

§ 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 act may be repealed for any legitimate reasons of expedience (suitability, practicability, fairness and morality, political reasons, financial reasons etc.)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