Universal Decimal Classification 342.9

Jan Ziekow

The Role of Administrative Procedure Law in Modernization of the State: the Case of Germany

Prof, Dr. h.c., Distinguished Rector of the Academy, distinguished Vice Rector

I would like to sincerely thank you for this kind invitation to this most interesting international conference. Administrative procedure and administrative procedural law have long been an important part of my field of activity in science and in practice. As a member of the advisory board for the German Ministry of the Interior, which is responsible for administrative procedural law, I have been participating in the political discussions on these laws for years. Drawing on the example of Germany, I would like to take the opportunity today to present to you some reflections and observations on the role that administrative procedural law plays in the modernization of the state.

What, you may ask, does administrative procedural law have to do with the modernization of the state? Are they not actually two completely different levels: On the one hand the "big wheel of history", the future viability of the state and its administration, and on the other hand the laws that merely regulate the procedures followed by that administration? Of course, this observation is correct and the modernization of the state and administrative procedural law are not on the same level. Above all, the modernization of the state is a process, one that is founded on the ideas of permanence and comprehensiveness, touching on numerous and very different areas. Yet in order to produce effective results, this process requires tools to realize the objectives of any given reform.

In a state like Germany, which has a legalistic administrative culture, making the administration largely rule driven, government reforms are, to a great extent, carried out via the ruling

instrument of law. This applies to substantive law, which regulates the regime of rights and duties, as well as to administrative procedural law.

The procedures of public administration are not only a social system to reduce complexity, to structure communication between various parties in order to reach a decision, but also a system to shape the exercise of power. These procedures mediate between constitutional requirements and administrative reality and act as the necessary coordinating mechanism for the social reality of substantive administrative law. Thus even administrative procedural law has to react to changing social realities.

Indeed, German general administrative procedural law has traditionally been very cautious in its attitude towards the acceptance of political impulses for modernization. To understand this restraint, it is necessary to understand the distinction German administrative law makes between general and special administrative law.

The traditional, and still in principle justifiable, distinction between general and special administrative procedural law is characterized by the fact that special administrative law is a special law that is oriented towards area specific objective issues. Such laws are designed to find solutions to sector-specific problems. The wide range of different issues they cover creates a reservoir of solution patterns, which through reduction of area specific characteristics one can derive more generalizable solutions.

This abstraction process enables the development of universal administrative sector regulation models within general administrative procedural law that can be applied in several or even all special administrative laws. In view of this understanding, the innovation potential of general administration procedural law for state modernization will result primarily from its openness to receiving new ideas. Thus, to the extent that state modernization makes use of the instrument of administrative law, the process will start first with special administrative law. Only if these new regulations have withstood the test outlined here will they be able to generate generalizable models that can then be transformed to the more abstract level of general administrative procedural law.

Through this transformation, general administrative law can offer models that can handle functionally comparable problems more efficiently. The reservoir capacity of these models can be great enough to address even questions which had not appeared before the model's formula-

tion. An example of such model is the specialization of the doctrine of the legislative form of action, seen especially in the administrative act and contract under public law.

This two-step nature of the implementation of modernization impulses into the legal system is designed for longer time cycles and means that the status of German administrative procedural law has remained virtually unchanged for decades. However, this perspective has changed significantly in recent years. The background for this change is a stronger focus on the so-called deployment feature of law. It points to the function of administrative law as being perceived as legitimate and able to generate constitutional and situation-appropriate decisions and thus enabling effective administrative action that is also close to the citizen. Law has to provide the necessary legal forms, institutions, procedures, and types of organization. Methodologically, this means a requirement for a task- and function-oriented approach. Administrative law has to ask what functions and tasks have to be managed by the administration and provide the administration with the necessary tools to ensure that it can handle the tasks to be carried out. The above-described model of general administrative procedural law developed on the basis of generalization from institutions of special administrative law will not generate this relationship between task and reality.

Therefore, such approach of generalization is not suitable or sufficient for the function of general administrative law. The implementation of innovations into administrative law will not necessarily develop in steps through abstraction. Because of its capacity to overarch different areas, general administrative law and thus administrative procedural law are indispensable as an innovation-promoting medium. Especially, when it comes to the question of the implementation of innovation, the structural, that is the conduct-arrangig role of the trans-sectoral administrative procedural law, is essential. The introduction of normative measures for the modernization of the state will only achieve the necessary significance for administrative practice if encompassing all administrative areas. Not without reason, in politics and science, administrative procedural law is called the “constitution of administration”. This is why we can talk about an innovation guiding function for general administrative procedural law.

2. Examples from the German discourse of government modernization

In recent discourse, this innovation guiding function of administrative procedural law has become increasingly important. In what follows, I will demonstrate this fact by means of some examples from recent years.

a) New Public Management

The first example is related to the implementation of elements of the New Public Management into German administration. This example might at first surprise experts from different administrative cultures, as New Public Management is the expression of a managerial administrative culture, which is quite different from the traditional legalistic administrative culture in Germany. Yet it is precisely this legalistic administrative culture that gives room for the discussion about the juridification of the various management instruments. A typical example is the discussion about the necessity for legal regulation of contract management between the political leadership and decentralized executive authorities and agencies.

I have previously advised against the implementation of regulations for contract management and other elements of the New Public Management, such as product-oriented output control and means of controlling in administrative procedure law. I recommended implementation in administrative procedural law in regard to only two issues: quality management and the customer orientation of administration. In view of the strengthened role of the administration as a service provider, it would be advisable, for example, to aim to introduce a quality management system in administrative procedural law, thereby ensuring the quality of public services along all aspects of citizen interest. This recommendation has not been taken up by the legislators.

The case is different in regard to the one-stop shops that take up the idea of customer orientation. Also in this context, I recommended a regulation to be implemented in administrative procedural law in order to place customer orientation and the front office/back office-model from New Public Management and associated questions in a prominent place. In the year 2008 the respective regulations of the administrative procedural law were amended by articles (§§ 71a to 71e) establishing the so-called single authority. The decisive impetus for this was the implementation of the EU Services Directive, which took up this element of New Public Management. The noteworthy development was that the associated issues concerning the single authority were regulated not only in special procedural law, as would have been the case in the above-described traditional German approach. Instead, an extensive regulation was implemented in administrative procedural law in order to assert this essential impulse of modernization in a prominent position.

b) Public Private Partnership

My second example relates to the instrument of Public Private Partnerships. In the 1990s the concept of a "lean government", as well as the model of the enabling state from the first decade of the new millennium, became seen as an important orientation framework for understanding the relationship between the state and society, leading to the so-called idea of shared responsibility.

This idea, were it to be met, would require expressing the most important principal lines of the changed state-society relationship within administrative procedural law. Therefore, the Federal Ministry of the Interior instructed me to deliver a comprehensive opinion on the necessary reforms. Among others, I suggested further developing the already existing regulations in paragraphs 54 ff. of the law on the public contracts and to complement it with provisions for a new type of administrative cooperation contract. This proposal has until recently been discussed very intensively within administrative law sciences. A vast majority considered it appropriate to implement regulations for the administrative cooperation contract into administrative procedural law. This led to a specimen draft for the officials responsible for administrative procedural law in the ministries of the federation and the federal states, which then provided for explicit regulations for a new type of cooperation contract. This development could be seen as a clear expression of a paradigm shift that recognizes the significant role of administrative procedural law in the modernization of the state.

However, a corresponding law has not yet been adopted, as in recent years the evaluation of the value of public-private partnerships in Germany has again changed. With the financial and economic crisis, one can see a decline in the use of the PPP instrument in administrative practice. After the crisis, the image emerged of the state as the only actor able to act during such difficult periods. Nowadays, as compared to before the crises, the performance of public services has become more the exclusive task of the state alone. Associated with this shift, service tasks that had been privatized before the crisis have been transferred back to the state and local authorities in recent years.

c) Citizen participation

The third example deals with the improvement of citizen participation when it comes to the realization of large projects. Until the first decade of the new millennium, Germany has re-

garded the international trend for more citizen participation with caution. Due to historical experiences in Germany, the organs of representative democracy were absolutely dominant over instruments of direct democracy.

The completely new perception and evaluation of citizen participation arose due to incidents in the context of the expansion of Stuttgart's main railway station in the year 2010, a project known in Germany as "Stuttgart 21". With the beginning of the construction of the new railway terminal, citizens protested very vigorously. In order to calm the situation after controversial police interventions, the former federal minister Geissler was appointed to act as a mediator. His conciliation efforts did not lead to the complete disappearance of mass protest in the streets; however, they did decrease significantly.

As a consequence of these events, political opinion in Germany shifted, coming to recognize that the relationship between the state and citizens had changed fundamentally in the 21st century and that this change had to be expressed by means of new legal regulations. For two years I was a member of a parliamentary Enquete Commission on "citizen-participation", which developed a variety of proposals in this context.

While regulations on citizen participation were previously established in special administrative law, which regulates the conduct of large projects, now there was from the beginning unanimity about the fact that this question has become so politically important that the change in the understanding of the state should be manifested in administrative procedural law. A corresponding regulation that aims at early public participation has thus been inserted in a prominent position as the new section 25 (3) (§25 Abs. 3) within the general procedural principles.

d) E- government

The last example relates to the area of e-government. In modernization theory, there is an intense discussion whether digitalization of the internal and external business processes of administration and its communication constitutes a mere instrument for the effective and efficient fulfillment of administrative tasks, or whether we are seeing a comprehensive digital transformation of administration. The Speyer institute supports the latter position and therefore has called one of its core program areas "Transformation of the state *through* digitalization". The German government's broad-based program "Digital Agenda" shows that the Federal Government views it the same way.

There is an intense debate about how the administration related questions of this agenda could be implemented in law. In the first instance, the Federal Government did not have full confidence in the innovation guiding function of general administrative procedural law. They were of the opinion that in addition to amending administrative procedural law, it would be necessary to establish an independent E-Government Act, which even in its title alone emphasizes the special significance of the modernization impact of e-government. This law was enacted in the year 2013. Since then, the government has left the path of creating special procedural law and has chosen reform via amendments to administrative procedural law in order to provide a further substantial impetus for modernization.

This relates especially to opening-up the possibility for an administrative act that is adopted fully automated, that operates without the contribution of any human decisions when applied to given concrete cases. Two weeks ago, the Federal government enacted a corresponding law.

3. Conclusion

In conclusion, I think that my comments have made clear that general administrative procedure law has undergone a substantial change of meaning during the last years. Recently, the innovation guiding function of administrative procedural law has become increasingly evident. At the least it is necessary to consider how essential measures for the modernization and its administration can be embedded in administrative procedural law. Within Germany this question has at the very least been discussed, while these discussions have sometimes also led to various changes and amendments of the law. As a result, procedural law has gained a significant role in the modernization of the state.