Deutsche Universität für Verwaltungswissenschaften Speyer

General Principles of Administrative Law

§ 4 Legality of Administration

Univ.-Prof. Dr. Ulrich Stelkens

Chair for Public Law, German and European Administrative Law

§ 4 Legality of Administration

Recommendation CM/Rec(2007)7 on good administration

Article 2 – Principle of lawfulness

1. Public authorities shall act in accordance with the law. They shall not take arbitrary measures, even when exercising their discretion.

2. They shall comply with domestic law, international law and the general principles of law governing their organisation, functioning and activities.

3. They shall act in accordance with rules defining their powers and procedures laid down in their governing rules.

4. They shall exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred.

§ 4 Legality of Administration

ECtHR, Judgment of 1999/03/25, no. 31107/96 (Iatridis vs. Greece)

58. The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 1 is that **any interference** by a public authority with the peaceful enjoyment of possessions **should be lawful**: the second sentence of the first paragraph authorises a deprivation of possessions only "subject to the conditions provided for by law" and the second paragraph recognises that the States have the right to control the use of property by enforcing "laws". **Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention** […] and entails a duty on the part of the State or other public authority to comply with judicial orders or decisions against it […]. **It follows that the issue of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights […] becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary.**

§ 4 Legality of Administration

ECtHR, Judgment of 2008/11/6, no. 58911/00 (Leela Förderkreis e.V. and Others vs. Germany)

85. The remaining applicant associations maintained that the Government's information campaign had had no legal basis. They considered that the principle of proportionality did not set sufficiently clear limits to the exercise of the Government's discretionary power where interferences with the freedom of religion derived directly from other constitutional rights.

86. The Court reiterates its settled case-law that the expression "prescribed by law" requires firstly that the impugned measure should have **a basis in domestic law**. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct […].

ECtHR, Judgment of 2008/11/6, no. 58911/00 (Leela Förderkreis e.V. and Others vs. Germany)

87. Further, as regards the words “in accordance with the law” and “prescribed by law” which appear in Articles 8 to 11 of the Convention, the Court observes that it has always understood the term **“law” in its “substantive” sense**, not its “formal” one […]. “Law” must be understood to include both statutory law and judge-made “law” […]. **In sum, the “law” is the provision in force as the competent courts** have interpreted it.

88. The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed. It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of “foreseeability” for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice […]. Furthermore it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law […].”

ECtHR, Judgment of 2008/11/6, no. 58911/00 (Leela Förderkreis e.V. and Others vs. Germany)

89. The Court notes that in its decision of 26 June 2002 the Federal Constitutional Court found that the legal basis of the interference under consideration was provided by the Basic Law. The duty of imparting information on subjects of public concern was one of the governmental tasks directly assigned by the Basic Law to the Government. The Court accepts that it can prove difficult to frame law with a high precision on matters such as providing information, where the relevant factors are in constant evolution in line with developments in society and in the means of communication, and tight regulation may not be appropriate. In these circumstances, the Court considers that the Government's information-imparting role did not require further legislative concretisation.

90. As to the applicant associations' argument that the legislature had failed to enact adequate legal rules to protect them against arbitrary interferences by public authorities with their right to manifest their religion or belief, the Court observes that, according to the Federal Constitutional Court, the Basic Law did not grant an unfettered discretion to the Government when imparting information. Statements affecting the very essence of the right guaranteed by Article 4 §§ 1 and 2 of the Basic Law must be appropriate in relation to the cause for concern. The State had to observe neutrality in religious or philosophical matters and was forbidden from depicting a religious or philosophical group in a defamatory or distorted manner.

91. Having regard to the above, the Court accepts that the interference with the applicant associations' right to manifest their religion may be regarded as being "prescribed by law".

§ 4 Legality of Administration

A) Priority of Law: Prohibition to Act against Law

B) Legal Reservation: Prohibition to Act without Legal (Statutory) Basis

C) Consequences of Illegality

A) Priority of Law: Prohibition to Act against Law

I. Aims of the Principle of Priority of Law

- „No action in contradiction to law“
- *Democratic component*: Parliament “steers” the administration by law - Guarantees responsibility of parliament for administrative decisions
- *Rule-of-law component*: predictability of administrative action

- Principle of Priority of Law concerns only the relationship between law (in a material sense) and individual decision (relationship between higher and lower “ranking” norms is a problem of the hierarchy of norms)

A) Priority of Law: Prohibition to Act against Law

I. Aims of the Principle of Priority of Law

II. Which Laws are Prior?

III. Priority of Law and Case Law (Continental Approach)

IV. Exceptions from the Principle of Priority of Law in Case of National Emergency?

V. Can Administration Overrule Law in case of an Infringement with Higher Ranking Norms?

I. Aims of the Principle of Priority of Law

- Fundamental decisions are taken independently from individual cases
- Safeguarding equal treatment of similar individual cases by submitting the ruler under the rules he issued himself (*Voltaire*: „La liberté consiste à ne dépendre que des lois“]).
- Legal certainty by foreseeability of administrative decisions
- Good description:
  - *Rudolf v. Jhering, Der Zweck im Recht – Band I, 3rd edition. 1893, Kap. VIII, pp. 329 et seq.*
  - *Rudolf von Jhering, Law as a Means to an End (translation of 1913), Chapter VIII, pp. 254 et seq (English translation of “Der Zweck im Recht I”)*

II. Which Laws are Prior?

Depending on the national legal order

- Constitution (depending on its legal force) - Special interest for administration: Distribution of competences, fundamental freedoms (directly applicable?), national objectives (directly applicable?)
- Acts of parliament (all laws adopted by parliament in the legislative procedure foreseen by the constitution - laws in formal sense)
- Delegated legislation / Executive regulations having the force of law (adopted in the forms given by the constitution or an act of parliament)
- By laws (of municipalities if recognized as a source of law in the national legal order)
- Customary law (if recognized as a source of law in the national legal order)
- General principles of law (if recognized as a source of law in the national legal order)
- International law? (rank and effect in the internal legal order depends on constitution)

III. Priority of Law and Case Law (Continental Approach)

What is meant by law?

- the „naked“ text?
- the text as interpreted by the courts?
- the text as it could be interpreted according to the principles of legal methodology?

Is it allowed for the administration to “ignore” the jurisprudence and case law and follow its own interpretation of the text?

IV. Exceptions from the Principle of Priority of Law in Case of National Emergency?

Fiat iustitia et pereat mundus :

„Let justice be done, though the world perish“

- Is the government allowed to ignore the law in case of national emergency?
- Who defines national emergency?
- Can acts of parliament only be changed slowly?

ECtHR, Judgment of 2004/06/22, no. 31443/96 (Broniowsky vs. Poland):

182. The Court accepts that in situations […] **involving a wide-reaching but controversial legislative scheme with significant economic impact** for the country as a whole, the national authorities must have considerable discretion in selecting not only the measures to secure respect for property rights or to regulate ownership relations within the country, but also the appropriate time for their implementation. The choice of measures may necessarily involve decisions restricting compensation for the taking or restitution of property to a level below its market value. […].

Nevertheless, the Court would reiterate that that margin, however considerable, is not unlimited, and that the exercise of the State's discretion, even in the context of the most complex reform of the State, cannot entail consequences at variance with Convention standards […].

183. Whilst the Court accepts that the radical reform of the country's political and economic system, as well as the state of the country's finances, may justify stringent limitations on compensation for the Bug River claimants**, the Polish State has not been able to adduce satisfactory grounds justifying**, in terms of Article 1 of Protocol No. 1, **the extent to which it has continuously failed over many years to implement an entitlement conferred** on the applicant, as on thousands of other Bug River claimants, **by Polish legislation.**

ECtHR, Judgment of 2004/06/22, no. 31443/96 (Broniowsky vs. Poland):

184. The rule of law underlying the Convention and the principle of lawfulness in Article 1 of Protocol No. 1 **require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation** […]. In the context of the present case, **it was incumbent on the Polish authorities to remove the existing incompatibility between the letter of the law and the State-operated practice which hindered the effective exercise of the applicant's right of property.** Those principles also required the Polish State to fulfil in good time, in an appropriate and consistent manner, the legislative promises it had made in respect of the settlement of the Bug River claims. This was a matter of important public and general interest […]. As rightly pointed out by the Polish Constitutional Court […], the imperative of maintaining citizens' legitimate confidence in the State and the law made by it, inherent in the rule of law, required the authorities to eliminate the dysfunctional provisions from the legal system and to rectify the extra-legal practices.

185. In the present case, as ascertained by the Polish courts and confirmed by the Court's analysis of the respondent State's conduct, the authorities, by imposing successive limitations on the exercise of the applicant's right to credit, and by applying the practices that made it unenforceable and unusable in practice, rendered that right illusory and destroyed its very essence. […].

V. Can Administration Overrule Law in case of an Infringement with Higher Ranking Norms?

- Conflict between the principle of priority of law and the hierarchy of norms
- Conflict arises only, when a lower ranking norm is considered as invalid when it is in contradiction to a higher ranking norm
- Who decides (or should decide) about this conflict?

B) Legal Reservation: Prohibition to Act without Legal (Statutory) Basis

I. Aim of the Principle of Legal Reservation

II. What is “Law” in the Sense of the Principle of Legal Reservation?

III. Principle of Legal Reservation and Interference with Citizen’s Rights

IV. Principle of Legal Reservation in the Welfare State

V. Principle of Legal Reservation and “Multipolar“-Relationships

I. Aim of the Principle of Legal Reservation

- „No administrative action without legal basis“
- Principle applies above all when an administrative action may restrict individual rights:
- Everything is allowed, if it is not explicitly forbidden by law

Priority of Law	Legal Reservation
Prohibits (negatively) an infringement of law	Demands (positively) a legal basis for administrative action
In case of missing laws, the administration may act nevertheless	In case of missing laws, any administrative action is prohibited

II. What is “Law” in the Sense of the Principle of Legal Reservation?

- Law in a material sense or law in a formal sense (only acts of parliament and delegated legislation)?
- Principle of legal reservation is not known in every state (very *German* principle)
- **Only limited harmonization by the ECtHR (see again:** ECtHR, Judgment of 2008/11/6, no. 58911/00 [Leela Förderkreis e.V. and Others vs. Germany, para 85 et seq.])
  - recognition of the principle of legal reservation as a condition for legitimate interference in the rights given by the ECtHR
  - requirement of a bundle of criteria: generally binding norm, determinateness, publication
  - Not necessarily: act of parliament (depends on national legal order)

III. Principle of Legal Reservation and Interference with Citizen's Rights

Every interference into a (fundamental) right has to have a legal basis

What does interference mean?

- Only (direct) prohibitions and commandments?
- What about detrimental factual actions of administration (e. g. warnings, negative information about somebody; factual preventions of public demonstrations)?
- What about banalities (necessity of "de minimis" exceptions)?
- What about accepted infringements ("volenti non fit iniuria")?
- What about the necessity of a legal basis in "special relationships" (civil service, school, social security, public services and rights of their users, prisons…)?

IV. Principle of Legal Reservation in the Welfare State

- “Total legal reservation” = total control of the administration by parliament?
- Not accepted in any state: would make effective administration impossible
- Laws may provide an exclusive enumeration in which cases a social benefit or a state aid might be given: Principle of priority of law may have the same effect as the principle of legal reservation

V. Principle of Legal Reservation and “Multipolar“-Relationships

What about

- interference in the rights of one citizen in favour of another citizen?
- giving benefits to one citizen at (indirect) expense to another citizen?
- dangerous actions of individuals not foreseen by law?

C) Consequences of Illegality

I. Factual acts

- Cannot be undone
- Question of state liability and disciplinary measures

II. Legal acts concerning individual cases

- are illegal: state liability and disciplinary measures
- may be considered as “ultra vires”/non-existent
- may be considered as invalid
- may be considered as valid, but annullable (ex nunc/ex tunc?)
- may be considered as valid and definite (after a certain time)