

The publication and online accessibility of norms in Germany

by Ulrich Karpen

INTRODUCTION

All legal norms must be published in the sense that they must be accessible to everybody who is affected by them. Nobody can obey secret law in a rule-of-law state. Publication is an integral element and the last step of lawmaking. Traditionally Parliamentary laws – and most statutory instruments – are published in paper form in a Law-Gazette. Newer forms of communication, mainly the internet, enable state governments to publish norms faster and facilitate access. There are, however, doubts over whether electronic publication is as reliable, durable and unassailable from outside as paper gazettes. This is one reason why some states take a different approach and are reluctant to change entirely, publishing laws in both new and traditional forms. However, internet access to the texts of regulations is granted in all technically developed countries.

This paper analyses publication methods in the Federal Republic of Germany.

CONSTITUTIONAL REQUIREMENT FOR PUBLICATION

Certification, promulgation, and publication are the final and integral elements of lawmaking. The highest constitutional authority – the head of the state, the prime-minister, or the government as a collegiate body – certify the authenticity of the text, as published, with the Act as passed by Parliament or other norm-setting authorities. After that, the authority orders the norm to be published. The norm must be accessible to everybody, not just officials and courts.

CLASSIFICATION OF NORMS

In Germany, the main categories of norms are constitutional law; statutory (Parliamentary) law; regulation (legislative decrees, ordinances, statutory instruments and delegated legislation); bye-laws; and administrative regulations. The procedure of Parliamentary legislation is regulated in articles 76-78 of the Federal Constitution (Basic Law, BL). Article 80 BL applies to statutory instruments:

The Federal Government ... may be authorized by law to issue statutory instruments. The content, purpose and scope of the authority conferred shall be specified in the

law. Each statutory instrument shall contain a statement of its legal basis.

Bye-laws are regulations from autonomous bodies, such as communal entities (cities, counties); universities; and chambers of commerce. Administrative regulations emanate from administrative bodies and are procedures for executing laws and statutory regulations. They have internal force and are binding on administrative organs, but may also have external effect – under the equality principle – on citizens.

Article 82 BL reads:

Laws enacted in accordance with the provisions of this BL shall, after countersignature, be certified by the Federal President and promulgated in the Federal Gazette. Statutory instruments shall be certified by the agency that issues them, and unless a law otherwise provides, shall be promulgated in the Federal Gazette.

Bye-laws and administrative regulations are published in other forms, mostly in internal forms. Details on promulgation and publication of norms are regulated in section 5 of the Rules of Procedure of the Federal Government (§§ 58-61 deal with Parliamentary laws, §§ 62-68 deal with statutory instruments and §§ 69-71 deal with administrative regulations). Further details can be found in the *Manual of Drafting Legislation* (3rd ed, Cologne, 2008), as edited by the Federal Minister of Justice.

THE FEDERAL LAW GAZETTE AND OTHER OFFICIAL JOURNALS

All Parliamentary laws and most statutory instruments are published in the Federal Law Gazette (“Bundesgesetzblatt”). It is organised in three parts:

- *Part I* covers all Federal Parliamentary Laws and, furthermore, the major part of Federal Statutory Instruments, unless they are published in the *Government Gazette* or in the official journal of the Federal Ministry of Traffic, Building and Estate Activities. In addition, the *Federal Law Gazette* contains the decision formulas (operative parts) of findings of the Federal Constitutional Courts, which – in the review-of-law procedures – have the force of Parliamentary law. Orders and statutory instruments of the Federal Presidents are also published

here, as are the Rules of Procedure of both houses of Parliament – Federal Diet and Federal Council.

- *Part II* covers international agreements and treaties.
- *Part III* has been, for a long time, the publishing organ of consolidation of law, with the effect that laws which are not republished cease to be applicable. This is now replaced by an e-journal.

In the interest of the state of defence of the country, a simplified publication of Parliamentary law and statutory instruments on radio or in newspapers is possible (Law of 1979/2016).

Another major instrument of publication is the *Government Gazette* (“*Bundesanzeiger*”). It is presented in electronic form by the Federal Minister of Justice, but can be published in paper form if necessary. As a substitute publication or in addition to e-publication it still has its values and is important for public offices and libraries in paper form. The law requires electronic publication to be complete and permanent. Statutory instruments may be published in the *Government Gazette* instead of the *Federal Law Gazette*.

Other *Government Gazettes* are addressed to special sections of government, for example in case of emergency for the waterways and shipping administration and the health service. Furthermore, there are *Gazettes* published by the Federal Revenue Service and the Federal Internet Agency. Other official announcements and public tenders are also published there, as are national laws to transform European law. In these cases, publication in the *Gazette* has to be announced in the *Federal Law Gazette*.

Bye-laws of autonomous bodies (communal entities, universities, chambers of commerce etc) are published in other information organs, many of them in electronic form. Administrative regulations and bids are published mostly on the internet.

PUBLICATION OF STATE LAWS

Germany is a Federal State consisting of 16 States (“*Länder*”). Each State has a Parliament and a government. The procedures for certification and promulgation of laws, statutory instruments, and other norms are similar to those for their federal counterparts. Since the States do not have presidents, the order to publish is given by the head of government, the collegiate government, or by the president of the respective Parliament. In general, laws and statutory instruments are published in a *State Law Gazette*. Two States – Brandenburg and Saarland – publish these categories of norms electronically, authorised by a Parliamentary law. Since electronic publication is a constitutional issue, a constitutional authorisation for the electronic promulgation of laws in constitutional amendments has been established in both states.

OBJECT OF PROMULGATION, CONSOLIDATED VERSION, CODIFICATION

The full text of the norm is subject to publication. As an exception, the Federal Constitutional Court held that sections of the State Budget must not be published in detail (the budget as a whole is a Parliamentary law). As far as references are concerned, the norms as referred to must be clear and published independently. Small corrections of norms (of a merely editorial nature) may be published on order of the government, but bigger errors or amendments would of course require an Act of Parliament. Removals of time limits for the applicability of a norm do not need to be published. Often, a consolidation of the law is necessary; unclear and often amended texts – hard to oversee – are mostly announced in an adjusted version. The published norms, in general, are to be implemented at the date of issue of the relevant number of the *Gazette*.

ELECTRONIC PUBLICATION OF LAWS AND STATUTORY INSTRUMENTS

In Germany, the legal and technical requirements for the electronic publication of laws are strict. A special legal authorisation is required; article 82 BL (“... and promulgated in the *Federal Law Gazette*”) is to be understood in a strict sense, as covering a publication in paper form only. For exclusive as well as cumulative promulgation in electronic and printed form, an *amendment of the Constitution* is required (the States of Brandenburg and Saarland followed this procedure). The Federal Constitutional Court, in a decision of 2009 (OffGaz 123, 39-88) held that electronic voting did not meet constitutional requirements, since essential steps of the voting procedure and counting of results must be (and in this case were not) reliable and understandable without special knowledge. They should be open to scrutiny by every citizen. This case has a different application, but by analogy demonstrates that principles of reliability, clarity and durability of information are taken seriously by the court under the rule-of-law-aspect. These requirements are not easily met by internet publication.

As far as the technical requirements for electronic publication of laws are concerned, general accessibility of electronic texts must be guaranteed, for instance by general public access points. It goes without saying that all laws and other norms are accessible on the internet nowadays, particularly when they are primarily published in paper form.

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