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The Public Service in Germany

Ensuring the integrity of the public service in Germany through the constitution

I. Responsibilities and functions of the public service

1. The public service as an important institution to the state

The public service is no German invention and no invention of modern times. Every state community, that is not merely a cooperative community, in which citizens are subject to central powers controlling politics, law and administration, requires powers to carry out and implement central instructions. Thus, even ancient Egypt already had a public service.[1]

Public service, i.e. a public service structured as a special legal system, does not only exist in Germany. In many Western states the status of public servants differs from that of employees in the private sector. Public servants thus have a special legal status characterised by rights and duties specific to the public service.[2] However, reform attempts of the past 20 years have in some states led to public service relationships moving closer towards the law governing employees in the private sector; most OECD member states, however, still agree on the core areas of administration.[3]

2. History

The public service in its typically German form is rooted in early liberalism. Its development is closely linked to that of the state in which the rule of law prevails: whereas the public servant was initially under obligation to the reigning monarch only, his status changed - as did the understanding of the concept of state - from a servant of lords to a servant of the state. It became his responsibility to protect the constitution and the law in the interest of the citizens also, and particularly, against the head of state.[4] This led to the legal formalisation of the civil service law, which already contained the basic principles of modern public service.[5] During the transition from the late period of absolutism to the liberal state in which the rule of law

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1 Näher hierzu *Allam/Fechner*, ZBR 1999, S. 301.
2 Vgl. OECD, Modernising Government (2005), S. 158; *Bossaert/Demmke/Nomden/Polet*, Der öffentliche Dienst im Europa der Fünfzehn, 2. Aufl. (2001), S. 35.
3 Vgl. OECD, Modernising Government (2005), S. 160 f.
4 Vgl. *Jachmann/Strauß*, ZBR 1999, S. 289.
5 Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <156 f.>.

prevails[6] Prussian General Law of 1794, for example, provided for fixed salaries according to hierarchical ranks and for a selection according to professional qualification only and for public servants to be in full-time employment.[7] The public servant should be characterised by conscientious devotion to duty and thrift.[8] The consequence of such a functional nature of the public service striving for a neutral, constitutional and lawful administration was that individual public servants did not shy away from conflict with the monarch where they considered his instructions an infringement against the law or the constitution. By way of example, I would like to refer to the so-called „Göttingen Seven"– professors of the University of Göttingen who opposed the recession of the constitution by King Ernst August von Hannover by a protest declaration in which they demanded the continued validity of the state constitution and their oath given on the constitution (that incidentally also bound the public servant to oppose any overthrowing of the constitution). Another example is that of the resistance of the public servants of the province of Kurhessen against the levying of rates and taxes without a basis of budget or other laws.[9]

This fundamental attitude, however, disappeared in the imperial state at the end of the 19th Century.[10] The Weimar Republic after World War I in its legal regulations continued the traditions of the rule of law during early Liberalism and transferred the public servants to a democratic system, but did not succeed in overcoming the internal prejudices of public servants, „loyal to the emperor", towards the Republic[11]. The German public service did not resist its well-planned destruction by Hitler through the removal of constitutional protection and the transformation of the public service relationship to a personal relationship of loyalty with Hitler and to a relationship of dependence on the NSDAP (German National-Socialist Workers' Party) that ruled the state. The very foundation of a public service serving only the people and the state and not a party was thus abolished, which led to the Federal Constitutional Court terminating all public service relationships after World War II on 8 May 1945.[12] The public service thus had no continued existence in Germany, but was newly established[13]; the institution of public service as per the current constitution is not identical with that of the constitution of the Weimar Republic.[14]

3. Responsibilities and functions of the public service in Germany

a) Possibilities of shaping the public service and how these are influenced by the national culture of law

A wide range of different regulatory models exists. The public service can be structured according to private or public law, the rights and duties governing the service

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6 Vgl. *Kleinheyer*, Das Allgemeine Landrecht für die preußischen Staaten vom 1. Juni 1794 (1995).

7 Vgl. PreußALR von 1794, II 10 §§ 68 ff.; *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <157>.

8 Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <157 f.>.

9 Vgl. bei *Huber*, Deutsche Verfassungsgeschichte, Bd. II, 3. Aufl. (1988), S. 96 ff. und 908 ff.

10 Vgl. *Jachmann/Strauß*, ZBR 1999, S. 289 <290>.

11 Vgl. Fenske, in: Demokratie und Verwaltung, 2. Aufl. (1997), S. 119; Hattenhauer, Geschichte des deutschen Beamtentums, 2. Aufl. (1993), S. 356.

12 BVerfGE 3, 58.

13 Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <164>.

14 Vgl. BVerfGE 8, 332 <343>; BVerwGE 47, 330 <334>.

relationship can differ from those of employment relationships in the private sector or can be brought into line with them. There is no ideal public service relationship. Every society faces its own challenges and is shaped by its own experiences.[15]

Thus, when establishing or later amending the public service, it must be ensured what the responsibilities and functions of the state service are within the respective national social and legal order. Its legal shape is never an end in itself; rather, it has a serving function.

b) The function of the public service in Germany according to the ideas of the constituent body

As can be seen from the deliberations in the Parliamentary Council the public service relationship under public law in Germany serves to stabilise the state.[16] The modern administrative state with its multiple and complex tasks, that need to be accomplished professionally, efficiently and timely on a daily basis in order to ensure the functioning of the socio-political system and the individuals, relies fully on an intact, loyal, dutiful public service obliged to the state and its constitutional order.[17] But the legislator also had the developments in the Soviet occupation zone in mind[18], where the abolition of the public service led to an abolition of the duty of the state to ensure general welfare and this was placed within the sphere of the ideological service of the Communist state party. Furthermore, according to the ideas of the Parliamentary Council, the public service also has the function of a *conditio sine qua non* for the principle of lawfulness of the administration.[19]

Full-time employment, internal and also material security and independence are to allow public servants to guarantee this principle. Independence is to exist in particular towards political parties[20] as well as towards economic influences[21]. To ensure immunity of the public service against such influences, the legislator was not satisfied to merely give a legal order of independence; rather, the legislator found it necessary to require life-long employment relationships in the public sector and a solid inner attitude which, the legislator found, could only be ensured if the public service was structured under public law.[22]

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15 Vgl. OECD, Modernising Government (2005), S. 160 f.

16 Vgl. Vors. *Wagner*, StenProt. der 12. Sitzung des Zuständigkeitsausschusses vom 14. Oktober 1948, S. 23; Abg. *Ehlers*, ebd., S. 26; jetzt in *Schneider* (Hrsg.), Das Grundgesetz – Dokumentation seiner Entstehung, Bd. 10, S. 410 f.

17 Vgl. BVerfGE 39, 334 <347>.

18 Vgl. Abg. *Dr. Strauss*, StenProt. der 12. Sitzung des Zuständigkeitsausschusses vom 14. Oktober 1948, S. 21; Vors. *Wagner*, ebd., S. 23; jetzt in *Schneider* (Hrsg.), Das Grundgesetz – Dokumentation seiner Entstehung, Bd. 10, S. 408 f.

19 Vgl. Abg. *Dr. Strauss*, StenProt. der 12. Sitzung des Zuständigkeitsausschusses vom 14. Oktober 1948, S. 24; jetzt in *Schneider* (Hrsg.), Das Grundgesetz – Dokumentation seiner Entstehung, Bd. 10, S. 410.

20 Vgl. Fn. 19.

21 Vgl. Abg. *Dr. Reif*, StenProt. der 12. Sitzung des Zuständigkeitsausschusses vom 14. Oktober 1948, S. 28; jetzt in *Schneider* (Hrsg.), Das Grundgesetz – Dokumentation seiner Entstehung, Bd. 10, S. 413.

22 Vgl. Abg. *Dr. Reif*, StenProt. der 12. Sitzung des Zuständigkeitsausschusses vom 14. Oktober 1948, S. 29; s. a. Abg. *Dr. Strauß*, ebd., S. 27; jetzt in *Schneider* (Hrsg.), Das Grundgesetz – Dokumentation seiner Entstehung, Bd. 10, S. 412 f.

In comparison to discussions of earlier years, the current situation in Germany differs in that – at least superficially – it is no longer subject to a certain ideology. Rather, the public service - or at least its legal form thus far - is being questioned under the flag of „modernisation“, and with instruments of economic science. In addition, the constitutional provision of Art. 33 s 5 of the German Constitution, which is of material importance to the public service law, was changed in its wording, albeit not in its content[23]; the new version, however, is dominated by the intention of emphasising the ability of the public service law to change under simple law.

The Federal Constitutional Court has described specialised knowledge, professional performance and the loyal fulfilment of duty as the basic prerequisites for a stable and lawful administration and as a compensatory factor against political powers that shape the life of the state.[24] The state, constituted on the principles of freedom and democracy, if it does not want to question itself, requires a body of public service that stands up for the state and the respectively valid constitutional order and defends the state in crises and loyalty conflicts by dutifully fulfilling its responsibilities only in accordance with the spirit of the constitution, with constitutional decisions of values and with the provisions of the valid laws.[25] This function, however, the public service can only fulfil if it enjoys legal and economic security.[26]

4. Conventional principles of public service in terms of Art. 33 s 5 GG – continuance and variability

a) In order to fulfil the above prerequisites, the legislator deemed it necessary to enshrine the public service in the constitution, not only in simple law. And thus the legislator created the institutional guarantee for the public service in Art. 33 s 4 GG.[27] In order to secure this article, the Parliamentary Council passed Art. 33 s 5 GG in terms of which the right of public service is to be practised according to conventional principles. This provision, in addition to the guarantee of the institution of public service, is to ensure – as Member of Council Dr. Strauß said – , „that the traditional and institutionalised principles of the public service law as it has existed thus far, shall remain intact“.[28] He thereby followed on the ideal of the Prussian public service. For a proper understanding of Art. 33 s 5 GG and thus of the public service it is of particular importance to point out that it was not the intention of the legislator to cement conventional structures for the sake of such structures. Guided by the recognition of their importance in guaranteeing a well-functioning state governed by the rule of law, the legislator rather provided ‘corset stays’ for the administration of the Federal Republic of Germany in the form of these principles that had stood the test of time in the public service.

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[23] Vgl. *Pechstein*, ZBR 2006, S. 285 <286>; *Höfling/Burkiczak*, DÖV 2006, ???.

[24] Vgl. BVerfGE 7, 155 <162>; 21, 329 <345>; 56, 146 <162>; 99, 300 <315>; 107, 218 <237>; 114, 258 <288>; hierzu auch *Leisner*, Beamtentum, S. 121 f.

[25] Vgl. BVerfGE 39, 334 <358>.

[26] Vgl. BVerfGE 7, 155 <163>; 8, 1 <16>; 8, 203 <216 f.>; 21, 239 <345>; 39, 196 201>; 44, 249 <265>; 56, 146 <162>; 64, 367 <379>; 70, 69 <80>; 71, 39 <60>.

[27] Vgl. *Masing*, in: *Dreier*, Grundgesetz, 2. Aufl., Bd. II, Art. 33 Rn. 58.

[28] Vgl. Abg. *Dr. Strauß*, JöR Bd. 1 n. F. (1951), S. 323. S. a. *Thoma*, Kritische Würdigung, PRDrucks 244 vom 25. Oktober 1948, S. 9.

In terms of the constitutional guarantee, public servants are bound to their employer at national, provincial or local level in terms of a service and loyalty relationship under public law. Sovereign powers are generally to be bestowed upon members of the public service; Art. 33 Abs. 4 GG. Art. 33 Abs. 5 GG, in terms of which the public service law is to be practiced with due consideration of the conventional principles of public service, thus provide an institutional guarantee of the public service. The bearing pillars of public service and the characteristic features of public service relationships are to be maintained. Beyond their objective substance, these norms also constitute a right for the public servant, similar to a constitutional right, that he can enforce right up to the Constitutional Court. In terms of the constitution, the public servant may thus lodge a constitutional complaint and request protection against his legal status being curtailed. This concerns his economic security, maintenance, as well as the right to occupation in line with his office and protection by the administrative court against being subjectively disadvantaged in comparison to competitors in appraisals for higher positions.

b) The conventional principles of public service as mentioned in Art. 33 s 5 GG refer to the core of structural principles that have been accepted and maintained generally or by the majority as binding for a longer, tradition-building period of time, at least under the constitution of Weimar.[29] The public service relationship is a relationship of service and loyalty under public law. Remuneration, provision for the public servant and his family must be guaranteed by law. The employer has the duty to give assistance to the public servant, which includes his right to remuneration in accordance with the office held, as well as provision for him and his family. In return the public servant shall fulfil the duty of loyalty towards the employer in terms of the public service law. He is obliged to actively promote constitutional order. Public servants do not have the right to strike. Entry into the profession of a public service and the ranking and promotion within the framework of legally regulated career paths, must – in terms of Art. 33 s 2 GG – follow the principles of aptitude, skill and professional performance. The duties of public servants, as well as their fulfilment are guaranteed by way of a special disciplinary law. Art. 33 s 5 GG defines the core of the structural principles of public service law.[30] This provision – in line with the institutional guarantee – is of preserving nature.[31]

Yet, even in the case of such conventional principles, the legislator may at his discretion adapt the public service law to meet the requirements of the state governed by freedom and democracy and of the developments of society. This is to prevent paralysis.[32] This liberty of regulation on the side of the legislator, however, is not unrestricted. The individual conventional principle is to be mutually honoured for its importance for the institution of public service. The result shall determine in which manner and to what extent it will limit the legislator's liberty to act.[33] The

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[29] BVerfGE 8, 332 <342 f.>; 106, 225 <232>; stRspr.

[30] Vgl. *Isensee*, in: *Benda/Maihofer/Vogel*, Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, 2. Aufl., § 32 Rn. 62.

[31] Vgl. *Lübbe-Wolff*, in: *Dreier*, GG, 1. Aufl., Bd. II, Art. 33 Rn. 70.

[32] Vgl. BVerfGE 3, 58 <137>; 7, 155 <162>; 8, 1 <16>; 9, 268 <286>; 11, 203 <215>; 43, 242 <278>; 44, 249 <263>; 52, 303 <335>; 56, 146 <161>; 58, 45 <78>; 64, 367 <379>; 70, 69 <79>; 71, 255 <268>; 114, 258 <288>.

[33] Vgl. BVerfGE 8, 1 <16>; abw. Meinung *Geiger*, BVerfGE 32, 199 <246> (insoweit nicht in Abweichung von der Mehrheitsentscheidung); *Jachmann*, in: *von Mangoldt/Klein/Starck*, GG, Bd.

administration of justice by the Constitutional Court has acknowledged that certain principles are of such significance for the institution of the public service that the legislator must not only consider these but must indeed comply with them – and must thus strictly adhere to them.[34],[35] Art. 33 s 5 GG thus intends to maintain the inviolability of the characteristic properties of the public service.[36] The provision thus prohibits that, in the arrangement of the public service law, the conventional central ideas and characteristics, which were developed to be characteristic of the specific nature of the public service before the constitution, can be rejected.[37] Yet, as long as no structural changes of provisions that are material for the institution of the public service are intended, Art. 33 s 5 GG is not opposed to the further development of the public service law.[38] The duty to observe the core content of the principles of public service law thus prevents the simple legislator to effect far-reaching structural changes.[39] This static nature in the public service law is not an end in itself, but serves to ensure a stable and lawful administration in the political power play.[40] The strict binding of the legislator to the conventional principles is the consequence of the guarantee of the institution that forms a binding framework for the legislator.[41]

c) Art. 33 s 5 GG thus provides the legislator with a certain legislative leeway so that the public service law can be adapted to meet the respective requirements.[42] [The above protection of existence is only achieved by the principle in terms of Art. 33 s 5 GG, however, not by any form it may take in simple law or by any concretisation of its contents through interpretation.[43] The concretisation of the principle allows its scope to remain elastic and to be adapted to changing circumstances.[44]

2, 5. Aufl., Art. 33 Rn. 53; *Merten*, in: *Magiera/Siedentopf*, Das Recht des öffentlichen Dienstes in den Mitgliedsstaaten der Europäischen Gemeinschaft, S. 188 f.; *Wiese*, Beamtenrecht, 3. Aufl. 1988, S. 2, spricht insoweit von einer "Rangordnung" unter den hergebrachten Grundsätzen.

34 Vgl. *Masing*, in: *Dreier*, GG, Bd. II, 2. Aufl., Art. 33 Rn. 80.

35 Vgl. BVerfGE 12, 81 <87>; 61, 43 <58>; 62, 374 <383>; 99, 300 <314>; 114, 258 <286>; BVerfG, 3. Kammer des Zweiten Senats, NVwZ 1994, S. 473.

36 Vgl. *Battis*, in: *Sachs*, GG, 3. Aufl., Art. 33 Rn. 67.

37 Vgl. BVerwGE 5, 39 <40>.

38 Vgl. *Battis*, in: *Sachs*, GG, 3. Aufl., Art. 33 Rn. 68.

39 Vgl. *Dollinger/Umbach*, in: *Umbach/Clemens*, GG, Art. 33 Rn. 100; *Jüsgen*, DÖV 1951, S. 474; *Lecheler*, in: *Isensee/Kirchhof*, HdbStR, Bd. III, 2. Aufl., § 72 Rn. 67; abw. Meinung *Geiger*, BVerfGE 32, 199 <246> (insoweit nicht in Abweichung von der Mehrheitsentscheidung); *Merten*, in: *Magiera/Siedentopf*, Das Recht des öffentlichen Dienstes in den Mitgliedsstaaten der Europäischen Gemeinschaft, S. 190 ("Wesensgehaltsgarantie").

40 Vgl. *Dollinger/Umbach*, in: *Umbach/Clemens*, GG, Art. 33 Rn. 100; *Isensee*, in: *Benda/Maihofer/Vogel*, Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, 2. Aufl., § 32 Rn. 62.

41 Vgl. *Lecheler*, AöR 103 (1978), S. 349 <363 f.>; *ders.*, in: *Badura/Dreier* (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, S. 359 ff. <364>.

42 Vgl. BVerfGE 7, 155 <162>; 11, 299 <303>; *Lecheler*, in: *Badura/Dreier* (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, S. 359 ff. <364, 367>.

43 Vgl. *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 63.

44 Vgl. BVerfGE 43, 154 <168>; 97, 350 <376>; Damit führt die Rechtsprechung des Bundesverfassungsgerichts letztlich zu demselben Ergebnis wie die Ansicht einzelner Autoren, die diese kritisieren; vgl. *Masing*, in: *Dreier*, GG, Bd. II, 2. Aufl., Art. 33 Rn. 81: Bzgl. aller Grundsätze kann von Einzelheiten der Ausgestaltung, die sie traditionell im einfachen Beamtenrecht erfahren haben, abgewichen werden; in keinem Fall zulässig sind aber Abweichungen, die den Grundsatz in seiner institutsprägenden Funktion als solchen aufheben würden.

Also with regard to material principles – such as the maintenance principle – the legislator has a certain leeway to act. Thus the public service law is open to development.[45] The Further Development Clause inserted through the 2006 Federalism Reform explained the regulatory mandate of the legislator without weakening existing guarantees[46].

II. What is required of the public service in a democratic, constitutional state under the rule of law

The legal form of the public service shall be determined by its function.[47] In a democratic state under the rule of law, the service relationship is characterised by two functions: the guarantee of a well-functioning administration[48] and the principle of the rule of law.[49]

1. The ability of the public administration to function well

It is the responsibility of the public service to ensure that the will of parliament, expressed in the form of laws, as well as the instructions by the top executive, i.e. the government, be made valid. The implementation of public service law ensures a clear and well-functioning line of instructions that is a prerequisite for democratic legitimacy of executive actions. Such a line of instructions must also ensure that personnel and material prerequisites for the best possible efficiency in administration are met.

In this process the quality of public service is decisive. In the interest of good functioning of the state it must be ensured that the public service is attractive for persons with above-average qualifications.[50] This requires the public service to offer – also financial – conditions that are at least comparable to those of the private sector. What happens to administrations in which public servants do not receive sufficient income can be seen time and again, "When you pay peanuts, you get monkeys!" In addition it must also be ensured that the individual servant of the state exercises his profession with his full dedication. This results in the necessity to restrict any side-line occupations of public servants, so that they can fully concentrate on their responsibilities in the public service.

And lastly the issue of efficiency also touches on the trust the population has in the lawfulness of administration. No resistance should be provoked by the administration creating the impression that its decisions are not guided by general welfare, the acts and the law, but rather by individual interests of individual citizens, parties, companies or associations.[51] [The democratic state under the rule of law cannot extensively enforce its decisions, but only as *ultima ratio* in exceptional cases.] The effectiveness of state actions thus also requires the acceptance of executive decisions. And such acceptance is not only prejudiced by the actual breach of law, but already by the mere appearance that it may have been breached.

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45 Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <174 ff.>.
46 Vgl. BVerfGE 117, 330 <348 f.>; 119, 247 <272 f.>.
47 Vgl. BVerfGE 7, 155 <162>; *Jachmann/Strauß*, ZBR 1999, S. 289 <290>.
48 Vgl. *Czerwick*, ZBR 2005, S. 24.
49 Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <166 ff.>.
50 Vgl. BVerfGE 114, 258 <288>.
51 Vgl. *Jachmann/Strauß*, ZBR 1999, S. 289 <291>.

2. Guaranteeing the principle of the rule of law

Besides the efficiency in administration, the second – equally important – function is the protection of the rule of law.[52] The organisation of the public service in accordance with the rule of law follows from the constitutional provision that it must be guaranteed that constitutional principles be effectively implemented.[53]

The principle of the rule of law in terms of Art. 20, 28 GG requires a state administration that is guided solely by the law and the acts. In order to guarantee this it must be ensured that an infringement against this by an individual public servant be sanctioned. Such a retrospective control, however, is not sufficient. In particular, it is unsuitable to uphold the principle of the rule of law in instances where the unlawful decision by the public servant was authorised or even instructed by the head of administration. Even administrative courts cannot fully guarantee the lawfulness of administration, because recourse to these courts requires an infringement of subjective public rights of citizens. Furthermore, the state governed by the rule of law may surely not declare the lawfulness of its administration dependent on citizens demanding it; the state itself must ensure such lawfulness.[54]

The civil service relationship must thus be structured in such a way that the public servant is principally immune against external influences. In order to prevent economic influences and corruption, civil servants must thus have an income that will ensure a suitable standard of living and thus makes them less vulnerable to corrupt activities. Furthermore, it is intended to prevent other dependencies. Thus the exercising of a side-line occupation cannot be reconciled with serving the state, even if the civil servant is only employed on a half-time basis. Both – the guarantee of sufficient income and the restriction of side-line occupation – leads to the model of the public service law being full-time occupation, even if part-time occupation is permitted. Enforcing part-time employment, as the federal state of Lower Saxony has done for its teachers in the public service[55], was declared unconstitutional because it constituted an infringement against the principle of full-time employment that is to ensure internal and external independence of public servants. The provincial legislation of Lower Saxony was thus declared null and void by the Federal Constitutional Court.[56]

It is also the task of the public service law to protect the civil servant from political influences. The legislator was well aware of the particular importance of political parties for a parliamentary democracy, but he displayed a certain degree of scepticism towards them. A repetition of the experiences of the Weimar Republic was to be avoided and it was thus to be ensured that party politics stay clear from the

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52 Vgl. *Lecheler*, in: *Badura/Dreier* (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, S. 359 ff. <360> ("Die Einrichtung des Beamtentums gehört zu den Grundelementen eines Rechtsstaats.").

53 Vgl. *Merten*, ZBR 1999, S. 1 <3 f.>.

54 Vgl. *Summer*, ZBR 1999, S. 181 <183>.

55 Vgl. BVerfGE 119, 247 <260 f.>.

56 Vgl. BVerfGE 119, 247 <260 f.>.

sphere of administration.[57] This is not an expression of a rejection of politics, which would be in conflict with a modern understanding of democracy. Political directives are not being rejected, but merely party-political influences on individual decisions. Part of the executive core business of the government elected by parliament is to do politics. Such politics, however, need to be unfolded within the framework of law and order. An undertaking subject to approval may, for example, not be delayed because it is in conflict with party-political objectives. The public servant, in exercising his discretion, may also not be guided by his own party-political convictions, but solely by legal[58] provisions.

Lawfulness of the administration and the rule of law are only guaranteed if the public servant cannot be pressurised to violate legal provisions. This requires him to be legally and economically independent[59] and thus requires employment with tenure.[60] The public servant cannot lose his appointment for life, except in cases of serious criminal offences. There is no 'hire and fire', even in the event of a change of government. If a public servant had to fear demotion or dismissal on the basis of his loyalty towards the law and thus had to fear for his economic existence, administration would be prone to manipulation.

III. The ethos of the office as *conditio sine qua non* of the public service as it is known in Germany

Not only the multitude, complexity and constant change of tasks makes the modern administrative state dependent on an intact, loyal, dutiful public service that is loyal to the state and its constitutional order.[61] The special nature of the public office itself leads to special requirements towards its holder, which differ significantly from those of an ordinary employment relationship.[62] In terms of Art. 20 s 2 GG the public servant serves the entire nation. His task does not end with the completion of his prescribed duties. He is not under an obligation towards his employer, but towards the people and towards general welfare. He embodies the state towards the citizens in the very responsible and sensitive areas of administration of services as contained in the constitution.[63] He must indeed be a truly reliable person. Beyond the mere fulfilment of responsibilities, the office thus requires an ethos that places an obligation on the entire personality of the public servant towards the democratic rule of law and the effectiveness of administration. This provision is not only constitutionally enshrined in Art. 33 s 5 GG but is part of the fundamental order of the constitution[64] and finds expression in simple law in the public service laws at federal level and at the level of federal states. Thus the German Civil Code

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[57] So *Dr. Strauß*, StenProt. der 12. Sitzung des Zuständigkeitsausschusses vom 14. Oktober 1948, S. 24; jetzt in *Schneider* (Hrsg.), Das Grundgesetz – Dokumentation seiner Entstehung, Bd. 10, S. 410.

[58] Vgl. *Merten*, ZBR 1999, S. 1 <6 ff.>.

[59] Vgl. BVerfGE 8, 1 <16>; 8, 203 <216 f.>; 21, 239 <345>; 39, 196 201>; 44, 249 <265>; 56, 146 <162>; 64, 367 <379>; 70, 69 <80>; 71, 39 <60>.

[60] Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <171 f.>.

[61] Vgl. Fn. 59.

[62] Vgl. *Vogelsang*, ZBR 1997, S. 33 <34>.

[63] Vgl. *Pieroth*, in: *Jarass/Pieroth*, GG, 8. Aufl. (2006), Art. 33 Rn. 41; *Lübbe-Wolff*, in: *Dreier*, **GG,** Bd. II, 1. Aufl., Art. 33 Rn. 57 ff.

[64] Vgl. *Vogelsang*, ZBR 1997, S. 33 <34>.

places an obligation on the public servant to serve the entire nation, to fulfil his tasks impartially and justly and to consider the welfare of society in the performance of his duties. His entire conduct – inside and outside office – must be in support of the fundamental order based on freedom and democracy and must contribute to upholding this. It further determines that the public servant must be fully devoted to his profession, must fulfil his duties selflessly and to his best knowledge, and must – through his conduct inside and outside his official functions – gain such respect and trust that his profession requires.

The ethos of the public service is also characterised by a strong sense of responsibility and duty, unconditional loyalty towards the rule of law, active promotion of the rule of law, taking back private needs and sensitivities to the benefit of the office and the dignified exercising of this office, which shape the entire personality of the public servant.[65] This ethos of the public office is confirmed and ensured by disciplinary law. Inappropriate conduct in office and outside office may lead to sanctions being imposed against the public servant. Even after commencement of his pension, the public servant is subject to the disciplinary powers and, in extreme cases; his pension payments may be withdrawn. The ethos of the public office is not a description of a condition, but rather a constitutional order. Its disregard will not lead to it being waived, but to it being imposed. This was confirmed by the Federal Constitutional Court in its administration of justice in terms of disciplinary law[66].

Contrary to some prejudices, this is not to support an *esprit de corps* or snobbishness.[67] The ethos of the public service is not an ethos of pre-constitutional times. In the same manner as the public service was newly established under the constitution[68], its ethos is also defined solely by the constitutional principles of the rule of law and democracy. It thus does not demand submissiveness to authority, or compliance, but the self-sacrificing service directed towards general welfare for the democratic rule of law as contained in the constitution.

This return to the ethos of the public office is highly topical. Since 1998 the OECD has recommended to its member states the implementation of codes of ethics and ethical practices in public administration[69] and points out that new management models should focus more on the necessity of linking public interest with individual motivation and values.[70] The Code of Ethics of the American Society for Public Administration contains, among others, the obligation to show personal integrity by meeting the highest possible standard in all activities and thereby to strengthen public trust in administration.[71] Also the Australian Public Service Act from 1999

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65 Vgl. *Vogelsang*, ZBR 1997, S. 33 <37>; *Isensee*, in: Knies (Hrsg.), Staat – Amt – Verantwortung, S. 41 ff. <43>.

66 Vgl. BVerfG, 1. Kammer des Zweiten Senats, Beschluss vom 9. August 2006, 2 BvR 1003/05.

67 Vgl. *Battis*, DÖV 2001, S. 309 <313>.

68 *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <164>.

69 Vgl. OECD, Principles for managing ethics in the public service, PUMA Policy Brief No. 4 (1998), http://www.oecd.org/dataoecd/60/13/1899138.pdf.

70 Vgl. OECD, Den Staat modernisieren: Der Weg in die Zukunft, S. 4, http://www.oecd.org/dataoecd/33/12/35508323.pdf.

71 Vgl. ASPA's Code of Ethics, http://www.main.org/aspa/code.htm.

contains an extensive description of values applicable to the public service.[72] Many scientific publications in the field of administration that were recently published in Belgium, France, the USA, Australia and Canada deal with responsibilities and ethical values in the public service.[73] The special emphasis that is being placed on the introduction of codes of ethics results from the realisation that the larger part of the liberty to lend specific form to public administration, as is being awarded through an administrative style guided by public management, also brings with it the danger of losing the distance required by the rule of law by entering into pacts with the respective clients and by opening doors to corruption.[74]

IV. Threats to the public service and its functions

Dealing with the functions of the public service under a democratic rule of law would remain incomplete, if it were to end with the description of theoretical principles without verifying their actual validity. In this regard] It must, however, be mentioned that the public service was and is exposed to numerous threats.

1. Threats by parliament and politics

In its history the public service was exposed to wide-ranging criticism. This in itself is not harmful: the public service is not sacrosanct, even if criticism is being characterised by ideological blindness, social envy or malice[75]. What has harmed the motivation of the servants of the state and thus the public service was the punishable neglect of the employers' duty to give assistance, who have in the best of cases not objected to polemics against the public service and, in the worst of cases, have even promoted this. Instead of rendering the discussions more objective, politics too have repeatedly felt called to please the tabloid press and propagated the clichés of a public service that is either "lazy and privileged" or that is "submissive to authority and that stems from a pre-democratic era". In a somewhat loud-mouthed, yet appropriate manner *Isensee*[76], a well-known German expert on law of nationality and citizenship, described this scathing attack on public servants as a "tried and tested method of politicians to achieve the loudest possible applause from the media with the least possible intellectual effort".

Of course it is easier to blame the lengthiness of approval procedures on a "lack of management skills and results-oriented working methods", rather than to remove over-dimensional legal regulations. A further example of the hypocrisy of many a criticism is the discussion around the so-called burden of pensions and related benefits. The immense increase in personnel costs for public servants on pension is caused mainly by appointments done in the 70s to meet the citizens' demands for improved quality of education and for strengthened internal security and to meet the requirements of an ever-expanding service administration.

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[72] Vgl. insbes. Articles 10 – 13 Public Service Act 1999, http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/F4267B83CA326D6ECA25719C00821AC7/$file/PublicService1999WD02_Version1.pdf.

[73] Vgl. *Battis*, DÖV 2001, S. 309 <313> mwN in Fn. 48.

[74] Vgl. *Battis*, DÖV 2001, S. 309 <313>.

[75] Vgl. *Isensee*, ZBR 1998, S. 295.

[76] *Isensee*, ZBR 1998, S. 295.

Those were largely political gifts at the expense of future generations. Because no social benefits are payable for public servants, they are “cheaper” during the period of their active employment than other employees – the consequence, however, is that pension payments are then not paid by pension funds but by the federal government and the government at federal state level; the costs are thus actually not saved but postponed to the future. Reserves to this end were however not made in the budget planning of over 50 years. In my opinion this is a case of hidden financing by way of credit.[77] If now the pension benefits are reduced to decrease the budgetary burden this implies debt relief of the state at the expense of public servants and constitutes, as such, a breach of contract. It is understandable that this does not serve to increase the motivation of the public service, in particular in view of the fact that the successor companies of the Post Office, with the support of government and parliament, practise personnel cuts through dubious early retirement packages[78] and thereby further increase the benefit costs which gives rise to serious doubts whether the responsible persons are in any way interested in ensuring sustainable financing of the public service. Seen from this slant, it is surely only a matter of time until public servants are again requested to cough up for costs supposedly caused by them – an attempt, however, that has been clearly restricted by the Federal Constitutional Court.[79]

2. Threats by public servants

However, it is not only the conduct of employers and politicians that threatens the public service. Such public servants that have joined the public service not to contribute their labour to the promotion of a well-functioning state administration, but rather to enjoy job safety, and that have developed a job mentality[80] focussing primarily on the rights of public servants, and that consider their mere presence in office an extraordinary performance, constitute an equally serious threat to the public service.[81] The special characteristics of the public service are only politically justifiable for as long as the public servants fulfil the high expectations held towards them.[82] Such a superficial attitude, however, is irreconcilable with the ethos

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77 Vgl. Bericht der Regierungskommission "Zukunft des öffentlichen Dienstes – Öffentlicher Dienst der Zukunft", Düsseldorf 2003, S. 43. S. a. *Isensee*, ZBR 1998, S. 295 <306> ("kurzsichtige Haushaltspolitik der letzten Jahrzehnte"); *Lecheler*, in: *Badura/Dreier* (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, S. 359 ff. <372>.

78 Bei den Nachfolgeunternehmen der Post wurde die Zahl der dort verbliebenen Beamten mit Hilfe umfassender Vorruhestandsregelungen reduziert: In den Jahren von 1995 bis 1999 war die Zahl der jährlichen Pensionierungen in etwa doppelt so hoch wie 1993. Von 1970 bis 1990 stieg die Zahl der Versorgungsempfänger bei der Post von 165.100 auf 176.800; im Jahr 1995 betrug sie bereits 195.400 und erhöhte sich im Jahr 2000 auf 260.500. Im Jahr 2002 war der Höchststand mit 273.600 Versorgungsempfängern erreicht. Der Anteil der Versetzung in den Vorruhestand wegen Dienstunfähigkeit an den Gründen für den Ruhestandseintritt bei der Post stieg von 42,2 v. H. im Jahr 1995 auf 98,0 v. H. im Jahr 2001. Das durchschnittliche Ruhestandseintrittsalter lag bei der Post im Jahr 2002 bei 48 Jahren gegenüber 59 Jahren 1993. Vgl. Dritter Versorgungsbericht der Bundesregierung, BTDrucks 15/5821, S. 219, 223 f., 310 und 318. S. a. Handelsblatt vom 26. September 2006, "Rechnungshof kritisiert Vorruhestandsgesetz", betreffend den Gesetzentwurf der Bundesregierung BTDrucks 16/1938.

79 Vgl. BVerfGE 114, 258.

80 Vgl. *Vogelsang*, ZBR 1997, S. 33 <34>.

81 Vgl. *Derlien*, DÖV 2001, S. 322 <327>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 84.

82 Vgl. *Battis*, DÖV 2001, S. 309 <314>; *Isensee*, ZBR 1998, S. 295 <298>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 84 und 103.

and dignity of public office. [Similarly, it is irreconcilable with the dignity of public office if public servants drag their employer before the courts, and most probably through various instances, for ridiculous amounts.[83]] Every public servant must bear in mind that the status of the public servant was not established to ensure rights, but to ensure that the duties are fulfilled and that the public office was not established to ensure that the needs of occupation, maintenance and self-development of the holder of the office are met, but rather that the purpose of general welfare is met.[84] Even the principles in favour of public servants, such as the maintenance principle, do not have the intention of privileging the public servant, but of ensuring the high quality of administration and thus of serving the interests of the people.[85]

3. Threat by patronage of the public office

Possibly the biggest threat to the public service is the increasing party-politicisation of administration and the related patronage of public offices.[86] This reproach is equally directed at public servants and political parties: such public servants who let themselves be bound to one political party to ensure their own professional progress or because they enjoy conspiracies, and those political parties of any shape and size that allow this to happen.[87] Both weaken the public service in its core function of being a compensatory mechanism for the political powers. This applies similarly to the patronage of dominance and maintenance, where worthy party members are placed in lucrative positions.

Patronage of offices refers to the informal influence of parties on administration through the selection of staff according to party-political criteria.[88] It is known for a long time and is unanimously rejected[89]; it has even found its way into German literature already.[90] It is obvious that it is unconstitutional.[91] However, it seems to spread continuously.[92] Within the public service it is common knowledge that certain offices – and not only those of the so-called political public servants – are only allocated to applicants with the “correct” party affiliation[93], although this is in conflict with the principle of performance as contained in Art. 33 s 2 GG. This, of course, is not without consequences: the number of non-party-affiliated secretaries

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83 Vgl. *Vogelsang*, ZBR 1997, S. 33 <36>; *Battis*, DÖV 2001, S. 309 <310>.

84 Vgl. *Isensee*, ZBR 1998, S. 295 <300>; *ders.*, in: *Knies* (Hrsg.), Staat – Amt – Verantwortung, S. 41 ff. <50>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 68.

85 Vgl. BVerfGE 21, 329 <346>; 39, 196 <201>; *Wilhelm*, in: *Fürst* (Hrsg.), GKÖD I, O vor § 1 BeamtVG Rn. 1; s. a. BVerfGE 8, 1 <12>; 9, 268 <286>; *Merten*, ZBR 1999, S. 1 <2>.

86 Vgl. *Battis*, DÖV 2001, S. 309 <311>; *Benda*, der Beamtenbund 2/1982, S. 7.

87 Vgl. *Kloepfer*, in: *von Arnim* (Hrsg.), Politische Klasse und Verfassung, S. 107 ff. <114>.

88 Vgl. *Wahl*, in: *von Arnim* (Hrsg.), Die deutsche Krankheit: Organisierte Unverantwortlichkeit?, S.107 ff. <107>.

89 Vgl. *Wahl*, in: *von Arnim* (Hrsg.), Die deutsche Krankheit: Organisierte Unverantwortlichkeit?, S. 107 ff.: "Krebsübel der Demokratie", "illegitimer Abkömmling des deutschen Parteienstaats"; *Schmidt-Hieber*, in: *von Arnim* (Hrsg.), Korruption, S. 84 ff. <87>: "Krebsgeschwür"; Vgl. *Isensee*, ZBR 1998, S. 295 <305>: "Hermelinläuse".

90 *Martin Walser*, Finks Krieg, Suhrkamp 1996.

91 Vgl. *Battis*, DÖV 2001, S. 309 <311>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 20.

92 Vgl. *Kloepfer*, in: *von Arnim* (Hrsg.), Politische Klasse und Verfassung, S. 107 ff. <107>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 108.

93 Vgl. *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 108.

of state and heads of departments in the ministries decreased from 72% in 1970 to 40% in 1995.[94]

The effects of this are obvious. One example is the article published in the weekly news magazine DIE ZEIT in 2002[95] about two incidents that occurred in the Federal Ministry for Consumer Protection before the election of the Bundestag when it was expected that a change of government was imminent: important documents of the ministry ended up simultaneously in the office of the minister and in the offices of the MP's of the opposition.

Disloyalties and false loyalties affect the effectiveness of administration just as much as lower qualifications that "are made up for" by the "correct" party affiliation. Patronage of offices – particularly in the event of a change of government – in the long run leads to an inflation of administration, because a new government cannot dismiss public servants with tenure that are from the "wrong" party and thus feels the need to create additional posts for its own people. The trust of citizens in the lawfulness of administration is undermined and thus the legitimacy of state actions is devalued.[96] The Federal Constitutional Court and the administrative courts try to avert this by lending a more imperative form to the protection of competitors' rights and this not only in the appointment of persons to initial offices, but also within the framework of processes of promotion and career development within the public service[97].

4. Threats by specific interest groups

Last but not least it must be mentioned that the demands for a uniform service law for private employees and public servants, for the public servants' right to strike and for the negotiation of the conditions of public service through collective bargaining[98] would distort the hitherto well-balanced relationship of rights and duties to the benefit of the former. Against this background it would no longer be politi-

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94 Vgl. *Derlien*, DÖV 2001, S. 322 <325>. In derselben Gruppe stieg die Fluktuation infolge von Regierungswechseln während des Zeitraums von 1969 bis 1998 von 33 auf 52 Prozent (vgl. Fn. 96. S. a. Wahl, in: *von Arnim* <Hrsg.>, Die deutsche Krankheit: Organisierte Unverantwortlichkeit?, S. 107 ff. <110 f.>). Nach Angaben des Bundes der Steuerzahler gehören in niedersächsischen Ministerien 90 Prozent der Abteilungsleiter einer bestimmten Partei an (vgl. *Schmidt-Hieber*, in: *von Arnim* <Hrsg.>, Korruption, S. 84 ff. <90>). Transparency International wirft Hamburg vor, nach 44 Jahren SPD-Herrschaft sei die gesamte Verwaltung von Parteisympathisanten durchsetzt; dort – wie auch in Köln, Frankfurt oder Berlin – sei praktisch kein öffentliches Führungsamt besetzt worden, ohne dass parteipolitisches Kalkül die wesentliche Rolle gespielt habe (Transparency International Deutchland, www.transparency.de/AEmterpatronage.74.98.html und www.transparency.de/Tagungsbericht-AEmterpatronage.72.98.html). *Kloepfer* (in: *von Arnim* <Hrsg.>, Politische Klasse und Verfassung, S. 107 ff. <109 f.>*)* hat die Motivation für eine Parteimitgliedschaft der Beamten pointiert mit derjenigen für Mitgliedschaft in einem Automobilclub vergleichen: Parteien seien im Hinblick auf Karrierechancen so etwas wie ein "politischer Abschleppverein auf Gegenseitigkeit."

95 "Die heimliche Hausmacht", DIE ZEIT Nr. 36/2002 vom ???.

96 Vgl. *Jachmann/Strauß*, ZBR 1999, S. 289 <291>; *Benda*, Der Beamtenbund 2/1982, S. 7; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., § 72 Rn. 108; *ders.*, in: *Badura/Dreier* (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, S. 359 ff. <372>.

97 Beschluss des Zweiten Senats des Bundesverfassungsgerichts vom 10. Dezember 2008, ZBR 2009, S. 125; BVerwGE 114, 149 ff.

98 Vgl. DGB, "Innovationen durch Verhandlungen", BT-Innenausschuss, Drs. 15(4)84 E Teil 1, S. 1.

cally justifiable to maintain a special status, as it is expressed in the life-time appointment. These recommendations would thus lead to a termination of the public service.

V. Reforming the public service

The leading of the state by public servants requires change and adaptation to insights gained in the private sector.

However, you may not submit to modernism and simply transfer every theory and practice discussed in the business economic sector to the public service. [Every revision should have as its point of departure the stock-taking of strengths and weaknesses in the existing system.[99] Thus the primary question is whether weaknesses existing in the current system can be resolved. Here it also needs to be verified whether existing regulations actually need to be changed or perhaps applied more consistently. Every new regulation must also fit into the remaining structure of standards and may not be in conflict with constitutional requirements. If this is not given, this does still not allow for the accusation of a lack of flexibility or management skills in public service law; rather, such limitations must be seen to result from the very own constitutional system of mutual power checks and balances and from the protection of the principle of the rule of law.

The question of a reform of the public service, as part of the reform of the state, is – in the words of the old Briest in Theodor Fontane's novel „Effi Briest" – a wide field, too wide a field, I might add, to be extensively covered within the framework of this presentation.

1. The need of reform

From discussions led in Germany thus far it is striking that critics find it difficult to name concrete deficiencies of the institution of the public service as such. If one of the commissions, the so-called Bull Commission, in its report criticises the extensive expansion of state responsibilities, the density of regulations of the German legal system, as well as the steering and control of the executive by politics through regulations and the earmarked allocation of funds[100], then these findings might be true, but these deficiencies have very little to do with the public service.[101] The complaint that performance and performance-based promotion are prevented by the principle of seniority, that is protected through case law and Art. 33 s 5 GG, is symptomatic for the superficiality of the discussion.[102] Yet standing administration of justice shows that age is no selection criteria.

Yet, many a person in the management of German local administrations may be reprimanded for his lack of management skills.[103] Poor management, however, is not a property immanent to the public service. Rather, it should be addressed

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[99] Vgl. *Pechstein*, ZBR 2006, S. 285.

[100] Vgl. Regierungskommission "Zukunft des öffentlichen Dienstes – Öffentlicher Dienst der Zukunft", S. 37 ff.

[101] S. a. *Pechstein*, ZBR 2006, S. 285.

[102] Vgl. Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung, Stenografischer Bericht der 8. Sitzung vom 8. Juli 2004, S. 184 A.

[103] Vgl. Regierungskommission "Zukunft des öffentlichen Dienstes – Öffentlicher Dienst der Zukunft", S. 41.

through better training and through the incentive that in the promotion process for management posts management skills will be advantageous. Management skills, in this instance, will include the ability to utilise the existing instruments of public service law.

2. The strengths of the public service

What is often disregarded in the discussions around the future of the public service are the strengths of the existing public service law and the merits of German public servants. To name but the prime example, it was with the help of the public servants that after German unification in 1990 it was possible to change the legal system of the new federal states within the shortest possible time from a socialist dictatorship to a democratic system under the rule of law.[104]

Contrary to what some prophets of doom may proclaim, the public service in Germany is efficient. Although the percentage of public servants of the total number of employees is one of the lowest worldwide, German authorities – by international comparison – are acknowledged to work in an exemplary manner and the efficiency of German public servants can stand up to any comparison.[105] The current public service law allows the flexible assignment/deployment of public servants. Thus the legislator at national level and at the level of the federal states could increase the number of weekly working hours to 42 hours within the framework of consolidating the state finances, without having negotiated this with the trade unions and without having to increase remuneration.[106]

3. The ability to reform the public service

Even under the existing constitution, the public service law is open for modernisation. This was emphasised by the Federal Constitutional Court through its administration of justice.[107] A number of the modernisation measures discussed, some of which have already been implemented in administration, are reconcilable with the constitution[108] and thus confirm the potential flexibility of the institution of the public service. [109]

What is not possible, however, in terms of the current constitutional law, is a policy of “hire and fire“. He who strives for such a policy should either have himself absolved from taking responsibility in budgetary planning or should implement a

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[104] Vgl. *Isensee*, ZBR 1998, S. 295 <301>.

[105] Vgl. ifo-Institut, ifo Standpunkt Nr. 56: Sieben Wahrheiten über Beamte, http://www.cesifo-group.de/portal/page?_pageid=36,102910&_dad=portal&_schema=PORTAL&item_link=stp056.htm.

[106] Vgl. *Battis*, DÖV 2001, S. 309 <316>; s. a. BVerfG, 1. Kammer des Zweiten Senats, Beschluss vom 15. März 2006, 2 BvR 1402/03.

[107] Vgl. BVerfGE 3, 58 <137>; 7, 155 <162>; 8, 1 <16>; 9, 268 <286>; 11, 203 <215>; 43, 242 <278>; 44, 249 <263>; 52, 303 <335>; 56, 146 <161>; 58, 45 <78>; 64, 367 <379>; 70, 69 <79>; 71, 255 <268>; 114, 258 <288>.

[108] Vgl. *Battis*, DÖV 2001, S. 309 <312>; s. a. das Grundsatzpapier der Bundesregierung vom 19. August 2004, Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung, Projektgruppe 2 "Öffentlicher Dienst/Innere Sicherheit", Projektgruppen-arbeitsunterlagen (PAU) 2/0006.

[109] Vgl. *Isensee*, ZBR 1998, S. 295 <305>; *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <174 ff.>.

submissive administration. What would also require an amendment of the constitution is the introduction of a uniform law of employment, as demanded by the Bull Commission. [Whether the labour law, however, is suitable to reform the administration may rightfully be questioned.] With regard to flexibility and costs, the public service law is far superior to the private labour law.[110] He who demands the public service to be restructured according to the labour law, can only do this on the basis of an ideal image of labour law, which is not to be found in reality. After all, these suggestions would have to consider the peculiarities particularly of the core of the public service and would thus have to make provision for a number of special regulations within the "normal" labour law.[111] In the case of such a labour law adapted to the rights and duties of the public service relationship, the question arises why the current legal status should be set aside[112].

Constitutional concerns were also expressed about the establishment of temporary offices as suggested in the law.[113] This new institution would have allowed pressure to be exercised on public servants employed for periods up to ten years in that such public servants would have to fear that in the case of possible resistance against politically desired measures they would lose their temporary job and would fall back to their previous position. This was, however, prevented by the Federal Constitutional Court (see above p. 16).

VI. The future of the German public service

In the matter of reforming the German public service, economic criteria can only be of secondary importance. The elementary tasks of the public service are administration and government, not management.[114] The suitability of the administrative system is not only determined by uniform formulas such as McKinsey's formula, but mainly by national legal traditions. The mere existence of states in which the rule of law prevails but in which no public service exists[115], does not question the ability of the German public service to exist in future. The German public service is a specifically German constitutional construction to ensure the rule of law.[116]

Public service law and the public service as such have stood the test of time. There are developments that deserve criticism. These, however, should not be addressed by softening or even waiving public service law, but rather by enforcing it consistently.

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[110] Vgl. *Battis*, DÖV 2001, S. 309 <316>; Vgl. *Isensee*, ZBR 1998, S. 295 <305>.
[111] Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <177>.
[112] Vgl. *Jachmann/Strauß*, ZBR 1999, S. 289 <291>.
[113] Vgl. *Isensee*, ZBR 1998, S. 295 <309>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., §72 Rn. 114; *ders.*, in: *Badura/Dreier* (Hrsg.), Festschrift 50 Jahre Bundesverfassungsgericht, 2. Band, S. 359 ff. <375 f.>.
[114] Vgl. OECD, Modernising Government (2005), S. 160 ("the fundamental purpose of the civil service is government, not management").
[115] Vgl. *Bull*, DV Bd. 37 (2004), S. 327 <339>.
[116] Vgl. *Jachmann*, in: *Eichenhofer*, 80 Jahre Weimarer Reichsverfassung, S. 155 ff. <156>; *Lecheler*, in: *Isensee/Kirchhof*, HbStR Bd. III, 2. Aufl., Rn. 14; *Merten*, ZBR 1999, S. 1 <10>.

The high requirements towards the public service do not fit all employment relationships, but are only justifiable for the core areas of state actions – police, justice, fiscal and ministerial administration - but in these areas they are absolutely necessary. Thus the employment of public servants should in future be limited to these core areas.[117]

The public service and thus the guarantee of an administration under the rule of law will only have a future if it can resist external influences from outside the field. This includes the restriction of side-line occupations according to private law, as well as curtailing party-politicisation and activism. The prohibition of party-political activities of public servants is not unthinkable. The legal disputes around the scarf worn by Moslem women and the possibility of forbidding public servants to show their religious affiliation[118], have shown that the waiving of the special status relationship has not led to public servants – in exercising their constitutional rights – not being subject to special restrictions.[119]

Public service law cannot turn a blind eye on new insights gained. Pilot projects, such as that of the Federal Ministry of the Interior and the Deutsche Bank AG who initiated a personnel exchange programme between public administration and the private sector, can also make their contribution in this regard.[120]

The implementation of business-economic instruments will at all times be subject to them being reconcilable with the functions of public administration, but are unavoidable. For all changes to the structure of the public service, the following applies: any possible reform must take into consideration that the current public service law is a complex, interactive system, in which the individual components necessitate each other.

It is thus not possible for any participant “to take the pick of the bunch“. The specifically German form of public service law has served Germany well for the past 60 years. On the one hand, the legal system ensures that the principle of lawfulness supersedes the exercising of power and, on the other hand, it is flexible enough to fulfil new requirements.

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[117] Vgl. *Vogelsang*, ZBR 1997, S. 33 <37>.
[118] Vgl. BVerfGE 108, 282.
[119] Vgl. *Isensee*, in: *Knies* (Hrsg.), Staat – Amt – Verantwortung, S. 41 ff. <50>.
[120] Vgl. *Fiedler/Scharioth/Schwarz/Geißler*, Personalaustauschprogramm Öffentliche Verwaltung und private Wirtschaft – Evaluationsbericht vom 10. Mai 2006.