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On the role of values in judgements on conflicting planning processes – prospects for agonistic planning? Basic considerations from Germany

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ABSTRACT

Adapting political science's model of agonistic pluralism, literature in spatial planning reinterprets conflicts as constructive elements. The impact of stakeholders and their management of conflicting values remains uncertain. However, planning requires continual validation of its values. The article delves into the role of values in judgments on conflicting planning processes. An explorative German study reveals that courts prioritise procedural over substantive values, although they acknowledge the latter, such as environmental protection. We argue in favour of considering values in research on agonistic planning but acknowledge that the influence of courts is limited due to institutional constraints.

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1 Introduction

With the paradigm shift in planning theory from consensus-oriented to conflict-oriented agonistic planning, the first question is what this paradigm shift would mean in practice for stakeholders involved in planning processes. Central actors that have generally received little attention in planning research and have been systematically ignored in the approach of agonistic planning are the courts. However, they play an essential role in democracies, where they are regarded as the final authority in conflicts. Secondly, it is striking that the topic of values and related conflicts, which has generally been little researched in the context of planning, has also hardly been addressed in the approaches of agonistic planning. However, this deficit is all the more serious here because conflicts of values, unlike interest, are more challenging to resolve and require an offensive examination of the actors' values.

Against this background, this paper brings these two aspects together to clarify the role of values in judgments on conflicting planning processes without consensus. In this way, the article contributes to a better understanding of values in their practical application. It provides initial indications of values and courts' role in agonistic planning.

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The article has been divided into five parts. The first part outlines the main features and shortcomings of agonistic planning. The second section deals with the role of courts and values in planning. The fourth part concerns the methodology used for this explorative study of judgments of conflicting planning processes from Germany and presents its results. In conclusion, the final section summarises the contribution of this paper and formulates perspectives for further research, especially regarding the agonistic planning approach.

2 The paradigm of agonistic planning under criticism

The agonistic planning approach has gained importance internationally since the 2000s and in recent years in Germany. Bäcklund and Mäntysalo (2010) even stated that in planning theory, the agonistic approach has developed into the leading approach after the rationalist, incremental and communicative approaches. However, there is no clear evidence for this thesis. Using the example of Finnish cities, Bäcklund and Mäntysalo (2010) state that there is a plurality of approaches in practice. Nevertheless, it seems worthwhile to take a closer look at this approach.

Agonistic planning first poses the following question: How could it come to the increase and intensification of planning conflicts when so many forms, instruments and methods of communication have been developed in democratic societies under the ‘communicative turn’ (Healey, 1996)?

The thesis of increasing and intensifying planning conflicts can also be confirmed based on the German planning context. Both prominent individual examples (e.g. Stuttgart 21, see Brettschneider & Schuster, 2013) and broader empirical studies (Bertram & Altrock, 2020) show that the number of local protests against planning projects increased significantly after 2010.

Against this background, the argument of agonistic planning builds on the critique of the Habermas approach to rational consensus building in society and politics (Hillier, 2003). The possibilities for conflict resolution of communicative planning are too limited, as it is geared towards working out the lowest common denominator. Thus, causes of conflict are often ignored (Blotevogel *et al.*, 2014, p. 87). As a result, conflicts are not resolved but postponed. Several authors (Pløger, 2004, 2018; Gualini, 2015) have claimed that this postponement leads to depoliticising planning within its usual procedures. Consequently, conflicts are carried out in other arenas, whose rules are not clearly democratically defined, which causes their increase and intensification. Criticisms of the participation procedures practised under the paradigm of communicative planning are based on similar arguments (Selle, 2011). Due to their social selectivity and the fact that consensus reached is not implemented in the end, participation also leads to an intensification of conflicts.

In contrast to communicative planning, agonistic planning demands a paradigm shift, accepting conflicts as the ‘normality’ of planning. Several works emphasise conflict’s productive and dynamiting function within democratic societies (Mouffe, 2013, p. 7; Kühn, 2021, p. 1). In this context, planning is seen as a competition between competitors within the framework of clear rules in a democratic setting (Mouffe, 2013, p. 7). For democratic planning, strife is essential: ‘The ongoing dispute about words, meaning, discourses, visions or “the good life”’ (Pløger, 2004, p. 71). That should be accepted

without automatically recurring to procedures like voting, forced consensus or compromises (Pløger, 2004, p. 84). However, going beyond the friend – enemy thinking, the participant one heavily disagrees with or does not understand should be seen as an adversary (Mouffe, 2000; Pløger, 2004, p. 87).

This attitude towards dealing with conflict is the feature that distinguishes agonistic planning from other planning theories. According to Kühn (2021), conflict avoidance is inherent in the model of rational synoptic planning. It is assumed that there are objective, rational and optimal solutions, through the elaboration and selection of which the overall well-being of all participants can be maximised. Participation and consensus building, on the one hand, are central to the communicative planning model. Here, win-win solutions are sought at an early stage of planning, and an attempt is made to eliminate conflicts. Agonistic planning, on the other hand, allows conflicts in planning processes and formulates rules for their resolution. The agonistic approach is thus a middle way between consensus-oriented planning under the paradigm of the communicative turn and agonistic planning.

However, representatives of political theory express fundamental doubts as to whether antagonistic conflicts can be transferred to agonism. To classify the agonistic approach in the German context, it should also be noted that Mouffe's approach refers primarily to the international and national policy framework (Kühn, 2021, p. 4). It corresponds more to competitive democracies such as the USA and the UK and less to consensus-oriented democracies such as Germany and the Netherlands (Hendricks *et al.*, 2010).

There are doubts in planning theory whether and to what extent agonistic theory can complement a positive theory of planning (Roskamm, 2015, p. 389). In addition, it is unclear how the idea should be implemented in practice (McAuliffe & Rogers, 2019, p. 304). For example, the question arises as to what follows from the agonistic planning approach to design concrete planning processes.

To explore the potential of agonistic planning, it is necessary to relate it to the concrete institutional framework of the policy field of spatial planning. After all, explicit and implicit rules already exist here, also for resolving conflicts: Spatial planning has the task of weighing and balancing interests (Fürst, 2018). At least in countries with a much-differentiated planning system based on written law, weighting and balancing interests is based upon well-rehearsed procedures in public planning institutions framed by exemplary decisions of administrative courts (Zemke, 2018). The public interest plays a central role in these phases of planning processes, often called balancing processes (Gailing & Moss, 2018). The public interest can be overestimated against the interests of certain parties, but formal rules have to be held to avoid so-called balancing mistakes (Gierke & Schmidt-Eichstaedt, 2019, p. 24).

The approach of agonistic planning, however, leaves open the question of which institutions (policy or planning) should pursue agonistic planning and how (Kühn, 2021). The role of planners also remains unclear. Kühn (2021, pp. 7–8) points out that in the model of agonistic planning, as in the model of incremental planning (Lindblom, 1959), the public interest is established within systematic negotiation processes between social actors. Compared to the rational model, the role of spatial planning is less powerful here, as it does not elaborate on the optimal solution but acts as a moderator (Kühn, 2021, p. 9). The following questions arise: Should conflicts be moderated, negotiated, or mediated between conflicting actors? What is the role of spatial planning in this? Under

certain circumstances, the agonistic planning approach opens up a field of tension between governance and empowerment for planners (Pløger, 2004, p. 82). However, the approach has provided too few indications of who will ultimately decide how about conflicts that cannot be resolved, which is indispensable in spatial planning.

It thus becomes clear that the current approaches of adapting agonistic policy-making on spatial planning have failed to address the role of specific institutions and actors in agonistic planning processes. Therefore, one institution is presumably central in this regard and is the focus of further consideration: the courts. For this reason, the next part gives an overview of the judiciary's role in spatial planning and shows its connection to values.

3 The role of judiciary and values in spatial planning

3.1 A largely blind spot in planning theory and planning research: the role of the judiciary

In democracies, courts are crucial in reviewing and revising planning decisions based on legal norms (Bryson & Grosby, 1993). The law has the task of mediating between seemingly incompatible, conflicting interests (Von der Pfordten, 2009, Von der Pfordten, 2013). The role of courts varies among different countries. The function of the courts has to be seen in the context of the wholly political and administrative planning system. For example, comparing the system of Germany with the system of the UK, some differences can be identified: In contrast to the UK, Germany has a powerful and differentiated system of administration law based on the concept of 'Rechtsstaat' emerging in the 19th century (Groß, 2018, p. 428).

Furthermore, the German planning system is much more decentralised than the UK system because Germany is a federal state. The communities, with their instrument of formally binding local plans, have an influential role in the planning system, based on Art. 28 of the Constitution. The regional planning administrations routinely approve the local plans following the principle of countervailing influence. A statewide spatial planning law exists, but the central state has no direct impact on local plans. In the UK, the local plan and permissions are in the competence of local planning authorities. However, if permission is refused, the applicant may appeal to the Secretary of the state. Generally, cases initially end up with the Planning Inspectorate, an executive agency of the UK Government's Department for Housing, Communities and Local Government (GOV. UK Ed, 2024). Decisions are taken at the ministerial level in significant cases, considering the inspector's report (Dembski & O'Brien, 2022). The courts are only involved in very few cases if the decision of the inspector and the ministry are not accepted and only procedural grounds. In Germany, there is no superior administration instance dealing with local and regional planning conflicts. The courts take control and decide on conflicts in several instances. In general, for spatial planning topics, the levels of 'Verwaltungsgericht' (regional level) and 'Oberverwaltungsgericht' (Federal State level) are responsible; in only a few cases, the 'Bundesverwaltungsgericht' (Central State level) is involved. Thus, the court system is much more important for the planning system than in the UK (Dembski & O'Brien, 2022).

However, there is also another understanding of the role of courts and judges. In the UK, in the absence of differentiated written regulations in administrative law and the planning system, judges are more independent than in Germany. It can be said that the courts and their judges in Germany execute formal routine control tasks that the central administrations undertake in the UK. Their main task is to control formal procedures. Nevertheless, in many cases, to judge the formal correctness of the former balancing process of the local or regional administration, they have to repeat the weighting, balancing the arguments of the involved actors (Merkel, 2012).

However, the judiciary's role in planning theory and research has been largely ignored. Courts usually come into play after the planning procedures have been completed (Becker-Ritterspach, 2015; Kühn, 2021, p. 11). However, agonistic planning, in general, only focuses on the planning process before the courts appear. Nevertheless, agonistic planning should encompass the entire planning and implementation process, especially as there are indications that planning processes more often end without consensus, and the importance of courts has increased. This development can prolong planning procedures and cause dysfunctionality.

In Germany, the fragmentation of planning law is one reason for the increasing importance of court proceedings in planning processes. This could result in courts understanding their review mandate not only formally but also substantively (Kupfer, 2014). According to Mehde (2010, p. 398), the *de facto* case law of the administrative courts has largely moved away from the basic idea of legal protection and towards the substantive nature of a judicial review, with the declaratory interest, in particular, being interpreted increasingly generously in the case of subsequent actions. This would mean that the weighting of different interests, which the politically legitimised administrations previously carried out in the sense of the public interest, would now be repeated and possibly even replaced by the representatives of the third power (Merkel, 2012; Becker-Ritterspach, 2015, p. 247). Nevertheless, the current federal government's coalition agreement proposes accelerating administrative court proceedings (SPD, Bündnis 90/ Die Grünen und FDP, 2021, p. 14).

So, while it is relatively straightforward that the judiciary plays a critical role in mediating conflicting interests, little is known about how courts decide and, above all, on what basis of values they do so. However, to find out what role courts might play in negotiating conflicts in the agonistic planning model, it is also essential to determine what values underlie their judgments. According to the agonistic policy approach, values are contingent and always subject to negotiation (Mouffe, 2013). Considering the underlying values in judgments can help to understand which values are essential in planning from the courts' point of view. For this reason, the next part gives an overview of the connection between values and planning.

3.2 Values in planning: a black box

Similar to the colloquial understanding, values are also frequently described in sociological research as compasses (Perry, 1954) or signposts (Rokeach, 1973; Klages, 1988) because they serve people to organise themselves socially and provide orientation for human action (Schwartz, 2012; Astolfi, 2020, p. 93). Although values permeate social life, people rarely articulate them explicitly.

In this respect, planning is no exception, even though it is a profoundly normative discipline. Planning science has not treated values in detail (Levin-Keitel & Behrend, 2022, p. 51; Bakunowtisch *et al.*, 2024). In agonistic planning theory, the gap is even more surprising, as Mouffe's model of agonism addresses values explicitly. Here, liberty and equality are central values of democratic institutions. According to her understanding, it is always necessary to negotiate what these values mean (Mouffe, 2013, pp. 7–8). However, it should be noted that they do not represent a central element in the overall model. McAuliffe and Rogers (2019) rightly point out that the agonistic model makes it difficult to understand the normative dimension of planning. Although the increasing pluralisation of society is explicitly cited as one of the reasons for the increase in conflicts in planning procedures (Pløger, 2004; Kühn, 2021). In this context, it would make it obvious to deal with the associated value pluralism and value conflicts (McAuliffe & Rogers, 2019). Negotiating what is understood by specific values would be of great interest to planning, as it must repeatedly legitimise its values. Especially since, from the perspective of agonistic planning, planners are always involved in conflicts over values, meaning and interests (Pløger, 2004, p. 83). Thus, studying values can contribute to a better understanding of these conflicts.

To clarify this, it is first relevant to consider the distinction made in conflict research by Aubert (1973) between conflicts of interest and conflicts of values (Willems, 2016). The former usually results from the scarcity of goods or positions that conflict parties equally strive for (Aubert, 1973, pp. 180, 182). However, disputes over the burdens associated with benefits are also counted among conflicts of interest. In both cases, distribution issues are central to the conflicts (Aubert, 1973). Consequently, many spatial planning disputes are conflicts of interest. In contrast to conflicts of interest, conflicts of values do not arise from distributional issues but from a 'dispute about the "right" prioritisation' (Bornemann & Saretzki, 2018, p. 570). This means that justifications conflict (Aubert, 1973, p. 183). Likewise, disagreements about values or facts and the hierarchy or proper application of values can trigger conflicts of values (Aubert, 1973, p. 184). In spatial planning, they find expression in disputes over different justifications of urban planning models or of public interests in general.

The resolution potentials for conflicts of interest and values differ due to their distinct characteristics. Conflicts of interest are typically perceived as rationally negotiable and can, therefore, be resolved through bargaining. Conversely, conflicts of fundamental values are considered non-negotiable (Zilleßen & Barbian, 1992, p. 17; Weidner, 1996, p. 141; Feindt, 2001, p. 684). It is assumed that, at best, a mutual understanding of different value systems can be promoted. For this, a sustained dialogue is necessary. In the discourse, new common values could be discovered, which would allow the conflict to appear in a different light and thus possibly ease the conflict. In contrast to conflicts of interest, compromise is less acceptable because values express intrinsic moral principles and are more identity-forming than goods or positions (Willems, 2016, pp. 12–13). Values are, therefore, considered to be more stable and, thus, in some ways, morally superior to interests. Even if, of course, there are always discussions about their interpretation and hierarchisation.

As many political discussions demonstrate, this analytical distinction (Kriesberg, 1989, p. 213) is not always clear. Often, conflicts involve mixed motives, and their

significance can change during decision-making (Aubert, 1973, p. 185). Parties in conflict may also accuse each other of acting solely based on interests or values. However, this distinction can be difficult in practice, as values are abstract phenomena rarely expressed explicitly in everyday life. These complexities make conflict analysis and resolution challenging.

However, examining the distinction between conflicts of interest and values in agonistic planning can deepen the understanding of conflicts in planning in general. This allows working out which values are addressed in planning and how they are interpreted and hierarchised. This facilitates talking about the legitimisation of land use decisions compared to when interests are solely perceived as distributional concerns (Aubert, 1973).

Furthermore, dealing with conflict of values poses a more significant challenge for agonistic planning than dealing with conflicts of interest. Conflicting actors in interest-based conflicts are more willing to resolve disputes without state intervention, as state intervention can result in a disadvantageous outcome (Aubert, 1973, p. 182). Conflicts of values, on the other hand, have a higher potential for escalation, as values are expressions of moral principles that are more difficult to compromise on. The public nature of values means that actors cannot negotiate their terms of exchange, unlike goods (Aubert, 1973, pp. 183–184). Conflicts over values in spatial planning are more likely to result in court proceedings, where the Senate decides the outcome (Aubert, 1973, p. 182). This highlights the importance of courts in agonistic planning due to their frequent involvement in conflicting planning procedures and their ability to be seen as actors that contribute to a legally binding resolution of conflicting interests and conflicting values.

To clarify the role of values in judgments, it is necessary to deal with the connection between values, law, courts and judgments: Values are part of the human organisational capabilities that make social life possible. They are cognitive expressions of basic human needs: Biologically based needs, social interaction requirements, and institutional requirements for the common good and survival (Schwartz & Bilsky, 1987, p. 551). They shape personal action and have a supra-individual effect due to their institutional integration and formalisation, such as in planning law within the German legal system. Here, values are anchored in the form of universal goals of the society and serve the common good (Astolfi, 2020, p. 185).

Planning law is a medium between individuals and the state, providing a normative framework for planning action (Astolfi, 2020, p. 222). It also serves a socio-orientation and conflict-solving functions (Astolfi, 2020, p. 141).

However, the value system that shapes the legal and planning laws is not conflict-free. Conflicts can arise due to differences in the definition and prioritisation of values. For example, justice is an essential value for both the planning discipline and civil society, but its interpretation may vary among actors involved in a planning project (Winkler & Duminy, 2016). Additionally, conflicts may arise on achieving existing values, such as the ongoing debate on mobility turnaround. The repositioning of values within the system can also cause distortions and raise questions about how quickly social changes are reflected in planning law. Environmental protection, for instance, became more important over time but was preceded by a prolonged societal debate (Albers & Wékel, 2021, p. 66). Overall, values in planning law are normative, serving as a medium between

individual goals and the common good. However, conflicts may still arise due to differing interpretations and repositioning of values within the system.

Against an agonistic planning background, it would be interesting to take a closer look at this negotiation. However, in this article, we first want to find out which values can be found in the judgments and how this affects the conflict resolution function of courts. Therefore, an explorative study from Germany follows in the next section to better understand the role of values in judgments for conflict resolution after planning processes without consensus.

4 Empirical study on the role of values in judgments

The paper takes the lack of empirical studies as an opportunity to study the role of courts and values in planning processes in Germany. This study aims to answer the following questions: Which values do courts consider when making decisions? How do they balance and resolve conflicting values favouring the common good? What role do the courts play in planning processes?

4.1 Methodology

A qualitative analysis of judgements was conducted to present the values in judgements on conflicting planning processes (Coffey, 2014). The sample comprised 94 judgements obtained through the Beck-Online case law database. Only judgements from 2004 to 2022 were analysed to reflect the perspectives on contemporary legal value. The analysis included different spatial contexts and instances (see Table 1).

The sample used for the study only included a few decisions from the Federal Administrative Court ($n = 4$), which has a unique role as a guiding influence for lower courts (see Figure 1). The majority of decisions included in the sample were from the Higher Administrative Courts ($n = 51$) and Administrative Courts ($n = 39$) (see Table 1). The focus was on land-use plans and appeals against building permits, representing everyday planning decisions made nationwide. Out of the 94 research judgements, owners generally filed the lawsuits, but only 25 were classified as successful by the Senate, which means that the owners won the case. The courts rejected the majority of the applications.

The analysis focused on the values mentioned in the reasoning of the judgements, as this is where the courts' value orientation is most apparent. The methodology is based on Kuckartz's (2016, pp. 97–121) qualitative content analysis with structured content analysis formed deductively and inductively using MAXQDA software.

Table 1. Overview of the sample: Court levels and the number of selected judgements. *Source:* own representation.

Court	Quantity
Federal Administrative Court	4
Higher Administrative Court	51
Administrative Court	39

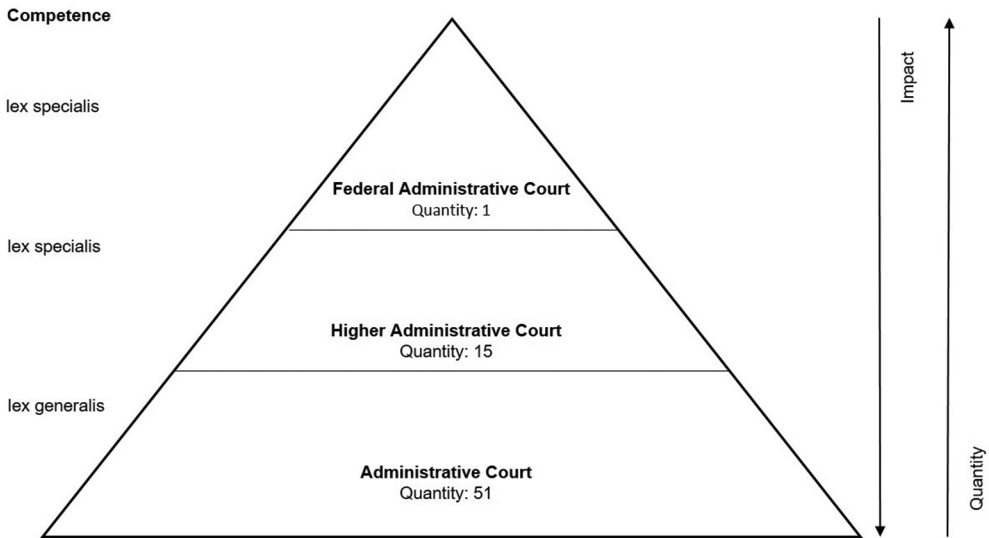


Figure 1. Administrative courts in Germany: Relationship between number of courts and impact of the court levels. *Source:* own representation.

The analysis is based on Schwartz's (2012) value model, with values oriented towards the target state formulated as subjects (terminal values) and values describing behaviour patterns expressed as adjectives (instrumental values). The value lists were supplemented with values from the Codes of Ethics of Canadian (Canadian Institute of Planners, 2016; American Planning Association ed., 2021) and (Royal Town Planning Institute Ed, 2001) planning associations and inductively supplemented or specified with further values from judgements, as no comparable framework paper exists for Germany. A multi-stage procedure was used to code judgements, with individual terms and text passages marked. Coding is subject to interpretation. For better comprehensibility, bold marks identified values or identifiers, such as 'not objectionable' for the instrumental value 'competent'.

4.2 Results

4.2.1 Which values do courts consider when making their decisions?

The data collected empirically indicates that values are present in all examined judgements. As discussed in the broader discourse on planning theory, it is helpful to differentiate between processual and substantive dimensions to analyse planning processes (Wiechmann, 2018). This means that there are values related to the planning process itself and those aimed at its results.

In Chapter 4, it was explained that values can be expressed in nouns (e.g. health and common good) and adjectives (e.g. comprehensible and influential). Based on these theoretical assumptions, instrumental values are more relevant to processual dimensions of planning, while terminal values are more applicable to the substantial planning dimension. Thus, a distinction is made between processual and substantial values in the following (refer to Figure 2): Processual values ensure that the correct procedures are



Figure 2. Visual representation of values' frequency | In blue: procedural values, in green: substantial values | The more frequently a value could be identified, the larger it is shown. (Source: own representation).

followed in planning. Courts use these values to justify their decisions in case of conflicts related to procedural rules. Plaintiffs in such cases usually cite formal errors as deficiencies.

The Senate follows the principle of the rule of law when assessing the expressed deficiencies. It determines whether the accused planning authority has adhered to and implemented legal requirements correctly. The values emphasised during this examination include 'comprehensible', 'competent', and 'obedient' in the sense of conforming to legal requirements. Figure 2 highlights the significant role of these processual values, often used in combination. A decision is considered comprehensible and competent when it complies with legal requirements (as shown in italics):

The circumstance objected to by the applicants that the decision on the preparation of the land-use plan does not contain any reference to the preparation of *the land-use plan in an accelerated procedure according to § 13a BauGB* is also **not objectionable**. (Bebauungsplan_OVG Bautzen_2019_08_22, p. 20).

The development plan did not **violate procedural or formal requirements** under land law. (Bebauungsplan_OVG Bautzen_2019_08_22, p. 14).

Furthermore, concerning the applicant's argument that there are already high levels of particulate matter and nitrogen oxide pollution near the planning area, the respondent **comprehensibly** states that the data on T. . . Street from the 2011 Clean Air Plan used by the applicants cannot be taken as a basis due to the distance and the lack of up-to-dateness. (Bebauungsplan_OVG Bautzen_2019_08_22, p. 19).

As demonstrated in the previous example, the Senate considers concrete spatial conditions and the local administrative context in its examination. The term 'situativity' is also relevant in judicial decisions concerning the comprehensibility and competence of the criticised planning procedures. Therefore, the courts rely on procedural values to justify the actions of the planning authority or to reprimand it if they believe that legal regulations have been breached.

In contrast to procedural values, substantive values do not describe behaviour patterns but rather the social goals themselves. They are mentioned less frequently in court judgements, but specific values are emphasised more than others (Figure 2). Environmental protection and nature conservation, being strongly oriented towards the common good and having gained social and professional significance in recent decades, warrants further examination of the normative design in court judgements. The value of ‘common good’ is associated with nature conservation concerns and emission control law. In the former case, it is linked with the value of ‘unity with nature’ as shown in the following example where values are expressed in the Federal Nature Conservation Act (highlighted in italics below):

However, regarding the red kite, the project violates *species protection prohibitions* (§ 44 IBNatSchG) and thus conflicts with *nature conservation concerns within the meaning of § 35 III 1 No.5 BauGB*. (Wind Energy_VG Aachen_2021_03_12, p. 6)

In contrast, the value ‘common good’ is paired with ‘health’ in the second case. This is evident, for instance, in the court’s references to immission control laws (highlighted in italics below):

The commercial uses must comply *with the noise guide values for commercial areas*. (Bebauungsplan_VGH München_2021_05_10, p. 15)

The divergent associations underscore the distinct protection concerns: the first prioritise the preservation of the natural environment, while the second prioritise safeguarding the human living environment. The court rulings emphasise both objectives intensely. The court’s consideration of which values to balance against or amongst each other further demonstrates this point. In the following, we will focus on the substantive values due to their more significant spatial influence.

4.2.2 How do courts balance and resolve conflicting values favouring the common good?

Conflicts arising from immission protection are highly relevant in planning projects, particularly concerning noise pollution caused by wind turbines and traffic (Dillmann *et al.*, 2018). This indicates that values such as ‘health’ and ‘environmental protection’ are currently considered significant in society. However, conflicts arise when the perspectives of owners and planning authorities differ significantly, leading to legal disputes. In such cases, the court is challenged to weigh different values or value concepts against each other to promote the common good, which can be understood as the welfare of society as a whole or the public interest. The concept of the common good plays a vital role in urban and spatial development (Gailing & Moss, 2018). As all values incorporated in planning law ultimately aim to benefit the general public (as discussed in Chapter 3.2), it is crucial to determine how they are prioritised in cases of conflict.

The court rulings demonstrate that although environmental protection aspects may be rejected in some individual cases, environmental concerns are generally viewed as promoting the common good in planning procedures. Consequently, the courts urge planning authorities to consider them adequately in the planning process. Environmental assessment has become a common practice in preparing urban land use plans since 2004

(Albers & Wékel, 2021, p. 68). In this example, the references to the environmental protection report (highlighted in italics below) are viewed as indicative of the value of ‘protecting the environment’:

In the opinion of the respondent [*the authority drawing up the plan*], the requirement to prepare such an [*environmental report*] is merely a mere formality. *The environmental report* would only consist of a cover sheet and would otherwise be without content. [...] However, *the environmental report also serves to document such a result as an indispensable part of the justification of the development plan*. It is precisely not a matter of mere fiddling. (Bebauungsplan_VGH München_2021_03_04, p.5–6)

The negative attitude of the planning authority towards the environmental report remains unclear. However, the authority does not view the report as effective. Thus, it can be inferred that they do not place the same value on environmental protection as the legislator intended. This example highlights how value conflicts can arise in planning procedures and the challenges faced by spatial planning. Planners not only navigate different interpretations of assertions and opinions, but their values can also lead to conflicts if they do not align with societal values (Pløger, 2004, p. 83).

However, conflicts of value more commonly arose between property owners and the planning authority or planning law. Often, the issue is centred around property value (in the sense of market values, i.e. money), limited by planning law. The courts have consistently recognised the high value of property. This is evident, for instance, in a weighing process where the court references the Basic Law and established case law (highlighted in grey below) and underscores the significance of the value of ‘property’ by merging it with the values of ‘obedience’ and ‘property’ (highlighted in bold below):

This is because **property**, which is guaranteed by *Article 14 of the Basic Law*, is prominently one of the **concerns to be taken into account by urban land use planning** (cf. *BVerwG, judgement of 23 November 2016–4 CN 2/16–, BVerwGE 156,336 and juris, marginal no.12*). (Bebauungsplan_OVG Koblenz_2020_06_24, p. 10)

Nonetheless, this does not imply that property in planning law is synonymous with the value of unbounded liberty. Instead, property in planning law is associated with the value of bounded freedom. Property owners’ ability to dispose of their land freely is curtailed in planning law if this limitation serves the public interest (Albers & Wékel, 2021, p. 64). As a result, in a dispute, the court dismisses economic interests, thereby devaluing the value of ‘wealth’ (highlighted indicators in bold below) in this instance:

This is because **no right to the best possible use of property** can be derived from the guaranteed content of the property guarantee. In principle, **a reduction in economic efficiency is to be accepted just as much as a deterioration in the prospects for exploitation** (BVerwG judgement of 16 March 2006–4 A 1075.04, BVerwGE 125, 116 marginal no. 402 with further references). (Windenergie_BVerwG_2019, p. 3)

The examples demonstrate that courts have played a corrective role in upgrading or downgrading specific values, impacting the planning process. Not only have courts fulfilled their role in providing guidance, but they have also been instrumental in resolving conflicts. The judgements have also shed light on other aspects of the role played by courts.

4.2.3 What role do the courts play in planning processes?

Several aspects relate to the role of courts in planning procedures. First, the question of their neutrality arises. Second, it is important to consider to what extent they provide their assessments of content and conflicts. Finally, it is important to determine whether they perceive their role as that of moderators, mediators, or decision-makers.

Chapter 4 explained that most complaints filed by owners were rejected by courts, accounting for approximately 73%. This suggests that the courts tend to side with the planning authorities.

The courts' support for planning authorities is evident, particularly when assessing the consideration under §1 para. 7 BauGB, as discussed in Chapter 4. As previously mentioned, the courts evaluate the administration's procedure as 'competent', 'comprehensible', and 'obedient'. However, the idea that the courts are taking over and potentially replacing the weighing process (as proposed by Merkel in Chapter 3.1) cannot be confirmed based on the analysed sample. While the data indicates that the consideration processes of the administration are examined for potential deficiencies, the courts only address the deficiencies mentioned in the complaint and do not repeat the entire weighing process. The judgements demonstrate that the courts rely on established case law and expert opinions in the interest of separating powers, indicating their confidence in the institutions involved.

Despite being decision-makers, courts often take a moderate stance in the weighing process by combining the value of 'moderate' with the values of 'obedient' and 'competent' to avoid extreme attitudes. An example of this can be seen in the following excerpt, in which the Senate outlines the criteria for moderately identifying nature conservation concerns. The value of 'moderate' is reflected through the interaction of the highlighted indicators:

It is neither actually possible nor legally required to completely depict a natural area's 'true' stock of flora and fauna. Since we are dealing with the occurrence of living organisms and plants, constant changes must be expected over the course of time. (Bebauungsplan_OVG Münster 2019_06_18)

The courts also strongly emphasise the value of 'choosing one's own objectives' in their reasoning regarding the planning authority. The following reference exemplifies this:

The term 'basic planning principles' is used in the law to describe the basic concept of an urban land-use plan as determined by the main objectives of the planning. What counts as the primary planning concept is assessed in each case according to **the planning intention of the municipality** expressed in the land-use plan. (Bebauungsplan_VG Osnabrück_2011_04_30, p. 5)

Therefore, the court rulings reinforce the idea of local self-governance rather than taking on the responsibilities of the planning authority.

5 Discussion and outlook

This explorative study examined the role of values in judgements on conflicting planning processes to better understand the courts' role in conflict resolution. The analysis of judgements revealed that procedural values are highly significant and are considered

a minimum requirement that cannot be weighed against other values, especially substantive values. However, the courts weighed up substantial values.

This analysis suggests that values serve two central functions in the judgements: First, values help the court resolve conflicts in individual cases. Second, values legitimise judicial decisions by orienting them towards the common good of society rather than private interests. This is evident in the courts' greater tendency to follow the arguments of administrations over those of private plaintiffs. Thus, these findings suggest that the role of the courts is that of a moderating decision-maker. These findings have implications for the planning research and the debate on agonistic planning.

This paper argues that adapting political science's model of agonistic pluralism provides important impulses for the international and German planning theory debate. The approach of agonistic planning recognises the need to settle planning conflicts in clearly defined democratic rules rather than postponing them through early consensus.

However, the article suggests that considerable efforts are still needed to make this approach fruitful for planning practice, particularly considering the specific institutional aspects of spatial planning and the national specifics that provide implicit and explicit mechanisms for dealing with planning conflicts.

In this context, courts are essential actors, as an increasing proportion of planning procedures end up in court. Although agonistic planning aims to avoid hardened fronts, the article argues that the role of courts in conflict resolution seems complicated to reconcile with principles of agonistic planning, as their function is to decide on conflicts rather than being part of the conflict resolution process among equals. Maybe this is precisely why they should be included in the debate. Their legally binding decisions can be seen as powerful value judgements whose concrete effects on hegemonic relations should be analysed. This leads to a second aspect that could be given more significant consideration in the debate on agonistic planning.

In reviewing the literature, only a few articles were found on the association between agonistic planning and the role values in planning. However, dealing with conflicts in an offensive way first requires a distinction between conflicts of values and conflicts of interest and, above all, a differentiated assessment of the interpretation and role of different values. The distinction between procedural and substantive values is central to spatial planning; the orientation towards the common good can be seen as a particularly relevant value for spatial planning, the interpretation of which, however, is always context-dependent and subject to social negotiation.

The exploratory nature of the empirical study helped shed light on some aspects of the role of courts, their value patterns, and the mechanisms used to weigh them. However, larger samples and process-oriented studies would be necessary to provide a more nuanced response to the questions posed. From a social sciences, planning sciences, and legal sciences perspective, it would be beneficial to analyse the value-based interpretation of undefined legal terms. Given the time and location-dependent nature of values, studying the evolution of specific interpretations would make sense. It is also essential to determine how changing social values are incorporated into planning law and jurisprudence and how these changes affect day-to-day planning. Similarly, an investigation into the impact of court decisions on the arguments of planning authorities and subsequently filed individual appeals could promote a deeper understanding of the role of courts in planning processes.

Given the institutional-legal framework, it seems unlikely that the agonistic planning approach will fundamentally alter the role of the courts as moderating decision-makers. As a result, it is not surprising that this institutional actor has largely been ignored in the context of agonistic planning. Anyway, the agonistic planning paradigm can set new impulses for innovative planning formats, such as mediation procedures (Kühn, 2021, p. 148).

There are similarities between agonistic planning and mediation, where conflicts are resolved through a rule-based approach without judgements. However, it is surprising that the role of mediators has not been evaluated in the antagonistic planning approach. Mediators are more compatible with the agonistic planning model than judges because they help de-escalate conflicts and enable the parties to resolve them. Mediation primarily supports the process of reaching an understanding, similar to moderation. However, mediators can also propose concrete solutions to the conflict, but the decision on which solution to implement is left up to the conflict parties. While moderators are suitable for processes with a low degree of conflict and are more aligned with the communicative planning model, the role of the mediator is appropriate for supporting processes of agonistic planning. Mediation procedures in countries like Germany are possible instruments to avoid court procedures. They were discussed more intensively in the early 2000s (Hammacher *et al.*, 2008) than nowadays, especially for certain significant infrastructure cases, like airports in Frankfurt (FORUM Ed, 2024) and railway stations in Stuttgart (Lorenz, 2019).

Although they can reduce conflicts in certain situations, they pose some planning challenges: They induce costs, and their results, in general, are not legally binding but only politically. Therefore, it is uncertain if they will survive political changes. A small lobby exists (Bundesverband Mediation Ed, 2024) and a small market for mediation in planning procedures. However, exact definitions are unclear (Lorenz, 2019), and only a few systematic research exist under which circumstances this instrument could be successful and, therefore, could be firmly anchored in the planning system. Nevertheless, perhaps the debate about agonistic planning can revitalise interest in mediation processes. This would be desirable, as they have the potential to address values in planning conflicts more transparently and thus contribute to a constructive approach to values.

The article discussed how social values could be reflected in court judgements. Nevertheless, the reverse could be another interesting question for further research: how might a court decision affect the arguments made by planning authorities and individual complaints submitted later?

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