

## REVIEW MECHANISMS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW

Contribution to the course *Public Policy, Legislation and Review Mechanism*  
from the perspective of comparison of laws

concerning § 3 IV of the course contribution

## Diagram 2

### Forms of action before the administrative courts in Germany

#### Preliminary remarks:

- An action before an admin. court is only admissible if the recourse to these courts is available under sect. 40 CACP<sup>1</sup> or special legislation. Furthermore, some general requirements must be met (see sect. 45 et seq., 61 et seq., 78, 81 et seq. CACP).<sup>2</sup>
- The primary objective of the administrative court proceedings in Germany is the *protection of the subjective rights* (especially fundamental rights) *of the citizen*, not the enforcement of the objective law. This is reflected in the specific admissibility requirements for the different forms of action.

#### A. Action for annulment [Anfechtungsklage] (sect. 42(1) 1<sup>st</sup> alternative CACP)

- plaintiff seeks annulment of an *administrative act* [= admin. decision]
- admissibility requirements:
  - right to bring proceedings [right of action, *Klagebefugnis*]: allegation that the admin. act violates the plaintiff's [own] rights (sect. 42(2) CACP)
  - no actio popularis - actions by registered NGOs only in exceptional cases under special legislation (e.g. in environmental law and animal protection law)
  - preliminary objective proceedings (administrative review) (sect. 68 et seq. CACP)
  - filing of action *within one month* after delivery of the ruling on the objection (sect. 74(1) CACP)
- action is well-founded if the concerned admin. act is illegal *and* violates the plaintiff's rights (cf. sect. 113(1) CACP)

#### B. Action for the issue of an administrative act [Verpflichtungsklage] (sect. 42(1) 2<sup>nd</sup> alternative CACP)

- plaintiff seeks a judgement ordering to issue a rejected or omitted administrative act
- admissibility requirements: corresponding to those for the action for annulment
- action is well-founded if the plaintiff is entitled to the desired admin. act (= if the rejection/ommission of the admin. act is illegal and violates his rights) (cf. sect. 113(5) CACP)
- if in the case of a discretionary decision the rejection/ommission of the admin. act was illegal but the case is not yet mature for adjudication, the admin. court will hand down the obligation of the admin. authority to decide about the admin. act with due regard to the the legal view of the court (cf. sect. 113(5) phrase 2 CACP)

#### C. Action for performance [Leistungsklage]

- plaintiff seeks a judgement ordering to perform an *admin. action not constituting an admin. act*
- admissibility requirement: right of action: allegation that the non-performance of the desired action violates the plaintiff's rights (sect. 42(2) CACP applied by analogy)
- action is well-founded if the plaintiff is entitled to the desired admin. action (= if the non-performance is illegal and violates his rights)

#### D. Action for prohibitory injunction [Unterlassungsklage]

- plaintiff seeks a court injunction ordering the public authority to *refrain from an illegal admin. action* or even to refrain from a *possible* illegal action [vorbeugende Unterlassungsklage]
- admissibility requirements: corresponding to that for the action for performance
- action is well-founded if the activity in question is (resp. would be) illegal and violates (resp. would violate) the plaintiff's rights

<sup>1</sup> *Code of Administrative Court Procedure* [Verwaltungsgerichtsordnung], English translation at [www.gesetze-im-internet.de/englisch\\_vwgo/index.html](http://www.gesetze-im-internet.de/englisch_vwgo/index.html).

<sup>2</sup> See for all the requirements for a successful legal action before the administrative courts (i.e. the requirements for the admissibility and the well-foundedness of the legal action) my comprehensive *examination scheme* (checklist) from an introductory course on practical case-solving in admin. law, [www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz\\_VwR-II-F\\_Schema2.pdf](http://www.iuspublicum-thomas-schmitz.uni-goettingen.de/Downloads/Schmitz_VwR-II-F_Schema2.pdf).

**E. Declaratory action [Feststellungsklage]** (sect. 43 CACP)

- plaintiff seeks a declaratory judgement on the existence of a *legal relationship* (positive declaratory judgement) or the non-existence of a legal relationship (negative declaratory judgement) or the *invalidity* of a seriously and evidently illegal *admin. act* (invalidity declaratory judgement)
- admissibility requirements: no other form of action available (sect. 43(2) phrase 1 - subsidiarity of this form of action), *declaratory interest* (sect. 43(1)) - for this action, no allegation of violation of own rights is required
- action is well-founded if the legal relationship in question exists resp. does not exist or the admin. act in question is invalid (not just illegal!)

**F. Action for the establishment of the unlawfulness of a settled administrative act [Fortsetzungsfeststellungsklage]** (sect. 113(1) phrase 4 CACP applied by analogy)

- plaintiff seeks a declaratory judgement on the unlawfulness of an already settled admin. act (e.g. after it has been executed or followed or the situation leading to it has changed)
  - a remedy important for the legal protection against police measures
- admissibility requirements:
  - right to bring proceedings [right of action, Klagebefugnis] as for an action of annulment (under sect. 42(2) CACP)
  - deadline for a possible objection not missed (if an objection had been possible at all until the expiration of the admin act; an objection against an already settled admin. act is not required)
  - special declaratory interest (danger of recurrence, vindication [restoration of reputation], preparation of a state liability lawsuit, typically short-term settlement preventing judicial review)
- action is well-founded if the expired admin. act was illegal and violated the plaintiff's rights

**G. Application for judicial review of sub-legislative legal provisions [Normenkontrollverfahren]** (sect. 47 CACP)

- claimant seeks a judgement declaring by-laws or other sub-legislative provisions at local or Land level void
- admissibility requirements:
  - non-statutory legal provisions of a kind against which this remedy is admitted (certain by-laws and regulations) (sect. 47(1))
  - right to bring proceedings [Antragsbefugnis]: allegation that this norm or its application violates or will violate within a foreseeable future the plaintiff's rights; furthermore, *authorities concerned* can file the application
  - filing of action *within one year* after publication of the legal norm (sect. 47(2) phrase 1 CACP)
- action is well-founded if the challenged legal provision is illegal