§ 14 Judicial control of public administration in Germany

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 19th century
- 51 *administrative courts* [Verwaltungsgerichte] as courts of first instance
  - with several chambers of 3 judges (plus 2 honorary judges in oral hearings); 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 professionality, 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 admissibile 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 seeked (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), 1st 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, § 12 IV)

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, § 12 IV)

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 5**
- 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 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