

§ 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 averting 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 averting 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 an abundance of jurisprudence and legal literature with a long tradition:
- ***public security*** is the inviolability 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 (responsibility 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 exercise 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 is 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