

# Introduction to Swiss Law – Administrative Law and Administrative Procedure

## Comments on the Examples of the Lesson of September 27, 2019

### **Example 1**

The requirement of a legal provision is fulfilled. It is questionable, however, whether the provision is unduly vague as it simply states that billboards must be “esthetically satisfying.” The Federal Supreme Court allows open or indeterminate provisions in technical areas. It is not possible to concisely circumscribe aesthetic requirements in a law. The authorities have a knowledge in the field and need a margin for judgement. Thus, the legal provision constitutes a sufficient legal base.

### **Example 2**

See F UHLMANN, ‘Administrative Law’ in M Thommen (ed.), *Introduction to Swiss Law* (Carl Grossman 2018) p. 214.

### **Example 3**

The guidelines were not enacted by parliament. Thus, they qualify as ordinance. They contained rules that were not stipulated in the law itself. The question was whether an ordinance is on a sufficient level to be a legal basis for these rules or whether they must be enacted on the level of a *law*. The constitution of the Canton of Grisons did not exclude the delegation of legislation. In the law itself, a delegation clause was contained which concerned precisely defined and limited questions. Thus, requirements (1)-(3) of the delegation of legislation were fulfilled. However, it was questionable whether the fundamental principles of the working conditions of public servants were contained in the law or not. The Federal Supreme Court reasoned that the law itself contained *no* rules on matters such as remuneration, holidays, the admissibility of strikes, night or weekend work and so on. Thus, on all these questions, the commission could regulate. The Supreme Court came to the conclusion that such an extensive legislative delegation in the field of personnel law does not satisfy the requirements arising from the principle legality.

### **Example 4**

First, the Federal Supreme Court stated that there was a sufficient public interest in force-medicating X as there is a duty of care arising from the fundamental rights.

Second, regarding the principle of proportionality, the Supreme Court carried out the three-tier test (suitability, necessity and reasonableness). It concluded that the Cantonal Administrative Court did not properly clarify the circumstances of the case so it was not possible to assess the necessity and the reasonableness. It referred the case back to the Cantonal Court.

### **Example 5**

See F UHLMANN, ‘Administrative Law’ in M Thommen (ed.), *Introduction to Swiss Law* (Carl Grossman 2018) p. 215.

### **Example 6**

The Federal Supreme Court reasoned as follows (BGE 109 Ia 33, own translation): “The price parity sought by the contested provision may not have a strong effect against alcoholism, but

it is not necessarily completely ineffective. If one assumes that a bottle (3 dl) of lager beer is about 60 to 70 centimes more expensive than a 3dl bottle of mineral water, it is clear that this difference in price is for quite a few guests a reason to order a beer. (...). Even if a difference in price does not affect all guests in their choice of drinks, it still cannot be said that nobody would be influenced by the price. It is possible, after all, that somebody who would choose an alcoholic drink because it is cheaper than a non-alcoholic drink, is deterred from drinking alcohol by the contested provision. (...). This provision is (...) a means of combating alcoholism which is in the public interest. Overall, the contested norm is therefore proportionate.”

### **Example 7**

See F UHLMANN, ‘Administrative Law’ in M Thommen (ed.), *Introduction to Swiss Law* (Carl Grossman 2018) p. 213.

### **Example 8**

- a) The smoking ban is of general-abstract nature. It does not constitute an administrative decision.
- b) The letter qualifies as administrative decision.
- c) The renaming of a post office is an organizational order which does not affect rights or obligations. It does not qualify as administrative decision.

### **Example 9**

The drone and helicopter flights are real acts. They do not qualify as administrative decisions because no legal relationship is regulated; rather, they aim at a factual effect. In order for the admissibility of state action to be reviewed, X must request an administrative action from the Federal Administration on the basis of art. 25a of the Federal Administrative Procedure Act which is subject to appeal.

### **Example 10**

The "LOVE LIFE" campaign is, as an official warning and recommendation, a real act. Legal protection against such real acts is not readily available. However, persons affected by the real act can proceed via art. 25a of the Federal Administrative Procedure Act.

In order to obtain such legal protection, the act must affect rights and obligations. The complainants referred to art. 11 of the Federal Constitution, which grants children and adolescents special protection of their integrity and encompasses their physical and mental integrity. According to the Federal Supreme Court, this right cannot be determined in an abstract and timeless manner. Rather, its interpretation depends on the respective social circumstances. For this purpose, it is decisive as to what influences children and adolescents are exposed to and what impressions they are confronted with on a daily basis.

The Federal Supreme Court stated the information campaign did not expose children and adolescents to noticeably different and stronger sexualised or erotic influences than is already the case in everyday life. Although the posters and videos of the campaign showed couples in various intimate (sexual) situations, they were neither pornographic nor associated with vulgar sexual language. Certain sexual acts could at best be assumed.

The children and young people have no right to be protected from the pictures of the campaign. Thus, the campaign did not affect their rights and they had no interest worthy of protection in order to obtain an administrative decision based upon art. 25a of the Federal Administrative Procedure Act. The prerequisites for the issue of an administrative decision by the Federal

Office of Health were not fulfilled. The Federal Supreme Court therefore concluded that the complaint is unfounded.

#### **Example 11**

See F UHLMANN, 'Administrative Procedure' in M Thommen (ed.), *Introduction to Swiss Law* (Carl Grossman 2018) p. 238.

#### **Example 12**

See F UHLMANN, 'Administrative Procedure' in M Thommen (ed.), *Introduction to Swiss Law* (Carl Grossman 2018) p. 239.

#### **Example 13**

- a) The Federal Supreme Court reasoned as follows (BGE 138 I 49, consid. 8.3.2, own translation): "From the principle of good faith (...), it can be deduced that the parties must not suffer any disadvantage because of an inaccurate indication of the legal remedies (...). However, a party may only rely on this principle if it acts in good faith. A party who noticed the error or should have noticed it when paying the attention required by the circumstances does not act in good faith. However, only gross procedural negligence can defeat the protection which is the case if a party or his lawyer could have become aware of the inaccuracy of the indication of legal remedies by simply reading the applicable law. However, they are not expected to consult the relevant case law or doctrine in addition to the legal texts. Determining whether the negligence committed is gross is based on the concrete circumstances and legal knowledge of the person involved. The requirements for lawyers are naturally higher: in all cases, lawyers are expected to carry out a brief ("Grobkontrolle") control of the indications on the legal remedies."
- b) The Federal Supreme Court reasoned as follows (BGE 113 IA 286, consid. 3, own translation): "The complainant criticizes the composition of the examination commission, the majority of which is composed of attorney-at-laws. The complaint is unfounded. A minimum claim to independence and impartiality of the authority can be derived from the Federal Constitution (...). However, this claim is not violated by the involvement of practicing attorney-at-laws as examiners. The mere possibility that a candidate who passes the examination could later enter into a competitive relationship with the lawyers examining him does not yet lead to a conflict of interest and does not generally indicate a conflict of interest.
- c) According to the case law of the Federal Supreme Court, it is sufficient for the assumption of partiality if there are circumstances which, objectively, give the impression of bias and prejudice. Here, this is arguably the case.

#### **Example 14**

- a) Cantonal Act on Administrative Procedure.
- b) Federal Act on the Federal Supreme Court.
- c) Art. 189(4) of the Federal Constitution. The same follows, *e contrario*, from the admissible objects of appeal provided for in the federal procedural acts.
- d) The right to be heard is contained in art. 29 of the Federal Constitution. It may also be stipulated in the cantonal code.

### **Example 15**

Y can directly/abstractly challenge the Police Act of the Canton of Zurich. In the Canton of Zurich, there is no procedure to abstractly challenge cantonal legislation. Thus, it is possible to lodge the appeal directly to the Swiss Federal Supreme Court (cf. art. 87 of the Federal Act on the Federal Supreme Court). Y has *locus standi* because she could potentially be affected by the act in the future (*virtuelle Betroffenheit*).

### **Example 16**

- a) The order is rendered as administrative decision. An appeal must be brought against this administrative decision (indirect challenge of legislation).
- b) Yes.
- c) The Police Act will not be applied in the present case if the appeal is successful. However, it will not be annulled.

### **Example 17**

- a) Yes.
- b) Only in exceptional cases (cf. slide 69).
- c) Yes.
- d) Yes. Federal ordinances may be challenged indirectly/concretely.
- e) Yes.