 BVERFGE 276 (294), endorsing the consistent practice of the courts.

[11] For this, however: D. Grimm, *Verfahrensfehler als Grundrechtsverstöße*, NVwZ 865 (1985). On the evolution of basic rights, see H.H. Rupp, AöR 101 (1976), 161; P. SALADIN, GRUNDRECHT IM WANDEL (1982).

[12] The legislator must effectively regulate university admission.

[13] 24 BVERFGE 267 (401), quoted in 53 BVERFGE 30, dissenting opinion 69 (73).

[14] Blümel, *supra*, note 8, 33. See also already in 33 BVERFGE 303 (341); 41, 251 (265); 52 BVERFGE 380 (390)

[15] For instance, BVERFGE 46, 202 (210); 52, 380 (389).

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protected space of the basic right freedom), but rather as a positive "performance" by the state. No one has more clearly formulated this than Georg Jellinek, as far back as 1892/1905. The negative status (oriented toward fending off and abstaining from disturbances) first attains "its juristic status" when supplemented by the positive status, and the "claims deriving from this upon the state". "The most significant claim deriving from the center of this positive status is the claim to protection of legal rights. This claim can be directly characterized as the essential characteristic of the personality". The source of this (not private-legal, but public-legal) claim is "the personality itself".[16] We will get to the question of the legitimation, of the "source" of subjective-legal procedural statuses later; here we are first interested in the assertion that their concession is not only a consequence of the modern, "redistributing" or "dispensing" performance-administration, nor of the association of the planning and steering administration with legislative final programs or indeterminate legal concepts.[17] It is the case that the complexity, duration, and effects of large-scale planning administration procedures (*e.g.*, those involved in the planning, construction and operation of nuclear power plants) and the large number of citizens possibly participating or affected, make it necessary that there be legal protections already pre-established in the *administrative* procedures themselves, if they are to be *effective* at all. This makes clear that basic rights realization is procedure-dependent already in this phase. And yet, long before the Mühlheim-Kärlich decision, the immediate influence of the substantive basic right (here: freedom of profession, Art. 12, para. 1, BL) upon an *administrative* (examination) procedure in a completely "traditional" procedure of "administrative ordering" (namely, the first lawyers' state examination), was basically found to be (and applied as) the "by-now established judicial position".[18]

II. A Typology of the Functions of Procedural and Organizational Regulation for Basic Rights Realization

1. Four Types of Functional Classification of Basic Rights and Procedural or Organizational Regulation

It would therefore be an impermissible simplification to describe the basic rights development simply as a two-phase succession, a phase of "freedom from the state" being replaced by one of "freedom through the state", and to link the basic rights relevance of procedural regulations with the granting of corresponding subjective-legal statuses to the

[16] G. JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE (1905), 105, 124, 125. For the significance of Jellinek in this connection: R. Breuer, *Grundrechte als Anspruchsnomen*, (91) FESTGABE BUNDESVERWALTUNGSGERICHT (1978).

[17] With a different emphasis: Grimm, *supra*, note 11, 865.

[18] 52 BVERFGE 380 (389); see also *supra*, note 14.

second phase. The *Rechtsstaat* has always acknowledged its "protective duty" (Georg Jellinek)[19] vis-à-vis individuals and their freedom by issuing procedural and organizational rules, not least of all with respect to the shaping of the institutions of private law. Even a cursory look instructs us that the legal interests protected by such "classical" basic rights as freedom of property, marriage, rights of association and union, etc. were (and still are) subject to a multitude of organizational and procedural regulations, intended to serve in part their own protection, in part the protection of important public interests, and in part too the resolution of collisions between basic rights. As fundamentally important procedural regulations one should here mention first of all the "proviso of law", the principle of proportionality of administration (Art. 20, para. 3, BL) including the order of governmental authorities and the establishment of a freedom-protecting administrative procedure. The *judicial* legal protection process (Art. 19, para. 4, 92, 97, BL) is in line with this.

If one attempts to classify the multiplicity of typical relationships between basic rights and procedural or organizational provisions under functional viewpoints, it becomes apparent that, with few exceptions (see (a) and (d) below), the classifications can *not be made specifically with respect to the basic rights*. This means that one and the same basic right can, depending on the mode of its exercise, be subject to procedural regulations for totally different purposes and in completely different ways, or for its part can have an impact on such regulations.

Nevertheless, the relationship of the basic rights to procedural or organizational regulations can *typically* be ordered into four groups:

(a) A particular procedure or a particular procedural structure can itself become the *subject of a basic rights guarantee*. Here the characterization "procedural basic right" is appropriate. Good examples are the guarantees of recourse to the courts (Art. 19, para. 4 BL), and, although not standardized in the basic rights section, the "basic judicial rights" of Art. 101, para. 1 BL (which assures that judges be chosen for specific cases via a neutral, legal procedure) and Art. 103, para. 1 BL (the right to be heard in all legal proceedings). The principles regulating the electoral process (Art. 38, para. 1 BL) also belong in this category.
(b) The exercise of the basic right in a concrete case depends on successfully following a procedure. This does not mean that the basic right in other objective situations could not in fact also be exercised without such a procedure. Yet the legislature in certain cases (or perhaps always) makes the allowable claim to the basic right dependent on a procedural control (a "test") or other procedural conditions.
(c) A procedure serves neither the realization of a certain basic right X nor the control of its exercise, but rather *other* purposes, whether it be the legal and basic rights

[19] Jellinek, *supra*, note 16, 125

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realization of third parties, or a legally determined public interest. The basic right X which is negatively affected thereby must be protected by conceding corresponding procedural statuses to the holder of the right.

(c) A basic right can de facto be exercised only by making claim to particular (governmental or non-governmental, "social") performances or institutional arrangements. The competition or cooperations of several holders of the same basic rights demands distributive and opinion-formation (Willensbildung) procedures or other organizational performances which make possible a balancing of interests and performances and a partly collective, partly individual basic rights realization for each of the respective holders of the basic right.

2. Is a Procedural/Organizational Structure Required by the Basic Rights? Statements from Constitutional Decisions

"Substantive" protection of basic rights and the structuring of procedure in the Rechtsstaat reciprocally condition one another.[20] If it is acknowledged (along with the FCC)[21] that "effective legal protection" – whatever that might be – is "an essential element of the basic right itself", then one cannot conceive of the thereby required (administrative or judicial) legal protection *procedures* as regulations which so to speak are added to the substantive basic right from the outside, as regulations which are "neutral vis-à-vis the basic rights". On the contrary, the procedural or organization structuring must serve to further the basic rights. Neither the procedural aspect nor the substantive legal content can unconditionally predominate in this reciprocal relationship. In the first case, the basic right would collapse into a bundle of procedural positions which were to be tied together by the legislature; the new law regarding refusal to perform military service (passed 28 February 1983)[22] offers an example for this which hopefully will not be imitated. The second case would in fact ultimately lead to a dissolution of all general structures of judicial procedure into a "legal actions procedural net" and to a "special, basic-rights specific procedural law" – and the Second Senate of the FCC has correctly warned us about the disadvantages of such a development.[23] The consequences of an imbalance in this reciprocity, of a disharmony (with respect to content) of substantive law and legal procedure, were clearly expressed by the FCC: "Should the legal procedure established by the legislature fail to fulfill its job, or should it impose such high barriers on the exercise of a right that the danger arises of a devaluation of the substantive legal status, then it is irreconcilable with the basic right

[20] On this also, Lorenz, *supra*, note 8, 865, 866, 868.

[21] 24 BVERFGE 367 (401)

[22] BGBl. I, 203; confirming this 69 BVERFGE 1; see however dissenting opinions by Böckenförde and Mahrenholz, 57; also, Mahrenholz, 87.

[23] 60 BVERFGE 253 (297)

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which it is intended to protect".[24]

However, it is much more difficult to do the opposite and make a *positive* statement about what the procedural rules must look like, *so as* to afford the necessary degree of "basic rights protection via procedure". In other words: the difficulty consists in developing criteria (which will also be applicable in judicial administration) for demarcating the basic rights-protecting procedural and organizational rules not only allowed but indeed *required* by the Basic Law. For constitutional review of procedural regulations (above all in procedures for constitutional complaints) such a demarcation within the totality of (technically highly differentiated) procedural laws is of decisive importance. The first aid which the FCC attempted to provide with its Mühleim-Karlich decision proved a shaky support: If the court takes a basic right violation "into consideration" when presented with a violation of a procedural regulation "which the state has issued in fulfillment of its duty to protect" the legal interests covered by the substantive basic right, then this leads either to the limitlessness of subjective-historical motivation research of legislative intent, or back to the unsolved question about objectifiable criteria.[25] A second indication given by the Court, in the right of asylum decision of 1981,[26] may be somewhat richer in "content", yet it remains too general and in need of concretization; moreover, that decision prompted a storm of criticism from both constitutional-theoretical and methodological points of view. According to that decision, violations of procedural regulations would be of "constitutional relevance" – or, differently expressed: such regulations would be "constitutionally required" – if, "according to the legislature, those regulations were fundamental in assuring the maintenance of the right of asylum".

3. Critique and Counter-Critique

The principle critique of this concept can be reduced to the formula: "From conformity of procedural law with the basic rights, to conformity of basic rights with the procedural law" – thus varying Leisner's old formula.[27] While the problem may be an old one, its solution requires new and concrete efforts. Can one really say that on the basic of those judicial guidelines the basic rights protective area orients itself according to the will of the legislature, that it is no longer the Basic Law, but the legislative proposals and protocols of Parliament which determine the scope of basic rights protection?[28] Does the significance of

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[24] 63 BVERFGE 131 (143)

[25] 53 BVERFGE 30 (65)

[26] 56 BVERFGE 216 (242)

[27] W. LEISNER, VON DER VERFASSUNGSMÄßIGKEIT DER GESETZE ZUR GESETZMÄßIGKEIT DER VERFASSUNG (1964); ID., DIE GESETZMÄßIGKEIT DER VERFASSUNG (1964), 201

[28] Thus K.-P. Dolde, *Grundrechtsschutz durch einfaches Verfahrensrecht*?, *Neue Zeitschrift fur Verwaltungsrecht*

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the substantive basic right (just like during the Weimar Republic) sink to the level of "a modified principle of legality of administration and judicial decision-making"? On the other hand, is it really correct to say that procedural law "required by the basic rights" is elevated to the status of constitutional law and that, after constitutional decisions have proven it to be a "substantive aspect of the Constitution",[29] it thereby not only gives the FCC (in comparison to the "specialty courts") an additional (and perhaps dubious) power of control (for now of course it is a matter of the violation of "specific constitutional rights"), but above all blocks the democratic legislature's intentions of changing the law?

It is initially important to point out the strange, Janus-faced quality of this criticism: on the one hand it displays concern that the substantive content of the basic right could all too easily fall subject to the arbitrary will of the legislature; but on the other hand it sees the playing room of the legislature endangered by the asserted elevation of the procedural law required (or at least sanctioned) by the basic right, and the concomitant restrictions upon change.[30]

Yet a proper understanding of the decisions on procedural law, read in the total context of basic rights decisions, reveals that the legislature is neither so powerful vis-à-vis basic rights nor, after passing the judicial test of constitutionality, so impotent as many critics fear.

(a) The problematic, as it shows up in the relationship between substantive basic law and "structuring" or "ordering" organizational/procedural regulations, is identical to the way it appears (for example) in the relationship between the constitutionally-guaranteed institution of "property" (Art. 14, para. 1, sentence 1, BL) and the laws which determine its content and limitations (Art. 14, para. 1, sentence 2). The FCC's statement[31] that in determining the constitutional-legal status of the property-owner, the Civil Law and the public laws are to be taken equally into account, and that the concrete powers over property at a given point in time could be discovered only after a "comprehensive examination" of all valid legal regulations controlling the property-owner's status, provoked a wave of scholarly legal critique,[32] the concerned tenor of which was concentrated in the question: Was property to be protected only according to the

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NVwZ 65, 69 (1982); also critical J. Held, Der Grundrechtsbezug des Verwaltungsverfahrens (1984), 106, 253.

[29] Thus Ossenbühl, *supra*, note 8, 192; similarly concerned is Grimm *supra*, note 11, 868.

[30] See Ossenbühl, *supra*, note 29; not thus concerned Dolde, *supra*, note 28, 69.

[31] 58 BVERFGE 300 (336)

[32] Good overview of problem in J. Ipsen, *Nuere Entwicklungen der Eigentumsdogmatik*, Recht und Wirtschaft, Osnabrücker Rechtswissenschaftliche Abhandlungen Band 1, Cologne *et al.* 129 (1985). Ipsen lists 27 publications *ad hoc* without claiming exhaustiveness, 130.

standards set by legislation"?[33] The practical effect of this decision is above all a *procedural* one: primary legal protection against illegal or unconstitutional seeming interferences with property is to be sought from the administrative courts, not the ordinary courts. Given the still solid and consistent position of the FCC with respect to a genuinely *constitutional* concept of property (which is characterized by an attribution to a holder of rights, by this holder's fundamental power of control, by private usefulness, but also by the socially-bounded nature of property)[34] and given too the calm reaction of the Bundesgerichtshof's compensation decisions[35] to the (after all not really so new) property and expropriation doctrines of the FCC, apocalyptic visions of the decline and fall of "bourgeois" property seem misplaced.

(b) Characteristically, the reaction in the scholarly journals to the accentuation of the "constitutional relevance" of procedural law[36] followed a somewhat different path. Attempts were made to channel the feared legislative dynamic (which others however greeted warmly of even encouraged)[37] through a new *table of categories* of the basic rights. For example, Ossenbühl[38] has proposed, besides the already-mentioned category of "basic procedural rights" – which, remarkably enough, he takes to include the abolition of the death penalty (Art. 102 BL), – a three-way division of the basic rights into 1. procedure-dependent, 2. procedure-affected and 3. procedure-imprinted rights. It is characteristic of the *first group* of rights that the substantive basic right guarantee cannot be effectively claimed and exercised possession of the basic right in a particularly-ordered procedure. The structuring of the procedure is "therefore so to speak a basic rights-existential question". One could distinguish between "essential" procedure-dependent basic rights (*e.g.* the right of asylum (Art. 16, para. 2, sentence 2) and the right to refuse to perform military service (Art. 14, para. 3) and "potentially" procedure-dependent basic rights, such as that of freedom of profession in the distribution of university study locations (Art. 12, para. 1 BL). The common denominator for procedure-dependency is the necessity of governmental "distribution"; in the cases mentioned, it is a matter of basic *performance* rights, through which "special entitlements (exceptional rights) are sought and granted".

While this interpretive scheme may be adequate as a description of the legal situation confirmed by the FCC, it raises all the more *doubts* with respect to its basic rights-

[33] See H.J. Papier, Maunz/Dürig, Kommentar zum Grundgesetz, Art. 14, Rn. 35. On this also E. Denninger, Die Zweitanmelderproblematik im Arzneimittelrecht, GRUR 627, 633 (1984).

[34] See 58 BVERFGE 300 (335, 338); 50, 290 (339); 52, 1 (29).

[35] BGH DVBl, 391

[36] 53 BVERFGE 30 (71) (dissenting opinion)

[37] In this sense, see Blümel, *supra*, note 8, 78, 83.

[38] Ossenbühl, *supra*, note 8, 1981, 1982

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theoretical starting point. These doubts are first of all aimed at the assumption of the "so to speak" basic rights-existential significance of the (recognition or distribution) procedure. The right, for example, to refuse to perform war service involving the use of arms is neither a "basic performance right" with which the objector seeks an "exceptional right" or a "special entitlement", nor does it correspond to a requirement "in the nature of the case", that this right could only be effectively exercised on the basis of a governmental recognition procedure. For it is not the case that the military service objector seeks – as it were "for the sake of mercy" – a particular governmental performance ("distribution" or "granting"), but quite the reverse: the state is demanding a performance from him, namely military service involving use of arms. In this sense the right from Art. 4, para. 3 BL is more accurately described as a performance-duty *defensive* basic right. As such, a claim could effectively be laid to it purely de facto, without any procedural intervention, if the draftee simply failed to follow his induction orders. The procedure of official recognition to which the objector is subjected is consequently not required because the basic right otherwise would not exist or could not be meaningfully exercised, but because the state wishes successfully to achieve its "public interest" (here: the performance of military service), which happens to run counter to the right of the individual, and the state can only do this (given the constitutional decision of Art. 4, para. 3 BL) in a legal manner against the will of the objector if the objector has "lost" in a fair procedure. The detailed analysis of the procedural structuring in the new war service refusal law also shows that the procedure was at least as much designed for the certain fulfillment of the "basic constitutional decision in favor of military defense of the nation"[39] as it was for the realization of the individual's right to refuse. As the Court has consistently recognized, this is "a basic right; it is not just a matter of 'principle' which first needs actualization through the legislature. The Constitution directly guarantees the citizen the right, for reason of conscience, to refuse to render war service involving arms". And "insofar as the objective scope of a basic right can be directly established through interpretation, there remains no room for constitutive regulation by the legislature".[40] This is a matter of a basic right for *everyman* – it would be valid for women or resident aliens, provided they too were called upon to perform military service involving use of arms. But this means that it is not a mere "exceptional right", but rather according to the Constitution a "regular basic right", just like every other basic right, regardless of whether the legislature proceeded in the expectation that its valid exercise would (statistically) remain the exception rather than the rule.

In principle, the same thing is true for the basic right of political asylum. Just as with the right to refuse military service, one must take into account the significance of the "pre-procedural", substantive-legal content of the basic right, a significance which is closely connected to the inviolability of human dignity.[41] Otherwise one runs the danger of

[39] 48 BVERFGE 127 (159); 69, 1 (21)

[40] 12 BVERFGE 45 (53)

[41] This is emphasized in 54 BVERFGE 341 (357); 56, 216 (235); R. Marx, *Eine menschenrechtliche Begründung des*

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acknowledging the basic right only according to the standard of some procedural regulations which serve completely different public interest goals. These regulations are of course supposed to further the *realization*, not the hindrance, of the substantive basic right. The First Senate of the FCC emphasized this, simultaneously with the legislature's broad freedom to structure the procedures, when the Court acknowledged the legislature's power to create any regulation "which recognizes the meaning of the right of asylum and makes possible a dependable and just examination of asylum petitions".[42] On this basis it is then constitutionally unobjectionable to characterize the right of asylum as "placed under a procedural proviso",[43] so long as one takes into account the rule (developed for the parallel case of Art. 4, para. 3 BL), that the legislature may "not restrict this basic right in its objective content, but only make clear the limits which already are inherent in the concepts" of the basic right norm itself.[44]

Even from a normative-theoretical point of view it is unjustified to form a special category of "procedure -dependent" basic rights and to verify it with the basic rights from Art. 4, para. 3, Art. 165, para. 2, sentence 2 BL, as well as other basic rights in distribution procedures (Art. 12, para. 1 BL, study location distributions). To give merely a few simple counter-examples: the right to practice as a lawyer (likewise Art. 12, para. 1 BL) is granted only to those who have successfully passed the two state lawyer's examinations and gone through the admissions procedure specified by the federal attorneys code, *i.e.* those who have been officially "recognized" as "full jurists", §§ 4, 6 BRAO, § 5 DRiG. Or: whoever wishes to use his property in constructing a house, must first submit to the construction supervision procedure (*e.g.* §§ 87 HessBauO with §§ 29 BBauG); whoever wishes to exercise his basic right to freedom of physical movement (Art. 2, para. 2, sentence 2 BL) or to freedom of travel (Art. 11 BL) with the help of a motor vehicle may do this only after passing the procedures controlling issuance of drivers' licenses and the admission of motor vehicles, §§ 1, 2, StVG, etc. All of these and other basic rights could be labeled "procedure-dependent rights" just as reasonably as the above-named rights (see above, section II. 1., at (b)); fundamental distinctions between them with respect to procedure-dependency are not evident.[45]

Asylrechts, Baden-Baden (1983). Against the assumption of constitutive effect of declaratory act, also F. Rottmann, *Das Asylrecht des Art. 16 GG als liberal-rechtsstaatliches Abwehrrecht*, 22 DER STAAT 337, 357 (1984).

[42] 56 BVERFGE 216 (236); see also dissenting opinion by Judge W. Böhmer BVERFGE 49, 220, 228; 243: "Procedural law serves not only the aim of ensuring orderly proceedings but also in the sphere of relevant basic law is the medium enabling the holder of basic rights to obtain his constitutional rights. Accordingly, where several interpretations of procedural law are possible, that one should be chosen which empowers the court to make basic law effective".

[43] 60 BVERFGE 253 (295)

[44] 48 BVERFGE 127 (163); 69, 1 (23)

[45] Similarly, Held, *supra*, note 28, 255: "There is no basic law dependent per se on procedure".

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"Procedure-affectedness" is likewise not a specifying characteristic of certain basic rights. Every basic right (independent of whether and to what degree it requires government protection or prior government recognition for its exercise) can become a procedure-affected right if it is attacked by the sovereign or by private parties. The same is true for the cases above in section II. 1., at (c)).

Finally, the dividing line between the so-called "procedure-dependent" (above section II. 3., at (b)) and the so-called "procedure-imprinted" basic rights (freedom of reporting by means of broadcasts, Art. 5, para. 1, sentence 2 BL, and the freedom of scientific endeavors, Art. 5, para. 3, BL,[46] are named as examples) is at best a fluid one – certainly it cannot be categorical. Thus it is not clear why the basic right to the free choice of a training location (in a numerus clausus field of study) should belong to the group of "procedure-dependent" rights, while the basic right to freedom of scientific endeavor belongs to the group of "procedure-impressed rights"; both share the quality that their exercise is "necessarily tied in with participation in governmental performances",[47] both therefore presuppose a certain degree of legal organization (or one resting on a legal basis) and an apportioning or distribution procedure which corresponds to the purpose. Both are cases of the type mentioned above in section II. 1., at (d)).

B. Constitutional Standards for Structuring Procedural and Organizational Regulations to Protect and Promote the Basic Rights

I. Type and Scope of the Legislature's Obligation of Protection

This critique of the attempt to create a procedure-related table of categories for the basic rights is intended to make clear that one can speak only in a very limited sense of a basic rights-specific proximity (or distance) to governmental procedural and organizational regulations. Such analysis makes sense only for the "basic procedural rights" (above section II. 1., group (a)) and (to a lesser degree) for the "procedure-impressed" basic rights requiring apportioning or distribution (above, section II. 1. group (d)). For the rest, it is the respective legal *situation* (the manner in which claim is laid to the basic right, its encounter with: (a) competing or cooperating exercises of similar basic rights, (b) exercises of different constitutional or legal rights, (c) objective-legally protected public interests) which determines in what way and to what degree a specific type of realization of a basic right should be either protected and promoted, or "channelized" (and perhaps even "braked"), through procedural and organizational provisions.

[46] Ossenbühl, *supra*, note 8, 187

[47] For Art. 5 Abs. 3: 35 BVERFGE 79 (115); for Art. 12 Abs. 1: 33 BVERFGE 303 (332).

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The draft of a Constitution proposed in 1977 by the Swiss Commission of Experts for the preparation of a total revision of the Swiss Federal Constitution, one of the most mature products of the modern, free, and democratic art of constitution-making, specifies in Art. 24: "Basic rights must be given effect in the whole of legislation, and particularly in organizational and procedural provisions".[48] This formulation neatly expresses the reciprocity between basic rights protection and such regulations (see above, section II. 2.): the organizational and procedural provisions must be *impressed* by the basic rights, so that for their own part they can be useful in *furthering* the basic rights. Yet this determination leaves open the issue of how "stringently" the constitution confronts the legislature. And this question has by no means been answered for Germany's Basic Law, either.

In principle, there are three conceivable positions here: (a) One can derive from the Constitution an organizational-procedural basic rights-optimization requirement.[49] The legislature would accordingly satisfy its obligation of protection only when it had passed and ordered application of procedural and organizational regulations for the optimal protection of basic rights interests. (b) One can initially consider the tasks of administration separate from any basic rights-realization. The administrative procedure would thus be per se "basic rights-neutral". At those points where individual basic rights freedoms could be endangered, the structuring of procedure must be achieved in a "basic rights-protective manner". Accordingly, what would be demanded "for the sake of the basic right would be (only) a minimal standard of the absolutely necessary procedural protection".[50] (c) Finally, renouncing all generalizing statements, one could attempt to determine case by case the weight of the respective basic right in each respective procedure.

Overall, the FCC's decisions in this matter offer no clear-cut picture. In the decisions of the First Senate (particularly in the dissents of Judges Heußner and Simon) one finds expression of a tendency towards measuring the constitutional demands upon the legislature by the *optimization* of the basic rights protection. As early as the judgment on Lower Saxony's university law (1973), one finds in the dissenting opinion of Rupp v. Brunneck and Simon talk of the "most effective realization possible" of the values embodied in the basic rights as one of the most eminent tasks of the legislature issuing organizational norms; yet restraint is recommended when a court scrutinizes the legislature's decisions for constitutionality.[51] In discussing the impact of the right of asylum (Art. 16, para. 2, sentence 2 BL) on extradition procedure, the entire First Senate in 1979

[48] In the draft for a new Federal constitution of 16 May 1984, by A. Kölz and J.P. Müller, *Münsingen* (1984). There is no equivalent requirement. Müller had been a member of the Swiss expert commission.

[49] See R. ALEXY, THEORIE DER GRUNDRECHTE (1985), 75.: Other than rules, principles are the requirements for optimisation; 122. Basic law provisions often have a double character; they are both rules and principles.

[50] Held, *supra*, note 28, 255; Breuer, *supra*, note 16, 89 , 94

[51] W. Rupp-v. Brünneck & H. Simon, dissenting opinion, BVERFGE 35, 79, 148 (153)

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emphasized "the constitutional duty which the specialty court had in structuring the procedure to aim for the best possible protection of the complainant's basic right".[52] This formula of the best possible protection of a basic right through the structuring of procedure and procedural law appears twice in the dissenting opinion to the Mühlheim-Kärlich decision.[53] In 1983 the Senate laid down the standard of "*effective* protection of the basic right" through procedural law.[54]

The Second Senate stresses, above all in its decisions on asylum procedure, the broad structuring freedom possessed by the legislature; its regulations must be "objective, suitable, and reasonable. "Only" elementary procedural requirements that are indispensable to the Rechtsstaat can be derived from the substantive basic rights".[55] Yet it would be premature to conclude from these statements that there is a general tendency towards minimizing the basic rights-protection through procedure or organization. It was, after all, the Second Senate which in the Kalkar decision (1978) not only developed (while dealing with legislative provisions of the law on atomic energy) the notion of dynamic basic rights protection, with the duty of the legislature to provide "subsequent improvements", but also *constitutionally* activated the principle (which dominates technological safety law) of the "best possible defense against dangers and prevention of risks" as a protection against mere ("not inconsiderable") endangerings of basic rights. An expression of this fact in the realms of administrative law (an expression which with respect to the Rechtsstaat must be seen as an exception) is the concession of an additional "refusal judgment" to the atomic energy approval authority.[56] That the very generally expressed criteria could lead to remarkable divergences within one and the same Senate even in the matter of "timely" granting of rights protection (in the sense of Art. 19, para. 4 BL), is demonstrated by the two preliminary examination committee decisions of 12 May 1980 and 1 August 1980.[57] Both decisions dealt with a granting of rights protection at an early stage in the air traffic law's approval procedure (according to § 6 LuftVG) and not merely in the subsequent plan confirmation procedure (according to §§ 9, 10 LuftVG). Whereas one 3-person committee could see in the planning obligation effectuated by the approval according to § 6 LuftVG no legally relevant, but only a de facto, burden on communal planning, a burden which as such still gave no rise to legal recourse, a second 3-person committee from the same Senate spoke out a little later on behalf of also taking into account the "de facto

[52] 52 BVERFGE 391 (408)

[53] 53 BVERFGE 30 (70, 75)

[54] 63 BVERFGE 131 (143)

[55] 60 BVERFGE 253 (295); continued for Art. 4 Abs. 3 GG in 69 BVERFGE 1 (50).

[56] 49 BVERFGE 89, in the sequence of quotations: (137, 130, 139, 146).

[57] BVERFGE of 12.5.1980 and of 1.8.1980, both in DVBl. 1981, 374; see also E. Schmidt Aßmann, *Konzentrierter oder phasenspezifischer Rechtsschutz?*, DEUTSCHES VERWALTUNGSBLATT 334 (1981); Blümel, *supra*, note 8, 82.

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compulsory (or highly likely) effects of a decision upon the citizen". Limitation of contestability to the concluding plan confirmation decision for reasons of efficiency would mean an impermissible contraction of rights protection.

On the basic of similar considerations – only early rights protection can be effective – Blümel and Redeker[58] demand citizen participation at an early stage of street planning (*e.g.* during highway alignment determinations, according to § 16 BFStrG) as a *basic rights* requirement. By contrast, critics of the Mühlheim-Kärlich line such as Dolde or Goerlich[59] warn of a constitutional over-valuation of the simple procedural law, in part out of concern about a possible refashioning of the procedural guarantees into participation obligations, to the disadvantage of the citizen. In fact, Redeker[60] had already drawn the consequences of elevated procedural participation in the sense of corresponding "participation burdens" of the citizen up to the point of preclusion – and from "burden" ("obligation") to "duty" is only a small step.

"Optimization", "minimization", limitation to the "appropriate" of the "necessary" of the "effective": such "standards" can only describe rough tendencies; advocacy of one or the other seems to be more a matter of taste than of stringent reasoning. If one wishes to avoid either falling into an unprincipled and aconceptual casuistry (above section B I at, c), or abstractly and generally calling upon "the already-established valuations, principles, norms and fundamental decisions in the Constitution",[61] if one wishes therefore to attempt to bring the discussion onto terrain theoretically suitable to basic rights, then clarity must rule in two respects: in the *legitimation* question and in the function question. The first focuses on the unified basis of *justification*, which provides a fundament for the completely different phenomena of basic rights-relevance of procedure and organization. Concretely expressed: the type and extent of the legislative protection obligations vary according to whether one sees them founded primarily in the principle of human dignity and in the individual case-related, concretized Rechtsstaat principle, or primarily in the public-good and democracy principles (on this, see below section II). The second question aims at the (in each case area-specific) *teleological* basis, at the causa finalis for a specific procedures or a specific organization and attempts from there to determine what is "required by the basic right", and what is not. Organization and procedure are of course not goals in themselves, rather they serve to further rational communication given a specific objective in view, whether it be the advancement of the sciences, the securing of free development of public opinion via the mass media, protection of conscience, national defense, the certainty of the law, or any other public interest. Thus only such structures

[58] Blümel, *supra*, note 8; Redeker, *supra*, note 8, 1597

[59] Dolde, *supra*, note 28, H. Goerlich, *Schutzpflicht – Grundrechte-Verfahrensschutz*, NJW 2616 (1981)

[60] S. Redeker, *supra*, note 8, 1597; on this also Görlich, *supra*, note 59

[61] 62 BVERFGE 1 (39)

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could be "required by the basic rights" which are procedurally or organizationally indispensable for the production of the specific communication-structures whose absence would lead to the collapse of rationally-conducted communication.

II. Legitimation of Basic Rights Protection via Procedure and Organization

"At the heart of the constitutional order stand the value and the dignity of the person, who in free self-determination acts as a member of a free society".[62] Independence, self-responsibility, and freedom of decision of the person[63] form not only the basis of the institutions of substantive law, they also require the consistent realization of the citizen's "subject status" in procedural law. They establish the "necessity of conversation between administration and citizen",[64] they prohibit allowing the human being to be made into a "mere object of government action", forbid the government to wield control over him as though over an object, whether with "good" or "bad" intent.[65] True, the individual is "subject" to all valid laws and owes obedience to them, yet these laws find their own limits in the basic rights of the citizen (Art. 1, para. 3, BL). To establish in a given case precisely where this limit lies, a particular (discovery-)procedure or even a process of opinion-formation within an organization may be necessary: It is at this point that the fundamental subject-status of the person demands that each individual in this procedure or in this organization be able to play his own part in the opinion-formation process. The result may completely or partially fall against him, but he must have had a fair chance to have influenced it.

Situationally concrete procedural or organizational participation may have a direct protective or promotive effect on basic rights. In many areas today, individual basic rights freedom can only be meaningfully realized in *cooperation* with other basic rights holders, in fact sometimes only via complementary activity of both the sovereign right holder and basic rights holder.[66] Such a cooperative exercise of basic rights presupposes that the individual is tied into complicated decision processes and trans-individual organizational forms. Examples often cited are the freedom to broadcast and the freedom of science (as organized in publicly-funded institutions); yet the same is true in the wholly "profane" area of the corporate-law bound, *e.g.* stock property. In such organizational structures,

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[62] BVERFGE 65, 1 (40)

[63] On this E. DENNINGER, RECHTSPERSON UND SOLIDARITÄT (1967), 80, 229

[64] 45 BVERFGE 297 (335)

[65] 30 BVERFGE 1 (33, 40)

[66] P. SALADIN, VERANTWORTUNG ALS STAATSPRINZIP (1984), 161; see also P. HÄBERLE, DIE WESENSGEHALTGARANTIE DES ART. 19 ABS. 2 GRUNDGESETZ (1983), 376; D. Suhr, *Freiheit durch Geselligkeit*, EuGRZ 529 (1984).

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individual self-determination and thus basic rights freedom realizes itself as co-determination. Sentences such as "As much freedom as possible, as little organization and procedures as necessary" and the like, because of their abstractness, fail to be adequate to reality, which cannot be captured in the abstract opposition of self- and co-determination. The one-sided and exclusive attribution of *self*-determination to the basic rights/freedom principle of the Rechtsstaat, and the attribution of *co-determination* to the democratic majority principle is a harmful abstraction, far from the reality of basic rights.[67] In the conceptual understanding developed here, procedural and organizational participation are required and legitimated by basic rights and therefore are to be understood primarily as the appropriate contemporary expression of the Rechtsstaat principle. That, beyond this, the exercise of basic rights is "an elementary functional condition of a free and democratic community based on the acting and co-determining capabilities of its citizens", and that consequently a fundamental connection exists between the substantive Rechtsstaat principle and the democracy principle, are points which the FCC has recently emphasized, using the example of the right to informational self-determination.[68]

C. Conclusions

I. Procedural and Organizational Structures Required by the Basic Rights to Guarantee Purposive-Rational Communication

The answer to the legitimation question – section B II – still gives no information about the problematic that has here been labeled the *function question*: How must a procedure or an organization be (minimally) constituted, so that its purpose – rational communicative decision-making – can be attained while fully guaranteeing the subject status of the basic rights holder? An exhausting, methodically tested answer could only be reached by comprehensively drawing upon the latest results of communications theory research. This cannot be done here. Yet as a first approximation, I will attempt to describe *four indispensable factors* for purposive-rationally conducted communication, as the basis for corresponding (procedural and organizational) legal structures.

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[67] However, in this direction: J. Isensee¸*Grundrechte und Demokratie*, Der Staat 20 (1981), 161; Rupp, *supra*, note 11, 180, 187. In contrast see Rupp, 186: "The constitutional status processualis can therefore be conceived only as the personal responsibility under a constitutional state turned round into the procedural aspect, not however as an element of democratic participation in ruling control". See also E. Denninger, in: KOMMENTAR ZUM GRUNDGESETZ (REIHE ALTERNATIVKOMMENTARE), *Before Art. 1*, annotation 29; For Art. 14 GG (property): 70 BVERFGE 191 (209) where the transformation of fishing rights into co-determination about the fishing resources is held consistent with the constitutional protection of private property.

[68] 65 BVERFGE 1 (43)

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1. The Subject-Status of the Procedure-Participant

The protection of the subject-status presupposes that the procedure-participating basic rights holder is physically and intellectually in a position to look after his rights and interests in the procedure, even if this takes place through a representative. This would forbid procedures against "someone incapable of negotiating"[69] or someone absent without fault, or a participant lacking command of the negotiating language, insofar as an interpreter is not called upon.

2. Reciprocal Information Flow

Rationally conducted communication presupposes a *reciprocal information flow* which is as complete and open as possible, and which extends to bringing facts, values, and manifestations of the will into the decision process. What is important is the *reciprocity* of information – only this assures "equality of weapons". The affected citizen must be able to present his information, but he must be able to receive all the necessary information from the government's side. From this result the following procedural positions:

(a) the right to a hearing (a "legal hearing", but not only in the courtroom, see Art. 103, para. 1, BL);
(b) the right to information and to inspection of files, §§ 25, 29 VwVfG (Statute of administrative procedure);
(c) rights to sufficient instruction and necessary advice[70];
(d) the right to a competent representative or an assistant;
(e) the right to adequate reasons for a decision, so that the party affected can make meaning full use of the available legal expedients.[71]

Corresponding to these rights are duties of the authorities. Violation of these duties are also violations of the basic rights.

3. The Time Factor

The time factor also has relevance vis-à-vis the basic rights. It plays an important role in the structuring of various cases. Thus the administrative procedure must provide for suitable

[69] With reference to criminal proceedings, see 51 BVERFGE 324, further 42 BVERFGE 64 (76), dissenting opinion 85.

[70] 52 BVERFGE 380; on the necessity of cooperation (ref. Art. 8 GG), see 69 BVERFGE 315 (355).

[71] The five positions are also quoted by Laubinger, *supra*, note 8, 73,without claiming exhaustiveness

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deadlines for the allegation of facts, rights, and objections of all kinds. These time limits must guarantee that the party affected is not "bowled over" by the decision, that he is not presented with "completed facts" without being able to seek redress. If the deadline for the statement of a legal claim is so short "that presentation of the claim is rendered substantially more difficult and not merely exceptional cases are threatened with failure because of it", then there can at the same time exist a violation of the "substantive" basic right.[72] Following the same basic idea, it is *constitutionally* required that in principle a *procedure of preliminary rights protection* (see §§ 80, 123 VwGO, 32 BVerfGG) be available for use in emergency cases. It must also be assured that the possibility of provisional rights protection thereby opened up cannot be undercut – except in compelling cases of overwhelming public interest – by official measures of immediate execution. This has long been an acute problem for foreigners seeking protection of their rights or petitioning for asylum, since expulsion and deportation threaten them with an irreparable loss of basic rights.[73]

4. The Tendency Towards Objective Correctness (Sachrichtigkeit)

The communicative procedures – as administrative or judicial decision processes, or procedures of internal organizational (corporations, associations, etc.) opinion formation – are not exhausted in the production of formal, lawful decisions without further consideration of their content. Procedural law conforming to basic rights serves much more to further the production of "just decision".[74] More precisely (and less pretentiously) one should speak in this connection of the *requirement that procedures further the achievement of objectively correct decisions*. The same is true for organizational structures. Out of this broad requirement for a tendency towards objectivity are derived specific procedural-legal requirements. Among them is the observance of the legally-established jurisdictional order, when this is an expression of the attempt to guarantee objectively, whether through the concentration of special expert knowledge, or through the guarantee of uniform administrative practice by unification under a single bureaucratic authority, or through the monopolization of specific decisions, on account of their great *political significance*, by a constitutional organ. Examples for these three variants of the tendency towards objective correctness are the federal examination office (in accord with the law against the dissemination of publications dangerous to minors),[75] the federal office which handles the recognition procedure (in accord with the asylum procedure law),[76] and the

[72] 53 BVERFGE 131 (144)

[73] 35 BVERFGE 35, 382 (401); 56, 216 (241)

[74] 42 BVERFGE 42, 64 (73)

[75] See 39 BVERFGE 39, 197 (204).

[76] See 56 BVERFGE 56, 216 (238); applies similarly to committees and courts according to the revised conscientious

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Federal Constitutional Court, for procedures according to Art. 18 and Art. 21, para. 2 BL, §§ 36, 43 BVerfGG.

The requirement of an orientation towards objective correctness acquires particular significance for the issuance of organizational norms, when the organization is to serve the functional fulfillment and the protection of an area of life particularly connected with basic rights. Examples are provided by the freedom of scientific endeavors as organized in the universities on the one hand, and the internally and externally pluralistic freedom of broadcasting on the other (but also other forms of basic rights realization tied to the collectivity).

Here, consideration for the basic rights exercise of every individual rights holder may demand that the area of competency to which the collective decision procedures apply be objectively restricted: a core area of basic rights freedom forms the *domain of the "non-determinable"*, form which all outside determination is excluded and in which the conceded co-determination is also not to be conceived of as a form of self-determination (see above section 22).[77] *To this degree*, organizational provisions have the negatory function of defenses against intervention.[78] Yet on the other hand, organizational norms receive the positive task of allowing the multiplicity of possible involved basic rights contents, and any public interest goals which should perhaps also be taken into account, to influence the decision process[79]. The FCC has repeatedly spoken out for a positive lawful structuring of broadcasting freedom.[80]

Thus, considered from a purposive-rational standpoint, the basic rights require organizational structures which:

(a) promote *pluralism* through securing chances to establish countervailing power and to publish contrasting information,
(b) *protect minorities*, insofar as this is not already sufficiently realized through the guarantee of a domain of the non-determinable,
(c) secure *neutrality*, *i.e.*, insofar as the state participates in procedure, it may not act in a partisan fashion nor exercise a dominating influence on the procedure; in certain circumstances, a sufficient "distancing of the state" must be organizationally assured,

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objection law.

[77] 35 BVERFGE 79, (151) (dissenting opinion)

[78] Emphasized by B. Schlink, *Freiheit durch Eingriffsabwehr – Rekonstruktion der klassischen Grundrechtsfunktion*, EuGRZ 457 (1984).

[79] J. Pietzcker, *Das Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag*, 41 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STRAATSRECHTSLEHRER (VVDStRL) 193, 209 (1983)

[80] 57 BVERFGE 295 (320); 60, 53 (64)

(d) guarantee the "*openness*" of the procedures in the sense of allowing for possible *innovations*.

The constitution itself allows no exact statements to be made abstractly concerning the method and extent of the realization of these structures in the concrete organization of a basic rights-relevant decision procedure. The legislature retains considerable playing room for organizational structuring. Thus, it also cannot be definitively said that the absence of one or the other of these structures – which in effect can partially substitute for one another – would in itself always give rise to a basic rights violation. To this degree, normative-theoretically considered, the structures receive (only an axiomatic character. When a concrete organizational form (as expressed for example in a state university or broadcasting law) is constitutionally reviewed, the important thing is whether comprehensive consideration and evaluation of all the individual provisions demonstrates that the legislature has sufficiently taken the discussed principles into account or not.

II. The Right to Informational Self-Determination as a Special Case

The *right to informational self-determination*, conceived as an expression of the general right of personality (Art. 2, para. 1 in connection with Art. 1, para. 1, BL), represents a special case of organizational-legal relevance to basic rights. For the securing of this basic right, the FCC demands "effective informational blackout regulations" between the government agencies which handle personal data only for statistical purposes, and those which actually execute administrative policies. The Court bases itself here upon the "principle of separation of statistics and executive activities".[81] The particular nature of the basic right leads to the result that, even *within* the administrative organization of the state, the basic right directly and normatively demands organizational consequences – precisely because the right to informational self-determination can already be infringed upon when data are passed around within the state apparatus for purposes other than that for which they were originally gathered.

[81] 65 BVERFGE 1 (49, 61); see also R. SCHOLZ & R. PITSCHAS, INFORMATIONSQUELLE SELBSTBESTIMMUNG UND STAATLICHE INFORMATIONSVERANTWORTUNG (1984); critical with regard to consequences for state security E. DENNINGER, DAS RECHT AUF INFORMATIONELLE SELBSTBESTIMMUNG UND INNERE SICHERHEIT (1985), 215.

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