

NON-JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN GERMANY

Contents**§ 1 Introduction**

- I. A plurality of mechanisms to control administrative action in Germany
 - internal/external, judicial/non-judicial, financial, political and specialised control
 - "hard" and "soft" control of administrative action
 - last but not least: political control by the public in the democratic discourse (media, political parties, social organisations, NGOs etc. interacting with public institutions and strengthening the role of control institutions)
- II. Historical backgrounds
- III. Legal backgrounds
 - 1) Constitutional backgrounds
 - a) Administrative action and fundamental rights
 - b) The *fundamental right* of the citizen *to have recourse to the courts* against any violation of his rights by public authority (art. 19(3) Basic Law)
 - 2) The influence of European Union law
 - 3) Judicial and non-judicial review
 - non-judicial review is more effective if there is the threat of a following review by the courts...
- IV. Social and cultural backgrounds

§ 2 Administrative self-control

- I. Administrative review of administrative acts: the *objection proceedings* [Widerspruchsverfahren]
 - 1) The functions of the objection proceedings
 - protection of the citizen's rights, administrative self-control, relief for administrative courts
 - prior administrative review as a *precondition for judicial review*
 - 2) The scope of administrative review in the objection proceedings
 - legality and expedience (!) of the administrative act
 - 3) The admissibility of the objection
 - a) Dispute within the jurisdiction of the administrative courts
 - only non-constitutional public law disputes
 - b) Suitable subject-matter
 - legality and expedience of an administrative act or of the failure to pass an administrative act applied for
 - c) Right of objection
 - objector must claim that his *rights* (not just legitimate or legal interests) have been *violated* or, in case of review of expedience, encroached on
 - d) Objection lodged in writing *within one month* at the concerned authority
 - e) General interest in bringing proceedings
 - 4) The well-foundedness of the objection
 - a) Illegality or inexpedience of the administrative act / of the failure to pass the admin. act applied for
 - b) Violation of (or, in case of review of expedience, encroachment on) the rights of the objector
 - 5) The (automatic) suspensive effect of the objection
 - in principle, the controversial administrative act cannot be executed
 - in case of exceptions prescribed by the law, the citizen may apply to the administrative court to order or reconstitute the suspensive effect
 - a powerful mechanism to protect the rights of the objector - with the risk of detrimental side-effects on the efficiency of public administration or on the interests of third parties involved

6) The course of the objection proceedings and the ruling on the objection

- if the authority that has issued the administrative act does not remedy the objection, the case is in general decided by the next higher authority
- in some Länder, special commissions (in some cases including ordinary citizens as assessors) decide on the objection or are involved in the decision making
- the *rulings* on the objection *must be reasoned*; they often resemble court rulings

II. Other forms of administrative self-control

1) Internal review by the administrative body

- e.g. by *internal audit services*
- note also the influence of *data protection officers*, *gender equality officers* and other officers with supervisory or advisory functions

2) Supervisory control [Fachaufsicht]

- review of the legality and expedience of administrative action by the superior authority

3) Legal supervision [Rechtsaufsicht]

- in case of self-government activities of authorities enjoying legal autonomy (e.g. municipalities, universities)
- review of the legality (not of expedience!) of administrative action by the superior authority

4) Disciplinary supervision [Dienstaufsicht]

- "formlos - fristlos - fruchtlos" (usually not effective...)

5) Soft control by special government commissioners [Regierungsbeauftragte]

a) The phenomenon of commissioners in German law

- a multitude of specialised government commissioners and independent commissioners on federal and Land level
- main fields: migration issues, gender issues, disabled persons issues, data protection issues
- advisory, monitory and participatory functions - but *no decisive powers*
- important role in the public discourse

b) Examples

- Federal Government Commissioner for Migration, Refugees and Integration
- Federal Government Commissioner for Culture and the Media
- Federal Government Commissioner for Information Technology
- Commissioner for the Integration of Immigrants of the Federal state of Brandenburg / Bà đặc trách hội nhập bang Brandenburg (→ with website in Vietnamese and English)
- Rhineland-Palatinate Land Commissioner for Migration and Integration
- Lower Saxony Land Commissioner for people with disabilities

§ 3 Non-judicial external control of administration

I. Parliamentary control

1) Classical parliamentary control

2) Parliamentary control via auxiliary institutions

a) Ombudsmen [Bürgerbeauftragte]

- only in the Länder Rhineland-Palatinate, Mecklenburg-Vorpommern and Thüringen
- mission: to safeguard the rights of the citizens against public authorities (not against judicial power)
- independent (not submitted to instruction or supervision)
- instruments: negotiations, recommendations, reports, participation in the dealing with petitions
(→ no own binding decisions)

b) Specialised commissioners

- e.g. the Parliamentary Commissioner for the Armed Forces of the Bundestag (→ website in English)
 - mission: in particular to safeguard the fundamental rights of the soldiers and to inspect the armed forces
 - every soldier has the right to submit a case
 - submitted to general guidelines of the Bundestag but not to individual instructions
- e.g. the Ombudsman for Social Affairs in the Land Schleswig-Holstein

II. Financial control by the courts of auditors

1) The Federal Court of Auditors [Bundesrechnungshof]

- a supreme federal authority and *independent body of government auditing*
- mission: examination of the federal financial management
- no court but members enjoy judicial independence
- with regional audit offices (in total 1.300 employees)
- reports on its audit findings in management letters that are sent to the audited bodies for comment
- delivers recommendation in its management letters and in annual and special reports
- provides advice to the executive and legislative branch

2) The courts of auditors of the Länder

III. Soft control by independent federal or Land commissioners [Beauftragte]

1) Data protection commissioners

a) The Federal Commissioner for Data Protection and Freedom of Information

- elected by the Bundestag
- may lodge complaints, delivers recommendations, reports and opinions
- has an important role in the public discourse

b) The commissioners for data protection of the Länder

- elected by the Landtag
- also act as Supervisory authority to enforce data protection in the private sector

2) Others

- e.g. the Bremen Central Office for the Realisation of Equal Rights for Men and Women

§ 4 Special problems and conclusion

- I. How to ensure the actual independence of the reviewing institution and the reviewers?
- II. How efficient and how costly is the present system of diversified control?
- III. Does the plurality of control mechanisms impede administrative work and progress?
- IV. Should the administrative review in the objection proceedings be abandoned?
- V. How significant is the diversification of mechanisms of control for the development and safeguard of an administrative culture strictly based on the rule of law?
- VI. Conclusion

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