Administrative Law

Chris Backes and Mariolina Eliantonio

J. Hage et al. (eds.), *Introduction to Law*, DOI 10.1007/978-3-319-57252-9_9

1 What Is Administrative Law

1.1 From Police State to Welfare State

In everyday life, many things are not organized by private parties but by public authorities. To drive your car to school or university, you must have a driving license. While driving, you use public roads and cross traffic lights. You also pass sites where public authorities have permitted the operation of industrial facilities, while other areas have been designated as residential estates. Hopefully, the use of dangerous substances in industrial production processes is sufficiently controlled. If you study abroad, your certificates have to be recognized, and you probably need a residence permit. Public authorities (who deal with a country's administration) play a role in all these matters. In order to be able to perform their tasks, public authorities (also described as administrative body or executive) need money. Raising taxes or other financial contributions is an important task for the administration too.

In the nineteenth century, the tasks of the State were mainly limited to maintaining law and order within the country and defending its territory against attacks from abroad. The idea behind this limitation was that public authorities should refrain from interfering with the rights and freedoms of citizens as much as possible.

After the industrial revolution, the tasks of the State shifted toward providing community services and distributing wealth among its citizens. This process was enhanced after several economic crises and, in particular, World War II. The tasks of the administration were no longer just defense and the maintenance of public order but also the provision of public goods and services.

For instance, the State now grants social security benefits and sponsors theaters.

The nature of the State has changed from «police State» to «welfare State».

More recently, tasks like monitoring the quality of foodstuffs and food production, as well as the implementation of an immigration and naturalization policy, have also been added to the responsibilities of the administration.

In all these fields, administrative bodies perform public duties and exercise certain powers. To do so, there have to be administrative authorities and civil servants. They must be equipped with the power to raise taxes or to stop your car if

you drive too fast. In making use of these powers, the administrative authorities are guided and bound by procedural rules and substantive requirements that serve to protect the interests of all parties concerned. When the administrative authorities use their public powers, they can interfere with your rights and interests. Therefore, there must be legal remedies available to protect your rights and interests against the possible abuses of the administration.

Topics of Administrative Law

Administrative law is mainly about

- Administrative authorities and their civil servants
- How administrative authorities get public powers
- Procedural rules for the use of public powers
- Substantive requirements administrative authorities have to take into account when using their powers
- Objection procedures and judicial protection against administrative action

1.2 Multilayer Governance

In any State, there are several levels of administrative decision-making. Besides national ministries, regional authorities of different kinds and municipalities, as well as other local bodies, fulfill important administrative tasks. The organization and structure of such authorities, their competences, and their dependence or independence from national authorities differ considerably between countries. This is owed to differences in the organization of the national State (centralized or federal) and to different traditions and cultures.

In France, for instance, national authorities have quite strong powers to control and influence the *regions*, whereas in Belgium, many administrative competences are concentrated in the *gemeenschappen* and *gewesten (regions)*, and the competences of the central government are very limited.

In Germany, the *Länder* enjoy (limited) sovereignty; they are subjects of international law and therefore competent, within certain boundaries, to conclude international treaties with other States. The division of tasks and competences between the federation and the *Länder* is laid down in the German Basic Law (*Grundgesetz*) and hence can only be altered by amending the *Grundgesetz*.

In a unitary State like the Netherlands, the provinces can be merged or totally dissolved through an act of parliament. Their tasks and competences are much more limited than those of the German *Länder*.

In 2007, Denmark abolished the 14 existing *Amten* and introduced five regions instead.

Together with the division of public powers between several territorial entities (central government, region, municipality), most countries have authorities specialized in certain subject areas, which often require specific technical knowledge and equipment. Examples are the British Environment Agency and the Dutch Water Boards (*waterschappen*).

Administrative tasks and competences are not only divided between several layers of administrative authorities within a national State. Nowadays, many administrative tasks are performed jointly by European and national authorities. Regional and national authorities often cooperate closely with the European Commission and European agencies. Examples of such cooperation can be found in the area of food safety and air traffic safety and in the designation of nature reserves that together form a European ecological network. Hence, administration is no longer a purely national affair but rather a joint venture of the European, national, and regional authorities. This is referred to as multilayer governance.

1.3 Various Instruments and Powers to Protect the General Interest

In order to serve the general interest, the administration has various *instruments*—i.e., juridical and factual acts—at its disposal to put its policies into effect and to bring about legal consequences for individuals. The legislator can empower the administrative body to issue general rules, and it can also give the administrative body the competence to grant subsidies or permits and to take decisions in individual cases. In some cases, in order to achieve certain policy goals, the administrative body needs to perform factual acts.

For example, municipalities install litter bins and flower tubs to enhance streets and public places.

Competences

In continental legal orders, a fundamental difference exists between competences under public law and competences under private law. In brief, public law competences are those competences that are exercised exclusively by public authorities. Therefore, competences under public law are competences that private law subjects (citizens, enterprises) cannot have, like the right to raise taxes or the right to issue residence permits to foreigners. Administrative authorities can have both kinds of powers. Besides competences under public law, which are typical for administrative authorities, private law

acts, such as concluding a contract for the construction of a bridge, can also serve the general interest.

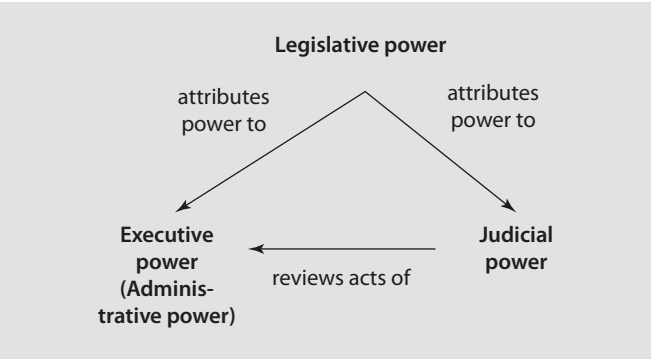
1.4 The Administration Within the *Trias Politica*

In the chapter on constitutional law, we already quoted Lord Acton, who in 1887 very aptly summarized the need for a division of power as follows: «Power tends to corrupt, and absolute power corrupts absolutely».

Trias Politica

To avoid too high a concentration of power, the competences of the government must be divided between legislature, administration, and judiciary. According to Montesquieu's doctrine of the *Trias Politica*, the administrative (or executive) branch of power should be separate from the legislative and the judicial branches. In an ideal model of the democratic *Trias Politica*, the legislator is chosen by and is responsible to the people. The administration receives its powers only from the legislature. It executes these powers and is controlled by independent courts. See ◘ Fig. 9.1.

All European legal systems offer the possibility to go to court to challenge both juridical and factual acts of administrative authorities. The courts can check whether the executive remains within the limits imposed by law. In a system with a thorough distribution of powers, the competences of the judiciary are limited. Mainly, courts may control whether the administrative body has acted within the confines of the competences attributed to it and the rules imposed upon it by the legislature. In any event, the courts are bound by the law and may not deviate from the decisions of the legislature. The



◘ **Fig. 9.1** *Trias Politica*

executive is hence situated between the legislature, from whose acts it derives all its competences, and the judiciary, which controls whether the executive has remained within the confines of the law.

Take, for example, the construction of a new power plant in an industrial area. The legislator has laid down the requirements to be fulfilled in order to obtain an environmental permit and planning permission, both of which are necessary if you want to construct such a power plant. Environmental law prescribes the procedure of decision-making and provides some general conditions. The administration applies the environmental statutes and follows the prescribed procedure, investigates and weighs all relevant interests, and determines the concrete conditions for the operation of the power plant. It issues the permit and afterwards monitors whether the operator complies with the conditions attached to it. If requested to do so, the courts assess whether the administration has correctly followed the procedural rules and applied all relevant legislation and whether all interests have been properly considered.

1.5 Questions

In the modern social welfare State, the public authorities are involved with almost every aspect of the daily life of individuals and in every area of society. The issues that administrative law deals with can be divided into two main categories. One category concerns the powers that administrative authorities need in order to fulfill their tasks and the conditions attached to such powers. It concerns what is called the *instrumental function* of administrative law.

The other category concerns the *safeguarding function* of administrative law. It deals with the protection of the rights and interests of citizens and of private organizations against the use of administrative power.

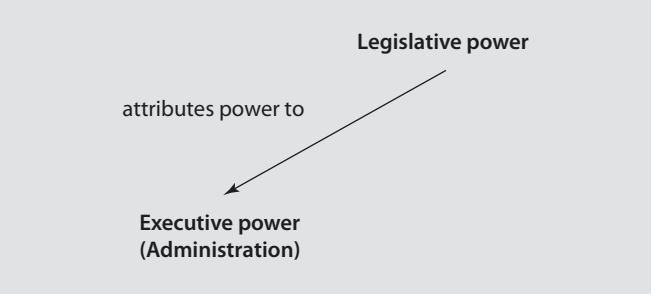
These two functions of administrative law correspond to two sets of questions that administrative law has to answer. The first set has to do with the rules that bind the administration in the execution of its tasks. The first question in this connection is when an administrative body has the power to act in a particular matter. This question is addressed in ► Sect. 2. The second question in connection with the instrumental function of administrative law concerns which rules bind the administration if it has the power to act in a particular matter. This is the topic of ► Sect. 3.

The second set of questions has to do with the supervision that the judiciary exercises over the administration. The first two questions in this connection are to what extent the judiciary is competent to review the acts of the administration and what it can do if it finds that the administration did not remain with the limits of the law. These two questions are the topic of ► Sect. 4, which also addresses two views on the function of administrative justice. Supervising the administration is a specialized task, and most countries have specialized judges to perform this work. This leads to a technical question of great importance; namely, when does an issue belong to administrative law and fall under the competence of these specialized judges? This question is addressed in ► Sect. 5. ► Section 6 deals with the question of which persons can address the court when they think that the administration has done something wrong. Can everybody complain about every mistake, or should one have some kind of interest in the matter? ► Section 7, finally, discusses the remedies that are available in case a court finds an administrative decision to be mistaken.

2 Public Powers: Rule of Law and Legality Principle

In order to pursue public goals and general interests, the administrative authorities receive certain competences from the legislator. We will now deal with the left half of the *Trias Politica* scheme. See ◘ Fig. 9.2.

The principle of the rule of law underlies administrative law in all European legal systems. It can have slightly different meanings across European legal systems, but its essence is always that the administration is, at all times, bound by the law. The allocation and execution of powers are regulated by



◘ **Fig. 9.2** Attribution of power

law, and the administration must refrain from violating the law, including the basic rights of individuals.

Legality Principle

A special requirement of the rule of law is the legality principle. Generally, this principle requires that the administration's competence to act must have a basis in legislation. The legislature should confer competences upon the administration to perform public duties and provide it with the power to interfere with the legal position of individuals. Administrative statutes hence provide for the legality of administrative acts. In this way, the legislature endows the administration with the necessary instruments to put its policies in various areas of society into effect and to serve the general interest.

Moreover, legislation should also set limits to the powers conferred upon the administration. Above all, this means that the administration is not allowed to use its competences for a different purpose than that for which they have been conferred.

Take, for instance, the power of the mayor (in the Netherlands) to restrict the right to demonstrate in order to ensure public safety and order. The mayor may not prohibit demonstrations merely because he does not agree with the political statements of the demonstrators or the aim of the demonstration. The administration may not divert its competence from the purpose other than that which the legislator intended when creating the competence.

Détournement de Pouvoir

The French call this the prohibition of *détournement de pouvoir*. Both the legality principle and the closely related prohibition of *détournement de pouvoir* bind the administration to the legislature, as the democratic representation of the people.

3 Procedural Rules and Substantive Requirements for the Use of Public Power: The General Principles of Administrative Law

3.1 Rationale of the General Principles: Preventing Abuse of Discretionary Power

As was mentioned above, the range of tasks and competences of the administration in various areas of society has grown enormously over the past decades. As a consequence, the

administration's power to interfere with the rights and obligations of individuals has also increased. Administrative competences have grown not only in quantity but also in quality: compared to former times, administrative authorities today do not only have more powers to regulate various policy areas and to interfere with the rights of individuals; they also enjoy greater freedom in exercising these powers.

Tax Law

How substantive the conditions for the use of public power are differs from one field of law to another. Tax law, for instance, prescribes exactly which percentage of your income has to be paid in income tax and what may be deducted from your income before taxes are calculated. Tax officers thus have relatively little leeway to weigh diverging interests when taking their decisions. They have, in other words, little discretionary power.

Land-Use Plans

On the contrary, when a regional or municipal council draws up a plan for the use of land and decides whether a particular area will be designated as a residential or industrial estate or whether it is protected as a nature reserve, the statutory provisions empowering the administration to make this decision contain few concrete requirements. Much is left to the administration, which should investigate all interests involved in the concrete case, weigh these interests, and take a decision. Because the legislator is unable to regulate in detail which decision should be taken by the administration in any given case, administrative authorities enjoy more discretionary power. Therefore, the rights and duties of individuals who are affected by the land-use plan are not regulated concretely in legislation.

Fundamental Rights

Whenever the administration must take decisions in concrete cases, it is not only bound by the conditions and limits explicitly mentioned in the applicable general rules. It also has to respect the fundamental rights of those affected by the decision, and it must take general principles of administrative law into account.

When investigating an enterprise (enforcement of administrative law), an inspection agency has to respect the fundamental right of protection against arbitrary interference of home and may not enter a dwelling without the permission of a judge. Furthermore, when entering the dwelling, the agency has to take the interests of the owner into account and has to act carefully in order to keep any impairment of his rights to a minimum (general principle of proportionality).

It was especially the need to prevent the abuse of highly discretionary powers that caused the evolution of general prin-

ciples of administrative law. The function of these principles is to control the administration, to set limits to administrative action, and to provide generally applicable safeguards against the abuse of administrative competences.

Supervision by the Judiciary

To some extent, one could say that the general principles of administrative law compensate for the frequent lack of concrete conditions and limits in the general rules that bind the administration. Moreover, with reference to the original idealistic model of the *Trias Politica*, one could say that this shift in function from legislation to general principles has caused a shift of power from the legislator, who is unable to formulate sufficiently concrete conditions and limits in specific legislation, to the courts, which can review the use of discretionary administrative powers by applying the general principles of administrative law.

3.2 Which Are the Most Important General Principles of Administrative Law?

Originally, the general principles of administrative law were developed in case law. Nowadays, however, there is a tendency in European legal systems to codify them, i.e., to lay them down in (general) statutory legislation. All European legal systems recognize more or less the same general principles of administrative law, although they may go under different names in different systems. The principles that are common to most European legal systems are:

1. The impartiality principle
2. The right to be heard
3. The principle to state reasons
4. The prohibition of *détournement de pouvoir*
5. The equality principle
6. The principle of legal certainty
7. The principle that legitimate expectations raised by the administration should be honored
8. The proportionality principle

Besides these principles, the European and national courts have acknowledged further principles that often can be understood as subcategories of the above-mentioned eight common principles and will not be dealt with here. In applying these principles to the acts and decisions of the administration in individual cases, the courts try to ensure that, even

though the administration has certain discretion, some legal limits are imposed on the administration in the exercise of its powers. Applying the general principles of administrative law protects the rights and interests of individuals against the abuse of public power and against an overemphasis on the general interest when public power is used.

Procedural Principles

Some general principles of administrative law are more of a procedural (or formal) nature, while others are more substantive. The procedural principles address the decision-making process and the way in which the interests of individuals are taken into account during this process. The first three principles mentioned above have a mainly procedural character. In every decision-making process, the administration has to act impartially.

For instance, the mayor and aldermen of a municipality should not favor members of their political party in deciding which construction firm will be granted the building of the new city hall. When preparing a decision, the administration must investigate all relevant interests and hear all persons possibly affected by the decision. If somebody applies for a building permit, the neighbors should be given the opportunity to state their views. When the decision is published, the authority should state the reasons that were decisive for the decision. It will not do if a province only informs an enterprise that it will not be granted an environmental permit without giving any explanation.

Substantive Principles

The latter five principles mentioned above may be qualified as substantive principles. Substantive principles impose certain requirements on the administration with regard to the content of the decision or measure.

As already mentioned above, authorities may use their public power only for the purpose for which it has been conferred on them (prohibition of *détournement de pouvoir*).

If in a regulation, a competence to control vehicles is delegated to ensure traffic safety, the police are not allowed to use this power to stop cars in order to search for a murderer.

Decisions of the administration should (among others) be clear and understandable (legal certainty). Furthermore, they

generally should not have any effect on events that occurred before the decision was published (no retroactive effect; this is another aspect of legal certainty).

For instance, the tax authorities should not suddenly modify the interpretation of tax rules, thereby retroactively attaching tax duties to events from the past that used to be tax-free.

The decisions should not treat people unequally without having a legitimate reason to do so (equality principle).

If one restaurant owner is allowed to have seats on a terrace in front of the restaurant, another restaurant owner who is in a similar situation should also be allowed to have them.

Administrative decisions should not negatively affect the interest of people more than is necessary to achieve the envisaged goal and should not lead to a clearly disproportionate result (proportionality principle).

If the administration establishes a violation of the rules on playing loud music in a bar it would be disproportionate to close the bar immediately. It can give a warning, though, and take measures if the violations continue.

Furthermore, if the administration raised legitimate expectations that a certain decision would be taken, it should, if possible, honor such expectations.

If a competent public officer informs a citizen that she will receive unemployment benefits because she satisfies all the conditions, and this citizen rents an apartment in the expectation that she will receive these benefits, it will not be easy to refuse the benefit because after all it turned out that the conditions for the benefit were not satisfied.

4 Judicial Review of Administrative Action

As we have seen, the rule of law means that the executive is bound by the law that governs the exercise of a specific power. Furthermore, the executive has to respect fundamental rights and must apply general principles of administrative law.

However, administrative bodies are not infallible, and it is possible that they act in an unlawful manner.

This would, for instance, be the case if they use a power for a purpose other than that for which it was conferred, e.g., where a building permit is refused because the mayor does not want a political enemy to become his neighbor (*détournement de pouvoir*).

An administrative body can also act unlawfully outside the sphere of its public law powers. This is the case, for instance, when it closes a bridge for maintenance for a period which is unnecessarily long and is to the detriment of the shop owners in the neighborhood (violation of the principle of proportionality) or when it discriminates in accepting tenants for houses owned by the city (violation of the principle of equality).

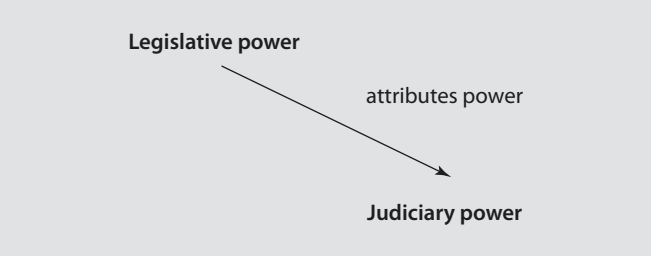
The questions then are as follows: who can do something about this, what can be accomplished, and how can it be accomplished? These questions are the subject matter of the current and following sections.

4.1 The Power of the Judiciary to Review Administrative Acts

The judiciary receives its power from the legislator. See ◘ Fig. 9.3.

If we look at the task of the judiciary within the structure of the *Trias Politica*, we deal with the relation between the judicial and the executive powers (see ◘ Fig. 9.4).

To what extent does the judiciary have the power to review acts of the executive? We have seen that the answer to this



◘ **Fig. 9.3** Attribution of judiciary power

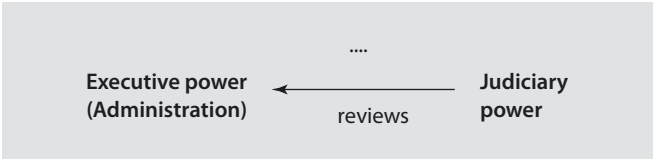


Fig. 9.4 Judicial review

question is, to a large extent, dictated by the doctrine of separation of powers and the way this doctrine is given shape in the form of the *Trias Politica*. The judiciary has the task to control the functioning of the executive, but in doing so it should remain within its own sphere and not take over the tasks that are assigned to the administrative body. We will see that this theoretical division of tasks is not always easy to implement in practice.

The actual implementation of the *Trias Politica* differs widely between national legal orders and deviates substantially from the theoretical ideal model. In practice, the legislator is often unable to describe the power conferred upon an administrative body in more than very vague terms and therefore grants broad discretionary powers to the administrative authorities. In such a case, in order to come to a decision, the administrative body has to identify all interests involved, balance them, and decide which interest will be given priority and to what extent. The outcome of this process therefore depends on the weight that the administration chooses to attach to each interest, within the framework conditions set by legislation. As the conditions prescribed by law are often quite vague and general, it is, to a large extent, not the legislator who decides about public rights and duties but the administrative body itself. Hence, administrative authorities do not only execute legal provisions, norms, and standards provided by legislation but also determine these norms and standards autonomously.

For example, environmental legislation by no means prescribes the permissible amount of emissions of hazardous substances to the air, or effluents to the water by industry. The reason is that the determination of this quantity largely depends on the circumstances of the individual case. The kind of industrial process in question, the age of the installation, the geographical conditions and the existence of recently developed environmental techniques all play a role. Because legislation by its nature deals with general rules, the executive

is in a better position than the legislature to evaluate the details of concrete cases. For that reason, legislation mainly prescribes that the operator of a certain installation has to apply for an environmental permit. It is then up to the administrative body to attach conditions to the permit, which specify limits with regard to air pollution or the discharge of substances.

Limitation of Administrative Competences

In many countries, administrative courts assess not only whether the administration has remained within its competences but also whether it has adequately investigated and weighed all relevant interests and used its powers appropriately. However, which decision serves the public interest best is, first and foremost, not a legal matter, but a policy choice. Therefore, the decision must be based on a general framework set by the elected legislature. The decision in concrete cases is left to the executive, which obtains a competence to act from the legislature and is bound by the general framework. The courts, however, have no role in this; their task is merely to check whether the executive has remained within the limits of the law.

The principle of legality imposes limits on the competences of the administrative body. Fundamental rights and several general principles of administrative law (see ► Sect. 3) guide the process of identifying and weighing the diverse interests that must be considered in administrative decision-making. Whether the administration has remained within its competences and whether it has observed these rights and principles in taking its decision are legal questions. Therefore, they can and must be examined by a court if an applicant requests a judicial review of the decision. However, whether the most suitable and advisable decision has been taken is a matter of policy, not a legal question, and hence is up to the executive. The legal question of whether all relevant interests have been taken into account and the outcome of the weighing is not disproportionate and the political questions as to which decision is preferable are narrowly related, which makes the task of the administrative court a difficult one.

How exactly the powers between the legislator, executive, and judiciary are distributed and where the boundaries between these three functional entities of a State can or should be found are ongoing and vividly discussed topics within each democratic State. Each country finds its own, to quite an extent, different answers to these questions.

4.2 The Function of Administrative Justice

The view on the main purpose of administrative justice influences which individuals have access to the courts in administrative affairs and which remedies can be obtained by judicial review of administrative actions. Therefore, we must first answer the question of what the *function* of administrative justice is before we discuss who can challenge administrative action and what can be achieved by doing so. The answer to this question differs substantially between national legal orders.

United Kingdom

In the UK, the very existence of administrative law as a separate branch of law has always been controversial, and for a long time its existence has been denied. According to the nineteenth century British constitutional scholar Albert Venn Dicey: «the words «administrative law» are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation».

Dicey's views on administrative law have been very influential and meant that until quite recently there was no formal separation between private law and administrative law in the UK. The executive was subject to common law, and administrative disputes were dealt with by the ordinary courts and decided on the basis of the same rules that also govern the disputes between private actors.

Consider again the example of a refusal to grant a building permit, inspired by the wish of the mayor not to have his political opponent as a neighbor. If the opponent filed a claim against an administrative body, this was originally treated in the UK analogously to a claim of one private actor against another for unlawful behavior.

The last years, however, have seen the emergence of separate judicial bodies for administrative matters and of special rules applicable to the executive (◘ Fig. 9.5).

Continental Europe

In continental Europe, there are, broadly speaking, two main views of the function of administrative justice. It is, however, almost impossible to find them in their pure form. Rather, «elements» in the different jurisdictions are found, which may be traced back to one view or the other.

The first view of administrative justice, which, for instance, is to a large extent characteristic of the French system, is based on the notion of *recours objectif*. According to this view, the main aim of judicial protection against administrative behavior is to check whether an administrative body has acted law-

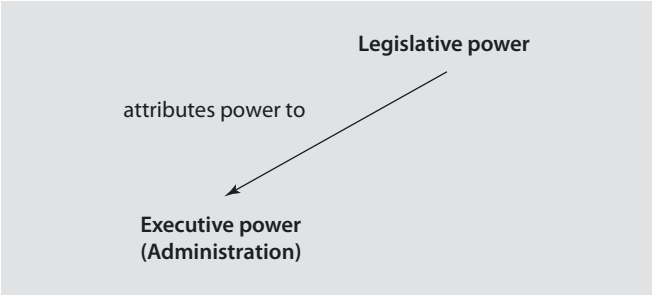


Fig. 9.5 Attribution of power

fully and within the scope of its powers. Judicial review thus mainly serves a public interest, namely, the interest that the executive should not act unlawfully. Of course, it is an individual who brings a claim before the court, and he or she does so in order to protect his or her own interests. And yet, in the view of *recours objectif*, this individual acts, in a way, as an «instrument» to allow the court to check the legality of the administrative behavior. The protection of the applicant's legal sphere is thus a by-product of the judicial review process, not its main objective.

In the *recours objectif* view, the political opponent of the mayor who challenges the refusal of a building permit functions primarily as an instrument of the public interest that makes the administration use its competences for the purposes for which they were given. A possible «by-product» would be that the opponent also gets his building permit.

The second continental view on administrative justice, which characterizes, for instance, the German system, is based on the notion of *recours subjectif*. According to this view, the aim of judicial protection against administrative behavior lies not so much in the check on the executive but in the protection of the individual's legal position. The primary task of a court that reviews administrative action is therefore not to determine whether the administration has acted lawfully but rather to determine whether the legal position of private actors has been violated. Of course, these two aims may partially overlap in some situations, but, as we shall see below (► Sect. 6), this is not always the case.

Consider again the example of a refusal to grant a building permit, inspired by the mayor's wish not to have his political opponent as a neighbor. If the opponent challenges this

refusal before a court, he does so in order to protect his rights. Under the doctrine of *recours subjectif*, this would be the primary function of this lawsuit. That the administration is forced to comply with the demands of legality would merely be a welcome «by-product».

5 Organization of Judicial Review in Administrative Dispute

Regardless of the way in which a certain legal system understands the function of the system of administrative justice, most systems feel that there must be a way to control the actions and omissions of the executive. However, the way in which this system of control is organized varies greatly throughout the legal systems. In the following sections, we will explain the main variations in the systems of administrative justice and their rationales. In this connection, several factors need to be taken into account.

5.1 Preliminary Objection

The first factor to be taken into account is the existence of a system of preliminary objection with the administrative authorities.

Some countries, such as Germany, have traditionally opted for a system of compulsory preliminary objection. Before a claim may be brought before an administrative court, individuals must first ask the public administration to review the administrative measure that allegedly violates the individuals' legal positions.

Other countries, such as France, also use the system of objection, but they do not consider raising an objection as a necessary prerequisite for access to court. Other countries, finally, do not have a system of preliminary objections, and individuals have no way to complain about administrative action to an administrative body. Where this is the case, individuals can only appeal against administrative decisions in court or, as we shall see below, before other types of quasi-judicial bodies.

The aim of the system of preliminary objection is to ease the workload of the courts and to make sure that violations by the authorities are remedied in a speedy and efficient way. Furthermore, some legal systems allow an administrative body to change the measure challenged in an objection

procedure: this might be impossible for the courts because of the doctrine of separation of powers and is therefore an advantage vis-à-vis judicial proceedings, at least from the perspective of an individual. The disadvantage of this system, however, might be that it is the administrative body that will have to rule on the alleged unlawfulness of its own actions. Therefore, in such cases, at least some doubts can be cast on the likelihood of the administrative body «changing its mind» and admitting its own error. This is why many legal systems adopt some «control mechanisms» such as the possibility to install an external advisory committee during the objection procedure (as is the case in the Netherlands) or to have a hierarchically higher administrative authority take a decision on the objection procedure (as is the case in Germany).

5.2 Specialized Administrative Courts

The second factor that can play a role in the categorization of the courts' systems is whether administrative matters are dealt with by specialized branches within general courts or by separate specialized courts. There are systems such as Germany that opt for review by specialized courts of administrative matters, while systems such as the Netherlands (in the first instance) or the UK opt for a review by specialized branches within the general courts.

9

While it is not unthinkable that there could be no separate courts or separate branches for administrative disputes, this setup is highly unlikely given the complexity of administrative law.

Because of the complexity of administrative issues, which range from environmental law to migration law to spatial planning law to many more, many legal systems have opted for the creation of specialized administrative courts for some specific areas. For example, Sweden has environmental courts, and Austria has courts for migration and asylum matters.

Similar to specialized courts, but not completely comparable to courts, are Tribunals, which are typical for both the UK and the Irish administrative legal systems. Tribunals are quasi-courts, and they fulfill a role that is similar to that of a court. However, they are highly specialized; there are Tribunals for social security and for environmental matters and also for matters relating to milk quotas only! Moreover, disputes are resolved not only by «real» judges, i.e., persons with a legal education, but also by lay people with a specific background in the subject matter of the dispute.

In a way, one could say that what happens before a Tribunal is a hybrid between court proceedings and a preliminary objection before the administration.

The advantage of this system is the concentration of expertise in the Tribunal and the fact that there are very few procedural hurdles for applicants. It is quite easy to access Tribunals, and this ensures that individuals always have a forum that will hear their complaints. At the same time, however, one could argue that, while Tribunals are applicant-friendly for their informal nature, this feature might sometimes go to the detriment of individuals; for example, in many Tribunals legal representation is not compulsory. This creates a very low threshold for applicants to access the Tribunals because they do not need the help of a lawyer, but this rule might in the end go to the disadvantage of those without representation because they will not be able to accurately present the point of law they wish the Tribunal to take into consideration.

5.3 What Is an «Administrative Dispute»? The Public/Private Divide

If a legal system decides, as the vast majority does, to assign «administrative disputes» to either a specialized court or to a specialized branch within ordinary courts, it is faced with the question of what an «administrative dispute» actually is.

This question may seem quite straightforward for certain cases. Few would doubt, for example, that a claim against an order for the demolition of a building is an administrative dispute, as this measure represents the core of what administrative law is about: the possibility for the public administration to limit the legal sphere and the rights or interests of an individual in the name of the public interest.

The delineation of what an administrative dispute is, however, becomes more complicated when, for example, an administrative body has concluded a contract with a building company for the construction of a bridge. Does the matter then fall within the competence of the administrative courts because the public administration is one of the parties to this contract? Or should this matter be reviewed by the ordinary courts since, after all, the subject matter of the controversy is a contract between two entities and hence, in principle, a private law juridical act?

Legal systems have adopted different solutions to this issue. Some legal systems, such as the British one, focus on the

Agent

agent: here, every dispute will be qualified as an «administrative dispute» if the challenged action has been carried out by a body «exercising public law functions», regardless of whether the action constitutes a private law juridical act or a public law juridical act. So, if the London police department buys new police cars, this can lead to an administrative dispute.

Action

Other legal systems, such as the Dutch one, focus not so much on the nature of the agent (i.e., the administrative body) but on the type of action that is at stake. Typically, these legal systems would assign only public law juridical acts that are not the creation or modification of rules to the jurisdiction of the administrative courts, while private law juridical acts (e.g., contracts) and the creation of rules would fall under the jurisdiction of the ordinary courts.

In the Netherlands, a claim concerning a building permit can be brought before the administrative branch of the ordinary courts, but not a sales contract, nor a complaint about the content of a local regulation.

9

Focusing on the action, however, may lead to different results in different countries. In the Netherlands, the criterion is whether the action is a written decision of the administrative body for a concrete case based on a public law competence. The determining criterion in France is not whether the act is a written decision but whether the action in question can be qualified as a public service that is carried out on the basis of a public power.

In France, similarly to the UK, even a claim regarding a contract between an administrative body and a private individual may be qualified as an «administrative dispute». This would, for instance, be the case if the administrative body is, with that contract, carrying out a public service such as the provision of bus services between two villages.

6 Standing

Once it is established that a matter is an «administrative matter» and it falls within the jurisdiction of a certain kind of court (be it a general administrative court, a specialized administrative court, or a specialized branch for administrative matters within the ordinary courts), an individual should seize a court of this kind if he or she wants to challenge the

administrative action. However, having selected the appropriate kind of court does not necessarily mean that the claim will actually be dealt with. Before being able to plead their case before a court, potential applicants have to show that they have «standing». The concept of standing is linked to the idea that there should be some kind of «link» between the applicant(s) and the subject matter of the action.

Legal systems understand and qualify this necessary link in very different ways. In some situations, there is little disagreement between the legal systems. For example, if the applicant is the addressee of an administrative measure (because an order for demolition is directed toward the building of which he or she is an owner), it can hardly be doubted that there is a clear link between his or her legal sphere and the contested measure.

The existence of this link becomes progressively more blurred if one thinks, for example, of a father challenging the amount of disability benefits received by his teenage son or a taxpayer challenging a local tax imposed upon all residents of a municipality or a resident of a city challenging a measure that imposes the closure of a certain street or an environmental NGO challenging the decision to open a nuclear plant in certain area where very rare birds nest.

For such situations, legal systems establish the necessary link in essentially two main ways, using the concept of either «interest» or «right». This choice is not accidental, but it is (at least traditionally) connected to the different conceptions of *recours objectif* and *recours subjectif* (see ► Sect. 4.2). Legal systems that adhere to the conception of *recours objectif* will typically have quite liberal standing rules. If the aim of the system of administrative justice is to check the objective legality of the administrative action, it is in the interest of the legal system itself that a rather loose link between the applicant and the contested administrative action suffices for the applicant to have access to a court.

This link is the concept of «interest». In order to have standing, the applicant will only have to prove that he or she has an «interest» in the legal situation affected by the administrative action. This means that not only the addressee of a measure will be able to prove standing but also whoever can show that the consequences of the administrative action are of interest to him or her.

For example, in case of a challenge against a license to open a nuclear plant, standing would be granted, in an interest-based legal system, not just to the individuals living around the

affected area but also to environmental NGOs who wish to protect citizens or the environment in general.

Conversely, legal systems that are based on the idea of *recours subjectif* often only grant standing to an individual where he or she can successfully demonstrate that the contested administrative action affects his or her rights.

This means that it will be much harder, in the example made above, for environmental NGOs to bring a claim before a court, given that they will hardly be able to show that their own rights have been affected.

However, this correlation between «interest-based» standing and *recours objectif* on the one hand and «right-based» standing and *recours subjectif* on the other hand is currently no longer that clear. While it is still the case that in systems with a right-based approach to standing the proceedings can be characterized as *recours subjectif*, there are also many systems with an interest-based approach to standing which adhere to a *recours subjectif* conception (such as the Netherlands).

The rather restrictive approach to standing which is present in legal systems adopting a *recours subjectif* approach should not be judged in isolation. As we will see (► Sect. 7), this restricted admittance to the courts goes hand in hand with relative extensive powers for the courts once the claim is declared admissible.

7 Remedies

Of course, one files a lawsuit not only for being dissatisfied with the behavior of the public administration but also because one wants a certain result. These demands, in technical terms, are called «remedies» or «actions.» Some remedies are so inherent to the idea of judicial protection against the acts of public authorities that they are to be found in every legal system. Some others are only available under certain circumstances or with some restrictions or are available not before the administrative courts but only before general courts. If the latter is the case, this means that an applicant is forced to make that demand before an ordinary court even if the respondent is an administrative body. If, for example, someone in Germany wants to hold a public authority liable because it acted unlawfully and wants to claim compensation of the damage that occurred from this unlawful action he has

to file a suit at German civil courts, notwithstanding the fact that the party being sued is a public authority.

The range of remedies available to administrative courts in the different legal systems does not vary accidentally but is to an extent the consequence of the rationale underlying the systems of administrative justice. If a system adheres to the view of a *recours objectif*, then it will typically grant courts only the powers that are strictly necessary to eliminate the illegal administrative action. If a system embraces the idea of *recours subjectif*, it will provide the courts with more extensive powers, as the aim of the claim is seen in the protection of the individual's legal sphere.

7.1 Annulment

When an applicant complains about an allegedly unlawful restriction of his or her legal sphere by the executive, the appropriate remedy (and the most «typical» one in the systems of administrative justice) is annulment. The applicant will typically make this demand (or, in more technical terms, bring this action or ask for this remedy) against an administrative decision that restricts his or her legal sphere. Then he will ask the competent court to deprive the contested measure of its effects.

Annulment is the equivalent in administrative law of what is called «avoidance» in private law. Annulment is only an option if the unlawful behavior of the executive consisted of a juridical act, because factual acts cannot be annulled.

An action for annulment may also be brought against a decision to deny a particular request. When this is the case, this only means that the measure (such as the denial to grant a license to open a restaurant) is annulled. It does not mean that the administrative body has been ordered to grant the license. It is even less likely that the court will grant the license itself.

7.2 Performance

Many legal systems allow individuals to ask the court to force an administrative body to issue a certain measure or to perform a certain activity, such as to repair a road, to pay a subsidy, and also to perform on its contractual obligations. For this purpose, many legal systems grant courts so-called injunctive powers. These are typical powers provided to courts in a legal system with the *recours subjectif* conception, as these

powers are aimed at protecting the individual's legal position and not merely at restoring the objective legality of the administrative action. However, these powers are not completely uncontroversial: they may conflict with a certain understanding of the *Trias Politica*. Giving courts the power to issue (more or less) detailed binding orders to the executive may be regarded as an interference of the judicial power into the realm of the executive and hence a potential breach of the principle of separation of powers. The necessity to keep courts and administration separate from each other and the idea that courts should not act as administrators have induced the legal systems that provide for this «injunctive» power to surround it with certain yardsticks.

In France and in Germany, for instance, courts are allowed to issue orders to the administration, but these orders may only have a specific content if there is only one way in which the administration may act. This is the case, for example, if there is no question about the amount of social security benefits that a person is entitled to. Then the court may order the administration to grant the benefits at that amount.

9

In all other cases, i.e., with discretionary decisions, courts are allowed to order the administration to act (i.e., to reopen the decision-making proceedings) but not to direct the content of the action.

While this choice is undoubtedly respectful of the principle of separation of powers, it is certainly not the most efficient one, given that the issue will have to go back to the administration, which will have to start the decision-making proceedings anew. How to increase the effectiveness of judicial protection without violating the principles of the *Trias Politica* is a much-debated issue in many countries.

8 Conclusion

Administrative law mainly deals with the relationship between the executive and private persons and/or organizations. In a democracy, an administrative body is strictly bound by law. First, it needs powers to be assigned to it by means of legislation. According to the rule of law (legality principle), all competences of administrative bodies that interfere with the legal position of individuals must derive from legislation.

Second, in performing a task, an administrative body is bound by the specific rules that govern this task and more generally both by the fundamental rights of the private persons and organizations that are affected by the administrative actions and by the general principles of administrative law.

The judiciary has the task to check whether the executive remains within the limits imposed on it by law. Notably, separation of powers means that it should not check whether the decisions taken by an administrative body and its other actions are the optimal ones. This kind of evaluation of the administration's work belongs to political bodies that are democratically legitimated. Courts can check whether an administrative body complied with the law, by checking whether the administrative body had the power to perform a task, and whether it obeyed the rules and rights that govern the execution of the tasks of the administration.

The precise procedures by means of which courts can check on the executive differ from country to country. An important factor in this connection is whether a country has a *recours objectif* or a *recours subjectif* view on the function of administrative justice. In legal systems adhering to the first view, quite some persons and organizations will have standing, but the powers of the courts to provide remedies are more limited. In legal systems adhering to the second view, it is just the other way round.

Recommended Literature

Bok AJ (2005) Juridical review of administrative decisions by the Dutch administrative courts: recours objectif or recours subjectif? A survey including French and German law. In: Stroink F, Van der Linden E (eds) Judicial lawmaking and administrative law. Intersentia, Antwerpen

Kuennecke M (2007) Tradition and change in administrative law. Springer, Berlin

Schwarze J (2006) European administrative law, 2nd edn. Thomson/Sweet, Andover

Seerden RJGH (ed) (2012) Administrative law of the European Union, its member States and the United States, 3rd edn. Cambridge, Intersentia