

# § 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 (usually 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 foresee 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 choose 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)