*Introduction to the Public Administrative Jurisdiction in Germany**

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The essay provides an overview of public administrative jurisdiction in Germany, beginning with the constitutional guarantee of effective legal protection against every act of public power. The guaranteed legal protection is provided by social, financial and – mainly – administrative courts. All of these courts decide in panels with judges whose independence is constitutionally guaranteed as well. The system of administrative courts in Germany is basically a three-instance system (administrative courts, administrative appeals courts, the Federal Administrative Court). Whereas the first two instances decide on law and facts,

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the Federal Administrative Court as a rule decides on (federal) law only. The essay outlines the principles of procedure and the court's examination programmes. It describes the growing influence of administrative courts in Germany and the reactions on the resulting overload of work for the administrative courts.

Key words: administrative justice – Germany, administrative courts, social courts, financial courts, three-instance system

1. Constitutional guarantee of legal remedies against the public power

Article 19 paragraph 4 sentence 1 of the Basic Law (*Grundgesetz* – the German constitution) guarantees a legal remedy against every act of the public power which violates the rights of a person. It reads:

»(4) 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.«

Just to avoid a misunderstanding: Whereas the rulings of judges are acts of the public power themselves these acts are not subject to Art. 19 par. 4 of the Basic Law. The German constitution guarantees protection through judges, not protection against judges. In other words: a second instance is not guaranteed. This will be an important matter as far as the system of the courts is concerned as will be explained later on.

2. Acts of public administration

What are the acts against which a legal remedy is guaranteed? Let us concentrate on the acts of the administration.There are:

- Statutory instruments (*Verordnungen*) (Art. 80 of the Basic Law): legal rules which the administration is entitled to produce instead of the parliament, e. g. a statutory act which defines different categories of dangerous chemical products.
- By-laws (*Satzungen*): legal rules passed by public bodies which have the right of self organisation like towns, organisations for some special professions (doctors, advocates, architects, craftsmen, among others).
- Public administrative acts (*Verwaltungsakte*): rules which are passed by the administration on a single case, e. g. a building permission, the order to tear down an illegal building, the prohibition of a certain demonstration.
- Public administrative contracts (*öffentlich-rechtliche Verträge*), e. g. a contract on the public support of a private school.
- Public administrative acts of fact (*Realakte, schlicht-hoheitliches Handeln*), e. g. the removing of a car from a parking area which is reserved for handicapped drivers.

3. Administrative courts, financial courts and social courts

Legal remedies against all of these acts are mostly provided by the administrative courts (*Verwaltungsgerichte*). In addition, there are two further types of courts which provide legal remedies against acts of public authority: In certain revenue matters, you can sue at financial courts (*Finanzgerichte*) of which one exists in each *Land*; in matters concerning public insurances (like public accident insurance, public pension insurance, public unemployed insurance) you can sue at social courts (*Sozialgerichte*). All of these courts are not mere tribunals but courts with a bench of at least one professional judge, as well as several lay judges. They are totally independent from the administration when deciding on a case.

4. Independence of the judges

The independence of the German judges (*Unabhängigkeit der Richter*) is widely and strongly protected. The fundamental rule is enshrined in the German constitution. Art. 97 of the Basic Law states:

> »(1) Judges shall be independent and subject only to the law.
>
> (2) Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred, or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.«

What does the independence of the judges mean in practical terms? Judges are no civil servants but have a special status. They are well paid – the salary of a first instance judge equals that of a deputy director of a grammar school or of a deputy head of a division of a ministry. After a three-year period at the beginning of their career (*Assessorenzeit/ Probezeit*) the professional judges are appointed for life (*Richter auf Lebenszeit*) and generally cannot be transferred from one court to another one without their consent (*Unversetzbarkeit der Richter*). They have to work as many hours as all the other members of the public service but do not have to do their work in the court building. This means that they can do a good deal of their work at home.

Furthermore, there is a constitutional rule which guarantees that a judge who is in charge of a case is appointed abstractly before a case is filed (*gesetzlicher Richter*). Art. 101 par. 1 sentence 1 of the Basic Law says: »No one may be removed from the jurisdiction of his lawful judge.« Consequently, there are acts which rule precisely which kind of court and which local court of this kind will be in charge. In addition, a judge-made annual plan (*Geschäftsverteilungsplan*) states exactly which judge of the court will be in charge for which cases. This may depend on the legal issue at hand, or on the file number of the case, or on the initial of the plaintiff, or on a combination of all the above. This might look a bit complicated or even sophisticated but it makes sure

that no inadequate interest whatsoever will influence the question of which judge will decide on which case.

5. The system of administrative courts in Germany: three instances

How are the public administrative courts in Germany organised? Germany is a federal republic (*Bundesstaat*). It has got *Länder* like Bavaria, Lower Saxony, North-Rhine Westphalia and Brandenburg, and the federal state, the Federal Republic of Germany. Whereas the power of passing law (*Gesetzgebungskompetenz*) is mainly concentrated at the federal level – most of the German law is federal law – administration and jurisdiction is mainly a matter of the *Länder*. Therefore, one will find one or more administrative courts (*Verwaltungsgerichte*) in every *Land*. In addition to this, there is one administrative appeals court (*Oberverwaltungsgericht/Verwaltungsgerichtshof*) in every *Land*. On top of the pyramid sits the Federal Administrative Court (*Bundesverwaltungsgericht*) which is situated in the City of Leipzig.

In most cases, the administrative courts provide the first instance. There is the usually the possibility of an appeal (*Berufung*) to the administrative appeals court and – if a question of federal law is concerned – of a revision (*Revision*) by the Federal Administrative Court. In certain cases, the administrative appeals courts are the first instance (with the possibility of a revision by the Federal Administrative Court). In very few cases, even the Federal Administrative Court is the first instance. When a court acts as a first instance it always decides on legal questions *and* facts. The judgement which follows an appeal is also a decision on legal questions *and* facts. The revision is a decision on legal questions only. Apart from the cases in which the Federal Administrative Court acts as a first instance court, the court´s main purpose is to guarantee the unity of the administrative jurisdiction all over Germany (*Einheitlichkeit der Rechtsprechung*). As mentioned before, the revision is therefore only provided if the legal question of the case concerns federal law.

The reader might ask why there are generally two instances provided which decide on legal questions *and* facts. This is simply seen as a matter of justice. People are afraid of wrong decisions. This anxiousness is to be seen under two aspects: First of all one has to take into account that in the vast majority of cases, a citizen is the plaintiff and the administration is the defendant. The citizen shall not suffer a wrong judgement which is handed down by an administrative court due to not knowing or misunderstanding the facts of the case. Secondly, a ruling in an administrative matter usually has a broad effect. If an administrative court passes a judgement, it is as a rule legally binding only in that very case. But the administration very often takes this judgement as a guideline for other cases or is even forced to do so by the public opinion. This also produces a strong interest to have judgements based on a profound knowledge and correct interpretation of the facts of the case.

6. The principles of the legal procedure at administrative courts in Germany

6.1. The procedure at administrative courts is not too formalistic. At administrative courts, no lawyer is needed; one only needs a lawyer if one´s case reaches the level of the administrative appeals court or the Federal Administrative Court.

6.2. A law suit can be filed at the administrative court by letter or simply by visiting the court: In the latter case, a specially trained civil servant will record it.

6.3. The judge cannot grant more to a plaintiff than the plaintiff has asked for (*Verfügungsgrundsatz*), but he is free to understand the law suit in a way that is meeting the real intention of the plaintiff in the best way.

6.4. As mentioned above, public administration can act in different ways which will in turn lead to different kinds of law suits. If the plaintiff states clearly which kind of act he wishes to be controlled, the administrative courts will help him to choose the right kind of law suit.

6.5. These different kinds of law suits against acts of public administration differ not only in their aim/target but also in certain procedural requirements, with one common requirement: The plaintiff may only fight against a violation of his own rights (*Verletzung eigener Rechte*) and not on behalf of the public in general (*keine Popularklage*).

6.6. The judge has to know the law which means that he has to investigate the sources of law that are to be applied in the case.

6.7. In each case, the judge has to check whether the law which has to be applied meets higher-ranking law requirements. The pyramid is as follows (from top to bottom):

- Basic Law (federal constitution – *Grundgesetz*),
- federal acts (*Bundesgesetze*),
- federal statutory acts (*Verordnungen des Bundes*),
- constitution of the respective *Land* (*Landesverfassung*),
- act of the respective *Land* (*Landesgesetze*),
- statutory act of the respective *Land* (*Verordnungen des Landes*),
- by-law (*Satzung*).

6.7.1. If a judge comes to the conclusion that the law which has to be applied to a case violates higher ranking law he can take direct action under the condition that no formal laws passed by parliament are concerned: Judges can set aside illegal statutory acts and illegal by-laws. This does not happen often with statutory acts, but it is quite common for by-laws.

6.7.2. If a judge is convinced that an act violates the constitution he has to put the case on hold and appeal to the constitutional court (*Bundesverfassungsgericht/Landesverfassungsgericht*) as to whether he has to apply the act or not. The same applies if a judge is convinced that an act of a *Land* violates federal law. This, however, is rather rare.

6.8. Apart from knowing the case-specific legal basis to apply, a judge also has to find out about the crucial facts pertaining to a case (*Amtsermittlungsgrundsatz*). Very often, this is not much work because the public administrative body in question did so before and the judge can rely on that. But if a public authority has for some reasons failed to research the facts - for instance because the authority has misunder-

stood the essence of the applicable law - the judge has to find these out for himself. In this context, the citizen has to make all possible efforts in assisting the judge by answering questions and presenting all facts only to be known by the citizen concerned which might shed a new light on the legal position at hand.

7. The control of the administrative discretion

Very often, public authorities dispose of administrative discretion under the law (*Ermessen*). Public administrative courts generally have to respect it, but they also have to examine:

- whether a public authority was not aware of the possibility to exercise discretion at all (*Ermessensausfall*),
- whether a public authority has underestimated the degree up to which it could exercise discretion (*Ermessensunterschreitung*),
- whether a public authority has violated the limits of discretion (*Ermessensüberschreitung*),
- whether a public authority has not used its discretion properly insofar as it has not respected the purpose for which the discretion was intended (*Ermessensfehlgebrauch*).

What does that mean? Some examples:

- A public authority is acting illegally if its civil servants wrongly assume that a strictly binding law needs to be applied when in fact there is room for discretion.
- A public authority is acting illegally if it violates the limits of the discretion. These limits are defined not only by the act itself which offers discretion but also by fundamental rights, especially the right of equal cases being treated equally: If it becomes the habit of a public authority to grant certain permissions under certain circumstances, then the authority as a rule has to continue to do so. The public administrative courts may control whether this is done properly.

- A public authority is acting illegally if it uses discretion for purposes other than foreseen in the original discretionary context: A police officer may check the lights of a student´s bicycle for safety reasons, but not because the student wears a t-shirt with a certain political message that might not be to the police officer´s liking.

8. The growing influence of administrative courts in Germany

8.1. There were no administrative courts in the German Democratic Republic. As in all other socialist/communist states, public authorities and the socialist/communist party itself were always right. By official doctrine, the administration in these countries was supposed to control itself. Only in the last few years of the German Democratic Republic´s existence the citizens could sue for the permission to leave the country. They had to go to a special chamber (*Kammer für Verwaltungssachen*) of the regular courts to do so.

8.2. In the Federal Republic of Germany there were administrative courts right from the beginning. The influence of these courts has grown steadily. This results from the fact that more and more areas of the public administration have been subject to jurisdiction, especially under the impact of fundamental rights:

- In the first years, the administrative courts more or less only had to deal with cases concerning traditional areas of the relation between the state and the ordinary citizen (for example revenue law, building law, police law).
- Later the application of fundamental rights and administrative law also became accepted in areas in which state and citizen have a more special and closer relation (*besonderes Gewaltverhältnis*): soldiers, civil servants as well as pupils can sue the state at administrative courts.
- Furthermore, the state has changed its role in relation to the ordinary citizen: It is not a merely question of allowing and

forbidding, but also providing. And with the state providing money or goods for the citizens (like social aid for instance) this has become not only a matter of mercy but a matter of legal claim. Therefore it can also result in becoming a matter for the courts.

- Finally the state has become the »big planner« for measures of infrastructure such as by-passes, airports, harbours, industrial estates as well as nature reserves. Insofar, the state has also taken on the role of big mediator and litigator for different interests. Legal rules have been established for all of this, so it is no wonder that no new road, no new airport and no new industrial area can be planned without people taking legal actions against it at the administrative courts. One example might illustrate this: A new Berlin International Airport has been in the planning stages over the last decade. In total, 72 law suits of nearly 4.000 plaintiffs have been filed against it at the Federal Administrative Court. (Meanwhile the Federal Administrative Court has passed judgements on four representative law suits. The airport may be built but late night flights are prohibited and there have to be other measures for noise protection as well.)

9. Restriction of appeals, judicial self-restraint, deregulation

Due to the fact that the public administrative law has extended into more and more areas of daily life and has become more and more complicated, and also due to the fact that individuals and citizens´ groups (*Bürgerinitiativen*) have learned to fight for their rights, the workload of administrative courts has increased enormously and the procedures have got longer and longer. Years ago, a secretary of interior affairs described this as follows: »Whereas the French sell their high-speed train all over the world, we Germans can already proudly announce that the law suit against our first high-speed train route has already reached the administrative appeals court.«

This development has brought the regular three-instance structure of the German administrative court system under pressure. The fact that a legal procedure could and still can easily last several years has forced some reactions to speed matters up.

One reaction was to reduce the instances as far as certain matters are concerned. A major example is the area of the restitution of plots of land which have been expropriated by the government of the former German Democratic Republic: When this results in a court case, the administrative courts are the first instance; there is no possibility of an appeal but only of a revision by the Federal Administrative Court. The second major example is the area of certain important traffic projects like new motorways or international airports. If their planning results in a court case, the Federal Administrative Court is the first and only instance. This is to end a development which made it take twenty years or longer to realize an international airport in Germany.

The second reaction is a general restriction of appeals, first introduced in asylum cases. Nowadays, an appeal to the administrative appeals courts is generally only possible if the appeal is permitted by the first instance court or by the appeals court itself for legally defined reasons. And there are already politicians who think about establishing an administrative court system with only one instance deciding on law and facts and a second instance deciding on legal questions only. But this is strictly criticised by the judges of the administrative courts themselves: They feel that this would be too strong a reduction of the protection against illegal acts of the public administration. In the end, the public has to answer the question as to how much legal protection shall be provided and how much legal protection shall be financed.

For further information see for example:

Kopp/Schenke, *Verwaltungsgerichtsordnung*, 13th edition, Munich 2003.

Sodan/Ziekow, *Verwaltungsgerichtsordnung*, 2nd edition, Baden-Baden 2006.

UVOD U UPRAVNO SUDOVANJE U NJEMAČKOJ

Sažetak

U Njemačkoj je Ustavom zajamčena pravna zaštita protiv svakog akta javne vlasti. Zajamčena se zaštita, uglavnom, pruža putem sudova za socijalna pitanja, financijskih i – u većini slučajeva – upravnih sudova. Svi ti sudovi odluke donose u sudskim vijećima koja čine suci čija je neovisnost također zajamčena Ustavom. Sudac zadužen za neki predmet ne određuje se ad hoc *nakon podnošenja tužbe, nego je redoslijed preuzimanja predmeta određen unaprijed s pomoću iscrpnog sustava pravila. Upravno sudovanje u Njemačkoj je trostupanjsko (upravni sudovi, upravni prizivni sudovi, Savezni upravni sud). Prve dvije instancije odlučuju o pitanjima zakonitosti i o činjeničnom stanju, dok Savezni upravni sud, u pravilu, odlučuje samo o utemeljenosti na (saveznim) zakonima. Sudski postupak pred upravnim sudovima u Njemačkoj nije previše formalan. U odnosu na različite vrste upravnih akata primjenjuju se različite vrste postupaka. Sud uvijek mora odlučiti o pravnim aspektima slučaja, uključujući i pitanje je li zakon, koji je u konkretnom slučaju primijenjen, u skladu s višim propisom. Sud također utvrđuje ključne činjenice slučaja. Sudska je kontrola ograničena glede diskrecijskih ovlasti koje upravna tijela imaju na temelju zakona. Tradicija upravnog sudovanja prekinuta je u Demokratskoj Republici Njemačkoj, dok je u Saveznoj Republici Njemačkoj utjecaj upravnih sudova neprekidno rastao, što je dovelo do preopterećenosti sudova i dugotrajnih postupaka. Određene procesne reforme trebale bi promijeniti takvo stanje.*

Ključne riječi: *upravno sudovanje – Njemačka, upravni sudovi, sudovi za socijalna pitanja, financijski sudovi, trostupanjski sustav*