

concerning § 2 VI The rule of law in the legality review of administrative decisions - the example of German administrative law

## Diagram 1

### Elements of the rule of law as criteria for the legality of the administrative act<sup>1</sup> - the example of German administrative law -

- preliminary step: determine the *type of measure*, since many requirements depend on it

#### A. Legality in form<sup>2</sup> [formelle Rechtmäßigkeit]

##### I. Competence [Zuständigkeit]

- 1) Subject-matter jurisdiction [sachliche Zuständigkeit]
- 2) Local jurisdiction [örtliche Zuständigkeit]
- 3) Acting of the right authority in the hierarchy of authorities [instanzielle Zuständigkeit]
  - where applicable also acting of the right person within the authority [funktionelle Zuständigkeit]

##### II. Procedure<sup>3</sup> [Verfahren]

- 1) No violation of general procedural requirements (sect. 9 et seq. APA)
  - **hearing of participants** (sect. 28 APA)
  - **allowing inspection of files** (sect. 29 APA)
  - **admission of representatives and advisors** (sect. 14 APA)
  - **no involvement of excluded persons<sup>4</sup>** and persons feared to be prejudiced<sup>5</sup> (sect. 20 et seq. APA)
- 2) No violation of special procedural requirements according to special legislation<sup>6</sup>
  - in particular public notice, collaboration of other authorities, public tender, environmental impact assessment, consent of the addressee when required by law
- 3) Where applicable: choice of the appropriate special type of procedure and compliance with their special requirements<sup>7</sup> (cf. sect. 63 APA et seq. + special legislation)
  - in particular public notice, oral hearings, formal hearings and discussions

##### III. Form<sup>8</sup> [Form]

- 1) Form in its strict sense (cf. sect. 37(2-5) APA)
  - in general no particular form is required; the admin. act may even be issued by implied conduct
  - a) Where required by law: written or electronic form<sup>9</sup>
    - must indicate authority and contain signature or name of head, representative or deputy
  - c) Where required by law: compliance with special formal requirements<sup>10</sup>
    - e.g. delivery of certificates
- 2) **Statement of reasons<sup>11</sup>** (sect. 39 APA)
  - communication of the chief material and legal grounds, in particular of the aspects considered when exercising discretionary power

<sup>1</sup> On terminology: In German administrative law, the common term for the administrative decision is "administrative act" [Verwaltungsakt].

<sup>2</sup> In Germany, most legality requirements that derive from the rule of law are regulated in general in an **Administrative Procedure Act (APA)** [Verwaltungsverfahrensgesetz], which has inspired legislation in many other countries.

<sup>3</sup> The missing of some of these requirements may be "cured" by fulfilling them subsequently (sect. 45 APA) - a **softening of the primacy of the law for pragmatic reasons**. The missing of some requirements may even not entitle the citizen to request annulment if it is evident that it has not influenced the decision on the matter (sect. 46 APA) - a problematic **serious relativisation of the primacy of the law**.

<sup>4</sup> Ensuring the **primacy of the law**.

<sup>5</sup> Implementation of the **principle of fair administrative procedures**.

<sup>6</sup> Ensuring the **primacy of the law or transparency, preventing nepotism or protecting the rights of the citizen**.

<sup>7</sup> Ensuring the **primacy of the law, transparency or the right of the citizen to be heard in planning procedures**.

<sup>8</sup> Neither the **notification of the administrative act** to the addressee and concerned persons (sect. 41 APA), nor the **notification on available legal remedies** (cf. sect. 58 et seq. Code of Admin. Court Procedure) are requirements of legality. The former is a precondition for the coming of the admin. act to existence. The latter is only relevant for the start of the deadline for legal remedies.

<sup>9</sup> Ensuring the **primacy of the law and transparency**.

<sup>10</sup> Ensuring the **primacy of the law and transparency or protecting the rights of the citizen**.

<sup>11</sup> A **core principle of fair administrative procedure**.

## B. Legality in substance [materielle Rechtmäßigkeit]

### I. **Legal basis** [Ermächtigungsgrundlage]

- 1) Necessity of a legal basis
  - according to the **principle of legal reservation** [Gesetzesvorbehalt], a legal basis is needed if the admin. act interferes with *fundamental rights* or is *essential* in another way for their exercise [Wesentlichkeitstheorie]
  - in German law, the legal norms on the jurisdiction generally do *not* imply the granting of powers; therefore, *usually a specific legal basis (in a separate provision)* is necessary
- 2) Existence of a legal basis
- 3) Validity and applicability of the legal basis
  - if incompatible with EU law, the norm is inapplicable, in the other cases it is invalid
    - a) Compliance with European Union law<sup>12</sup>
    - b) Compliance with the Basic Law<sup>13</sup>
    - c) In case of Land law: compliance also with federal law and with the Land constitution<sup>14</sup>
    - d) In case of statutory regulations or by-laws: compliance also with the relevant statutory legislation<sup>15</sup>
- 4) Fulfilment of the preconditions set in the legal basis
  - usually one of the major problems in a given case

### II. **Choice of the right addressee**<sup>16</sup>

- a sensitive question in the fields of police (public security) law and environmental protection law
- dogmatically a special problem of the correct exercise of discretionary power

### III. **General requirements of legality in substance**

- 1) **Definiteness**<sup>17</sup> (sect. 37(1) APA)
- 2) **Feasibility of implementation**
  - there must not be any material or legal grounds making it impossible to implement the admin. act
- 3) **Proportionality** of the measure [Verhältnismäßigkeit]
  - the **core essence of the rule of law**
    - a) **Legitimate aim**
      - the measure must pursue an objective provided or allowed for in the law
    - b) **Suitability**
      - the measure must be conducive to its purpose
    - c) **Necessity**
      - the measure must be the least intrusive act of intervention that is equally conducive
      - often the crucial point in the examination of a case
    - d) **Proportionality (in its strict sense)**
      - the burdens imposed must not be out of proportion to the aim in view
- 4) No violation of (other) legal norms<sup>18</sup>

### IV. **In case of discretionary decisions: no incorrect exercise of discretion** [Ermessensfehler]

- 1) Non-exercise of discretion [Ermessensnichtgebrauch]
- 2) Exceeding of discretionary power<sup>19</sup> [Ermessensüberschreitung]
- 3) Abuse of discretion [Ermessens Fehlgebrauch]
  - a) Wrongful determination of the facts of the case<sup>20</sup>
  - b) Misuse of discretionary power for wrong purposes<sup>21</sup> [Ermessensmissbrauch]
  - c) Basic deficits in the reasoning<sup>22</sup>
    - such as logic errors, inconsistencies, disregard of essential aspects etc.
  - d) **Unproportionality** (see supra, B.II.3)
  - e) Violation of the principle of equality<sup>23</sup> (art. 3(1) Basic Law)
  - d) Violation of other fundamental rights or constitutional principles<sup>24</sup>

<sup>12</sup> Ensuring the **primacy of the law**.

<sup>13</sup> Ensuring the **primacy of the constitution - in particular with all sub-principles of the rule of law and all fundamental rights**.

<sup>14</sup> Ensuring the **primacy of the law, esp. of the constitution**.

<sup>15</sup> Ensuring the **primacy of the law**.

<sup>16</sup> Ensuring the **compliance with the duty to respect and protect the fundamental rights and thus the primacy of the constitution**.

- In case of a threat to public security, the authority must take measures against the aggressor, not the victim.

- If authority needs to request support of an uninvolved third person, it must choose this person with regard to **proportionality**.

<sup>17</sup> The **principle of definiteness** does not only apply to legal norms but also to administrative acts.

<sup>18</sup> Ensuring the **primacy of the law**.

<sup>19</sup> Ensuring the **primacy of the law**.

<sup>20</sup> The principles of fair administrative procedure require that **authority must examine carefully and impartially all relevant aspects of the case**.

<sup>21</sup> In particular: **No** pursuit of an **illegitimate aim**.

<sup>22</sup> Ensuring in particular the **primacy of the law** (by correct = logical application) and the **proportionality requirements of suitability and necessity**.

<sup>23</sup> E.g. by intervening against some wrongdoers but not others. Ensures respect for an important fund. right and thus the **primacy of the constitution**.

<sup>24</sup> **Ensuring the primacy of the constitution**.