What means “studying administrative law” in Germany?

- **Theoretical**: learn the substantive and procedural facts about administrative law.

  **Overview** in two chapters: “basics of German administrative law”
  - chapter 1: Thursday, 13th November (11.30 h – 13.30 h)
  - chapter 2: Friday, 14th November (17.00 h – 19.00 h)

- **Practical**: impression about the writing of a judicial opinion and the terms in Germany.

  **Overview** in one chapter: “Vertiefung und Anwendung”
  - chapter 3: Monday, 17th November (17.00 h – 19.00 h)

Main content of the lecture:

- Condense the main facts of German administrative law
  - background and basic condition of German administrative law
  - function and principles of German administrative procedure
  - overview of the system of administrative action
- Give an impression of studying law in Germany
  - nature of the exam exercises and question
  - how a German legal opinion has to be written up

..... inspire interest in German administrative law and the exchange program to Germany
Sources of the general section of administrative law ...

...are...

- the Basics of the German legal System
- the main statutes for German administrative law
  - Administrative Procedure Act (VwVfG)
  - Code of Administrative Court Procedure (VwGO)
  - Special statues, for example:
    - federal building code (BauGB)
    - environmental code (ImSchG)
    - police codes of the federal states (PolG)
    - etc.

The basic sources of German law:
- Constitution or Basic Law (Grundgesetz - GG)
- Federal Statutes, e.g. Civil Code (BGB); Criminal Code (StGB)
- Customary law

Fundamental constitutional provisions of the Basic Law

Art. 20 GG [Constitutional principles – Right of resistance]
(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.
(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
**Administrative law in context of higher-ranking principles and legal rules**

### Constitutional principles

- **Principle of democracy** (Demokratieprinzip - Art. 20 I, II GG)
- **Rule of law** (Rechtsstaatsprinzip - Art. 20 I, III GG)
- **Principle of the social state** (Sozialstaatsprinzip - Art. 20 I GG)
- **Federal state** principle (Bundesstaatsprinzip - Art. 20 I GG)

### Legality of the administration:

Art. 1 Basic Law (GG)
(1) ...
(2) ...
(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Executive is **not only bound by acts of parliament** but also by fundamental **constitutional values**, Art.1 III GG:

- The administration authorities have to check Case-by-case for every individual administration act
  - not only the compatibility to the legal basis and the higher ranking rules,
  - but also the compatibility to the constitution (esp. civil rights) and its principles.
Administrative law in context of higher-ranking principles and legal rules

Legality of the administration:

Executive is not only bound by acts of parliament but also by fundamental constitutional values, Art.1 III GG:
- This is mostly relevant if the legal basis gives the authorities discretionary powers:

  Case by case decision in order of the principles of proportionality ("Verhältnismäßigkeitsgrundsatz").

Influenced by EU-law and EU-justification:

- EU-law is executed by the member-state-administration
- Supremacy of application of European Law over German Law
- the idea of effete utile and loyal cooperation between the states and the EU-institution:
  - administrative authorities are bound by directly.
  - Esp. applicable EU-law, the judgment of the EU-courts and the duty to incorporate EU-directives into national law.
  - Example: "Nürburgring" withdrawal of furtherances for a racetrack-project.

Federal state principle - Art. 20 I; 79 II GG

1. 1 Federal republic
2. 16 Federal states ("Länder")
3. Many Regions, cities and municipalities ...
Administrative law in context of the constitution and the sovereign power of the states ("Länder")

- states have the right to legislate insofar as the Basic law (GG) does not determines something else (Art. 72 ff GG)
- states execute their own laws and the federal law.
- They are competent to regulate their own administrative procedure act.

In order to ensure homogeneity, the states have only formerly their own administrative procedure.

- The state codes mostly repeat the federals administrative procedure act - for example LVwVfG of Baden-Württemberg and the Federals VwVfG are congruent.

Consequence for the administration work:

check the compatibility of administrative actions and its legal basis with higher ranking legal rules...
chapter 1.2 - Overview: types of administrative measures

Thursday, 13th November (11.30 h – 13.30 h)

- general section of administrative work: part of administrative law containing general principles

- special sections of administrative work: police law, building law, municipality law, law of local government, environment law, industrial law, public business law, etc.

The legality of the „public administration” and it’s enforcement measures in different administration-areas:

- Check the legality of the „public administration” as a sovereign authority
- Lawfulness of administration-standard-instruments:
  - main instrument: the administrative act
    - legal basis
    - formal lawfulness/facts:
    - substantive lawfulness /facts of the legal basis:
      - Material facts/actus reus
      - legal consequence
  - other administrative instruments: statutory instruments and by-law
    - legal basis
    - Formal lawfulness
    - substantive lawfulness /facts of the legal basis:
      - Material facts/actus reus
      - Compatibility with higher ranking legal rules
I. statutory instrument / executive ordinance ("Rechtsverordnung")

A rule of law, which is **adopted by executive authorities** to control different state affairs.

The executive body must be **authorized by a special parliamentary law** to issue a statutory instrument in a specific area. ("authorized by law" Art. 80 GG)

Example: general banning of feeding birds (general police regulation).

II. By-Law

A statue, which a **public-law corporations** issued to regulate their autonomy and their scope of tasks.

By-law rules the corporation itself and applies only **internal for its members** – for example the by-law-statute of a municipal to its citizens.

Example: development plan; community/municipal statutes; Swimming-pool-hall-statute.

III. The administrative act:

§ 35 Administrative Procedure Act (VwVfG):

**Definition of an administrative act**

(1) An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.
III. Major instrument of administration: the administrative act:

Two forms of administrative acts are included in § 35 VwVfG:

1. individual-administrative act:
   (1) An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect.

2. Subcategory: general-administrative act ("Allgemeinverfügung")
   (2) A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

Example: sending-off/order to leave; order to demolate a building; traffic sign etc.

III. The administrative act:

Major rules concerning the administrative act – to save the attend interests

Secure the rights of the directed participant <-> effectiveness of the administration

- Informality and simplicity § 10 VwVfG
- Sufficiently clearly defined in content, § 37 I VwVfG
- Right to advice and information by the authority, § 25 VwVfG
- Right to be heard, § 28 VwVfG

III. The administrative act:

Major rules concerning the administrative act

Secure the rights of the directed participant <-> effectiveness of the administration

- No special form without special legislation, (but: “may be”) § 37 II VwVfG
- Illegal administrative act remain valid and enforceable:
  - Illegal administrative act (esp. formal defects) is not invalid, § 46 VwVfG.
  - An illegal administrative act (but not an invalid one) remains effective for as long as it is not been annulled in the course of administrative or judicial review, § 43 II VwVfG.
III. The administrative act:

Major rules concerning the administrative act

Secure the rights of the directed participant <-> effectiveness of the administration

- No special form without special legislation, (but: “may be”) § 37 II VwVfG
- Illegal administrative act remain valid and enforceable:
  - Only a very gravely erroneous administrative act is invalid, § 45 I, II VwVfG - immediately visible errors like the obligation for a criminal/immoral action.
  - Besides that it is possible to "cure" formal defects and procedural errors, § 45 VwVfG.

IV. "Real-Act":

A "real act" or "factual act" shall be any simple sovereign administrative action in the sphere of public law taken by an authority not to regulate, but rather to have a factual, external effect.

The "Real-Act" has similar features as the administrative act, like ...

... taken by a public law authority
... in the sphere of public law
... for individual cases
... with an external effect

... but what is the difference to an administrative act?

... taken by a public law authority
... in the sphere of public law
... for individual cases
... with an external effect

... factual means it does not regulate anything.

Example: public information/warnings; subvention payments; towing of a vehicle.
example 1-5

The Public Health Authority in a German town inspects routinely all restaurants in the township. Main aspect of the inspection is to observe a good standard of hygiene in the kitchens and to protect the citizen from infections. Therefore the authority informs regularly in a booklet about all objected restaurants. The authority gets an anonym call by a woman. She talks about “roaches and rats” in “B’s Pizza-Palace”, a nice Pizza-Restaurant in town. The agency boss is horrified because he ate there a day before. Immediately he instructs the competent hygiene-official H to inspect B’s restaurant.

H noticed a very poor hygiene standard in “B’s Pizza-Palace”. Consequently the authority publishes a report in the next booklet about the hygiene-standard in B’s restaurant. After the hygiene-warning from the sovereignty, no more guests visit the restaurant and eat there. B’s reputation and his financial basis are ruined. He sees no way out and decides to take revenge at the health authority and its officials.

On the same day he calls the authority-manager (M) and credibly threatens that he has hidden a bomb in the building, which soon explodes. M is alert and contacts the local police. The competent police department imposes a prohibition order: Everybody has to leave the building and it is prohibited to enter.

In spite of the police-order, hygiene-official H wants to fulfill his obligation as a decent civil servant. Finally, he has to tick another twenty forms. So he still stubbornly sits in his warm office chair. During the police officers O and OO are looking for the bomb they incidentally meet H in his room. The officers tell H to leave the building immediately. H reluctantly leaves.

Please classify these different types of administrative-measures.
“Steps to administrative standard-measure”

**Example 1**

A. What type of action is the instruction to H?

- **Public-law**
- **Private law**

- **Legal act**
- **“Real act”**

- **External relationship**
- **Internal relationship**

- **Abstract-general**
- **Concrete**

**Statutory instrument**

- **By-law**
- **Administrative act**
- **Public contract**

**Regulatory provision (“Verwaltungsvorschrift”):**
- Internal order within a authority
- No external effect
- Not possible to take it to the administrative court

B. Result: Internal provision

**Example 2**

H noticed a very poor hygiene standard in “B’s Pizza-Palace”. Consequently the authority publishes a report in the next booklet about the hygiene-standard in B’s restaurant.

What type of action is the booklet-information published by the authority?
types of administrative measures

**Example 2**

A. What type of action is the booklet-information?

- **Legal act**
  - **Public-law**
  - **Private law**
  - **Real act**

The booklet-information has features, like...
- ...published by a public law authority
- ...in the sphere of public law
- ...for an individual case
- ...with an external effect

...but the booklet-information has no legal/regulating effect.

B. Result: “Real-act” or factual act

**Example 3**

After the hygiene-warning from the sovereignty, no more guests visit the restaurant and even less guests eat there. B’s reputation and his financial basis are ruined. He sees no way out and decides to take revenge at the health authority and its officials.

On the same day he calls the authority-manager (M) and credibly threatens that he has hidden a bomb in the building, which soon explodes.

M is alert and contacts the local police. The competent police department imposes a prohibition order: Everybody has to leave the building and it is prohibited to enter.

What type of action is this prohibition order?

**Types of Administrative Measures**

- Legal act
- Factual act
- Administrative act
- Public contract
- Statutory instrument
- By-law
- Abstract
- Concrete
- External relationship
- Internal relationship

**The Prohibition order: a administrative act or a general-abstract-regulation?**

1. ...any order, decision or other sovereign measure by an authority ...
   - It is a subordinated act by a authority, §1 IV VwVfG.

2. ...in the sphere of public law...
   - It is a act in public-law-business. (regulates a public law situation by a authority)

3. ...to regulate...
   - The act is directly aimed at bringing a legal consequence as a banning-order.

4. ...individual case...
   - (p): It is directed to a indefinite group of persons (every person in and next to the building)

5. ...direct, external legal effect.
   - It has a external legal effect to the citizens around.
Two forms of administrative acts are included in § 35 VwVfG:

1. concrete-individual administrative act:
   (1) An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect.

2. Subcategory: general-administrative act ("Allgemeinverfügung")
   (2) A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

A. Administrative act or general regulation? (like statutory instrument?)

In consequence for an administrative act in contrast to a general ruling....

Individual case does not mean...

..."directed to on person"

individual case means...

...“directed to one factual situation”.

B. Result: “general-administrative-act” = Subcategory of administrative act
In spite of the police-order, hygiene-official H wants to fulfil his obligation as a decent civil servant. Finally, he has to tick another twenty forms. So he still stubbornly sits in his warm office chair.

During the police officers O and OO are looking for the bomb they incidentally meet H in his room. The officers tell H to leave the building immediately. H reluctantly leaves.

What type of measure is this order?

§ 35 VwVfG - concrete-individual administrative act:
(1) An administrative act shall be any order, decision or other sovereign measure (+) taken by an authority (+) to regulate (+) an individual case (+) in the sphere of public law (+) and intended to have a direct, external legal effect (+).

Does the order regulate a individual case or repeats it the prohibition order to enter only?

- The officials want to individualize the available general-administration-act (indefinite banning-order to leaving the building) on H.
- The order imposes a separate ban with an new regulation-effect.

B. Result: administrative act

Why is it relevant to categorize the different types of administrative directives?

Major legal consequence of the classification

The Legitimation to take legal action:
- because the plaintiff is individual and subjective affected, he has to be able to bring the administrative act reasonable to a court (Rechtsstaatsprinzip - Art. 20 I, III GG).
- An action against a abstract-general rule is regularly subsidiary.

Any Questions or comments?

Thanks for your attention!

See you tomorrow at the next lecture.