

Seminar 8: The Need for a Sophisticated Modern Administrative Law for Sustainable Development

I. The need for a modern, professional and rule of law-based public administration to support development

- the experiences of successfully developing countries demonstrate that development requires
 - not only a dynamic, innovative, market-orientated economy
 - a large pool of cheap but sufficiently skilled labour and
 - a fair balance of social interests that ensures social stability, butalso a modern, professional public administration that operates within the rule of law and supports development by
 - planning for, creating and maintaining *reliable suitable framework conditions*
 - *expanding infrastructure* timely in line with the demand and
 - providing *up-to-date public services* that meet development needs
(see the successful concepts of "Daseinsvorsorge" and "service public" in German and French admin. law)
- public administration must offer *legal certainty*
 - investors need protection of their property and investments
 - businesses & citizens need reliable rules & fair admin. procedures with predictable outcome
- public administration must be *transparent and free from corruption and nepotism*
 - not only to ensure fairness and efficiency, but also to maintain the trust of businesses and citizens, which is essential for the willingness to make long-term investments
- public resources must be used efficiently

II. The need for such public administration to operate on the basis of an elaborate, clear, well-structured and logically consistent admin. law

- the need for a sophisticated legal framework for public administration which
 - enables public authorities to pursue efficiently the public interest, especially the Sustainable Development Goals (SDGs)
 - effectively implements all elements of the rule of law, concretising them for the given state in the given time, and ensures their effective realisation and enforcement in practice
 - protects effectively the fundamental rights of the citizen
 - while limiting bureaucracy to the inevitable minimum
- the need for a modern and rational (clear, well-structured and consistent) admin. law
 - not a chaotic historically grown law with unclear or inconsistent structure and outdated concepts or legal terminology
 - in particular, the need for a modern *general administrative law* and a coherent system of areas of special admin. law
- for this reason, throughout history, states have adopted key elements of their admin. law from the more advanced admin. law of other states
 - particularly influential: French and German admin. law (within the continental legal tradition) and American and British admin. law (within the common law tradition)
 - spectacular: the adoption of important elements of German admin. law from French admin. law via the Strasbourg scholar OTTO MAYER, although at that time Germany and France faced each other as enemies
- development cooperation often includes support for a modernisation of admin. law as an essential part of public administration reform
 - e.g. support in the preparation of a comprehensive administrative procedure act

III. The need for a detailed, clear and logical system of requirements for the lawfulness of administrative action

- see for more details special materials (slide, diagram) from the course Administrative Law, and conference material
- most important: the requirements for the lawfulness (= elements of the legality) of administrative decisions (the most important instrument of public administration)
- if any element of legality is missing, the admin. decision is unlawful and will be annulled by the administrative court after a legal action of the affected citizen
 - this is reflected in the traditional legal term "grounds of review"; however, note that in a modern, advanced admin. law system, *any* missing element of legality is a "ground of review"!
- in states with an advanced admin. law, complex examination schemes ["Prüfungsschemata" or "tests"], elaborated as part of a sophisticated, rational, differentiated and systemising *legal doctrine*, serve to solve correctly & precisely even the most complex cases in a logical, well-structured and transparent, fully replicable way; this is a *gain in rationality*, since it
 - reduces the influence of subjective factors in decision-making
 - renders the remaining subjective factors visible and
 - makes it easier to detect undue influence (corruption, nepotism, political interference, bias)
- many states have codified important elements of the legality of admin. decisions in a comprehensive administrative procedure act
 - a useful but demanding solution, often recommended by development cooperation partners
 - the admin. procedure act is usually inspired by model legislation in other countries, the jurisprudence of admin. courts, constitutional courts and geo-regional rights courts, and legal science
- special problem: principles of good governance as binding law?
 - a vague and heterogeneous concept, originally developed by the World Bank in the 1990s
 - basically a *political, not legal concept* (from political and admin. science), enriched by some legal principles
 - the sets of principles usually include participation, responsiveness, effectiveness, efficiency, transparency, accountability and rule of law
 - the principles are often made binding in development cooperation agreements, in Indonesia also in the law
 - the problem: *some principles are suitable to serve as a political guideline but not as a legal principle*
 - they cannot be applied objectively and precisely by the courts; this increases the risk of arbitrariness
 - courts are not functionally legitimised to apply political criteria

IV. The need for unimpeded access to justice and effective legal protection for everyone to remedy illegal administrative action that may jeopardise development

- administrative law can only be as good as the effectiveness of its enforcement
- any tolerance of unlawful administrative action sabotages the development of the country
- citizens need *effective legal protection* by trustworthy, unbiased and corruption-free courts
 - to enforce the rule of law and to protect their rights
- effective legal protection requires unimpeded access to justice for everyone
 - also for marginalised persons who lack the financial resources for costly legal proceedings
 - state must provide legal aid where needed - in criminal, civil and also admin. law matters
- special problem: effective legal protection of indigeneous communities in developing countries
 - they may not only lack financial resources but also the necessary knowledge and courage to defend their rights
 - rule of law requires a "level playing field" in court, also when powerful authorities or influential investors are involved
 - there is a broad variety of possible solutions, e.g.
 - special precautions against "land grabbing" and natural resources exploitation in land law and natural resources law
 - self-government institutions that participate as stakeholders with own rights in administrative and court proceedings
 - support of indigeneous communities, also in court, by independent special commissioners
 - support of indigeneous communities by special civil society organisations with own rights in legal proceedings
 - special procedural rules facilitating participation of indigeneous people in court proceedings
 - special rights for indigeneous communities in human rights treaties
 - see the comparative study about solutions under Indonesian and Philippine law