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PUBLIC ADMINISTRATIVE JURISDICTION IN GERMANY

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1. Constitutional Guarantee of Legal Remedies against the Public Power

Article 19 paragraph 4 sentence 1 of the Basic Law (the German constitution) guarantees a legal remedy against every act of 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 any misunderstanding: Whereas the rulings of judges are acts of public power themselves these acts are not subject to Art. 19 par. 4 of the Basic Law. Our 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 courts is concerned as will be explained later on.

2. Acts of public administration

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

There are:

- Statutory instruments (Art. 80 of the Basic Law): Legal rules which the administration is entitled to produce instead of parliament, e. g. a statutory act which defines different categories of dangerous chemical products.
- By-laws: 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: 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, e. g. a contract on public support for a private school.
- Public administrative acts of fact, 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

The legal remedies against all above acts are mostly provided by administrative courts. 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 with one located in each "Land", in matters concerning public insurances (like public accident insurance, public pension insurance, public unemployment insurance) you can sue at social courts. All of these courts are not mere tribunals but courts with a bench of at least one professional, as well as several lay judges. They are totally independent from the administration when deciding on a case.

4. Independence of Judges

The independence of German judges is widely and strongly protected. The fundamental rule is enshrined in our 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 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, professional judges are appointed for life and generally cannot be transferred from one court to another without their consent. They have to work as many hours as all other members of the public service but don't 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 (Art. 101 Para. 1, sentence 1 of the Basic Law: "No one may be removed from the jurisdiction of his lawful judge.") which guarantees that a judge who is in charge of a case is appointed abstractly before a case is filed: Acts rule precisely which kind of court and which local court of its kind will be in charge. In addition, a judge-made annual plan states exactly which judge at which 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 which judge will decide on which case.

5. The System of Administrative Courts in Germany: Three Instances

How are public administrative courts in Germany organised? As you might know, Germany is a federal republic. We have 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 laws is mainly concentrated at federal level - most of our law is federal law - administration and jurisdiction is mainly a matter of the "Länder". Therefore, you will find one or more administrative courts in every "Land". In addition to this, there is one administrative appeals court in every "Land"¹. On top of the pyramid sits the federal administrative court which is situated in the City of Leipzig.

In most cases, administrative courts are the first instance. There usually is the possibility of an appeal to the administrative appeals courts and - if a question of federal law is concerned - of a 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 administrative jurisdiction all over Germany. As mentioned before, the revision is therefore only provided if the legal question of the case concerns federal law.

You 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 sentence 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 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.

¹ The Land Berlin and the Land Brandenburg have one common administrative appeal court since July, 1st 2005. The author had the privilege of contributing to this by co-drafting the treaty between both "Länder".

6. The Principles of 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; you only need a lawyer once your 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 this 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, but in taking into account the facts underlying a particular case, the judge is not limited by their literal interpretation. Instead he/ she has to find out the real will of the plaintiff.
- 6.4 As mentioned above, public administration acts can take on different forms which in turn will lead to different kinds of law suits. If the plaintiff makes clear which kind of act he/ she wants to have reversed, the administrative courts will help him/ her 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/ her own rights and not on behalf of the public in general.
- 6.6 The judge has to know the law which means that he/ she has to investigate the sources of law that are to be applied in a specific case.
- 6.7 In each case, the judge has to check whether the law to be applied meets higher-ranking law requirements. The pyramid is as follows (from top to bottom):
 - Basic Law (federal constitution);
 - federal acts;
 - federal statutory acts;
 - “Länder” constitution;
 - Act of a specific “Land”;
 - statutory act of a certain “Land”;
 - by-law.
- 6.7.1 If a judge comes to the conclusion that a law which has to be applied to a specific case violates higher ranking law he/ she can take direct action under the condition that no formal laws passed by parliament are concerned. For example, judges can declare statutory acts and by-laws deemed illegal null and void. This does not happen often with statutory acts, but it happens frequently in the case of by-laws.
- 6.7.2 If a judge is convinced that an act violates the constitution, he/she has to put the case on hold and appeal to the constitutional court as to whether he/ she has to apply the act or not. The same applies when a judge is convinced that an act of a "Land" is violating 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 crucial facts pertaining to a case. Very often, this is not much work because the public administrative body in question did so before and he/ she can rely on that. But if a public authority for some reason has failed to research the facts - for instance because the authority has misunderstood the essence of the applicable law - the judge has to find out for himself/ herself. 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 Administrative Discretion

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

- Whether a public authority was aware of the possibility to exercise discretion;
- whether a public authority has respected the limits of discretion;
- whether a public authority has used discretion properly insofar as it respected the purpose discretion was intended for.

What does this 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 discretion. These limits are defined not only by the act itself which offers discretion but also by fundamental rights, especially the right of having identical cases being treated equally. If it becomes the habit of a public authority to grant certain permissions under certain circumstances, then the authority has to continue to do so. The public administrative courts may control such practices.
- 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 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. It was only in the last years of the German Democratic Republic that the citizens could sue for the permission to leave the country. They had to go to a special chamber of the ordinary 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 public administration have been subject to jurisdiction, especially under the impact of fundamental rights:

- In the first years, administrative courts more or less only had to deal with cases concerning traditional areas of the relation between 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: 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 no merely allow and forbid, but it also provides. 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 a "big planner" in terms of infrastructure projects 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 action 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 few years - In total, 72 law suits of nearly 4.000 plaintiffs have been filed against it at the federal administrative court.

9. Restriction of Appeals, Judicial Self-restraint, Deregulation

Due to the fact that 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 have learned to fight for their rights, the workload of administrative courts has increased enormously and the procedures have gotten 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 the first high-speed train route has already reached the administrative appeal 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 instances as far as certain matters are concerned. A major example is the area of restitution of plots of land which had 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 came to the point that it took twenty years or longer to realise 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 administrative courts themselves: They feel that this would be too strong a reduction of the protection against illegal acts of 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.