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Protection of Constitutional Rights and Reform of Nuclear Power Plant Licensing Procedures in West Germany: An Interim Assessment

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I. INTRODUCTION

With the great amount and continuing publicity of litigation dealing with nuclear power plant licensing in West Germany, it is hardly noticed that not everything which ought to be important in such cases is argued before the courts. The judges are fully occupied just understanding and weighing the scientific studies and affidavits which are always presented and then must make their decision—usually for the plant operator. There barely remains time to consider how large the potential for danger to society actually might be and which burdens may be demanded of the environment so that society can solve its energy problems. West German courts, though competent to protect constitutional rights, are thus spared many fundamental concerns when they decide upon the legality of nuclear power plant permits.[1] While one can speculate about the various reasons for the limited judicial role, those reasons are not the subject of this Commentary. Rather, the focus here is on the problem of the remainder of decisionally important questions, which has become smaller in recent years.[2]

During the past decade, there has been a lively discussion about

* This Commentary is a revised and updated version of an article which appeared in German in 5 KRITISCHE JUSTIZ [KJ] at 389-401 (1980). English translation by Chris Witteman.

1. *See, e.g.*, Judgment of Mar. 17, 1980, Verwaltungsgericht [VG] Schleswig, 80 ENERGIEWIRTSCHAFTLICHE TAGESFRAGEN [ET] 305 (1980); Judgment of Dec. 22, 1980, Bundesverwaltungsgericht [BVerwG], 25 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1393 (1981).

2. A. ROSSNAGEL, GRUNDRECHTE UND KERNKRAFTWERKE 35-38, 42-43 (1979). *See generally* Geulen, *Die langsame Beseitigung des Rechtschutzes im Umweltrecht*, 2 KJ 170 (1980).

the simplification and acceleration of the nuclear power plant licensing procedure in West Germany. This debate is attributable to the fact that the licensing of a new nuclear power plant requires from twenty to thirty individual permits[3] and can take up to eight years to complete.[4] The reform movement is led by legal scholars who are thoroughly convinced that they contribute to social progress by deforesting large groves of statutes and simplifying procedures, even though their efforts impact on the solution of significant social problems like the production of energy. Amidst the general popularity of these reform goals,[5] one can easily lose sight of the fact that the object of the licensing process— the protection of the public from nuclear dangers and risks—is very special and is arguably not, at least at this point in time, susceptible to procedural acceleration and simplification.

It is noteworthy that the relationship between the dangers of nuclear energy and the constitutional rights to life and bodily inviolability,[6] to freedom from anxiety,[7] and to a humane environment[8] has hardly been examined up to now.[9] Yet in a time which is still shaped

3. R. LUKES, L. VOLLMER & W. MAHLMANN, GRUNDPROBLEME ZUM ATOMRECHTLICHEN GENEHMIGUNGSVERFAHREN 18 (1974).

4. The debate is also fueled by a belief in some quarters that the development of nuclear power is absolutely necessary to protect West Germany from a worldwide energy shortage and to strengthen its ability to compete in the international economic arena, not insignificantly by the sale of nuclear power plants. *See, e.g.*, 22 BULLETIN DER BUNDESREGIERUNG 183 (Feb. 29, 1980) (statement of Secretary of State Lautenschläger).

5. The West German public, however, is becoming increasingly conscious of the fact that the equation "reform equals progress" is no longer quite accurate. A decade of "reform" on the part of the social-liberal coalition has changed the content of this terminology. *See, e.g.*, BUNDESTAGS-DRUCKSACHE 7/3871 at 10 (1975). Although at the beginning of the 1970's one could still grasp "reform" as part of societal emanicipation (Willy Brandt's "to risk more democracy"), the absence of the promised reforms has given rise to the current realization that the word "reform" has taken on a new and different meaning. In the present restorative phase, procedural reforms serve primarily to maintain the status quo, instead of contributing towards progress (in the sense of increasing the democratization of society).

6. GRUNDGESETZ [GG] art. 2, ¶ 2 (W. Ger.), 2 states: "Everyone shall have the right to life and to the inviolability of his person." The *Grundgesetz*, or "Basic Law," is the present constitution of West Germany, adopted in 1949.

7. Freedom from anxiety is derived from GG art. 1, ¶ 1 (W. Ger.), which guarantees that "[t]he dignity of man shall be inviolable." The essence of this dignity includes the guarantee of an "interior space" (*Innenraum*), to which the individual can always retreat and in which he can feel undisturbed. A. HAMMANN & H. LENZ, KOMMENTAR ZUM GRUNDGESETZ 128 (1970).

8. GG art. 1, ¶ 1 (W. Ger.), in conjunction with GG art. 2, ¶ 2, produce a mandate for a humane environment. A. HAMMANN & H. LENZ, *supra* note 7, at 137.

9. This is perhaps an indication of the low level of judicial engagement by nuclear power opponents. It is for this reason that the proponents of nuclear power can always maintain without contradiction that, even within their own agenda, the observance of basic rights takes priority over the expansion of nuclear power.

by an unbroken belief in growth and by the idea that every reform aiming at the preservation of the economic status quo automatically carries within itself the seeds of its own legitimacy, it is important to recognize the ideological character of the proposed and enacted reforms. The goal of this Commentary is therefore to point out the lack of concern about the fundamental constitutional rights of the individual in the discussion over the future handling of nuclear energy in West Germany.[10]

II. PARAMETERS OF THE REFORM DISCUSSION

The reform discussion is not new.[11] By 1975, the West German government had already determined that reform of the nuclear power plant licensing process was a necessity and that its contents should be "decided according to the constitutional rules of parliamentary democracy."[12] For a number of years, not much happened in the way of concrete changes in the law. The government failed to take the decisive step by leaving the section of the Atomic Energy Law[13] dealing with licensing procedures untouched. Since 1981, however, the federal government has introduced other measures to put some of the reform proposals into practice.[14] If not all of the essentials of the reform movement have been realized, it is less attributable to the complexity of the legal material than it is to the political explosiveness of the problem.

Part of this explosiveness stems from the fact that the relevance of the West German Constitution to procedural law became topical about the same time that the government articulated its desire to streamline the licensing procedure. The function of procedural law in the realization of fundamental rights was worked out as a result of recent constitutional interpretation.[15] This development can be seen in the current tendency of the Federal Constitutional Court[16] to extrapolate standards

10. It does not, however, comprise an exhaustive portrayal of the situation, but rather describes the significant themes and tendencies of the reform discussion.

11. *See infra* notes 34-74 and accompanying text.

12. BUNDESTAGS-DRUCKSACHE, *supra* note 5, at 10.

13. ATOMGESETZ [AtomG], Law of Dec. 23, 1959, [1959] BUNDESGESETZBLATT [BGBl] I 814 (W. Ger.). Licensing procedures are set out in the Ordinance of Feb. 18, 1977, [1977] BGBl I 280. These procedures have recently been revised. *See infra* text accompanying notes 68-74.

14. *See infra* notes 68-74 and accompanying text.

15. P. HAEBERLE, VERFASSUNG ALS ÖFFENTLICHER PROZESS 677 (1978).

16. On the function of this court, see generally Benda, *Constitutional Jurisdiction in West Germany*, 19 COLUM. J. TRANSNAT'L L. 1 (1981).

for the shaping of procedural law from the constitutional rights of individuals.[17] In the *Mülheim-Kärlich*[18] decision, for example, the Court recognized the influence of the constitutional rights to life and bodily inviolability in the nuclear power plant licensing process. This decision is a landmark on the way to a procedural order which realizes and respects constitutional rights. In the future, no judge or court will be able to escape this determination that public participation in nuclear power licensing procedures serves the protection of the citizen and not, as practiced until a short while ago in some courts, solely the informational interest of the administrative apparatus.[19] The protection of constitutional rights through the right of public participation seems assured for the time being.

How the reform movement will react to this constitutional development is an interesting question, or, perhaps more accurately, could have become an interesting question. That is because the reformers' solution to the conflict between procedural efficiency and constitutional rights had already begun to develop before the reformers could take a comprehensive position on the question. A hint of this development appeared in the dissenting opinion in the *Mülheim-Kärlich* decision, which emphasized the "weighty additional advantages"[20] of the participation of citizens in the administrative licensing procedure: "[This participation] is a requirement for the indispensible acceptance of nuclear power licensing decisions throughout the populace and thereby allows the courts to shift the emphasis of their examination from the difficult evaluation of technical and scientific questions to controlling the procedural conduct of the actual decision makers. . . ."[21] In other words, a

17. Judgment of Sept. 27, 1978, Bundesverfassungsgericht [BVerfG], 49 BVerfGE 20, 225 (1979) (property rights under GG art. 14); Judgment of Nov. 8, 1978, 50 BVerfGE 16, 29 (1979) (freedom to pursue a profession under GG art. 12 (W. Ger.)); Judgment of June 19, 1979, 51 BVerfGE 324, 327 (1980) (rights to life and bodily inviolability under GG art. 2, ¶ 2 (W. Ger.)).

18. Judgment of Dec. 20, 1979, 53 BVerfGE 62 (1980). In this case, a woman living seven miles from a reactor site contested a substantial change in the reactor plans which was allowed without a public hearing. The court stated that: "The protection of constitutional rights is to a great extent realizable in the shaping of procedural law. Constitutional rights are not only a matter of substantive law, but also have an influence on procedural matters." *Id.* at 65. Nevertheless, the court ruled that the preclusion of the plaintiff's opportunity to assert her constitutional rights as a third party, though violative of a procedural decree, was not a constitutional error.

19. *See, e.g.*, Judgment of May 3, 1977, Oberverwaltungsgericht [OVG] Koblenz, 16/17 DEUTSCHES VERWALTUNGSBLATT [DVBl] 730 (1977).

20. 53 BVerfGE, *supra* note 18, at 81.

21. *Id.* at 81-82. It is important to understand that West Germany has a separate administrative court system which belongs to the judicial branch of the government. These

green light for the loosening of judicial control became apparent.

The shifting of control from the judiciary to the executive has become the common denominator of all proposals for the streamlining of the nuclear power plant licensing process in West Germany.[22] A glance at the previous publications on this theme[23] shows impressively the unanimous desire of the government, the energy industry, and the legal academia to make the process more effective and expeditious. There are differences in the evaluation of the necessity of constitutional guarantees, but the proposals are all directed towards a more efficient procedure. This unanimity is not surprising in view of recent experiences which demonstrate that increased public awareness about the dangers of nuclear power[24] and the length of individual permit litigation stand in direct contradiction to the prioritized expansion of this form of energy.[25]

The first judicial decision to deal with questions raised by the construction of nuclear power plants was issued in 1962. It was held by a lower court[26] that the protection of the populace anchored in the statute[27] took priority over the "strong private and public interest in the research, development and use of nuclear power for peaceful purposes."[28] Since that time, the standards of protection from the dangers

courts should not be confused with the administrative authorities involved in the nuclear power plant licensing process, who are a part of the executive branch. For an overview of the West German court structure, see generally Meador, *Appellate Subject Matter Organization: The German Design from an American Perspective*, 5 HAST. INT'L & COMP. L. REV. 27 (1981).

22. At the Sixth Congress of German Administrative Judges in May, 1980, a large majority of the approximately 200 judges in attendance was convinced that the much lamented overloading of the administrative courts required the shifting of control out of the courts and into administrative procedures. Frankfurter Allgemeine Zeitung, May 10, 1980, at 8. *See also* the report in 22 DIE ÖFFENTLICHE VERWALTUNG [DÖV] 931, 933 (1982), discussing the October, 1982, meeting of the Congress of Public Law Professors, where a similar conclusion was reached.

23. For an overview, see the regularly-held Symposia on German Atomic Energy Law, with contributions by scientists, government administrators, and representatives of industry. DEUTSCHES ATOMRECHTS-SYMPOSIEN (R. Lukes, ed. 1972).

24. The reformers are understandably concerned that increased public debate will expand the number of issues involved in nuclear power plant licensing (*Thematisierung des Atomstaates*) and thus contribute to licensing delays. *See* Hinz, *Der Atomstaat vor Gericht?* in DIE ATOMARE GESELLSCHAFT 115, 137 (J. Hallerbach ed. 1978).

25. As a result of these two phenomena, the already chronic overloading of the administrative court system is becoming acute. *See generally* Ossenbühl, *Gerichtliche Überprüfung von Kernkraftwerken*, 1/2 DVBl 1 (1978).

26. This Aachen administrative court decision is discussed in Hinz, *supra* note 24, at 115.

27. AtomG § 1(2).

28. Hinz, *supra* note 24, at 115.

and risks of nuclear energy have been increased and detailed by the courts. The most significant step was the *Wuergassen* decision of the Federal Constitutional Court,[29] which confirmed the priority of the protection of the population in determining the legality of power plant permits.[30]

Certainly, there are other decisions which reflect a more restrictive tendency.[31] The high point of this restrictive tendency is the decision of the Federal Administrative Court regarding the nuclear power plant at Stade.[32] This decision set the standing requirement for citizens so high that it makes a pursuit of constitutional rights within the licensing process almost impossible for large segments of the affected populace. Even at a distance of twenty-five kilometers from the planned site, the Court found that it could "obviously no longer speak of a danger" to the plaintiff.[33] Another court has stated that it should be carefully examined "whether the plaintiffs in these cases, in asserting their subjective concern, are not really just opposed to nuclear energy in any form."[34]

In spite of this restrictive tendency in the case law, the general parameters discussed above make it clear why reformers by and large want to move the decisional competency out of the courtroom and into the administrative arena and, beyond that, into the legislature. Given the overall situation, one might well suspect that the participation and legal protection of the public are at issue.

III. CONTENTS OF THE REFORM

Up to now, the reform efforts can be structurally differentiated into those which are directed towards applying in detail the provisions of the Nuclear Energy Law and those which are directed at changing

29. Judgment of Mar. 16, 1972, BVerfG, 17 DVB1 678 (1972).

30. *See also* Judgment of Oct. 17, 1977, OVG Lüneburg, 7 DVB1 340 (1977); Judgment of Mar. 14, 1977, VG Freiburg, 36 NJW 1645 (1977) (requiring the complete exclusion of any risk that the reactor would fail); Judgment of Feb. 17, 1978, [1978] 55 BVerwGE 250 (emphasizing the complete reviewability of lower courts' grounds for deciding on the adequacy of emission protection and the necessity of a plan for preventing radioactive emissions).

31. *See generally* Geulen, *supra* note 2. *See also* Judgment of Mar. 17, 1980, *supra* note 1, holding that a nuclear waste disposal plan was not a requirement for a permit within the context of AtomG § 7(2) and that any uncertainty in the waste disposal situation was attributable to the legislature, not the plant operator.

32. Judgment of Dec. 22, 1980, BVerwG, 25 NJW 1393 (1981).

33. *Id.* at 1395.

34. This decision of the administrative court in Schleswig was reported in the Kieler Nachrichten, Aug. 21, 1980.

the statute or introducing new administrative procedures. Those proposals which have already been acted upon by the federal government will also be considered.

A. Proposals Dealing with Existing Law

1. Limiting Judicial Review

In the effort to loosen judicial control in favor of increased decisional competency for the administrative authorities, the greater proximity of administrative bodies to the licensing process and other qualitative differences between administrative and judicial bodies are emphasized. A number of proposals to impart judicially unreviewable discretion to the administrative authorities have been advanced.[35] Such attempts to limit the power of the courts are subject to the basic objection that there is no dogma in general West German administrative law which recognizes a judicially unreviewable discretion on the part of the administrative bodies. Moreover, the process cannot proceed on an ad hoc basis without giving the administrator too much discretion, thereby violating the constitutional principle of separation of powers. Although generally restrictive in tendency,[36] the decisions of the Federal Administrative Court mandate judicial review of administrative decisions unless there are exceptionally compelling reasons to the contrary.[37] Otherwise, the authorities could always withdraw their determination from judicial review by reference to the special issues involved in the case. Apart from that, the strict commands[38] of the Atomic Energy Law hardly allow for the recognition of latitude based upon prognostic or planning aspects of an administrative decision.

2. Increased Legislative Participation

There is a certain regret on the part of the reformers over the discrepancy between the government's energy plans and the conversion of these plans into reality. This regret leads to proposals to separate general planning decisions from the review of a particular plant's safety

35. C. ULE, BUNDESIMMISSIONSSCHUTZGESETZ KOMMENTAR § 3, nos. 1725-32 (1977); C. ULE, WIRTSCHAFT UND VERWALTUNG 77, 80-94 (1970); W. SCHMITT-GLAESER, DER LANDKREIS 242, 246-50 (1976); Ossenbühl, *supra* note 25, at 5-8; P. FEUCHTE, DIE VERWALTUNG 291-99 (1977); C. DEGENHART, KERNENERGIERECHT 148-49 (1981).

36. *See, e.g.*, Judgment of Feb. 17, 1978, 55 BVerwGE 250, 253 (1978).

37. For instance, where the whole set of circumstances is unique and unlikely to reoccur. *See* 26 BVerwGE, 65, 74; 39 BVerwGE 197.

38. The German terminology is the "strict application" (*Anspruchscharakter*) of these statutes. It entails an if-then scheme: if the applicant follows the obligations of the law, then he must get the permit.

precautions.[39] It is also the reason for the repeatedly expressed desire for increasing the participation of the legislature in the permit process, the theory being that legislative involvement is appropriate for questions which are of larger political importance,[40] such as nuclear energy. It is doubtful, however, that legislative participation means greater democratic legitimacy, as is always argued, and that the interests of the affected population are protected when the judicial role is necessarily limited by such proposals. Nor is there any indication in the reform movement that these proposals will not lead to an ever greater loss of citizen participation and input in the nuclear power plant licensing process.

3. Standardizing Statutory Precautions

Another area of reform proposals dealing with existing law is the application of the executory provisions of the Atomic Energy Law. Here, the primary concern is the further standardization of precautions necessitated by statutory command.[41] In the opinion of the West German government,[42] there are ways to calculate and quantify the allowable residue of risk which could serve as the basis for the legal determination of permissible danger levels.[43] Without fully evaluating the matter here, one can nevertheless point to numerous uncertainties in the currently employed methods of assessing risk and in the data used by these methods.[44]

The increasingly accepted scientific perception that there is simply no concrete spectrum of harmlessness[45] leads to the conclusion that great flexibility and caution are called for in the standardization of acceptable radiation levels.[46] Up to this point, however, judicial decrees

39. This was the case with the proposal for a preliminary siting decree discussed in Thieme, *Doppelte Auslegung im Immissionsschutzverfahren*? 9 DÖV 296 (1976), and the proposal for establishing procedures to draft such a decree discussed in R. LUKES, L. VOLLMER & W. MAHLMANN, *supra* note 3, at 33-63.

40. *See, e.g.*, Ossenbühl, *supra* note 25, at 8.

41. AtomG § 7(2), no. 3, requires "financial security . . . to cover all legal liability to pay compensation for damage."

42. See the explanation in 122 BULLETIN DER BUNDESREGIERUNG 1138 (Oct. 11, 1979).

43. *See, e.g.*, the German Risk Study undertaken for the Society of Reactor Safety in DEUTSCHE RISIKO STUDIE (8 vols. 1979-81).

44. The American Rasmussen Study, for example, had to be withdrawn because of its all too optimistic initial data. As the incidents at Three Mile Island and La Hague, France, demonstrate, it is the human factor which is impossible to calculate. R. PAUL, DIE LEKTION HARRISBURG UND DIE FOLGEN FÜR UNSRE ZUKUNFT 253-56 (1980).

45. H. STROHM, FRIEDLICH IN DIE KATASTROPHE 169, 169-93 (1981).

46. The "dynamic protection of constitutional rights" which the Federal Constitutional

and administrative regulations have only shifted the problem of risk quantification to legislators instead of posing a solution. One reform proposal involves the introduction of so-called "Sub-Parliaments" with certain rule-making competence, similar to European Common Market specialist committees.[47] Such a committee could react with more flexibility to changes in the level of technical and scientific knowledge. The main problem with such a plan is that the composition of a committee with final decision-making authority, already a central problem under current law, has hardly been addressed. If the disinterest in this question persists, the essential decisional competence may fall into the hands of scientific and technical experts who are selected on the basis of the reputation of the institutions which employ them—institutions which often have vested economic and political interests in decisions regarding the use of nuclear energy.[48]

B. Proposals for New Procedures and Procedural Entities

1. Administrative Specialist Panels

This widely discussed proposal[49] strives for a solution to the power conflicts between the executive and the judiciary, between politics and law. It envisions a suitably empowered, independent, and non-partisan committee which would perform its quasi-judicial function at the administrative level, as opposed to the legislative committee suggested previously.[50] This committee of scientific and legal experts would have the final decisional competency for technical and scientific questions arising in individual permit proceedings within the licensing process. The question of judicially controlling the controllers under such a plan is generally answered with two assertions. First, there is no constitutional right to a second determination of factual issues by the courts, and second, judicial control may be constitutionally limited to an examination of the regularity of administrative procedure.[51] In such circumstances, the decisive question remains the manner in which public participation and the effective legal protection of those affected is to be secured.

Court demanded in its *Kalkar* decision could be an antidote to excessively standarized safety norms. Judgment of Aug. 8, 1978, BVerfG, 1/2 DÖV 49 (1979).

47. Lukes, *Das Atomrecht im Spannungsfeld zwischen Technik und Recht*, 6 NJW 241, 246 (1978).

48. P. MAYER-TASCH, UMWELTRECHT IM WANDEL 37-38, 53-55 (1978).

49. *See, e.g.*, Ossenbühl, *supra* note 25, at 9.

50. *See supra* note 47 and accompanying text.

51. GG art. 19, ¶ 4 (W. Ger.).

Because this reform proposal lacks provisions for judicial review of the facts, it cannot evade the reproach that it represents at least a partial denial of legal protection. This criticism remains justified until specific judicial control is present in the plans for such an administrative specialist panel.

2. Decisional Concentration

According to existing West German law, the granting of a nuclear power permit binds other authorities participating in the licensing procedure in such a way that these authorities must proceed on the basis of those permits already granted to the plant in question.[52] This splintering of competencies and the consequent delay in the licensing procedure are not eliminated by the Atomic Energy Law. Thus, the need for a concentration of administrative decision-making is frequently and variously expressed.

Most of the proposals in this regard involve legislation which would roll back the otherwise dominant administrative separation in favor of administrative concentration.[53] The undeniable advantage of such a plan, the containment of the bureaucratic Moloch, is largely counter-balanced by the disadvantages entailed by the loss of decentralized control, particularly in the fact that each aspect of the proposed power plant may not be considered in its own light. Above all, there would be difficulties in the preservation of opportunities for the participation of the citizen in each procedural segment. It is thus highly questionable whether such a concentrated licensing procedure, with the heightened demands it places on the informational capabilities[54] of the affected citizen, will be able to assure the same degree of public participation and protection which is otherwise possible.[55] In spite of these

52. For the latest reiteration of this principle, see Judgment of Nov. 22, 1979, BVerwG, 1 GEWERBEARCHIV 40 (1980).

53. *See, e.g.*, Jarass, *Die Abgrenzung parallel erforderlicher Anlagegenehmigungen*, 1/2 DÖV 21 (1978).

54. This means the ability to gather, integrate, and digest all the pertinent information. Under previous procedure, the citizen could break this mass of information down into manageable "bits" because the licensing procedure itself was spread over a number of different phases.

55. These concerns hold especially true for the replacement of the licensing procedure by a nuclear power plant master plan. R. LUKES, L. VOLLMER, & W. MAHLMANN, *supra* note 3, at 18. *See also* Listel, *Die Entscheidungsprärogative des Parlaments für die Einrichtung von Kernkraftwerken*, 1/2 DVBl 10 (1978). If such a master plan were to replace individual building permit procedures, the affected citizen at or near each building site would no longer be able to receive an appropriate hearing. His protection would be limited to an examination of the narrowly drawn "plan determination requirements" (*Planfest-*

defects, the federal government has already introduced such a unified administrative procedure into the licensing process.[56]

3. Legislative Site Planning

A further area of procedural concentration lies in the nuclear power plant siting provisions, which have been separated from the rest of the licensing procedure.[57] Site planning is already being performed in a rudimentary fashion in West Germany by state officials,[58] but reformers propose that it be accomplished in the future by the federal legislature in one comprehensive, legally binding siting plan. In this regard, only the relationship between federal and state planning authorities is disputed. The general consensus, nonetheless, is that the federal government is competent to pass a law dealing with the general parameters of site planning whereby the various states would be free to fill in details consonant with the federal plan.[59] The advantage of such a federal plan is that the permit authorities would no longer be forced to either accept or reject completed site proposals presented by the energy industry. Rather, the legislature itself could become involved in the planning process and thereby improve the coordination of government and private site planning conceptions.

On the other hand, if the site planning provisions are understood to be a "common task of the state and the energy industry,"[60] as if the sole purpose of such a plan were to bring the federal legislature and the nuclear energy industry closer together, then the question of opportunities for citizen participation in the process again arises. With such an understanding, an orderly permit procedure utilizing public participation will simply be preempted by parliamentary planning and land use projections precluding the collaboration of affected citizens in the highly sensitive area of siting nuclear power plants.[61] A justifiable concern therefore exists that site planning will occur under such a system with an eye only to expediting the process at the cost of protecting individu-

stellungsvoraussetzungen) set out in AtomG § 9b(2) and § 7(2). *But see* Geulen, *supra* note 2, at 276.

56. *See infra* notes 68-74 and accompanying text.

57. For a discussion of the previous system, see Blümel, *Die Standortvorsorge für Kernkraftwerke*, 7 DVBl 301, 306 (1977).

58. Depenbrock, *Die Standortvorsorge für flächenintensive Grossvorhaben*, 1/2 DVBl 17-19 (1978).

59. This competence is by virtue of GG art. 75 (W. Ger.). Blümel, *supra* note 57, at 307. *But see* Depenbrock, *supra* note 58, at 17-19.

60. Blümel, *supra* note 57, at 309.

61. *Id.* at 309 n.140.

als' constitutional rights.[62]

4. Waste Disposal and Plant Decommissioning

The absence of regulation of a suitable subject can also mean reform, in the sense that it promotes the quick and uninterrupted realization of a nuclear energy program. There are still no normative bases for a system of nuclear waste disposal[63] and the decommissioning of nuclear power plants.[64] The existing government resolutions regarding waste disposal call only for interim storage facilities and for a study on waste disposal techniques.[65] The problem of plant decommissioning, as has always been the case, is confined to a simple shutting down of the power plant's reactors.[66] This situation exists in spite of the fact that both of these related aspects of nuclear power production will affect the lives of future generations and thus require immediate technical and legal solutions. Because further regulation of the waste disposal and plant decommissioning area based on reliable scientific data and offering long-term security will necessarily impede the expedition of the licensing process, it is clear that the reform movement will either avoid this area entirely or regard it as settled and complete.[67]

C. Reform Measures Already Instituted

No government can long remain immune to pressure from industry and the prevailing opinion among its legal scholars. Nor does the federal government of West Germany desire to remain immune from this pressure because it is intent on tripling nuclear power capacity by

62. Listel, *supra* note 55, at 10, 11 and 14. *But see* Blümel, *supra* note 57, at 301 n.4.

63. Blümel, *supra* note 57, at 301 n.4.

64. *See, e.g.*, Scharnhoop, *Genehmigungspflicht der Stillegung und des Besitzes stillgelegter kernteschnicher Anlagen*?, in DRITTES DEUTSCHES ATOMRECHTS-SYMPOSIUM 63 (R. Lukes ed. 1975).

65. 122 BULLETIN DER BUNDESREGIERUNG 1133 (Oct. 11, 1979). Such decrees have an illusory normative character while being subject to political opportunism. *See generally* H. HOFMANN, RECHTSFRAGEN DER ATOMAREN ENTSORGUNG (1981). There are courts which are satisfied with such illusory norms and are willing to grant a permit without a sufficient waste disposal plan. Judgment of March 17, 1980, *supra* note 1. It cannot be ruled out, moreover, that "interim" storage facilities will one day become final storage facilities.

66. For a comparative analysis of decommissioning procedures in West Germany, Canada, and the U.S.A., see Note, *Decommissioning Nuclear Power Plants: The United States, West Germany, and Canada*, this volume at *supra* 433.

67. Wagner & Ziegler, two prolific writers working for the Nuclear Energy Research Center in Karlsruhe, reach this conclusion. In their opinion, neither a change in the Atomic Energy Law nor a permit requirement is necessary regarding the waste disposal question. Wagner, *Schadensvorsorge bei der Genehmigung umweltrelevanter Grossanlagen*, 8 DÖV 269, 276 (1980).

the end of this decade.[68] This goal can only be attained if the time-consuming licensing procedure is simplified and the judicial control over the process is loosened.

The federal government of West Germany has already taken steps to unify permit applications and shorten the licensing process for certain types of reactors.[69] Of special significance to the constitutional protection of individuals, however, is the 1982 revision of the Ordinance on Nuclear Power Licensing Procedures.[70] The revision pursues the goal of shifting legal protection of the citizen into the administrative arena in order to satisfy the constitutional requirement that the fundamental rights of citizens to life and bodily inviolability be given due consideration in the administrative licensing process.[71]

What at first seems to be an improvement in constitutional protection proves, on closer inspection, to be the exact opposite. Participation of the public in the administrative procedure is substantially reduced. In the past, the prospective plant operator had to publish both the application and the supporting documents for each permit phase of the entire licensing process. The public therefore had the opportunity to discuss the application at each phase and object to it if necessary. In the future, the plant will be approved in the single, unified procedure described previously. Thereafter, the public need only be consulted when essential changes or additions to the plan are proposed.[72] If such changes are proposed, moreover, the administrative authorities decide on them through a prognostic evaluation. According to the majority view, such an evaluation is not subject to full judicial review. The administrative authorities therefore have the power to decide whether public participation is warranted.

The long duration of the prior licensing procedures has proven the importance of objections by the public in later phases of the process. If it became apparent in a later phase that earlier safety standards relative to external catastrophes, for example, were no longer adequate in light

68. Roser, *Nuclear Energy and International Relations: The Case for the Federal Republic of Germany*, 73 AM. SOC'Y INT'L L. PROC. 166, 167 (1979).

69. In October, 1981, a ten point catalogue of measures was published by the federal government of West Germany which was aimed at bringing immediate and varied relief to power plant permit applicants. This relief impacted especially on pressurized water reactors, which have been declared "permit-ready" without any provision for individual examination of the particular building plans. Furthermore, expert evaluations may now be used in more than one permit proceeding. *See* Bosselmann, *Rechtsschutz? Nein Danke*, 4 KJ 402, 414-415 (1981).

70. Decree of Mar. 31, 1982, 1982 BGBl I 409 (W. Ger.).

71. *See* the official explanation in BUNDESTAGS-DRUCKSACHE 467, at 6 (1981).

72. Decree of Mar. 31, 1982, *supra* note 70, §§ 4(1) and (2).

of recent findings and experiences, these new perspectives were consistently considered under the former law. Now, however, it is largely up to the applicants and the licensing authorities whether or not the public will be heard.[73] The revised procedural ordinance also makes no provision at all for the participation of the public in procedures concerning small nuclear reactors and the decommissioning of nuclear power plants.[74] Efficiency will likely take precedence over safety.

IV. CONCLUSION

From the viewpoint of those members of the affected population seeking legal protection, the interim assessment of the reform of nuclear power plant licensing procedures in West Germany is clearly negative. The reform concepts aim consistently and one-sidedly at an acceleration of the licensing process. Even if it can be maintained that this acceleration will not necessarily result in a lessening of safety standards for nuclear power plants, it still must be acknowledged that safety from the dangers and risks of nuclear power hardly stands at the center of the reform conception. The federal government of West Germany, moreover, apparently presupposes that protection of fundamental constitutional rights can be afforded to the citizen without his knowledge or participation. The "parliamentarizing" of essential parts of the current licensing procedure, the shifting of competency from the judicial to the administrative branch of government, and the concentration of administrative decisional power will surely bring about an overall loss of public participation and protection in the licensing process. In view of the current knowledge that many previously held beliefs about the safety of nuclear energy are open to criticism, this emphasis on the speedy expansion of nuclear power capacity instead of on a thorough examination of all of the risks to society is a fateful path to tread.

73. The revised Ordinance only provides for public participation in five specific situations—for example, when the "reliability of the plant would not be compromised." Decree of Mar. 31, 1982, *supra* note 70, § 4(2), no. 3. The procedure depends upon a judicially unreviewable prognostic evaluation, and it is possible that new findings regarding radiation dangers and potential system malfunction will be bracketed out of consideration. Moreover, a newly proposed Code of Administrative Court Procedure pending before the *Bundestag* will speed up court procedure in an effort to relieve the courts. This will further truncate the judicial protection of the citizen. Kopp, *Entlastung der Verwaltungsgerichte*, 13 DVBl 613 (1982).

74. Decree of Mar. 31, 1982, *supra* note 70, §§ 4(4) and (5).