

### Question 1 (25 points, 350 words)

Roberta Schmitt is an eighty-five-year old resident of the city of Eindhoven in the Netherlands. Every week her grandchildren come to visit her by car. Parking in her street is very expensive. However, one of her neighbors informs that she can register her visitors on a smartphone application and they will only pay 10 cents per hour. Roberta Schmitt does not own a smartphone, does not know how to operate one, and has very poor sight. She calls the municipality of Eindhoven and asks if there is a non-digital alternative to this smartphone application that can allow her to welcome her visitors at the same price. After two hours waiting to talk to a municipal civil servant, she is told that there is no offline alternative and she should rely on her grandchildren for help. Rebecca Schmitt is dissatisfied with this answer which she finds is citizen-unfriendly and highly discriminatory against senior citizens.

Drawing on the readings and the materials discussed in class, explain (i) what the principles of good administration entail for the way in which public bodies interact with citizens; (10 points, 150 words) (ii) how Rebecca Schmitt could be protected here by specific principles of good administration and what public institutions she could appeal to for further assistance. (15 points, 200 words)

#### Answer:

(i) Good administration has multiple dimensions, two of which concern this situation directly. Firstly, the efficiency and quality dimension focuses on principles of standards of conduct, proportionality, and acting within reasonable time. Secondly, the procedural dimension focuses on principles such as the right to be heard. Principles of good administration outline the ways in which public authorities need to behave and conduct themselves, and the ways in which such bodies shall refrain from acting. It includes such principles as impartiality, fairness, transparency in decision making, openness to the public, effectiveness/efficiency and acting within reasonable time. According to article 41 CFR<sup>1</sup>, it is expressed that the right to good administration entails that a person has the right to impartiality, fairness, and response within reasonable time, which shows how important these principles are, and how important it is for the public authorities to respect them and promote them.

(ii) The principles of good administration have been breached as Ms. Schmitt was waiting for 2 hours and received insufficient/unhelpful information. Furthermore, the principle of equality also

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<sup>1</sup> Charter of Fundamental Rights of the EU [2000], article 41

plays a role in good administration, as in this case elders are discriminated against because of their inherent lack of technological access/expertise. Furthermore, public authorities, in light of principles of good administration, have the duty to give information. In this case, Ms. Schmitt was not given information regarding how to access the app and operate it (told to ask her grandkids), and thus her right to be informed was also breached. In such cases, the Ombudsman would be an appropriate entity since a complaint for individual grievances can be filed. The ombudsman would then be able to follow up on such a complaint and remedy it if deemed necessary. The code of administrative behavior<sup>2</sup> outlines good administration and can be used to find maladministration if an authority fails fundamental rights, legal rules or principles, or the principle of good administration. It is important to note that the Ombudsman does not carry the force of law (not legally binding), but has very high compliance rates due to their authoritative position and influence<sup>3</sup>.

## **Question 2 (20 points, 300 words)**

Kingsbury, Krisch, and Stewart have identified the growth of global regulatory structures as international trade, cooperative environmental commitments, and cross-border human rights obligations grow. These commitments, however, can at times conflict with domestic interests and concerns. National authorities may have decreased autonomy over administrative matters. Some states have responded by disregarding commitments established in global administrative law. For example, in 2018 the United States restricted the import on trade in steel citing concerns of national security. Certain Member States of the European Union have phased out coal as an energy source for environmental reasons, impacting commitments made by these states in investment and trade agreements.

From the perspective of global administrative law, (i) discuss the ways that global administrative law restricts a state's ability to act on relevant domestic interests. What are the advantages and disadvantages of increased regulatory commitments across borders? Use practical examples to support your answer. (15 points, 200 words) (ii) Do

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<sup>2</sup> European Ombudsman, *The European Code of Good Administrative Behaviour* (European Union, 2015).

<sup>3</sup>Cases, Materials and Text on Judicial Review of Administrative Action edited by Chris Backes, Mariolina Eliantonio, Chapter 10

you agree or disagree with the statement that there are increased needs for such structures? (5 points, 100 words)

**Answer:**

**Question 2:**

(i) Global administrative law creates a transnational framework for accountability of global administrative bodies while ensuring that they meet “standards of transparency, participation, legality” and effective review of decisions being made (Kingsbury et al [2005])<sup>4</sup>. With the example of the elimination of coal from EU states provided, one can consider the European Green Deal as well as the prohibition of the manufacturing and selling of ICE<sup>5</sup> vehicles from 2035, as limiting to States domestic interest. For example, Italy, who has companies like Ferrari, Alpha Romeo and Lamborghini, has an interest in maintaining ICE engines, but is prohibited from doing so by a global administrative framework and new principles (such as protection of the environment) imposed by it. The advantages of increasing regulatory commitments are promotion of transparency and participation<sup>6</sup> (states NGOs, individuals etc...), ensuring substantive principles like proportionality, international access to justice (Aarhus convention), and accountability of organizations and states (state liability). A disadvantage could be reduced state sovereignty and authority over domestic interest, as provided in the example of Italy and car manufacturing.

(ii) I agree that there is an increasing need for global administration because of the globalization/digitalization of the modern world. People are not confined to the state in which they currently live, as was the case in the 16th century, but are global citizens. Thus, regulatory frameworks with global range/scope are essential in protecting fundamental rights of individuals, ensuring transparency of institutions, and accountability for maladministration and unlawful governance by ignitions. Additionally, as the environment is becoming volatile and endangered,

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<sup>4</sup>B Kingsbury, N Krisch, and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68(3) Law and Contemporary Problems 15

<sup>5</sup> Internal combustion engines

<sup>6</sup> B Kingsbury, N Krisch, and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68(3) Law and Contemporary Problems 15, page 37 paragraph 4

to ensure the continuation of this planet we need to have such a regulatory framework to deal with transnational disputes.

### **Question 3 (30 points, 450 words)**

Citing dangers to child development and concentration, the Communications Commission of the State of Lembradio (a fictional State) has blocked the use of apps that allow video uploads of no more than 20 seconds. The app, BlingBlab, has been completely shut down in Lembradio as a result of the changes. The app is, however, freely used in bordering States. Other video apps have not been impacted by the ban. A group representing the interests of influencers who make the majority of their income from uploading videos to BlingBlab are challenging the new regulation.

Answer the following questions with reference to Germany and France:

- i) Does the group representing the influencers have standing? If not, how could a successful claim be brought? (10 points, 150 words)
- ii) Which remedy should be requested? (10 points, 150 words)
- iii) Are there alternative paths that the group could take for resolving their concerns? (10 points, 150 words)

### **Answer:**

i) In Germany, they would not have standing as they follow a rights-based approach, meaning that the plaintiff needs to have his subrights violated<sup>7</sup>. As the group represents the influences and are non addresses, they could only have standing if they could show that the act at issue infringes their subjective rights. In this case it does not, and thus no standing is granted. In France, the system follows an interest based approach, and is very broad<sup>8</sup>. The interest to file a claim must be direct, actual and certain. In France, this group could potentially have standing as they do have an interest in taking legal action. To secure a successful claim, it would be easier if the influence themselves filed the claim, as in this way, under German law, they could be

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<sup>7</sup> Article 42(2) Verwaltungsgerichtsordnung

<sup>8</sup> As established in *Casanova v Municipality of Olmeto*, Conseil D'état, 29th March 1091

attributed locus standi (due to the burdensome ban/act), or general standing for breach of rights and equality.

ii) An action for annulment would be appropriate, since it may have retroactive effect (*ex tunc*) and is legally binding (unlike a declaratory judgment). In Germany, annulment may be requested<sup>9</sup>, and if found unlawful/in violation of right, an action for annulment may annul the act<sup>10</sup>. In France, the legal remedies are classified into two categories; (1) action for annulment or (2) full jurisdiction remedy<sup>11</sup>. An action for annulment is limited to ruling on the legality of the decision, and if necessary, annulling it. In sum, the appropriate legal remedy would be an annulment action, which would annul the decision to ban the application with retroactive effect (disappears from the legal and natural world) thus making the use of such app legal again (if it complies with the 20 second video limits)

iii) Alternative paths could include declaratory judgments from the court, which are not binding and declare a certain act unlawful and clarify legal citations. This remedy is available both under French<sup>12</sup> and German law<sup>13</sup>. Furthermore, due to possible maladministration, under French law a complaint could be filed to the Ombudsman if there is a relevant right infringed. Under German law this is not the case because due to the broad access to judicial review and protection of fundamental rights by the constitution and administrative code, there is no federally established Ombudsman. Other pathways include petitions, human rights institutions and internal complaint procedures. Additionally prior to filing for judicial review and for annulment, one can file a statement of objections to the relevant authority hoping it reverses the act without the need for judicial intervention.

#### **Question 4 (25 points, 350 words)**

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<sup>9</sup> Section 42(1) VwGO

<sup>10</sup> Section 113(1) VwGO

<sup>11</sup> Code de Justice Administrative Article L311-4: The council of state is competent, at first and last instance, to grant a “full jurisdiction remedy” in the cases that are referred to it in accordance with (...)

<sup>12</sup> Minister for Infrastructure and Housing v Societe le Val d'Oise, Conseil d'Etat [1971], n77323

<sup>13</sup> §43(1) VwGO and §43(2) VwGO

In many jurisdictions, citizens are not allowed to start the judicial review of an administrative decision by appealing it directly before an (administrative) court and must first go through the administrative phase. Explain (i) what this administrative phase entails and what the differences are between this first phase and the judicial review before a court, (15 points, 200 words) (ii) and what type of evidence can be brought forward to support an application during any of these two phases. Illustrate your answer with examples discussed in class OR examples discussed in the compulsory readings regarding the Dutch OR German jurisdictions. (10 points, 150 words)

**Answer:**

(i) The administrative phase is the phase prior to judicial intervention and review, and aims to fix the problem without burdening the judicial system. Primarily, after receiving an administrative act, a person may ask the authority to reconsider this judgment/act through a statement of objections. In this statement, a person may lodge his complaints or his situation which may give rise to the public authority understanding they made a mistake or that the act is not proportional in the given circumstances. The public authority will then reply, and if they refuse to reconsider their position they will issue a new decision agreeing with the original one. In that case, one can lodge a claim for judicial review of the act before an administrative court. In Germany for example, there is a forced preliminary objection, and thus individuals must file a statement of objections to the public authority prior to filing for judicial review. The main difference between the administrative phase and the judicial phase is the presence of the judge. Germany follows an inquisitorial system and thus the judge plays a very important role in the dispute and the development of the trial.

(ii) In general, evidence regimes should be in compliance with art. 6(1) of the ECHR<sup>14</sup>. In Germany, the principle of direct evidence allows the judge to gather/determine evidence before him ranging from written documents, oral testimonies from witnesses/experts and from the parties themselves<sup>15</sup>. In Germany, expert witnesses are allowed but the notion of Amicus Curiae

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<sup>14</sup> Joachim Steffsen, case c-276/01 [2003], ECLI:EU:C:2003:228

<sup>15</sup>Section 96(1) VwGO

is unknown. Section 404 of the Zivilprozessordnung posits that selection of experts is done by the court (and the parties have no power over it but may cross examine them<sup>16</sup>, and experts may be requested to appear before court to explain their findings. Additionally, Article 86 VwGo posits that the court can investigate ex officio, “and is not bound to the submissions of the parties”. Lastly, unlawfully obtained evidence is admissible in German administrative court as long as it is not an extreme breach of privacy (up to the authority of the judge).

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<sup>16</sup> This was held in the Mantovanelli v France case. , [Mantovanelli v France, European Court of Human Rights, 18 March, 1997]