

Judicial Review of Administrative Action in Germany

I. Backgrounds

1. The need for judicial control of public administration
 - the need to ensure the rule of law, protect citizens' rights and prevent arbitrariness and corruption in public administration
 - the need to control the executive by professional judges with the authority of the Third Power
 - non-judicial mechanisms² are not sufficient
2. Historical backgrounds
 - German tradition of rule of law (the concept of *Rechtsstaat* [negara hukum]) since 18th century
 - introduction of independent administrative courts in the second half of the 19th century
 - resolute 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)
3. Constitutional backgrounds
 - a fundamental constitutional principle of the rule of law [Rechtsstaatsprinzip] (art. 20(3) BL)
 - concretised in detail in a rich constitutional jurisprudence
 - requires effective mechanisms to ensure compliance of public administration with the law
 - a comprehensive and effective guarantee of fundamental rights [= human rights anchored in the Constitution]
 - f.r. as directly binding law (art. 1(3) BL)
 - an extensive catalogue of f.r. that even includes a *general freedom of action* (art. 2(1) BL)
 - consequently, any prohibition or order to the citizen interferes with f.r. and must therefore be justified under the constitution
 - citizens can defend their f.r. by individual constitutional complaint before the Federal Const. Court (art. 93(1) no. 4a BL)
 - an explicit guarantee - and requirement - of *judicial independence* (art. 97 BL)
 - a **fundamental right to have recourse to the courts** and obtain effective legal protection **against any violation of one's rights by public authority** (art. 19(4) BL)
4. Social and cultural backgrounds
 - more trust in the courts than in non-judicial control in Germany
 - high degree of professionalism, integrity and independence of the judges (see → infra, III.4)
 - high readiness of German citizens to bring legal disputes before the court
 - citizens strongly determined to fight for the defense of their rights
 - citizens often more willing to accept dispute settlements in legal proceedings and based on law
 - sometimes both sides may prefer to bring difficult legal questions before the court to achieve a sustainable, legally consistent solution
 - legal expenses insurances foster litigiousness by covering the financial risk of legal proceedings

II. The German system of administrative courts

- a system of separate specialised courts in the field of administrative law in all instances
 - court system and procedure are regulated in the Code of Administrative Court Procedure (CACP) [Verwaltungsgerichtsordnung]
 - a system sometimes overburdened by the continuous strong flood of lawsuits (esp. → asylum cases)
1. Administrative courts [Verwaltungsgerichte]
 - courts of first instance
 - 51 administrative courts, each with several chambers of 3 professional judges (plus 2 honorary judges in oral hearings); simple matters often entrusted to judges sitting alone
 2. Higher administrative courts of the Länder [Oberverwaltungsgerichte/Verwaltungsgerichtshöfe]
 - courts of appeal, in some cases of first instance
 - 15 higher administrative courts, each with several senates of 3 or 5 judges
 3. Federal Administrative Court in Leipzig [Bundesverwaltungsgericht]
 - a supreme court of review on points of federal law, in some cases court of first and last instance
 - with currently 55 judges in several senates of usually 5, outside oral hearings 3 judges

III. Important characteristics of administrative jurisdiction in Germany

1. The limitation of judicial review 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
 - **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
 - usually he will claim a violation of one of his fundamental rights (often of his general freedom of action)
 - only two exceptions (see infra, V.5/7)

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² Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

2. A system of legal protection based on different forms of legal action
 - the requirements for both, 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.)
 - some forms of action are regulated in the CACP, others have been developed in jurisprudence
 - the most important forms of action focus on *legal protection against administrative acts (= administrative decisions)*³, the central legal concept in German administrative law
3. A complicated but effective system of interim protection (see → infra, VI.)
4. Last but not least: 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

IV. The recourse to the administrative courts

- general recourse to the administrative courts in all non-constitutional public-law disputes not allocated by special statutory law to other courts (sect. 40(1) CACP)
 - demarcation between public and civil law and thus administrative and ordinary jurisdiction can be intricate
- if plaintiff takes wrong recourse, the court will refer the legal dispute ex officio to the competent court

V. The forms of legal action before the administrative courts

1. *Action for annulment of an administrative act* [Anfechtungsklage]⁴ (sect. 42(1), 1st alternative CACP)
 - plaintiff seeks the annulment of an admin. act - the most common action before the administrative courts
 - usually only admissible, within one month, after an administrative review of the admin. act in *preliminary objection proceedings* (sect. 68 et seq. CACP)
 - well-founded if the challenged admin. act is illegal (unlawful) and actually violates the plaintiff's rights
2. *Action for the issue of an administrative act* [Verpflichtungsklage]⁵ (sect. 42(1), 2nd alternative CACP)
 - plaintiff seeks a court order obliging the administrative authority to issue a specific administrative act he has applied for (e.g. a licence, permit, approval, statement)
 - admissible under equivalent conditions as for the action for annulment
 - 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, the court will only hand down the obligation to decide, taking its legal view into consideration (sect. 113(5) phrase 2 CACP)
3. *Action for performance*
 - plaintiff seeks a court order obliging the administrative authority to perform a specific administrative action that does not constitute an administrative act (e.g. paying money, providing information)
 - well-founded if plaintiff is entitled to the requested performance (= if its omission is illegal and violates his rights)
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
 - well-founded if plaintiff has a right to injunctive relief under public law (= if the prohibited administrative action is illegal and violates his rights)
5. *Declaratory action* (sect. 43 CACP)
 - plaintiff seeks a declaratory judgement on the existence or non-existence of a legal relationship or the (exceptional) nullity of a seriously and evidently unlawful admin. act
 - admissible only if there is no other form of action available, but in this case not only if plaintiff claims violation of own rights but also if he has a justified interest in the declaratory judgement (declaratory interest)
 - well-founded 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 (= APA))
6. *Action for the establishment of the unlawfulness of a settled administrative 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
 - only admissible if deadline for objection proceedings had not expired before admin. act was settled

³ In German admin. law, a "Verwaltungsakt" ["administrative act" or "administrative decision"] is a unilateral decision taken by a public authority to regulate an individual case in the sphere of public law and intended to have a direct external legal effect (on the citizen). The German term draws on the French term "acte administratif" but is limited to decisions on individual cases. In English usage, in Europe mostly the term "administrative act" but also the term "administrative decision" is employed.

⁴ Sometimes also translated as "rescissory action".

⁵ Sometimes also translated as "enforcement action".

- only admissible if plaintiff has a *justified special interest in the declaratory judgement*; recognised case groups:
 - prevention of similar measures in the future (e.g. future illegal prohibitions of demonstrations)
 - short-term settlement, which is typical for such measures, has prevented a timely action for annulment
 - vindication (restoration of the plaintiff's good reputation)
 - preparation of a lawsuit for state liability
- well-founded if the challenged admin. act was illegal (unlawful) and actually violated the plaintiff's rights

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
- admissible within one year after publication of the challenged provision if this kind of sub-statutory law is submitted to judicial review (details regulated in sect. 47 (1))
- application cannot only be submitted by citizens claiming violation of their own rights but also by any concerned public authority (sect. 47(2) phrase 1)
- this remedy played an *important role in the legal protection against Covid-19 restrictions*, since they were usually imposed by corona ordinances (executive regulations) of the Land governments

VI. Interim protection by the administrative courts

1. The suspensive effect of actions for annulment (sect. 80 et seq. CACP)

- actions for annulment against administrative acts and also the preliminary objections before the administrative authorities generally have an *automatic* 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
 - a favoured citizen cannot make use of it if a third party (e.g. a neighbour) is opposing it
- there are exceptions, e.g. for police measures or when an authority or the court orders immediate execution in the public interest or an overriding private interest, but in these cases the court may and often does order or restore the suspensive effect (sect. 80(2, 5), 80a CACP)
- 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; in practice, they are often more important than the decision on the merits of the case

2. Interim orders of the administrative courts

- in cases not related to the contestation of an admin. act, interim protection is provided by *temporary orders*
 - to secure the enforcement of the citizen's rights (sect. 123(1) phrase 1 CACP)
 - to arrange provisionally for a contentious legal relationship (sect. 123(1) phrase 2 CACP) or
 - to prevent serious disadvantages by possibly unlawful sub-legislative provisions (sect. 47(6) CACP)
 - important in the legal protection *against the Covid-19 restrictions*

VII. On the scope of judicial review

1. Review of legality, not expedience of administrative action

- a consequence of separation of powers
- considerations of expediency (usefulness, appropriateness, practicability, fairness and morality, political reasons, financial reasons etc.) are outside the competence of the judiciary
- therefore *no review of "good governance"*, which is basically a political, not legal concept
 - most g.g. principles are unsuitable as legal principles because they cannot be applied objectively and precisely by courts

2. An elaborate system of elements of legality of administrative action

- a comprehensive rational and logically structured system of elements of legality
 - not regulated in the law but developed by jurisprudence and scholarly doctrine
- no numerus clausus of "grounds of review": in principle, the missing of *any* element of legality renders the administrative measure unlawful and thus will result in its annulment resp. prohibition
 - as an exception, defects in procedure and form are irrelevant if they are subsequently corrected or have obviously not influenced the authority's decision (cf sect. 45, 46 Admin. Procedure Act)

a) Elements of legality in form (→ external aspects)

aa) Competence

- subject-matter jurisdiction, local jurisdiction and hierarchical jurisdiction of the acting authority

bb) Procedure

- no violation of general or special procedural requirements
- in particular *hearing of participants* and allowing inspection of files (sect. 28, 29 APA)
- in particular no involvement of relatives a.o. close or potentially biased persons (sect. 20, 21 APA)

cc) Form

- in particular written or electronic form where legally required
- in particular *statement of reasons* for admin. acts (sect. 39 APA)

b) Elements of legality in substance (→ internal aspects)

aa) Legal basis

- necessary for any interference with fundamental rights
- must be valid and applicable (no violation of higher law)

- bb) Choice of the right addressee
 - a sensitive question in public security and environmental law
 - for example, police must not take measures against victim but aggressor
 - dogmatically a special problem of the correct exercise of discretionary power
 - cc) General requirements of legality in substance
 - no violation of any (other) general or special applicable norm
 - in particular *proportionality of the measure* [Verhältnismäßigkeit]: legitimate aim, suitability, necessity and proportionality in the strict sense (burden not out of proportion to aim in view)
 - in particular no (other) violation of fundamental or human rights, sub-principles of the rule of law or other constitutional principles
 - dd) No incorrect exercise of discretion
3. Restricted review of discretionary decisions
- a sophisticated doctrine for reviewing admin. measures for *incorrect exercise of discretionary power* [Ermessensfehler] that differs significantly from corresponding doctrines in other countries
 - case groups of incorrect exercise of discretion: non-exercise of discretion, exceeding of discretionary power and abuse of discretion (wrongful determination of facts, extraneous considerations, basic deficits in the reasoning, unproportionality, unequal treatment of cases, choice of wrong addressee, violation of fundamental rights or constit. principles)
 - basic distinction between *discretion* [Ermessen], which is granted as legal consequence in a legal provision, and the *margin of appreciation* [Beurteilungsspielraum] in the interpretation of *indefinite legal concepts* [unbestimmte Rechtsbegriffe] in legal provisions, such as "public interest" or "public order"

VIII. Conclusion

Further Reading

Cane, Peter; Hofmann, Herwig C. H.; Ip, Eric C.; Lindseth, Peter L.: The Oxford Handbook of Comparative Administrative Law, 2021, p. 697 ff., 857 ff. (for advanced research with a general comparative approach)

Kuhlmann, Sabine; Proeller, Isabella; Schimanke, Dieter; Ziekow, Jan: Public administration in Germany 2021, p. 27 ff., 185 ff., <https://link.springer.com/book/10.1007/978-3-030-53697-8>

Künnecke, Martina: Tradition and Change in Administrative Law, 2007, p. 21 f., 28 ff., 34 ff., 42 ff., 73 ff., 137 ff., <https://link.springer.com/content/pdf/10.1007/978-3-540-48689-3.pdf?pdf=button>

Leithoff, Ralf: Introduction to the Public Administrative Jurisdiction in Germany, Hrvatska Javna Uprava 6 (2006), no. 3, p. 23 ff., <https://core.ac.uk/download/pdf/33276343.pdf>

Pünder, Hermann; Klafki, Anika: Administrative Law in Germany, in: René Seerden (editor), Comparative Administrative Law. Administrative Law of the European Union, its Member States and the United States, 4th edition 2018, p. 81 ff.

Robbers, Gerhard: An Introduction to German Law, 7th edition 2019, p. 67 ff., 107 ff.

Schmidt-Aßmann, Eberhard: General principles of German administrative law, Journal of the Indian Law Institute 35 (1993), no. 1/2, p. 65 ff., <http://www.jstor.org/stable/43952325>.

Schmitz, Thomas: The requirements of the legality of the administrative decision in German and European law, conference materials, German-Vietnamese Law Days 2013, www.thomas-schmitz-hanoi.vn/Downloads/ZDR-Conference_admin-decision_Schmitz2-en.pdf

Weidemann, Lilly: Administrative Procedure and Judicial Review in Germany, in: Giacinto della Cananea, Mauro Bussani (editors), Judicial Review of Administration in Europe, 2021, p. 53 ff.

See also the course materials from my course contribution "Non-Judicial and Judicial Control of Public Administration in Germany" to the course "Oversight of State Administration" at Universitas Gadjah Mada, Semester 1, 2022-2023, http://www.thomas-schmitz-yogyakarta.id/Courses/Control_Public_Administration_Germany.htm

Annex: Legal provisions in English translation

Basic Law for the Federal Republic of Germany (excerpts)

Art. 19(4) [right to have recourse to the courts]

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) [principle of the rule of law]

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

Code of Administrative Court Procedure (excerpts)

Sect. 40(1) [recourse to the administrative courts]

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 [action for annulment]

(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 [action for the issue of an administrative act]

(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

Section 47 [application for review of sub-legislative legal provisions]

(1) The Higher Administrative Court shall adjudicate on application within the bounds of its jurisdiction on the validity of
1. by-laws issued under the provisions of the Federal Building Code [Baugesetzbuch] and of ordinances issued on the basis of sect. 246(2) of the Federal Building Code,

2. other legal provisions ranking below the statutes of a Land, to the extent that this is provided in Land law.

(2) Applications may be made by any natural person or body corporate claiming to have been aggrieved by the legal provision or its application, or that he/she will be aggrieved within the foreseeable future, or by any public authority within one year of announcement of the legal provision. ...

(5) ... Should the Higher Administrative Court come to the conclusion that the legal provision is invalid, it shall declare it to be null and void; in this case, the ruling shall be generally binding ...

(6) On application the court may issue a temporary injunction where this is urgently required in order to avert the creation of serious disadvantages or for other compelling reasons.

Sect. 68 [objection proceedings]

(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. 80 [suspensive effect]

(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. ...

Sect. 113 [decision on action of annulment or the issue of an admin. act]

(1) Insofar as the administrative act is unlawful and the plaintiff's rights have been violated, the court shall rescind the administrative act and any ruling on an objection. ... If the administrative act has been settled previously by withdrawal or otherwise, the court shall declare on request by judgment that the administrative act was unlawful if the plaintiff has a justified interest in this finding. ...

(5) Insofar as the rejection or omission of the administrative act is unlawful and the plaintiff's rights are violated thereby, the court shall announce the obligation incumbent on the administrative authority to effect the requested official act if the case is mature for adjudication. Otherwise, it shall hand down the obligation to notify the plaintiff, taking the legal view of the court into consideration.

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