

§ 3 Judicial review of administrative action

I. Historical foundations

- until the 19th century only internal administrative review of the legality of admin. decisions
- in the second half of the 19th century
 - introduction of judicial review of admin. decisions by the French Conseil d'Etat and the Dutch Raad van State [Council of State]
 - introduction of judicial review of admin. decisions by independent specialised administrative courts in Europe, especially in Germany
 - 1873 formation of the Preußisches Oberverwaltungsgericht [Prussian Higher Admin. Court]
- after the Second World War modernisation of judicial review, reorganisation and strengthening of the administrative courts in Germany and other European countries
- in the 90s introduction of admin. courts in some formerly communist European countries
- slow and hesitant development of judicial review by the ordinary courts in the UK and other common law countries

II. Basic models of judicial review of administrative action

1) Judicial review by the ordinary courts

- in most countries, in particular smaller countries and common law countries
- sometimes by special departments within the ordinary courts
- in some common law countries first review by *administrative tribunals* whose decisions can be reviewed by the courts

2) Judicial review by specialised administrative courts

- e.g. in Germany, France, Italy, Austria, Poland, Sweden, Finland, Lithuania, Estonia, Ukraine, Thailand, Indonesia
- in some countries only in the first instance

3) Judicial review by special institutions (councils of state) with advisory and judicial functions

- e.g. in France, Netherlands and Belgium (last instance)

III. Administrative jurisdiction in Europe - the example of Germany

- primary objective: *protection of the subjective rights of the citizen* (in particular fundamental rights), not of the objective legal order
 - constitutional background: right to effective legal protection against public authority (art. 19(4))
- structure: administrative courts [Verwaltungsgerichte], Higher Administrative Courts [Oberverwaltungsgerichte] and (supreme) *Federal Administrative Court* [Bundesverwaltungsgericht]
- *general recourse to the administrative courts in all non-constitutional public-law disputes* not allocated by statute to other courts (sect. 40(1) Code of Admin. Court Proced. [= CACP])
 - problems to delimit jurisdictions of admin. courts and ordinary courts in detail...
- complicated but *effective system of interim legal protection* (sect. 80 ff., 123, 47(6) CACP)
 - in general, objections and actions for annulment have *suspensive effect*; if not, court may order it (sect. 80(1, 2, 5) CACP)
 - in other cases court may issue *interim order* (sect. 123, 47(6) CACP)
 - problem: remedies often misused to profit from the suspensive effect during the long time of the proceedings

IV. Forms of action before the German administrative courts

- each of them with a specific function and specific admissibility requirements
- see for details *diagram 2*
- **action for annulment** of an admin. act (= recissory action) [Anfechtungsklage] (sect. 42(1).CACP)
- **action for the issue of an administrative act** [Verpflichtungsklage] (sect. 42(1).CACP)
- **action for performance** other than issuing an admin. act [Leistungsklage]
- **action for prohibitory injunction** to refrain from illegal admin. action [Unterlassungsklage]
- **declaratory action** [Feststellungsklage] on the existence or non-existence of a legal relationship or the invalidity of a seriously illegal admin. act (sect. 43.CACP)
- **action for the establishment of the unlawfulness of a settled administrative act** [Fortsetzungsfeststellungsklage] (sect. 113(1) phrase 4.CACP applied by analogy)
- **action for judicial review of sub-legislative legal provisions** (sect. 47.CACP)

V. Special problems

- in particular: excessive duration of the court proceedings