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**Preliminary remark:** At the Faculty of Law of Universitas Gadjah Mada the courses are shared by several lecturers. This table informs about the contents of my lectures on 08.11., 10.11., 15.11. and 17.11.2021. They complement those of my colleagues from the comparative perspective with a focus on German law.

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More information on this course contribution at [www.thomas-schmitz-yogyakarta.id](http://www.thomas-schmitz-yogyakarta.id). For any questions, suggestions and criticism please contact me in my office (Building A, room A.IV.11), via WhatsApp or via e-mail at [tschmit1@gwdg.de](mailto:tschmit1@gwdg.de).

## Legal provisions in English translation

### Basic Law for the Federal Republic of Germany (excerpts)

#### Art. 1(3)

The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

#### Art. 19(4)

Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts...

#### Art. 20(3)

The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

#### Art. 45b

A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the Armed Forces. Details shall be regulated by a federal law.

#### Art. 83

The Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.

#### Art. 84

(1) Where the Länder execute federal laws in their own right, ...

(3) The Federal Government shall exercise oversight to ensure that the Länder execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest Land authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

(4) Should any deficiencies that the Federal Government has identified in the execution of federal laws in the Länder not be corrected, the Bundesrat, on application of the Federal Government or of the Land concerned, shall decide whether that Land has violated the law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court. ...

#### Art. 85

(1) Where the Länder execute federal laws on federal commission, ...

(3) The Land authorities shall be subject to instructions from the competent highest federal authorities. Such instructions shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent. Implementation of the instructions shall be ensured by the highest Land authorities.

(4) Federal oversight shall extend to the legality and appropriateness of execution. For this purpose the Federal Government may require the submission of reports and documents and send commissioners to all authorities.

#### Art. 114(2)

The Federal Court of Auditors whose Members shall enjoy judicial independence shall audit the accounts and examines the management of the budget and the conduct of business as to economy and correctness. ... In addition to the Federal Government, it shall annually report directly to the Bundestag and the Bundesrat [Federal Council]. In all other respects, the powers of the Federal Court of Auditors shall be determined by federal legislation.

## **Code of Administrative Court Procedure (excerpts)**

### Sect. 40(1)

Recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature insofar as the disputes are not explicitly allocated to another court by a federal statute. ...

### Section 42

(1) The annulment of an administrative act (action for annulment), as well as sentencing to issue a rejected or omitted administrative act (action for the issue of an administrative act) can be requested by means of an action.

(2) Unless otherwise provided by law, the action shall only be admissible if the plaintiff claims that his rights have been violated by the administrative act or its refusal or omission.

### Section 43

(1) The establishment of the existence or non-existence of a legal relationship or of the nullity of an administrative act may be requested by means of an action if the plaintiff has a justified interest in the establishment being made soon (declaratory action).

(2) The establishment cannot be requested insofar as the plaintiff may pursue or could have pursued his/her rights by reformatory action or application for an injunction. This shall not apply if the establishment of the nullity of an administrative act is requested

### Sect. 68

(1) Prior to lodging a rescissory action, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings. Such a review shall not be required if a statute so determines, or if

1. the administrative act has been handed down by a supreme federal authority or by a supreme Land authority, unless a statute prescribes the review, or
2. the remedial notice or the ruling on an objection contains a grievance for the first time.

(2) Subsection 1 shall apply mutatis mutandis to the enforcement action if the motion to carry out the administrative act has been rejected.

### Sect. 69

The preliminary proceedings shall begin on the lodging of the objection.

### Sect. 70

(1) The objection shall be lodged in writing within one month after the administrative act has been announced to the aggrieved party, in writing or for the record of the authority which has carried out the administrative act. ...

### Sect. 72

If the authority considers the objection to be well-founded, it shall remedy it and rule on the costs.

### Sect. 73

(1) If the authority does not remedy the objection, a ruling on the objection shall be handed down. This shall be issued by

1. the next higher authority unless another higher authority is determined by law,
2. if the next higher authority is a federal or supreme Land authority, the authority which has issued the administrative act,
3. in self-administration matters the self-administration authority unless otherwise determined by law. ...

(3) The ruling on an objection shall be reasoned, supplemented with a notice on appeals and served. ...

### Sect. 80(1)

(1) An objection ...and an action for annulment shall have suspensive effect. This shall also apply to constitutive and declaratory administrative acts, as well as to administrative acts with a double effect (section 80a).

(2) The suspensive effect shall only fail to apply

1. if public charges and costs are called for,
2. with non-postponable orders and measures by police enforcement officers,
3. in other cases prescribed by a federal statute or for Land law by Land statute ...
4. in cases in which immediate execution is separately ordered by the authority which has issued the administrative act or has to decide on the objection in the public interest or in the overriding interest of a party concerned. ...

(5) On request, the court dealing with the main case may completely or partly order the suspensive effect in cases falling under subsection 2 Nos. 1 to 3, and may reconstitute it completely or partly in cases falling under subsection 2 No. 4. The request shall already be admissible prior to filing of the action for annulment. ...

## **Federal Court of Auditors Act (excerpts)**

### Sect. 1

The Federal Court of Auditors shall be a supreme federal authority and as an independent institution of government audit shall be subject only to the law. Within the scope of its statutory functions, the Federal Court of Auditors shall provide assistance to the Federal Parliament and the Federal Government in their decision making procedure.

## **Federal Budget Code (excerpts)**

### Sect. 90 Substance of Audit

The audit shall examine whether the regulations and principles of adequate financial management have been observed, and in particular whether

1. the Budget Act and the adopted Estimates have been adhered to,
2. receipts and payments have been properly substantiated and supported by vouchers, and whether both the budget and capital accounts have been properly prepared,
3. funds are administered efficiently and economically,
4. functions might be performed with fewer human or material resources, or more effectively by other means.

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concerning § 1 II, III of the course contribution

## Diagram 1

### The mechanisms to control public administration in Germany (overview)

#### A. Non-judicial control

##### I. *Administrative self-control*

- internal control within the sphere of public administration
- 1) **Objection proceedings** [Widerspruchsverfahren] (sect. 68 et seq. CACP)
  - administrative review of the *legality and expedience* of administrative acts (= admin. decisions) by the issuing authority and (except in self-government matters) the superior authority
  - objector must claim that his own rights (not just interests) are concerned
  - objection generally has suspensive effect (admin. act cannot be executed)
- 2) Functional and legal supervision
  - a) **Functional supervision** by the superior authority [Fachaufsicht]
    - review of *legality and expedience*
  - b) **Legal supervision** by the superior authority [Rechtsaufsicht]
    - review of *legality of self-government activities* of authorities enjoying autonomy
    - limited to instruments provided in the law
    - measures can be challenged before administrative court
  - c) Supervision of the execution of federal law by the Länder by the Federal Government (federal oversight)
    - usually legal supervision (with decision by the Federal Council), in some fields functional supervision
- 3) Self-control within the administrative body
  - a) Internal audit
    - general or financial audit
  - b) Self-control by special officers with supervisory or advisory functions
    - e.g. data protection officers, gender quality officers
- 4) Disciplinary supervision of the personal conduct of officers [Dienstaufsicht]
- 5) Soft control by special government commissioners [Regierungsbeauftragte]
  - with advisory, monitory and participatory functions but no decisive powers

##### II. *External control*

- 1) Parliamentary control
  - by the German Bundestag and the parliaments of the Länder
  - in particular via committees of inquiry
  - also via auxiliary institutions, such as ombudsmen (rare) or specialised commissioners
- 2) Financial control by the courts of auditors
  - by the Federal Court of Auditors and the courts of auditors of the Länder
  - financial audit and performance audit
- 3) Soft control by independent federal or Land commissioners [Beauftragte]
  - in particular data protection commissioners

#### B. Judicial control

##### I. *Legal protection by the administrative courts*

- 1) Judicial review of administrative acts upon action for annulment (cf. sect. 42(1), 113(1) CACP)
  - review of the legality of admin. acts
  - legal action generally has suspensive effect
- 2) Adjudication on actions for the issue of an administrative act (cf. sect. 42(1), 113(5) CACP)
  - allowing the citizen to obtain required licenses, permits, approvals etc.

- 3) Adjudication on actions for other performance than the issue of an admin. act
- 4) Adjudication on actions for prohibitory injunction
- 5) Adjudication on declaratory actions (sect. 43 CACP)
- 6) Judicial review of already settled administrative acts (sect. 113(1) phrase 4 analogously)
  - in practice important to prevent similar measures in the future
- 7) Judicial review of sub-legislative legal provisions (sect. 47 CACP)
- 8) Interim protection
  - ordering, where exceptionally missing, the suspensive effect of objections & actions for annulment (sect. 80(5) CACP)
  - interim orders (sect. 123, 47(6) CACP)

## *II. Legal protection by other courts*

- 1) By the ordinary courts in state liability and certain other disputes
- 2) By the fiscal courts in tax and customs disputes
- 3) By the social courts in social security disputes

## *III. Subsidiary protection against human and fundamental rights violations by the constitutional courts and the European Court of Human Rights*

- only after all other legal remedies have been exhausted
- 1) Constitutional complaint to the Federal Constitutional Court for violation of f.r. under the Basic Law
  - 2) Constitutional complaint to the Land constitutional court for violation of f.r. under the Land constitution
  - 3) Individual complaint to the European Court of Human Rights for violation of h.r. under the European Convention on Human Rights and its protocols

concerning § 4 IV Admissibility and well-foundedness of actions before the administrative courts

## Diagram 2<sup>1</sup>

### Prospects of success of a legal action before the administrative court

A legal action before the administrative court will be successful if it is admissible and well-founded, i.e. if it meets all the requirements of the admissibility of the action (A.) and of the well-foundedness of the action (B.).

#### A. Admissibility of the action

A legal action before the administrative court is admissible if it meets all the requirements of admissibility (A.I. - A.IV.).

##### I. Recourse to the administrative courts<sup>2</sup>

- 1) According to special regulations
- 2) According to the general clause of sect. 40(1) CACP<sup>3</sup>
  - for every *public law dispute* of non-constitutional nature not explicitly allocated to other courts by statutory law

##### II. Form of action<sup>4</sup>

- 1) **Action for annulment** (sect. 42(1), 1<sup>st</sup> alternative CACP)
  - plaintiff seeks annulment of an administrative act (= admin. decision)
  - the most common action before the administrative courts
- 2) **Action for the issue of an administrative act** (sect. 42(1), 2<sup>nd</sup> alternative CACP)
  - plaintiff seeks court order to issue a specific administrative act (e.g. a licence, permit, approval)
- 3) Action for performance
  - plaintiff seeks court order to perform a specific administrative action that does not constitute an admin. act (e.g. paying money, providing information)
- 4) Action for prohibitory injunction<sup>5</sup>
  - plaintiff seeks court order to cease and desist from a certain administrative action
  - also possible as preventive action
- 5) Declaratory action (sect. 43 CACP)
  - plaintiff seeks declaratory judgement on the existence/non-existence of a legal relationship or the nullity of an admin. act
- 6) **Action for the establishment of the unlawfulness of a settled admin. act** (sect. 113(1) phrase 4 analogously) ["Fortsetzungsfeststellungsklage"]
  - plaintiff seeks declaratory judgement that an already settled (e.g. executed/fulfilled) admin. act was unlawful
- 7) Application for judicial review of sub-legislative legal provisions (sect. 47 CACP)
  - applicant seeks court decision declaring by-laws or other sub-legislative provisions at local or Land level void

##### III. Special admissibility requirements depending on the form of action<sup>6</sup>

- 1) For an action for annulment or for the issue of an administrative act
  - a) Right to bring proceedings (sect. 42(2) CACP)
    - plaintiff must *claim violation of own rights* by the admin. act or its omission
    - note that *in some other countries only a legal interest* in the proceedings is required!
  - b) **Objection proceedings** before the administrative authorities (sect. 68 et seq. CACP)
    - an obligatory preliminary administrative review of the admin. act (restricted in some Länder)
  - c) One month period for filing the action (sect. 74 CACP)

<sup>1</sup> In Germany, the students in the courses in Administrative Law must study and learn thoroughly this (or a similar) examination scheme and be able to apply it correctly to the individual case. This is to ensure that the law does not remain in the realm of the theoretical but is applied and enforced precisely and correctly in practice. The diagram lists as a "checklist" all the aspects the lawyer needs to think about but many will be unproblematic in the particular case and the lawyer's explanations will be limited to those that are significant.

<sup>2</sup> If there is only recourse to other courts, the administrative court will refer the legal dispute ex officio to the competent court.

<sup>3</sup> Court of Administrative Court Procedure ["Verwaltungsgerichtsordnung"].

<sup>4</sup> It is essential to first determine the relevant form of action (A.II.) because there are special admissibility requirements depending on it (A.III.).

<sup>5</sup> A special case of the action for performance.

<sup>6</sup> In the case solution for an individual case only the specific requirements for the relevant form of action will be discussed.

- 2) For an action for performance or for prohibitory injunction
  - Right to bring proceedings (sect. 42(2) CACP analogously)
- 3) For a declaratory action
  - a) No other form of action available (sect. 43(2) CACP)
  - b) Declaratory interest (sect. § 43(1) CACP)
    - plaintiff needs justified interest in the declaratory judgement (but not to claim violation of own rights)
- 4) For an action for establishment of the unlawfulness of a settled administrative act
  - a) Right to bring proceedings (sect. 42(2) CACP)
    - plaintiff must *claim violation of own rights* by the settled admin. act
  - b) Deadline for objection proceedings not expired before admin. act was settled
  - c) Special declaratory interest
    - recognised case groups: risk of recurrence, vindication (restoration of reputation), preparation of state liability lawsuit, typically short-term settlement preventing judicial review
- 5) For an application for judicial review of sub-legislative legal provisions
  - a) Sub-statutory legal provision submitted to judicial review (cf. sect. 47(1) CACP)
  - b) Right to bring proceedings (sect. 47(2) phrase 1 CACP)
    - applicant must be concerned public authority or *claim violation or imminent violation of own rights* by the challenged provision or its application
  - c) One year period for filing the application (sect. 47(2) phrase 1 CACP)

#### IV. General admissibility requirements

- 1) Jurisdiction of the court
  - subject-matter jurisdiction, local jurisdiction, acting of the right court in the hierarchy of courts
- 2) Requirements concerning the parties involved
  - a) Capacity to sue and to be sued (cf. sect. 61 CACP)
  - b) Capacity to effect procedural acts (cf. sect. 62 CACP)
  - c) Ability to postulate (cf. sect. 67 CACP)
  - d) Action/application directed against the right defendant (cf. sect. 78, 47(2) phrase 2 CACP)
- 3) Proper filing of the action/application (cf. sect. 81, 82 CACP)
- 4) No final judgements or pending of the case elsewhere (cf. sect. 121 CACP)

### B. Well-foundedness of the action

A legal action before the administrative court is well-founded if it meets the specific requirements for the well-foundedness for the relevant form of action (B.I or B.II./III./IV./V./VI./VII.).

#### I. Action for annulment (cf. sect. 113(1) phrase 1 CACP)

- 1) Illegality of the challenged administrative act
  - see my special material "The requirements of the legality of the administrative decisions in German and European law" from the course Administrative Law
  - When solving a practical case, check at this point, in a structured way, all aspects listed in this material in diagram 1. Like that you can solve correctly, precisely and in a transparent way even the most complicated cases!
- a) Legality in form
  - competence, procedure, form
- b) Legality in substance
  - legal basis, choice of the right addressee, general requirements (no violation of legal provisions, proportionality etc.), no incorrect exercise of discretion
- 2) Violation of the rights of the plaintiff by the challenged administrative act
  - otherwise the action is not well-founded, even if the challenged admin. act turns out to be illegal!

#### II. Action for the issue of an administrative act (cf. sect. 113(5) CACP)

- well-founded if plaintiff is entitled to the requested admin. act (= if its omission is illegal and violates his rights)
- in discretionary cases not yet mature for adjudication, court will only hand down the obligation to decide, taking its legal view into consideration (sect. 113(5) phrase 2 CACP)

#### III. Action for performance

- well-founded if plaintiff is entitled to the requested performance (= if its omission is illegal and violates his rights)

#### IV. Action for prohibitory injunction

- well-founded if plaintiff has a right to injunctive relief under public law (= if the prohibited administrative action is illegal and violates his rights)

*V. Declaratory action*

- wellfounded if the alleged legal relationship exists, the contested legal relationship does not exist or the admin. act in question is not only illegal but even invalid (under sect. 44 of the Administrative Procedure Act)

*VI. Action for establishment of the unlawfulness of a settled admin. act*

- 1) Illegality of the challenged settled administrative act
  - see diagram 1 of my special material (→ see above, B.I.)
- 2) Violation of the rights of the plaintiff by the challenged settled administrative act

*VII. Application for judicial review of sub-legislative legal provisions*

- application wellfounded if the challenged legal provision is illegal

# § 1 Introduction

## I. Why do we need control mechanisms for public administration?

- the need to protect the rights of the citizen
- the need to ensure the rule of law in public administration
  - in particular to prevent corruption
- the need to ensure an economical use of the taxpayer's money
- the need to ensure the correct and efficient execution of the government's policies

## II. The plurality of mechanisms to control public administration in modern constitutional states

- see overview in **Diagram 1**
- internal and external control
  - from inside or outside of public administration?
- legal, political, financial and specialised control
  - of legality, expedience, financial accuracy and frugality, or under special criteria?
- "hard" and "soft" control of public administration
  - reversing decisions and giving orders or just criticising and giving advice?
- last but not least: the political control by the public in the democratic discourse
  - by the media as "fourth power" in the democratic state
  - by political parties, social organisations, NGOs and international partners interacting with the authorities and strengthening the role of control institutions

## III. In particular: Judicial and non-judicial control mechanisms

- control by professional judges with the authority of the Third Power or just by other civil servants in superior authorities or auditors or politicians?
- in Germany, non-judicial remedies do not exclude the right of the citizen to have recourse to the courts afterwards
- experience shows that *non-judicial review is more effective if there is the threat of a following review by the courts...*

## IV. Historical backgrounds of the control of public administration in Germany

- strong tradition of rule of law (the concept of → *Rechtsstaat* [negara hukum]) since the 18<sup>th</sup> century
- introduction of independent administrative courts in the 19<sup>th</sup> century
- total decline of rule of law and human rights under the totalitarian regimes of the National Socialists under Adolf Hitler (1933 - 1945) and the Communists (East Germany, 1945 - 1989)
  - however, even then there was still an - often informal - supervisory control by the superior authorities
- very effective implementation of the rule of law and protection of human rights under the Basic Law for the the Federal Republic of Germany of 1949 [= BL]

## V. Legal backgrounds

### 1) Constitutional backgrounds

#### a) **The fundamental constitutional principle of the rule of law** (art. 20(3) BL)

- concretised in detail in a rich constitutional jurisprudence
- some rule of law elements also anchored in special constitutional provisions
- requires effective mechanisms to ensure compliance of public admin. with the law

#### b) **A comprehensive and effective guarantee of fundamental rights**

- fundamental rights as directly binding law (art. 1(3) BL)
- a comprehensive f.r. catalogue which even includes a *general freedom of action*  
- derived from art. 2(1) BL; consequently, every order or prohibition to the citizen constitutes an encroachment on f.r. and, thus, is illegal if it is not justified under the constitution
- the legal remedy of individual *constitutional complaint* against any fundamental rights violation before the Federal Constitutional Court (art. 93(1) no. 4a BL)

#### c) **The fundamental right of the citizen to have recourse to the courts against any violation of his rights by public authority** (art. 19(4) BL)

- usually recourse to the administrative court
- *courts must provide effective legal protection*, including interim relief

### 2) The influence of European Union law

- the supranational integration within the EU is based on law (→ integration through law)  
- therefore, EU cannot tolerate any deviation from its law in the member states
- the compliance of all public institutions in the member states with EU law is thoroughly monitored by the European Commission, to which every citizen can complain
- the European Court of Justice has developed a rich jurisprudence on the duties of the member states to effectively implement and enforce EU law

## VI. Social and cultural backgrounds

### 1) More trust in the courts than in administrative self-control in Germany

### 2) A high degree of professionalism, integrity and actual independence of the judges

- judges highly qualified, even at the lower courts
- almost no risk of corruption
- judges not only *de iure* (cf. art. 97 BL) but also *de facto* independent  
- do not allow any influence of personal relations, political parties, religious groups etc.  
- will not hesitate to enforce the law against any resistance of the government
- administrative judges particularly known for their intellectual independence and often critical approach

### 3) A high readiness of the citizens to bring legal disputes before the court

- citizens strongly determined to fight for the defense of their subjective rights
- citizens often more willing to accept dispute settlements in legal proceedings and based on law
- sometimes both, citizens and authorities may prefer to bring difficult legal questions before the court in order to achieve a sustainable, legally consistent solution
- legal expenses insurances foster litigiousness by covering the financial risk of the legal proceedings

## § 2 Administrative self-control

### I. Administrative review of administrative acts: the objection proceedings

[Widerspruchsverfahren] (sect. 68 et seq. Code of Administrative Court Procedure [= CACP])

#### 1) The functions of the objection proceedings

- protection of the citizen's rights
  - a legal remedy but more simple and cheaper than judicial review
- administrative self-control
  - the admin. authority shall be given the chance to correct wrongful acting itself
- relief for administrative courts
  - therefore a **legal precondition for judicial review**
  - however, in practice many citizens have recourse to the courts if their objection is not successful

#### 2) The scope of administrative review in the objection proceedings

##### a) Review of the legality of the administrative act (= admin. decision)

- see for the requirements of legality the special material from my contribution to the course Administrative Law

##### b) Review of the *expedience* of the administrative act

- something that cannot be achieved by the way of judicial review since the judge is functionally limited to the control of legality
- the admin. act may be repealed for any legitimate reasons of expedience (suitability, practicability, fairness and morality, political reasons, financial reasons etc.)

#### 3) The admissibility of the objection

##### a) Dispute within the jurisdiction of the administrative courts

- only non-constitutional public law disputes (see for details § 4 IV)

##### b) Suitable subject-matter

- dispute about the legality or expedience of an administrative act or of the failure to pass an administrative act applied for (cf. sect. 68 CACP)

##### c) Right of objection

- objector must claim that his rights have been violated (or, in case of review of expedience, encroached on)
  - his *own* rights (not those of friends, family, neighbours etc.) must be concerned
  - his *rights, not just interests* must be concerned

##### d) Objection lodged in writing *within one month* at the concerned authority

(sect. 70 CACP)

##### e) General interest in bringing proceedings

#### 4) The well-foundedness of the objection

- the admissible objection will be successful under the following conditions:

##### a) **Illegality or inexpedience of the administrative act or the failure to pass the administrative act applied for**

##### b) **Violation of the rights of the objector**

- or, in case of review of expedience, encroachment on the rights of the objector (his rights may not be violated but must be affected)

### 5) **The (automatic) suspensive effect of the objection** (sect. 80 CACP)

- in principle, the controversial administrative act cannot be executed until the authority has decided about the objection; where the law provides for exceptions, the citizen may ask the administrative court to order/restitute the suspensive effect
- this is a powerful mechanism to protect the objector's rights - with the risk of detrimental side-effects on the efficiency of public administration or the interests of third parties
  - therefore it has now been restricted, cf. sect. 80, 80a, 80b CACP

### 6) **The course of the objection proceedings and the ruling on the objection**

- if the authority who issued the admin. act does not remedy the objection
  - in matters of self-government (autonomy) it decides itself about the objection
  - in other matters generally the next higher authority decides (sect. 73(1) CACP)
- in some Länder, special commissions are involved or decide on the objection
  - they may even include in some cases ordinary citizens as assessors
- the *rulings* on the objection *must be reasoned*; they often resemble court rulings

### 7) **The future of the objection proceedings**

- in order to save time and financial resources, some Länder abolished the objection proceedings for many or even most cases; however, after some years some partially reintroduced them because they turned out useful to avoid long and costly court proceedings
- the discussion on whether advantages or disadvantages prevail is still going on

## II. **Functional and legal supervision**

### 1) **Functional supervision** [Fachaufsicht]

- review of the *legality and expedience* of administrative action by the superior authority
- the *standard case* in any hierarchically structured public administration
  - e.g. functional supervision by the state authorities of the performance of tasks delegated to counties and communes
- supervisory authority is free to issue instructions; supervised authority must follow
- supervisory measures are internal affairs of public administration and therefore cannot be challenged before the courts
  - except if they encroach on the field of local self-government

### 2) **Legal supervision** [Rechtsaufsicht]

- review of the *legality* (not of expedience!) of administrative action by the superior authority
- in case of *self-government activities* of authorities enjoying autonomy (e.g. local government, universities)
- *limited to the instruments provided in the relevant laws*, such as
  - requiring information
  - formal complaint
  - binding order
  - substitute performance or
  - temporary substitution of institutions by a commissioner
- serves the public interest, therefore no claim of the citizen for intervention
- supervisory decisions are admin. acts that interfere with the right to self-government (cf. for communes and counties art. 28(2) BL) and therefore can be challenged by an action for annulment before the administrative court

- 3) **Special: supervision of the execution of federal law by the Länder (*federal oversight*)**
- a) **Legal supervision of execution of federal law by the Länder in their own responsibility**
- Most federal laws are executed by the Länder in their own responsibility; often, they delegate it to the counties and communes.
  - The Federal Government exercises federal oversight to ensure that the Länder execute the federal laws in accordance with the law. For this purpose it may send commissioners to the highest Land authorities and, with their consent or with the consent of the Bundesrat [Federal Council], also to subordinate authorities (art. 84(3) BL).
  - If the Federal Government identifies deficiencies in the execution of federal law in a Land [*staatsrechtliche Mängelrüge*] and the alleged deficiencies are not corrected, the Bundesrat, on application of the Federal Government or the Land concerned, decides whether that Land has violated the law. Since the Bundesrat consists of members of the Land governments, thus, *competent peers decide* about the issue. The decision may be challenged in the Federal Constitutional Court (art. 84(4) BL).
- b) **Functional supervision of execution of federal law by the Länder on federal commission**
- In some fields, the Länder execute the federal laws on federal commission.
  - In these cases, the Federal Government may regulate the uniform training of the staff. The heads of intermediate authorities shall be appointed with its approval. The *Land authorities* are *subject to instructions* from the highest federal authorities, which are usually addressed to the highest Land authorities, who shall ensure their implementation (art. 85(3) BL). Sometimes, instructions on sensitive political issues cause tensions.
  - This federal oversight extends to legality and expedience. The Federal Government may require the submission of reports and documents and send commissioners to all authorities (art. 85(4) BL).

### III. Other forms of administrative self-control

#### 1) Self-control within the administrative body

##### a) Internal audit

- by independent *internal audit units*
- common for all public institutions but heterogeneous systems and regulations

##### aa) Financial audit [Rechnungsprüfung]

- prescribed for self-governing bodies in the relevant laws

##### bb) General internal audit [Innenrevision]

- usually an audit of efficiency, cost efficiency and financial compliance
- can be a comprehensive audit of compliance (with all kinds of standards)
- see for the federal admin. the *Recommendations for internal audit in the Federal Administration* of 2007 (admin. provisions issued by the Federal Ministry of the Interior)

##### b) Self-control by officers with special supervisory or advisory functions prescribed by law

- e.g. *data protection officers, environmental officers, gender equality officers*
- independent exercise of these functions - no instructions by superiors!

#### 2) Disciplinary supervision [Dienstaufsicht]

- supervision of the *personal conduct* of the individual officer
- "formlos - fristlos - fruchtlos" [informal - no deadlines - vain] - usually not effective...

#### 3) Soft control by *special government commissioners* [Regierungsbeauftragte]

##### a) The phenomenon of commissioners in German law

- a multitude of specialised government commissioners and independent commissioners on federal and Land level
- main fields: data protection issues, migration issues, gender issues, disabled persons issues, IT issues
- advisory, monitoring and participatory functions - but *no decisive powers*
- important role in the public discourse

**b) Examples**

- Federal Government Commissioner for Migration, Refugees and Integration
- Federal Minister of State for Culture and the Media
- Federal Government Commissioner for Information Technology
- Federal Government Commissioner for for Matters relating to Persons with Disabilities
- Lower Saxony Land Commissioner for Migration and Participation
- Lower Saxony Land Commissioner for Persons with Disabilities
- Saxony-Anhalt Land Commissioner for Children and Youth
- Baden-Wuerttemberg Land Commissioner for Animal Protection

# § 3 Non-judicial external control of public administration

## I. Parliamentary control

### 1) Classical parliamentary control

- right to require government members to be present and answer questions, committees of inquiry, decisions on petitions etc.

### 2) Parliamentary control via auxiliary institutions

#### a) Ombudsmen [Bürgerbeauftragte]

- only in the Länder Rhineland-Palatinate, Mecklenburg-Vorpommern, Thuringia and Baden-Wuerttemberg
- mission: to safeguard the rights of the citizens against public authorities (not against judicial power)
- independent (not submitted to instruction or supervision)
- instruments: negotiations, recommendations, reports, participation in the dealing with petitions (→ no own binding decisions)

#### b) Specialised commissioners

- e.g. the Parliamentary Commissioner for the Armed Forces of the Bundestag (→ with website in English)
  - mission: in particular to safeguard the fundamental rights of the soldiers and to inspect the armed forces
  - every soldier has the right to submit a case
  - submitted to general guidelines of the Bundestag but not to individual instructions
- e.g. the Ombudsman for Social Affairs and the Commissioner for Refugee, Asylum and Immigration Affairs in the Land Schleswig-Holstein

## II. Financial control by the courts of auditors

### 1) The Federal Court of Auditors [Bundesrechnungshof]

- first German predecessor in the 17th century in Prussia
- supreme federal authority and *independent body of government auditing*
  - nine audit divisions, 51 audit units, 7 regional audit offices (ca. 1.150 employees)
  - not a court of justice but its members enjoy judicial independence
  - decisions are usually taken as panel decisions
- the mission: *financial audit* (regularity and compliance) and *performance audit* (economy, efficiency, effectiveness) of the federal financial management
  - reports on its findings in *management letters* [Prüfungsmittelungen] that are sent to the audited bodies for comment
  - delivers recommendations in its management letters and in annual and special reports
  - provides advice to the executive and legislative branch
- cooperates with the European Court of Auditors (of the EU) and the Supreme Audit Institutions of other EU member states

### 2) The courts of auditors of the Länder [Landesrechnungshöfe]

- not subordinated but cooperating with the Federal Court of Auditors

### III. Soft control by independent federal or Land commissioners [Beauftragte]

#### 1) Data protection commissioners

##### a) Federal Commissioner for Data Protection and Freedom of Information

- elected by the Bundestag
- supervises and enforces the implementation of the EU General Data Protection Regulation and the Federal Data Protection Act in federal administration
- may give orders and lodge complaints, delivers recommendations, reports and opinions
- has an important role in the public discourse

##### b) **The commissioners for data protection of the Länder**

- elected by the Landtag (Land parliament)
- supervise and enforce the implementation of data protection law in Land administration
- also act in most Länder as supervisory authority to enforce data protection in the private sector

#### 2) Others

- e.g. the Bremen Central Office for the Realisation of Equal Rights for Men and Women

# § 4 Judicial control of public administration in Germany (overview)

## I. The German system of administrative courts

- a system of specialised courts in the field of administrative law in all instances
  - first administrative courts already introduced in the second half of the 19<sup>th</sup> century
- 51 *administrative courts* [Verwaltungsgerichte] as courts of first instance
  - with several chambers of 3 judges; simple matters are often entrusted to judges sitting alone
- 15 *higher administrative courts* [Oberverwaltungsgerichte, Verwaltungsgerichtshöfe] of the Länder as courts of appeal (in some cases court of first instance)
  - with several senates of 3 or 5 judges
- supreme *Federal Administrative Court* [Bundesverwaltungsgericht] in Leipzig as court of review on points of federal law (in some cases court of first and last instance)
  - with currently 54 judges in several senates of usually 5, outside oral hearings 3 judges
- a system building on the professionalism, integrity and independence of the judges
  - highly qualified, well-paid legal professionals who cannot be bribed, committed to their mission to enforce the law effectively against the executive
  - judges not afraid of any government, parliament, influential politicians or political, social or religious pressure groups
  - judges can be young; this is helpful to prevent gerontocracy and entanglement with elites
  - administrative judges not only legally but also intellectually independent; lower courts often show a critical approach and do not follow the jurisprudence of their higher admin. court if they are not convinced by its legal reasoning

## II. Important characteristics of administrative jurisdiction in Germany

### 1) The limitation of the judicial control to the protection of subjective rights

- primary objective is the protection of the subjective (personal) rights of the citizen, not of the objective legal order
- therefore, *legal actions* are generally *only admissible if the plaintiff claims a violation of his own rights* (not just interests); for this, he needs to be directly personally concerned
  - constitutional background: the need to take fundamental rights as directly binding law seriously and the citizen's right to effective legal protection against public authority (cf. art. 1(3), 19(4) BL)
- plaintiff will usually allege violation of one of his fundamental rights
  - if he has been ordered or prohibited to do something he can allege at least a violation of his general freedom of action (art. 2(1) BL)

### 2) A system of legal protection based on different forms of action (→ see infra, IV)

- the requirements for the admissibility and the well-foundedness of a legal action largely depend on the relevant form of action, which depends on the kind of court decision sought (annulment, injunction, declaratory judgement etc.)

### 3) A complicated but effective system of interim legal protection (→ see infra, VI)

- since legal protection is not effective if the administration can create a *fait accompli*
- very complicated but practically important regulations on the *suspensive effect* of objections and actions for annulments (cf. sect. 80 ff. CACP)

## III. The recourse to the administrative courts

- general recourse to the administrative courts *in all non-constitutional public-law disputes* not allocated by statute to other courts (sect. 40(1) CACP)
  - problems to delimit jurisdictions of admin. courts and ordinary courts in detail...
- if plaintiff takes the wrong recourse, the court will refer the legal dispute *ex officio* to the competent court

## IV. The forms of action before the administrative courts

- 1) **Action for annulment** (sect. 42(1), 1<sup>st</sup> alternative CACP)
  - plaintiff seeks the annulment of an administrative act (= admin. decision)
  - the most common action before the administrative courts
  - usually only admissible after an administrative review of the administrative act in objection proceedings (→ see supra, § 2 I)
- 2) **Action for the issue of an administrative act** (sect. 42(1), 2nd alternative CACP)
  - plaintiff seeks a court order obliging the administrative authority to issue a specific admin. act he has applied for (e.g. a licence, permit, approval, statement)
  - usually only admissible following objection proceedings (→ see supra, § 2 I)
- 3) **Action for performance**
  - plaintiff seeks a court order obliging the administrative authority to perform a specific admin. action that does not constitute an admin. act (e.g. paying money, providing information)
- 4) **Action for prohibitory injunction**
  - plaintiff seeks a court order obliging the administrative authority to cease and desist from a certain administrative action (e.g. from providing certain information to others)
  - also possible as preventive action
- 5) **Declaratory action** (sect. 43 CACP)
  - plaintiff seeks a declaratory judgement
    - on the existence or non-existence of a legal relationship or
    - on the nullity of a seriously and evidently unlawful admin. act
- 6) **Action for the establishment of the unlawfulness of a settled admin. act**  
[Fortsetzungsfeststellungsklage] (sect. 113(1) phrase 4 CACP analogously)
  - plaintiff seeks a declaratory judgement that an admin. act which is already settled (e.g. has been executed or followed) was unlawful
  - often to prevent similar measures in the future (e.g. future prohibitions of demonstrations)
- 7) **Application for judicial review of sub-legislative legal provisions** (sect. 47 CACP)
  - applicant seeks a court decision declaring by-laws or other sub-legislative provisions at local or Land level void

## V. Admissibility and well-foundedness of actions before the administrative courts

- see detailed presentation in **Diagram 2**
- the requirements vary in detail, depending on the form of action, but in most cases include that the plaintiff must claim a violation of own rights (for admissibility) and that his own rights must indeed be violated (for well-foundedness); in Germany, the illegality of the contested admin. action alone does not render the legal action successful

## VI. Interim protection

### 1) The suspensive effect of objections and actions for annulment

(sect. 80 et seq. CACP)

- these remedies generally have suspensive effect (sect. 80(1)), meaning that during the proceedings
  - the contested admin. act does not produce legal effects and cannot be enforced
  - the addressed citizen does not need to follow
  - if a third party (e.g. a neighbour) opposes a favouring admin. act (e.g. a license) the favoured citizen cannot make use of it
- there are exceptions, e.g. for police measures or when an authority orders immediate execution in the public interest or an overriding private interest, but in these cases the court may and often does order resp. restore the suspensive effect (sect. 80(2, 5), 80a)
  - in practice, this decision is often more important than the decision on the merits of the case
- the suspensive effect *prevents any fait accompli* and, thus, protects the citizen effectively but can delay the law enforcement against him or bar him from using a legally obtained position for a considerable time
  - therefore, decisions on applications to order or restore the suspensive effect require a thorough balancing of the concerned interests, taking into account the probable prospects of success in the main proceedings

### 2) Interim orders of the administrative court (sect. 123, 47(6) CACP)

- interim protection outside the objection proceedings and actions for annulment
- temporary orders
  - to secure the enforcement of the citizen's rights
  - to arrange provisionally for a contentious legal relationship or
  - to prevent serious disadvantages by possibly unlawful sub-legislative provisions

## § 5 Topics for discussion

- I. What is the impact of social and cultural backgrounds on public administration control?
- II. How to ensure the actual independence of the reviewing institution and the reviewers?
- III. How efficient and how costly is the present system of diversified control?
- IV. Does the plurality of control mechanisms impede administrative work and progress?
- V. How significant is the diversification of control mechanisms for the development and safeguard of an administrative culture strictly based on the rule of law?
- VI. Does a mandatory prior administrative review in objection proceedings enhance or weaken the legal protection of the citizen?
- VII. Is it appropriate to limit the judicial control of public administration to the protection of subjective rights or should it serve more generally to ensure the objective legality of admin. action?
- VIII. How can interim protection find an appropriate balance between securing the rights of the citizen effectively and avoiding abuse?
- IX. Conclusion