

§ 2 The elements of the legality of the administrative decision

I. Backgrounds

1) Why is it important to study the elements of the legality of administrative action in detail?

- In a state based on the *rule of law* ["negara hukum", "Rechtsstaat", "État de droit"], any activity of the public administration must be legal. The law is not only a vague guideline to be approximated but an *absolute standard*, binding without exceptions *in every single case*: Each violation of a legal norm by public authority, even by the lowest authority at the local level in the most unimportant case, represents a failure of the state, a loss of face, a shame for the country.
- Often, administrative action consists of the public authority regulating issues in an administrative decision. The elements of the legality are the conditions for the legality of that decision. If only one of them is missing, the admin. decision is illegal and may be annulled by the administrative court after a legal action of the concerned citizen. In the administrative law of many countries this is reflected in the traditional legal term of "grounds of review" but in an advanced administrative law system based on the rule of law *any* unlawfulness, i.e. the missing of *any* element of the legality is a "ground of review".
- In a state based on the rule of law, the lawyer needs to be able to *examine the legality* of an administrative action thoroughly and *precisely* in a transparent, replicable way. This does not only require high knowledge and advanced methodological skills of the lawyer but also a sophisticated, rational, differentiated and systemizing legal doctrine, as it sometimes is reflected in *complex examination schemes* ["Prüfungsschemata" or "tests", see [special material](#)]. The doctrine of the elements of the legality of the administrative decision is a centerpiece of such a sophisticated administrative law doctrine - crucial for the implementation of the rule of law and to prevent arbitrariness and unfairness in public administration. It is also helpful in uncovering corruption because it allows to identify quickly the dubious aspects of a decision.
- The legality of an administrative action can be assessed objectively. It is not negotiable and does not depend on the attorneys' rhetorical skills. Often the law will grant the authorities a margin of discretion but in these cases it will still determine the limits and the criteria for the exercise of the discretion.

2) The administrative decision [= "administrative act"] as most important instrument of public administration

- a *unilateral decision*, taken by public authority in the sphere of public law, with external legal effect (typically addressed to the citizen)
- a legal institution of administrative law, developed in France already in the 19th century
- strong focus of administrative law doctrine in most countries on this legal institution
- narrow concept in German admin. law (only decisions regulating individual cases) versus wide concept in French admin. law (also general administrative regulations)

II. Legality and validity of administrative decisions

- In order to keep public administration efficient, in many countries an illegal admin. decision is *not automatically invalid* or ineffective (except in special or serious and evident cases) but needs to be abolished by the way of administrative or judicial review.
- see, for example, the complicated regulation of invalidity in [sect. 44 of the German Administrative Procedure Act \(APA\)](#)
- If the citizen misses the deadline for legal remedies, even an illegal admin. decision may be executed.

III. Legality and expediency of administrative decisions

- a fundamental distinction in admin. law, required by the *separation of powers* and important for the limits of legal protection
- In the course of admin. review in objection proceedings, the admin. decision may be abolished for illegality or inexpediency (since the responsibility still lies within the administration)
- In the course of judicial review, the admin. decision can only be annulled for illegality. Unlike the administrative superior, the judge is not allowed to examine if the decision is expedient, convenient, practical or politically suitable.
- The distinction can be difficult, in particular for discretionary decisions and with regard to the principle of proportionality.

IV. The heterogeneous structure of the examination of the legality of administrative decisions

1) The examination of legality as important part of the national admin. law tradition

- In countries with a long admin. law tradition the examination of legality has developed slowly over a long period of time, mainly during the era of the stand-alone nation-state. Therefore it is strongly influenced by the national legal history and culture.
- For this reason, the terminology and also the structure of the examination vary from country to country - even if there is not always a logical reason for that.
- In Europe, even European integration has not brought a unified terminology and structure of the examination of the legality, despite a certain "Europeanisation of admin. law". Instead, a specific examination of the legality of EU measures has evolved, parallelly to and slightly different from the examination in the admin. law of the EU member states.

2) Changes of this examination in the course of time

- continuous extension of the concept of legality in admin. law in the 19th and 20th century
 - due to a broader understanding of the rule of law
 - due to a growing awareness of the necessary impact of human and fundamental rights
 - due to a growing influence of the judicial power and jurisprudence (in particular of judicial further development of law)
 - supported by the rise of administrative law science
- on-going changes of the examination of legality due to progress but also to temporary trends and changeable international influences in legal science
 - the example of the *controversy about the structure of the examination in Germany*

3) Logical aspects concerning contents and structure of the examination

- as any legal examination, the *structure of the examination* of the legality of admin. decisions *must follow the laws of logic and the dogmatic structures of the field of law*
- logically and dogmatically, two groups of requirements can be distinguished:
 - those concerning the making of the admin. decision (external or "formal" aspects) and
 - those concerning the contents of the admin. decision (internal or "material"/"substantial" aspects);
 - the aspects of these different groups must not be mixed but examined separately
 - within the groups there is partially a logical order

V. The basic structure of the examination of the legality of admin. decisions in French law, European Union law and German law

1) France: "légalité externe" and "légalité interne"

a) **Légalité externe [external legality]**

aa) *Incompétence* [lack of competence]

bb) *Vice de forme* [vice of form]

- infringement of procedural or formal requirements

b) **Légalité interne [internal legality]**

aa) *Détournement de pouvoir* [misuse of (discretionary) powers]

- not pursuing the public interest

- not pursuing the right public interest

- *détournement de procédure* [misuse of procedure]

bb) *Violation de la loi* [infringement of (substantive) law]

- *erreur de droit* [error of law]

- in particular acting without the necessary legal basis

- *illégalité relatif aus motifs de fait* [illegality with regard to the underlying facts]

- in particular *faute de qualification* [erroneous subsumtion] and *faute d'appréciation* [wrong assessment when using discretionary power]

2) EU: (no) lack of competence, infringement of essential formal or procedural requirements, infringement of substantive law or misuse of powers

- grounds of review defined in art. 263 sub-sect. 2 FEU Treaty (based on French tradition)

- see for the details special material and diagram (conference material, p. 7)

3) Germany: "formelle Rechtmäßigkeit" [legality in form] and "materielle Rechtmäßigkeit" [legality in substance]

- categories correspond to those of "légalité externe" and "...interne" but have a different sub-structure (see *infra*, VI.)

VI. The elements of legality in detail - the example of Germany

- see for the details special material and diagram (conference material, p. 5 f.)

- preliminary step: determination of the *type of the measure* (may be decisive for formal and procedural requirements)

1) The elements of the legality in form

a) **Competence**

b) **Procedure**

aa) No violation of general procedural requirements

- hearing of participants, allowing inspection of files, admission of representatives and advisors, no involvement of legally excluded persons

bb) No violation of special procedural requirements according to special legislation

cc) Where appropriate: choice of the appropriate special type of procedure

c) **Form**

aa) Form in the strict sense

bb) Statement of reasons

2) The elements of the legality in substance

a) Legal basis [Ermächtigungsgrundlage]

- aa) Necessity of a legal basis
- bb) Existence of a legal basis
- cc) Validity (constitutionality) and applicability of the legal basis
- dd) Fulfilment of the preconditions set in the legal basis

b) Choice of the right addressee

- important in particular in police law

c) General requirements of legality in substance

- aa) Definiteness of the admin. decision
- bb) Feasability of implementation
- cc) Proportionality [Verhältnismäßigkeit]
 - legitimate aim, suitability, necessity, proportionality (in its strict sense)
- dd) No violation of (other) legal norms

d) No incorrect exercise of discretion [Ermessensfehler]

3) In particular: the requirements for a correct exercise of discretionary power

a) Exercise of the discretion

b) No exceeding of discretionary power

c) No abuse of discretion

- no wrongful determination of facts, misuse of discretionary power, basic deficits in the reasoning, unproportionality, unequal treatment of citizens or disrespect for constitutional principles or fundamental rights