

Prof. Dr. Thomas Schmitz

Semester 2, 2022/2023

ADMINISTRATIVE LAW

Contribution to the course from the perspective of comparison of laws

Question for the final examination

(25/100 points for this final examination)

This question is about the examination of the legality of an administrative decision - a core topic in any modern administrative law.

- a) In a state based on the rule of law [negara hukum/Rechtsstaat/État de droit], the lawyer must be able to examine the legality of an administrative decision thoroughly, accurately and precisely. Why? [4 points]
- b) In rational terms, two groups of elements of legality of an administrative decision can be distinguished. Which ones and why? [4 points]
- c) Imagine that you are working for an international agency that supports countries in the development of a modern administrative law based on the rule of law. One day you are asked to prepare a systematic, well-structured general compilation of the typical elements (requirements) of the legality of an administrative decision, taking into consideration the structure and the most important elements in countries with an advanced administrative law. What will your compilation look like? Please formulate and explain briefly in your own words. [17 points]

Note: This is not about writing an essay but an academic exam. Please read the question very carefully and think carefully before you formulate your answer. It must be exhaustive but limited to what is asked for, precise, concise, well-structured and written in your own words. You may follow the inspiration from the foreign laws which we have studied or reject it but please explain why and present a coherent compilation. After the exam, all students are welcome to contact me to discuss the strong and weak points of their answer (e-mail: tschmit1@gwdg.de).

The topic was discussed in the lectures and presented in Slide 2 ("*The elements of the legality of the administrative decision*") and in the special material "*The requirements of the legality of the administrative decision in German and European law*" (see in particular Diagram 1 for the example of the German admin.law), which are available for download at the website for my course contribution. In the lectures we have discussed as models the elements of the legality of an admin. decision in French, German and European law. We also had a practical case-solving exercise with a case concerning these topics.

- a) **The need to be able to examine the legality of an admin. decision thoroughly, accurately and precisely** (own equivalent reasoning also accepted) (/ 4 points)
 - In a state based on the rule of law, *any* activity of the public administration must be legal - without any exceptions. Administrative decisions are the most important instrument of public administration. The elements of their legality are the conditions for their legality. If only one element is missing, the admin. decision is illegal and, thus, incompatible with the rule of law, and may be annulled by the administrative court after a legal action of the citizen.
- b) **The two groups of elements of legality of an admin. decision that can be rationally distinguished** (/ 4 points)
 - two groups of requirements can be distinguished: those *concerning the making* of the admin. decision (external legality, comprising external or "formal" aspects) and those *concerning the contents* of the admin. decision (internal legality, comprising internal or "material"/"substantial" aspects); the aspects of these different groups must not be mixed
 - explained, *why* these groups can be distinguished (rationality, distinction deriving from logic etc.)
- c) **The compilation of the typical elements of the legality of an administrative decision in an administrative law based on the rule of law** (/ 17 points)
 - aa) Elements of the external legality/legality in form: (/ 8 p.)
 - (1) Competence of the acting authority
 - (2) Procedural requirements (e.g. hearing of participant)
 - (3) Formal requirements (e.g. written form, statement of reasons)

- bb) Elements of the internal legality/legality in substance (examples): (/9 p.)
- (1) Legal basis
 - (2) Choice of the right addressee (e.g. police measures against aggressor, not victim)
 - (3) Proportionality
 - (4) No violation of (specific) legal norms
 - (5) No (other) incorrect exercise of discretionary power
- cc) Explanation / your reasons, why you follow/don't follow inspiration from foreign laws (/4 extra p.)