FOCUS ARTICLE

Judicial Protection against the Executive by German Administrative Courts

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I

1. Administrative law deals with the power of the executive. Due to the separation of powers, however, it is only possible to define the executive's power with reference to the powers both of the legislature and of the judiciary. In the German legal doctrine of the early 19th century the separation of powers was thought to imply that both the judiciary and the executive independently and separately enforce the law. The courts therefore only had jurisdiction over private law matters, while the executive was supposed to supervise the legality of its own actions through internal control. Consequently, in order to prevent the emergence of a dominant judicial branch, no judicial protection was given against administrative acts. Later in the 19th century, this "pyramid conception" (the legislature at the top, two law-enforcing bodies at the bottom) was abandoned. The need for an independent judicial control was recognised, not least as a remedy for biased executive officers. However, a long-lasting controversy arose as to whether the so-called "ordinary" private law courts should have jurisdiction over the executive or whether special – "extraordinary" – courts should be established.[1] The latter concept was carried through, particularly due to the fact that specialist knowledge was deemed necessary for judicial control of administrative action. Today there exists a separate judicial branch of administrative courts in German law with a higher administrative court in every federal state ("Bundesland") and the Federal Administrative Court at the top. At the same time, the procedural separation entails a strict distinction between public rights and private rights. [2]

2. There being a judicial system it could be said that the power of the administration correlates with the degree and extent of judicial control. This would lead to a definition of power as the capacity to decide conclusively, even if not always correctly; under this conception power is intrinsically different from correctness. If a statutory provision provides "where A and B, the administrative authority has to do X",[3] it is first of all the duty of the executive to do X whenever there is A and B, and not to do X when A and B are not given. On a second level, however, the formula reveals the underlying problem of how to decide on whether A and B are given or not. Or, put in more legal terms: the question is whether and how far the executive has the power conclusively to decide on the meaning of A and B. Again, on the reverse side of the same coin the question is to what degree the courts can review the administration's interpretation and application of statutory terms. To be sure, in a democracy the answer to these questions will always be that the relevant body is only following the proper intention of Parliament. This is usually called "the rule of law". Yet, who has the final say on what Parliament's will is? That is the question of power in public law.

English common law tackles this question with the ultra vires doctrine. Under this doctrine an administrative decision is void whenever the executive has acted outside its competence. But, again, what is the relevant competence? Here the common law uses the concept of jurisdiction to grant a certain latitude to administrative tribunals. The consequence is that the tribunals have the power to add a margin "d" to the meaning of A and B respectively so that the formula becomes "where (A+d) and (B+d), the administrative authority has to do X".

The scope of evaluation that is implied in "d" applies both to matters of law (interpretation) and matters of fact (application). This is especially true for those concepts of law which imply value laden terms such as "public need" or "public order" or "compelling reason". Thus the common law courts, for both practical and theoretical reason, confer a significant part of their interpretative function and power to the administration.

3. German administrative law, in principle, does not recognise such a high degree of administrative autonomy. Its

starting point is the concept of the "Rechtsstaat",[4] a notion best translated with the familiar doctrine of the rule of law.[5] Like the rule of law, one of the most important elements of "Rechtsstaat", if not its intrinsic meaning, is the precedence of an act of Parliament over decisions of the administration ("Grundsatz des Gesetzesvorrangs").[6] As already mentioned, this broad principle is not of much help if one does not know the meaning of the act and its specific terms (A and B) and, in addition, where the power lies to decide on it. German law takes the answer from the constitution; Article 19 (4) of the Basic Law stipulates: "Should any person's right be violated by public authority, recourse to the court shall be open to him."

In its literal sense, this provision grants everyone a fundamental right of free access to the courts. But it is, in addition, interpreted as making the executive branch subject to a comprehensive judicial control. This entails that there is no latitude, no margin "d", given to the administration to determine whether A means A1 or A2. Instead, it is assumed that Parliament has attached a specific meaning (A1) to the concepts used in a particular provision. Consequently, the executive is only empowered to enforce this defined meaning of the law and falls outside its competence whenever failing to do so. Thus German post-war administrative law[7] considers any kind of autonomy or "discretion"[8] as incompatible with the concept of "Rechtsstaat" (rule of law). Therefore, the administration's power is defined by the requirement that it acts "correctly".

This comprehensive nature of judicial review applies even to concepts such as "public interest", "public need" and "public order". They are considered in German law to constitute a distinct category which is called "indeterminate concepts of law" ("unbestimmte Rechtsbegriffe"). There, as well, it is generally accepted that the courts are to review whether a concept has been correctly interpreted by an authority. However, since the interpretation of an indeterminate concept still admits various evaluations in a specific case, there has been academic controversy whether the courts can substitute their own judgement for that of the authority. Prominent administrative lawyers have spoken in favour of a limited judicial review of indeterminate concepts and argued that the administration possesses both better expertise and experience than the courts. Moreover, it was said that the administration stands in close relationship with the concrete case and its circumstances.[9] Yet the Federal Administrative Court did not follow the underlying assumption that through indeterminate concepts used in an act Parliament gives a margin of judgement ("Beurteilungsspielraum") to the administrative authority. Instead, it held that the general experience of the administration is subject to expert witnesses in court and that the application of indeterminate concepts therefore is equally subject to an unlimited judicial review.[10] According to this doctrine a first instance administrative court decided in 1988 that low-flying training flights of the German airforce cannot – outside a case of emergency – be justified as "compellingly necessary" when they take place below 300 metres.[11]

4. In a very narrow field, however, the Federal Administrative Court has accepted that the administrative body has the power of conclusive evaluation. Although there is no agreed category of exceptions, the exclusion from strict scrutiny applies, in general, to decisions by committee in examinations and in the sphere of education generally as well as to judgements and assessments in civil service law. In the case of individual assessments the courts accept that it is not possible to reconstruct the full evidence and to reconsider the evaluations of a committee. In other cases, eg the Federal Board of Censors on printing materials liable to corrupt the young,[12] the Federal Administrative Court recognises a "prerogative of evaluation" ("Einschätzungsprärogative") because the relevant statute provides for establishing a special board or committee representing various societal groups. Although exercising a limited judicial control the courts determine whether the administrative authority started its evaluation from a correct interpretation of the concepts involved and whether it proceeded on the basis of a correct understanding of the facts.

5. While the administration is not granted latitude in the evaluation of the law, statutory provisions often leave the administrative authority with a discretion whether, and if so how, to act in a specific

case. The formula mentioned earlier then becomes "where A and B, the administrative authority can do X". Thus, under German law discretion only lies as to the range of possible decisions the administrative authority can enforce. The notion of "discretion" therefore is never used when the concepts of law (A and B) are at stake; this is true even in the exceptional case of indeterminate concepts of law.

As in common law, however, the administration is not left uncontrolled in the exercise of this discretion. Again with reference to Art.19 (4) of the Basic Law and the concept of "Rechtsstaat" (rule of law), the German courts recognise only a discretion bound by law ("duly exercised discretion"). The administration therefore has to exercise its discretion (1) without exceeding the conceptual limits of the statutory provision (excess of discretion) and (2) without taking into regard improper considerations (abuse of discretion[13]). In addition to these principles, the administration is regarded as being bound by its internal orders and by its previous application of the law. This is seen as a corollary of the fundamental right of equality in law. An administrative authority is thus restricted from changing its policy without good reasons for doing so. These standards clearly bear a strong similarity to the categories under which English courts review discretionary power.

Finally, all administrative decisions restricting a person's freedom or property are subject to the principle of proportionality. This concept states that the decision has to be (1) "suitable" for the purpose at issue and that (2) the restriction on the citizen's rights must be "necessary" in the sense that a less restricting action would not serve the same purpose. In an (intricate) third step the administration has to consider whether the need and importance of the intended administrative action justifies an intrusion upon the citizen's rights. This latter aspect of the principle, the so called "proportionality in its narrow sense", was held to be violated for instance in a criminal case where a dangerous medical test was ordered to ascertain the defendant's criminal responsibility. Considering the fact that the defendant was only accused of a misdemeanour the court held that there was no reasonable relation between the medical test and the need to sanction disorderly behaviour.[14]

Under the regime of these principles guiding the exercise of discretion, the courts in some cases hold the discretion to be reduced to only one admissible action. On a suit for mandatory injunction the courts will then order a specific action to be taken rather than directing the administrative authority to consider the case afresh.

6. It has already been mentioned that judicial control of discretion works in similar categories both under common law and German law. In addition, the predominance of the German courts as to the interpretation of legal concepts seems to have changed in recent years. German courts now show a tendency to yield more to the administration's expertise and need for flexibility. This applies particularly to legal concepts involving very technical matters such as in nuclear energy law and environmental law. Judicial control therefore tends to give more latitude to the administration while at the same time the strict separation between the interpretation of legal concepts and the discretion in actions is subject to increasing criticism.[15]

II

1. Although the available extent of judicial review might be at the heart of administrative law, procedural aspects have a significant impact on the practical consequences of administrative law. Two concepts of administrative procedure law shall be focused on: the concept of voidness and voidability on the one hand, and the notion of standing on the other.

Since all errors of law are reviewable in the courts (the rare exceptions in cases of indeterminate concepts of law notwithstanding), administrative authorities theoretically act outside their powers and therefore "ultra vires" whenever their decisions are legally flawed. For the sake of legal certainty and reliance on the administration, however, administrative acts[16] stand and are legally effective as long as they are not quashed in court. In principle, therefore, administrative acts are only "voidable" in English terminology. Since the administrative act becomes binding not only on the parties but also on the administrative authority itself, a comparison could be drawn with the notion

of "res judicata". Yet German law seeks to maintain the distinction between judicial and administrative bodies. Administrative acts are therefore said to retain a particular type of administrative validity ("Bestandskraft") despite the possibility of the act being wrong. Moreover, in contrast to judgments, the binding effect of such an act on the administrative authority is limited insofar as under certain conditions prescribed by the Administrative Procedure Act,[17] the authority can revoke its decision or reopen the administrative proceedings.

An administrative act being effective and binding on the parties, the appropriate legal remedy cannot be a suit for declaration but has to be a suit for the modification of legal rights. The courts therefore annul or invalidate the administrative act. From a common law perspective this "invalidation" of a "valid" decision has been strongly criticised as self-contradicting;[18] but it has to be seen that the administrative act possesses only a prejudicial effectiveness rather than being regarded as legally correct.

If, however, the time limit[19] has expired, no cause of action is granted. The decision then becomes unreviewable. Since German law strictly separates private rights and public rights[20] and similarly divides the spheres of private law and public law remedies, the addressee of an administrative act is also precluded from claiming in private law proceedings that the act is legally wrong. A German Mr Winder, therefore, would clearly lose his case when pleading in private law courts the invalidity of the council's rent increase.[21]

While the effect of stability and the entailed concept of voidability apply in principle, an administrative act will be without any legal effect if it suffers from a gross error of law and, in addition, if under due consideration of all relevant circumstances this error of law is evident. Although the Administrative Procedure Act 1976 today prescribes certain categories of void acts,[22] an administrative act is generally considered to be void if it "bears...[the] brand of invalidity upon its forehead", as Lord Reid has put it.[23]

In cases of "voidness" the administrative act has no binding effect and consequently it is reviewable by way of declaration rather than a suit for invalidity. Since legal certainty cannot apply for administrative acts having no legal effect whatsoever, no time limit restricts the availability of the suit of declaration. To be sure, the German concept of voidness entails no presumption of validity: the administrative decision being "void" the addressee is by no means required to bring an action to declare the voidness, although it is to their own risk if in a later public law litigation the court holds the administrative act to be legally flawed but only "voidable" in the sense mentioned above. In this case the time limit might have expired so that no judicial review will be granted.

2. A second aspect that mitigates the high density of judicial control is the concept of standing. Insofar as Art.19 of the Basic Law guarantees access to the courts if "any person's right be violated", the concept of standing equally restricts the availability of judicial remedies to persons that are able to show the possibility of a right being violated by an administrative action.

Thus the concept of standing is twofold: first, an action is only admissible if the applicant has furnished sufficient evidence for the court to take into account the possibility that the challenged administrative act may be illegal. Second, the applicant must be able to show the violation of an own legal position under public, not private law. This latter condition gives rise to many intricate questions, since it turns on the definition of what constitutes a right or legal position against the executive.

In English administrative law judicial review operates, broadly speaking, to control the legality of acts of the administration. Since conformity with the law is regarded as a public good rather than as an individual right, the citizen has no entitlement that a specific unlawful act be invalidated. The administrative courts can exercise judicial discretion whether to grant a remedy or not. Discretion in remedy, however, means discretion in law; as a corollary English law did not evolve "subjective" rights against the executive. Instead, since there is nothing like "subjective public rights" in English law,[24] the concept of standing has been formed in terms of interests rather than legal positions.

In German law the guarantee of fundamental rights together with free access to

the courts implies that the citizens are conferred an entitlement as to the legality of administrative actions. Also in public law, therefore, the remedy follows the law. But the entitlement cannot go beyond the subjective legal source from where it stems. It is only under the condition of what is known as a "subjective public right" that the citizen holds a right to claim that the courts invalidate an illegal administrative act. Since the addressee of an administrative act can always claim a violation of due process of law, they always have standing to bring an action against this very act.

The intrinsic problem of the law of standing, however, is third party claims brought against administrative acts granting a permission or a license to another person. In this regard the law of standing and the subjective public right of third parties are considered to depend upon the purpose of the relevant statutory provision. In planning law, for example, it is asked whether laws restricting the erection of buildings outside the city are only enacted in the public interest or whether they are also meant to protect neighbours from buildings erected without a lawful planning permission. Yet, the interpretation of the relevant statutory provision has to be done with reference to fundamental rights of third parties in question.

3. Thus, on a comparison with the common law concept of standing requiring "sufficient interest", it can be seen that the precondition of "subjective public rights" narrows significantly the scope of administrative actions. No German Mr Blackburn is possible for bringing suits to reinstall good morals,[25] nor a Mr Smedley supervising the Government's contribution to the EEC.[26] There being "subjective public rights" the courts have lost the discretion "to vindicate the rule of law" (as Lord Diplock said[27]) on the motion of a public-spirited citizen. This might also be the reverse side of high density judicial control.

Endnotes

1 For references see: Rüfner W, Zur Entwicklung der Verwaltungsgerichtsbarkeit, in: Jeserich/ Pohl/v. Unruh (eds), Deutsche Verwaltungsgeschichte, Vol 3, 184, p909 ff

2 See article at II 2

3 For this formula and the following: Detmold M J, Courts and Administrators, A Study in Jurisprudence, London 1989

4 Cf. Götz V, Legislative and Executive Power under Constitutional Requirements entailed in the Principle of Rule of Law, in: Starck C (ed), New challenges to the German Basic Law, 1991, p141 ff

5 For a comparison of the two concepts see: MacCormick D N, Der Rechtsstaat and die Rule of Law, Juristenzeitung 1984, p65 ff

6 The second pillar of the concept of "Rechsstaat" is the principle that Parliament itself has to decide on essential matters, that is on matters restricting fundamental rights ("Grundsatz des Gesetzesvorbehalts"). The principle prescribes broad delegation of powers to the government or governmental bodies. Cf. the decision of the Federal Constitution Court of 8 August 1978, BVerfG Vol 49, p89 ff

7 For the concept of "discretion" in the 19th century cf. Bullinger M, Das Ermessen der öffentlichen Verwaltung, Juristenzeitung 1984, p1001 ff

8 For the use of this term see article at I 5

9 Leading articles by Bachof O, Beurteilungsspielraum, Ermessen und unbestimmter Rechtsbegriff im Verwaltungsrecht, Juristenzeitung 1955, p97 ff; and Ule C H, Zur Anwendung unbestimmter Rechtsbegriffe im Verwaltungsrecht, in: Gedächtnisschrift für Jellinek W, 1955, p309 ff; for references see Singh M, German Administrative Law in Common Law Perspective, Berlin 1985, p96 ff

10 This latter term is misleading, since the courts come close to exerting an appeal function

11 Decision of the Administrative Court at Darmstadt of 6 October 1988, Neue Juristische Wochenschrift 1988, p3170 ff

12 "Bundesprüfstelle" nach dem Gesetz über jugendgefährdende Schriften, cf Decision of the Federal Administrative Court of 16 December 1973, BVerwG Vol 39, p197 ff

13 Paradigmatic English example: the "Wednesbury Redhead" (Associated Provincial Picture Homes Ltd v Wednesbury Corporation, 1948, 1 KB p223 ff, pp229 per Greene MR)

14 Cf. Decision of the Federal Constitutional Court of 10 June 1963, BVerfG Vol 16, p194 ff

15 For further references see: Fiedler W, The Strengthening of the Executive in the Contemporary Constitutional System, in: Starck C, Rights, Institutions and Impact of International Law according to German Basic Law, 1987, p95 ff

16 "Administrative act" is a technical term in German law: as defined in the Administrative Procedure Act 1976, an administrative act is a decision "taken by an authority for the regulation of a particular case in the sphere of public law directed at immediate external legal consequences" (§35). The concept of "administrative validity" described in the text therefore does not apply to any kind of legislation, including regulations and bylaws.

17 Cf. §§48, 49 of the Act 1976 (A translation of the Act is given as Appendix II in M Singh's book, supra note 9)

18 Detmold, supra note 3, pp31

19 A suit for invalidity has to be filed within one month from the date when the appeal decision of the authority is delivered (§74 of the Administrative Courts Act 1960). Before filing a suit for invalidity the legality and expediency of an administrative act have an administrative appeal authority; these "appeal proceedings" have to be filed within one month after the delivery of the administrative act (§§68, 70)

20 See article at II 2

21 Cf. Wandsworth London Borough Council v Winder, 1985 AC p461 ff. In German law, however, the rent increase would not be regarded as a public law matter

22 Cf. §44 section 2 of the Administrative Procedure Act. Thereafter an act is void, eg if the act is taken by an authority outside its local competence, if for factual reasons nobody can perform it or if it conflicts with good morals

23 Smith v East Elloe Rural District Council 1956 AC p736 ff, pp769; the very same "forehead" formula is used, curiously enough, in textbooks on German administrative law

24 Cf. Cocks v Thanet DC, (1983) 2 AC p286 ff, pp293, where Lord Bridge held that a decision of the housing authority created rights and obligations "in the field of private law". Instead of subjective public rights there is a "two stage process" (cf Roy v Kensington and Chelsea FPC, 1991, 1 AllER (HL), p705 ff, pp727 per Lord Nourse in the Court of Appeal): proceedings anddecision under public law; and rights and their enforcement under private law

25 Cf. Blackburn's cases in (1968) 2 QB p118 ff; 1973 QB p241 ff; (1976) 1 WLR p550 ff; The Times 7 March 1980

26 R. v Her Majesty's Treasury ex.p. Smedley, 1985 QB p657 ff

27 R. v IRC ex.p. National Federation of Self-Employed and Small Businesses Ltd 1982 AC p617 ff, pp644

REGULAR REPORTS

Administrative Review Council

Reports, submissions and letters of advice

Since the last issue of Admin Review, the Council has provided:

- letters of advice to the Attorney-General on
  - a proposal to abolish the Security Appeals Tribunal;
  - the National Witness Protection Program;
  - changes to the immigration portfolio;
  - the Draft Seafarers' Rehabilitation and Compensation Bill; and
  - superannuation, concerning the provision of an external dispute resolution mechanism; and
- a submission to a parliamentary committee on the role of Parliament in an age of Executive dominance.

Current work program – developments

Community Services and Health

The Council has recently redirected this project towards investigating the scope of merits review of decisions made under Commonwealth funding programs.

Intellectual property

A draft discussion paper on review of patents decisions is being prepared by a consultant, Dr Margaret Allars of Sydney University.

Specialist tribunals

As a result of resource difficulties, publication of a draft report on this subject is expected to be delayed until some time in 1993. The second Conference of Commonwealth Review Tribunals was held in Sydney on October 16 and 17, 1992. Details on the conference will be provided in the next issue of *Admin Review*, as this issue was ready to go to press at the time the conference was held.

Government business enterprises

The Council is working on a draft report on the extent to which GBEs should be subject to administrative review. This is expected to be available towards the end of this year. Anyone interested in obtaining a copy of the draft report should contact Robyn Johansson, the responsible Project Officer at the Council, ☎ (06) 257 6115.