Prof. Dr. Thomas Schmitz Fall Semester 2023

GERMAN PUBLIC LAW

Contents

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de and Canvas. For any questions, suggestions and criticism please contact me in office 219, via WhatsApp or via e-mail (tschmit1@gwdg.de).

Prof. Dr. Thomas Schmitz — Fall Semester 2023

GERMAN PUBLIC LAW

Bibliography

A. Public law in general

Pünder, Hermann Waldhoff, Christian (editors)	Debates in German Public Law, 2014
Robbers, Gerhard	An Introduction to German Law, 8th edition 2023 [available at the lecturer]
Stolleis, Michael	Public Law in Germany. A Historical Introduction from the 16th to the 21st Century, 2017

B. Constitutional law

Bröhmer, Jürgen Elsner, Gisela Hill, Clauspeter Spitzkatz, Marc (editors)	70 years German Basic Law: The German Constitution and its Court. Landmark Decisions of the Federal Constitutional Court of Germany in the Area of Fundamental Rights, 3rd edition 2019, www.kas.de/de/web/rspa/publikationen/einzeltitel/-/content/70-years-german-basic-law-the-german-constitution-and-its-court-1 (English translations of landmark decisions on fundamental rights)
Bumke, Christian Vosskuhle, Andreas	Casebook on German Constitutional Law, 2019 [available at the lecturer]
Grimm, Dieter	Constitutionalism. Past, Present and Future, 2018 [available at Google Books]
Glaser, Henning (editor)	Constitutional Jurisprudence. Function, Impact and Challenges, 2016
Heringa, Aalt Willem	Constitutions Compared. An Introduction to Comparative Constitutional Law, 6th edition 2021
Heun, Werner	The Constitution of Germany. A Contextual Analysis, 2011 [available at the lecturer]
Jestaedt, Matthias Lepsius, Oliver Möllers, Christoph Schönberger, Christoph	The German Federal Constitutional Court. The Court without Limits, 2020
Kau, Marcel	Constitutional Law, in: Zekoll, Joachim; Wagner, Gerhard (editors): Introduction to German Law, 3rd edition 2018, Chapter 2 [available at the lecturer]
Robbers, Gerhard	Constitutional Law in Germany, 2017
Rogowski, Ralf Gawron, Thomas (editors)	Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court, 2016

C. Administrative law

Cane, Peter Hofmann, Herwig C.H. Ip, Eric C. Lindseth, Peter L. (editors)	The Oxford Handbook of Comparative Administrative Law, 2021
Kuhlmann, Sabine Proeller, Isabella Schimanke, Dieter Ziekow, Jan (editors)	Public administration in Germany, 2021, https://link.springer.com/book/10.1007/978-3-030-53697-8 1(for advanced research)
Künnecke, Martina	Tradition and Change in Administrative Law, 2006 [avaible at the lecturer]

Rose-Ackermann, Susan Lindseth, Peter L. Emerson, Blake (editors)	Comparative Administrative Law, 2nd edition 2019
Saurer, Johannes	Administrative Law, in: Zekoll, Joachim; Wagner, Gerhard (editors): Introduction to German Law, 3rd edition 2018, Chapter 3 [available at the lecturer]
Schmidt-Aßmann, Eberhard:	General principles of German administrative law, Journal of the Indian Law Institute 35 (1993), no. 1/2, p. 65 ff., www.jstor.org/stable/43952325
Seerden, René (editor)	Comparative Administrative Law. The Administrative Law of the European Union, Its Member States and the United States, 4th edition 2018
Weidemann, Lilly	Administrative Procedure and Judicial Review in Germany, in: Cananea, Giacinto della; Bussani, Mauro (editors), Judicial Review of Administration in Europe, 2021, Chapter 8, https://doi.org/10.1093/oso/9780198867609.001.0001

D. Journals with contributions on German public law in English

ECLR	European Constitutional Law Review, since 2005
ERPL/REDP	European Review of Public Law / Revue Européenne de Droit Public, since 1989
GLJ	German Law Journal, since 2000, www.cambridge.org/core/journals/german-law-journal
Verfassungsblog	Verfassungsblog - On Matters Constitutional, since 2009, https://verfassungsblog.de [a blog with numerous authors and a partly journalistic, partly scientifc approach]

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de and Canvas. For any questions, suggestions and criticism please contact me in office 219, via WhatsApp or via e-mail (tschmit1@gwdg.de).

(Datei: Bibliography (GermanPublicLaw))

§ 1 General Introduction

I. Why studying comparative public law?

1) Why studying foreign public law at all?

- for a *better understanding* of the own public law (constitutional and administrative law), its particularities (and the alternatives), its strong and weak points and the perspectives of its development
- as a *source of inspiration*: legislators, courts and authorities in different countries often face similar problems in the field of public law, and legal solutions developed in one country may be useful in others too (you do not need to reinvent the wheel...)
  - example: the creation of constitutional courts, inspired by the German model
  - example: the development of an advanced fundamental rights doctrine by East European constitutional courts, inspired by the jurisprudence of the German Federal Constitutional Court and the European Court of Human Rights
  - example: the development of a sophisticated doctrine of important institutions of administrative law, in particular the dominating institution of the administrative act [= admin. decision] in many countries, inspired by the French or the German administrative law
- for a *better critical analysis of the domestic constitutional and administrative jurisprudence*: couts in other countries may have found better solutions or shown a more sophisticated reasoning for the same problem
  - often relevant for questions of constitutional principles or fundamental rights or individual elements of legality of administrative action
- *not only the success stories* but also the failures of foreign constit. law are interesting: you must not repeat the mistakes of others...

2) Why studying German public law?

- because German public law is a particularly highly developed continental legal system, with many interesting, innovative concepts and practical experience with them
- a long history of *constitutional, legal and jurisprudential reception*: many countries have adopted with great benefit concepts and institutions from countries with a more developed constit. law
  - e.g. reception of elements of German fundamental rights doctrine in European and Asian countries
  - e.g. reception of elements of general administrative law, especially administrative procedure law in European countries
- in the field of constitutional law, legal *reception is easier* than in most other fields of law
- in the field of administrative law, comparison of laws is *more interesting than in other fields of law* (e.g. family law) because admin. law is less dominated by the national cultural background but more influenced by the principles of rule of law, good governance and efficiency

3) How to get the most out of studying German public law

- focus on the systematics, the general approaches and concepts, not on the details
- focus on the *general understanding and handling* of the law, in particular the fundamental approach of German lawyers to *systemise and dogmatise the law*, categorise legal norms, elaborate basic principles and definitions and develop fine distinctions
- focus on the sophisticated *legal methodology*, in particular the methods of legal interpretation, analogy, subsumption and theoretical reflection and the techniques of practical case-solving: they are of universal relevance and can be used with great benefit also in Kazakhstan

II. The concept of public law

1) Law, customs and morality

- legal norms are not the only rules in society, but the only ones that are generally and absolutely binding and enforced by the state
- rules of morality complement them, but in the modern, pluralistic society they are not legally binding and can only be enforced by *social sanctions*

2) Public law and private law

- private law regulates the legal relationships between individuals
- public law regulates the relationship of the individual to the state and other holders of public authority as well as the relationship between the public institutions and bodies

3) Formal law and substantive law

- substantive law: those legal norms which regulate the content, the creation, termination, modification or transfer of rights and legal obligations.
- formal law: those legal norms that serve to enforce the substantive law

4) Objective law and subjective rights

- subjective right: a special legal power, usually in form of a personal right, granted to the individual by the law for the protection and enforcement of his legitimate interests
  - example: the fundamental rights under the constitution, which the citizen can enforce by legal action before the courts (and in Germany even by individual constitutional complaint before the constitutional court)
  - must be distinguished from mere interests benefiting from the law

III. The spectrum of public law

- see **Diagram 1**

1) National, international and supranational public law

2) Constitutional law, administrative law and other fields of national public law

3) General administrative law and special administrative law

4) Substantive administrative law, administrative procedure law and administrative court procedure law

IV. General characteristics of German public law

1) A public law in continental European legal tradition

- no "case-law" like in common law countries, but only jurisprudence
  - jurisprudence is the interpretation of the law, not part of the law itself
  - however, in practice, jurisprudence is also important (and must be studied by the students), in particular the jurisprudence of the Federal Constitutional Court

2) A public law orientated towards the rule of law and human rights

- a reaction to the atrocities and arbitrariness of the rule of National Socialism and the Second World War
- all exercise of public power is strictly bound to the law (art. 20(3) BL) (see § 5 of this course)
- the fundamental rights under the Constitution are directly binding law (art. 1(3) BL) (see § 7 IV of this course)

- a commitment taken seriously in practice and shaping all theoretical and practical legal work in all areas of law

3) A public law strongly building on judicial control

- due to a comprehensive and effective guarantee of fundamental rights (art. 1 - 20 BL), a fundamental constitutional principle of rule of law (art. 20(3) BL) and a *fundamental right of the citizen to have recourse to the courts against any violation of his rights by public authority* (art. 19(4) BL)
- a high readiness of the citizens to bring legal disputes before the court
  - in particular more trust in the courts than in the self-control of the executive in Germany
- a high degree of professionality, integrity and actual independence of the judges
  - judges highly qualified, almost no risk of corruption
  - judges not only de iure but also de facto independent
  - administrative judges particularly known for their intellectual independence and often critical approach

4) National public law under the influence of European Union law

- the domestic law of the European Union member states is in many aspects influenced or even shaped by binding standards and requirements of European Union law
- this has significantly shaped the domestic law: the phenomenon of the *Europeanisation of administrative law and constitutional law*

concerning § 1 III The spectrum of public law

Diagram 1
The spectrum of public law

<table>
<tr><td colspan="5">Public law</td></tr>
<tr><td rowspan="2">Public Intern. law</td><td>European law
• European Union law
• ECHR
• other European law</td><td colspan="3">German public law</td></tr>
<tr><td>Constitutional law</td><td colspan="3">Administrative law</td></tr>
<tr><td></td><td></td><td>• state organisation law
• fundamental constitutional principles
• fundamental rights
• other constitutional law
• see also ordinary (non-constitutional) state law</td><td>General administrative law
• general principles of administrative law
• administrative procedure law
• state liability law
• law of public property (e.g. road law)
• other general administrative law</td><td>Special administrative law
• local government law
• general police and public security law
• special public security law and related fields of law - e.g. law on public assemblies, immigration law, industrial law, environmental law, recycling and waste management law, agriculture and forestry law, press law, road traffic law
• public construction and planning law
• civil servants law
• school law and higher education law
• other fields of special administrative law</td><td>Admin. court procedure law</td></tr>
</table>

(Datei: Diagram1 (GermanPublicLaw))

§ 2 Basics of constitutionalism

I. Concept and types of constitution

- a constitution in the sense of constitutional theory is always a constitution
  - in the *normative* (not empirical) sense
  - in the *legal* (not just historical) sense and
  - in the *formal and material* sense
    - formal characteristics: set of norms originally enacted by a single normative act, written form, primacy, specific procedures and requirements for amendments
    - material characteristics: function as ***basic legal order*** of the state, basic political-philosophical orientation of the state, organisational design of the state, self-identification as a constitution
- types of constitution:
  - constitutions of states, federated states (within a federal state) and supranational unions (EU)
  - democratic, monarchic, socialist (not communist!) and islamic (not islamist!) constitutions

II. The constitution as a legal institution

- a *legal institution*, developed in the modern age for a reliable rough arrangement of the political conditions and a basic orientation and restraint of public power
- functions of the constitution:
  - to provide for a *basic legal order* of the state
  - to *stabilise* the state *by* combining *flexibility* (allowing for developments and changes) and *rigidity* (channeling and limiting them)
  - to *legitimise* but also *restrain* the *exercise of public power* (and, thus, to protect the citizen)
  - to *integrate* the citizens by the common identification with their constitution and its values (→ the phenomenon of *constitutional patriotism*)

III. The pouvoir constituant (constituent power)

- lies with the one who in the given moment actually has the highest decision-making power in the state and, thus, enacts the constitution
  - this *can be anyone* but in a democratic state it *must be the people*

IV. The constitution as binding law

1) The legal character of the constitution

- not a political (programmatic) document but legally binding

2) The direct applicability of the constitution

- *all public authorities* are *directly bound* to the constitutional norms addressed to them; they are not allowed to wait for a regulation in the relevant laws
- this concerns in particular constitutional principles and fundamental rights

3) The primacy of the constitution

- first established by ***U.S. Supreme Court, Marbury v. Madison (1803)***: the constitution as the "supreme law of the land"
- for a long time disputed (even in Germany in the late 19th century) but generally recognised since the end of the Second World War
- cannot be accepted by totalitarian regimes (therefore → no communist, fascist or islamist constitutions)
- primacy in validity: any conflicting national or sub-national law is void

- primacy, of course, also over moral and religious norms
  - no custom, tradition or religious dogma can call into question a constitutional norm!

4) The interpretation of ordinary law in conformity with the constitution

- among several possible interpretations of a norm only those are admissible that are compatible with the constitution; furthermore, the norm must be applied in a compatible way
  - examples: narrow interpretation of indefinite legal concepts, moderate exercise of wide discretionary power
- thus, often the invalidity of the norm can be avoided but this may tempt the legislator to shift the risk of violating the constitution to the executive

V. Constitutional interpretation

1) Classical methods of interpretation

- the same as for the interpretation of any law:
- *grammatical (literal)* interpretation (focusing on the *wording* of the norm)
  - the wording sets the absolute limit for any legal interpretation
- *systematic* interpretation (focusing on the norm's systematic *position*)
  - position often indicates function and, consequently, sense of the norm
- *historical* interpretation (focusing on the *genesis* of the norm)
  - important for constitutions aiming to react to the failures of their predecessors
- *teleological* interpretation (focusing on the *purpose* [ratio legis] of the norm)
  -most important in practice

2) Additional specific methods for constitutional interpretation

- interpretation with regard to the *unity of the constitution*
  - understanding the constitution as a homogeneous whole
- interpretation leading to *practical concordance*
  - colliding values and norms shall be reconciled gently by considerate concretisation and balancing, allowing all of them to unfold under reciprocal limitation as far as possible
- interpretation with *comparative approach*
  - a convenient rich source of inspiration within teleological interpretation
  - helpful in particular in the field of fundamental rights and constitutional principles
  - a constitutional court may deviate from the interpretation of similar clauses by the constitutional courts in other countries, but needs to explain the reasons for it

VI. Milestones in German constitutional history

- see **Diagram 2**

concerning § 2 VI Milestones in German constitutional history

Diagram 2

German constitutions in the spectrum of milestones in constitutional history

England a the time of Cromwell		
Year	**Denomination and special features**	**Importance**
1653	Instrument of Government - establishing the rulership (constituting the ruling institutions) - executive power with "Lord Protector" and "State Council"	• basic legal order of England as a (short-time) republic • first constitution in the sense of const. theory
North America after independence		
Year	**Denomination and special features**	**Importance**
1776	Virginia Bill of Rights	• first positivation of fundamental rights
1776/77	First state constitutions in North America (in the former colonies)	• encouraged constitutionalism in Europe
1787/88	Constitution of the United States of America - sovereignty of the people ("We, the People of the United States...") - enumeration of the federal legislative competences - fund. rights catalogue added with 1st to 10th Amendment (1791) - development of sophisticated theory during ratification discussion by the FEDERALISTS (MADISON, HAMILTON, JAY)	• first constitution of a modern federal state • impulse, model and standard for development of constitutionalism in Europe
1803	US Supreme Court, decision in the case Marbury v. Madison - postulation of the primacy of the constitution and the right of the courts to review the constitutionality of laws	• often quoted historical elucidation of an essential basis of constitutionalism
France during and after the French Revolution		
Year	**Denomination and special features**	**Importance**
1789	Déclaration des droits de l'homme et du citoyen - proclamation with universal claim but initially not legally binding - preservation of human rights as objective of the state (art. 2) - sovereignty of the nation [people] (art. 3) - comprehensive liberty ("to do anything that does not harm others", art. 4) - the law as expression of the general will ["volonté générale"] (art. 6) - guarantee of fundamental rights and separation of powers as necessary characteristics of any constitution (art. 16)	• first European proclamation of important fundamental values of the free and democratic constitutional state • has made the ideas of the French Revolution popular in Europe • art. 16 postulates a position that is still uphold by many constitutionalists in Europe[1]
1791	Constitution of 1791 - less than one year in force - Déclaration of 1789 included - still a monarchy but based on the sovereignty of the people - discussion of theoretical foundations of modern constitutionalism in ABBÉ SIEYES' pamphlet "Qu'est-ce que le Tiers Etat?" (1789)	• model for many constitutionalist movements in Europe
1793	Constitution of the year I (Constitution montagnarde) - adopted by referendum but not entered into force	• first republican constiution

[1] While many scholars consider these elements characteristics of the type of a *free and democratic* constitution, many others maintain that a document missing one of them (as the Indonesian Constit. of 1945 until 2000) is not a constitution at all.

Important European constitutions of the 19th and 20th century (selection)		
Year	**Denomination and special features**	**Importance**
1814	France: Charte constitutionnelle - imposed monarchical constitution	• model constitution for constit. monarchy
1814-24 1831-33	Early German constitutionalism, Middle German constitutionalism - monarchical constitutions	• first waves of German constitutions - no free and democratic constitutions
1849	**Germany: Constitution of the German Reich** (Frankfurt Constit.) - drafted in the *St. Paul's Church* in Frankfurt by a national assembly on the basis of the constituent power of the people - was rejected by the King of Prussia (who was supposed to become German Emperor) and ***did not enter effectively into force*** - concept of the Reich as a democratic German federal state with separation of powers between Emperor and Reichstag - comprehensive catalogue of fundamental rights - Reichsgericht (Reich's Court) with functions of a constitutional court, including individual fundamental rights complaint	• first free and democratic German constitution • important source of inspiration for the Weimar Constitution and the Basic Law
1850	Constitutional Charter for the Prussian State - basical monarchical constitution - three-class voting system for the Second Chamber	• Prussian constitution until 1918
1871	Constitution of the German Reich (Bismarck Constitution) - mixed constit. of the German Empire combining monarchical and democratic elements	• constit. of German national state until 1918
1919	**Constitution of the German Reich** (Weimar Constitution) - the Reich as a free and democratic republican federal state - destructive non-confidence vote (caused instability) - strong position of elected President of the Reich, including right to dissolve Reichstag and to take dictarorial emergency measures - long part on heterogeneous fundamental rights which were conceived as non-binding programmatic principles	• first German republican constitution • first German free and democratic constitution entering effectively into force • conceptual flaws fostered crisis of German parliamentarism
1949	**Basic Law for the Federal Republic of Germany** - a constitution for the West German state, enacted by adoption by the parliaments of the West German Länder - the Federal Republic as a free and democratic republican social federal state based on the rule of law, with human dignity as highest fundamental value - only constructive vote of no-confidence - concept of defensive democracy - fundamental rights as directly binding law - comprehensive jurisdiction of the Federal Constitutional Court, including remedy of individual constitutional complaint	• most successful constitution in German history; maintained after the German reunification 1990 • has for many decades strongly fostered the identification of the citizens with the state (→ constitutional patriotism) • a source of inspiration for constitutional design in South and East Europe and for constitutional theory
1958	France: Constitution of the Fifth Republic - semi-presidential system with strong position of the President of the Republic and also of the Prime Minister (various → "cohabitations") - preventive constitutional review by Conseil constitutionnel - Déclaration des droits de l'homme et du citoyen of 1789 part of the "bloc de constitutionnalité" (recognized by Conseil const. in 1971)	• prevailing constitution • not popular in the past
2004	Treaty establishing a Constitution for Europe - did not enter into force after rejection in referenda in F. and NL - fundamental reform of the European Union and its institutions - integration of the Charter of Fundamental Rights as constit. law	• first constitution of an organisation based on public international law

§ 3 The Basic Law for the Federal Republic of Germany of 1949

I. The making and development of the Basic Law

- 1945 - 1947 recreation of Länder (federated states) and Land constitutions in the Western occupation zones
- 1947 initiative of the Western Allies to prepare an interim constitution for West Germany
- 1948 preparation of a preliminary draft by a politically neutral committee of experts appointed by the Prime Ministers of the Länder, the *Herrenchiemsee Constiutional Convention*
- 1948/49 elaboration of a draft Basic Law in Bonn by the *Parliamentary Council*
  - 65 members, elected by Land parliaments, some of them democratic politicians in the Weimar Republic
  - committed to create a solid, free and democratic, rule of law-based constitutional order for the interim period until German reunifaction
  - striving to avoid the mistakes of the past that had led to the failure of the democratic Weimar Republic
  - this led to a progressive, highly innovative draft constitution
- 05.1949 adoption of the draft by the Parliamentary Council and approval by the Western Allied military governors
- 05.1949 adoption of the Basic Law as constitution for West Germany by approval by two-thirds of the Land parliaments
  - *no direct approval by the people by referendum!*
- since 1949 frequent minor constitutional amendments on detailed issues
- 1968 controversial introduction of harsh special rules for the case of war, threat of war or imminent danger to the free and democratic constit. order (cf. art.115a, 80a, 87a, 91)
- 1990 maintenance of the Basic Law, now as all-German constitution, after German reunification
- 1994 minor reform of the Basic Law (based on the proposals of a constitutional commission)
- 2006 reform of the federal system
  - to counter long-lasting tendencies of unitarisation in the German federal state

II. The role of the Basic Law in German law, politics, public administration and society

- strong imprint of constitutional standards on the ordinary law
  - due to the primacy of constitutional law over ordinary law
  - in particular of directly applicable standards, such as constitutional principles and fundamental rights
  - *in all fields of law*; as a consequence, every lawyer needs to know well the constit. law relevant in his area of expertise
- strong influence of constitutional standards on the political discussion
  - solutions that would violate constit. standards will usually not be seriously discussed in the mainstream
- particularly strong influence on public administration
  - since the exercise of public power bears a particular risk of violating constit. standards (e.g. fund. rights)
  - therefore, civil servants need special in-depth training in the relevant areas of constitutional law
    - example: *You cannot be a good police officer without advanced knowledge of the fundamental rights!*
- great support of the Basic Law and its values in society from the beginning to present time
  - not least because of the continuous and consistent elaboration and communication of the const. values and standards in the jurisprudence of the Federal Constitutional Court
  - for more than 60 years a broad social consensus across all ideological boundaries, but now, as in most Western countries, threatened by the rise of right-wing extremist populism
- the phenomenon of German *constitutional patriotism:* identifying with the home country not because of the "nation" but because of the Constitution and its values
  - the extraordinary integrative power of the German Basic Law

III. The influence of the German Basic Law and constitutionalism on the development of constitutionalism in Europe and beyond

- the German Federal Constitutional Court as a model for the establishment of constitutional courts in Europe, Asia and Africa (see below, § 8 I)
- the jurisprudence of the Federal Constitutional Court as source of inspiration for the jurisprudence of other constit. courts
  - especially in the fields of constitutional principles (e.g. rule of law) and fundamental rights
  - sometimes other constitutional courts even refer explicitly to FCC decisions in their own reasoning
  - German scholarly constit. law doctrine also serves as a source of inspiration
- innovative elements in the Basic Law, the basic ideas of which have found their way into general constitutional theory
  - e.g. the principle that fundamental rights are directly binding law (art. 1(3) BL)
  - e.g. the idea that constitutional amendments meet their limits where they would affect the fundamental values and ideas that form/define the core/identity of the constitution (art. 79(3) BL)

IV. The German Basic Law and European integration

- a *decline of importance of the national constitutions* in the process of European integration, since the EU member states are bound by EU law, but the EU is not bound and cannot by bound by the law (even constit. law) of its member states
  - the primacy of European Union law over national law, an essential foundation of European integration
- the phenomenon of *Europeanisation of constitutional law*: even the constitutional law of the member states needs to adapt to the standards set by European Union law
  - example: in the case *Tanja Kreil* (ECJ, case C-285/98), Germany needed to give up its constit. ban on military service of women at arms because it was incompatible with an EU equal treatment directive
- a complicated, never-ending story: the resistance of the Federal Constitutional Court against the inevitable decline of importance of national constitutional law
  - extensive constit. jurisprudence on Germany's participation in the process of European integration
  - note that most other constitutional courts do not share the critical German approach!

V. Overview over the Basic Law

- note: when studying sources of law, always first study their structure and systematics, for better orientation!
- particularly interesting from comparative perspective: art. 1, 2 - 19, 20, 20a, 21, 33, 79, 93, 94, 97, 100, 101 - 104 BL

§ 4 Germany as a free and democratic constitutional state

I. Theoretical background: How fundamental constitutional decisions on the fundamental values and ideas define the constitutional identity of the state

- The constitution must comprise the fundamental decisions about the *fundamental values and ideas* on which the political community shall be based.
- These fundamental decisions constitute the *unchangeable core* of the constitution. They define the *identity of the constitution* and, thus, the constitutional identity of the state.
  - this allows to classify the constitution with regard to the various types of constitution (cf. supra, § 2 I)
  - a *shift to other fundamental values* and ideas of the state is of course possible but *requires* to adopt a *new consitution*, which would constitute a revolution from the legal perspective
- The fundamental decisions are usually anchored in several *fundamental norms of the state*, mostly in the form of *fundamental constitutional principles*.

II. European background: Fundamental decisions in European constitutions as implementation of the European common fundamental values

1) The common European fundamental values - a historical heritage

- roots: philosophy of the enlightenment, French Revolution (not: Christianity)

2) The Council of Europe as promotor of the European fundamental values

- a very active special international organisation for the promotion of human rights, democracy and rule of law; has prepared numerous international treaties
- the *Venice Commission* of the Council of Europe: a multinational authentic authority on questions of up-to-date free and democratic constitutionalism

3) The fundamental values clause of the European Union (art. 2 EU Treaty)

- the most up-to-date formulation of the fundamental values and ideas of free and democratic constitutionalism and the basis for European integration
- directly binding law, with which all EU institutions and member states must comply

> **Art. 2 of the Treaty on European Union (EU Treaty)**
> (originally art. I-2 of the Treaty establishing a Constitution for Europe, which has not entered into force)
>
> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

III. Human dignity as supreme constitutional value

- a European common value, usually a fundamental right, but in Germany the *supreme and absolute constitutional value* (cf. art. 1(1))
  - immune to constitutional amendments
  - must be respected and protected by the state (→ duties of protection)
  - has inspired introduction of new rights (esp. personality rights) by judicial development of law
  - constitutes itself a special fundamental rights immune to restrictions
- rooted in the philosophy of IMMANUEL KANT (the human being as autonomous, self-determined being) with further historical roots in the Christian imago dei doctrine

- human dignity is the *self-determination of the free and equal humans* under respect for the *intrinsic value of every human being*
- according to the *object formula* of the Federal Constitutional Court, no human being must "be made a mere object of state power", his "quality as a subject" must not be "basically called into question"
  - examples: no cruel, inhuman or degrading punishment, no torture (under no circumstances!)
  - no legal authorisation to shoot down passenger aircrafts abused by terrorists as deadly weapons if this would kill innocent passengers (FCC, BVerfGE 115, 118[1], Aviation Security Law)

IV. The decision for sovereign statehood in a republican system (art. 20(1) BL)

- if Germany wants to join a future European federal state, and thus abandon its legal status as state under public international law, it must first adopt a new constitution authorising that
- republican system: head of state must be elected for a limited term

V. The principle of democracy (cf. art. 20(1) BL)

1) Foundations

- derivation of all public power from the people (*sovereignty of the people*)
  - requires an *uniterrupted chain of legitimacy* for all acting of public institutions
  - problem: foreign long-term residents as part of the "people" in local elections?
- *regular elections* with a real choice for the voter
- *majority rule, protection of minorities and pluralism*
  - legitimacy and authority of the majority decision (even if it is wrong...)
  - guarantee of the chance of the minority to become the majority in future fair elections
  - cultivation of a ***pluralistic culture***, bringing together different political approaches and stakeholders in a constructive debate
- publicity and transparency of the decision-making; broad public discourse
  - therefore, special importance of the communicative freedoms
  - problem: the derationalisation and rise of hate speech in public debates
  - problem: the manipulation of the public discourse by bots and fake news

2) The decision of the Basic Law for representative democracy

- no elements of plebiscitary democracy at the federal level (but in the Länder and communes)

3) The decision of the Basic Law for parliamentary democracy

- a distinct parliamentary governing system, with a clear dominance of the Bundestag
- therefore, German doctrines concerning the relations between the state institutions can usually not be transferred or serve for inspiration in countries with a presidential system, such as Kazakhstan

4) The prominent role of the political parties (art. 21 BL, Political Parties Act)

- principle of participation of political parties in the formation of the political will of the people (art. 21(1))
  - political parties as *constitutional institutions* with the function of *intermediaries between state and society*
  - free establishment, but parties must not seek to undermine or abolish the free and democratic order (art. 21(2))
- prinicple of equal chances for political parties (art. 21(1), 38(1) BL)
- prohibition of political parties only by the Federal Constitutional Court (art. 21(2, 4))
  - only if they fight the free and democratic constit. order; high requirements (only two successful cases)
  - such parties can also be excluded from public funding (art. 21(3, 4))
- complicated system of combined private and public party funding
  - with strict but often violated rules and numerous scandals in recent German history

[1] Federal Constitutional Court, judgement of 15.02.2006, 1 BvR 357/05, Aviation Security Law, BVerfGE 115, 118 (= Entscheidungen des Bundesverfassungsgerichts [Decisions of the Bundesverfassungsgericht], vol. 115, p. 118 ff.)

5) The concept of defensive democracy

- democracy must protect itself against those who want to destroy it, or it will perish
- precautions and instruments for the protection of democracy in the German Basic Law
  - prohibition of political parties seeking to undermine or abolish the free and democratic constitutional order (art. 21(4))
  - declaration of forfeiture of certain fundamental rights (art. 18)
  - defense of the constitution by specialised intelligent services
  - impeachment of judges and the Federal President in case of intentional violation of the constitution (art. 98(2), 61)
  - loyalty to the constitution as requirement for being a public servant
  - a *fundamental right to resist* against attempts to abolish the free and democratic constitutional order (art. 20(4))

VI. The principle of separation of powers (art. 20(2) phrase 2 BL)

- in Germany - unlike in most constit. states - considered an element of the rule of law (see infra, § 5)
- see **Diagram 3, F.III.**

VII. The decision for federalism (art. 20(1) BL)

1) The model of the federal state: two independent levels of statehood within one sovereign state

- a new model, introduced in 1788 with the conversion of the USA from a confederation to the first federal state
- based on a theory of federalism established by "THE FEDERALISTS" 1787/88 and developed particularly in USA, Germany, Switzerland
- basic idea: ***unity in diversity***
- *two concepts of statehood*: *in the sense of public intern. law* (sovereign state - the federation) *and state law* (non-sovereign state within a state - the federated states/Länder)

2) Formative elements of the German federalism

a) Special constitutional status of the Länder

- originary and independent own public power under the Basic Law
- own legislative, executive and judicial competences under the Basic Law that are exercised autonomously
- constitutional autonomy and autonomous self-organisation
  - own state institutions (Land government, parliament, constitutional court etc.), regulated in Land law
- financial resources guaranteed by the federal financial constitution (art. 104a et seq. BL)

b) Distribution of competences between the Federation and the Länder by the Basic Law

- technically, state functions are allocated to the Länder insofar as the Basic Law does not otherwise provide or permit (cf. art. 30, 70, 83 BL), but detailed regulations grant important competences to the Federation
- *far-reaching legislative powers of the Federation* (cf. art. 71 et seq. BL), but *participation of the Länder in the federal legislation via the Bundesrat* [Federal Council] (art. 50, 76 et seq. BL)
- as a general rule, the Länder execute the federal law as their own business (art. 83 BL)

c) Primacy of federal law over Land law (art. 31 BL)

d) Principle of federal loyalty

- obligation of mutual consideration and solidarity between the Federation and the Länder

VIII. The social state principle (art. 20(1) BL)

- the German implementation of the common European value of solidarity/social security, social justice and social cohesion (cf. Title IV of the EU Charter of Fundamental Rights)
  - philosophical-historical background: the fundamental idea of *fraternité* [brotherhood] of the French Revolution
- objective law approach: no social rights but a social state principle
  - a constitutional mandate to actively shape the social conditions
  - can justify encroachments on fund. rights or unequal treatment in support of disadvantaged groups of persons
- the problem of the vagueness of the concept
  - high margin of appreciation of the legislator
  - lack of exact legal criteria that can be applied precisely and are suitable for judicial review

§ 5 In particular: the principle of the rule of law [Rechtsstaatsprinzip]

- see **Diagram 3**

concerning § 5 In particular: the principle of the rule of law

Diagram 3

The principle of the rule of law in the modern constitutional state - with special regard to the example of Germany -

A. Fundamental idea and historical foundations

- the fundamental idea: overcoming arbitrariness by moderating public power and reliably adjusting it to legal rules
- the concept of the *Rechtsstaat* [state based on the rule of law] emerged in Germany in the 18th and 19th centuries as a liberal antonym to the absolutist concept of the *Polizeistaat* [police state]; in the 20th century it served as *antithesis to totalitarianism*

B. Different manifestations of the same fundamental idea in Europe: "Rechtsstaat", "État de droit", "rule of law" and "general principles of law"

- the German comprehensive concept of *"Rechtsstaat"*
- the French comprehensive concept of *"État de droit"*
  - generally recognised since the 1980s but based on elements partially developed already in the 19th and early 20th century
- the British concept of *"rule of law"*
  - restricted for a long time to a predominantly formal understanding
- the *general principles of European Union law*
  - unwritten principles that are inherent in any legal order which is based on the rule of law
  - "discovered" by the European Court of Justice in the way of judicial further developing of law; the Court uses the common legal traditions of the EU member states, the European Convention on Human Rights and other intern. treaties as sources of inspiration
  - nowadays the most comprehensive and up-to-date repository of rule of law elements
- the *convergence* of the different concepts *in the course of European integration*
- the common use of the term "rule of law" (in a broad sense) in the international discourse

C. The spreading of the idea in the wake of globalisation and development

I. A first triumph of the rule of law in the wake of democratisation in Europe

- the successful adoption of the rule of law in Spain and Portugal in the 1970s
- the adoption of the rule of law in the East European former socialist states in the 1990s
  - supported by the West European countries, the Council of Europe and its Venice Commission
  - fostered by the introduction of constitutional courts and their jurisprudence

II. The rising popularity of the idea in countries with emerging economies

- promoted by development partners, NGOs, intellectuals, economic actors and even government think tanks and senior officials
- the rule of law as an - ideologically neutral - way to secure sustainable development
- example: the commitment of ASEAN and its member states to the rule of law (cf. art. 1 no. 7, 2(2) lit. h ASEAN Charter)
- example: Kazakhstan as a Rechtsstaat (art. 1(1) of the Constit. of 1995)
- economic background: rule of law as a key requirement for sustainable economic globalisation

III. Recent threats to the rule of law by populism and extremism

- serious regressions in the rule of law in EU member states (Hungary, Poland) and accession candidates (Turkey)
  - failure of the European Union to intervene with appropriate measures to secure the rule of law
- unpunished ignorance of the rule of law in the U.S.A. by the Trump administration
- challenge of the rule of law by religious fundamentalists and authoritarian regimes (Russia, China)
- outlook: does the concept of the rule of law lose its attraction?

D. Formal and material concept of the rule of law

- the German concept of "Rechtsstaat" evolved in a long process *from a narrow formal concept* consisting of the primacy of the law and some formal principles *to a comprehensive material concept* that includes numerous material (substantial) principles of law
- the British concept of "rule of law" followed this way later
- the general principles of European Union law included formal and material elements from the outset
- in the global discourse, "rule of law" stands for a broad concept that includes all formal and material principles but must be distinguished from the concepts of democracy, separation of powers and human rights and can even be realised without them

E. The constitutional basis of the rule of law

- some constitutions refer explicitly to the concept of "Rechtsstaat"/"État de droit" or "rule of law" as a fundamental constitutional principle (e.g. in Kazakhstan (art. 1(1)), Indonesia (art. 1(3)), Portugal (art. 2), Spain (art. 1(1)), Poland (art. 2); see also art. 2 EU Treaty)
- The Basic Law for the Federal Republic of Germany of 1949 [= BL] does not explicitly postulate a principle of the rule of law but anchors important elements in various provisions, and refers to the concept of "Rechtsstaat" in art. 28(1). The Federal Constitutional Court derives a ***"Rechtsstaatsprinzip"*** from art. 20(3). Some elements are regulated separately as constit. principles or fund. rights (cf. art. 1(3), 19(4), 20(2) phrase 2, 101, 103, 104 BL).
- The elements of the rule of law are usually worked out in a *rich constitutional jurisprudence*, which is often inspired by the jurisprudence of other constit. courts and the European Court of Human Rights. There is an abundance of jurisprudence of the Federal Constitutional Court on the requirements of the "Rechtsstaatsprinzip".

F. The elements of the rule of law

- Note that there is no homogeneous terminology or systematics! Some elements may not be known in some countries, not associated with the rule of law or labeled differently. The following compilation includes all important elements, with special regard to the German law, but is not exhaustive.

I. The subjection of all activity of public institutions to the law *(cf. for Germany art. 20(3) BL)*

- the essence of "Rechtsstaatlichkeit"/"rule of law"
- includes the *obligation to enforce the law*, in favor of but also *against* the citizen

1) The primacy of the constitution

- subjection of all public institutions, including the legislator, to the constitution
- in particular direct binding effect of fundamental rights (see for Germany art. 1(3) BL)

2) The primacy of the law

- the subjection of the executive and the judiciary to the law
- the "law" includes in the European Union the subjection to the supranational European Union law
- problem: direct subjection to public international law? The controversy between *monism* and *dualism*
  - for international treaties, German follows dualism: they must first be implemented into national law

II. The principle of statutory reservation

- in some countries regulated explicitly (e.g. in France (art. 34))
- in Germany derived from the "Rechtsstaatsprinzip" or from this principle combined with the principle of democracy, and complemented by special statutory reservations in the limitation clauses for the individual fundamental rights
- usually more comprehensive in parliamentarian than in presidential democracies
- requires a *legal basis for all encroachments on fundamental rights* and other decisions imposing a burden on the citizen
  - in Germany also for decisions that are somehow essential for the exercise or the realisation of fundamental rights (so-called THEORY OF ESSENTIALITY" ["WESENTLICHKEITSTHEORIE"] of the Federal Constitutional Court)

III. The separation of powers

- usually considered a distinct, complementary feature of the free and democratic constitutional state, but in Germany considered an element of the rule of law
- philosophical foundations: ARISTOTELES, LOCKE, MONTESQUIEU
- division of state activity into three blocks (legislature, executive, judiciary) and allocation to different institutions
- objectives: securing freedom and *moderating state power* by *separation and interlocking of powers*; rational and functional organisation of state power

1) Constitutional principle of separation of powers (art. 20(2) phrase 2 BL)

- requires functional, organisational and (partly) personal separation of powers
- safeguard of the balance of powers as provided by the Constitution
- absolute protection of the *core area* of each power

2) Realisation of the separation of powers by the arrangement of the state institutions in the Constitution

3) Complementation of the horizontal by a vertical separation of powers in the German federal state

IV. The principle of proportionality [Verhältnismäßigkeitsprinzip]

- the most important legal principle at all
- can apply in states with different political-philosophical orientation (democratic, socialist, islamic states etc.), but:
- the most radical challenge to totalitarianism: categorical rejection of any claim of absoluteness for any objectives of the state!
- philosophical foundations in the Bible (Old Testament)
- can be derived from both, fundamental rights and Rechtsstaatsprinzip/principle of the rule of law
- legislator is bound but enjoys a *margin of appreciation and evaluation*
- applies to all measures imposing a burden on the citizen
- the structure of examination varies in different legal orders; see the *sophisticated German approach* with four requirements:

1) The measure must pursue a *legitimate aim*

- the measure must pursue a public, not private interest
- the aim must not be excluded by the constitution or other law
  - e.g. no public enforcement of private morality in a state committed to human rights
- the aim must be intended in the relevant legal basis

2) The measure must be *suitable* to pursue that aim
   - the measure must be conducive to its purpose
   - caution: measures might be harsh but nevertheless suitable!
3) The measure must be *necessary* to achieve the pursued aim
   - the measure must be the least intrusive act of intervention that is equally conducive
   - often the crucial point in the examination of a practical case
   - the lawyer must consider possible alternatives to the measure - this usually requires phantasy...
4) The measure must be *proportional* (in the strict sense)
   - the burden imposed must be in reasonable proportion (not excessive, not out of proportion) to the aim in view
   - requires thorough *balancing* of the concerned public interests and the rights (in particular fundamental rights) of the citizen

V. The principles of legal certainty and protection of legitimate expectations

- the citizen must know what he can expect and what he is expected to do so that he can adapt and prepare himself

1) The principle of definiteness
   - legal norms must be formulated *clearly and precisely*, allowing the citizen to anticipate the acting of the authorities
   - conferred powers must be defined and limited clearly; this does not exclude but limits the use of general clauses and indefinite legal concepts (usually one of the great topics in administrative law)
2) The prohibition of inconsistencies within the law
   - since the citizen cannot adapt to contradictory laws with contrary requirements
   - often a problem in developing countries when different ministeries supported by different foreign development partners prepare different laws that may in some cases interfere with each other
   - inconsistencies can be avoided by a thorough scrutiny of all bills in all fields of law by a central unit in the government
3) The limitation of legislation with retroactive effect
   - in particular protection of *acquired rights*
   - legislation with *true retroactive effect* (referring to facts in the past that cannot be changed anymore, e.g. criminalising a behaviour that was allowed at the time when it happened) should only be admitted in extremely exceptional cases and if required by imperative public interests
   - legislation with *pseudo-retroactive effect* (referring to present, on-going facts or relationships and affecting them for the future, e.g. setting higher standards for the final exams during the studies or higher preconditions for pension claims) may be excluded by the *right of the citizen to the protection of his legitimate expectations*; often, however, the problem can be solved by *transitional provisions*
4) The protection of the trust in the finality of administrative decisions and court judgements
   - the citizen must be able to trust that the case is settled after the proceedings are finished and the decision/judgement is final
   - *can collide with the obligation* of the state *to enforce the law*; this requires a thorough → *balancing* that can lead in different legal orders to different results (the German balancing needed to be readjusted under the pressure of European Union law after focusing too strongly on the protection of the trust of the citizen and neglecting the enforcement of the law)

VI. The guarantee of effective legal protection

- in Europe particularly developed in the rich jurisprudence of the European Court of Human Rights

1) Effective legal protection in civil law matters (in Germany derived from art. 2(1) read together with art. 20(3) BL)
2) Effective legal protection against public authority (see for Germany art. 19(4) BL)
   - the citizen must be able to defend and enforce his rights effectively against any measures of public institutions
   - includes interim relief
3) The right to a fair trial
   - in particular the right to an independent and impartial court
   - in particular the right to the lawful judge (see for Germany art. 101(1) phrase 1 BL)
   - in particular the right to be heard at the court (see for Germany art. 103(1) BL)

VII. Principles in the fields of criminal and criminal procedure law

- in Europe particularly developed in the rich jurisprudence of the European Court of Human Rights

1) Nulla poena sine lege (see for Germany art. 103(2) BL)
   - a special concretisation of the principle of definiteness and the prohibition of legislation with retroactive effect in the field of criminal law
2) Ne bis in idem (see for Germany art. 103(3) BL)
   - no one may be punished more than once for the same act under criminal law
3) Special rights of the defendant in the criminal procedure
4) Guarantees in case of deprivation of liberty (see for Germany art. 104 BL)
5) Presumption of innocence until conviction
6) In dubio pro reo

VIII. Principles of fair administrative procedure

- in the European Union anchored as a right to good administration in the Charter of Fundamental Rights
- in Germany not explicitly regulated in the Basic Law but codified in an Administrative Procedure Act
- the *right* of the ciziten *to be heard*
- the right of the citizen of *access to his file*
- the duty of the authority to *examine carefully and impartially* all relevant aspects of the case
- the duty of the authority to *decide within a reasonable time*
- the obligation to *state the reasons* for the administrative decision

IX. State liability for illegal acts of public authorities

- the citizen must be compensated for the damage caused by any illegal acting of public institutions
- CONTROVERSIAL in Germany for illegal acts of the legislator (recognized for violations of European Union law)

G. Further reading

- Concerning the concepts of Rechtsstaat, État de droit and rule of law in general, see the reports, studies and other documents of the *Venice Commission*, www.venice.coe.int/webforms/documents/?topic=34&year=all; see also *Pietro Costa; Danilo Zolo (editors)*, The Rule of Law. History, Theory and Criticism, 2007, http://books.google.de/books?id=qOrWShp0nzMC&printsec=frontcover&hl=de; *Thomas Schmitz*, The rule of law - an oftern underestimated core principle of the modern constitutional state, guest lecture at UNDIP, 2021, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Underestimated-rule-of-law_UNDIP2022.pdf.
- Concerning the German concept of "Rechtsstaat" see *Thomas Schmitz*, The Principle of the Rule of Law as a Constitutional Principle - the Example of Germany, special lecture at Universitas Janabadra, 2019, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_rule-of-law-Germany_Studium-Generale.pdf; *Matthias Koetter*, Rechtsstaat and Rechtsstaatlichkeit in Germany, 2010, http://wikis.fu-berlin.de/display/SBprojectrol/Germany (in English); *Werner Heun*, The Constitution of Germany. A Contextual Analysis, 2011, p. 35 ff [available at the lecturer].
- Concerning the general principles of European Union law as an up-to-date repository of the elements of the rule of law see *Thomas Schmitz*, The general principles of European Union law - a source of inspiration for the development of a modern administrative law in the Republic of Moldova, in: Administrarea Publică 2017, no. 1 (93), p. 26 ff., http://aap.gov.md/files/publicatii/revista/17/AP_1_17.pdf
- Concerning the current rule of law standards in modern constitutional states see the comprehensive guide of the *Venice Commission*, Rule of Law Checklist, 2016, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e.

§ 6 The German parliamentary governing system (short overview)

I. Introduction

- a distinct parliamentary governing system, in which
  - the decision in essential matters is reserved for parliament
  - the government is fully accountable to parliament (can be overthrown at any time)
- a federal system, in which the Länder do not only have their own competences under the Constitution but also participate through the Bundesrat [Federal Council] in the legislation and administration of the Federation and in matters concerning the European Union
- legal disputes between the constitutional bodies can be settled in special proceedings before the Federal Constitutional Courts (cf. art. 93(1) no. 1 BL)

II. Constitutional organs

- terminological distinction between simple *state institutions* and *constitutional organs* (= constit. bodies), i.e. those state institutions which have been established, regulated and vested with own powers directly by the Constitution

1) The Bundestag

- the German parliament; most important constitutional organ
  - may be dissolved prematurely only in exceptional circumstances (cf. art. 63(4), 68 BL)
- adopts the federal laws (art. 77(1) BL) and decides about the federal budget (cf. art. 110 BL)
- ratifies by law international treaties (art. 59(2) BL)
- elects the Federal Chancellor who then forms the Federal Government (art. 63, 64 BL)
- exercises parliamentary control over the Federal Government (art. 43 ff. BL)
- declares in the event of a military threat or attack the state of tensions or the state of defence (art. 80a, 115a BL)
- needs to approve the deployment of the Armed Forces abroad
- participates within Germany in matters concerning the European Union (art. 23 BL)

2) The Bundesrat [Federal Council]

- a federal institution representing the Länder, not a second chamber of parliament
  - consists of of members of the Land governments; number of votes of a Land depends on population (art. 51 BL)
- participates in federal legislation (art. 76 et seq. BL)
- needs to approve certain important political decisions (art. 80(2), 84(2), 85(2), 59(2), 115a(1) BL)
  - e.g. certain federal ordinances, admin. provisions, intern. treaties, the declaration of the state of defence
- exercises certain control functions (e.g. under art. 53 BL)
- participates within Germany in matters concerning the European Union (art. 23 BL)

3 The Federal Government

- consists of the Federal Chancellor and the Federal Ministers (art. 62 BL)
- *Federal Chancellor* elected by Bundestag on proposal of the Federal President (art. 63)
  - determines the general guidelines of policy (art. 65 BL)
  - can only be overthrown by election of a new Federal Chancellor (constructive vote of no confidence, art. 67 BL)
- directs and controls the execution of federal laws
  - adopts ordinances and admin. provisions, organises federal authorities, monitors execution of federal law by Länder
- participates in federal legislation (art. 76 et seq. BL)
- represents Germany in the European Union
- decides - with approval of the Bundestag - about deployment of the Armed Forces abroad

4) The Federal President

- not elected by the people (but by a Federal Convention, cf. art. 54 BL)
- not the leading political institution but a "pouvoir neutre" with functions rather like those of a "state notary"
  - certifies and promulgates the federal laws (art. 82 BL)
  - appoints and dismisses Federal Chancellor, federal ministers, judges and civil servants
  - represents the Federation in international law, e.g. hands over ratification instruments (art. 59 BL)
- however, some political functions
  - proposes candidate for election of the Federal Chancellor (art. 63(1) BL)
  - may dissolve Bundestag after failure to elect a Federal Chancellor (art. 63 IV phrase 3 BL)
  - may dissolve Bundestag after unsuccessful motion of the Federal Chancellor for a vote of confidence (art. 68 BL)

5) The Federal Constitutional Court (introduction)

- see for the details infra, § 8
- 16 constitutional judges in two Senates
  - elected half by the Bundestag, half by the Bundesrat for a 12 years term
- both court and constitutional organ
  - on equal footing with the other constitutional bodies
  - with own rules of procedure and independent budgeting
- highly respected in the population across political camps; has contributed significantly to the consilidation of democracy and rule of law in Germany

III. Federal legislation

- distinction between *exclusive legislative powers* of the Federation (art. 71, 73 BL) and *concurrent legislative powers* (where the Länder may legislate as long as the Federation has not legislated, art. 72, 74 BL)
- bills introduced by Federal Government, Bundesrat or the floor of the Bundestag (art. 76(1) BL)
- in the standard case, the *Bundesrat may object* to a bill adopted by the Bundestag, but the Bundestag can reject the objection (art. 77(3, 4) BL)
- in some cases the Basic Law requires the *consent of the Bundesrat* for a bill to become law; in these cases the Bundesrat has the power to prevent the law
  - such laws have become frequent because they often regulate the admin. organisation and procedure for their execution (cf. art. 84(1), 85(1) BL); this has significantly strengthened the Bundesrat's position
- a Conciliation Committee may be convened, to resolve differences between the Bundesrat and the Bundestag (art. 77(2) BL)
- laws enter into force after *certification and promulgation by the Federal President* (art. 82 BL)

IV. The execution of federal laws

- *generally by the Länder*, in their own right and responsibility (art. 83 BL)
  - administrative structure and procedure in principle regulated by Land law (art. 84(1) BL)
  - many administrative tasks delegated to the counties and communes
- in some cases by the Länder in federal commission [Bundesauftragsverwaltung] (art. 85 BL)
  - in these cases, administrative structure often regulated by federal law with consent of the Bundesrat
- in a few cases by federal administrative authorities
  - e.g. Federal Police, Federal Criminal Police Office, Foreign Service

§ 7 Fundamental rights

I. Human and fundamental rights

- see **special material** from the course Human Rights Law at Universitas Gadjah Mada (Yogyakarta), 2023
- *"human rights":* the pre-legal *("natural") rights* of every human beeing deriving from natural law (according to a philosophical doctrine dating from the era of enlightenment)
  - state can neither create nor abolish nor regulate them but must respect and protect them
  - term also used for *rights guaranteed in human rights treaties* (who pretend to mirror the natural rights)
- *"fundamental rights"*: *legal positions* created by the implementation of this doctrine into law
  - created, shaped and granted by the state; different in every state; can be repealed
- *"constitutional rights"*: f.r. guaranteed in the constitution
- some constitutions cause confusion by calling the f.r. "human rights"; be aware of the risk of misunderstandings!

II. The fundamental rights guaranteed in the Basic Law (overview)

- see **special material**

III. Types of fundamental rights

- see for the most up-to-date categorisation the EU Charter of Fundamental Rights
- freedom rights, equality rights, social rights, rights concerning justice, rights related to human dignity and other rights
- rights of man and citizens' rights
- fundamental rights and institutional guarantees

IV. Fundamental rights as directly binding law

1) Fundamental rights as directly applicable norms addressing to all public institutions

- like all constitutional norms, f.r. are directly binding law; they must be respected by all authorities and courts without waiting for a regulation by the the legislator
  - first explicitly regulated in 1949 in art. 1(3) of the German Basic Law, this basic idea has become a *key common acquis of general fundamental rights doctrine* so that nowadays there is no need for explicit regulation

2) The prohibition of public servants to execute orders or laws that contravene fundamental rights

- public servants are bound by constitution and law - orders of superiors cannot excuse the violation of f.r.!

3) The effective enforcement of the fundamental rights as a primary mission of the courts

- a key requirement of the rule of law
- if courts perform their function effectively, no need for ombudsmen, human rights commissions or other special human rights protection institutions

4) Fundamental rights as a limit to democracy

- democracy must be practiced in conformity with f.r. - the will of the majority cannot legitimise the violation of f.r.!

- fundamental rights limit in particular criminal law - the definition of crimes, the ways and extent of punishment, standards for criminal procedure etc.
- fundamental rights also limit the possible binding nature of traditional values and customs and religions

V. The interpretation and application of ordinary law "in the light of" the fundamental rights

- avoiding fundamental rights violations by strictly interpreting and applying all ordinary law "in the light of" (= in compliance with) the fundamental rights
- among several options of interpreting or applying a law, authorities must choose one that does not violate any f.r.
  - in most countries, in this case the law is considered constitutional (not "conditionally const."); thus, the *responsibility is shifted* from the legislator to the executive and judiciary
  - examples: interpretation of indefinite legal concepts, use of wide discretionary powers
  - requires thorough education of all officials in the field of f.r. and f.r. doctrine

VI. Functions of fundamental rights, duties of protection

- note that in advanced constitutional states for each function there is a different doctrine!
- f.r. as *defensive rights* (status negativus, easy to enforce by the courts)
- f.r. as *positive rights* (status positivus, requires legislation or government action)
- f.r. as *participatory rights* (status activus)
- f.r. as *objective values* (that must always be taken into account)
- f.r. implicate *duties of protection* (state must intervene actively to protect citizen against private encroachments)

VII. Holders and addressees of fundamental rights

- some f.r. may be limited to some holders (e.g. citizens of the state, natural persons)
- public institutions are usually not holders but addressees of f.r.
- f.r. do not bind the citizen but must be taken into account by the legislator when making the law and by the courts when interpreting and applying it (*indirect horizontal effect*)

VIII. The dogmatic structure of (defensive) fundamental rights

- a general structure common to all defensive rights, deriving from their nature and determining in some advanced constitutional states the structure of the examination of a possible violation

1) Scope/sphere of protection [Schutzbereich]

- Is the right in question (a protected activity of a protected person) *concerned*?

2) Encroachment/interference [Eingriff]

- Is the right actually *affected*?

3) Fundamental rights' limits [Schranken] and limits of limits [Schranken-Schranken]

- Is the encroachment/interference *justified* by the right's limits?
  - those are usually regulated in a *specific or general limitation clause*
  - the limitation clause, in turn, must be interpreted narrowly in the light of the restricted right, to preserve freedom (doctrine of *reciprocal effect* [Wechselwirkungslehre]).

IX. The limitation of fundamental rights encroachements by the principle of proportionality

- the most important element of the rule of law (see Diagram 3) and of f.r. doctrine
- any encroachment/interference must pursue a *legitimate aim*, be *suitable* to pursue that aim, be *necessary* to achieve the pursued aim and be *proportional in the strict sense* (not impose a burden out of proportion to the aim; this requires thorough *balancing*)

X. Exercise in practical case-solving in the field of fundamental rights

- see **case 1**

concerning § 7 II The fundamental rights guaranteed in te Basic Law (overview)

The fundamental rights guaranteed in the Basic Law - an overview

I. Human dignity (art. 1(1))

II. Civil rights and liberties and similar rights

1) Right to free development of personality (art. 2(1))
   a) General right of personality (art. 2(1) read together with art. 1(1))
      - right to privacy
      - right in one's own picture, right in one's own spoken word
      - right of informational self-determination (right to data protection)
      - right to ensured confidentiality and integrity of information technology systems
   b) General freedom of action (art. 2(1))
2) Right to life and right to physical integrity (art. 2(2) phrase 1)
3) Personal freedom (art. 2(2) phrase 2, 104) and freedom of movement (art. 11)
4) Freedom of religion [= freedom of faith] (art. 4(1, 2))
5) Freedom of conscience (art. 4(1)) and right to conscientious objection (art. 4(3))
6) Communicative freedoms (art. 5)
   a) Freedom of opinion (art. 5(1) phrase 1, 1st part)
   b) Freedom of information (art. 5(1) phrase 1, 2nd part)
   c) Freedom of the press (art. 5(1) phrase 2))
   d) Freedom of broadcasting (art. 5(1) phrase 2))
   e) Freedom of movies (art. 5(1) phrase 2))
7) Freedom of arts (art. 5(3) phrase 1)
8) Freedom of science (art. 5(3))
9) Fundamental rights concerning the school system (art. 7)
   - guarantee of religion classes in public schools (art. 7(3))
   - right of the parents to decide whether their children shall follow religion classes at school (art. 7(2))
   - right to establish private schools (art. 7(4, 5))
10) Freedom of assembly (Art. 8)
11) Freedom of association (Art. 9 I)
12) Right to form associations to safeguard and improve working and economic conditions (art. 9(3))
13) Privacy of correspondence, posts and telecommunications (art. 10)
14) Freedom of occupation (art. 12(1))
15) Prohibition to be required to perform particular work and prohibition of forced labour (art. 12(2, 3))
16) Inviolability of the home (art. 13)
17) Poperty and right of inheritance (art. 14)
18) Protection against deprivation of citizenship (art 16(1)) and extradition (art. 16(2))

III. Equality rights

1) General principle of equality (art. 3(1))
2) Equal rights of men and women (art. 3(2))
3) Special prohibitions of discrimination (art. 3(3) phrase 1)
4) Prohibition of disadvantaging because of disability (art. 3(3) phrase 2)
5) Equal opportunities for children born outside of marriage (art. 6(5))
6) Equal citizenship (art. 33(1-3))
   - in particular equal eligibility for any public office (art. 33(2))
7) Equal elections (art. 38(1) phrase 1)

IV. Fundamental rights regarding marriage and familiy (art. 6)

1) Protection of marriage and family (art. 6(1))
2) Parental right (art. 6(2))
3) Right of mothers to protection and care (art. 6(4))
4) Equal opportunities for children born outside of marriage (art. 6(5))

V. Justice

1) Right to effective legal protection against public authority (art.19(4))
2) Right to effective legal protection in civil law matters (art. 2(1) read together with 20(3))
3) Right to the lawful judge (art. 101(1) phrase 2)
4) Right to be heard at the court (art. 103(1))
5) Nulla poena sine lege (art. 103(2))
6) Ne bis in idem (Art. 103(3))

VI. Other fundamental rights

1) Right of asylum (art. 16a)
2) Right of petition (art. 17)
3) Right to resist [against attempts to abolish the free and democratic constitutional order] (art. 20(4))
4) Special rights of civil servants (cf. art. 33(5))

§ 8 Constitutional jurisdiction

I. Constitutional jurisdiction as an essential element of modern constitutionalism

1) Historical and theoretical foundations

- the need of a mechanism to *enforce the primacy of the constitution effectively*
  - even against infringements by the legislature
- the landmark decision ***Marbury v. Madison*** of the U.S. Supreme Court of 1803
  - the Constitution as the "supreme law of the land" and the right of the courts to review the constitutionality of laws
- the establishment of constitutional courts in Europe, Asia and Africa since the 20th century
  - in Austria after the First World War (first specialised const. court)
  - in Italy and Germany after the Second World War
  - in France in 1958 (Constitutional Council)
  - in Spain and Portugal in the 1970s
  - in Korea in 1988
  - in East Europe in the 1990s
  - in South Africa in 1994
  - in Indonesia in 2003
- the triumph of constitutional jurisdiction in modern constitutional states
  - has significantly contributed to the consilidation of a rule of law-based constitutionalism with effective primacy of the constitution in state practice

2) Basic models of constitutional jurisdiction

a) The U.S. model: constit. jurisdiction by the ordinary courts

- includes const. review of laws in concrete cases, as inherent part of judicial power
  - usually by all ordinary courts (→ diffuse constit. jurisdiction)
  - common in common law countries and some Latin American countries

b) The Austrian model: constit. jurisdiction by a Constitutional Court

- a specialised court with exclusive, usually comprehensive constit. jurisdiction, including the abstract and often also concrete constit. review of laws
  - a concept originally developed by HANS KELSEN
  - nowadays the prevailing model; common in particular in Europe

c) The French model: constit. jurisdiction by a Constitutional Council

- a specialised institution with limited constit. jurisdiction
  - common in African and Arab states, Cambodia
- includes constit. review of laws (mainly only preventive review)
- in practice, French Conseil constitutionnel has approximated to a constit. court

3) Constitutional jurisdiction as a motor for the development of constitutional law doctrine

- constitutional law develops much faster and also more consistently
- constitutional jurisprudence serves as point of reference and inspiration for scientific legal research but also takes up new developments in the scholarly discussion
- esp. important for the development of rule of law and fundamental rights doctrine

II. Constitutional jurisdiction and separation of powers

- a needed counterweight to the power of parliament and government
- in democratic states an important precaution against the degeneration of democracy into a dictatorship of the majority
  - the majority rule does not entitle to override fundamental rights or the rule of law!

III. The German Federal Constitutional Court [Bundesverfassungsgericht]

- see for the details the Federal Constitutional Court Act (FCCA)

1) Status

- both court and constitutional organ
  - on equal footing with and independent of all other constitutional bodies
  - own rules of procedure
  - independent budgeting
- highly respected among lawyers, politicians and in the population

2) Structure and organisation

- two *Senates* with each 8 constitutional judges
  - each Senate has several *Chambers* with each 3 judges which decide about admissibility of judicial referrals and admission of const. complaints
- *Plenary* decides if Senate wants to deviate from previous jurisprudence of the other
- *President* and Vice-President
- judges elected (half by Bundestag, half by the Bundesrat) for a 12 years term
- each constitutional judge assisted by 4 highly qualified *scientific assistants*
  - but still a too high workload - for all of them...

3) Role of a model and source of inspiration for the development of constitutional jurisdiction in Europe and the world

- because of its rich, consistent, often elaborate and sophisticated jurisprudence already since the 1950s
- jurisprudence often referred to by other constitutional courts
  - however, very controversial in matters of European integration
- jurisprudence a popular object of the legal research of foreign scholars
  - however, few decisions officially translated into English

IV. Types of proceedings before the Bundesverfassungsgericht

1) Disputes between constitutional organs (art. 93(1) no. 1 BL)

- about the constitutional rights and duties of federal constitutional organs or parts of them (or of other parties vested with such rights)
- capacity to sue/be sued: constitutional organ, parts of constitutional organs, other parties

2) Abstract constitutional review (art. 93(1) no. 2 BL)

- review of the compatibility of federal and Land law with the BL without special reason (and of Land law with other federal law)
- on application of Federal Government, Land government or ¼ of the members of the German Bundestag
- since 1994 also review of compliance of federal law in certain areas with the requirement of federal necessity in the national interest (art. 72(2) BL) on application of the Bundesrat [Federal Council] or a Land government or parliament (art. 93(1) no. 2a BL)

3) Concrete constitutional review (art. 100(1) BL)

- review of the constitutionality of federal or Land statutory law, which a court considers unconstitutional, if the court's decision in the given case depends on its validity (or of the compatibility of Land statutory law with federal statutory law, if the court considers it incompatibel)
- judicial referral can be filed by every court but must be thoroughly reasoned

4) Federative disputes between Federation and Länder (art. 93(1) no. 3 BL)

- about the rights and duties of the Federation and the Länder emanating from their constitutional federal relationship

5) Others (selection)

- proceedings for the prohibition of political parties (art. 21(2) BL)
- electoral complaints (art. 41(2) BL)
- constitutional complaints of communes and counties against laws violating their right to self-government (art. 93(1) no. 4b BL)

V. In particular: the constitutional complaint [Verfassungsbeschwerde]

(art. 93(1) no. 4a BL)

- review of all kinds of German acts of public power for possible violations of fundamental rights under the Basic Law
- can be filed by anyone but only after all legal remedies have been exhausted
- directly against a law only if the law affects the citizen directly (e.g. in criminal law)
  - otherwise incidental const. review of the relevant provisions
- review of court decisions limited to *specific* violations of fundamental rights
  - Bundesverfassungsgericht no "super appellate body"
- ca. 5.000 - 6.000 complaints per year; therefore filtering of irrelevant complaints in a (non-discretionary) acceptance procedure before a Chamber of 3 judges
- in most Länder also constitutional complaint before Land constitutional court against violations of fundamental rights under the Land constitution

VI. Special problems

- how to cope with the high workload caused by the high number of constitutional complaints?
- the Federal Constitutional Court and the ordinary and specialised jurisdictions
- the risk of a "clash of courts": the Bundesverfassungsgericht and the European Court of Justice

Prof. Dr. Thomas Schmitz Fall Semester 2023

GERMAN PUBLIC LAW

concerning § 7 X of the course

Case 1

(facts of the case)

During the Covid-19 pandemic, severe Covid-19 restrictions are imposed on the citizens, and not everyone likes them. In a German city, at a time when a Covid-19 wave has just subsided somewhat, discontent German citizens stage a demonstration against the restrictions. The demonstrators keep a proper distance from each other and from other people. However, there are some small groups among the demonstrators who refuse to wear face-masks, as prescribed by the Coronavirus Prevention Regulation and also ordered by the authorities for this demonstration. When the organisers of the demonstration and the police remind them that they are obliged to wear face-masks, they persistently refuse to follow. Finally, the police end the demonstration and order the demonstrators to leave. The decision is based on the Law on Assemblies, which authorises the police to terminate a public assembly in case of threat or violation of public security.

1. The organisers of the demonstration consider the decision of the police excessive and consider their freedom of assembly under the Basic Law violated. Are they right?

2. What if it is a huge demonstration at a peak time of the pandemic, the demonstrators do not keep their distance but crowd densely together in a small space, and ca. 25 % of them do not wear a face-mask?

Prof. Dr. Thomas Schmitz — Fall Semester 2023

GERMAN PUBLIC LAW

concerning § 7 X of the course

Case 1

(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; how to examine the possible violation of a defensive fundamental right; fundamental rights limits and limits of limits; freedom of assembly

OUTLINE OF THE CASE SOLUTION

A. Answer to question 1

The organisers of the demonstration against the Covid-19 restrictions are right that their freedom of assembly (art. 8 BL) has been violated, if (I.) the sphere [scope][1] of protection of the freedom of assembly is concerned, (II.) the decision of the police to end the demonstration and order the demonstrators to leave the place represents an encroachment on [interference with][2] this freedom and (III.) this encroachment was not justified by the freedom of assembly's limits.[3]

I. Sphere of protection [Schutzbereich]

The sphere of protection of the freedom of assembly was concerned if the decision of the police concerned (1.) a holder (protected person) of this fundamental rights (personal sphere of protection) and (2.) an activity protected by it (material sphere of protection[4]).[5]

1) Personal sphere of protection [persönlicher Schutzbereich]

Under the Basic Law, the freedom of assembly is reserved to Germans,[6] but according to the facts of the case, the organisors of the demonstrations were German citizens. So the personal phere of protection of the freedom of assembly was concerned.

---

[1] In English, both terms and also the terms "area of protection" and "protected area" are common.

[2] In English, both terms are common. Note that they do not necessarily mean "violation" (= "infringement"). Only an encroachment/interference that is not justified by the freedom's limits is considered as a violation of the freedom.

[3] Note: This *introductory sentence* is important because it is indicative of the dogmatic structure of the freedom of assembly as a fundamental right and it presents without unnecessary explanations the structure of the following examination. Such introductory sentences may facilitate the understanding of the case solution considerably, in particular for non-experts in the field (such as clients, managers, head of departments ...).

There are two possible structures for the examination of a violation of a defensive fundamental right: Strictly dogmatically, there are two steps with each several substeps: (I.) Encroachment on the sphere of protection of the fundamental right (that means that the right in question is affected) and (II.) Unconstitutionality of this encroachment (no constitutional justification by the right's limits). However, it has become a more common practice to split the first step into two steps and follow a three steps pattern: (I.) Sphere of protection, (II.) Encroachment, (III.) No justification by the fundamental right's limits. Although the first alternative is more accurate, both ways are appropriate.

[4] In English, some authors use the terms "substantive sphere", "substantive scope" or "subject matter of protection".

[5] Note: Introductory sentences do not only make sense at the very beginning of the examination but also at the beginning of the examination of complex, important or difficult aspects. However, the general context must always be clear (here: this is not the start of a new examination but 1. and 2. are sub-aspects of I.).

[6] Foreign citizens also enjoy the freedom to demonstrate, but it is only guaranteed under the general freedom of action (art. 2(1) BL), a fundamental right which can be restricted more easily in the public interest.

2) Material sphere of protection [sachlicher Schutzbereich]

The termination of the demonstration must have impacted an activity that is protected under the freedom of assembly. Holding a demonstration in public is a classic activity that falls under this freedom. Art. 8(1) BL only guarantees the right to demonstrate peacefully and unarmed, but there are no indications that this was not the case. So the material sphere of protection was concerned too.

The sphere of protection of the fundamental right under art. 8 BL was concerned.[7]

II. Encroachment [Eingriff]

The decision of the police can only have violated the freedom of assembly of the organisers of the demonstration if it encroached on [interfered with] this freedom, that means actually affected it. The decision to end the demonstration and the order to leave the place meant the *prohibition* to continue to assemble. The prohibition of a protected activity is a classical kind of encroachment. So the freedom of assembly was not only concerned but also affected in the given case.

III. Unconstitutionality of the encroachment (no justification by the fundamental right's limits)

The encroachment on the freedom of assembly must not have ben justified by the freedom's limits [Schranken]. An encroachment on a fundamental right does not yet signify a violation. Despite its negative impact, such a measure is constitutional if the encroachment is justified by the fundamental right's limits. Since some demonstrators refused to wear face-masks, this could be the case.

1) The limits of the freedom of assembly: the statutory reservation

As any freedom, the freedom of assembly is not unlimited. Art. 8 BL does not only guarantee the freedom (art. 8(1)) but also contains a *special limitation clause* [Schrankenklausel], under which the right to assemble outdoors is subject to restrictions by or pursuant to statutory law (*art. 8(2)*, so-called *statutory reservation* [Gesetzesvorbehalt]). In the given case, the freedom of assembly has been restricted based on the Law on Assemblies, which authorises the police to terminate a public assembly in case of threat or violation of public security. This law serves a public interest that in some cases may outweigh freedom of assembly.

When some participants at the demonstration did not wear face-masks in spite of the obligation to do so under the Coronavirus Prevention Regulation and the order of the authorities, this constituted a regulatory offence and also posed a risk to the health of other participants and, thus, threatened and violated public security in two ways. So the conditions under which the Law on Assemblies could in principle authorise to terminate a public assembly were given.

2) Respect of the "limits of limits" ["Schranken-Schranken"], here: the principle of proportionality

However, even if the preconditions for a measure under statutory law are met, the measure may only be taken if the so-called "limits of limits", i.e. principles that prevent excessive, unreasonable or unjust fundamental rights restrictions, are met. In particular, the requirements of the *principle of proportionality* must be met, i.e. the measure must be suitable, necessary and proportional in the strict sense (in reasonable proportion) to achieve a legitimate aim. In the given case this is questionable, since the police ended the whole demonstration, although only small groups among the demonstrators refused to wear a face-mask.

a) The legitimate aim of the decision of the police

The measure must have served a legitimate aim. Its objective was to stop the violation of public security by the regulatory offences of some demonstrators who ignored their obligation to wear face-masks, and to prevent the threat for public security (here: the risk of infections and thus the health of other persons) caused by this. So the measure served a legitimate aim under the Law on Assemblies.

b) The suitability of the decision of the police to achieve this aim

The measure must have been suitable to achieve this aim, i.e. *conducive to its purpose*. This was the case, since the breaking up of the demonstration and the order to leave the place dispersed the crowd, stopped demonstrators from staying at the place without face-masks and thus ended the risks of Covid-19 infections in the crowd.

---

[7] Note: Every major part of the examination *must* be finished by a *concluding sentence* that indicates clearly, which sub-question has been answered (in which context) with which result. This is crucial for the orientation of the reader. Without such concluding sentences at the end of major parts, the reader will soon lose his bearings.

c) The necessity of the decision of the police to achieve this aim

The measure must have been necessary to achieve its aim. It must have been the *least intrusive act* of intervention that was equally conducive, i.e. there must *not* have been *a milder alternative*. In the given case, breaking up the demonstration and ordering everyone to leave rather was the ultima ration. There was a milder, less intrusive alternative: The police could have ordered off specifically those demonstrators who did not wear face-masks. Where necessary, the police could have enforced this order by going into the crowd and removing those persons forcibly, if necessary accompanied by imposing fines. Since *only small groups* of the demonstrators were not wearing face-masks and causing the threat/violation of public security, and there are no indications that they would have resisted with violence, this would have been possible. It was *not necessary to end the whole demonstration* and, thus, to force even the law-abiding citizens who lawfully exercised their freedom of assembly, to leave. So this measure was not necessary.

Since the decision of the police was not necessary, it does not meet the requirements of the principle of proportionality. It does not comply with the "limits of limits" who in their turn limit the restrictions of freedom rights.

The encroachment on the freedom of assembly of the organisers could in principle be based on he Law on Assemblies but did in the given case not respect the "limits of limits" - here the principle of proportionality - and thus was not justified by the freedom of assembly's limits under art. 8(2) BL.

Result: The organisers of the demonstration are right that their freedom of assembly has been violated.[8]

B. Answer to question 2 [9]

In this case again, the sphere of protection of the freedom of assembly (art. 8 BL) was concerned, the decision of the police constituted an encroachment on this freedom, and the question is if this encroachment was justified by the freedom's limits. The Law on Assemblies can in principle authorise to terminate a public assembly during Covid-19 times if its participants defy their obligation to wear face-masks, but such a step must be *proportional* in the given situation.

In this case again, the measure pursued a legitimate aim and was suitable for this purpose. Unlike in the original case, it was *also necessary*: If in a huge demonstration every fourth demonstrator does not wear a face-mask, the police cannot have the manpower to address all perpetrators individually and, where necessary, fine and remove them, even by physical force. The police forces would have been overchallenged, especially since the demonstrators crowded densely, what made it difficult to isolate a high number of individuals. So the measure that represented a milder alternative in the original case was out of question here.

The measure also needs to be *proportional in the strict sense*, i.e. the burden imposed on the citizen must be in reasonable proportion (not excessive, not out of proportion) to the legitimate aim in view. Although the *termination of a public demonstration* by the police is a *serious fundamental rights encroachment*, having regard to the special importance of the freedom of assembly for democracy, this was here the case: Unlike in the original case, the demonstration did not take place at a time when the pandemic subsided but at a peak time of the pandemic. So the risk of spreading the coronavirus was particularly high. Moreover, the demonstration was huge and the participants crowded densely. If under these circumstances every fourth demonstrator refused to wear a face-mask, this did not only represent a strong defy of the authority of the state and the law, but also constituted an extremely high risk of spreading the infection in the society. With regard to this serious threat, the decision to end the demonstration and order the participants to leave the place was not excessive.

So in this case, the requirements of the principle of proportionality as an important "limit of limits" to fundamental rights restrictions were met and the decision of the police actually justified by the freedom of assembly's limits (cf. art. 8(2) BL). In this case, the organisers of the demonstration are not right: their freedom of assembly is not violated.

---

[8] Note that at the end of your analysis you may not just need one but a series of concluding sentences, until you conclude the whole exmination.

[9] Note: Since question 2 is only about a case variant and logically big parts of the case solution will be the same as in the original case, the answer to this question can be confined to summarise these parts in keywords and then focus on those aspects where the case is different.

FURTHER READING:

On the principle of proportionality as a limit to the restriction of fundamental rights, see *Gertrude Lübbe-Wolff*, The Principle of Proportionality in the Case-Law of the German Federal Constitutional Court, HRLJ 34 (2014), p. 12 ff., www.researchgate.net/publication/326782433_The_Principle_of_Proportionality_in_the_Case-Law_of_the_German_Federal_Constitutional_Court; *Luka Anđelković*, The elements of Proportionality as a Principle of Human Rights Limitations, Law and Politics 15 (2017), no. 3, p. 235 ff., DOI 10.22190/FULP1703235A.

More information on this course at www.iuspublicum-thomas-schmitz.uni-goettingen.de and Canvas. For any questions, suggestions and criticism please contact me in office 219, via WhatsApp or via e-mail (tschmit1@gwdg.de).

(Datei: Case 1 (GermanPublicLaw))

A. Answer to question 1

I. Sphere of protection [Schutzbereich]

1) Personal sphere of protection [persönlicher Schutzbereich]

2) Material sphere of protection [sachlicher Schutzbereich]

II. Encroachment [Eingriff]

III. Unconstitutionality of the encroachment (no justification by the fundamental right's limits)

1) The limits of the freedom of assembly [Schranken]: the statutory reservation

- see the Law on Assemblies

2) Respect of the "limits of limits" ["Schranken-Schranken"], here: the principle of proportionality

a) The legitimate aim of the decision of the police

b) The suitability of the decision of the police to achieve this aim

c) The necessity of the decision of the police to achieve this aim

- the milder alternative: ordering off those demonstrators who do not wear face-masks and going into the crowd and removing them

B. Answer to question 2

- the necessity of the decision of the police
  - no feasible milder alternative
- the proportionality in the strict sense of the decision of the police

Prof. Dr. Thomas Schmitz Fall Semester 2023

GERMAN PUBLIC LAW

Mid-term examination

(50 of 100 points for the course)

1. The *rule of law* is a universal fundamental value anchored in the constitutions of most modern constitutional states, including Kazakhstan. What is its basic idea? Which different manifestations have emerged in Europe and how have they developed? Which are its important elements in German law, besides the self-evident obligation of public institutions to follow the law? Please explain shortly and concisely in your own words. (25 of 50 points)

2. *Simple practical case:* Mr. X is the head of a local government authority in the state S. In this state, human rights are anchored as fundamental rights in special clauses in the national constitution that guarantee them and define their limits, but these fundamental rights have little practical effect. Mr. X wants to contribute in his work to change that.

   You are studying for one semester as a foreign exchange student at the local university in the city of Mr. X. One day you meet him in a bar. When he hears that you have studied German law, he is excited because he has heard that in Germany fundamental rights play an important role not only in legislation but also in public administration. So he wants to know: Why and in what ways do fundamental rights impact the work of the public authorities? How can an official examine whether or not a measure under consideration would violate certain fundamental rights, such as freedoms, or not? What will be your (correct) answer) (25 of 50 points)

Note: Please write in legible handwriting. Please make sure that your text answers precisely the questions, is concise, has a consistent structure and shows well your deeper understanding of the subject matter. After the exam, all students are welcome to contact me to discuss in detail the strong and weak points of their paper (e-mail: tschmit1@gwdg.de; phone/WhatsApp: +7 775 364 2384).

(Datei: Mid-term examination (GermanPublicLaw))

§ 9 Introduction to German administrative law

I. Administrative law as part of public law

- see **Diagram 1**

II. The distinction of administrative law from private law

1) An important basic distinction

- important for determining the legal standards applicable to certain activities
  - the *Administrative Procedure Act* only applies to administrative activities under public, not under private law
  - the central form of action of the *administrative act* is only available for acution under public law
  - there are special rules for *contracts under public law* that differ from those for contracts under private law
- important for determining the liability rules applicable to certain activities
- important for chosing in case of dispute the right recourse to the admin. or ordinary courts
  - cf. sect. 40 CACP, sect. 13 Courts Constitution Act

2) The general distinction (see already supra, slide 1, p. 2)

- private law regulates the legal relationships between individuals
- administrative law regulates the relationships between individuals and administrative authorities as well as those between the administrative and state authorities and bodies
- authorities may use private-law legal forms to perform public tasks, but in this case the private law is partly superimposed by mandatory public-law standards
  - so-called "administrative private law" ["Verwaltungsprivatrecht"]
  - example: private-law contracts for the admission to the public swimming pool
  - in this case, the authority is still bound to fund. rights and rule of law principles

3) Theories for the delimitation in difficult cases

- *subordination theory:* legal provisions regulating a relationship of super- and subordination between the authority and the citizen fall under admin. law
- *subject theory:* legal provisions entitling or obliging in any conceivable case a public authority in a specific sovereign function fall under admin. law
- *interest theory:* legal provisions serving the public interest fall under admin. law, those serving the private interest of the individual fall under private law

III. The history of German administrative law (overview)

1) References for self-study

- see for a short, targeted presentation: *Florian Becker*, The Development of German Administrative Law, George Mason Law Review 24 (2016-17), p. 453
- see for a detailed presentation: *Michael Stolleis*, Public Law in Germany. A Historical Introduction from the 16th to the 21st Century, 2017, in particular chapters 3, 4, 8, 11, 12, 14, 15, 17

2) Some milestones important for the understanding of modern admin. law

- strong tradition of rule of law (→ Rechtsstaat) since the late 18th century
- *Allgemeines Landrecht für die Preußischen Staaten* [General Land Law for the Prussian States] of 1794
  - a late-absolutist natural law-orientated codification
- introduction of *independent administrative courts* in the 19th century
- limiting the police to the mission to prevent threats for public security and order: the Kreuzberg judgement of the Prussian Higher Administrative Court of 1882

- strong influence of the French law-inspired scholar ***OTTO MAYER*** on the development of modern German administrative law
  - textbooks Theorie des Französischen Verwaltungsrechts, Strasbourg 1886, and Deutsches Verwaltungsrecht, vol. 1, Leipzig 1895
  - famous dictum *"Verfassungsrecht vergeht, Verwaltungsrecht besteht"* ["const. law passes, admin. law persists"], 1924
  - important, French-law inspired contribution to the development of the doctrine of the admin. act [Verwaltungsakt]
- total decline of rule of law and human rights under the totalitarian regimes of the National Socialists (1933 - 1945) and Communists (East Germany, 1945 - 1989)
- effective implementation of the rule of law and protection of the fundamental rights under the Basic Law of 1949
  - famous dictum *"Verwaltungsrecht ist konkretisiertes Verfassungsrecht"* of the President of the Federal Administrative Court [Bundesverwaltungsgericht] FRITZ WERNER, 1959
- establishment of the *Federal Administrative Court* [Bundesverwaltungsgericht], 1952
- *Code of Administrative Court Procedure* [Verwaltungsgerichtsordnung], 1960
- *Administrative Procedure Act* [Verwaltungsverfahrensgesetz], 1976
- modern codification and frequent reforms of public security and order (police) law, since the late 1960s
- regulation of more and more areas of special administrative law in highly specialised laws, since the 1970s
- Europeanisation of administrative law
  - with initial resistance from some admin. law scholars in the 1990s

IV. Legal sources of administrative law

1) Federal law, Land law and European Union law

- in a federal state, the federal law and the law of the federated states (in Germany: Land law) are different parts of the same legal order
  - in case of conflict, in Germany federal law takes precedence over Land law (art. 31 BL)
- the European Union has its own legal order, distinct from those of its member states
  -in case of conflict, Union law prevails (→ primacy of Union law)

2) The types of legal sources

a) The highest legal source: the Basic Law

- constitutional principles and fundamental rights are *directly binding law*
  - with strong influence on the interpretation and application of all other norms in the field of admin. law
- civil servants must check the constitutionality of sub-constitutional norms before applying them and refuse to apply (evidently) unconstitutional norms
  - usually conflicts can be avoided by *interpreting* the sub-constitutional norms *"in the light of"* (in conformity with) *the Constitution*

b) International treaties

- e.g. human rights treaties, international investment agreements
- Germany follows *dualist approach*:
  - treaties only binding internally after transformation into German law
    - this is, however, usually effected by or together with the ratification law
  - treaties have same (not higher!) rank as German statutory law
    - however, conflicts are minimised by interpreting German law "in the light of" the treaties

c) Statutory law

- distinction between laws in the "formal sense" (statutory laws) and "material sense" (all legal norms)
- requirement of a ***legal basis*** [Ermächtigungsgrundlage] for every encroachment on fundamental rights (***principle of statutory reservation***, core element of the rule of law)
  - even for all decisions that are essential for the exercise or realisation of the f.r. (theory of essentiality ["Wesentlichkeitstheorie"] of the Federal Constitutional Court)
- interpretation and application always in the systematic context and in line with the Basic Law, the Land constitution (in case of Land law) and European Union law
  - no schematic, "literal" application of statutory law!
  - in particular considerate use of norms granting discretionary power

d) Ordinances (regulations) [Rechtsverordnungen]

- legal norms issued by the Federal Government or a federal minister, a Land government or Land minister; also by local administrative authorities
- in Germany only by virtue of regulatory powers delegated by the legislator (cf. art. 80 BL)
- binding to the citizen in the same way as statutory law
- subject to abstract constitutional review by the Federal and Land Constit. Courts (art. 93(1) no. 2 BL and corresponding Land law), Land ordinances also to judicial review by the higher admin. courts (sect. 47 CACP)

e) By-laws [Satzungen]

- legal norms issued *by self-government bodies* who are *legal persons* under public law for the autonomous regulation of their own affairs
  - e.g. by communes, counties, universities, chambers, public service broadcasters
  - adopted usually by their representative body (city/county council, faculty council, senate)
- examples: by-laws on local rates, the use of public facilities and garbage disposal, the local development plan (land use plan), autonomous regulations of universities and faculties
- self-government bodies act on the basis of a *general legal authorisation to pass by-laws* in their self-government aiffairs; however, the essential decisions with regard to the fundamental rights are taken by the legislator

f) Customary law

- requires long-lasting general practice (*longa consuetudo*) and the general opinion that this practice is legally required (*opinio iuris*)
- cannot replace the necessary statutory basis for encroachments on fund. rights
- nowadays in Germany as in most countries with a highly developed legal system *extremely rare*, due to the large quantity and density of written norms but also to the rapidly changing circumstances and the heterogeneous opinions in a pluralistic society

g) General principles of administrative law?

- important in French admin. law and European Union law but little important in German law, where their quality as distinct source of law is CONTROVERSIAL
- nowadays usually superseded by codified law, which in turn is often based on them

h) No source of law: court decisions

- since there is no doctrine of precedent (stare decisis) in German law
- court decisions represent *jurisprudence, not "case-law"*
  - courts not allowed to "make" new law but to further develop the existing law
  - nonetheless, court decisions must be studied and beared in mind

i) No source of law: administrative provisions

- internal regulations within the executive power binding only the authorities
  - often interpreting or concretising legal norms or guiding the exercise of discretionary power
- cannot be a legal basis for encroachments on fund. rights
- irrelevant for judges, scholars and students because not binding them - not even in the interpretation of the law
- disrespect in an individual case does not violate as such the rights of the citizen but can be illegal for breach of the principle of equal treatment (cf. art. 3(1) BL)

3) The hierarchy of norms

- within the same legal order, legal norms inconsistant with higher-ranking law are void (→ *primacy in validity*); this applies in particular to the primacy of the Constitution
- law of the EU member states insonsistent with EU law is only inapplicable (→ *primacy in application*)

4) The speciality of norms (lex specialis principle)

- lex specialis derogat lex generalis
- often relevant in the special sub-fields of admin. law (e.g. general public security law and environemental law)
- problem: transfer of doctrine from the more general to the more special sub-field of law?

§ 10 Administrative bodies and competences

I. Public administration on Land level, local level and federal level

1) The execution of Land law

- always by and in the responsibility of the Land
- administrative structure and procedure regulated by Land law
- many *tasks delegated to the counties and communes* (with functional supervision by the Land)

2) The execution of federal law

a) *generally by the Länder*, in their own right and responsibility (art. 83)
- administrative structure and procedure in principle regulated by Land law (cf. art. 84(1) BL)
- many *tasks delegated to the counties and communes*

b) *in some cases* by the Länder *in federal commission* [Bundesauftragsverwaltung] (art. 85 BL)
- in these cases, often the admin. structure is regulated by federal law with consent of the Bundesrat

c) *in some cases* by *federal administrative authorities*
- e.g. Federal Police, Federal Criminal Police Office, Federal Defence Administration, Foreign Service

3) The execution of European Union law

- same distribution of competences as if it was German law (art. 84 et seq. BL applied analogously)

4) Local self-government

- local self-government a *constitutional right* of the communes and counties (art. 28(2) BL)
  - defendable by legal action before the administrative court and constitutional complaint (against laws) before the Federal Constitutional Court (art. 93(1) no. 4b BL)
  - includes guarantee of the formal and material (also financial...) preconditions of local self-government
- *comprehensive jurisdiction of the communes for all affairs specific to the local community*
  - incl. territorial jurisdiction, right to self-organisation, financial autonomy, planning autonomy (→ land use planning), own regulatory power (by-laws, regulations) and autonomy to cooperate with others
- only *legal supervision*, no functional supervision by the state (control of legality, not of expediency of self-governing activities)

II. Federal administrative bodies

- federal ministries, central federal authorities and federal corporations and institutions
- only *in few cases* (e.g. Federal Police) federal authorities *with own admin. substructures* (supreme and higher federal authorities, intermediate and lower federal authorities, art. 87 BL)

III. Land administrative bodies

- general and specialised Land authorities
- traditionally 3 levels of Land authorities
  - Land ministries & other central authorities, regional Land authorities [Bezirksregierungen, Regierungspräsidenten] (eliminated in some Länder) and local authorities

IV. Local government bodies

- communes
  - after comprehensive territorial reforms in the 1970s usually performant
  - often voluntarily united in general associations of several communes with own institutions for better performance
- counties [Landkreise]
- special: REGION HANNOVER (legal merger of several counties & a Land capital city to a new regional collectivity)

§ 11 General principles and concepts of administrative law

I. The principle of legality of public administration [Gesetzmäßigkeitsprinzip]

1) The principle of the primacy of the law [Gesetzesvorrang]

- classical & most important element of the rule of law (art. 20(3) BL)

2) The principle of statutory reservation [Gesetzesvorbehalt] (repetition)

- requires a *legal basis in statutory law* for all encroachments on fundamental rights
  - where a measure is adopted on the basis of an ordinance, the ordinance requires a legal basis in statutory law and *all* those *decisions* that are *essential for the exercise or the realisation of fundamental rights* must not be taken in the ordinance but in the statutory law (THEORY OF ESSENTIALITY" ["WESENTLICHKEITSTHEORIE"] of the FCC)
  - examples: decisions on the use of nuclear energy, press subsidies, women's quotas, sex education at school
  - decisive: the extent and degree to which citizens are legally affected; in detail still vague and unclear
  - CONTROVERSIAL for for the provision of services, benefits and subsidies (usally just based on the budget)

II. In particular: the phenomenon of the constitutionalisation of administrative law

- FRITZ WERNER 1959: "Administrative law is concretised constitutional law" ["Verwaltungsrecht ist konkretisiertes Verfassungsrecht"]
- an essential consequence of modern constitutionalism: the principle of the rule of law and its many sub-principles, other constitutional principles and the respect for the fundamental rights strongly dominate most of the important decisions in the field of administrative law
  - in the modern constitutional state, an independent admin. law with an own character, independent from constit. law is not conceivable

III. Discretion and dealing with indefinite legal concepts

1) A problem of separation of powers between the executive and the judiciary

- The legislator cannot forsee and regulate itself appropriately all possible case and problem constellations. Even in a sophisticated regime of strict rule of law, the law needs to leave a considerable *scope for own decision-making of public administration*.
- The role of the judiciary is limited to control the legality of admin. action and provide legal protection to the citizen. The decision on expediency, practicability, political, moral and financial issues in the application of the law is reserved to the admin. authorities.
- difficult delimitation of the scopes of admin. decision-making and judicial control in detail: effective legal protection and law enforcement or "gouvernement des juges"?

2) The German distinction between exercise of discretion [Ermessen] and interpretation of an indefinite legal concept [unbestimmter Rechtsbegriff]

- note that the doctrine of discretion forms a pivotal element of any admin. law system and therefore is different in every country, influenced by the historical development of the domestic admin. law; major doctrines have emerged in French, German and English law
- German admin. law draws a *basic distinction between discretion*, which is granted by a legal basis as a legal consequence (if the preconditions set by the provision are fulfilled) *and* the *margin of appreciation* [Beurteilungsspielraum] in the interpretation of *indefinite legal concepts* in legal provisions (e.g. "public interest", "public order", "reliability"). While the judicial review of the exercise of discretion is limited to the search for certain recognised cases of incorrect exercise of discretion [Ermessensfehler], a margin of appreciation not subject to judicial review is only recognised in exceptional cases.

3) The limitation of judicial review of discretionary decisions to certain cases of incorrect exercise of discretion [Ermessensfehler]

a) Non-exercise of the granted discretion [Ermessensnichtgebrauch]

- the question *whether* a legal provision grants discretion, is a question of legal interpretation and thus decided ultimately by the Court

b) Exceeding of discretionary power [Ermessensüberschreitung; cf. sect. 40 APA]

- e.g. imposing a fine of 200 € where the law only allows a fine of 100 €

c) Abuse of discretion [Ermessensfehlgebrauch]

aa) Wrongful determination of the facts of the case

bb) Misuse of discretionary power [Ermessensmissbrauch; cf. sect. 40 APA]

- if decision relies on extraneous considerations

cc) Basic deficits in the reasoning

- such as logic errors, inconsistencies, disregard of essential aspects etc.

dd) Violation of the principle of proportionality

ee) Violation of the principle of equality (art. 3(1) Basic Law)

- e.g. unjustified deviation from administrative provisions or general practice

ff) Violation of other fundamental rights or constitutional principles

gg) Ignorance of a *reduction of discretion to zero* [Ermessensreduzierung auf Null]

- a not so rare special case where special circumstances require a specific discretionary decision and any other decision will be defective in the given case

4) Exceptional margins of appreciation of public administration in the interpretation of and subsumption under indefinite legal concepts [Beurteilungsspielraum]

a) The principle: full judicial review

b) Recognised exceptions for special case groups

- only where the *functional limits of jurisprudence* are reached because special circumstances, needed expert knowledge or the highly political nature of the decision reserve it to the executive

aa) Grading in exams

- e.g. in state exams or final exams at public universities
- judicial review limited to compliance with procedural rules and general grading standards, correct determination of the facts and freedom from extraneous considerations

bb) Selection decisions under civil service law

- to chose the "best" candidate for promotion or recruitment

cc) Decisions by independent expert commissions

dd) Predictive decisions and risk decisions

- e.g. the risks caused by a planned nuclear power plant

ee) Decisions of administrative policy nature

IV. Legal certainty and protection of legitimate expectations in administrative law

- an important element of the rule of law (see supra, Diagram 3, F.V.) with high impact in admin. law
- citizen must be able to rely on the law and on admin. acts addressed to him
- limits in particular legislation with retroactive effect and the withdrawal and revocation of beneficial administrative acts (see infra, § 12 II.4.)
- can collide with the obligation of the state to enforce the law; this requires a thorough balancing (cf. sect. 48(2) APA)

§ 12 Administrative action

I. Forms of administrative action (overview)

- chosen form decisive for formal and procedural requirements and legal protection

1) Administrative act (= administrative decision) [Verwaltungsakt, sect. 35 et seq. APA]

- the main instrument of public administration
- unilateral regulation of individual cases in the sphere of public law
- also *planning approval* after a complex planning process (cf. sect. 72 et seq. APA)

2) Public-law contract [öffentlich-rechtlicher Vertrag, sect. 54 et seq. APA]

- bilateral regulation constituting, amending or anulling a legal relationship under public law
- two main categories: compromise agreements (sect. 55 APA) and exchange agreement (sect. 56)
- must be in writing (sect. 57 APA)
- special reasons for invalidity (sect. 59 APA)

3) Ordinance and bylaw [Rechtsverordnung & Satzung]

- general regulation of administrative matters

4) Simple, non-regulatory admin. action (real act) [schlichtes Verwaltungshandeln, Realakt]

- admin. action without regulatory character
- examples: providing information, warning, commenting, patrolling, physical help, use of physical force, preparatory and enforcement acts for admin. acts
- odd: German doctrine strongly tends to interpret physical action as a conclusive action implying regulation
  - e.g. interpret the towing of an illegally parked vehicle as enforcement of a fictitious drive-away order
  - this can make the legal handling of a simple process very complicated in German law...

5) Forms of action under private law

- in particular private-law contract, but also establishment of legal entities under private law
- common not only for fiscal administrative action (e.g. purchase of equipment), but also for the fulfillment of public tasks (e.g. providing public services)
- also combined with administrative acts, esp. in the granting of subsidies, according to the so-called *two-stage theory [Zweistufentheorie]*:
  - first stage: basic decision (e.g. about the subsidy or loan) in an administrative act
  - second stage: implementation via a private-law agreement (e.g. a loan agreement)

6) Internal administrative measures

- binding only the administration, not the citizen
- e.g. administrative provisions, internal orders
- cannot be challenged before the administrative court

II. The administrative act (= administrative decision) [Verwaltungsakt]

- the by far ***most important legal institution of administrative law***
  - developed in France already in the 19th century
  - strong focus of admin. 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)

1) The concept of administrative act

- definition: a measure taken by a public authority to unilaterally regulate an individual case in the sphere of public law with external legal effect (→ legal definition in sect. 35 APA)

a) Measure taken by a public authority

- authority: any body which performs tasks of public administration (sect. 1(4) APA)
  - also private individuals entrusted with public powers (e.g. ship captains, aircraft pilots, notaries)

b) In the sphere of public law

- see Slide 8 (§ 9 II.)

c) Regulation

- decisive criterion for differentiation from the real act
- measure must intend to establish a binding legal consequence
- only *unilateral regulations* (differentiation from the public-law contract)
- preparatory measures are not an admin. act themselves and therefore cannot be attacked separately before the admin. court

d) Individual case

- decisive criterion for differentiation from ordinances and bylaws
  - unlike in French admin. law...
- categorical distinction between
  - concrete-individual regulation (→ classical admin. act)
  - concrete-general regulation (→ also admin. act)
    - example: prohibition of a planned demonstration (includes prohibition to anyone to participate)
  - abstract-individual regulation (→ also admin. act)
    - example: order to a property owner to grit the sidewalk in every case of black ice
  - abstract-general regulation (→ legal provision)
- special case: *general order* [Allgemeinverfügung, sect. 35 phrase 2 APA]
  - decision directed at a group of persons defined or definable on the basis of general characteristics
  - decision on the public-law nature or use of an object by the general public

e) External effect

- decisive criterion for differentiation from internal decisions
  - distinction can be difficult in civil service law matters

2) The legality of the administrative act

a) Introduction

- In a state based on the rule of law, any activity of the public administration, including any individual admin. act, must be legal. The law, as an absolute standard, is binding in any single case. The elements of the legality, as presented for German law below, are the conditions for the legality of the admin. act. If only one is missing, the admin. act is illegal and may be annuled by the administrative court after an action for annulment. In the admin. lawof many countries this is reflected in the traditional legal term of "grounds of review" but in an advanced admin. 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".
- Admin. law has a different tradition in every country. In some countries it developed slowly and continuously in the course of a long history. In others, it boosted in times of political change or economic boom. As a consequence, the *structure of the examination* of the legality of admin. acts (admin. decisions) *varies from country to country*, even if the legality concept follows similar basic ideas and many elements correspond. The German model is attractive for comparative studies, because it has

strongly developed in a short time after the Second World War and therefore is a little bit more rational-logical and less historical in nature.

b) Legality and expediency of an administrative act

- 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. act may be abolished for illegality or inexpediency (since the responsibility still lies within the administration).
- In the course of judicial review, the admin. act 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.

c) The basic structure of the examination of the legality

- as any legal examination, the *structure of the examination* of the legality of admin. acts *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. act (external or "formal" aspects) and
  - those concerning the contents of the admin. act (internal or "material"/"substantial" aspects);
  - the aspects of these different groups must not be mixed but examined separately, and within the two groups there is partially a logical order

d) The elements of the legality of an administrative act

- **Further reading:** See also on the elements of legality under French and European admin. law Slide 2 from a course in Yogyakarta 2023 and the special material from a conference in Hanoi 2013
- see detailed presentation in **Diagram 4**

aa) Elements of legality in form
- competence, procedure, form

bb) Elements of legality in substance
- legal basis, choice of right addressee, general requirements (definiteness, feasability of implementation, proportionality etc.), no incorrect exercise of discretion

3) The exceptional invalidity of an unlawful administrative act

- to keep public administration efficient, in Germany as in many countries an illegal admin. act 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 the complicated regulation of invalidity in sect. 44 APA
- if citizen misses deadline for legal remedies, even an illegal admin. act may be executed

4) The withdrawal and revocation of administrative acts

- a delicate balancing between the need to enforce the law and the protection of legitimate expectations, two often contrary elements of the rule of law
- detailed regulation in sect. 48, 49 et seq. APA

III. The administrative procedure

- regulated in detail in the ***Administrative Procedure Act (= APA)***, esp. sect. 9 et seq.
- follows the inquisitorial principle (sect. 24)
- detailed special regulations for *special types of procedure*, e.g. planning approval procedures (sect. 63 et seq.)

- in particular: *hearing of participants* (sect. 28)
- in particular: allowing inspection of files (sect. 29)
- in particular: admission of representatives and advisors (sect. 14)
- in particular: no involvement of persons excluded or feared to be prejudiced (sect. 20 et seq.)
- in particular: secrecy of matters of confidential nature, esp. those relating to the citizen's private life and business (sect. 30)
- in particular: statement of reasons (sect. 39)
  - communication of the chief material and legal grounds, in particular for the concrete exercise of discretionary power

IV. The administrative review of administrative acts in the objection proceedings

- legal basis: sect. 68 et seq of the Code of Administrative Court Procedure [= CACP]
- a special remedy of *administrative review* (= by public administration itself) of admin. acts, and likewise a *precondition for judicial review*
- useful functions:
  - protection of the citizen's rights
  - administrative self-control
  - relief for the administrative courts
- nevertheless abolished in some Länder to save time and financial resources
- objection must be lodged within one month (sect. 70 CACP)
- *review not only of* the *legality but also of* the *expediency* of the admin. act
  - something not achievable by the way of judicial review, since the judge is functionally limited to the control of legality
  - the admin. act may be repealed for any legitimate reasons of expedience (suitability, practicability, fairness and morality, political reasons, financial reasons etc.)

concerning § 12 II The administrative act (= administrative decision)

Diagram 4
The legality of an administrative act

- preliminary step: determination of the *type of measure*

A. Legality in form[1] [formelle Rechtmäßigkeit = légalité externe]

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]
4) Where applicable: acting of the right person within the authority [funktionelle Zuständigkeit]
   - e.g. in case of reservation of certain measures to the head of authority

II. Procedure [Verfahren]
1) No violation of general procedural requirements (sect. 9 et seq. Administrative Procedure Act [= APA])
   - *hearing of participants* (sect. 28)
   - allowing *inspection of files* (sect. 29)
   - admission of representatives and advisors (sect. 14)
   - *no involvement of excluded persons* and persons feared to be prejudiced (sect. 20 et seq.)
2) No violation of special procedural requirements according to special legislation
   - 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 (cf. sect. 63 et seq. + special legislation)
   - in particular public notice, oral hearings, formal hearings and discussions

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

B. Legality in substance [materielle Rechtmäßigkeit = légalité interne]

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

---

[1] Note that the missing of some of these requirements may be "cured" by fulfilling them subsequently (sect. 45 APA) or may not entitle the citizen to request annulment if it is evident that it has not influenced the decision on the matter (sect. 46).

[2] Note: Neither the *notification of the administrative act* to the addressee and concerned persons (sect. 41), neither the *notification on available legal remedies* (cf. sect. 58 et seq. Code of Administrative Court Procedure) are requirements of legality. The former is a precondition for the existence of the administrative act. The latter is relevant for the start of the deadline for legal remedies.

2) Existence of a legal basis
   - the relevant legal provision must not only concern such measures but grant the power to take them
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
   b) Compliance with the Basic Law
   c) In case of Land law: compliance also with federal law and with the Land constitution
   d) In case of statutory regulations or by-laws: compliance also with the relevant statutory legislation
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

- 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 (sect. 37(1))
2) Feasability 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 principle of proportionality as ***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
      - caution: measures might be harsh but nevertheless suitable!
   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
      - consider possible alternatives to the measure!
   d) Proportionality (in its strict sense)
      - the burden imposed must be in reasonable proportion (not excessive, not out of proportion) to the aim in view (requires thorough → *balancing*)
      - in particular no infringement of the essence ["Wesensgehalt"] of fundamental rights
4) No violation of (other) legal norms

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

1) Non-exercise of discretion [Ermessensnichtgebrauch]
2) Exceeding of discretionary power [Ermessensüberschreitung]
3) Abuse of discretion [Ermessensfehlgebrauch]
   a) Wrongful determination of the facts of the case
   b) Misuse of discretionary power [Ermessensmissbrauch]
      - if decision relies on extraneous considerations
   c) Basic deficits in the reasoning
      - such as logic errors, inconsistencies, disregard of essential aspects etc.
   d) Unproportionality (see supra, B.II.3)
   e) Violation of the principle of equality (art. 3(1) Basic Law)
      - e.g. unjustified deviation from administrative provisions or general practice
   d) Violation of other fundamental rights or constitutional principles

§ 13 Special administrative law (brief overview)

I. Public security and order law

[Recht der öffentlichen Sicherheit und Ordnung = Gefahrenabwehrrecht = Polizei- und Ordnungsrecht]

1) One of the oldest fields of administrative law, with heterogeneous designations

- public security and order law is the law governing the most classical mission of public administration: the *averting of dangers* [Gefahrenabwehr] *for public security and order* [öffentliche Sicherheit und Ordnung]
- a heterogeneous terminology in German law:
  - historical designation: "Polizeirecht" [police law]
  - common contemporary designations:
    - "Polizei- und Ordnungsrecht" [police and order law]
    - "Gefahrenabwehrrecht" [law of averting dangers]
    - "Recht der öffentlichen Sicherheit und Ordnung" [public security and order law] (often used in the titles of the relevant Land laws]
  - best English translation, with regard to the subject: "public security and order law" or "public security law"

2) Land and federal, general and special public security and order law

- this field of law falls in general within the competence of the Länder and is regulated mainly in the often modernised *general Public Security and Order Acts of the Länder*
- however, the avertion of numerous special kinds of threats or threats in certain areas is regulated specifically in separate federal or Land laws, which function as *lex specialis*
  - examples: public assembly law, environmental law, recycling & waste management law, industrial law, law of gastronomic establishments, infection protection law, weapons law, immigration law, youth protection law, building regulations, traffic law, press law

3) Differentiation between police and public security and order admin.

- according to the Public Security and Order Acts of the Länder, averting dangers is in general the task of the *public security and order authorities* [Ordnungsbehörden]
  - these are usually the communes and counties, while the police are Land authorities
- the *police authorities* shall only take action subsidiarily if the public security and order authorities are unable to avert the danger or to avert it timely; moreover, the police authorities have tasks and competences in the field of criminal prosecution
  - the distinction between preventive and repressive police activities can be difficult
- there is also a *Federal Police* [Bundespolizei] and a *Federal Criminal Police Office* [Bundeskriminalamt]
  - Federal Police protects railways, airports, air traffic and property & personnel of the Federal Government and secures the German borders
  - Federal Criminal Police Office fulfils tasks in the field of criminal investigation

4) The mission to avert dangers for public security and order

- the police is limited to this mission since the famous *Kreuzberg judgement* of the Prussian Higher Administrative Court in 1882
- ***averting dangers*** [Gefahrenabwehr] includes measures
  - to prevent dangers from materializing
  - to eliminate disturbances that have already occurred and
  - to prepare for the future avertion of dangers

- ***danger*** [Gefahr] means a *concrete danger*, i.e. a situation with sufficient probability in the indiv. case that damage to public safety or order will occur in foreseeable future
  - most relevant legal bases require such a concrete danger, some even an actual or considerable (significant) danger, a few only an abstract danger (possible situation which, if occurring, will constitute a danger)
- the protected goods public security and public order have been given sharp contours in a an abundance of jurisprudence and legal literature with a long tradition:
- ***public security*** is the inviolabilty of
  - the objective legal order
    - no crimes, regulatory offences or violations of orders or prohibitions under admin. law
  - the subjective rights and legal interests of the individual
    - no violation of their life, health, freedom, privacy, personality rights, property etc.
  - the institutions and events of the state and other public authorities
    - no attacks or disturbances of their functioning
- ***public order*** is the totality of rules governing the behavior of individuals in public, the observance of which is regarded an indispensable prerequisite for orderly community life
  - these rules are mostly unwritten and depend strongly on location and time
    - example: the kissing of two homosexual men in the public would have been considered a disturbance to public order in the past, while nowadays rather intolerant reactions to it would be considered a disturbance
  - due to fundamental rights, such rules can only be recognised with extreme restraint
    - for this reason, public order was temporarily deleted as a protected good from the public security laws of some Länder and is still deleted in some Länder

5) The dualism of a general authorisation and special authorisations for standardised measures to avert dangers

- the central legal basis for the measures of police or public security and order authorities is a ***general authorisation*** in the Public Security and Order Act, which entitles them to *"take the necessary measures to avert a danger..."*, unless other provisions in this Act specifically regulate their powers; this can include a very broad variety of measures
- ***special authorisations*** in the same Act regulate ***standardised measures*** against frequently recurring dangers or in frequently recurring situations; this also includes special powers for data collection and processing
  - e.g. checkpoints, identity check, identification measures, banning from premises, no-contact orders, searching of objects and persons, taking into police custody, preventive talks with persons likely to threaten public security, surveillance of telecommunication, observation, use of undercover investigators
  - the number of standardised measures has grown considerably over time
  - these standardised measures must be distinguished strictly from those of the police under criminal procedure law

6) The choice of the right addressee

- a sensitive question of the correct exercise of discretion
- in principle, measures must be directed against the *responsible person*:
  - if a person causes the danger, against that person (responsibility for behaviours)
  - if an object or animal causes the danger, against the person who has actual control of it (responsability for the condition of objects)
- only in exceptional cases may measures be directed against *non-responsible parties*, if measures against the responsible persons are not possible or not possible in good time
  - example: termination of a political demonstration threatened by a huge violent counter-demonstration if the police forces are not strong enough to stop the violence

7) Strict limitation of all measures by the principle of proportionality

- a matter of course in a state based on the rule of law, but regulated explicitly in the Police Acts already before the times under the Basic Law

II. Civil servants law [Beamtenrecht]

1) The dual system of civil servants and ordinary employees in the public service

- in 2019, 35 % of persons employed in the German public sector were civil servants
- a recent tendency to employ more persons as ordinary employees

2) The constitutional foundations of civil servants law

Art. 33 Basic Law (extracts):

...

(2) Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.

(3) Neither the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.

(4) The exercise of sovereign authority on a regular basis shall, as a rule, be entrusted to members of the public service who stand in a relationship of service and loyalty defined by public law.

(5) The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service.

- *institutional guarantee of the professional civil service* (art. 33(4, 5))
  - in order to achieve the stability and continuity of public administration
- *reservation of exercice of public power* in general *to civil servants* (art. 33(4))
  - a limit for all reforms of the public service
  - DISPUTED for teachers

3) The principle of equal eligibility for public office and of selection of the best candidates ["Bestenauslese"] (art. 33(2) BL)

- extended by statutory law to all EU citizens
- guarantees equal access to and equal chances of promotion within the civil service
- ***principle of selection of the best candidates (achievement principle)***
  - *no access* to public office *because of family or personal relationships!*
  - requires thorough examination of aptitude, qualifications and professional achievements of all candidates and thorough reasoning in the selection decision
  - important for promotions: the assessment by the superiors in the regular staff reports
  - in practice often difficulties to identify the best among several well-qualified candidates
  - in case of equal aptitude, qualifications and achievements civil servants law usually encourages to *prefer women* if this is necessary to eliminate existing discriminations

4) The special status of the public servant and the traditional principles of professional civil service (cf. art. 33(5) BL)

- a *special relationship of service and loyalty* under public law with far-reaching duties of allegiance, care and protection
- regulation in the Federal Civil Service Act ["Bundesbeamtengesetz"], the federal Law regulating the status of civil servants in the Länder ["Beamtenstatusgesetz"], the civil service acts of the Länder and other federal and Land laws
- regulation with due regard to the ***traditional principles of professional civil service***, in particular:
  - life-long special relationship
  - dedication to the civil service with full commitment
  - career in a legally regulated tenure
  - obligation of comprehensive loyalty to the state and to the constitution
  - *no right to strike* but right of association to promote professional interests
  - obligation of self-restraint in political activity
  - obligation of confidentiality
  - alimentation with regard to the office instead of salary
  - civil service pensions instead of ordinary pensions
  - right to benefits in the event of illness, birth and death

- transparency of personnel decisions and access to the own personnel records
- right to an office-appropriate official title
- right to staff representation

5) Legal protection for civil servants

- first administrative review in *objection proceedings*, afterwards, if necessary, *judicial review* before the administrative courts
- in particular actions for annulment against administrative decisions affecting the civil servant's status (e.g. transfer or retirement) or declaratory actions (e.g. against wrongful staff reports)
- very common: action of competitors against the appointment or promotion of others

6) Is civil servants law still up-to-date?

- a long debate triggered by supporters of a neo-liberal approach

III. Public construction law

- regulates the construction of buildings on land; to be distinguished from private construction law
- a building project ist only permitted and a building permit may only be granted if the planned building is admissible under urban land-use planning law and complies with the requirements of building regulations law

1) Urban land-use planning law [Bauplanungsrecht]

- regulated in the *Federal Building Code* [Baugesetzbuch]
- the law regulating the planning of the commune for the use of the land on its territory for buildings and other purposes
  - the commune regulates the urban land-use on its own responsibility but within the framework set by the laws
- two kinds of urban land-use plans:
  - the more abstract ***preparatory urban land-use plan*** [Flächennutzungsplan]
  - the concrete and ***binding land-use plan*** [Bebauungsplan]
    - the decisive instrument for the planning of the development of the municipality
    - is developed from the preparatory urban land-use plan
    - has the legal nature of a by-law
    - contains the *concrete and legally binding stipulations* for the construction of buildings in the covered area

2) Building regulations law [Bauordnungsrecht]

- regulated mainly in the *Building Regulations* [Bauordnungen] of the Länder
- the law regulating the *technical, safety and design aspects* of buildings as well as the *building permit* and the building permit procedure

IV. Environmental law

- a *complex multi-level system* with a multitude of legal sources of
  - customary international law (e.g. the prohibition of transborder environmental pollution)
  - global environmental agreements
  - geo-regional (pan-European) environmental agreements
  - European Union environmental law
  - federal environmental law
  - Land environmental law
- a *constitutional principle of protection of the natural foundations of life* (art. 20a BL)
  - needs to be taken into consideration in any decision of the legislative, executive and judiciary
  - however, only a simple but not a fundamental constitutional principle (see § 4 I of the course)
  - however, not a detailed Charter for the Environment as in French constitutional law

- the most important federal laws in the field of environmental law:
  - Federal Immission Control Act [Bundes-Immissionsschutzgesetz]
  - Federal Nature Conservation Act [Bundesnaturschutzgesetz]
  - Water Resources Act [Wasserhaushaltsgesetz]
  - Federal Soil Protection Act [Bundes-Bodenschutzgesetz]
  - Circular Economy Act [Kreislaufwirtschaftsgesetz]
  - Atomic Energy Act [Atomgesetz]
  - Plant Protection Act [Pflanzenschutzgesetz]
  - Genetic Engineering Act [Gentechnikgesetz]
  - Chemicals Act [Chemikaliengesetz]
  - Environmental Impact Assessment Act [Umweltverträglichkeitsprüfungsgesetz]
  - Environmental Information Act [Umweltinformationsgesetz]
  - Greenhouse Gas Emissions Trading Act [Treibhausgas-Emissionshandelsgesetz]
  - new: Building Energy Act [Gebäudeenergiegesetz]
  - in preparation: a new Federal Climate Change Act [Bundes-Klimaschutzgesetz]
- the guiding principles implemented in the German environmental law
  - precautionary principle
  - polluter pays principle
  - cooperation principle
  - principle of sustainable development
- in practice important role of environmental standards
  - detailed regulations prepared or issued by expert committees
  - in various legal forms (ordinances, special kinds of administrative provisions, private regulations etc.)
- a broad variety of legal instruments
  - incl. mandatory *environmental impact assessment* for certain projects
- a spectacular but controversial *Federal Constitutional Court decision* on climate protection and fundamental rights of 2021
  - declaring the Federal Climate Change Act of 2019 unconstitutional for shifting the reduction of greenhouse gases too much into the future, thus endangering the freedom of future generations

(Datei: Slide 12 (GermanPublicLaw))

§ 14 Judicial control of public administration in Germany

I. The German system of administrative courts

- a system of specialised courts in the field of administrative law in all instances
  - first administrative courts already introduced in the second half of the 19th century
- 51 *administrative courts* [Verwaltungsgerichte] as courts of first instance
  - with several chambers of 3 judges (plus 2 honorary judges in oral hearings); simple matters are often entrusted to judges sitting alone
- 15 *higher administrative courts* [Oberverwaltungsgerichte, Verwaltungsgerichtshöfe] of the Länder as courts of appeal (in some cases court of first instance)
  - with several senates of 3 or 5 judges
- supreme *Federal Administrative Court* [Bundesverwaltungsgericht] in Leipzig as court of review on points of federal law (in some cases court of first and last instance)
  - with currently 54 judges in several senates of usually 5, outside oral hearings 3 judges
- a system building on the professionality, integrity and independence of the judges
  - highly qualified, well-paid legal professionals who cannot be bribed, committed to their mission to enforce the law effectively against the executive
  - judges not afraid of any government, parliament, influential politicians or political, social or religious pressure groups
  - judges can be young; this is helpful to prevent gerontocracy and entanglement with elites
  - administrative judges not only legally but also intellectually independent; lower courts often show a critical approach and do not follow the jurisprudence of their higher admin. court if they are not convinced by its legal reasoning

II. Important characteristics of administrative jurisdiction in Germany

1) The limitation of the judicial control to the protection of subjective rights

- primary objective is the protection of the subjective (personal) rights of the citizen, not of the objective legal order
- therefore, *legal actions* are generally *only admissibile if the plaintiff claims a violation of his own rights* (not just interests); for this, he needs to be directly personally concerned
  - constitutional background: the need to take fundamental rights as directly binding law seriously and the citizen's right to effective legal protection against public authority (cf. art. 1(3), 19(4) BL)
- plaintiff will usually allege violation of one of his fundamental rights
  - if he has been ordered or prohibited to do something he can allege at least a violation of his general freedom of action (art. 2(1) BL)

2) A system of legal protection based on different forms of action (→ see infra, IV)

- the requirements for the admissibility and the well-foundedness of a legal action largely depend on the relevant form of action, which depends on the kind of court decision seeked (annulment, injunction, declaratory judgement etc.)

3) A complicated but effective system of interim legal protection (→ see infra, VI)

- since legal protection is not effective if the administration can create a fait accompli
- very complicated but practically important regulations on the *suspensive effect* of objections and actions for annulments (cf. sect. 80 ff. CACP)

III. The recourse to the administrative courts

- general recourse to the administrative courts *in all non-constitutional public-law disputes* not allocated by statute to other courts (sect. 40(1) CACP)
  - problems to delimit jurisdictions of admin. courts and ordinary courts in detail...
- if plaintiff takes the wrong recourse, the court will refer the legal dispute ex officio to the competent court

IV. The forms of action before the administrative courts

1) Action for annulment (sect. 42(1), 1st alternative CACP)

- plaintiff seeks the annulment of an administrative act (= admin. decision)
- the most common action before the administrative courts
- usually only admissible after an administrative review of the administrative act in objection proceedings (→ see supra, § 12 IV)

2) Action for the issue of an administrative act (sect. 42(1), 2nd alternative CACP)

- plaintiff seeks a court order obliging the administrative authority to issue a specific admin. act he has applied for (e.g. a licence, permit, approval, statement)
- usually only admissible following objection proceedings (→ see supra, § 12 IV)

3) Action for performance

- plaintiff seeks a court order obliging the administrative authority to perform a specific admin. action that does not constitute an admin. act (e.g. paying money, providing information)

4) Action for prohibitory injunction

- plaintiff seeks a court order obliging the administrative authority to cease and desist from a certain administrative action (e.g. from providing certain information to others)
- also possible as preventive action

5) Declaratory action (sect. 43 CACP)

- plaintiff seeks a declaratory judgement
  - on the existence or non-existence of a legal relationship or
  - on the nullity of a seriously and evidently unlawful admin. act

6) Action for the establishment of the unlawfulness of a settled admin. act

[Fortsetzungsfeststellungsklage] (sect. 113(1) phrase 4 CACP analogously)

- plaintiff seeks a declaratory judgement that an admin. act which is already settled (e.g. has been executed or followed) was unlawful
- often to prevent similar measures in the future (e.g. future prohibitions of demonstrations)

7) Application for judicial review of sub-legislative legal provisions (sect. 47 CACP)

- applicant seeks a court decision declaring by-laws or other sub-legislative provisions at local or Land level void

V. Admissibility and well-foundedness of actions before the administrative courts

- see detailed presentation in **Diagram 5**
- the requirements vary in detail, depending on the form of action, but in most cases include that the plaintiff must claim a violation of own rights (for admissibility) and that his own rights must indeed be violated (for well-foundedness); in Germany, the illegality of the contested admin. action alone does not render the legal action successful

VI. Interim protection

1) The suspensive effect of objections and actions for annulment

(sect. 80 et seq. CACP)

- these remedies generally have suspensive effect (sect. 80(1)), meaning that during the proceedings
  - the contested admin. act does not produce legal effects and cannot be enforced
  - the addressed citizen does not need to follow
  - if a third party (e.g. a neighbour) opposes a favouring admin. act (e.g. a license) the favoured citizen cannot make use of it
- there are exceptions (e.g. for police measures or when an authority orders immediate execution in the public interest or an overriding private interest), but in these cases the court may order resp. restore the suspensive effect (sect. 80(2, 5), 80a)
  - in practice, this decision is often more important than the decision on the merits of the case
- the suspensive effect *prevents any fait accompli* and, thus, protects the citizen effectively but can delay the law enforcement against him or bar him from using a legally obtained position for a considerable time
  - therefore, decisions on applications to order or restore the suspensive effect require a thorough balancing of the concerned interests, taking into account the probable prospects of success in the main proceedings

2) Interim orders of the administrative court (sect. 123, 47(6) CACP)

- interim protection outside the objection proceedings and actions for annulment
- temporary orders
  - to secure the enforcement of the citizen's rights
  - to arrange provisionally for a contentious legal relationship or
  - to prevent serious disadvantages by possibly unlawful sub-legislative provisions

concerning § 14 IV Admissibility and well-foundedness of actions before the administrative courts

Diagram 5 [1]

Prospects of success of a legal action before the administrative court

A legal action before the administrative court will be successful if it is admissible and well-founded, i.e. if it meets all the requirements of the admissibility of the action (A.) and of the well-foundedness of the action (B.).

A. Admissibility of the action

A legal action before the administrative court is admissible if it meets all the requirements of admissibility (A.I. - A.IV.).

I. Recourse to the administrative courts[2]

1) According to special regulations
2) According to the general clause of sect. 40(1) CACP[3]
   - for every *public law dispute* of non-constitutional nature not explicitly allocated to other courts by statutory law

II. Form of action[4]

1) ***Action for annulment*** (sect. 42(1), 1st alternative CACP)
   - plaintiff seeks annulment of an administrative act (= admin. decision)
   - the most common action before the administrative courts
2) ***Action for the issue of an administrative act*** (sect. 42(1), 2nd alternative CACP)
   - plaintiff seeks court order to issue a specific administrative act (e.g. a licence, permit, approval)
3) Action for performance
   - plaintiff seeks court order to perform a specific administrative action that does not constitute an admin. act (e.g. paying money, providing information)
4) Action for prohibitory injunction[5]
   - plaintiff seeks court order to cease and desist from a certain administrative action
   - also possible as preventive action
5) Declaratory action (sect. 43 CACP)
   - plaintiff seeks declaratory judgement on the existence/non-existence of a legal relationship or the nullity of an admin. act
6) ***Action for the establishment of the unlawfulness of a settled admin. act*** (sect. 113(1) phrase 4 analogously) ["Fortsetzungsfeststellungsklage"]
   - plaintiff seeks declaratory judgement that an already settled (e.g. executed/followed) admin. act was unlawful
7) Application for judicial review of sub-legislative legal provisions (sect. 47 CACP)
   - applicant seeks court decision declaraing by-laws or other sub-legislative provisions at local or Land level void

III. Special admissibility requirements depending on the form of action[6]

1) For an action for annulment or for the issue of an administrative act
   a) Right to bring proceedings (sect. 42(2) CACP)
      - plaintiff must *claim violation of own rights* by the admin. act or its omission
      - note that *in some other countries only a legal interest* in the proceedings is required!
   b) *Objection proceedings* before the administrative authorities (sect. 68 et seq. CACP)
      - an obligatory preliminary administrative review of the admin. act (restricted in some Länder)
   c) One month period for filing the action (sect. 74 CACP)
2) For an action for performance or for prohibitory injunction
   - Right to bring proceedings (sect. 42(2) CACP analogously)

---

[1] In Germany, the students in the courses in Administrative Law must study and learn thoroughly this (or a similar) examination scheme and be able to apply it correctly to the individual case. This is to ensure that the law does not remain in the realm of the theoretical but is applied and enforced precisely and correctly in practice. The diagram lists as a "checklist" all the aspects the lawyer needs to think about but many will be unproblematic in the particular case and the lawyer's explanations will be limited to those that are significant.

[2] If there is only recourse to other courts, the administrative court will refer the legal dispute ex officio to the competent court.

[3] Court of Administrative Court Procedure ["Verwaltungsgerichtsordnung"].

[4] It is essential to first determine the relevant form of action (A.II.) because there are special admissibility requirements depending on it (A.III.).

[5] A special case of the action for performance.

[6] In the case solution for an individual case only the specific requirements for the relevant form of action will be discussed.

3) For a declaratory action
   a) No other form of action available (sect. 43(2) CAPC)
   b) Declaratory interest (sect. § 43(1) CACP)
      • plaintiff needs justified interest in the declaratory judgement (but not to claim violation of own rights)
4) For an action for establishment of the unlawfulness of a settled administrative act
   a) Right to bring proceedings (sect. 42(2) CACP)
      • plaintiff must *claim violation of own rights* by the settled admin. act
   b) Deadline for objection proceedings not expired before admin. act was settled
   c) Special declaratory interest
      • recognised case groups: risk of recurrence, vindication (restoration of reputation), preparation of state liability lawsuit, typically short-term settlement preventing judicial review
5) For an application for judicial review of sub-legislative legal provisions
   a) Sub-statutory legal provision submitted to judicial review (cf. sect. 47(1) CACP)
   b) Right to bring proceedings (sect. 47(2) phrase 1 CACP)
      • applicant must be concerned public authority or *claim violation or imminent violation of own rights* by the challenged provision or its application
   c) One year period for filing the application (sect. 47(2) phrase 1 CACP)

IV. General admissibility requirements

1) Jurisdiction of the court
   • subject-matter jurisdiction, local jurisdiction, acting of the right court in the hierarchy of courts
2) Requirements concerning the parties involved
   a) Capacity to sue and to be sued (cf. sect. 61 CACP)
   b) Capacity to effect procedural acts (cf. sect. 62 CACP)
   c) Ability to postulate (cf. sect. 67 CACP)
   d) Action/application directed against the right defendant (cf. sect. 78, 47(2) phrase 2 CACP)
3) Proper filing of the action/application (cf. sect. 81, 82 CACP)
4) No final judgements or pending of the case elsewhere (cf. sect. 121 CACP)

B. Well-foundedness of the action

A legal action before the administrative court is well-founded if it meets the specific requirements for the well-foundedness for the relevant form of action (B.I *or* B.II./III./IV./V./VI./VII.).

I. ***Action for annulment*** (cf. sect. 113(1) phrase 1 CACP)

1) Illegality of the challenged administrative act
   • see on the requirements for the legality of an admin. act **Diagram 4**
   • When solving a practical case, check at this point, in a structured way, all aspects listed in this material in this diagram. Like that you can solve correctly, precisely and in a transparent way even the most complicated cases!
   a) Legality in form
      • competence, procedure, form
   b) Legality in substance
      • legal basis, choice of the right addressee, general requirements (no violation of legal provisions, proportionality etc.), no incorrect exercise of discretion
2) Violation of the rights of the plaintiff by the challenged administrative act
   • otherwise the action is not well-founded, even if the challenged admin. act turns out to be illegal!

II. ***Action for the issue of an acministrative act*** (cf. sect. 113(5) CACP)

• well-founded if plaintiff is entitled to the requested admin. act (= if its omission is illegal and violates his rights)
• in discretionary cases not yet mature for adjudication, court will only hand down the obligation to decide, taking its legal view into consideration (sect. 113(5) phrase 2 CACP)

III. Action for performance

• well-founded if plaintiff is entitled to the requested performance (= if its omission is illegal and violates his rights)

IV. Action for prohibitory injunction

• well-founded if plaintiff has a right to injunctive relief under public law (= if the prohibited administrative action is illegal and violates his rights)

V. Declaratory action

• wellfounded if the alleged legal relationship exists, the contested legal relationship does not exist or the admin. act in question is not only illegal but even invalid (under sect. 44 of the Administrative Procedure Act)

*VI. **Action for establishment of the unlawfulness of a settled admin. act***

1) Illegality of the challenged settled administrative act
   - see diagram 1 of my special material (→ see above, B.I.)
2) Violation of the rights of the plaintiff by the challenged settled administrative act

VII. Application for judicial review of sub-legislative legal provisions

- application wellfounded if the challenged legal provision is illegal

Prof. Dr. Thomas Schmitz — Fall Semester 2023

GERMAN PUBLIC LAW

concerning § 12 II, § 14 VI and § 15 of the course

Case 2

(facts of the case)

After finishing their studies at a university in their home town, Mrs. A and Mrs. B, two devout muslima from a Muslim country with strong religious tradition, continue their studies in an international postgraduate study program in a city in the Land L in the southeast of Germany. Since they have only focused on the quality of the study program when preparing their stay in Germany, they are not aware that the Land L is known for its problems with right-wing extremism, xenophobia and islamophobia - and the ignoring or playing down of it by the state authorities. One evening, when they are enjoying a walk in the beautiful pedestrian area in the city centre, three local men stop them, insult them and demand them to take off their hijab [headscarf], threatening to beat them if they do not. When Mrs. A and Mrs. B refuse to take off their hijab for religious reasons, the local men grab them at their backside and try to touch their breasts and to tear their hijabs down. Two policemen patrolling nearby have noticed that. They approach but do not talk with Mrs. A and Mrs. B but only with the three local men. Finally, they order Mrs. A and Mrs. B to take off their hijab. They explain that Mrs. A and Mrs. B have the right to wear the hijab in Germany but that the police needs to take measures to protect the public security and order ["öffentliche Sicherheit und Ordnung"] if the wearing of the hijab triggers anger among the locals which may result in public disorder.

You are pursueing postgraduate studies in German public law in another German university town where this problem does not exist. When you meet Mrs. A and Mrs. B at the next weekend, they ask you if the order they received from the policemen was legal and if they can take legal action against it before the administrative court. What will be your (correct) answer?

Legal provisions relevant for the case:

Excerpt from the Basic Law for the Federal Republic of Germany [= BL] (German Constitution)

Art. 4(1,2) [freedom of religion]

(1) Freedom of faith, of conscience and freedom to profess a religious or philosophical creed shall be inviolable.

(2) The undisturbed practice of religion is guaranteed.

Art. 19(4) [guarantee of recourse to the courts against rights violations]

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. ...

Excerpt from the Administrative Procedure Act [=APA]

Sect. 28: Hearing of participants

(1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.

(2) This hearing may be omitted when not required by the circumstances of an individual case, in particular when

1. an immediate decision appears necessary because of imminent danger or in the public interest ...

(3) A hearing shall not be granted if it conflicts with imperative public interest.

→

Excerpt from the Police Act of the Land L [= LPolA]

Sect. 2: Tasks of the Police

The Police has the task to avert dangers for the public security or order (averting of dangers). The Police ... ensures the unhindered exercise of fundamental rights. ... The Police only intervenes, if the avertion of the danger by the [competent authorities] appears impossible or not possible in time.

Sect. 12(1): General powers

The Police may adopt the necessary measures to avert a danger for the public security or order, unless the powers are specifically regulated.

Sect. 6(1): Responsibility for one's own behaviour

If a person causes a danger [for public security or order], the measures must be directed against this person.

Excerpt from the Code of Administrative Court Procedure [= CACP]

Sect. 40(1): [Recourse to the Administrative Courts]

(1) Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. ...

Sect. 42: [Actions for annulment and for the issue of an administrative act]

(1) The annulment of an administrative act (action for annulment), as well as sentencing to issue a rejected or omitted administrative act (action for the issue of an administrative act) can be requested by means of an action.

(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his rights have been violated by the administrative act or its refusal or omission.

Sect. 113(1) phrase 4: [establishment of the unlawfulness of an administrative act settled during the court proceedings] (applied analogously)

(1) ... If the administrative act has been settled previously by withdrawal or otherwise, the court shall declare on request by judgment that the administrative act was unlawful if the plaintiff has a justified interest in this finding.

Prof. Dr. Thomas Schmitz — Fall Semester 2023

GERMAN PUBLIC LAW

concerning § 12 II, § 14 VI and § 15 of the course

Case 2

(discussion of the case)

SUBJECTS: How to structure a case solution; introductory and concluding sentences in a case solution; elements of German admin. law: legality of an administrative act [decision], legality in form and substance, hearing of the participant in the admin. procedure, discretion [Ermessen], choice of the right addressee for admin. measures; fundamental rights: freedom of religion, state's duty of protection; admissibility of a legal action against a (settled) administrative act

OUTLINE OF THE CASE SOLUTION:

A. The Legality of the order of the policemen

My correct answer to the first question of Mrs. A and Mrs. B will be that the order which they received from the German policemen was legal - if it meets all requirements of (I.) legality in form [formelle Rechtmäßigkeit] and (II.) legality in substance [materielle Rechtmäßigkeit].[1]

I. Legality in form

The order needs to be legal in form, that is, the competent authority must have acted and there must be no procedural or formal errors.

1) The police authorities must have been the competent authorities to act in this case. According to sect. 2 of the Police Act of the Land L (LPolA) the police has the task and, thus, competence to avert dangers for the public security or order [Gefahrenabwehr]. This includes the task to prevent and stop violence, harassments and other offences on the streets, as they were happening in the given case, and, expressly, to ensure the unhindered exercise of fundamental rights. Under sect. 2 LPolA the police is only competent if the otherwise competent local authorities (here: the commune) cannot intervene in time. This was the case on that evening. Concerning the local jurisdiction of the patrolling policemen, there is no doubt. So the policemen were acting as competent authority.

2) There must be no procedural errors. The procedural requirements for the administrative procedure are stipulated in sect. 9 et seq. of the federal Administrative Procedure Act (APA), which is applicable in the Land L according to Land legislation. In the given case, the hearing of participants, as required by sect. 28(1) APA, is missing, since the policemen did not talk with Mrs. A and Mrs. B before ordering them to take off their hijab but only talked with the three local men harassing them. In the given case, none of the exceptions under sect. 28(2, 3) APA allowing to omit the hearing applied, since it would only have taken one minute to talk first with Mrs. A and Mrs. B, there was no imminent danger or public interest demanding an immediate decision (cf. sect. 2) and it would not have conflicted with the public interest to talk with Mrs. A and Mrs. B before addressing orders to them (cf. sect. 3). So this procedural requirement has not been met.

3) There are no indications for formal shortcomings in the given case. A special form (e.g. written form) is not required for administrative acts issued by the police. Concerning the obligation of the admin. authority to issue a statement of reasons for the administrative act (cf. sect. 39 APA), it only applies to written or electronically confirmed admin. acts. Moreover, in the given case the policemen have explained orally to Mrs. A and Mrs. B the reasons for their decision.

Thus, it shall be noted as *partial result* that the order of the policement is *illegal in form* for *default of hearing of participants* (violation of sect. 28(1) APA).

---

[1] See on the various requirements of the legality of an administrative act Diagram 4 from this course.

II. Legality in substance

The order of the policemen to Mrs. A and Mrs. B to take off their hijabs in the public needs to be legal in substance, that is, its contents must not be contrary to the law.

1) Legal basis

The policemen may need a legal basis for issuing such an order. In this case, the order is only legal, if a legal basis exists, is valid and applicable and the preconditions set in the legal basis are fulfilled.

a) According to the principle of legal reservation [Gesetzesvorbehalt], which derives from the principles of the rule of law and democracy (art. 20(1, 3) BL), a legal basis is needed if an admin. act interferes with the fundamental rights of the citizen. In the given case, the police order to two religious muslim women to take off their hijab in the public constitutes an *encroachment on* the fundamental right of freedom of religion under art. 4(1, 2) BL (the German Constitution), since the wearing of a hijab is part of practicing Islam as required by this religion (according to many muslims). The freedom of religion does not only include the right to have and express a faith but also the right to act in accordance with the faith, in particular to align one's lifestyle to the rules of the faith (for example, eating only certain foods or wearing certain clothes). In this context, the question is irrelevant if Islam really does require to wear a hijab or does not, since not the rules of the (abstract) religion are decisive but the personal belief of the concerned citizen. If Mrs. A and Mrs. B think that it is a religious rule to wear a hijab in the public, the order to take it off encroaches on their freedom of religion. Such an encroachment may be justified by the limits of this freedom but in any case a basis in a statutory law, adopted by the legislator in the democratic process of legislation, is required.

b) In the given case, sect. 12(1) LPolA, the general clause on the police powers [polizeiliche Generalklausel] may serve as legal basis. This traditional clause in the Police Laws, common in the law of many countries, is valid and applicable, since it is not contrary to the Constitution or to European Union law. The risk that the wide discretionary power it grants may lead to unproportional (excessive) encroachments on the fundamental rights of the citizens is avoided by the obligation of the authorities to interpret and apply it in the light of (strictly in line with) the fundamental rights. Since the concerned kind of police measures (the order to take off the hijab) is not regulated specifically in other norms, this norm applies in the given case.

c) The order of the policemen can only be based on sect. 12(1) LPolA if the preconditions set in this clause are fulfilled. This means that the measure must serve to avert a danger for the public security or order (the question if the measure is necessary for this purpose, is not a question of the legal basis but of the proportionality of the measure[2]). In the given case, the threats and the harassment of Mrs. A and Mrs. B by the three local men, which even constitute criminal offences, represent a disturbance of public security (here: the aspect of the invioalibility of the legal order - prevention of criminal offences and other illegal activities). So the preconditions set in the legal basis are fulfilled. The Police is entitled under sect. 12(1) LPolA to take measures to end this disturbance. The order of the policemen to Mrs. A and Mrs. B serves this purpose and therefore can be based on sect. 12(1) LPolA.

So there is the necessary legal basis for the order of the policemen.

2) Choice of the right addressee

The police measures must be directed against the right addressee. This is a question of the correct exercise of discretion [Ermessen] and it is also important for an effective protection of the fundamental rights. If a threat to or disturbance of public security is caused by the behaviour of a person, according to sect. 6(1) LPolA, the measure must be directed against this person. So the police is not free in its decision when an aggressor attacks a victim. The ***police must not take measures against the victim but against the aggressor.*** This applies ***in particular in cases of sexual harassment of women by men***: The public authorities are not allowed to punish the woman (who is the victim) or to restrict her freedom but they *must* intervene against the man who is the aggressor - even if this is embarassing or more difficult. Otherwise, they would violate their duty of protection, which derives from the victim's fundamental rights.

In the given case, Mrs. A and Mrs. B acted in a legitimate way, just exercising their constitutional right of freedom of religion. It is irrelevant if this causes anger among the locals - they have the right to do so. Other citizens who do not like their behaviour or their religion may talk

---

[2] Note: The opposite view is also reasonable. Those who follow that view need to discuss the question if it was "necessary" to order Mrs. A and Mrs. B to take off their hijab at this place.

with them and have the right to criticise them or their religion but are not allowed to take physical action to hinder them from exercising their freedom. However, the three intolerant men tried to stop them, thus encroaching on the fundamental rights of Mrs. A and Mrs. B. Furthermore, they grabbed the women at their backside and tried to touch their breats (without their consent) - a classical sexual harassment. Under these circumstances, only the three local men and not Mrs. A and Mrs. B could be the right addressee of an order of the two policemen to restore public security.

In exceptional cases, if there is an imminent danger and the police is not able to end the disturbance by measures against the responsible persons (e.g. if there are too many aggressors and the police is physically not able to fight them), the police may also consider measures against the victim (as "non-responsible person") in order to calm down the situation and reduce the danger for the health or life of human beings. Under these circumstances, such a measure can be "necessary", as required in sect. 12(1) LPolA and by the principle of proportionality. However, this was not the situation in the given case: There were only three aggressors and the two policemen - professionally educated, psychologically skilled and physically well-trained - can be expected to cope with this situation, take measures against the three agressors as responsible persons and enforce these measures, even by the exercise of physical force, if necessary.

So the order of the policement was not directed against the right addressee.

3) No violation of fundamental rights

In case of discretionary power, as in police matters, the public authorities must exercise their discretion without any violation of fundamental rights. Since Mrs. A and Mrs. B were hindered to exercise their freedom of religion by following the islamic practice of women wearing a hijab in the public, this fundamental right under art. 4(1, 2) BL may be violated in the given case. As all freedom rights, the freedom of religion is not unlimited. According to the doctrine of the German Federal Constitutional Court [Bundesverfassungsgericht] and most scholars, it can be restricted in the event of a *collision with fundamental rights of other citizens or other constitutional values*, if in the concrete case, thoroughly weighed, the freedom of religion proves to be subordinate (so-called inherent limits).[3] Public security, in particular the prevention of violence and criminal offences in the streets, is such a constitutional value whose protection can justify restrictions of this fundamental right. If there was no other way to stop the violence and harassments and to avert dangers for health and life (e.g. if the two policemen were facing a huge and well-trained violent mob), when thoroughly weighed, public security could indeed prevail and, thus, justify an order to take off the hijab in the special situation in the public. However, as already discussed above (see supra, A.II.), this was not the case and in principle the public authorities must restore public security by measures against the aggressor and not against the victims.

In the given case, the freedom of religion is violated under two aspects: First, the two policemen were obliged to take measures against the three local men in order to protect the free exercise of religion by Mrs. A and mak B. By refraining from such measures, they *passively* violated the state's duty of protection [grundrechtliche Schutzpflichten] and, furthermore, disregarded their task under sect. 2 phrase 2 LPolA. However, this does not affect the legality of the order they addressed to the women. Second, by this order, the policement *actively* violated the women's freedom of religion, since this encroachment on their right under art. 4(1, 2) BL was not justified by the fundamental right's limits.

So the order violates fundamental rights.

So it shall be noted as *second partial result* that the order of the policment is *illegal in substance for* the *choice of the wrong addressee* (violation of sect. 6(1) LPolA) *and* for *violation of* the fundamental right of *freedom of religion* (art. 4(1, 2) BL).

My (correct) answer to the first question of Mrs. A and Mrs. B will be that the order, which they received from the German policemen, was not legal.

---

[3] See on the limits of the freedom of religion *Thomas Schmitz*, Freedom of Religion (workshop material) 2019, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_FRGermany_freedom-of-religion.pdf, p. 2. Those who understand German may find a more thorough discussion of this problem in my practical training case "Crucifix", www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_Grundrechtsfall_Kruzifix.pdf, p. 5 ff.

B. The option of a legal action before the administrative court

My correct answer to the second question of Mrs. A and Mrs. B will be that they can take a legal action against the order of the policemen before the administrative court if the *requirements for the admissibility* of such an action are met.[4]

I. Recourse to the administrative courts

The recourse to the administrative courts needs to be available in their case. In Germany, art. 19(4) of the Basic Law guarantees to anyone whose rights are violated by public authority the recourse to the courts. Where the jurisdiction of other courts is not particularly established, the recourse shall be to the ordinary courts. In the given case, however, it is established by sect. 40(1) of the Code of Administrative Court Procedure [= CACP]. Under this general clause the recourse to the administrative courts is available *in all public-law disputes of a non-constitutional nature* not explicitly allocated to other courts. The dispute about a police order is a classical public-law dispute. It is also of a non-constitutional nature, although the question of the violation of the constitutionally guaranteed freedom of religion plays an important role: Sect. 40(1) CACP only aims to exclude specific constitutional disputes between constitutional actors about their constitutional competences, rights and duties. As in any state based on the rule of law, the effective protection of the fundamental rights of the citizen in the daily life is the mission of *all* courts. Concerning the administrative courts, it is even in the main focus of their work. So this requirement is met.

II. Form of action

In the second step the relevant form of action needs to be determined because under the German administrative court procedural law the requirements for the admissibility of a legal action largely depend on it. Usually, the legal action against an administrative act (here: the police order to take off the hijab) would be an action for annulment [Anfechtungsklage] under sect. 42(1) CACP. However, in the given case the admin. act is already settled (the incident in the pedestrian area is over) and therefore does not have any effect and cannot be annulled anymore. The legal action would rather aim to prevent similar orders in the future. There is a form of action to seek a court order prohibiting a certain administrative action: the action for prohibitory injunction [Unterlassungsklage]. It can even be filed preventively. Yet, it is not suitable against possible future administrative acts.

However, Mrs. A and Mrs. B may file an action for the establishment of the unlawfulness of a settled aministrative act [Fortsetzungsfeststellungsklage], seeking the declaration of the court that the already settled police order was illegal. This form of action is not expressly regulated in the Code of Administrative Court Procedure but derives from an analogous application of sect. 113(1) phrase 4 CACP which provides that in the case of an admin. act settled during the court proceedings the court shall declare that it was unlawful if the plaintiff has a justified interest in this finding. Like that, a gap in legal protection is avoided.

III. Special adminissibility requirements for the action for establishment of the unlawfulness of a settled administrative act

An action for the establishment of the unlawfulness of an already settled admin. act is only admissible if some special requirements are met:

1) The plaintiff must have a *right to bring proceedings* like for an action for annulment (sect. 42(2) CACP applied analogously): He must *claim a violation of his own rights* by the settled admin. act. In the given case, this requirement is met, since Mrs. A and Mrs. B can claim that their fundamental right of freedom of religion (art. 4(1, 2) BL) has been violated (see supra, A.II.3).

2) The deadline of one month for a possible administrative review of the admin. act in the objection proceedings (cf. sect. 70 APA) must not have expired before the admin. act was settled. This is the case, since the police order was, as usual for such measures, settled immediately.

3) Finally, an action for the establishment of the unlawfulness of a settled admin. act requires a special declaratory interest (a special interest of the plaintiff in the finding, although the decision does not have any effect anymore). This is essential to avoid overloading the administrative courts. There are four recognised case groups of a declaratory interest: the risk of repetition, the vindication (restoration of the reputation of the citizen), the preparation of state liability suit and cases where a

[4] See on the requirements for the admissibility of a legal action before the administrative court Diagram 5.

short-term settlement peventing regular judicial review is typical.[5] In the given case, two of these groups are relevant: First, there is an imminent *risk of repetition*: There may be more intolerant locals harassing Mrs. A and Mrs. B in the future and the police may again order the women to take off the hijab instead of intervening against the aggressors. Second, police orders which need to be followed ad hoc are typical cases where an admin. act is settled before the citizen has the chance to initiate judicial review. So Mrs. A and Mrs. B have the required special declaratory interest.

IV. General admissibility requirements

Regarding the general requirements for legal actions before the administrative court, there are no doubts that they are met. However, Mrs. A and Mrs. B need to make sure that they file their ation properly and to the administrative court with local jurisdiction.

My (correct) answer to the second question of Mrs. A and Mrs. B will be that under sect. 113(1) phrase 4 CACP applied analogously, they can take a legal action for the establishment of the unlawfulness of the police order before the administrative court.

FURTHER READING:

See on the structure of the examination of the legality of an administrative act [decision] in German admin. law *Schmitz*, The requirements of the legality of the administrative decision in German and European law (conference material), 2013, www.thomas-schmitz-hanoi.vn/Downloads/ZDR-Conference_admin-decision_Schmitz2-en.pdf, p. 2, 4 f.

See on the freedom of religion under the German Basic Law *Schmitz*, Freedom of Religion (workshop material), 2019, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_FRGermany_freedom-of-religion.pdf; *Schmitz*, Freedom of Religion and Tolerance in a Pluralistic Society - illustrated by the Example of Germany, guest lecture at UNDIP, 04.06.2021, www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_Freedom-of-religion-tolerance-pluralism_UNDIP2021.pdf.

See on the methods and techniques of legal case-solving *Schmitz*, Introduction to legal case-solving, http://www.thomas-schmitz-hanoi.vn/Downloads/Schmitz_Case-solving_introduction.pdf (materials from the course Introduction to legal case-solving and mooting, Hanoi, Semester 1, 2013/14).

(Datei: Case 2 (GermanPublicLaw))

[5] C.f. *Ferdinand Kopp; Wolf-Rüdiger Schenke*, Verwaltungsgerichtsordnung [Code of Administrative Court Procedure], 24th edition 2018, § 113 no. 136 ff. with further references.

A. The legality of the order of the policemen

I. Legality in form

1) Competence: (+)

- in particular subject-matter jurisdiction of the police to avert dangers for public security or order (sect. 2 LPolA)

2) No procedural errors: (-)

- no hearing of the participants (cf. sect. 28(1) APA)

3) No formal errors: (+)

II. Legality in substance

1) Legal basis: (+)

a) Necessity of a legal basis: (+)

- because encroachment on [interference with] freedom of religion (art. 4(1, 2) BL)

b) Existence, validity and applicability of a legal basis: (+)

- sect. 12(1) LPolA (general clause on police powers)
- wide discretionary power not contrary to fund. rights but sect. 12(1) LPolA must be interpreted and applied in the light of (in line with) fundamental rights

c) Fulfilment of the preconditions of the legal basis: (+)

- threats and harassments of Mrs. A and Mrs. B a danger for public security (here: aspect of invioalibility of the legal order - prevention of criminal offences and other illegal activities)

2) Choice of the right addressee: (-)

- authorities must *take measures against the aggressor, not against the victim* - also and in particular in cases of *sexual harassment*
- cf. sect. 6(1) LPolA; duty of protection of fundamental rights
- no exceptional situation where police cannot protect victim otherwise

3) No violation of fundamental rights: (-)

- *passive* violation of freedom of religion by not taking measures against aggressors irrelevant for question of legality of order to Mrs. A and Mrs. B
- *active* violation of freedom of religion by order to Mrs. A and Mrs. B which is not justified by the freedom's limits (here: the need to protect public security)

B. The option of a legal action before the administrative court

- only if such a legal admission is *admissible*

I. Recourse to the administrative courts: (+)

- under sect. 40(1) CACP

II. Form of action

1) Action for annulment (sect. 42(1) CACP): (-)

- order of the policement cannot be anulled anymore because it is already settled

2) Preventive action for prohibitory injunction: (-)

- not possible against danger of future admin. acts

3) Action for establishment of the unlawfulness of an already settled administrative act (sect. 113(1) phrase 4 CACP analogously): (+)

III. Special adminissibility requirements for the action for establishment of the unlawfulness of a settled administrative act

1) Right to bring proceedings (claim of violation of own rights): (+)

- here: of the *freedom of religion* (art. 4(1, 2) BL) of Mrs. A and Mrs. B

2) Deadline for objection proceedings not expired before admin. act was settled: (+)

3) Special declaratory interest: (+)

- here: *risk of repetition*
- here also: typically short-term settlement which prevents judicial review before admin. act is settled

IV. General admissibility requirements: (+)

- proper filing of the action before the right administrative court
  (only needs to be mentioned briefly)