Montaigne Centre

Designing Administrative Pre-Trial Proceedings

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Philip M. Langbroek
Anoeska Buijze
Milan Remac

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A Comparative Study of Administrative Legal Protection in England and Wales, France, Germany and the Netherlands with a View to Developing Administrative Pre-Trial Procedures

Philip M. Langbroek
Anoeska Buijze
Milan Remac

Montaigne Centre for Judicial Administration and Conflict Resolution
Utrecht University, The Netherlands
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Preface

Administrative law is predominantly national law. In Europe it is increasingly influenced and modified by European Union law. This book aims to focus on the choices that can be made when designing administrative pre-trial proceedings. It therefore seeks to transcend national choices based on a comparative analysis of the organisation of administrative pre-trial proceedings in England and Wales, France, Germany and the Netherlands. The result is a text with recommendations on choices to be made when designing a system of legal protection for citizens and organisations against the government.

This small book is a follow-up to an assignment of the World Bank to draft a comparative analysis for an administrative law project in Turkey. The results of the research were presented and discussed in Ankara in November 2010. We are grateful to Mr Klaus Decker, Project Manager on Improving the Justice System at the World Bank, for his support and help with the project. Furthermore, we received assistance from Mr. François Lafarge, from the École Nationale de l'Administration in Strasbourg, Mrs. Caroline Foulquier from the Unversité de Limoges and from Gordon Anthony of Queens' University in Belfast.

Before publication, we had this text reviewed. This has resulted in thorough revisions. In that respect, we are grateful for the contributions of Gerdy Jurgens, Utrecht University, and Chris Backes, Maastricht University, for their valuable comments.

Of course, we as authors accept full responsibility for this text.

Philip Langbroek
Anoeska Buijze
Milan Remac

Utrecht, May-July 2012

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I Comparing Pre-Trial Proceedings in Administrative Law with a View to Designing Administrative Procedures

1. Introduction

The Montaigne Centre of Utrecht University, the Netherlands, accepted an assignment from the World Bank to conduct a comparative study on pre-trial proceedings in administrative law in England and Wales, France, Germany and the Netherlands. The aim of the study is to provide an input for policy dialogues surrounding the issue of improving procedures for administrative legal protection. During the past 10-15 years, countries like Turkey, Macedonia, Mongolia, Georgia, Armenia and Azerbaijan have engaged in a process of improving the functioning of their legal systems, in order to enhance legal certainty for businesses and ordinary people alike. In addition, they have developed special systems of administrative law to organize and regulate relations between citizens and public administration.

2. Judicial Strategy

Designing pre-trial proceedings in administrative procedure should take chosen strategies for judicial conflict resolution into account. Georgia, Europe, already adopted a modern administrative law act 12 years ago.[1] Mongolia adopted an administrative law system in 2004,[2] Armenia in 2008,[3] Macedonia in 2004 and 2011,[4] while Azerbaijan adopted administrative law legislation in 2006 and

1 Mark H. Cohen & David C. Will, Administrative Law, *Mercer Law Review* 1999, issue 51, pp. 103-125.

2 Tsogt Tsend, Judicial procedure for administrative case in Mongolia, *SSRN*_ID1695283-code 1539822, October 20, 2010. <www.admincourt2.gov.mn>, consulted 28 September 2011. For more information on judicial reform in Mongolia, see: Sebastian R. Astrada, Exporting the Rule of Law to Mongolia: Postsocialist Legal and Judicial Reforms, *Denver Journal of International Law and Policy,* Vol. 38:3, 2010, pp. 481-525, who indicates that it is not logistics in proceedings but corruption that is a major problem in the Mongolian judicial system.

3 Prof. Dr. Otto Luchterhandt, Prof. Dr. Rüdiger Rubel & Wolfgang Reimers, *Leitfaden zum Allgemeinen Verwaltungsrecht*, Jerewan 2008, see <www.gtz.de/en/weltweit/europa-kaukasus-zentralasien/26436.htm> accessed on 29 September 2011.

4 Natasa Pelivanova & Branko Dimeski, *ibid.*, demonstrate that the introduction of an administrative appeal in two instances does not decrease the workload of the highest administrative court because virtually all cases are appealed. Also see: Borche Davitkovski & Ana Pavlovska-Daneva, The

established a new administrative court system in 2010.[5,6] These systems are often mixes of different approaches with obligatory and non-obligatory pre-trial proceedings, where in their design or implementation, French, German, Dutch and American influences are visible. The strategies are usually to keep the less socially important cases out of court while at the same time guaranteeing the accessibility of the courts.

Pre-trial proceedings in general give parties the opportunity to renegotiate their positions and to try to reach an amiable 'out-of-court' solution. Success is often the result of a better exchange of information between the parties. In this fashion, cases need not necessarily be filed at an administrative or other court. Well-functioning pre-trial proceedings keep parties out of court, unless the resolution of their conflict requires the interference of a judicial authority. A necessary condition to be fulfilled, however, is that there is enough trust between the parties involved. In administrative contexts, this means that citizens trust that their administrative authorities act rationally and are unbiased.[7]
This may be different for complex cases involving large economic societal interests, where pre-trial proceedings are unlikely to bring a solution. Such cases might better be referred to the courts directly. A well-functioning pre-trial system is still beneficial: when in place, the courts will be able to deal with complex cases thoroughly, without backlogs and delays.

The Turkish Ministry of Justice pursues a policy which ensures an 'effective implementation of measures to prevent disputes and improving alternative dispute resolution mechanisms'.[8] Part of this strategy is to establish Courts of Appeal in the administrative judicial system and to make them operational, in order to unburden the Council of State from an excessive workload.[9] Another part of this strategy is to develop and implement pre-trial dispute resolution procedures in administrative proceedings.[10] The filter mechanism of administrative pre-trial proceedings is mentioned explicitly:

Novelties in the Macedonian Law on General Administrative Procedure, *Law and Politics* Vol. 6, No. 1, 2008, pp. 21-28.

5 <www.jlc.gov.az/e_mehkeme_ve_huquq.php>, consulted 28 September 2011. Also see: Thomas Herrmann & Dr. Rebekka Hye-Knudsen, Introduction to the new administrative law of Azerbaijan, Baku 2006 downloaded from <www.gtz.de/de/dokumente/en-gtz-materialiensammlung-19-2006.pdf>.

6 A great deal of information on the developments in the judicial systems of the countries mentioned can be found on <www.usaid.gov>, <www.worldbank.org>, <www.coe.int>, and <www.gtz.de>.

7 Natasa Pelivanova & Branko Dimeski, Efficiency of the Judicial System in Protecting Citizens against Administrative Judicial Acts: The Case of Macedonia, *International Journal for Court Administration*, issue 6, 2011, pp. 45-52 show that where trust in (judicial) authorities is practically absent, people will appeal to a higher court anyway.

8 Ministry of Justice, Judicial Reform Strategy, Ankara 2009.

9 Judicial reform Strategy, p. 27.

10 *Ibid.*, p. 50.

> "Likewise the civil and criminal judiciary, pre-trial resolution methods for conflicts will also be developed in administrative judiciary by creating new application methods. The fact that certain conflicts (such as disputes between students and education institutions about grades), which fall under competence of the administrative judiciary and which are resolved by means of having conducted expert witness examination, an obligation of examination by a commission established under structure of the administration (like universities or the Ministry of Education) will be introduced. After the examination of this commission, persons concerned may still resort to the administrative judiciary if they wish. Those commissions will serve as filters for cases to come before the administrative judiciary."[11]

Expected Impact on Economic and Social Development

An effective and efficient system of legal protection for businesses and citizens in the field of public administration will help administrative authorities to remain within the confines of their competences, and will guarantee the rights and obligations of citizens. Administrative courts that operate effectively and efficiently are essential to achieving that objective. They enable citizens and businesses and other organizations (legal persons) to make administrative authorities juridically accountable for their actions. That is a basic feature of the rule of law. As the rule of law enhances legal certainty and therefore the predictability of the exercise of competences by administrative authorities, effective law enforcement by the courts and an effective execution of their judgments by administrative and judicial authorities are conditions sine qua non for enhanced economic and social development.

Pre-trial procedures in administrative law may help to achieve that objective, because they may help to filter out all the cases where administrative errors can be easily rectified by the administration itself. Hence, they are likely to help allocate those cases that most require the skills and knowledge of administrative judges to the administrative courts. This will make the use of the time spent by the courts on deciding disputes between citizens and the administration much more efficient and effective. Proceedings in the context of administrative law are therefore likely to speed up on average. Such measures will help governments to live up to the demands of fair trial and timeliness, as expressed, for example, under Article 6 of the European Convention on Human Rights, and as applied in the jurisprudence of the European Court of Human Rights.

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11 *Ibid.*, p. 50.

3. A Brief Introduction to Administrative Procedure

Administrative law comprises the system of regulations and decisions by which the government of a country and administrative authorities can take decisions affecting persons, organizations, businesses and society as a whole. Choices as to what rights and obligations persons have or will be given are usually based on statutes adopted by parliament. Within the continental idea of the rule of law such statutes must fit the constitutional rules that create offices and assign competences to these offices. Usually constitutions implement the concept of the separation of powers in one way or another. This means that a distinction is made between the functions of legislation, administration and adjudication, and that provisions are made to organizationally separate administrative and judicial functions. Furthermore, a constitution within the concept of the rule of law attributes basic rights to citizens, persons and businesses in order to delineate a separation between the public sphere of the state and the private sphere of citizens and businesses. Those basic rights limit the competence of legislative and administrative powers, and provide guidance to the legislative, administrative and judicial powers as to under what conditions and in how far the legislator and the administration may limit the rights of citizens, persons and businesses.[12]

To date, this conception of administrative activity within the concept of the legal state is about 200 years old, even though the theories on the separation of powers date back to 17th century England[13] – and, indeed, even earlier. The separation of powers may be considered outdated, because it is linked to the nation state and technological developments and globalization have not yet found their equivalents for the nation state. To date, the globalization of trade, travel and war challenge constitutionalism because the competence to create rights and obligations for governments, legislators, citizens, natural persons and businesses is partly transferred to international organizations by treaties or contracts. Examples are the contracts entered into by the Federation of International Football Associations with host countries for the world championships, the International Criminal Courts and also the international cooperation in combating piracy in the Indian Ocean. Other examples are the International Monetary Fund and the World Trade Organization, and last but not least in the context of this book, the jurisprudence of the European Court of Human Rights based on the European Convention on Human Rights.

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12 The concept of the Rechtsstaat or constitutional state was further developed especially in the period between the two world wars in the German-speaking countries: we refer to Carl Schmitt, *Verfassungslehre*, Berlin, 1928, and F.L. Neumann, *Die Herrschaft des Gesetzes*, Frankfurt am Main 1986, originally in English, 1936, O.W. Kägi, *Zur Entstehung, Wandlung und Problematik des Gewaltenteilingsprinzipes,* Zürich 1937.

13 J.C. Vile, *Constitutionalism and the separation of powers*, Oxford, 1967.

Public Administration in a Legal State

However, this does not mean that national, regional or local state-based administration has become irrelevant, and neither has the separation of powers. Basically, public administration is the state-related activity by which offices represented by office holders make choices on the regulation of activities of citizens and businesses and other organizations (legal persons). Examples are social security decisions, grants for sport clubs, driving licences, concessions for mining or public transport, spatial planning and building construction, licences for activities that may pose a danger to the environment etc. The number of activities subject to administrative regulatory control is countless and covers virtually all aspects of life, from birth to death, from schooling and education to property, from health care to public transport, and so on. Administrative law is everywhere and administrative authorities have the tasks of creating and maintaining order in all societal activities. This involves making choices, granting rights and obligations concerning an activity to persons and businesses, but also imposing and enforcing prohibitions on certain activities for all.

Administrative law is about the organization and limitation of public competences, and the different ways in which control is exercised over the execution of those competences and by whom. Usually, administrative authorities are subject to democratic and juridical accountabilities. It is the task of administrative authorities to make choices and to take decisions with some kind of legal effect. Mostly, they cannot and will not avoid making choices, because a person or a citizen is legally entitled to an authority which takes a decision, in one way or another. Such authorities are *e.g.* a minister, a regional council or mayor and the alderman of a municipality. It may also be a taxation officer or a competition authority. Most of these choices are subject to political control by a democratically elected representative body. This holds true for administrative authorities with territorial jurisdiction within state territory; a county or municipality will have a council and a presiding officer and/or an executive body. Sometimes, however, agencies and authorities are charged with highly specialized tasks that cannot be very well combined with direct political control. Examples are the president of a national bank and a competition authority.

No matter what kind of task has been assigned to an administrative authority, before taking any decision it has to weigh the interests of citizens, persons and businesses involved in the choices to be made against each other, also with a view to the public interest. The demolition of a neighbourhood in order to construct an underground railway system in a city is an example of a highly complex context demanding many decisions falling within the scope of administrative law. Decisions on social insurance benefits or taxation are often much less complex, but they also fall within the scope of administrative law. An often occurring feature of more complex decisions which have to be made is that administrative offices have

a position as a third party with the power to decide, and which mediate when there are conflicting societal interests, also on the micro level. In that respect their position resembles that of a judge in civil proceedings. Administrative courts therefore have a position which is quite different from courts in civil proceedings: they merely evaluate the administrative decision making and therefore often cannot take decisions that decide the conflict at hand, that is, they function as legal controllers of the administration – on demand.

Legal Protection against the Administration and the European Convention on Human Rights

What administrative decisions have in common is that they must be taken within the delimitation of legality. The administrative authority may not act beyond the scope of its legally attributed competences. Also the weighing of interests is restricted to those limitations. Of course, administrative authorities have room for discretion as they usually have to interpret vague and general wording in legislation, and they also need to decide if the conditions for the exercise of a competence are fulfilled. Some of these choices are often publicly contested. Building a new railroad or licences for oil drilling in a nature reservation may affect many people. Other choices can affect only one person or one business. The demands of legality, however, remain similar, but the decisions affecting larger groups of persons are much more likely to receive political attention from democratically elected representative bodies than decisions with relatively minor effects which are usually taken in a context of bureaucratic routines, like social insurance benefit decisions. For the development of a system of legal protection for persons and businesses against decisions of administrative authorities, an important question is how the system of legal protection is related to the organization of democratic political control. This relates to the extent of the judicial control of administrative actions and court competences to review the decisions of administrative bodies. At the heart of these choices on how to organize legal protection against administrative decisions are conceptions of the separation of powers doctrine. Within the nation state, and especially in the field of administrative law, this doctrine is very much alive.

The Convention on Human Rights directly grants citizens of the states that are parties to the treaty several human rights, one of them being the right to a fair trial and, as a consequence, they can invoke these rights in court. The right to a fair trial based on Article 6 of the ECHR gives them the right to have access[14] to an independent court in order to have their case reviewed and to receive a final decision within a reasonable time when their civil rights or obligations have been violated or if there has been a criminal charge.

14 Golder Judgment, ECtHR,21/02/1975/, case 4451/70.

In Europe, there are also some limitations to these choices, as the European Court of Human Rights has decided that citizens and businesses have the right to a fair trial also with regard to the actions of an administrative authority, based on the phrase "civil rights and obligations" in accordance with Article 6 of the Convention. This means that most administrative actions imposing rights and obligations on legal persons and citizens concern civil rights and obligations, and result in a right to a fair trial under Article 6.[15] An exception concerns *e.g.* the imposition of non-punitive taxation decisions.[16] Article 6 is also applicable to administrative sanctions, based on the autonomous interpretation of the phrase "criminal charge" in Article 6 ECHR.[17]
Two issues of interpretation are important: the bearer of civil rights and obligations cannot be an authority under public law, and a general interest organization can also not be a bearer of civil rights and obligations regarding the interests it seeks to represent.[18]

In this study we describe the choices concerning the organization of the legal protection of persons and businesses against actions of administrative authorities as they have been made in Germany, England & Wales (UK), France and the Netherlands. These four countries are parties to the ECHR which defines the minimum standard of legal protection which should be complied with by the parties of the ECHR. In this study, we will focus especially on the phase of proceedings between the outcome of the processes leading to the original administrative decision and the organization of the access of persons and businesses to an independent court as defined by the European Convention on Human Rights and by the European Court of Human Rights. It is inevitable that while doing so we also refer to the relation between pre-trial proceedings and court proceedings against administrative actions.

4. Terms of Reference

According to the Terms of Reference for this assignment as given by the World Bank, the work should focus on:

> "the authority, procedures and processes used by administrative agencies and/or other institutions to resolve administrative disputes with citizens before the disputes are taken to a court".

And:

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15 The jurisprudence has already been under development for at least 35 years.
16 Ferrazinni Judgment, ECtHR, 12/07/2001, case 44759/98.
17 Öztürk Judgment, ECtHR, 21/02/1984, case 8544/79.
18 Article 34 ECHR.

The Comparative Study should provide a clear description of the following:
- the legislative and/or regulatory authority which supports non-judicial review and resolution of disputes between administrative agencies and citizens;
- the procedures and rules that govern the non-judicial dispute resolution process, including the use (if any) of alternative dispute mechanisms such as mediation or arbitration;
- the institution(s) or individual(s) charged with conducting or leading the non-judicial dispute resolution process, their qualifications and training requirements (if any);
- the procedures and processes for appealing pre-judicial dispute decisions in courts;
- any available data on the impact of the pre-judicial dispute resolution procedures on the caseload of administrative courts in the countries; and
- an analysis of the costs and benefits, advantages and disadvantages of each of the non-judicial administrative dispute resolution systems.

The choice of countries was limited to England or the USA and to France, plus two other European countries.

5. Method

For reasons of expertise and the language abilities of the researchers we have chosen the administrative law systems of England and Wales, France, Germany and the Netherlands as objects of description, analysis and comparison.[19] Thus, a variety of different systems of legal protection against the administration would be covered: voluntary (France) and obligatory (the Netherlands, Germany) pre-trial proceedings, and with (England and Wales) or without specialized administrative tribunals (France, Germany), as well as with or without special (the Netherlands, France, Germany) administrative courts (England and Wales).
Each researcher was assigned to a country's administrative law system and gathered information on legislation and its system of pre-trial procedures in administrative litigation. The sources are academic literature, websites approved by the government or the relevant court, rules for court procedures, and legislation on administrative procedure, where possible. The subjects dealt with are the following:
- functions of administrative review;
- the administrative bodies, their decision-making competences and administrative review;

19 For the methodology of comparative law see inter alia: K. Zweigert & H. Kötz, *Introduction to comparative law,* Clarendon Press, Oxford 1998; W. Pintens, *Inleiding tot de rechtsvergelijking*, Leuven University, 1998, especially chapter VI.; J.H. Merryman, The French Deviation, 1996, 44 *American Journal of Comparative Law*, pp. 109-119.

- procedural requirements such as
  - timeliness;
  - effective conflict resolution;
  - defence rights;
  - protection of public and third party interests; and
  - other.
- administrative Courts and administrative pre-trial proceedings;
- other conflict resolution instruments (mediation, ombudsman, arbitration); and
- statistical information.

We have developed the description of the pre-trial proceedings for each country from a general description of its system of legal protection against the government. Depending on the administrative law system in each country, deviations from this pre-set order were inevitable. Especially the English system is very different from the continental approach to administrative law and therefore the report follows a different order. The reports were individually drafted and checked and partially redrafted by the other researchers. Furthermore, we asked researchers from France, Germany and England for advice when necessary. Thus, we tried to prevent any misunderstanding from arising.

Comparative Analysis

The comparative analysis is based on the country reports and describes the most important choices to be made with a view to designing pre-trial proceedings in administrative law. This was done by referring to choices which were apparent from the country reports and by discussions amongst the researchers. These choices are based on the systems of pre-trial proceedings in the administrative law of the four countries studied. It should be noted that administrative procedural law conceived of as both procedures for administrative decision making and procedures for reviewing administrative decisions are immensely complex. Administrative pre-trial proceedings in relation to proceedings before an administrative court add to that complexity. Furthermore, the choice of countries limits the generalizability of the results of the comparative analysis. Also for that reason we do not pretend to be able to provide a full comparative overview of all procedural issues of pre-trial proceedings in administrative law. We were also not able to conduct extensive empirical research into the actual practices of pre-trial proceedings in the different countries, and we acknowledge that this limits the scope of our recommendations. The choices we present are based on a comparative analysis of a limited scope, and therefore the choices to be made should be considered by also taking local, practical considerations into account. The solutions are local and can be different from country to country. Further limitations are that we have not considered the increased interactions between citizens and the administration, as a result

of increased transparency, internet consultations and other administration – citizens' co-production activities. They have in common that the administration becomes less of an expert administration and more of a network of public and private accountabilities.[20] Lastly, but no less important, we also acknowledge that our perspective is European. We presume a direct link between fair economic competition and economic growth, on the one hand, and legal certainty and the predictability of government actions, on the other. There may be doubts about the transplantation of values which we hold dear to other societies: our interpretation of administrative procedure has its roots in Dutch,[21] French and German public administration norms[22] and we also adhere to the principles of New Public Management, although not always to the ways it has been implemented. The idea of a global administrative law as part of an answer to globalization together with a further empowerment of international organizations, and transforming them into transnational authorities, seems to be an attractive proposition, but we should be reluctant in propagating it. Harlow demands the thorough democratic legitimacy of also public administration norms and public administration accountability, and so far this can be actually realized in democratic states.[23] Even so, we do hope that this small book will contribute to deliberately designed systems of administrative legal protection for citizens against the administration.

6. This Book

We start this book with a description and analysis of the pre-trial administrative proceedings in England and Wales, France, Germany and the Netherlands. Following those descriptions we present a comparative analysis and propose some refinements in the design of administrative procedures, based on well-designed and local user-oriented experiments.

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20 For further discussions on comparative administrative law, see Francesca Bignami, From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law. *American Journal of Comparative Law*, Vol. 59, 2011; GWU Legal Studies Research Paper No. 580; Available at SSRN: <http://ssrn.com/abstract=1916744>.

21 P.M. Langbroek, General Principles of Proper Administration in Dutch Administrative Law, in Bart Hessel & Piotr Hofmanski (eds.), *Government Policy and Rule of Law in Poland and the Netherlands*, Białystok 1997, pp. 81-107.

22 Oswald Jansen & Philip Langbroek, *Defence Rights during Administrative Investigations*, *a comparative study into defence rights during administrative investigations against EU fraud in England & Wales, Germany, Italy, the Netherlands, Romania, Sweden and Switzerland*, Intersentia, Antwerp 2007.

23 Carol Harlow, Global Administrative Law: The Quest for Principles and Values, *European Journal of International Law*, Vol. 17, No. 1, 2006, pp. 187-214, especially pp. 211-213. The European Union is not (yet) a democratic state, and the centralization of public administration norms may or may not be the solution for the development of certain values.

II Pre-Trial Proceedings in Administrative Law in England and Wales

1. Introduction

Initially, in contrast to continental countries, the United Kingdom did not have a separate field of administrative law, as it was not considerably influenced by changes in Europe in the late 18th and at the beginning of the 19th century, such as the French Revolution. In general, administrative law in the sense of the French droit administratif was perceived as something non-English, as something existing outside the common law tradition. One of the most influential jurists and scholars A.V. Dicey put it very bluntly: "In England we know nothing of administrative law; and we wish to know nothing".[1] General mistrust in administrative law led to opinions that 'ordinary' courts should deal with 'administrative' cases. Because of their independence, the existing courts were most likely to decide whether the administration had acted within the legal boundaries which were set by Parliament. To date, the appreciation of administrative law has changed considerably compared with its perceptions at the beginning of the 20th century. Currently, administrative law comprises a significant part of the law system in the UK. Administrative, instrumental legislation has grown very quickly, also in England and Wales, and the courts and tribunals also follow this legislation. Having stated that, the system of legal protection against the Government in England and Wales is different from continental systems, but that is not so much a matter of law but of the organization of access to administrative justice and the organization of jurisdictions. In contrast to France, England and Wales have a vast array of specialized administrative tribunals that fulfil a most important function between society and public administration and fall within the appellate jurisdiction of the Administrative Court.[2] Originally, the tribunals were established within different

1 In Administrative law, P. Leyland & G. Anthony, *Textbook on Administrative Law*, 6th edition, Oxford University Press, 2009, p. 1.

2 For an exposé on the differences between the English legal system and continental legal systems, see: J.H. Merryman, The French Deviation, 1996, 44 *American Journal of Comparative Law*, pp. 109-119. John Merryman, & Rogelio Perez-Perdomo, *The Civil Law Tradition*, 3rd edition: *An Introduction to the Legal Systems of Europe and Latin America*, Stanford University Press, 2007.

fields of government activity, developing and applying their own rules of procedure. The Tribunals, Courts and Enforcement Act 2007 brings the different tribunals together under one institutional roof. Procedural differentiation according to sector specifics is supposed to be accepted within newly set general rules aiming at procedural consistency.[3]

From here, we will elaborate the paths for redress which a citizen can take if s/he is not content with an administrative decision or administrative conduct. S/he has several paths to follow and to choose from. S/he can use:

1. the system of control by the administration itself – complaint (about certain behaviour or a service), appeal (about substance);
2. the system of control by tribunals – statutory appeal;
3. the system of control by the ombudsman – complaint against maladministration;
4. the system of control by the courts – judicial review; and
5. a system of control by other means (conciliation, investigation, inquiry, consultation, public participation, inspection, complaint to a Member of Parliament).[4]

We will follow those paths in the subsequent sections of this chapter, but we will also pay some attention to the efforts and consequences to integrate the different ways of administrative redress for individuals in England and Wales.

2. Control of the Administration – Pre-Trial Proceedings in *Sensu Stricto*?

A striking feature of the control offered by the administration in England and Wales is that there is no general arrangement of protection against the government. There is no general statute that would in general terms describe administrative proceedings in the form of some 'General Administrative Law Act'.[5] There is no uniform model that can be used by an individual in a dispute with an administrative body. This opens the door to a diversity of possibilities for an individual. On the other hand, it also brings a certain lack of consistency and a possible ambiguity within the system of legal protection against the administration. The lack of a general arrangement of dispute resolution by the administration also influences academic writers. In their publications references to pre-trial procedures are minimal.[6]

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3 *E.g.* Paul Craig, Perspectives on Process: Common Law, Statutory and Political (August 1, 2009), *Public Law*, p. 275, 2010; Oxford Legal Studies Research Paper No. 75/2010. Available at SSRN: <http://ssrn.com/abstract=1701283>, pp. 290-291.

4 This system will not be discussed in this paper. Its inclusion here should help to draw a complete picture.

5 As we can see in some other countries, for example in the Netherlands and Germany.

6 See for example P. Leyland & A. Anthony, *Textbook on Administrative Law*, 6th edition, Oxford University Press, 2009; A.W. Bradley & K.D. Ewing, *Constitutional and Administrative Law*, 13th

With some administrative bodies it is possible to find various 'internal mechanisms' for dispute resolution. This is the case for one of the largest departments in the UK – the Department of Work and Pensions. The Department, like the system itself, strictly distinguishes between complaints against its service and appeals against its decisions. In its publication of April 2010 –*'If you think our decision is wrong'*, the Department describes several possibilities that an individual has. With some generalization we can underline the following mechanisms that an individual can use if he or she thinks that a decision is wrong, or if he or she does not understand it:

a) an individual can ask for an oral or written explanation of the decision;
b) secondly, he or she can ask the administrative body to reconsider the decision;
c) thirdly, he or she can ask the administrative body for a *'written statement of reasons'*, if it was not given at the same time as the decision;
d) fourthly, in certain cases an individual can ask an independent body to review a decision; (for example, the Independent Review Service for the Social Fund)[7]
e) and, last but not least, he or she can appeal against the decision with the body that deals with appeals against the decision – this body is in most cases an independent administrative tribunal.[8]

The first four possibilities help an individual to understand the decision and attempt to keep him or her away from the courts and tribunals as much as possible. This means that, for example, a department can deal with its decision in an internal procedure and in this way it can avoid the possible tribunal procedure of a statutory appeal.

Another department that has adopted an internal complaint mechanism is the Department of Health. On its internet site it describes extensively how to complain if one is dissatisfied with a service provided by the Department.[9] It points out the possibility to:

a) file a complaint with the originating section of the department;
b) file an official complaint with the department via the Complaints Manager;
c) file a complaint with the Parliamentary and Health Service Ombudsman.

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edition, Longman 2003 or H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 10th edition, Oxford University Press, 2009.

7 The Core Business Independent Review Service is to deliver an independent review of discretionary Social Fund decisions made in Jobcentre Plus offices. It also shares information and expertise with those who have an interest in the discretionary Social Fund and its review. See <www.irs-review.org.uk/aboutirs/about>, accessed on 11 June 2012.

8 The name 'administrative tribunals' is rather archaic. Some writers consider that it does not describe the real present-day function of tribunals. In most cases, authors simply use the denomination 'tribunals'. See for example C. Harlow & R. Rawlings, *Law and Administration*, 3rd edition, Oxford University Press, 2009.

9 See <www.dh.gov.uk/en/ContactUs/ComplaintProcedures/DH_119677>, accessed on 8 June 2012.

It also states that if an individual is still unhappy with the decision of the department, he can appeal to the authorized tribunal or submit an application for a judicial review.

The Ministry of Defence (MOD) also offers a number of possibilities for discontented individuals. An individual can complain in connection with the conduct of the Ministry or its department. It is possible to raise a complaint with:

a) the part of the MOD involved in the matter, as they will usually be the most able to set things right;
b) the Ministerial Correspondence Unit;
c) via the MOD's internet site or telephone.

If an individual is not satisfied with the way in which his or her complaint has been handled, he or she has the right to ask for an internal review of the case which will be carried out by the division where he or she made the initial complaint.[10] An individual can also complain to the Parliamentary and Health Service Ombudsman. Certain types of complaint procedures, such as complaints about requests for information made under the Freedom of Information Act or the Environmental Information Regulations 2004, complaints under the Data Protection Act 1998, or complaints about low-flying military aircrafts have to be made to a specific body and a specific complaint procedure is often necessary. Against certain decisions of the Ministry of Defence (for instance, a decision on pensions) it is possible to appeal to the authorized tribunal. As a last resort it is always possible to submit an application for a judicial review. With some understanding of government bureaucracies, those complaint instances can be found on the internet, where instructions are given on how to file a complaint.

There are some conclusions that can be drawn from the previous examples and from inventorying and comparing the complaint procedures of the above-mentioned governmental bodies.

Status of the Complaint

A complaint to an administrative body is neither an appeal nor an application for judicial review. Complaints do not substitute these legal options. In certain cases they may deal with the distress of an individual but they cannot provide an answer to legal issues that can only be challenged by a statutory appeal. Complaints almost exclusively deal with the *conduct* or *service of the administrative bodies*. Only on rare occasions can they deal with the content of an administrative decision. Because of that, they cannot be characterized as full pre-trial proceedings in the continental

10 See <www.mod.uk/DefenceInternet/Help/ModComplaintsProcedure>, accessed on 8 June 2012.

sense, but they do intend to keep complainants out of the courts and tribunals by addressing the problems posed by complainants.

Right to File a Complaint

In most cases the person who is directly influenced by a decision or behaviour of the administration can file a complaint. In some cases it could also be a representative, which does not necessarily have to be a legal representative. In certain specific situations, only a particular individual can file a complaint (*e.g.* a member of the armed forces). Usually, anonymous complaints are not taken up, as complaints are connected with a right to receive an answer as to how the complaint has been dealt with.

Time Limits

In general there is a time limit of 12 months for filing a complaint at the administrative body. A complaint to a department does not affect other time limits especially the time limits for an appeal or an application for judicial review. A complaint to a department usually stays the time limit for filing a subsequent complaint to an ombudsman.

3. Reorganization: Organization Perspectives Concerning Tribunals and Ombudsmen

In 2004, the White Paper on Transforming Public Services: Complaints, Redress and Tribunals as a general policy aim stated that there should be: "an independent, accessible, flexible and authoritative dispute resolution system, tailored to the needs of the individual."[11] This comprises tribunals, the Administrative Court and the redress function of public administration ombudsmen in England and Wales. The National Audit Office has investigated the administrative redress system for citizens, following a similar perspective.[12] And the Administrative Justice and Tribunals Council also follows a unifying 'systems' perspective.[13] It is important to note that scholars seem to have followed the same perspective as that of the policy makers, namely 'designing redress' from a comprehensive perspective on the protection of citizens against the administration. Kirkham, Thompson and Buck have argued for a stronger position for Ombudsmen in the English constitution in

11 Department for Constitutional Affairs, Transforming Public Services: Complaints, Redress and Tribunals, London, 2004.

12 Citizen Redress: What citizens can do if things go wrong with public services, Report by the Comptroller and Auditor General | HC 21 Session 2004-2005 | 9 March 2005.

13 Administrative Justice & Tribunals Council Securing Fairness and Redress: Administrative Justice at Risk?, October 2011. Downloaded from <ajtc.justice.gov.uk>, accessed on 10 June 2012.

order to support their work for redress.[14] Drewry has described the developments comprehensively, from a historic perspective, indicating the policy orientation on customers and efficiency and the holistic approach.[15] LeSueur recommends a common set of principles for redress 'systems', and referring to past and current efforts to rationalize the organization of citizens' redress, because of their constitutional relevance.[16] Paul Craig describes the way in which procedural rules are established in the English courts and for tribunals as code-like procedure rules, but notices that for the making of such rules there is no democratic representation, whereas they have major importance in guaranteeing citizens' rights.[17] In 2007, Trevor Buck noticed a problem with the precedent system in Tribunals, as confusion had arisen about what are relevant decisions from a precedent perspective. Tribunals had been restricting case law presentations by parties in proceedings, and no system to produce reported (in contradistinction with unreported) decisions had been made. According to Buck, the reforms should also address this issue.[18]

Actual reorganization efforts, however, have focused on the tribunal system and not on the ombudsmen. This reorganization was based on the Leggatt Report, 'Tribunals for users. One system, one service' from August 2001.[19] The eventual enactment of the Tribunals, Courts and Enforcement Act 2007 ('TCE Act 2007') following the 2004 White Paper had three goals. First, it recognized that tribunals are part of the system of adjudication. Second, the Act tried to arrange the independence of the tribunals. And last but not least, it tried to create a systematic structure for tribunals. The TCE Act 2007 opted for a system of the administration of justice in two instances:

– The first instance is covered by one huge tribunal – the First-Tier Tribunal.
– The second, appellate instance is covered by the Upper Tribunal.[20]

The functions/jurisdictions of most of the pre-existing tribunals have been integrated in this new structure and nowadays there are only a few 'independent'

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14 R. Kirkham, B. Thompson & T. Buck, The Ombudsman's Place in the Constitution. *Parliamentary Affairs*, 2009, pp. 600-617.

15 G. Drewry, The Judicialisation of 'Administrative' Tribunals in the UK: from Hewart to Leggatt, *Transylvanian Review Of Administrative Sciences,* No. 28 E Si/2009, pp. 45-64.

16 Designing Redress: Who Does it, How and Why?, March 15, 2012, *Asia Pacific Law Review*, 2012; Queen Mary School of Law Legal Studies Research Paper No. 109/2012. Available at SSRN: <http://ssrn.com/abstract=2023181>.

17 Perspectives on Process: Common Law, Statutory and Political (August 1, 2009). Public Law, p. 275, 2010; Oxford Legal Studies Research Paper No. 75/2010. Available at SSRN: <http://ssrn.com/abstract=1701283>.

18 Trevor Giles Buck, Tribunal Reform in the UK: Precedent and Reporting in the New Unified Structure (June 2007). Available at SSRN: <http://ssrn.com/abstract=992258>.

19 See <http://webarchive.nationalarchives.gov.uk/+/http://www.tribunals-review.org.uk/leggatthtm/leg-00>, accessed on 8 June 2012.

20 It is primarily the Upper Tribunal, but not exclusively, that reviews and decides appeals against the decisions of the First-Tier Tribunal.

tribunals that are not included within this structure. All tribunals which will be established in the future will also be integrated in this new structure. The First-Tier Tribunal mostly decides on statutory appeals against decisions of administrative bodies. The Upper Tribunal has two functions. Firstly, it has the function of an appellate institution. The Upper Tribunal deals with appeals against the decisions of the First-Tier Tribunal. Furthermore, it is competent to deal with judicial review cases, which is a novelty. This power brings the Upper Tribunal close to that of the judiciary as previously only the courts could exercise the power of judicial review.

The TCE Act 2007 created divisions within the First-Tier Tribunal, as well as within the Upper Tribunal. The First-Tier Tribunal is currently divided into six chambers: the General Regulatory Chamber, the Social Entitlement Chamber, the Health, Education and Social Care Chamber, the War Pensions and Armed Forces Compensation Chamber, the Tax Chamber and the Immigration and Asylum Chamber.[21] Each Chamber has its own procedural rules although these procedural rules resemble each other to a certain extent.
The Upper Tribunal is currently divided into four chambers: the Administrative Appeals Chamber, the Tax and Chancery Chamber, the Lands Chamber and the Immigration and Asylum Chamber.[22] Each chamber has its own procedural rules applicable to all its parts.
The tribunals do not manage themselves. In 2006, the Tribunal Service was established as an executive agency of the Ministry of Justice to provide administrative support for the tribunals' judiciary which hears cases and decides on appeals.[23] However, on 1 April 2011 the Tribunals Service merged with the HM Courts Service to form the HM Courts & Tribunals Service. Since then the Courts and Tribunals have been administered by the same agency.[24]

Now that the tribunal system has been reorganized, other scholars, but also the Administrative Justice and Tribunals Council, are arguing for more attention for the ombudsman insitutions.[25] The outcomes of the tribunal reorganization to date are described below.

4. Control of the Administration by Tribunals

Tribunals

A system of specialized administrative courts as known in some continental countries practically does not exist in the UK. It can be argued that there is the

21 See <www.justice.gov.uk/about/hmcts/tribunals.htm#1>, accessed on 8 June 2012.
22 *Ibid*.
23 History of Tribunals reforms, HM Courts and Tribunals Service, p. 3.
24 <www.justice.gov.uk/about/hmcts>, accessed on 10 June 2012.
25 AJTC, *Strategic Plan 2010–13* (AJTC, 2010); T. Buck, R. Kirkham & B. Thompson, (2011) Time for a "Leggatt-style" review of the ombudsman system? *Public Law* Spr:1, pp. 20-29.

Administrative Court; however, this court is only a part of the High Court and has all in all only some 50 judges who deal with its cases. Admittedly, the work of the Administrative Court is varied but it consists mainly of appellate jurisdiction over inferior courts, tribunals and a large number of public bodies.

An important feature of English (and Welsh) administrative law is the multitude of tribunals created by Acts of Parliament. Tribunals have always played an important role in the statutory appeal procedure. A large number of these tribunals were created on an ad hoc basis after World War II. Tribunals had diverse competences and were, and to a certain extent still are, based on different statutes. Tribunals deal with a wide range of subject-matter areas, such as social security, taxation, property rights, immigration, mental health, special education needs, and so on. A major type of dispute resolution in public administration (in England) is determining appeals against adverse initial decisions on benefit claims and licensing applications. Such appeals are most frequently dealt with by administrative tribunals.[26]

The tribunals system has developed during the 20th century. There was a tendency to create a new tribunal for every field of law. Tribunals each had their own procedural rules. It differed from tribunal to tribunal whether there was a right to appeal against its decision. If there was a right to appeal, then it differed which body had the competence to deal with the appeal. It was possible that another tribunal had this competence, but there was also the possibility that a minister was competent or a court. The introduction of tribunals can be closely linked to the development of a coherent system of administrative justice on a scale comparable to droit administrative under the Conseil d'Etat.[27] What tribunals actually are is thus not an easy matter. Tribunals can be described by their features:

- they offer an independent assessment of the administrative case;
- they are a faster, cheaper and less formal alternative to the courts;
- they do not require any form of legal representation;
- their procedures are informal;
- they hold public hearings;
- they give reasons for their decisions;
- they are flexible in their approaches;
- they make legally enforceable decisions that are subject to further appeal and to judicial review;
- they have inquisitorial rather than adversarial procedure as the tribunal judges play an active role in the proceedings; and above all
- they are highly specialized in a particular issue.[28]

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26 B. Thompson, *Textbook on Constitutional & Administrative Law*, 3rd edition, Blackstone press limited, 1993, p. 357.

27 P. Leyland & G. Anthony, (in n. 29), p. 154.

28 Tribunals usually sit as a panel, incorporating a legally qualified tribunal chairman, as well as panel members with specific areas of expertise. See <www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jurisdictions/tribunal-jurisdiction>, accessed on 8 June 2012.

In accordance with a report of the Cabinet Office – Public Bodies 2009, tribunals are to be considered non-departmental public bodies.[29] In the year 2010-2011 they received 830,000 cases and decided 714,000.[30] This shows the societal importance of tribunals.

The situation has not always been as it is now. In recent years, the whole system of protection offered by the tribunals has gone through extensive changes and reorganization. There were three issues that were experienced as problematic.

The first issue was the independence of tribunals. Tribunals were independent only 'virtually'. In most cases they were created within the administrative body whose decisions they had to assess. Because of this fact tribunals were not always offering an independent and impartial assessment of the case filed with them.

The second issue was the ambiguity of the tribunal system. At the beginning of the 21st century there were about one hundred tribunals, some of them covering only one particular issue. Every tribunal had its own set of procedural rules and legal remedies. In some cases there was the possibility to appeal to the courts, in others an appeal could be made to a different body. All in all, the system was becoming disorganized and an individual faced extensive problems in finding the right tribunal to address.

The third issue was the status of the tribunal members. As they were still de facto employees of the administrative body it was relatively easy to discharge them from their function and thus again influence their impartiality.

Protection Offered by Tribunals

The tribunals are a very important feature of English administrative law. The largest share of administrative disputes is decided within the tribunals system. Without tribunals, the court system would quite simply break down and the machinery for alternative dispute resolution would need to be heavily augmented.[31] The tribunals deal with about one million cases a year. In this impressive amount of cases we can find examples of all the different procedures offered by the tribunals.

a. Statutory Appeal at the First-Tier Tribunal (or Upper Tribunal)

As stated before, there is no general right of appeal against decisions of public (administrative) authorities. Legal statutes have to make clear that there is a possibility to appeal against a particular administrative decision. If there is such an appeal, they also designate a body that can deal with it. In most cases this body is a special tribunal. Today, most of the tribunals fall under the umbrella of the

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29 See <www.civilservice.gov.uk/about/resources/information-on-public-bodies>, accessed on 8 June 2012.

30 Annual Tribunals Statistics, 1 April 2010 to 31 March 2011, downloaded from <www.justice.gov.uk/statistics/tribunals/annual-stats>, last visited on 10 June 2012.

31 C. Harlow & R. Rawlings, *Law and Administration*, 3rd edition, Oxford University Press, 2009, p. 487.

First-Tier Tribunal, this would be one of the specialized parts of the chambers of the First-Tier Tribunal or of the Upper Tribunal, as the latter can also act as a first instance appeal body. Cases coming to the First-Tier Tribunal are statutory appeals against the decisions of administrative bodies. There is only a right to a statutory appeal if there is a law (an Act of Parliament) that grants a right of statutory appeal. Statutory appeals are not always brought before a tribunal; sometimes they have to be brought before a particular body that is designated in an Act of Parliament as the appellate body. This could be a court, a minister or some other body. The disputed decision can be reviewed fully in a statutory appeal procedure.

Particular Acts of Parliament describe what powers the tribunal has in each case. Some appeal procedures can lead to quashing or affirming the contested decision. Others can lead to a request to the administrative body to reconsider the matter. Generally, tribunals can:

a) affirm the decision or action;
b) quash the decision or action in whole or in part;
c) substitute another decision or action of a kind that could have been taken for all or part of the decision or action;
d) add a decision or action of a kind that could have been taken during the initial decision or action;
e) remit a matter to the administrative body (generally, or for determination in accordance with a finding made or direction given by the Tribunal);
f) reinstate a lapsed or revoked licence.

These powers are vested in, for instance, the Gambling Appeals Tribunal that is today part of the First-Tier Tribunal (Gambling).[32] However, these powers may, and indeed do, differ. For instance, another part of the First-Tier Tribunal (Asylum support) can:

a) ask the Secretary of State to reconsider the matter;
b) substitute their decision for the decision being appealed against; or
c) dismiss the appeal.[33]

The powers of the Tax Chamber of the First-Tier Tribunal are described as follows:

> "The tribunal does not have unlimited powers. It can only do what the law gives it the power to do. Sometimes, if it accepts that your appeal is valid, it can replace the decision you are appealing against with the decision it thinks should have been made.

32 These powers exist in accordance with the Gambling Act 2005.
33 See <www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/asylum-support/appeals>, accessed on 8 June 2012.

> In other cases it can only direct HMRC to reconsider their decision. If it does not accept that your appeal is valid it will uphold the decision you are appealing against."[34]

Thus proceedings before different chambers of the First-Tier Tribunal may lead to different results. Similarly, time limits for appealing against an administrative decision could be different. These time limits could be different between chambers of the First-Tier Tribunal and can also differ within one chamber.
For example, the time limit for appealing against social security and child support decisions is one calendar month from the date on which the official letter announcing the decision was sent to the addressee. In the case of tax credit appeals an individual has 30 days in which he can appeal. An appeal to the First-Tier Tribunal (Local Government Standards in England) has to be made within 28 days of the completion of the report made in accordance with section 63(3)(a) of the Local Government Act 2000. If an appeal is submitted from outside the UK, there is a time limit of 28 days from the day when an individual received the notice of the decision to appeal to the First-Tier Tribunal (Immigration and Asylum Chamber). However, this limit is much shorter if an individual is in the UK, in which case the time limit is 5 working days from the day when the individual received the notice of the decision if he is in detention, or 10 working days from the day when the individual received the notice of the decision if he is not.
The appellate proceedings are regulated in the procedural rules of the chambers and will be addressed later.

b. Appeal against Decisions of the First-Tier Tribunal to the Upper Tribunal

The Upper Tribunal is independent from the First-Tier Tribunal and has the authority to overturn the First-Tier Tribunal's decisions, if they are wrong in law (for example, if the tribunal has failed to manage procedures properly). Any party to a case has a right to appeal to the Upper Tribunal against a decision of the First-Tier Tribunal.[35] Due to the number of appeals in England and Wales, the right of appeal is subjected to permission (or leave) that should be given by either the First-Tier Tribunal or the Upper Tribunal. A party to a case has to submit an application for leave to appeal and it is up to the tribunals to decide whether permission will be given. There are, however, certain decisions that cannot be appealed against as they are excluded from the right of appeal. Section 11 (5) TCE Act 2007 contains the list of 'excluded decisions'. The Lord Chancellor has the power to specify who may or may not be treated as a party to a case for the purposes of making an appeal.

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34 Making an appeal, Explanatory booklet, Issued by the Tax Chamber of the First-Tier Tribunal, August 2010, p. 2.
35 Section 11 (2) of the TCE Act 2007.

If the Upper Tribunal finds that the making of the decision concerned involved an error on a point of law, it may 'but it does not need to' set aside that decision. If the Upper Tribunal decides that the error of law does not invalidate the decision of the First-Tier Tribunal it can allow that decision stand. If the Upper Tribunal decides to set aside the decision, it has two options. It can remit the case back to the First-Tier Tribunal with directions for reconsideration, or it may direct a different judicial panel to reconsider the case, and give procedural directions in relation to the case. An alternative option for the Upper Tribunal is to remake the decision appealed against. If it chooses to do this, it can also exercise its fact-finding powers.
In those cases where it is not possible to appeal against a decision of the First-Tier Tribunal, the only possible remedy is to submit an application for a judicial review of the tribunal's decision.[36]

c. Appeal against Upper Tribunal Decisions to the Court of Appeal

The Upper Tribunal hears most of the appeals against decisions of the First-Tier Tribunal and against decisions of some other bodies.[37] As a 'supreme' tribunal, its decisions are not reviewed by any other tribunal within the tribunal system, but by one of the senior courts of the kingdom – the Court of Appeal or another relevant appellate court. Section 13(12) TCE Act 2007 provides for a right of appeal to the relevant appellate court[38] on any point of law arising from a decision made by the Upper Tribunal, other than a decision that has been excluded from this possibility. Again, the right of appeal is subjected to leave to appeal being granted by the appellate court or the Upper Tribunal upon an application by a party. The Lord Chancellor has the power to specify who may or may not be treated as being a party to a case for the purposes of making this appeal. He can also restrict appeals to cases where the Court of Appeal or the Upper Tribunal considers that the proposed appeal would raise an important point of principle or practice, or that there is some other compelling reason for the appeal to be heard.
Similar to the Upper Tribunal, the Court of Appeal 'may, but does not need' to set aside the decision of the Upper Tribunal if it finds an error on a point of law. If the Court sets aside a decision, it must return it to the Upper Tribunal for reconsideration, or it must remake the decision itself.

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36 This is the case concerning, for example, decisions of the First-Tier Tribunal (Asylum Support). See <www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/asylum-support/appeals.htm#deter>, accessed on 10 June 2012.
37 Such a body is, for example, the Valuation tribunal or HM Revenue and Customs.
38 The Court of Appeal for England and Wales.

d. Judicial Review by the Upper Tribunal

One of the inherent powers of the courts is judicial review. Although traditionally this power belonged exclusively to the courts, in 2007 the TCE Act changed this, as it vested the power of judicial review in the Upper Tribunal as well.
In accordance with section 15(1) TCE Act 2007, the Upper Tribunal has the power to grant mandatory, prohibiting and quashing orders, and to issue a declaration or an injunction. Under certain circumstances the Upper Tribunal can also award damages, restitution or the recovery of a sum. The TCE Act 2007 emphasizes that the relief granted by the Upper Tribunal has the same effect as the corresponding relief granted by the High Court on an application for judicial review and it is enforceable in the same way.[39] The Upper Tribunal must apply the principles of judicial review developed by the courts. As the procedure for judicial review before the Upper Tribunal mirrors the procedure before the High Court, permission (leave) for application for judicial review is necessary. Such leave will not be granted unless the Tribunal considers that the applicant has a *sufficient interest* in the matter to which the application relates. The Upper Tribunal may refuse to grant leave for the making of the application for judicial review and it may refuse to grant any relief sought in the application. However, if the Upper Tribunal decides to refuse to grant permission or to grant relief, the Court of Appeal may nevertheless decide on the application for relief.[40]

The circumstances in which the Upper Tribunal can exercise its powers of judicial review are set out in section 18 TCE Act 2007, which specifies four conditions under which such a review can take place. The first condition is that the application for judicial review to the Upper Tribunal seeks only such relief that the Upper Tribunal is able to grant, either permission for that relief, or a monetary award, or interests and costs. The second condition is that the application does not call into question anything done by the Crown Court. The third condition is that the application falls within a class specified for the purposes of this subsection in a direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 (c. 4). The fourth and last condition concerns the status of the judge presiding at the hearing of the application, who has to be a judge at one of the senior courts.
If any of these conditions are not met the application for judicial review must be transferred to the High Court. On the other hand, if all four conditions are met and the application is made to the High Court, it must be transferred to the Upper Tribunal.

39 Section 15(3) of the TCE Act 2007.
40 Section 16(8) of the TCE Act 2007.

e. Judicial review of the decisions of the First-Tier Tribunal and the Upper Tribunal by the Administrative Court (High Court)

An individual may seek the judicial review of a decision of the First-Tier Tribunal before the High Court (the Administrative Court). Such a claim will fall by the wayside if the matter is one which satisfies all the conditions for judicial review by the Upper Tribunal. The claim may also be turned down if the High Court decides that the claimant should exercise his or her rights of statutory appeal to the Upper Tribunal. There is extensive case law on the circumstances in which a statutory appeal must be used rather than a judicial review, and it is quite likely that the High Court will insist that the claimant has to use his or her right of statutory appeal to the Upper Tribunal.

A claimant may also seek the judicial review of a decision of the Upper Tribunal. However, the High Court is unlikely to allow the claimant to bring a judicial action against the Upper Tribunal. The Upper Tribunal is a 'Superior court of record' by virtue of section 3(5) of the TCE Act 2007. This ensures that its decisions should not be subjected to judicial review. The only remedy for those dissatisfied with a decision of the Upper Tribunal will be by way of an appeal to the Court of Appeal. However, in December 2009, the High Court Queen's Bench Division gave judgment on this matter (*R* (*on the application of Cart & Ors*) *v. The Upper Tribunal & Ors* [2009] EWHC 3052) and concluded that decisions from the Upper Tribunal were indeed open to judicial review but only on the very limited grounds of either acting in outright excess of jurisdiction or the denial of a right to a fair hearing. Subsequently this case was submitted to the Supreme Court, which handed down its judgment in June 2011: *R (Cart) v. The Upper Tribunal* [2011] UKSC 28. The decision discusses the circumstances in which an ordinary court will deal with an application to judicially review a decision of the First-Tier or Upper Tribunals.

If the Upper Tribunal has exercised its judicial review powers and the claimant wishes to contest this finding, recourse should be had to the Court of Appeal.

f. Self-Review of Decisions by the First-Tier Tribunal and Upper Tribunal

Both the First-Tier Tribunal and the Upper Tribunal are given the power to review their own decisions either on their own motion or on application of a person who has a right of appeal against the decision.[41] In the light of this review tribunals may correct accidental errors, amend the reasons given for the decision or set the reviewed decision aside. The First-Tier Tribunal may then re-decide or refer the case to the Upper Tribunal, whereas the Upper Tribunal must re-decide the matter if it sets aside one of its decisions. The statute does not specify the grounds on which the tribunal may set the decision aside. This innovation provides a relatively

41 Section 9(1) of the TCE Act 2007.

swift and cheap alternative for an appeal. The right to self-review is limited to one review.[42] Categories of cases may be excluded from self-review by statute.

Jurisdiction and Accessibility of Tribunals

The TCE Act 2007 does not address the jurisdiction of the First-Tier Tribunal and the Upper Tribunal. The jurisdiction in the different chambers of the First-Tier Tribunal and the Upper Tribunal are still based on special statutes – legi speciali.[43] The issue of the jurisdiction of tribunals does not only concern the question of which decisions may be scrutinized by the tribunals, but also what kind of decisions the tribunals can take, although in general, there are three main outcomes of an appeal. First, the tribunal can reaffirm the disputed decision of the public authority. Second, it can quash the disputed decision in whole or in part and return the case to the administrative body. And third, it can substitute its own decision for all or part of the disputed decision. The particular type of decision may thus depend on provisions of a special act. As stated above these decisions are not the only possible outcomes as the special statutes can specify that a tribunal can take another decision as well.

If a Statutory Act grants a right of appeal against a specific decision based on that Statutory Act and if the functions of the competent tribunal mentioned in the Act have been transferred to the First-Tier or the Upper Tribunal by the TCE Act 2007 or by any subsequent statute, then it is the First-Tier Tribunal or the Upper Tribunal that is competent to deal with an appeal in the first instance. It will then decide the case on the basis of the jurisdiction as included in the *lex specialis*. The fact that a specific statute still mentions the old tribunal as the competent authority rather than the First-Tier Tribunal or the Upper Tribunal is the consequence of the principle of implied repeal that is generally applicable in British constitutional law.

Standing/Interested Party/Third Party

In general an individual can appeal only where the law gives him or her a right of appeal.

In case of doubt it is the tribunal that will determine whether a party has standing. According to the Tribunal Procedure of the First-Tier Tribunal (General Regulatory Chamber) Rules 2009, an "appellant" is a person who commences Tribunal proceedings, whether by making an appeal, an application, a claim, a complaint, a reference or otherwise; or a person that is added or substituted as an appellant by the tribunal. The 2007 TCE Act does not specify who has the right to appeal

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42 Sections 9(10) and 10(8) of the TCE Act 2007.

43 See, for example, Section 4AA of the Sea Fish (Conservation) Act 1967 (c. 84), Schedule 4 to the Transport Act 1985 (c. 67), or Section 2A of the Charities Act 1993 (c. 10) etc. The jurisdiction of the original tribunals today falls under the jurisdiction of the First-Tier Tribunal and the Upper Tribunal but is still included in original legal statutes although in changed and amended form.

against a decision of an administrative body. This is most probably due to the fact that the tribunal system deals with a huge number of different claims that used to be dealt with by a multitude of tribunals. In general, however, it is possible to state that only a person who has a legal interest can appeal against a decision by the administration. In most cases this person will be indicated in the administrative decision itself, but this statement (or the lack thereof) as such does not create or deny a right to appeal, because, as stated above, in the end it is the tribunal that will decide whether it will deal with an appeal or not. If there is a statute creating a right to appeal against a specific decision, this helps considerably.

Generally, when a legal statute grants a right to appeal to the First-Tier Tribunal, this right is granted to someone who applied for an original decision.[44] In those cases it is clear that the right to appeal is granted to a person who has an interest in the case. Thus the possibility to bring an actio popularis before the English tribunals is more or less excluded. Some rights of appeal are granted against decisions that are taken on the initiative of the responsible public authority.[45] Similarly, the tribunals system does not recognize the principle of the prohibition of *reformatio in peius*. A claimant (certainly in the field of social security benefits) always has to bear in mind that the decision on appeal might leave him worse off. Sometimes a right of appeal is dependent on a number of conditions that need to be meet before the appeal can be brought. This could be the completion of a prior review procedure, or asking for leave to appeal.

The Statutes that provide the First-Tier Tribunal with its jurisdiction do not usually describe a general concept/definition of the interested party. In the same way in which each Statute makes clear what decisions can be appealed, they also make clear who has the right to appeal. As many of the issues which have been transferred to the First-Tier Tribunal concern decisions that are taken upon application, the concept will often be limited to the applicant to whom the right of appeal is conferred. There is also a wide range of different terms defining the appellant.[46] In general the right to appeal will be limited to the addressee of the disputed decision. Because of that, third parties do not play a significant role in appeal procedures before tribunals. If a third party has a right of appeal against a certain decision, this party will be defined in the Statute regulating both the competences of the administrative authority and the jurisdiction of the related tribunal. For instance, section 62(1) of the Financial Services and Markets Act 2000 states: "If the Authority decides to grant an application … it must give

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44 For example, section 55(1) of the Financial Services and Markets Act 2000 states: "An applicant who is aggrieved by the determination of an application made under this Part may refer the matter to the Tribunal."

45 For example, section 55(2) of the Financial Services and Markets Act 2000 states: "An authorized person who is aggrieved by the exercise of the Authority's own initiative-power may refer the matter to the Tribunal."

46 Issuer, applicant, interested party, a person against whom a decision to make an order is made, etc.

written notice of its decision to each of the interested parties." Section 62(5) of that act defines the notion of 'interested parties' in relation to an application. "The interested parties", in relation to an application, are:

a) the applicant;
b) the person in respect of whom the application is made ("A"); and
c) the person by whom A's services are to be retained, if not the applicant."

If there is no statutory right of appeal for such a party ('out of jurisdiction'), it might ask permission for judicial review from the ordinary court or the Upper Tribunal. The Supreme Court Act 1981, today the Senior Courts Act 1981, requires a sufficient interest on the part of the claimant for judicial review.[47]

Organization of the Hearings

Procedural Rules

Section 22(1) of the TCE Act 2007 states that there are to be 'Tribunal Procedural Rules' governing the practice and procedure to be followed in the First-Tier Tribunal and the Upper Tribunal. And indeed there are sets of Tribunal Procedural Rules that have been adopted as Statutory Instruments that have been published and have been allowed by the Lord Chancellor. It should be stressed that the procedural rules of the chambers of tribunals are similar although they reflect different subject-matter areas. The Tribunal Procedural Rules are to be made by the Tribunal Procedure Committee and have to be allowed by the Lord Chancellor.

Time Limits

The time limits for appeals against the decisions of administrative (public) bodies and for appealing against tribunal decisions differ. The time limits for appealing against different decisions of public bodies are to be found in various statutes that create a right to statutory appeal.

The time limits for appeals against decisions of tribunals can be found in different statutes or in the different procedural rules of the different Chambers. These time limits may differ from Chamber to Chamber and are created to fit the types of cases that are dealt with.

For instance:

– The Tribunal Procedural Rules of the First-Tier Tribunal (General Regulatory Chamber) 2009 set a more precise time limit:

> "An appellant must start proceedings before the Tribunal by sending or delivering to the Tribunal a notice of appeal so that it is received:

47 Rule 31(3) of the Senior Courts Act 1981.

(a) in an appeal against a refusal or revocation of a licence to give driving instruction, within 14 days of the date on which notice of the decision was sent to the appellant;
(b) otherwise, within 28 days of the date on which notice of the act or decision to which the proceedings relate was sent to the appellant."[48]

– The Tribunal Procedural Rules of the First-Tier Tribunal (Tax Chamber) only generally state that: "Where an enactment provides for a person or persons to make an originating application or reference to the Tribunal, the appellant must start proceedings by providing an application notice or notice of reference to the Tribunal within any time limit imposed by that enactment."

– The Tribunal Procedural Rules of the First-Tier Tribunal (War Pensions and Armed Forces Compensation Chamber) 2008 set different time limits:

"An appellant must start proceedings by sending or delivering a notice of appeal to the decision maker so that it is received:
(a) in proceedings under section 5(1) of the Pensions Appeal Tribunals Act 1943, within 3 months after the date on which written notice of the decision being challenged was sent to the appellant; or
(b) in other cases under the Pensions Appeal Tribunals Act 1943, within 6 months after the date on which written notice of the decision being challenged was sent to the appellant.[49]
Other three chambers of the First-Tier Tribunal have different time limits for appealing. In all of the cases an appellant has to stay within the time limit. However the tribunal may exceed this limit, but the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time."

The examples show that the time limits for appealing to the tribunal are different. That mostly depends on the issue that is covered by the original decision.

Before the Hearing

An appellant can make an appeal only in writing. He has to send a notice of appeal[50] either to the appropriate tribunal or to the original decision maker. The notice of appeal has to be written in English or Welsh (in Wales only), it has to be signed and it has to include necessary information.[51] The tribunal can ask an appellant to provide further information.

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48 Rule 22(1) of the Tribunal Procedural Rules of the First-Tier Tribunal (General Regulatory Chamber) Rules 2009, 2009 No. 1976 (L. 20).
49 Rule 22(1) of the Tribunal Procedure (First-Tier Tribunal) (War Pensions and Armed Forces Compensation Chamber) Rules 2008, 2008 No. 2686 (L. 14).
50 This could have a different name, sometimes merely simply an 'appeal'.
51 Such as the name of the appellant, a description of decision appealed against, evidence, the grounds for an appeal etc.

After Sending the Appeal Form

Generally, the public authority can change the decision which is subject to the appeal at any time until the tribunal hearing. If it decides to revise the decision to the claimant's advantage, the appeal will lapse. If the claimant is not satisfied with the revised decision, he will have to appeal against it anew. If the decision has been revised to the detriment of the applicant, his appeal does not lapse but continues against the revised decision.[52]

The respondent administrative body has to send its response to the appeal within a set period of time, usually 28 days. The response must include a statement as to whether the respondent opposes the appellant's case and, if so, any grounds for such opposition which are not contained in another document provided with the response.[53] The 'response' arrives as a bundle of papers as it should also include the disputed decision, a summary of the relevant facts, the reasons for the decision, the documents relied upon by the respondent when reaching the decision, and any other documents which the respondent considers could adversely affect its case or support the appellant's case etc. The purpose of the response is to present the case as the public authority sees it to the tribunal. The task of the tribunal is to decide impartially and independently what the correct facts are and how the law should be applied to them. Withholding an opportunity to the administrative body to present its case before the tribunal is a ground for a judicial review of the tribunal's decision.

Preparing for the Tribunal Hearing

A claimant has to think about what evidence he needs to support his case, since most appeals involve some dispute over the facts. It is unusual for the public authority to produce new evidence at the hearing. Usually there are three types of evidence. First, there are statements by the parties. Second, there are statements by witnesses. And lastly, there are other documents. Documents sent to the Tribunal will be copied and sent to the other party. A notice of hearing will be sent to the claimant giving the time, date and place of the hearing.

The Hearing; Composition of the Forum

Each of the chambers of the First-Tier Tribunal and the Upper Tribunal consist of judges and other members.[54] There are two types of members of the tribunals; legally qualified members (judges) and other members (experts, such as accountants or physicians etc.). The composition of the tribunal is determined by

52 See, for example, If you think our decision is wrong, Department for Work and Pensions, April 2010, p. 13.

53 Rule 27(3) of the Tribunal Procedural Rules of the First-Tier Tribunal (General Regulatory Chamber) Rules 2009, 2009 No. 1976 (L. 20).

54 Section 3(3) of the TCE Act 2007.

law. Appellants do not have the right to choose the members of the tribunal. The composition of the tribunals varies according to the type of case.

The Hearing Event

Hearings are open to the public, although the tribunal may give a direction that a hearing, or a part thereof, is to be held in private.[55] Proceedings are informal and the appellant is required to attend them in person. Legal representation is not mandatory. Public bodies usually do not send their representatives to these proceedings and basically just wait for the tribunal's assessment.[56] A formal note of the proceedings 'the record of proceeding' is taken. In most cases the hearing is oral. In cases where the parties to a dispute thereby agree, the tribunal can decide based on written evidence only. The Judge is responsible for asking questions during the hearing. Witnesses can be heard. In addition, the tribunal can require either party to provide expert evidence.

The Decision

The Tribunal will consider the evidence and statements in private. The decision does not have to be unanimous. When the three members of the appeal panel cannot agree, the majority view will prevail.[57] The decision of the tribunal is announced publicly, but this obligation can be affected by a restricted reporting order.[58] The Tribunal may give its decision orally at the hearing. The appellant and the administrative body will also receive the decision in writing within 28 days after the decision is made. If the decision of the tribunal does not include the reasons for the decision, the appellant has the right to ask for a 'statement of reasons'. If the First-Tier Tribunal does not uphold the decision appealed against, they will send the public authority a 'decision notice'. This will tell the public authority what it should do to put matters right.

Setting Aside the Decision

An appellant may apply (in writing) to have a tribunal decision set aside and have a new hearing arranged when:

– a document relating to the proceedings was not sent or received in time;
– a hearing was arranged but the claimant did not attend;
– there was some other procedural irregularity; or

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55 See, for example, Rule 30(3) of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008.

56 In some situations the representation of public bodies before tribunals is a rather costly affair. One of the examples could be proceedings before the First-Tier Tribunal (Social Security and Child Support). As there are more than 100,000 cases before this tribunal per year it must definitely be expensive.

57 Appealing to the First-Tier Tribunal (Care Standards) A guide to the appeals procedures, Tribunal Service – Care Standards, March 2010, p. 11.

58 For example, in the case of restricting the publication of names to prevent a child or vulnerable adult or any other person at the hearing from being identified etc.

– a party, or a party's representative, was not present at a hearing related to the proceedings.

g. Defence Rights

Defence rights can be found in the Tribunal Procedure Rules that are published as UK Statutory Instruments. As there are 4 Chambers of the Upper Tribunal and 6 Chambers of the First-Tier Tribunal, and as each of these chambers has its own rules of procedure, all in all we have 10 different, although very similar, sets of rules of procedure that are applicable to the two tribunals.
The following section compares the procedural rules of the Social Entitlement Chamber (SEC) and the Asylum and Immigration Chamber (AIC) of the First-Tier Tribunal, because most of the First-Tier Tribunal cases are decided by these 2 chambers.

Representation

In accordance with section 11 of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008,[59] a party[60] may appoint a representative to represent it in the proceedings.[61] This representative does not have to be legally qualified. It is not mandatory to appoint a representative, although it might prove helpful. There is no state-supported legal aid available before the SEC. Representation is allowed before the AIC as well, and again is not mandatory. In general we can conclude that there is no compulsory legal representation before the Chambers of the Tribunals.

Expenses/Costs/Damages

Tribunals may reimburse reasonable expenses incurred in attending the hearing, both by appellants and by other persons who attend a hearing to give evidence, although this depends on the particular Chamber. Some Chambers will reimburse the appellant for expenses in attending the tribunal hearing, such as travelling allowances, lost wages while attending the hearing, the costs of child-minding, but others will not. Unlike when going to court, there are no fees or the risk of costs involved. Tribunals have only limited powers to impose fines and penalties or to award compensation and costs. This depends on rules governing a particular case. The Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber)

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59 Statutory instrument 2008 No. 2685 (L. 13).

60 A 'party' in accordance with these rules could be, for example, a person who is an appellant or respondent in proceedings before the Tribunal, a person who makes a reference to the Tribunal under section 28D of the Child Support Act 1991a) etc. See Section 1(3) of the SEC Procedural rules.

61 The same requirements for representation are made in the remaining four procedural rules of other chambers of the First-Tier Tribunal. Similarly, the section which talks of representation is section 11.

Rules 2008 expressly state, for example: "The Tribunal may not make any order in respect of costs (or, in Scotland, expenses)." They usually cannot award damages. Damages suffered from an unlawful decision can only be awarded in an ordinary procedure.[62] This is also possible in a judicial review procedure, but only in combination with another order, as damages are not very often awarded in judicial review.

Compared to court proceedings, procedures before the tribunals are usually free. If there is a 'tribunal fee' then this fee is considerably lower than the one for court proceedings. In certain exceptional circumstances where the payment of a 'tribunal fee' would involve undue financial hardship for appellants, tribunals have powers to order a fee exemption or fee reduction.

The Suspensive Effect of Tribunal Proceedings

A procedure before the tribunals only suspends the enforceability of the initial decision pending appellate proceedings in certain circumstances. An appeal against an administrative decision does not include a mandatory stay or suspending of the effects of the decision pending the determination of an appeal.

A person who wishes the Tribunal to decide whether a contested decision should be stayed or suspended must file a written application with the Tribunal.[63] Then, it is up to the tribunal to decide whether the effects of the decision will be stayed or suspended. If the tribunal decides in the affirmative, the decision is stayed or suspended until the appeal is heard. If an appeal is launched against a decision of the First-Tier Tribunal, the tribunal may also suspend the effect of its own decision pending the Upper Tribunal's decision on an application for permission to appeal, or the actual appeal or review of that decision.[64]

5. The System of Control by Ombudsmen

Ombudsmen are another important feature of the Administrative Justice system in the UK. They are very accessible, and an effective and cheap way to find redress for citizens. Even though ombudsmen reports do not have legally binding force, almost all of their recommendations to redress grievances are followed.[65] The amount of the cases of the Parliamentary and Health Services Ombudsman and the Local Government Ombudsmen is not so large as those of tribunals; however, in the year 2010-2011 it was about 35,000[66] which is an increase of about 5,000 since the year 2008-2009.

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62 See Part 54 Civil Procedure Rules.

63 See, for example, Rule 20(2) of the Tribunal Procedural Rules of the First-Tier Tribunal (General Regulatory Chamber) Rules 2009, 2009 No. 1976 (L. 20).

64 *Ibid.*, Rule 5(3) l).

65 Citizen Redress: What citizens can do if things go wrong with public services, Report by the Comptroller and Auditor General | HC 21 Session 2004-2005 | 9 March 2005, pp. 28-44.

66 Annual report Local government Ombudsman 2010-2011, Delivering Public Value, p. 18. And <www.ombudsman.org.uk/healthchp/statistics/year-at-a-glance>, accessed on 10 June 2012.

Since the incorporation of the first ombudsman in the UK – the Parliamentary Commissioner for Administration,[67] ombudsmen have become a welcomed and often used feature of the constitutional system. A vast number of ombudsmen, public service ombudsmen and private ombudsmen have been created since 1967. This part addresses only the most influential English public service ombudsmen, the Parliamentary and Health Services Ombudsman[68] and the Local Government Ombudsmen.

The Parliamentary Ombudsman deals with complaints against maladministration by the central government.[69] Individuals cannot file a complaint directly with this Ombudsman. Instead, an individual who wants to complain about the administrative action to the Parliamentary Ombudsman has to file his or her complaint to a Member of Parliament, or more precisely to a Member of the House of Commons. This so-called the MP filter is often perceived as the biggest flaw of this particular ombudsman, and there are calls for its removal. The Parliamentary Ombudsman still remains independent and is appointed by Parliament.

The competence of the Parliamentary Ombudsman is fairly restricted. The investigation of complaints, mediation and possible subsequent reporting to Parliament are her main instruments. A number of statutory bars limit the Parliamentary Ombudsman's competences. She will usually not deal with a case if the complainant has the opportunity to deal with his problem in some other way, like when he can address a court of law or a tribunal. This also holds true when a plaintiff had this option in the past, but did not make use of it. However, occasionally the Parliamentary Ombudsman deals with such cases anyway. To justify this, she emphasizes the specific scope of control and the different role of the ombudsman institution, compared to that of the courts and tribunals.[70]

The investigation and the case files of the investigation remain confidential, because the statutes require 'a private investigation'.

However, the Parliamentary Ombudsman has developed her own sets of standards, Principles of Good Administration against which she assesses the administrative actions of administrative bodies. Within her competence of good administration are six broad statements that should act as a kind of guidance for administrative bodies as to what constitutes good administration, at least in the Parliamentary Ombudsman's perception. They include:

1. Getting it right;
2. Being customer focused;
3. Being open and accountable;
4. Acting fairly and proportionately;

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67 In the early 2000s, the Parliamentary Commissioner for Administration rebranded itself as the Parliamentary and Health Service Ombudsman.

68 See <www.ombudsman.org.uk/>, accessed on 2 August 2011.

69 The Parliamentary Ombudsman does not deal only with complaints against the central government and some other bodies in England and Wales but with complaints against central governmental bodies in the whole country.

70 See, for example, the report of the Parliamentary Ombudsman 'The Debt of Honour'.

5. Putting things right;
6. Seeking continuous improvement.

These principles have been designed in clear and simple language that is also understandable for those without legal training.[71] The first principle for example, 'Getting it right', refers to the importance of the law, both for administrative authorities themselves and for the assessment of complaints. This is confirmed by the fact that all reports (and other decisions) of the Parliamentary Ombudsman can be challenged in court.

Local Government Ombudsmen have a different position. In England, there are two local ombudsmen who deal with complaints against local administrative authorities, or as they put it themselves: "they provide independent, impartial and prompt investigation and resolution of complaints of injustice caused through maladministration by local authorities and other bodies within [their] jurisdiction."[72]
The Local Government Ombudsmen have also developed their own principles of good administrative practice which they use to assess complaints. They have recorded them in the 'Axioms of good administration'. These axioms include inter alia requirements to:

> 1. Understand what the law requires the council to do and fulfil those requirements.
> …
> 3. Formulate policies which set out the general approach for each area of activity and the criteria which are used in decision making.
> …
> 8. Consider any special circumstances of each case as well as the council's policy so as to determine whether there are exceptional reasons which justify a decision more favourable to the individual customer than what the policy would normally provide.
> 9. Ensure that decisions are not taken which are inconsistent with established policies of the council or other relevant plans or guidelines unless there are adequate and relevant grounds for doing so.
> 10. Have regard to relevant codes of practice and government circulars; and follow the advice contained in them unless there are justifiable reasons not to do so.
> …
> 12. Ensure that adequate consideration is given to all relevant and material factors in making a decision.
> 13. Give proper consideration to the views of relevant parties in making a decision.
> 14. Use the powers of the council only for their proper purpose and not in order to achieve some other purpose.
> …

71 Which is not always the case for principles, grounds or standards drawn by the courts.
72 See <www.lgo.org.uk/about-us/what-we-do/>, accessed on 9 July 2011.

19. Carry out a sufficient investigation so as to establish all the relevant and material facts.[73]

Reports of the Local Government Ombudsmen can be challenged before the courts, just like those of the Parliamentary Ombudsman. Ombudsmen, similar to administrative authorities, have to operate within the framework of the law and the legality of their decisions can be challenged before the Administrative Court in judicial review proceedings.[74]

The services of both the ombudsman bodies are free of charge. At this point, it should be noted that court proceedings are costly in the UK, in part due to the fact that legal representation is usually mandatory. Because of this, the ombudsman fulfils the role of instances of redress to a much greater extent than on the continent.
However, the ombudsmen do not address the same issues as the courts, nor do they have the same powers. For instance, they cannot compel the administrative body to change its decision. Instead, they can only look for maladministration. If maladministration is found, they will quite often recommend financial compensation. And although the ombudsmen cannot oblige the bodies to follow their recommendations, administrative bodies tend to accept these recommendations. Therefore the ombudsmen seem to be good alternatives for court proceedings.[75]

6. The System of Control by the Courts

The control offered by the courts in English administrative law is relatively limited. It is limited in the number of cases dealt with by the courts, since most of the statutory appeals are dealt with by the tribunals. Compared to the numbers of cases that are dealt with by the tribunals, the Administrative Court only deals with a relatively small number of cases each year.[76] The courts, however, have the

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73 Good administrative practice Guidance on good practice 2, <www.lgo.org.uk/publications/guidance-notes/>, accessed on 21 June 2012.

74 The High Court's judgment in *R v. Local Commissioner for Administration in North & North East England* (on the application of Liverpool City Council) [1999] EWHC Admin 146 of 16 February 1999; examples confirming the courts' competence to do so are, for instance, the Court of Appeal's judgment in *R v. Local Commissioner For Local Government For North And North East England* (on the application of Liverpool City Council) [2000] EWCA Civ 54 of 24 February 2000. Further examples are *Bradley v. Secretary of State for Work and Pensions* EWHC 242; [2007] Pens. L.R. 87. and *R (Mencap) v. The Health Service Commissioner* CO/6118/2009 (17 November 2011). For an analysis of the consequences of court decisions for the ombudsman's remit: Richard Kirkham, Brian Thompson & Trevor Buck, When putting things right goes wrong: enforcing the recommendations of the ombudsman. *Public Law*, 2008, pp. 510-530.

75 Citizen Redress: What citizens can do if things go wrong with public services, Report by the Comptroller and Auditor General | HC 21 Session 2004-2005 | 9 March 2005.

76 The Administrative Court received over 10,000 applications for permission to apply for judicial review, but it allowed only 194. See the Summary statistics on Judicial Review applications, 2010,

final say in all administrative disputes. Thanks to the procedure of judicial review, where the courts have the possibility to decide on the legality of administrative decisions and actions, or a public body's failure to act, the courts can influence the whole system of legal protection.

The Administrative Court is not an 'administrative court' in the continental sense. First, it is a part of the High Court rather than a separate judicial body. Second, it deals with statutory appeals against the decisions of some public bodies, but only to a limited extent. Third, the Administrative Court deals with specific types of cases like applications for habeas corpus or applications for committal for contempt. Fourth, there is only one administrative court. English law does not have a system of specialized administrative courts. It is possible to appeal against a decision of the Administrative Court to the Court of Appeal, which is not an administrative court but an ordinary superior court. And last but not least, the Administrative Court does not deal only with the legality of decisions of public bodies but also has special jurisdiction. Through its judicial review the Administrative Court exercises its supervisory jurisdiction over tribunals, inferior courts, ombudsmen and bodies exercising public functions. Bodies that belong to this supervisory jurisdiction of the Administrative Court include also tribunals and ombudsmen.

In the last decade, the court system and the tribunals system in England and Wales have converged. Slowly, the tribunals start to resemble the courts, although it is unlikely, in the foreseeable future, that the distinction between courts and tribunals will be abolished in the UK.[77] Tribunals still retain their specifics. When comparing the court and tribunal systems, it is necessary to emphasize the main differences between these systems. As the tribunals were discussed above, the following paragraph briefly describes court proceedings and their relation to the administrative proceedings before administrative bodies.

The features of court proceedings as a part of the administrative redress system in England and Wales are:

– The judicial review proceedings before the Administrative Court are the last possible stage in the fight against administrative actions, and the last possible remedy. Judicial review is a remedy of last resort.[78] An individual has to exhaust all possible alternative remedies (including ombudsmen if he or she has an opportunity to resort to that body) before he or she can submit an application for judicial review. In proceedings concerning an administrative decision an individual has to appeal to a tribunal if he has a statutory appeal, and only after the appellate procedure before the tribunal has been concluded can he or she apply for judicial review before the courts.

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published at <www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual>, accessed on 21 June 2012.

77 See P. Cane, Understanding administrative adjudication, *in* Pearson, Harlow and Taggard (eds.), *Administrative Law in a Changing State*, Hart Publishing 2008, p. 287.

78 A. Horne & G. Berman, Judicial Review: A short guide to claims in the Administrative Court, Research paper 06/44, 28 September 2006, House of Commons Library, p. 22.

- An individual cannot apply for judicial review immediately. First, he or she has to apply for permission to apply for judicial review. This must be done promptly and in any event no later than 3 months after the grounds to make the claim first arose. The court decides whether permission will be granted or refused. If permission is refused, it is possible to request a reconsideration of that decision at an oral hearing.
- There is a limited array of possible outcomes to the court proceedings as they are pre-set.[79] The court can award damages only in exceptional cases (especially in connection with the Human Rights Act).
- The Administrative Court cannot substitute its own decision for the decision of an administrative body.[80] This means that even if its decision is quashed, the administrative body may take the same decision anew. However, Rule 54.19(2b) of the Civil Procedure Rules enables the court to substitute the decision when making quashing order.
- The Administrative Court does not (expressly) deal with the contents of the decision but is concerned mainly with its legality.
- The proceedings before the Administrative Court are highly formal.
- The applicant has to pay certain court fees which can exceed £ 275.[81]
- Legal representation before the Administrative Court is generally not obligatory but is strongly advised.[82]
- The procedure before the courts is adversarial. It is up to the parties to the proceeding to present their case. The court will decide upon the evidence submitted to it.
- Oral hearings are rather rare. In most cases the court decides upon written evidence.

Even though the courts in England and Wales do not play a very extensive part in administrative proceedings, their role is undoubtedly an important and respected one.

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79 Rule 54.2 of Civil Procedure Rules: CPR Part 54, see <www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part54>, accessed on 21 June 2012.

80 See, for example, *Adan v. London Borough of Newham & Anor* [2001] EWCA Civ 1916 (14 December 2001) where Lord Justice Brooke stated that "a court of supervisory jurisdiction does not, without more, have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact-finding power has been entrusted". Para. 41.

81 See the Administrative Court Office Fees Table from 4 April 2011. This table is to be found at <www.justice.gov.uk/guidance/courts-and-tribunals/courts/administrative-court/>, accessed on 21 June 2012. Fees included in the table have been taken from The Civil Proceedings Fees (Amendment) Order 2011.

82 See Pre-Action Protocol for Judicial Review <www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/protocols/prot_jrv>, accessed on 21 June 2012.

7. Conclusions

English law does not recognize pre-trial procedures in the field of administrative justice in the sense of continental administrative law. However, it can be argued that the procedures before the tribunals are comparable to continental pre-trial procedures, because both types of procedures share similar qualities. Both exist in order to provide simpler, speedier, cheaper, more informal, and more accessible justice than the ordinary or administrative courts provide. Despite the similarities of the continental pre-trial procedures and the tribunal procedures, the tribunals do not form part of the administration, at least not anymore. Today they form an integral part of the machinery of adjudication which is unequivocally recognized by the 2007 TCE Act. This reorganization brought tribunals close to the courts. Closer than ever in fact. Still the most relevant redress procedure is the procedure of the statutory appeal against administrative decisions before the tribunals. Judicial review plays an important but very distinct role, and it is difficult to achieve, as the numbers show: the Administrative Court produces only about 200 cases, the Tribunals produce about 800,000 cases annually.
Ombudsmen deal with issues that differ from the issues that are covered by the courts, as they seek to solve citizens' problems with the administration, while assessing complaints against good administration standards. The work of the ombudsmen in England and Wales is very effective. They are very accessible, fast and low-cost institutions while almost 100% of their recommendations are followed by the administration.

The reorganization of the tribunal system might be followed by a further reorganization of the Ombudsman system, so that the administrative redress system will be further integrated into one system. Even so, a unification of administrative protection against the government in Germany and the Netherlands enacted in legislation on administrative procedure is not (yet) a policy aim. The debate in England&Wales is about values and about the effective protection of citizens by efficient means. So far that has resulted in a piecemeal pragmatic approach with increasing tendencies towards aspects of an integrated design. In how far this integration process will continue under the current austerity measures is still an open question.

Annexes

STATISTICS

Cases received and disposed of by Tribunals*	Receipts			Disposals		
Year	2008-09	2009-10	2010-11	2008-09	2009-10	2010-11
Number of cases	631,900	793,900	831,000	558,400	639,600	714,500

* Source: Annual Tribunals Statistics, 1 April 2010 to 31 March 2011, downloaded from <www.justice.gov.uk/statistics/tribunals/annual-stats>, accessed on 21 June 2012.

Tribunals

The process of appealing before the First-Tier Tribunal takes on average between three and eight months, depending on the type and complexity of the case (from start to finish).

First-Tier Tribunal

First-Tier Tribunal (Asylum Support)	*First-Tier Tribunal (Immigration Services)*
Statistical data for the 2008/09 Financial Year Judicial Pool: 25 Days Sat: 555 Receipts: 1,974 Withdrawn: 841 Decided: 2,010 Outstanding: 43 Success Rate: 19% Oral Hearings: 65% Waiting Times: 12 working days from receipt to the determination of the case	Statistical data for the 2008/09 Financial Year Judicial Pool: 10 Days Sat: 19 Receipts: 9 Withdrawn: 5 Decided: 5 Outstanding: 2 Success Rate: 10% Oral Hearings: 70% Waiting Times: no information available
First-Tier Tribunal (Mental Health)	*First-Tier Tribunal (Criminal Injuries Compensation)*
Statistical data for the 2008/09 Financial Year Judicial Pool: 999 Days Sat: 19,964 Receipts: 22,964 Withdrawn: 10,393 Decided: 14,998 Outstanding: 1,792 Success Rate: 14% Oral Hearings: 100% Waiting Times: no information available	Statistical data for the 2008/09 Financial Year Judicial Pool: 56 (Eng.), 1 (Wal.), 13 (Sc.) Days Sat: 1,741 (Eng.), 84 (Wal.), 240 (Sc.) Receipts: 2,210 (Eng.), 60 (Wal.), 212 (Sc.) Withdrawn: 187 (Eng.), 10 (Wal.), 36 (Sc.) Decided: 2,715 (Eng.), 112 (Wal.), 289 (Sc.) Outstanding: 1,481 (Eng.), 49 (Wal.), 174 (Sc.) Success Rate: 43% (Eng.), 56% (Wal.), 43% (Sc.) Oral Hearings: 75% (Eng.), 66% (Wal.), 91% (Sc.)
Upper Tribunal	
Statistical data for the 2008/09 Financial Year Judicial Pool: 36 Days Sat: 302 Receipts: 1,762 Withdrawn: no information Decided: 2,114 Outstanding: 922 Success Rate: 16 Oral Hearings: no information Waiting Times: no information	

Ombudsmen

Parliamentary Commissioner for Administration

In 2008-09 the Parliamentary Commissioner conducted 7,608 enquiries related to 7,990 complaints about government departments, agencies and public bodies (excluding health). There was an increase of 8.8 per cent in the number of complaints. The top 5 departments complained about remain unchanged. The most significant increases are in complaints about the Home Office (up 61.3 per cent) and the Ministry of Justice (up 35.3 per cent). The number of complaints about HM Revenue & Customs fell in 2008–09 by 7.8 per cent.[83]

Local Government Ombudsmen

The table below shows the number of complaints per subject filed with the local government ombudsmen in 2008/2009.[84]

	Adult care services	Children and family services	Education	Housing	Benefits	Public finance (incl. local taxation)	Planning and building control	Transport and highways	Other	**Total**
Premature complaints and enquiries	310	298	134	1,637	379	595	960	544	1,117	**5,974**
Advice given (excl. premature advice)	155	164	304	738	177	244	540	416	1,610	**4,348**
Forwarded to inv. team (resubmitted premature)*	82	90	64	583	112	150	641	254	551	**2,527**
Forwarded to inv. team (new)	362	340	1,757	1,387	261	300	1,705	758	1,293	**8,163**
Total	**909**	**892**	**2,259**	**4,345**	**929**	**1,289**	**3,846**	**1,972**	**4,571**	**21,012**

Websites

<www.tribunals.gov.uk>
<www.ajtc.gov.uk>
<www.tribunals-review.org.uk>
<www.ombudsman.org.uk>
<www.lgo.org.uk>

83 Annual Report 2008/2009 of the Parliamentary and Health Service Ombudsman, p. 24.
84 Annual Report 2008/2009 of the Local Government Ombudsmen, Delivering Public Value, p. 17.

III Pre-Trial Proceedings in Administrative Law in France

1. Introduction

According to Article 1 of the Constitution of the French Republic of 4 October 1958, France is an indivisible, secular, democratic and social Republic that inter alia shall be organized on a decentralized basis.

In the last decades of the 20th century, France reformed its administration system. Due to the reform of 1982[1] which was confirmed in 2003 by the constitutional reform, France has become a decentralized country. According to Article 72 of the Constitution, the territorial communities of the Republic are the Municipalities (*Communes*), the Departments, the Regions, the Special-Status communities and the Overseas Territorial communities (*Collectivités d'outre-mer régies*). There are 22 Regions (and four overseas), 94 departments (and four overseas) and 36,679 Communes in France. The *Code général des collectivités territoriales* of 2000 redefines the rights and obligations of these local subjects and their bodies. Regions may levy their own taxes and they have competences in education, public transport, the funding of universities and secondary education (*lycées*), and in economic development. The relevant bodies in the Regions are the regional council, the economic and social committee and the regional council's chairman. The departments have competences in health and social services, rural capital works, departmental roads, and the capital expenditure and running costs of colleges. Communes exercise their powers in services, including local plans, building permits, social affairs, the building and maintenance of primary schools and *collèges*, waste disposal and some welfare services.

The development of the administration during the past century has also resulted in an extension of the protection of citizens against the government which has led to the development of an administrative judiciary. The French judicial system clearly distinguishes two different types of jurisdiction; *l'ordre judiciaire* (ordinary),

1 La loi de décentralisation of 2 March 1982.

on the one hand, and *l'ordre administratif* (administrative) on the other. Ordinary courts have their jurisdiction in settling disputes between private legal entities and punishing violators of penal laws. Administrative courts decide on disputes between individuals and the State, local authorities, public bodies or between individuals and private bodies that exercises public services, or disputes between these entities. These two systems are organized in a pyramidal structure with three instances. The ordinary courts of first instance are the civil courts (for example, the *Tribunal de commerce or Tribunal d'instance*). Similarly there are also the criminal first instance courts such as the *Tribunal de police or Tribunal correctionnel*. Decisions of the first instance judiciary might be appealed against to the *Cour d'Appel*. The highest court in the ordinary jurisdiction is the *Cour de Cassation*. The system of administrative courts is similar. The first instance courts are administrative tribunals (42). Their decisions may be appealed to the administrative courts of appeal (8). The Supreme administrative court is the *Conseil d'Etat*. It has two sections. The first one has an adjudicative function and the other one exercises an advisory function for the French Government. The latter examines and expresses opinions on the most important legislative bills and draft decrees.

The administrative courts hear all cases against acts and decisions of various branches of public administration. They hear cases against acts of administrative bodies, regional councils, departments, municipalities. They also deal with actions for damages against administrative public services and disputes relating to contracts with the State. Last but not least, they also decide on disputes concerning taxes and municipal and cantonal elections and employment disputes within the public service.

Another important body of the French judiciary, the *Conseil constitutionnel,* has a special status within the court system, because it may decide on the conformity of legal acts with the Constitution, although it cannot be considered to be a court *strictu senso*. Its control is limited to the period prior to the promulgation of the act concerned.[2]

Administrative decision making has not been generally regulated. There is no general act on administrative decision making and legal protection against the administration. Nevertheless, French administrative decision making takes place in a heavily juridified context, which is considered to be not very 'user' friendly. Several reports have been published and debated to improve the quality of French law, to improve administrative services for citizens (also by enhancing the accessibility of the administration via the internet), to enhance non-judicial conflict resolution mechanisms and, last but not least, to create better conditions

2 Article 61 of the French Constitution.

for citizens and interest groups to participate in public decision making.[3] Typically, the Conseil d'État often takes the initiative to legally improve the functioning of the French administration.

There exists a variety of administrative pre-trial proceedings. The role of these administrative pre-trial proceedings is currently being discussed.

The most important legal acts dealing with the issue of administrative proceedings are the following:

1. The Constitution of 4 October 1958;
2. Decree n°65-29 of 11 January 1965 relatif aux délais de recours contentieux en matière administrative.[4]
3. Statute n°78-753 of 17 July 1978 portant diverses mesures d'amélioration des relations entre l'administration et le public et diverses dispositions d'ordre administratif, social et fiscal;
4. Statute n°79-587 of 11 July 1979 relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public;
5. Decree n°83-1025 of 28 November 1983 concernant les relations entre l'administration et les usagers;
6. Statute n°87-1127 of 31 December 1987 portant réforme du contentieux administratif
7. Statute n°2000-321 of 12 April 2000 relative aux droits des citoyens dans leurs relations avec les administrations;
8. Code de justice administrative of 4 May 2000;
9. Statute n°2004-809 of 13 August 2004 relative aux libertés et responsabilités locales
10. Decree n°2006-672 of 8 June 2006 relatif à la création, à la composition et au fonctionnement de commissions administratives à caractère consultatif;
11. Statute n° 2011-525 of 17 May 2011 on the simplification and improvement of the quality of law
12. Decree n° 2012-765 of 10 May 2012 on experimental obligatory administrative pre-trial proceedings in relation to contentious administrative proceedings in cases of civil servants concerning their personal position.

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3 The reports are: Conseil d'État, *Les recours administratifs préalables obligatoires*, La Documentation Française, Paris 2008; Jean-Luc Warsmann, *Simplifions nos lois pur guérir un mal français*, La Documentation Française, Paris 2008; Conseil d'Etat – Rapport public 2011, *Consulter autrement, participer effectivement,* La Documentation Française, Paris 2011.

4 It is possible that there are other legal statutes, legal acts or decrees of the Conseil d'Etat that have a direct or an indirect influence upon administrative procedure in France. For amendments see: <www.legifrance.gouv.fr> (consulted on 20 June 2012).

In the following sections we first describe the formal administrative proceedings including administrative courts. In the last section we describe the French alternative dispute resolution system (including, for example, the ombudsman).

2. Protection of Interested Parties in Administrative Proceedings

If an individual does not agree with adopted administrative decisions, the French system of legal protection provides him or her with different options.

In general, the French system offers three different ways that could in the end lead to a reversal of or an amendment to the challenged decision or to settling the dispute between the administrator and the administrated person. An individual may:

1. raise an objection against the administrative decision with the administrative authorities (*Proceedings at the administrative organs*). In some cases an individual has an obligation to do so;
2. raise an objection against the administrative decision at the administrative court (*Proceedings at the administrative courts*); or
3. try do solve his problem outside the system of administrative courts and administrative authorities by the use of alternative dispute settlement possibilities (*Alternative dispute settlement*).

It should be noted that, also in France, administrative law and legal protection against the government and the administration are not static and isolated, but form a normative system that has evolved in parallel with societal developments. Pre-trial administrative proceedings have become more common during the past 16 years, following a decree by the Prime Minister in 1995.[5] Part of the system of legal protection against the government is the system of mediators – complaint handlers, or ombudsmen, in various fields, like *e.g.* pensions and taxation. This is to be understood as being quite different from formal pre-trial proceedings such as in Germany or the Netherlands, although it can certainly not be denied that this system is effective in solving citizens' problems with the administration.[6]

3. Proceedings with Administrative Authorities – *Recours administratif préalable*

In general, the French administrative law system offers administrative authorities *a second chance*. An individual may object against the administrative decision with an administrative authority. In order to avoid court proceedings the administrative

5 Circulaire du 9 février 1995 du Premier ministre relative au traitement des réclamations adressées à l'administration. JORF n°39 du 15 février 1995 page 2522.

6 See: <www.mediateur-republique.fr>, accessed on 19 June 2012.

authority may change, quash or reconsider its former decision. In this case we talk about *recours administratif préalable* (an administrative objection or an application for reconsideration). This procedure is generally optional (facultative) but in exceptional cases it can be obligatory. The administrative authority may adopt, following this *recours administratif préalable* procedure, a new administrative decision. On the one hand, this is to review the decision objected against, but, on the other, the intention is also to convince the complainant that the outcome of the review is justified. Filing a case at an administrative court should therefore no longer be necessary.

Because of this quality of the *recours administratif préalable* it may be stipulated that it is considered to be an *internal* alternative dispute settlement procedure by the administrative authority itself. By a re-examination of the case the administrative authority can successfully avoid court proceedings, *i.e.* proceedings that commence by the *recours contentieux* (the administrative appeal or the application for a judicial review of the administrative decision). The procedure of *Recours administratif préalable* thus helps to create a broader dialogue between the administration and those who are administered and also helps to decrease the amount of cases filed at the administrative courts. The caseload of those courts has increased considerably in the last few decades.

Administrative Authority – Competences

In connection with the internal *recours* procedure the administrative authorities have certain competences. The *recours administratif préalable* has not been arranged in general legal statutory acts. Therefore the procedure and the competences of different administrative authorities can be different. However, according to the case law of the *Conseil d'État* there are two major competences of the administrative authority:

- to quash (*annuler*) the decision (and substitute it by a new one) and
- to change or amend (*réformer*) the decision.

When the administrative authority has received the *recours,* it can change the decision entirely or partially. However, there is a difference in the procedure at the administrative authorities. If the decision creates a right and is thus based on a certain freedom of interpretation or certain discretion existed for the administrative authority in taking the decision, an 'internal consultation' of the administrative authority is necessary. Conversely, if the decision does not confer a right (and is not based on discretion) but is only declaratory and there is only a clerical error in an administrative document (for example, in issuing a driving licence or a diploma) then the administrative authority may change it without any internal consultation, even if the error was beneficial for the addressee.[7] This

7 For the purpose of this book we do not discuss the question whether a declaratory decision constitutes a legal act.

was confirmed by the *Tribunal Administratif de Poitiers* in the case of a mistakenly attributed diploma that was subsequently withdrawn from the candidate (who had failed the examination in question). The Poitiers' Administrative Tribunal stated in its decision that:

> " … taking into consideration, on the one hand, the part that is undisputed, that Mr. N. has not received the same or higher grade than 10 out of 20 points for 2 out of 4 training modules in which he participated; thus, under these provisions, the diploma of sports instructor … could not be attributed to him; on the other hand, the decision by which the Ministre de la jeunesse et des sports issued it to him, by mistake, was a decision which was purely declaratory concerning which the administration has no discretion; and because of that the Minister was required to maintain the consequences of the failure of Mr. N to pass the tests for sports instructor and could lawfully withdraw the diploma that had been issued in error."[8]

Similar cases were also heard by the courts in *Tribunal Administratif de Rennes*, M. et M^{me} B of 13 February 1991 and in *Tribunal Administrative d'Amiens*, M^{lle} V of 1 March 1991. In general, the decision that is adopted by the administrative authority after the objection must be a reasoned one, unless it is stipulated otherwise in the special legal act.[9]

With respect to the competences of the administrative authorities we can distinguish between different types of administrative objection (*recours*) proceedings. The first criterion is that of the authority to which the individual should submit the objection. In this case, there is a distinction between:

1. *Recours gracieux* (an objection that is addressed to the public body that adopted the decision – an original decision maker (*l'auteur de l'acte*)), and
2. *Recours hiérarchique* (an objection that is addressed to the public body that is superior to the public body that adopted the decision). In this case it should be noted that the *Conseil d'État* considers the hierarchical control of the administrative decisions to be one of the general principles of law.[10] Therefore only a statute may exclude this type of *recours* as a remedy. A statutory act may exclude the existence of this remedy, either explicitly[11] or by creating

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8 See TA de Poitiers, 9 February 2000, n°9801027-3: "considérant, d'une part, qu'il n'est pas contesté que M. Noblet n'a pas obtenu une note égale ou supérieure à dix sur vingt dans deux des quatre modules de la formation qu'il suivait ; qu'ainsi, en application des dipositions précitées, le diplôme de brevet d'éducateur sportif … ne pouvait lui être attribué ; que, d'autre part, l'acte par lequel le ministre de la jeunesse et des sports lui a délivré, par erreur, ce diplôme, constitue une décision purement recognitive à l'égard de laquelle l'administration ne dispose d'aucun pouvoir d'appréciation ; que le ministre était tenu de tirer les conséquences de l'échec de M. Noblet aux épreuves du brevet d'éducateur sportif et a pu légalement lui retirer le diplôme qui lui avait été délivré par erreur".

9 CE, 7 March 1947, *Bornet*: Rec. CE, p. 706. – 23 May 1947, *Couty:* Rec. CE, p. 215. – 29 October 1993, *Min. agr. et forêt c/ M. et Mme Cousin et a.* req. n° 121543 : Juris-Data n° 046798.

10 See CE, 30 Juny 1950, *Quéralt*, p. 413.

11 For example Article L. 121-10 of *Code rural* excludes all *recours administratif* against decisions of the Departmental commissions on land development (commissions départementales d'aménagement foncier).

an administrative authority without a superior body, *i.e.* by creating an independent administrative body (*autorités administratives indépendantes*).[12]

The second criterion for the division of administrative objections in the French administrative system is the character of the *recours administratif préalable*. This is important especially in order to be able to commence subsequent court proceedings. In this case a distinction can be made between:

1. *Recours administratif préalable facultatif* (the person or organization, in order to be able to challenge the administrative decision before the administrative court, has a *possibility* to raise an objection prior to the court proceedings with the administrative authority), and
2. *Recours administratif préalable obligatoire* (the person or organization, in order to be able to challenge the administrative decision before the administrative court, has an *obligation* to raise an objection prior to the court proceedings with the administrative authority).

Gustav Peiser mentions "*la régle de la decision préalable*" – the rule of the prior decision.[13] This rule means that the interested person or organization can object against the decision of the administrative authority in the *recours* procedure.[14] This rule was designed for three reasons: 1. to warn the administration of the existence of a dispute, 2. to allow the administration to take a position before the court proceedings, and 3. to decrease the number of cases that reach the administrative courts. Nevertheless, it also creates a privilege for the administration in being able to delay the involvement of the court in the administrative proceeding at hand. This action generally involves the existence of an administrative decision. The rule of the prior decision (*décision préalable*) proves to be very important in the case of judicial proceedings especially in those where this procedure is obligatory, because it stresses the separate responsibilities of the adminstrative body and the administrative court.[15]

The French legislator wanted to create obligatory pre-trial administrative proceedings in order to ease the burden of the administrative tribunals. It announced the generalization of this procedure in Article 13 of the Law of 31 December 1987, which states that:

> "The decrees rendered by the Conseil d'État shall determine under what conditions contractual disputes concerning the State, local governments and their public institutions, as well as the actions involving contractual liability, should be submitted,

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12 See CE, 13 June 1969, *Bussy,* p. 309.

13 Gustave Peiser, *Contentieux administratif*, 14th edition, Dalloz, Paris, 2006, p. 126.

14 CE, 8 January 1997, *Sté des grands magasins de l'Ouest*, p. 1005 or EC, 8 August 1990, Min. de l'Agriculture c. Djaout, p. 243.

15 CE, 21 February 1997, *M. Quile*, RFDA, 1997, p. 422.

> prior to the arbitration or court proceedings, to a preliminary procedure of recours administratif or to conciliation."[16]

This article thus partially announced the generalization of the obligatory pre-trial proceedings at least in the case of contractual disputes concerning public entities and in the case of the extra-contractual responsibility of the administration. However, according to the sources available such a general codification has not yet taken place.[17] This means there still exist some 150 different obligatory administrative pre-trial proceedings in different fields of administrative responsibility (for example, education, defence, the environment, plans for land use, construction etc.).[18]

In 2008, two important reports were published. First, the Conseil d'État's report on obligatory administrative pre-trial proceedings,[19] and, second, the report by Jean Luc Warsmann, *Simplifions nos lois pur guérir un mal français*.[20] The latter report recommended in propositions 49 and 50 the harmonization of the multitude of administrative obligatory pre-trial proceedings and the extension of those proceedings to new domains, especially concerning disputes on the restitution of points on drivers' licences, and concerning the positions of civil servants. Finally, the French legislature has taken several steps in 2011 to make administrative bodies – also in pre-trial proceedings – more service-oriented as far as citizens are concerned.[21] Recently, the Prime Minister issued a decree in which, for the sake of experimentation, administrative pre-trial proceedings have been made obligatory for civil servants concerning labour issues, like salaries and promotion.[22]

Needless to say, these only seem to be small steps and this also suggests some resistance within the French civil service against an effective improvement in relations with citizens and users.[23] However, the experiment will be evaluated as annual reports have to be sent to Parliament. A possible positive outcome of those experiences may lead to a further extension of obligatory administrative pre-trial proceedings.

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16 "Des décrets en Conseil d'Etat déterminent dans quelles conditions les litiges contractuels concernant l'État, les collectivités territoriales et leurs établissements publics, ainsi que les actions mettant en jeu leur responsabilité extracontractuelle sont soumis, avant toute instance arbitrale ou contentieuse, à une procédure préalable soit de recours administratif, soit de conciliation." Article 13 of Law n°87-1127 of 31 December 1987 portant réforme du contentieux administratif.

17 Conseil d'État, Les recours administratifs préalables obligatoires, La Documentation Française 2008, pp. 15-16.

18 See the lengthy list in the same publication of the Conseil d' État, pp. 187-207.

19 Conseil d'État, Les recours administratifs préalables obligatoires, 2008.

20 Jean-Luc Warsmann, *Simplifions nos lois pur guérir un mal français,* La Documentation Française, Paris 2008.

21 See LOI n°2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit (1).

22 Décret n°2012-765 du 10 mai 2012 portant expérimentation de la procédure de recours administratif préalable aux recours contentieux formés à l'encontre d'actes relatifs à la situation personnelle des agents civils de l'Etat. Also see: M.C. de Montecler, L'expérimentation du recours administratif préalable pour les fonctionnaires de l'État est Lancée, Dalloz Actualité 25 mai 2012.

23 See B. Delaunay, Les réformes tendenat à améliorer les relations des citoyens avec les administartions, AJDA 2011, p. 1180, p. 4.

Standing

The issue of the standing of individuals in pre-trial proceedings before the administrative authority and the question of who may commence and participate in this type of proceedings deserves a closer look. Since there is no general legal statute that would describe it, this issue is to a large extent defined by rules established in the case law of the administrative courts. In general, it is possible to state that a person has standing only if he or she has a personal interest in or a grievance caused by the decision.[24] In some cases, the person is explicitly mentioned in the provisions of special legal statutes. Nonetheless, even if the individual has the right to use this administrative objection procedure he or she has to fulfil some *conditions*:

a) The *objection letter* has to be submitted to the administrative authority within the general time limit (*délai*) of two months since the day of being notified of the decision of the administrative authority.[25] This time limit is the general period in which an individual may apply to the court for a judicial review of the administrative act. Thus the *recours administratif* has to be submitted in the period for *recours contentieux*. Challenging the administrative decision within this time limit at the administrative authority prolongs the period for challenging the decision before the courts.
b) The *objection letter* should require the quashing (l'*Annulation*) or changing (*Reformation*) of the decision in question, not just require an explanation or information;[26]
c) Generally, the *objection letter* should be addressed to the competent public authority (however, this condition was partially changed in 2000 when an obligation was created for wrongfully addressed incompetent public bodies to transfer the *objection letter* to the competent body).[27]
d) The *objection letter* should be directed against an administrative decision that is susceptible to this kind of *recours, i.e.* an act that is open to retroactivity (*Retrait retroactif*).[28]
e) The *objection* should generally be made in writing (a paper application), but an application via fax or email is also accepted. However, these applications have to be subsequently supported by signed paper versions.[29] The issue of the email *objection* has also been confirmed by the decision of the *Conseil d'État*, where it decided that it is possible to file an objection by email, but the initiator has to

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24 Most of the time this is only the person who is directly affected by an administrative decision.
25 Article R 421-1, the *Code de Justice Administrative.*
26 Le Médiateur de la République, *Les recours contre les décisions de l'administration: nature et délais*, p. 2, <http://mdr.defenseurdesdroits.fr/fic_bdd/pdf_fr_fichier/1236851673_Les_recours_contre_les_decisions_de_l_administration.pdf>, accessed on 19 June 2012.
27 Article 1, Law of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations*
28 Médiateur (n. 134), p. 3.
29 *Ibid*., or Article 16 of Law n°2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations.*

confirm that he is the author of the email.[30] Recent legislation has somewhat eased the demands for electronic communications with the administration for citizens; this involves the exchange of information about a 'user' between administrative bodies.[31] Nonetheless, some legal acts require a precise and specific form for the *recours*.[32]

f) The *objection letter* may be submitted by the interested person or by his/her legal representative.[33]

Interested Party/Third Party

As stated above, pre-trial administrative proceedings can be initiated by a person who has a personal interest in the case. An interested party is the party to whom or to which the administrative decision is directed. According to the *Conseil d'État* the questioning of the rights of third persons is statistically rare.[34] Most of the decisions only have individual effect (a refusal of visas, a refusal to consult administrative documentation). Other cases that concern more people are not that clear. The issue of the interest of third persons is indeed a delicate one, especially when their interest is not easy to determine explicitly. The *Conseil d'État* has not distinguished between persons who have an interest in accordance with the provisions of statutory acts and third persons who might eventually have some personal interest in exercising the *right to object, i.e.* the right to object is not only limited to interested persons enumerated by the law but it applies to any person aspiring to contest the initial administrative act.[35] However, this rule was changed in 2006 with the addition of an exception for administrative decisions

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30 See CE, 28 December 2001, n° 235784, *Élections municipales d'Entre-Deux-Monts,* "Considérant qu'il résulte de l'instruction, et notamment de l'accusé de réception émis par la préfecture que la protestation de M. G., dirigée contre les opérations électorales qui se sont déroulées dans la commune d'Entre-Deux-Monts le 11 mars 2001, a été transmise à la préfecture du Jura par un courrier électronique reçu le 16 mars 2001, et que M. G. a ultérieurement confirmé être l'auteur de cette protestation par lettre adressée au tribunal administratif de Besançon ; que cette protestation était ainsi recevable."

31 Loi n°2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit (1). On the issue of electronic data interchange between citiziens and the administration, B. Delaunay, les Réformes tendant à améliorer des relation des citoyens avec les administrations, Actualités Juridique Droit Administratif 2011, p 1180. He indicates that a great deal of effort will still be necessary for ministries and regional and local authorities to have their operations adapted to modern electronic communications with citizens.

32 See, for example, the further description of the *recours* procedure according to the *Code de la Défense*.

33 See CE, 10 March 1965, *Möller*, p. 157, DA 1965, n°177.

34 Les recours administratifs préalables obligatoires, Conseil d'État, La documentation francaise, 2008, p. 46

35 See CE, 28 September 2005, Loius: "…lorsque des dispositions legislatives ou réglementaires organisent une procédure obligatoire de recours administrative préalable à l'intervention d'une juridiction, le respect de cette procédure s'impose à peine d'irrecevabilité du recours contentieux à toute personne justiffiant d'une intérêt pour introduire ce recours contentieux; qu'il en va ainsi meme dans le cas où les dispositions régissant la procedure de recours administrative préalable, dans l'énumération qu'elles donnent des personnes susceptibles de le former, auraient omis de faire figurer toute autre personne justifiant d'un intérêt suffisant pour l'exercer."

adopted by professional bodies. The *Conseil d'État* has returned to a rather restrictive position since then. Today pre-trial objections may only be submitted by persons who are explicitly mentioned in the legal act. This rule is strictly applicable within the obligatory administrative objection procedure.[36] At the same time the *Conseil d'État* has suggested that it is not desirable to extend obligatory pre-trial administrative procedures generally to third persons. The *Conseil d'État* enumerates various reasons for this; for example, the conditions relating to the publicity of the decision, the complexity of contradictory proceedings or the logic of the pre-trial system.[37] But third parties having an interest in a decision can start contentious proceedings before an administrative court.

Unless a particular legal provision states otherwise, the administrative *objection* is not subject to any formality. However, an individual has to prove that it is he or she who has submitted an *objection* to an administrative authority.[38] It should be noted that the administrative authority has to confirm that it has received the *objection*. Article 19 of the Act of 12 April 2000 provides that "any request to an administrative authority is the subject of a receipt issued under conditions set by the decree rendered by the Conseil d'Etat … The limited term to file an objection cannot be used against the complainant if the receipt has not been sent to him or if it does not contain the information required by the decree mentioned …".[39]
In most cases the administrative authority replies to the *objection* received from the complainant. But if that does not occur, *i.e.* the administrative authority does not reply to the complainant within the general or another explicitly stipulated time limit, then the lack of response by the administrative authority is considered to constitute a rejection of the objection.[40] The general time limit in which the administrative authority is obliged to answer an individual after the *objection letter* has been received was shortened from four to two months in 2000.
The *objection* has to be submitted to the administrative authority within this time limit because of:

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36 See CE, 10 March 2006, Leroy Merlin: " … sous réserve du cas où, en raison tant des missions conférées à un ordre professionnel qu'à son organisation a l'échelon local et au plan national, les dispositions legislatives ou reglementaires prévoyant devant les instances ordinales une procédure obligatoire de recours administratif préalablement à l'intervention d'une juridiction doivent être interprétées comme s'imposant alors a peine d'irrecevabilite du recours contentieux à toute personne justifiant d'un intérêt lui donnant qualité pour introduire ce recours contentieux, une procédure de recours administratif prléalable n'est susceptible de s'appliquer qu'aux personnes qui sont expressément énumérées par les dispositions qui en organisent l'exercise … ".

37 Les recours administratifs préalables obligatoires (n. 27), pp. 48-49.

38 See <www.sports.gouv.fr/francais/metiers-et-formations/reglementation/la-reglementation-des-diplomes/brevets-d-etat-d-educateur-sportif/jurisprudence-des-examens-sportifs/complements/recours-administratifs-recours>, accessed on 5 June 2010.

39 Law n°2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administration.*

40 Article 1, Decree n°65-29 of 11 January 1965 *relatif aux délais de recours contentieux en matière administrative.*

1. The competence (discretion, circumstances) of the administrative authority to withdraw or change this particular decision; and
2. The possibility to initiate the procedure before the courts if the administrative authority rejects the objection. The objection must be submitted to the administrative authority within the period for bringing proceedings before the court (*recours contentieux)*, if an individual wants to preserve the benefits of this time limit in case of the rejection of the objection.[41] However, a delayed *objection* does not stay the time limit for bringing proceedings before the court (*recours contentieux)*.[42]

So in order to be able to protect her or his rights also in the later stages of proceedings, *i.e.* before the court, an individual has to submit this *administrative objection* within the time limit prescribed by law.

Organization of the Proceedings

In general, pre-trial administrative proceedings before the administrative authority are carried out in writing. An individual has to send her or his written objection, including evidence, to the administrative authority and wait for a reply, which should also be in writing. In the case of pre-trial proceedings oral hearings are an exception. However, if the administrative authority considers it necessary or a legal act so demands, the authority may summon the complainant for an oral hearing. The lack of a general legal norm on pre-trial administrative proceedings makes it almost impossible to describe the precise organization of the proceedings. Because there are more than 140 special pre-trial administrative procedures,[43] a generalization is very difficult. Some procedures take place before responsible ministers,[44] others before different commissions[45] or before certain committees.[46] At the same time the legal acts describing these *recours* procedures as well as accessible written sources are usually silent on the issue of the organization of these proceedings. Because of that it is possible to presume that the organization of the proceedings depends on the discretion of the administrative authority concerned and its internal procedures. This discretion is limited by the case law of the administrative courts and by existing legislation.

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41 See "*doit être introduit dans le délai du recours contentieux pour conserver à son auteur le bénéfice de ce délai au cas où il ferait l'objet d'une décision de rejet"* (CE 20 April 1956, *Ecole professionnelle de dessin industriel*).

42 See CE 30 November 1994, *Syndicat national du patronat moderne et indépendant de la Réunion*

43 Les recours administratifs préalables obligatoires, (n. 27), p. 15.

44 For example, administrative objections stemming from works on historic monuments are assessed by the Minister of Culture in accordance with the *Code du Patrimoine*.

45 For example, administrative objections stemming from university elections are assessed by the *Commission de contrôle des operations électorales* in accordance with Decree 85-59 of 18 January 1985.

46 For example, administrative objections in sport disputes are assessed by the *Comité national olympique et sportif francais* in accordance with Law n°92-652 of 13 July 1992.

Defence Rights

When it comes to the defence rights of individuals in pre-trial proceedings, the most important one is the general right to raise an objection about the administrative decision and to commence pre-trial proceedings. The issue of defence rights similar to the issue of the organization of the proceedings is not generally regulated in the legal acts. One of the reasons might be the written character of the *recours* procedure. Nevertheless, some general legal acts grant the complainant some defence rights, for example the right to be represented by a representative of her or his own choice. The representation does not necessarily have to be legal representation. Although it is not a rule, it is usually the legal representative of the interested party who communicates with the administrative authority or administrative court. In the case of an oral hearing the legal act may require some criteria to be fulfilled by the representative.[47] Since most pre-trial proceedings are generally in writing, the representation as such is not very visible. Other frequent defence rights in administrative proceedings are, *e.g.* the right to consult the case file, the right to submit new evidence during the proceedings (including the hearing of witnesses), the issue of bias on the part of (persons working for) the administrative authority or other rights that the complainant has in regular administrative proceedings, are not mentioned in the available sources.[48]

One of the issues that has not been addressed in general legislation in France is the obligation to give reasons for administrative decisions.[49]

4. Relation between Pre-Trial and Judicial Proceedings

As mentioned above, the *recours* procedure, its conditions, its timeframes, and its other qualities are not included in a general legal act on administrative decision making and administrative proceedings for legal protection against the government like the German Verwaltungsverfahrensgesetz or the Dutch General Administrative Law Act. Nevertheless, it is possible to find a relation between pre-trial administrative proceedings and judicial proceedings. Although a general legal act does not exist, there are many legal acts with the status of a lex specialis that require the person adressed to first follow pre-trial administrative proceedings before an interested party is able to challenge the administrative decision before an administrative court. In this case two major types of administrative objections could be distinguished, the *recours administratif préalable facultative* (a facultative

47 For example he or she has to be an advocate or a member of the armed forces etc.

48 For the rights of the defence (*droits de la défence*) in administrative proceedings see, for example, Analyse comparée du droit administratif, *La procédure administrative non contentieuse en droit français,* European Public Law Series Vol. XIV, ed. Michel Fromont, Esperia publications Ltd., London, 2000, p. 114.

49 Delaunay 2011, p. 6.

pre-trial administrative objection) and the *recours administratif préalable obligatoire* (obligatory pre-trial administrative objection).

Recours administratif préalable facultatif *(RAPF)*

This type of *recours* is a more common one. In general, every administrative act may be challenged by means of a *recours* procedure. However, it is necessary to point out that there is no legal act in the French legal system that would describe this type of *Recours* in general terms. Still the legal academic literature, some special legal acts, decisions of the *Conseil d'Etat* and the practice of many public bodies, for example the documents of the Défenseur des Droits, attest to its existence. This type of *recours* is almost completely based on administrative experience and unwritten rules of law. In the case of the RAPF, the relation between administrative pre-trial proceedings and judicial proceedings is a very loose one. An individual has the possibility to decide whether he or she will apply to the administrative authority or whether he or she will challenge the administrative decision directly by filing a case at the administrative court.

Recours administratif préalable obligatoire *(RAPO)*

On the other hand, there are situations where the administrative authority should have a possibility to reconsider its decision before the administrative court assesses it. The *recours administratif* is obligatory if it is expressly required by law.[50] The obligatory pre-trial *recours* procedure is not a general procedure for all administrative actions, although there were efforts to impose this procedure for all of them. Up until now these efforts have not been successful, however. This procedure is not covered, similar to the facultative procedure, by one general legal act. However, the references to this procedure can be found in different legal acts that have the status of *lex specialis*. This obligation was presupposed by the reform of the administrative judiciary in 1987. According to academics the RAPO procedure is prescribed more and more frequently. This is affirmed by the advice of the Warsmann report and by the legislation to improve the quality of French law.[51]

Specific characteristics of the RAPO are:
- The use of the RAPO procedure is obligatory in order to be able to subsequently present the case at the administrative court,[52]
- The courts would declare any objection inadmissible if the complainant did not use this procedure.[53]

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50 CE, 28 September 2005, *M. Louis*, ADJA 2006, p. 103.
51 Loi n°2011-525 du 17 mai 2011 de simplification et d'amélioration de la qualité du droit.
52 For example Article R229-27, Code de l'environnement or Article R 600-1 of the Code de l'urbanisme.
53 CE, 28 September 2005, AJ 2005, p. 1869, *obs. M.- C. de Montecler.*

- This procedure stems from special legal acts.[54]
- The period in which an individual has to submit the case to the administrative authority varies. If the particular legal act does not stipulate this time limit the general time limit of two months will apply.[55]
- This procedure might be used by every person who has an interest in the administrative decision.[56]
- The legal time limit for applying to the court may be preserved more than once.[57]

Three General Consequences of the RAPO Procedure[58]

Firstly, the administrative authority dealing with a RAPO has to take into account that it has to decide the case in accordance with the situation (the law, the facts) at the time it takes the new decision. The administrative authority has to take into consideration changes in the law and in the facts and circumstances that have occurred since the date when the original, contested decision was taken.[59]
Second, the decision that has been provoked by the RAPO substitutes in all cases the decision that had been contested by the complainant both in the case of the revision or confirmation of the decision. At the same time, because the contested decision was substituted by the new one, all the errors that were initially raised by the objection do not have an influence on the legality of the new decision and it is not possible to use them in case of a new objection procedure against it. In other words they are inoperative.[60]
Third, the RAPO has the effect of "crystallizing" the possible case at an administrative court, *i.e.* it determines what could be used in proceedings before the court. This has two aspects. The first one concerns the evidence of the *recours*. This means that the complainant cannot ask the court to decide on different evidence than that which he or she had already mentioned in the pre-trial objection procedure. For example, only evidence actually submitted to the Departmental Commission on land development can be used in the court proceedings.[61] The second aspect concerns the claims of *recours jurisdictionnel*. In judicial proceedings, an individual cannot invoke claims other than those that were already invoked in the procedure of *recours préalable*. For example, the court will not decide on claims other than those that were submitted to the Commission.[62]

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54 See, for example, Article R229-27 of the Code de l'environnement.
55 This issue will be further described in the text.
56 CE, 28 September 2005, AJ 2005, p. 1869, *obs. M.- C. de Montecler.*
57 CE, 29 May 1963, *Maurel*, p. 334.
58 These three general consequences of the RAPO are described by René Chapus, in *Droit du contentieux administratif*, 12e edition, Montchrestien, Paris, pp. 396-397.
59 CE, 13 November 1991, *Girer*, p. 392.
60 CE, 27 February 1956, *Assoc. des proprieteires du Chesne*, p. 92.
61 CE, 17 February 1997, *Mme Chartier*, p. 420.
62 CE, 11 October 1972, *Elect au Conseil*, p. 628.

The unacceptability of new claims or new evidence stems from the logic of obligatory *objection* proceedings, *i.e.* to examine and repair the case before the court proceedings. This logic would be undermined if the court had to decide anew based upon new claims or evidence. However, some scholars suggest that so far it has not been possible to find, in French jurisdiction, the explicit general principle of the unacceptability of claims or evidence by the court if they have not been submitted in the *recours* procedure.[63] These two principles are not absolute, because there is a possibility that the court will accept new evidence. That is the case when there is evidence of *"ordre public"* that may be invoked during the whole course of the proceedings.[64]

General Time Limit for Raising the RAPO

The general time limit of two months is applicable also here. However, as stated above, the time limits may vary because the special legal acts may require a different period in which the obligatory objection should be raised and which may be as short as 5 days in some cases.

Sources of the RAPO

The obligations of the RAPO may stem from two different sources; from legislative provisions or from contractual clauses.

Contractual Clauses

The entries of the public procurement (*cahiers des charges*) may include provisions that the parties that concluded the contract with the administration may address the court only after they have submitted the objection to the administrative authority.[65]

Provisions in Statutory Acts

In some cases the obligation to initiate administrative objection proceedings is explicitly included in the provisions of legal statutes. The administrative pre-trial objection procedure is obligatory *inter alia* in the following cases:[66]

1. in the case of orders for revenue or demands for payment issued to ensure the recovery of debts of a foreign state and in the area of taxes, the legal texts

63 Chapus, (n. 32), p. 397.
64 CE, 16 November 1998, Ep. *Bravy*, p. 1120.
65 CE, 18 December 1981, *Denic et Queinnec.*
66 However, this list is not exhaustive.

specify that, before submitting the case to court, the taxpayer must submit her or his claim to the tax officer who was in charge of the order for revenue.[67]

2. in other cases where legal provisions state that the complainant has to submit the *objection* to a specified administrative authority before submitting it to the administrative court: *recours* against academic elections. In this case it is necessary to submit a RAPO in three or eight days before the entitled *commission de contrôle;*[68]
   - *recours* against the elections of the *Conseil National de Universités* has to be submitted to the Minister or the President of the University;[69]
   - *recours* against pecuniary sanctions imposed by the *Préfets* under the application of the *Code rural* should be presented within the period of one month to the *Commission des recours* that has been created in accordance with that act,[70]
   - *recours contentieux* by civil servants and members of the armed forces against decisions regarding their personal situation should be preceded by the *recours administratif préalable* according to the decree rendered by the *Conseil d'Etat;*[71]
   - a similar condition is also set in the *Code de la Défense* that requires the military complainant in personal issues to submit the objection to the Committee before applying to the court.

In order to give an example of how such proceedings should legally evolve, the objection proceedings for military personnel will be described in greater detail below.

Proceedings

Since there is no *lex generalis* that describes the *recours administratif préalable* procedure in general terms, we will provide a short description of the procedure included in a *lex specialis*. The following description stems from Part 4, Book 1, Title II, Chapter V (Article R4125-1 and following) of the *Code de la défense*.

1. According to the Code, every *recours contentieux* brought by military personnel against the administrative decision related to their personal situation shall be preceded by a *recours administratif*, under penalty of the inadmissibility of the *recours contentieux*.[72]

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67 Article 62, Décret n°62-1587 of 29 December 1962 portant règlement général sur la comptabilité publique.

68 Article 39, Décret n°85-59 of 18 January *1985 fixant les conditions d'exercice du droit de suffrage, la composition des collèges électoraux et les modalités d'assimilation et d'équivalence de niveau pour la représentation des personnels et des étudiants aux conseils des établissements publics à caractère scientifique, culturel et professionnel ainsi que les modalités de recours contre les élections*.

69 Article 4, Décret n°92-70 of 16 January 1992 *relatif au Conseil national des universités.*

70 Article R-331-8, *Code rural et de la pêche maritime.*

71 Article 23, Law n°2000-597 of 30 June 2000 *relative au référé devant les juridictions administratives.*

72 Article R4125-1, I., *Code de la Défense.*

2. The *recours administratif préalable* is reviewed by the Commission of military objections, located within the Ministry of Defence. The referral to the commission preserves the deadline for lodging the *recours contentieux*.[73]
3. The obligation to submit the *recours administratif* is not applicable concerning certain administrative decisions (for example, in the case of military recruitment or disciplinary dispositions).[74]
4. The *recours administratif* may only be submitted by the person that is directly influenced by the decision. The person must be a member of the military forces. He or she may challenge only the administrative decision related to his personal situation.[75]
5. The *recours administratif* must be submitted within a period of two months since the notification or publication of the decision that is being challenged.[76]
6. The *recours administratif* must be sent to the Secretariat of the permanent commission placed under the authority of the president of the commission.[77]
7. The *recours administratif* must be sent by registered mail with a return address.[78]
8. The *recours administratif* must include the copy of the contested decision. If it is not included, then the complainant has the right to be notified by the Secretariat of the Committee to produce these documents within a period of two weeks. If the complainant does not supply the documents within this period the *recours administratif* is *ex lege* deemed to have been withdrawn. If that is the case, then the complainant has the right to be notified thereof.[79]
9. If the *recours administratif* procedure is initiated after the end of the time limit mentioned in paragraph five, the Chairman of the Committee notes the foreclosure of the case and notifies the persons concerned.[80]
10. The administrative authority that issued the challenged decision as well as the persons concerned have a right to be informed that the *recours administratif* has been submitted.[81]
11. The Chairman of the Committee shall transmit the *recours administratif* to the competent authority if it does not fall under its jurisdiction and he shall inform the persons concerned. Any authority that receives a *recours administratif* which falls within the jurisdiction of the Committee shall transfer the *recours,* without delay, to the Committee and shall inform the complainant.[82]
12. The exercise of a *recours administratif* before the commission does not suspend the legal effect of the decision concerned. However, the author of the decision (the original decision maker) can suspend it until the responsible minister

73 *Ibid.*
74 Article R4125-1, II., *Code de la Défense.*
75 This condition stems from the wording of the *Code de la Défense.*
76 Article R4125-2, *Code de la Défense.*
77 *Ibid.*
78 *Ibid.*
79 *Ibid.*
80 *Ibid.*
81 Article R4126-3, *Code de la Défense.*
82 *Ibid.*

decides upon the *recours*.[83] Following pre-trial proceedings the interested party can file summary proceedings at the administrative court ("procédures de référé") based on Article L. 521-1 of the Code of administrative justice.[84]

13. The *recours administratif* procedure takes place in writing. The Committee shall decide only after the person in question has been able to submit written comments. If considered necessary, the Committee may summon the person for an oral hearing. The complainant has a right to be heard at such an oral hearing. He may be assisted by any member of his choice in active military service.[85]
14. The Committee then recommends to the competent minister to either dismiss the *recours* or to accept it partially or in totality. However, its recommendation does not bind the competent minister.[86]
15. The individual raising the objection has a right to be informed, within four months, by the commission on the decision of the competent minister. The decision on his *recours* replaces the original decision. Such notification must be sent by registered mail; the return receipt is requested. The absence of a notification of the decision by the expiry of a four-month period is considered to be a rejection of the *recours* by the minister. This notification should include *inter alia* a reference to the possibility to appeal against the initial decision before the administrative tribunal and the period for submitting the case to the tribunal.[87]
16. The administrative authority has a right to receive a copy of the decision.[88]

Recours administratif procedures can also be found in other legal acts like the Code de l'environnement, the Code de la santé publique, the Code de l'urbanisme or the Code de l'éducation although the legal provisions included in these legal acts are not as elaborate as in the Code de la Défense.

Some procedural rights of the complainant might be found in other legal acts that describe more or less in general terms some procedural aspects of the pre-trial administrative proceedings and it is possible to say that these general rules are applicable to *recours* proceedings.

According to Article 24 of Statute n°2000-321 of 12 April 2000 *relative aux droits des citoyens dans leurs relations avec les administrations* the decision of the administrative authority has to be reasoned. The individual has a right to submit her or his written observations and if the administrative authority considers it

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83 Article R4126-4, I., *Code de la Défense.*

84 Loi n°2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives et décret d'application no 2000-1115 du 22 novembre 2000.

85 Article R4125-8, *Code de la Défense.*

86 Article R4125-9, *Code de la Défense.*

87 Article R4125-10, *Code de la Défense.*

88 Article R4125-11, *Code de la Défense.*

important also oral observations. He or she has the right to be represented by an advocate of her or his choice.
According to Article 23 of the same law an individual has a right to have the administrative decision changed because of its illegality by the administrative authority in the period for *recours contentieux*. The administrative authority may change this decision after the *recours contentieux* has been submitted. According to Article 25 an individual has a right to know the reasons for the decision, the ways of changing the decision, the timeframe to do so, conditions that enable her or him to submit her or his written or oral observations and the possibility to be represented by an advocate of her or his choice. These obligations are also included in the case law on social security and cases involving the social insurance agriculture fund of salaries.
According to Statute n°79-587 of 11 July 1979 *relative à la motivation des actes administratifs et à l'amélioration des relations entre l'administration et le public* individuals have a right to be also informed about the reasons for administrative decisions that are not in their favour.

A problem related to the *recours préalable* is that the *recours hierarchique* as well as the *recours gracieux* are not based on written legal provisions. They exist mainly in administrative practices and are recognized by the courts, but that makes these procedures rather unclear.[89] There is no legal act that describes, in general terms, the *recours* procedure to which the complainant may resort. For those proceedings one has to rely on the long practice and experience of administrative authorities and administrative courts, and also on the *leges speciales* that describe (at least partially) this procedure. Nonetheless, this procedure is one of the most often used ways to avoid court proceedings.

5. Proceedings before the Administrative Courts – *Recours contentieux*

In 2001, the reform of the administrative justice system in France harmonized the legal acts that deal with administrative justice offered by the courts into one code *i.e.* the Code of Administrative Justice. The Code entered into force on 1 January 2001. The procedural rules, however, are not included in the Code.
There are some specific features of the French administrative *contentieux* system.

1. French administrative courts are arranged in a classical pyramidal structure. Most cases are decided by the first instance administrative courts – administrative tribunals. Their decisions can be appealed to the administrative appeal courts. The system is headed by the supreme administrative court – the *Conseil d'État*.

89 Compare CE 20 April 1956, *École professionnelle de dessin industriel*, p.163; CE 13 June 1969, *Ministre de Armées c Busy*, p. 438 or CE, 6 January 1989, *Renaud et al.*, p. 3.

2. The proceedings before the administrative courts are written (*procedure écrite*). The parties submit their conclusions, observations and requests to an administrative court only in a written form. Oral proceedings with public hearings are very rare. They only exist where the law so determines. Still oral procedures are very limited. In the oral hearing before the administrative tribunals, the parties have a possibility to develop their new proposals but it is necessary that they are developed in writing before the beginning of the conclusions of the *Commissaire du Gouvernement*.[90] Because of this character of the proceedings judges decide the case in general on the basis of the written evidence included in the case file.
3. Proceedings at an administrative court are inquisitorial. This means that it is the administrative judge who leads the proceedings. The judge directs and organizes the proceedings. The court takes it upon itself to discover the facts. It is not limited or constrained to rely only upon the investigation and arguments of the parties.
4. The proceedings at an administrative court are contradictory. Parties do not have the initiative, but have possibilities to discuss facts and arguments. Each side must be given an opportunity to contradict what the other party has said.
5. Proceedings at an administrative court are partially confidential. However, the secrecy of administrative proceedings is relatively limited. The confidential character of the proceedings means that third parties cannot consult the case file and public oral hearings are only held if a statute explicitly states that this must be the case. For example, the *Conseil d'État* decided that disciplinary proceedings must be dealt with without the presence of the public,[91] even though this practice has been changed because of the decision of the ECHR. After that the *Conseil d'État* accepted that the general public may be present in certain cases.[92]
6. In general, the *recours contentieux* does not suspend the effects of challenged decisions. That means that the administrative decision challenged by the *recours contentieux* may be executed.[93] Unless the law says so explicitly, the *recours* procedure does not have a suspending effect.[94] This rule is a consequence of the *privilege du préalable* that is enjoyed by the administrative authorities.[95] Of course, there are some rare exceptions to this rule. For example, the *recours* has a suspending character in the case of appeals against the decisions of the *Préfet* on the deportation of non-citizens.[96]

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90 CE, 5 January 1962, *Rietzch*, p. 11.
91 CE, 30 March 1990, *Botazzi*, RFDA, 1990, p. 472.
92 CE, 14 February 1996, *Maubleu*, p. 159.
93 Article L 4, *Code de Justice Administrative.*
94 Article L 4, *Code de Justice Administrative*, "Sauf dispositions législatives spéciales, les requêtes n'ont pas d'effet suspensif s'il n'en est autrement ordonné par la juridiction."
95 CE, 2 July 1982, *Huglo*, p. 253.
96 Article L 776-1, *Code de Justice Administrative.*

7. Proceedings before administrative courts are not complicated. Being written, without specific court fees and guided by the court, a complainant does not have to worry about the course of the proceedings as such.
8. The individual does not need to be represented by an advocate at all the levels of administrative proceedings before administrative courts. This makes the contentious procedure more accessible for citizens. There are some exceptions, however. The legal representation of a party is required in specific types of proceedings. In proceedings at an administrative court, it is mandatory that the complainant is represented by a lawyer especially in cases when the complainant sues the State or one of its public institutions for damages.[97] In other cases, recourse to legal representation is optional. Nevertheless, in proceedings at the *Conseil d'État* legal representation is mandatory. An interesting aspect here is the fact that the choice of an advocate before the *Conseil d'État* is not entirely free. The complainant has to choose one of the *Avocats au Conseil d'Etat et à la Cour de Cassation i.e.* special advocates who, as a select professional group, have a "monopoly" in proceedings before the supreme courts of the state. A complainant may apply for legal aid. But he or she must do that within the time limit for the *recours contentieux*.
9. Proceedings before administrative courts are generally inexpensive. There are usually some procedural costs. They include the costs of necessary actions (*e.g.*, an expert's fees whose expertise has been sought). Also, the fees for legal representation have to be paid. The only other fee that previously had to be paid was the "*droit de timbre*" which was an obligation to pay a certain sum to the court for each *recours* (100 francs/15 euro).[98] This fee was abolished in 2003.
10. Administrative courts may award damages to the complainant. In this case the rule of prior decision plays a significant role. A right to bring an action for damages against the administration does not exist simply because some event has resulted in damage. It is necessary to obtain a decision by the administrative authority. This decision may either deny an award to a complainant or the award granted by the decision may be deemed insufficient by the complainant.
11. A party must have a personal interest in the proceedings. The Conseil d'État has been rather reluctant to admit the *actio popularis* which would enable every individual to challenge an administrative act. Complainants must have a personal interest in order to have standing in proceedings before administrative courts.[99]

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97 Articles R. 431-2, *Code de Justice Administrative.*

98 Order n°2003-1235 of 22 December 2003 relative à *des mesures de simplification en matière fiscale et supprimant le droit de timbre devant les juridictions administratives.*

99 Compare CE, 9 December 1996, *Assaupamar*, p. 479 or CE, 14 January 1998, *Comm. De Toulon et Cie des Eaux et de l'ozone*, p. 8.

12. The administrative court's decision-making competence is limited. It may annul (quash) the administrative decision and return the case back to the administrative authority to take a new decision. However, in some cases the administrative court may go further. It may change/substitute (*réformer*) the administrative decision. On rare occasions the law permits the judge not only to annul but also to change the challenged decision. So even if proceedings based on excess power leads to the annulment of the decision, it h*as to be up to* the administration and not to the judge to replace the illegal act.[100] Only cases of *contentieux de pleine juridiction* with pecuniary condemnation as an outcome escape this rule.

In order to be able to make use of court proceedings there are several conditions that have to be met by an *individual,* namely concerning the:[101]

1. *Language and contents*
   An objection to the court has to be written in the French language. It has to include the identification of the complainant including her or his signature. It has to include certain documents such as a copy of the challenged decision; and last but not least it should be reasoned.
2. *Way of objecting*
   The objection letter should be sent by regular mail, but it is possible to send it via telegram, telex, fax or email.[102]
3. *Personal interest*
   An individual must have a personal interest in the contested decision.[103] Group actions in the general interest are not possible. The general interest is considered to be a public, state and administrative concern and part of the political domain where citizens should use their political rights.[104]
4. *The existence of a prior administrative act*
   The jurisdiction of the administrative courts is restricted to existing administrative acts (administrative decisions or administrative contracts) emanating from an administrative authority. Individuals have to appeal against existing administrative acts.[105] The second possibility is an administrative

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100 R. Chapus, *Droit administratif*, Tome 1, 15th edition, Montchrestien, Paris, 2001.

101 Article R 441-1, *Code de Justice Administrative.*

102 CE, 13 March 1996, *Diraison,* p. 78; or CE, 28 December 2001, *Elect. mun. d'Entre-Deux-Monts*, p. 1086, D 2002.

103 Group actions as such are not possible in French administrative procedure, but are being discussed. See Philippe Belaval (president du groupe de travail), l'action collective en droit administratif, 5.05.2009. This report investigates the legal possibility to have an organization represent individual interests in administrative court proceedings. Also see: Situation et perspectives de la juridiction administrative, Intervention de Jean Marc Sauvé, Réunion annuelle des présidents des cours administratives d'appel et des tribunaux administratifs, Paris, April 7 2010, who announces the prepartion of legislation to make such collective action possible. See: <www.conseil-etat.fr/node.php?articleid=2042> consulted on September 22, 2011.

104 Réflexions sur l'intérêt général – Rapport public 1999, see <www.conseil-etat.fr/node.php?articleid=430>, accessed on 22 September 2011.

105 CE, 16 October 1970, *Pierre c. EDF.*

appeal against an 'implicit' decision, especially in circumstances of the expiry of a certain time limit without a reply from the administrative authority in question.

5. *Time limit for the recours contentieux*
   An individual has to direct her or his objection to the court within a general period of two months after the notification of the decision of the administrative authority.[106]
6. *Obligation of the RAP*
   If a statutory act so requires, an individual has to use the *recours administratif obligatoire* procedure before applying to the court.[107]

Possible Claims by the Individual

In general theory there are four different actions that can be brought by an individual before an administrative court.

First, an individual may request the administrative court to recognize the illegality of the administrative decision and annul the decision (*contentieux de l'annulation*). The main type of claim within this group is the *recours pour excès de pouvoir*. In order to support this action, an individual can in principle invoke an argument based on a violation of objective law, *i.e.* the Constitution, laws, regulations or case law – thus *recours objectif*. This means that a case is filed to control the legality of the decision and, in principle, such a case can only lead to the contested decision being confirmed or repealed. Here, in principle, it is not possible to raise a breach of contractual terms as these are connected with subjective right and therefore they belong to the *recours subjectif*. Second, an individual may request the administrative court to use all its powers to award him or her damages and to determine her or his rights or entitlement which may go beyond quashing and annulling the challenged decision (*contentieux de pleine juridiction*). In such a case the appellant asks the court to recognize his or her subjective rights in relation to an administrative action, which may also involve a claim for damages. This is typical for the *recours subjectif*.[108] In some specific cases of the contentieux de pleine juridiction, the administrative court can replace the decision of the administration, *e.g.* in tax cases.
Third, prejudicial questions or particular demands, or the need to interpret the legal norm or pronounce on the legality of the administrative decision are cases of *contentieux de l'interprétation* or *contentieux de légalité*.

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106 Article R 421-1, *Code de Justice Administrative.*
107 See, for example Article 600-1, Code de l'urbanisme.
108 Although this type of division of 'recours' is not very usual in French administrative law literature. One can find the main differences between *contentieux objectif* and *contentieux subjectif* for example in C. Debbasch & J.-C. Ricci, *Contentieux administratif*, Dalloz, Paris, 8th edition, 2011, p. 724.

Last but not least, the administrative court is competent to sanction certain persons who have infringed certain legal provisions (*contentieux de la répression*); in this case the administrative court acts as a criminal court.
The administrative courts have these different competences. Still the most important competence of the administrative courts is their possibility to quash decisions made by administrative authorities.

Length of the Proceedings and the Caseload

In 2008, the administrative tribunals decided more than 183,000 cases. The expected average time of the hearing, which was more than 20 months in 2000, has been reduced to less than 13 months.
Around 16% of judgments rendered by administrative tribunals are subject to an appeal to the administrative appeal courts (an appeal in some disputes remains with the *Conseil d'État*). In 2008 the administrative courts of appeal in Bordeaux, Douai, Lyon, Marseille, Nancy, Nantes, Paris and Versailles decided more than 27,000 cases, and the average time for hearing a case, which was over 3 years in 2000, had dropped to less than 13 months.
In deciding about 10,000 cases a year, the *Conseil d'État*, like other administrative courts, has made considerable efforts to reduce delays in its decision-making processes. The time for hearing a case has generally been reduced to less than 10 months.[109] More details concerning the caseload are included in the Annex to this chapter.

6. Alternative Dispute Settlement

French administrative law also distinguishes means of dispute settlement outside judicial proceedings. These include *inter alia* conciliation, mediation, transaction or arbitration.[110] However, with the exception of mediation, these alternative dispute settlement measures are used rather reluctantly in administrative proceedings. Most of them are based on the provisions of civil law. Nevertheless, the value of mediation has been acknowledged by the *Conseil d'Etat*.[111]

Transaction

The transaction is an agreement according to which the parties should settle their (existing or possible future) disputes. It is one of the internal procedures for dispute settlement and it does not require the participation of a third person.

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109 *La justice administrative, en bref,* Conseil d'État, p. 4, 2009.
110 For an overview see Emmanuel Roux, Panorama des différents modes alternatifs de règlement des litiges, *Actualités Juridiques Collectivités territoriales* 2012, p. 234.
111 Les développements de la médiation, Colloque organisé par le Conseil d'Etat à la Chambre de commerce et d'industrie de Paris, intervention de Jean-Marc Sauvé, 4 mai 2011.

Although it is enshrined in Article 2044 of the *Code Civil,*[112] in certain situations it can be used in disputes with administrative authorities. Various decisions of the *Conseil d'État* and legal norms of the legislature[113] have recognized the transaction as one of the means of dispute settlement. Of course, not all of the principles of a civil transaction are applicable in the circumstances of administrative disputes. A transaction in administrative law is limited only to cases of *plein contentieux* (before an administrative court).[114] A transaction is excluded in the case of *excès de pouvoir*. Also the administrated subject cannot renounce, in advance, his right to challenge an administrative decision.[115] The effects of the transaction in administrative law are, however, similar to the civil transaction. It produces an agreement and the parties to the agreement that do not comply with their obligations may be sanctioned by the administrative courts.[116] However, a signed transaction has the quality of *res judicata* and it creates an obstacle to judicial proceedings in the same case.[117]

Mediation

Mediation implies intervention by a third person in a dispute. The mediator's function is to bring a solution to a dispute and therefore his active participation to the dispute is required and expected. In the French legal system, Mediation is a well known form of alternative dispute settlement. An institution of the *Médiateur de la République* was established by the Statutory act of 3 January 1973, but it was not embodied in the 1958 Constitution. The French *Médiateur* carried out the functions of ombudsman. Subject to the control of the *Médiateur* were government bodies, local administrative authorities and other bodies vested with a public service mission. The criteria for exercising his control were defined through a *"failure of an authority to accomplish its public missions"*.[118] Any person (legal and natural) had the right to demand an investigation. However, the actual control procedure could only be started by a Member of the French Parliament who could refer the objection to the *Médiateur*. Because of that fact that an individual, in order to actually complain before the *Médiateur,* had to submit his or her objection to a Member of Parliament, this "MP filter" of the ombudsman is

112 *La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître.* Article 2044, the Code Civil.

113 See, for example, the Law of 2 March 1982 *relative aux droits et libertés des communes, des départements et des régions.*

114 *Le service public et l'exigence de qualité*, Lucie Cluzel-Métayer, Nouvelle Bibliothèque de Thèses, Dalloz, Paris, 2006, p. 352.

115 CE, Ass., 19 November 1955, *Andréani*, Rec. p. 511.

116 CE, 5 May 1971, *Ville de Carpentras*, Rec. p. 326.

117 CE, 8 February 1956, *Dame Germain*, Rec. p. 69; CE, 18 January 1998, *Borg Wagner*, Rec. p. 20.

118 *Toute personne physique ou morale qui estime, à l'occasion d'une affaire la concernant, qu'un organisme visé à l'article premier n'a pas fonctionné conformément à la mission de service public qu'il doit assurer, peut, par une réclamation individuelle, demander que l'affaire soit portée à la connaissance du Médiateur de la République*, Article 6 of the Law of 3 January 1973 instituant un Médiateur de la République.

nowadays only known in the United Kingdom in connection to the Parliamentary Ombudsman. The objection procedure was not subsidiary, and it had to be preceded by appropriate action within the authority concerned. Filing an objection with the *Médiateur* did not suspend or interrupt the time limits for challenging the case before the court or before an administrative authority. Proceedings before the *Médiateur* were free of charge. The *Médiateur* had extensive rights to access files and view documents. When he considered a claim to be a justified he could make recommendations that he considered necessary to settle the dispute and could recommend any solution that would lead to an equitable solution. If the administrative authority did not follow his recommendations he could disclose his recommendations. The *Médiateur* received thousands of submissions on a yearly basis. In 2009 he received more than 72,000 submissions out of which more than 43,000 were objections against administrative authorities.[119]

In 2011 the 'ombudsman' or Médiateur system was changed. A new state body, *the Défenseur des droits,* replaced the *Mediateur de la Republique* on 20 March 2011. The Défenseur is today a constitutional body and by constitutional reform it is included in the French constitutional system. It replaces the *Défenseur des enfants*, the *Haute autorité de lutte contre les discriminations et pour l'égalité* and the *Commission nationale de déontologie de la sécurité*.[120] The statute creating the *Défenseur* has enlarged the competences of the original *Médiateur.* Especially the scope of control of the *Défenseur* has become much broader. It includes breaches of human rights and freedoms by functions of administration of the State, local authorities, public institutions or an organization with public service tasks and missions.[121] As in the case of the Médiateur, applying to the *Défenseur* is free of charge. Also, the 'MP filter' has been changed. MPs can still be addressed with a complaint, but now a complainant can also file a complaint directly at the *Défenseur*. However, such a petition to the *Défenseur* does not interrupt or suspend the time limits in civil, administrative or criminal cases, nor does it stay those time limits that relate to recours administratif or recours contentieux.[122] The Défenseur has extensive rights connected with accessing files and requiring information. He can make recommendations connected with administrative conduct that in his opinion breaches human rights.[123] He also retains the right to mediate between the parties to the dispute.[124] Thus it is possible to presume that the practices of the *Défenseur* will be similar as the practices of the *Médiateur*.

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119 For precise numbers see the Annual Report 2009 of the Médiateur, p. 8.
120 Organic Statute no. 2011-333 of 29 March 2011 relative au Défenseur des droits and Ordinary statute no 2011-334 du 29 mars 2011 relative au Défenseur des droits.
121 Article 5(1) of Organic Statute no. 2011-333 of 29 March 2011.
122 Article 6 of Organic Statute no. 2011-333 of 29 March 2011.
123 Article 26 of Organic Statute no. 2011-333 of 29 March 2011.
124 Article 27 of Organic Statute no. 2011-333 of 29 March 2011.

Conciliation

Similar to mediation, conciliation also implies intervention by a third person who will propose a legal solution to the parties in dispute. Conciliation requires an active participation on the part of the third person who tries to lead the contesting parties to an agreement that should bring their dispute to an end. The French legal system recognizes two types of conciliation; 1. conciliation by special administrative authorities and 2. conciliation by a judge. In the first case, since the beginning of the 20th century statutory acts create committees that help to solve disputes in special areas of public life.[125] One example is the *Comités consultatifs de règlement amiable des différends ou des litiges relatifs aux marchés publics* that helps to deal with disputes in the area of public commerce.[126] The use of these conciliation committees *inter alia* suspends the time limit to submit the case to an administrative tribunal.[127] In the above-mentioned Article 13 of the Statutory act of 31 December 1987 (p. 5), the legislator tried to generalize the use of these committees. However, similar to the case of obligatory pre-trial administrative proceedings the generalization of conciliation proceedings has not yet taken place and is still limited to certain areas of public life. Still, in some cases, the use of a conciliation procedure is obligatory.[128] Conciliation by an administrative judge is also possible. Article L211-4 of the *Code de justice administrative* expressly alleges that *les tribunaux administratifs peuvent exercer une mission de conciliation*. Since the incorporation of conciliation into the *Code de justice administrative,* administrative courts have had a few possibilities to make use of it. However, conciliation (administrative or judicial) is not used as often as mediation.

Arbitration

Arbitration only has marginal importance in the case of administrative proceedings in France. Arbitrage is a procedure by which the parties to the dispute agree to submit the dispute to an independent arbiter and to consider his decision as binding. Arbitration is faster, less difficult and less formal than court proceedings. The arbiter can say what the law is but he is not in a position to order a decision to be enforced. In the case of public entities arbitration was already prohibited by the *Conseil d'État* at the end of the 19th century.[129] The principle of the prohibition of arbitration has been elevated to the level of a general principle of law by the opinion of the *Conseil d'État* in the case of the construction of Eurodisney.[130]

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125 The decree of 24 December 1907 created consultative committees at the ministries that should assist in amiable dispute settlement in different areas including the area of public works.

126 Decree of 18 March 1981.

127 Lucie Cluzel-Métayer, (n. 94), p. 355.

128 For example, Article 19 of the Law of 16 July 1984 *relative à l'organisation et à la promotion des activités physiques et sportives.*

129 CE, 17 July 1896, *Clouzard c Department de l'Yonne*, Rec. p. 584.

130 CE, Section des travaux publics, Opinion, 6 March 1986, *Eurodisneyland*, E.D.C.E., 1987, n 38, p. 178.

However, there are cases where the intervention of the legislator breached the principles of the courts and permitted arbitration.[131] Nevertheless, arbitration is not often employed as a means of alternative dispute settlement.

7. Conclusion

France has developed its own system of administrative law. Debates amongst administrative lawyers during the past 5 years indicate that there is an increasing willingness to improve relations between the administration and its citizens or users. The non-judicial resolution of conflicts between citizens and the administration is being stimulated, even though this may take place in a variety of ways, also by involving interested parties and citizens in consultations prior to administrative decision making. New obligatory pre-trial proceedings in cases concerning civil servants are experimental and will be evaluated.

Like in England and Wales, a patchwork of arrangements for different fields of governmental administrative activities exists in France, including a variety of proceedings. But there are a few general rules. First of all, every citizen can file objections against a decision at an administrative court. If not regulated otherwise, they can also choose to file an objection at the responsible administrative authority. The way an administrative authority should handle such objections has been developed in the case law. At this moment in time, there is no General Act on administrative pre-trial procedures or decision-making. For the arrangement of legal protection at the administrative courts there is general legislation, and it makes a distinction between cases against administrative acts (decisions) and cases concerning administrative contracts.

131 For example, Article 25, Law n°82-1153 of 30 December 1982 *d'orientation des transports intérieurs.*

Annexes

Annex 1 – Raw Data – Tribunals Administratif

	2005[1]	2006[2]	2007[3]	2008[4]	2009[5]
Registered cases	167 150	172 557	175 165	181 815	180 246
Decided cases	166 512	173 907	192 109	192 109	195 908
Pending cases	229 368	228 265	220 616	210 459	195 108

Annex 2 – Net Data – Tribunals Administratif

	2005	2006	2007	2008	2009
Registered cases	156 994	166 785	170 014	176 313	172 195
Decided cases	155 562	164 342	175 011	183 811	187 236
Pending cases	210 043	211 990	206 676	198 791	184 623

Annex 3 – Raw Data – Cours administratives d'appel

	2005	2006	2007	2008	2009
Registered cases	20 527	21 602	26 554	27 802	28 059
Decided cases	24 385	26 414	25 716	27 485	29 307
Pending cases	32 705	27 959	28 495	30 918	31 087

Annex 4 – Net Data – Cours administratives d'appel

	2005	2006	2007	2008	2009
Registered cases	20 208	21 083	26 908	29 733	29 268
Decided cases	23 553	25 890	26 443	27 235	28 202
Pending cases	21 861	27 153	28 062	28 825	28 814

Annex 5 – Raw Data – Conseil d'État

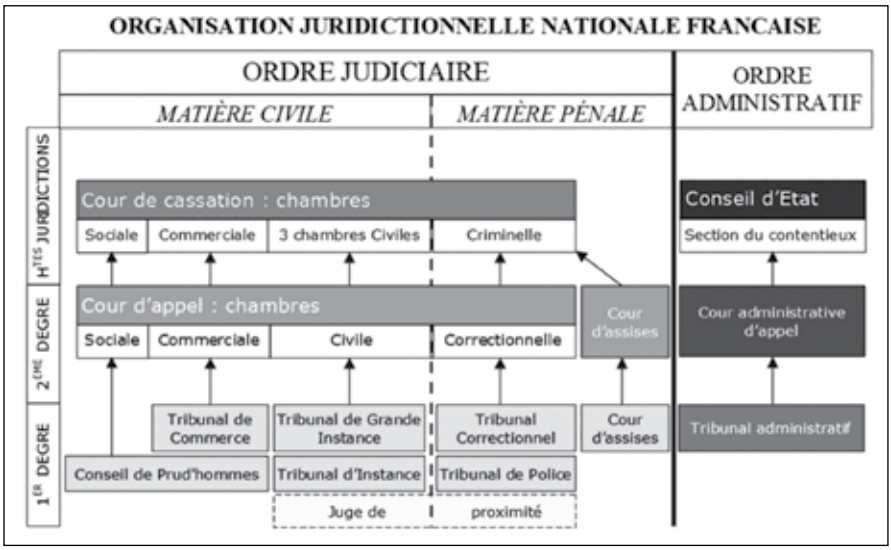
	2005	2006	2007	2008	2009
Registered cases	12 572	11 578	11 745	11 840	11 361
Decided cases	12 076	12 625	12 462	11 680	11 033
Pending cases	11 363	9 789	9 072	9 174	9 553

1 All the data for the year 2005 have been compiled from Rapport public 2007, Rapport d'activité, p. 22.
2 All the data for the year 2006 have been compiled from Rapport public 2007, Rapport d'activité, p. 22.
3 All the data for the year 2007 have been compiled from Rapport public 2009, Rapport d'activité, p. 24.
4 All the data for the year 2008 have been compiled from Rapport public 2010, Rapport d'activité, p. 33.
5 All the data for the year 2009 have been compiled from Rapport public 2010, Rapport d'activité, p. 33.

Annex 6 – Net Data – Conseil d'État

	2005	2006	2007	2008	2009
Registered cases	11 196	10 271	9 627	10 250	9 744
Decided cases	11 222	11 198	9 929	10 270	9 986
Pending cases	10 089	8 567	8 201	8 149	7 916

Annex 7 – L'ordre judiciaire – <www.justice.gouv.fr>



IV Pre-Trial Proceedings in German Administrative Law

1. Introduction

Germany is a federal state, meaning that government power is divided between the Federation (Bund) and the states (Länder). The German Basic Law (Grundgesetz) strongly limits the power of the Federation, especially its administrative powers, and makes administration first and foremost a competence for the states. Article 87f of the Basic Law attributes to the Federation the power to administer in the fields of Federal finances, foreign affairs, transport, railways, waterways, postal services and telecommunications, and national defence. All powers that are not explicitly attributed to the Federation remain with the states.[1] This means that for the largest part administrative law belongs to the states and that there may be differences between the states in the content of administrative law and in how rules of procedure are implemented by administrative authorities.

The states are further subdivided into districts (Kreise) and municipalities (Gemeinden). These are part of the *mittelbare Landesverwaltung*, which means they independently execute some of the tasks of the states, without being their hierarchical subordinates.[2] This means that unlike in France, the German administration is decentralized to a large degree. The districts have primary administrative functions in specific areas, such as highways, hospitals and public utilities. The municipalities have two major responsibilities. First, they administer programmes authorized by the federal or state governments. Second, Article 28(2) of the Basic Law authorizes them to regulate, subject to their own responsibility, all the affairs of the local community within the limits set by law.[3]

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1 Rita Exter & Martina Kammer, *Legal Research in Germany between Print and Electronic Media: An Overview*, <www.nyulawglobal.org/globalex/Germany.htm#introduction>, accessed on 26 September 2011.

2 Mahendra P. Singh, *German administrative law in common law perspective,* 2nd ed. Springer, Berlin 2001, p. 276.

3 Joachim Zekoll & Matthias Reimann, *Introduction to German Law,* 2nd ed. Kluwer Law International, The Hague 2005, p. 63.

The German administration is organized in a strongly hierarchical way. Usually an administrative body comprises of three hierarchical layers, where the majority of decisions are taken at the lowest level, and the higher levels have mostly supervisory powers.[4] An example on the federal level would be the *Wasser- und Schiffahrtsverwaltung*, which consists of the *Bundesministerium*, the *Regierungspräsident*, and the *allgemeine Verwaltungsbehörde der Landrat*.

The administrative powers of the Federation are regulated in Chapter 8 of the Basic Law, as well as in the Law on Administrative Procedure (*Verwaltungsverfahrengesetz* – VwVfG). Article 19(4) of the Basic Law guarantees that everyone will receive effective legal protection against any action or omission by a public authority. This right is made operative in the Law on Administrative Courts (*Verwaltungsgerichtsordnung* – VwGO), which regulates access to and procedures before the administrative courts. Here, we also find the rules on prejudicial proceedings. The Law on Administrative Procedure applies to the extent that matters are not covered by the Law on Administrative Courts.

The guarantee of effective legal protection in Article 19(4) of the Basic Law requires that every action or omission by an authority can be challenged and reviewed by an appeal to an independent court. Usually, this will be the administrative court.[5] The German judiciary is divided into five separate branches, which are completely independent of each other. An overview can be found in the chart below. The ordinary courts, starting with the county courts and with the Federal Court of Justice as the highest authority, determine civil and criminal cases. The general administrative courts are competent in all kinds of non-constitutional public law matters, unless there is a statute that explicitly assigns it to the social or fiscal courts. Examples of cases that are brought before the administrative courts are those concerning asylum, building permits, traffic issues, municipal revenue, subsidies, public welfare, education, and environmental matters. However, the administrative courts are unable to award damages, and so cases concerning public liability are heard by the ordinary courts.
The administrative courts are completely independent of the executive and do not have an advisory function.[6]

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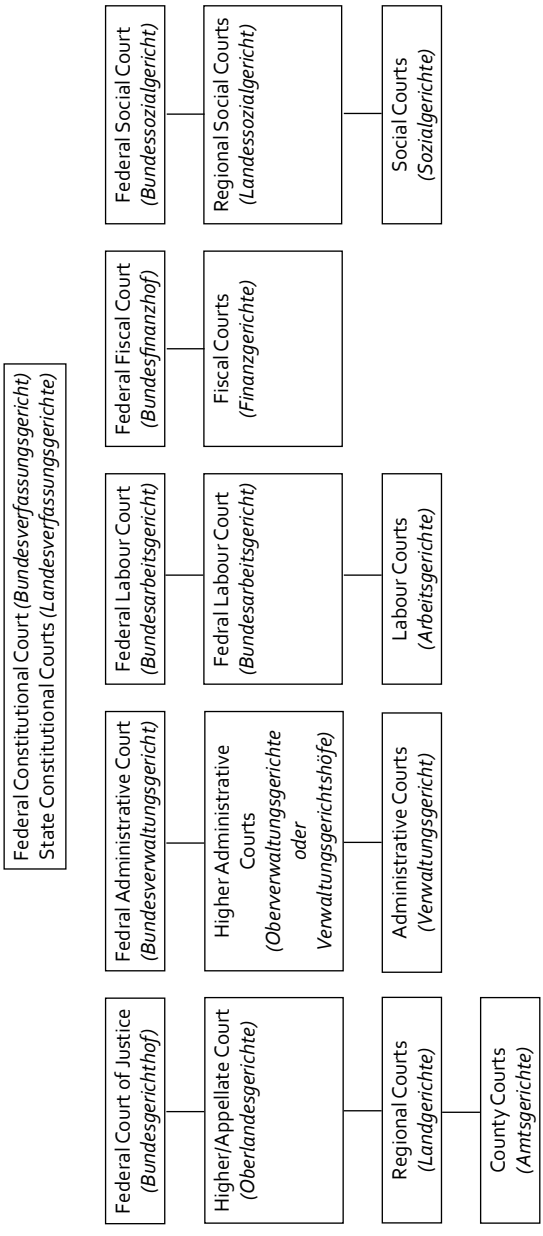
4 Leonard Bär, *Introduction to the system of legal protection under administrative law in Germany*, <www.scharpf-law.de/LegalProtection.pdf>, accessed on 17 June 2010, p. 3.

5 M. Schröder, Administrative Law in Germany, in R. Seerden & F. Stroink (eds.), *Administrative Law of the European Union, its Member States and the United States: a comparative analysis*, Intersentia, Antwerp – Groningen, 2007, p. 130.

6 Schröder 2007, p. 131.

2. The German Court System



(Schröder 2007)

Most cases are heard at first instance by the Administrative Courts, with the possibility to appeal to the Higher Administrative Courts. However, an appeal is only admissible when the court that gave the contested ruling gives leave to appeal. The task of the Federal Administrative Court is mainly to preserve the unity of the law, and therefore it only rules on matters of law, not on matters of fact.[7]

Access to the Courts for those of limited means is guaranteed through a legal aid system.[8] The court that hears the case also decides on an application for aid, and it can refuse an application if a case has been filed for malicious reasons.[9] The aid is granted in the form of an interest-free loan, which has to be repaid in monthly installments, with a maximum of 48 months. The amount of the installments depends on the income and the assets of the applicant. If those are below a certain minimum, the applicant does not have to repay the loan at all. Legal aid is also available for extrajudicial advice and legal representation.

3. Pre-Trial Proceedings

When a citizen disagrees with an action or omission by the administration, he has several options available. There are a number of informal, form-free, remedies. However, the citizen has no 'right' to claim them, which basically means that the authorities are under no obligation to respond.[10]

If a citizen seeks recourse to a formal remedy, this places an obligation on the administration to review the legitimacy and the expediency of its decision.[11] The protest and formal complaint procedures are limited to financial administration, leaving the objection or *Widerspruch* as the most important formal remedy.[12] When challenging an administrative act a citizen is usually obliged to submit an objection with the administration before he can have recourse to the court, but there are a number of exceptions to this rule (§ 68 VwGO).[13]

The first category of exceptions concerns those found in statutes. Second, when someone wants to bring an Untätigkeitsklage, which is an action before the administrative courts concerning the failure of the administration to respond to an application, he does not need to file an objection with the administration.

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7 Zekoll & Reimann 2005, p. 107; 19 BverwGE 323 (327).

8 Section 166 VwGO determines that the rules in Section 114-127 of the Civil Procedure Code (*Zivilprozessordnung* – ZPO) are applicable to proceedings before the administrative courts as well.

9 A. Baumbach, P. Hartmann & W. Lauterbach, *Zivilprozeßordnung* , C.H. Beck, Munich 2010, § 114, para. 107.

10 See Schröder 2007, p. 129.

11 *Ibid.*

12 Leonard Bär, *Introduction to the system of legal protection under administrative law in Germany*, <www.scharpf-law.de/LegalProtection.pdf>, accessed on 17 June 2010, p. 4.

13 66 BverwGE 342 (343).

Third, one can resort directly to the court when the complaint is about the decision of the highest administrative authorities of the Bund or the Länder.
Fourth, it is not necessary to file an objection when one disagrees with the outcome of an objection procedure, if one did not file an objection to the original decision because one then agreed with the initial decision.
Finally, decisions taken after formal administrative proceedings are excluded from the obligation to file an objection before resorting to the court (§ 70 VwVfG). Such decisions are assumed to have been taken with the utmost competence and objectivity, so that there is no need to reconsider the decision.[14]

The objection procedure serves three purposes.[15] The first is self-control by the administration. The objection procedure allows the administration to correct its own errors. This saves both the administration itself and citizens valuable time and costs, because it means that errors can be corrected without an expensive and time-consuming procedure before the courts.[16] The second purpose of the objection procedure is to diminish the workload of the administrative courts. Finally, the objection procedure offers a cheap and expeditious means of providing legal protection for citizens. The citizen benefits from a relatively rapid procedure: there are many *Widerspruchsbehörde*, the authorities that deal with objections, and not so many courts. In addition, the administration can review all aspects of its decision, including policy aspects. The courts cannot do that.[17]
Some authors also mention the role of the objection procedure in improving the acceptance of public policies. A citizen can file an objection both against a decision by an administrative authority, and a failure to take such a decision.

If an objection procedure is mandatory, to initiate a *Widerspruch* procedure the plaintiff must file an objection with the administrative authority that took the initial decision, or that was supposed to take a decision. This will allow it to correct any errors. After the objection is received, the administration has to review the legality and expediency of the initial decision in full. If the administrative authority agrees with the objection in full, it can deal with it itself. It will either withdraw or change a decision it took, or take the requested decision.
If, on the other hand, it disagrees with the objection, in whole or in part, it has to send the objection to the *Widerspruchsbehörde*. This is usually the next higher authority. However, sometimes the administrative authority that took the initial

14 Jens-Peter Schneider, 'Strukturen und Typen von Verwaltungsverfahren,' in Hoffmann-Riem, Schmidt-Aβmann & Voβkuhle (eds.), *Grundlagen des Verwaltungsrechts;* Verlag C.H. Beck, Munich 2008, p. 126.

15 Wilfried Wolff, *Allgemeines Verwaltungsrecht; Verwaltungsverfahrensrecht, Verwaltungsprozessrecht,* 4th ed. Nomos Verlagsgesellschaft, Baden-Baden 2004.

16 Leonard Bär, *Introduction to the system of legal protection under administrative law in Germany*, <www.scharpf-law.de/LegalProtection.pdf>, accessed on 17 June 2010, p. 3.

17 Schneider 2008, p. 121.

decision is also the *Widerspruchsbehörde*. Examples are municipalities acting in their capacity as independent administrators.[18]
The *Widerspruchsbehörde* will review the legality and the expediency of the procedure.[19] It is not bound by the arguments or evidence the complainant gives, but will decide the case at its own discretion, taking into account whatever arguments and evidence it deems relevant.
If it agrees with the complaint in full, it will withdraw or change the decision as requested and the procedure will end there. Otherwise, the affected citizen has recourse to the administrative courts.

Having stated that, it should be mentioned that pre-trial proceedings are arranged differently in different German states, as a consequence of Article 68 I second sentence of the Administrative Justice Regulation (VwGo).[20] Originally, the idea was that lower administrative authorities would decide on objections, but if they would deny the objection, the case would be referred to a higher administrative authority for review. A review by a superior administrative authority was considered to contribute to adequate and just protection for citizens. Since 1996, German states have a so-called 'competitive competence' for administrative acts in relation to the German federation, which gives them the possibility to indicate that objection proceedings do not apply.[21] Since then, several states have considerably reduced the general applicability of the objection proceedings. In some states the objection procedure has been abolished for decisions at the state level (Baden-Württemberg, Hessen),[22] or almost entirely (North-Rhine Westphalia). In several states the decisions on objections to administrative decisions are now reviewed by the authorities that took the original decision (*e.g.* Lower Saxony).[23] In other states in several areas of administrative law citizens have been given the choice of commencing objection proceedings or appealing directly to an administrative court (Bavaria, Mecklenburg-Vorpommern). Obligatory objection proceedings remain in cases prescribed by federal law. If a statutory act so indicates, the objection procedure at the administration need not be followed and an administrative court

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18 H.J. Wolff, O. Bachof & R. Stober, *Verwaltungsrecht,* 5th ed., vol. 3, Munich, Beck 2002, pp. 14-29, 161.

19 Schröder 2002, p. 127.

20 This version has been applicable since 1996.
Vor Erhebung der Anfechtungsklage sind Rechtmäßigkeit und Zweckmäßigkeit des Verwaltungsakts in einem Vorverfahren nachzuprüfen. Einer solchen Nachprüfung bedarf es nicht, wenn ein Gesetz dies bestimmt oder wenn:
1. der Verwaltungsakt von einer obersten Bundesbehörde oder von einer obersten Landesbehörde erlassen worden ist, außer wenn ein Gesetz die Nachprüfung vorschreibt, oder
2. der Abhilfebescheid oder der Widerspruchsbescheid erstmalig eine Beschwer enthält.

21 Peter Kothe, Überfällige Entrümpelung oder Erosion des Rechtsstaats? Die Abschaffung des Widerspruchsverfahrens in der anwaltlichen Praxis, *Anwaltsblatt* 2009/2, p. 96.

22 Kothe, p. 97.

23 Ines Härtel, Rettungsanker für das Widerspruchsverfahren?, *Verwaltungs Archiv* 2007, pp. 60-61. Also see Christine Steinbeisz-Winkelmann, Abschaffung des Widerspruchsverfahrens – ein Fortschritt?, *NVwZ* 2009/2, pp. 686-692.

can be addressed separately. The consequences are, however, that different pre-trial rules apply to different types of decisions in different German states and this is considered to be a fragmentation of administrative law in Germany.[24]

Those changes in legal protection have been inspired by a formalistic, time-consuming treatment – going through the motions – of the objection procedure by administrative authorities, the opposite of a desired citizen-friendly type of behaviour by the administration. The intended administrative self-control was not very effective and especially with third parties being involved, it was too complex to be dealt with diligently by the administrative authorities. The fact that administrative courts could rectify procedural mistakes[25] was also not a stimulus for active engagement in conflict resolution by administrative bodies. The fact that advocates were often involved meant that when the administration 'gave in', it was a costly affair.[26] Eventually, better communications between the administrative courts and administrative authorities and a desire to reduce the length of administrative proceedings made it possible to dispense with large parts of obligatory objection procedures. This was further facilitated by the active involvement of administrative courts in solving problems between citizens and the administration. The court could act more proactively, as a consequence of a reduction of cases in the administrative courts during the past decade.

Newly Commenced First-Instance Proceedings in German Administrative Courts and in the Social Courts[27]

	2004	2005	2006	2008	2009	2010
Administrative	181,766	154,267	138,308	127,735	123,183	123,864
Social benefits	296,893	308,160	325,218	369,300	387,791	422,214

It should be noted that administrative cases are dealt with separately from social insurance cases, and therefore they comprise a considerable proportion of cases with third party interests. Social benefit cases have continued to increase. As they are decided following separate rules of procedure and separate courts, we will leave them out of consideration for comparative purposes.
Anyway, the movement away from the obligatory pre-trial proceedings in German administrative procedure is not uncontested as we will discuss below.

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24 Kothe, p. 101.

25 In accordance with § 45 Abs. 2 VwVfG (Administrative Procedure Act).

26 Dieter Kallerhoff, Strukturelle Konsequenzen der Veränderungen beim Widerspruchsverfahren, in Martin Burgi & Manfred Palmen (eds.), Symposium, Die Verwaltungsstrukturreform des Landes Nordrhein-Westfalen, Vortragsband, Bochum, August 2008, pp. 181-183.

27 Source: Statistisches Bundesamt, Fachserie 10 Reihe 1, Rechtspflege 2007 und 2011; in 1995 about 250,000 new cases were filed at first instance administrative courts.

Procedural Requirements

Filing the Complaint

To initiate the *Widerspruch* procedure, one must lodge a complaint in writing with the administrative authority that took the initial decision.[28] If the complaint is lodged with the *Widerspruchbehörde*, the authority that is competent to decide on the complaint if the authority that took the initial decision stands its ground, it has to send it on to the latter. The rationale for this is that the authority that took the initial decision must have an opportunity to correct any errors it may have made, but it is controlled by a superior authority.

There are a few formal demands which the complaint has to meet. It has to be in writing; oral complaints are inadmissible. It is not necessary that the complaint is explicitly designated as a *Widerspruch*: it should be clear which administrative act it concerns, that the person who lodged the complaint disagrees with that act and that the act should be changed or withdrawn.

To be admissible, the complaint must be lodged within a month of the announcement of the original decision. However, when the original decision lacks a regulatory *Rechtsbehelfsbelehrung* – an explanation of how and when the decision can be challenged – this term will be one year.[29] When the decision has not been communicated at all, there is no term at all. When the term has been inculpably exceeded, it is possible to 'revert to the earlier state.' Otherwise, if the term is exceeded, the administration can elect to deal with the objection anyway,[30] as long as there are no third party interests at stake.[31] In other cases, an inadmissible *Widerspruch* will be dealt with as an Aufsichtsbeschwerde, an informal complaint. This procedure allows the authority that took the initial decision to review it once again, but it does not oblige it to do so, and does not allow access to the court after its conclusion.

Standing

Not everyone can file an objection. The plaintiff must have standing before the administrative court, otherwise his *Widerspruch* is inadmissible. This requires the administrative act to infringe his or her rights (§ 62(2) VwGO). This will always be the case for the addressee of an adverse administrative act.[32] Third parties will have standing if they claim that the administration has infringed provisions that serve to protect not only the general public, but also their individual rights.[33] This means that it is not enough that their rights are infringed; the infringement must

28 Schröder 2007, p. 138.
29 *Ibid*., p. 139.
30 Bundesverwaltungsgericht – BVerwGE 15, 306 (310).
31 BVerwG, DVB1 1982, p. 1097(1097).
32 BverfGE 6, 32 ff.
33 Leonard Bär, *Introduction to the system of legal protection under administrative law in Germany*, <www.scharpf-law.de/LegalProtection.pdf>, accessed on 17 June 2010, p. 5.

result from the violation of a legal norm that serves to protect those rights. If an individual does not have standing before the administrative courts, his objection will be inadmissible as well.

Who Decides?

There are no specific rules on who can decide on a *Widerspruch*, besides that the authority that took the initial decision cannot usually reject an objection itself, but has to send it on to the *Widerspruchsbehörde*.[34] In addition, the general rules of the VwVfG will apply. These rules can be found in § 20 and 21. § 20 lists categories of persons who cannot act on behalf of an authority in administrative proceedings. The list includes participants in the proceedings, their relatives, participants' representatives and their relatives, their employees and managers, and any person who has furnished an opinion or has otherwise been active in the matter outside his official capacity.
§ 21 contains a more general provision to help prevent prejudice. Based on this section, the head of an authority can require anyone about whom a fear of prejudice exists to refrain from any involvement in the current proceedings. If a fear of prejudice relates to the head of the authority, the supervisory authority shall request him to refrain from involvement.

If the *Widerspruchbehörde* is the same authority as the one that took the initial decision, it might decide to establish a '*gerichtsähnlicher Widerspruchsausschüsse*,' a court-like objection committee, either within its own organization or in a hierarchically superior organization.[35] However, it is not obliged to do so, and there are no rules for its organization, apart from § 20 and 21 VwVfG.

Rights of the Defence

Usually, when an authority intends to take a decision which has adverse effects for one or more parties, it has to hear them (§ 28 VwVfG). In the *Widerspruch*, an oral hearing is often not necessary, because it has already been held before the initial decision was taken.[36] There are a number of exceptions to this rule. When there is new information which was not taken into account when the original decision was taken, a new hearing should be held. Likewise, when a *Widerspruch* raises an objection which was not raised before the initial hearing was held, there should be a new hearing. Finally, if the new decision that the administration wants to take has adverse effects upon a party's interests, whilst the original decision did not,

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34 H.J. Wolff, O. Bachof & R. Stober, *Verwaltungsrecht,* 5th ed., Vol. 3, Munich, Beck 2002, pp. 14-29, 161.

35 Jens-Peter Schneider, Strukturen und Typen von Verwaltungsverfahren, in Hoffmann-Riem, Schmidt-Aβmann & Voβkuhle (eds.), *Grundlagen des Verwaltungsrechts;* Verlag C.H. Beck, Munich 2008; § 28, p. 124.

36 Schröder 2007, p. 126.

or did so in a different way, it has to hear that party (§ 71 VwGO). This provision is also taken to mean that a Reformatio in peius is possible during a *Widerspruch* procedure, a view that has been accepted by the Federal Administrative Court (*Bundesverwaltungsgericht*).[37] If the authority that took the original decision failed to hear an interested party, in violation of Article 28 VwVfG, this failure can be corrected during the objection procedure. More detailed rules for hearings are given in § 66-68 VwVfG, but these only apply to so-called 'formal administrative procedures'.

§ 29 on the inspection of documents by participants applies to *Widerspruch* procedures as well. This article requires the authority to allow participants to inspect any documents connected with the proceedings where knowledge of their contents is necessary in order to assert or defend their legal interests. This requirement suffers from some exceptions: documents can be kept confidential when this is required by law, or when making the documents public would disadvantage the country as a whole or one of the *Länder*, or to protect the rightful interests of participants or third parties.[38]

§ 14 VwVfG allows participants in administrative proceedings to allow themselves to be represented by a person authorized for that purpose.[39] In addition, § 14(4) gives a participant the right to appear in negotiations and discussions with an adviser.[40]

Suspensive Effect and Interim Relief

Another mechanism to protect the rights of parties who are affected by an administrative decision is the suspensive effect of filing an objection. Before 1997 a *Widerspruch* automatically had suspensive effect. However, this has been changed to prevent illusory objections which are only intended to delay proceedings.[41] In the case of *Anfechtungsklage*, an action brought against an adverse decision, the standard is still that a *Widerspruch* has suspensive effect, but there are many exceptions to this rule.[42]
The suspensive effect will last until a decision has become final, or when an appeal with the administrative court was unsuccessful, three months after the end of the legal term within which the reasoning for the appeal at the higher courts must

37 BVerwGE 14, 175 (178).
38 Christoph Gusy, Die Informationsbeziehungen zwischen Staat und Bürger, in Hoffmann-Riem, Schmidt-Aβmann & Voβkuhle (eds.), *Grundlagen des Verwaltungsrechts;* Verlag C.H. Beck, Munich 2008.
39 Representation is voluntary, except in appeal proceedings (Art. 67 WvGO).
40 BVerfGE 38, 105; this is a right that follows from the Rechtsstaatprinzip, which requires administrative proceedings to be fair. Denying it will violate that principle. The fact that proceedings are not public cannot be used as a justification for denying participants this right.
41 Willemsen 2005, p. 55.
42 Schröder 2007, p. 139.

be sent in. The Court can extend the suspensive effect. If an objection has no suspensive effect, the plaintiff can request interim relief, which will be granted if there is a danger that a change in the current situation will result in the loss of a petitioner's right or if the realization of that right will be substantially impeded; or to prevent '*wesentliche Nachteile oder drohende Gewalt*'– serious disadvantages or a threat of violence, of if it is necessary on other grounds.[43] The Court will usually grant interim relief only when it considers that the decision concerned is illegitimate, or if it has grave doubts about its legitimacy.[44]
In the literature two theories concerning suspensive effect can be discerned. The first assumes that the legal force of the decision is suspended. The second theory holds that the administration is prohibited from executing its decision. In the latter case, which is accepted in the case law, third parties objecting to a decision granting rights do not gain any protection from the suspensive effect, as it does not prohibit, for example, the holder of a building permit from building a shed in his garden, or the holder of a licence from felling an ancient tree in the town square.

Costs

The *Widerspruchsbehörde* or, in the case of an *Abhilfentscheidung*, the authority that took the initial decision, has to decide on the costs as well. In the case of a *Widerspruchbescheid*, it is the *Widerspruchbehörde* that decides on the costs. The costs will be refunded when the appeal is successful, and when the appeal is unsuccessful only because the infringement of a prescription as to form or procedure is insignificant under § 45 VwVfG.
If the appeal is not successful, the person lodging the appeal has to refund the costs of the authority which issued the disputed administrative act.[45]

The Widerspruchsbescheid

The procedure before the *Widerspruchbehörde* has to result in a *Widerspruchsbescheid*, which must be served by writ upon the plaintiff. It must contain the final decision, the reasoning for that decision, and a Rechtshilfebelehrung. In addition, it must contain a decision on the costs.[46]

4. The Procedure before the Administrative Courts

As said, citizens have the right to challenge any action or omission by the administration. That means that they are not limited to challenging formal

43 § 123 VwGO.
44 Willemsen 2005, p. 58.
45 § 154 VwGO.
46 § 73 VwGO.

administrative acts, the *Verwaltungsakten*. In fact, there are five different actions that can be brought by the claimant. Those are rescinding actions (*Anfechtungsklage*), directed at the annulment of an administrative act; actions for mandatory injunctions (*Verpflichtungsklage*) which are directed at the issuance of an administrative act; declaratory actions establishing the existence or non-existence of a particular legal relationship (*Feststellungsklage*); general actions for performance (*Leistungsklage*) instructing public authorities to perform an activity other than an administrative act in the strict sense, and actions for the annulment of a non-parliamentary law (*Normenkontrollantrag*).[47]
The Verpflichtungsklage can be further subdivided into an action after a public authority's refusal to take a decision (*Vornahmeklage*) and an action against a public authority's failure to respond to a request to take a decision (*Untätigkeitsklage*).[48]

A plaintiff is obliged to file an objection with the administration before he can bring an *Anfechtungsklage* or a *Vornahmeklage* before the court, but as we have seen there are many exceptions to this rule. Even if one of those exceptions applies, it is still possible to follow an informal complaint procedure, but the time limit for initiating court proceedings will not be stayed by this. Nevertheless, these procedures might have advantages over formal court proceedings that lead citizens to elect to follow them anyway; they are quicker, cheaper, and offer the option to review the expediency of the decision.

After the outcome of the objection procedure has been notified, the parties have one month to file a suit in the administrative court. If the administrative authorities fail to decide on a *Widerspruch*, a plaintiff can file a suit with the court three months after he filed his objection with the administration.[49] In this case there is no term within which the complaint needs to be filed.[50]

There are no formal requirements to file an action before a first instance court. Everyone can either file an action himself, or can be assisted in doing this by a court clerk. Before the courts of first instance, the parties do not need legal representation, although in appeals they need to be represented by a professional attorney or a university professor of law.[51]

The plaintiff must have standing before the administrative court, otherwise his action is inadmissible.[52] The rules are the same as for the *Widerspruch* procedure. The administrative act must infringe the rights of the appellant (§ 42(2) VwGO).

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47 Willemsen 2005, pp. 41-43.
48 § 67 VwGO; Schröder 2007, pp. 136-137.
49 44 BverwGE 294 (298).
50 Willemsen 2005, p. 49.
51 Schröder 2007, p. 136.
52 *Ibid*., p. 138.

This will always be the case for the addressee of an adverse administrative act.[53] Third parties will have standing if they claim that the administration has infringed provisions that serve to protect not only the general public, but also their individual rights.[54] If an individual does not have standing before the administrative courts, his objection will also be inadmissible.

Competences of the Courts

When an action is brought before an administrative court, the court has a limited array of possibilities. Usually, it will only annul a decision.[55] If this happens, in most cases the court annuls the original decision as well as the *Widerspruchbescheid*. Sometimes only the *Widerspruchbescheid* will be annulled. This will be the case when only the latter decision is challenged before the Court, which can happen if the action was brought by a party who had no problems with the initial decision, but whose interests were harmed by the decision taken after the objection procedure. A successful *Verpflichtungsklage* will result in an order to take a decision.[56] The Court cannot dictate what decision should be taken, nor can it take a decision itself. However, it can give criteria that the decision to be taken has to meet, and these criteria can be so strict that there is only one decision that can be taken.[57] In the case of a *Feststellungsklage*, the court can make a declaration as to legal status. The German administrative courts cannot award damages, so if someone wants to hold the government liable for an illegal act or omission, he should bring an action before the civil courts. This is a 'historical accident', and an extra complication for judicial proceedings.

The courts can also grant interim relief, although in many cases that will not be necessary. In many cases actions brought before the administrative court have suspensive effect,[58] unless the contested administrative act has been declared provisionally enforceable by the issuing public authority.[59] In the latter case the suspensive effect may be restored by way of interim relief.[60]

In general, interim relief will be granted if there is a danger that a change in the current situation will result in a loss of the petitioner's right or if the realization of that right will be substantially impeded; or to prevent '*wesentliche Nachteile oder drohende Gewalt*', or if it is necessary on other grounds.

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53 R. Wahl, in F. Schoch, E. Schmidt-Assmann & R. Pietzner, *Verwaltungsgerichtsordnung. Kommentar,* Munich: C.H. Beck, § 42 Abs. 2.

54 Leonard Bär, *Introduction to the system of legal protection under administrative law in Germany*, <www.scharpf-law.de/LegalProtection.pdf>, accessed on 17 June 2010.

55 § 113 VwGO.

56 *Ibid*.

57 M. Gerhardt, in F. Schoch, E. Schmidt-Assmann & R. Pietzner, *Verwaltungsgerichtsordnung. Kommentar*, Munich, Verlag C.H. Beck, § 113. Willemsen 2005, p. 54.

58 Schröder 2007, p. 142.

59 § 80 VwGO.

60 § 123 VwGO.

The Court will usually grant interim relief only when it considers that the decision concerned is illegitimate, of if it has grave doubts about its legitimacy.
The Court is not limited to considering the arguments and evidence that were used in the objection procedure. A plaintiff can adduce new arguments and evidence for the first time during the court proceedings.

The decision-making competences of the courts vary with the type of complaint that has been issued. An action to oblige an administrative authority to issue a certain decision, or to pay a certain amount of money, or a request to give a declaratory decision concerning the legal relation between a citizen and the administration, alongside a decision to legally abolish a decision are possible. In special circumstances, administrative judges can help complainants to adjust their demands during proceedings. For that reason, administrative judges in Germany have considerable possibilities to actually solve problems between citizens and the administration.[61] Of course, although positive interaction with parties is possible, judges must be careful that they do not cross the border of the separation of powers. But this will not prevent them from stimulating parties to come to an agreement that will be part of the court decision.[62]

5. Alternative Dispute Resolution

Alternative dispute resolution has not been strongly developed in Germany.[63] Although a number of *Länder* have ombudsmen, most do not, and there is no ombudsman at the Federal level. There are parliamentary petition committees that citizens can address, but they are not necessarily an effective way to deal with complaints. Mediation, although a theoretical possibility, is not extensively used, except in a number of specific fields. However, in 1999 a federal statute was enacted that allowed the *Länder* to make mediation compulsory in specific cases.[64] This led to an increase in the number of cases where mediation was applied, but the system has been heavily criticized, because its compulsory character and focus on legal fact-finding is difficult to reconcile with the nature of mediation.[65]

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61 Ch.W. Backes *et al.*, *Snellere besluitvorming over complexe projecten vergelijkend bekeken*, WODC / ministerie van Justitie, 2009, p. 104.

62 Ulla Held-Daab, *Review of administrative decisions of government by administrative courts and tribunals*, National Report for the Federal Administrative court of Germany (Bundesverwaltungsgericht), for the 10th Congress of The International Association of Supreme Administrative Jurisdictions Sydney and Canberra, 2010, p. 24.

63 Buck 2004, p. 42.

64 Buck 2004, p. 43.

65 Katja Funken, The Pros and Cons of Getting to YES, Shortcomings and Limitations of Principled Bargaining in Negotiation and Mediation, at <www.centrale-fuer-mediation.de/texte/zkm_05.htm> (January 2002).

Mediation

Mediation is rarely used in conflicts between citizens and the administration, with the notable exception of environmental law. There is no regulation of this kind of mediation, but there are a number of conditions for mediation, and a number of 'success factors'. In the latter category we find the requirement that all interested parties must be involved, that participation must be completely voluntary, and that the administrative authority involved in the mediation process must have some discretion. Mediation is impossible if one of the parties is completely inflexible. Obviously, the parties cannot step beyond the boundaries of the law.
Mediation is not bound to a particular phase of the decision-making process, and can be used throughout the process, from the initial policy-making stage to conflict resolution after the initial decision is taken.
In principle, mediation does not diminish one's right to judicial protection. However, the parties involved in the mediation who have consented to certain limitations during the mediation cannot contest those in court. Judicial protection for parties not involved in the mediation procedure remains fully intact.

In 1999, Germany tried to stimulate the use of mediation as a dispute resolution method, in order to reduce the caseload of the first instance courts. This allowed the *Länder* to introduce mandatory court-connected mediation in financial disputes up to a value of €750, in certain neighbourhood disputes and in defamation disputes where the alleged defamation has not occurred through the media. Although this is mainly relevant with regard to civil cases, the effects of trying to stimulate mediation through legislation are likely to be applicable to administrative law as well.

Bavaria was the first state to introduce a mediation law, the Bayerisches Schlichtungsgesetz.[66] This law introduces mandatory mediation for the cases mentioned above. Lawyers and notaries are to mediate those disputes.[67] A mediator cannot later take part in court proceedings if the mediation fails.[68] The mediator has to convene an oral hearing, although in exceptional cases a written procedure can be followed. Only the parties themselves take part in the mediation, accompanied by their legal representatives if they so wish. If all parties agree there can be witnesses if this will not cause an unreasonable delay.[69] If the mediation is successful, the mediator will draw up a record of the agreement, which should include details of how the costs of the mediation will be split.[70] If the mediation fails, or if the mediator decides that the case is unsuitable for mediation, he issues

66 Buck 2004, p. 43.
67 § 3(1) Bayerisches Schlichtungsgesetz.
68 § 8(2) Bayerisches Schlichtungsgesetz.
69 § 10 Bayerisches Schlichtungsgesetz.
70 § 12 Bayerisches Schlichtungsgesetz.

a certificate of failure, after which the parties can choose to bring the case before a court.[71]

The Bavarian law has been heavily criticized, because of its focus on the clarification of the facts and its 'very legalistic and evaluative understanding of mediation.'[72] This, and the compulsory character of the procedure, might negate the well-known benefits of mediation, such as achieving a win-win solution and preventing damage to the relationship between the parties.
Despite its shortcomings, since the introduction of the mediation law the number of dispute resolution services has increased, and the German Bar Association has established a committee on mediation.[73]

Ombudsman

Germany does not have a national ombudsman, but there are a number of regional ombudsmen (*Bürgerbeauftragte*) in the *Länder*. The first of those was installed in 1974 in Rhineland-Palatinate, but nowadays there are also ombudsmen in Mecklenburg-Western Pomerania and Thuringia. Schleswig-Holstein has a specialized Ombudsman for Social Matters.[74]
The task of the ombudsmen is to support the Petition Committees, which are much older institutions which give effect to the right in Article 17 of the Basic Law that every person has the right individually or jointly with others to address written requests or complaints to competent authorities and to the legislature. The Petition Committees are part of their respective *Landtag*. There is also a federal petition committee attached to the *Bundestag*.[75]

Petition Committees

Article 45c of the Basic Law establishes the Petition Committees. Their powers and procedures are further regulated by a By-law of the German *Bundestag* (*Geschäftsordnung des Deutschen Bundestags*), § 108-112, and the Act on the powers of the Petition Committee of the German *Bundestag* (*Gesetz über die Befugnisse des Petitionsausschuses des Deutschen Bundestags*). The Committee has created additional rules in the Rules of Procedure of the Petition Committees (*Verfahrensgrundsätze des Petitionsausschusses über die Behandlung von Bitten und Beschwerden*).

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71 § 4 Bayerisches Schlichtungsgesetz.
72 Funken 2002.
73 Buck 2004, p. 44.
74 Brigitte Kofter, Germany, in Kucsko-Stadlmayer (ed.), *European Ombudsman-Institutions*, Springer, Vienna 2008, p. 204.
75 Kofter 2008, p. 204.

The Petition Committee of the *Bundestag*, comprised of members of the *Bundestag*, consists of 25 members and 25 deputy members, who have a seat in the *Bundestag*.[76] The task of the Committee is to supervise the Federal Government, the federal authorities and other institutions discharging public functions.[77] The Head of State and the courts are excluded, and so is the penitentiary system, as this falls within the competence of the Länder.

All citizens have a right to petition the Committee.[78] This is a political right rather than a legal right, but petitioners do have the right to be informed about the way their petition was dealt with and the reasons for this.[79] There are no formal requirements, other than that the petition should be in writing.[80] However, illegible and ambiguous letters can be set aside.[81]

The Petition Committee can review the legality of administrative actions and their compliance with principles of good administration.[82] It can only conduct an investigation after a complaint has been received.[83]

The complaints are handled by the Petition Committee Service, which prepares a proposal for the further handling of the complaint which it transmits to the rapporteurs.[84] The competent rapporteur examines the proposal and suggests to the rest of the Committee how the petition should be dealt with, which will then decide about the recommendation of a resolution to the *Bundestag* within three weeks.[85] The *Bundestag* may refer the issue to the Federal Government for remedial action or re-examination, as background material or as a simple referral. The Government must reply within six weeks, but there are no sanctions for non-compliance.[86] The petitioner must be informed about the way his petition has been dealt with and the reasons for this.[87]

Administrative organs are required to supply all relevant information, unless it must be kept confidential pursuant to legal requirements or other compelling interests.[88]

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76 Kofter 2008, p. 204.
77 *Ibid*., p. 205.
78 § 17 of the Basic Law.
79 Kofter 2008, p. 206.
80 § 4 of the Rules of Procedure.
81 § 7 of the Rules of Procedure.
82 Kofter 2008, p. 205.
83 *Ibid*.
84 § 7 Rules of Procedure.
85 § 8.1 Rules of Procedure.
86 § 9.2.1 Rules of Procedure.
87 § 112(3) of the By-law.
88 § 1 Act on the powers of the Petition Committee of the German *Bundestag*.

The Committee can hear the petitioner, experts, and witnesses. It may require an individual to appear before it and can enforce such a request.[89]
The Federal Petition Committee receives over 16,000 requests and complaints each year. In 2006, 20,000 petitioners approached the Committee. The Committee is a well-established part of the German Constitution, and its work appears to be appreciated: 'The logic of its recommendations, rapid proceedings and critical analysis of the answers rendered by the authorities are deemed to be decisive factors for the efficiency of the Committee's work.'[90]
Not everybody is that enthusiastic, however: "the significance of such petitions must not be overestimated. Parliament has very limited possibilities of practical action. Of all petitions for 2006, Parliament advised government in 29 cases to take action to remedy the complaint and recommended government in 32 cases to consider redress."[91]

The Ombudsman of Rhineland-Palatinate

The Federal Petition Committee only takes action in a small fraction of the cases which it is confronted with. In Rhineland-Palatinate, the Petition Committee is assisted by an Ombudsman. He has been established by Article 11 of the Regional Constitution of Rhineland-Palatinate, and his work is regulated in the Act on the Ombudsman, the *Landesgesetz über den Bürgerbeauftragten des Landes Rheinland Pfalz*.

The Ombudsman is a permanent representative of the regional Petitions Committee. All petitions directed towards Parliament or the Committee must be forwarded to the Ombudsman.[92] He is fully independent, though, and not bound by any instructions.[93] He can be dismissed by Parliament, but only with a two-thirds majority.[94]

The Ombudsman's task is to monitor the regional Government, all regional authorities and all entities under public law which are subject to supervision by the *Land*. The Courts and the prosecution authorities are excluded from the Ombudsman's authority, unless the complaint is concerned with a delay in proceedings.[95] Anyone can file a complaint with the Ombudsman, free of charge. He is under an obligation to investigate all complaints that he receives, except unclear or ambiguous complaints.[96]

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89 § 4 Act on the powers of the Petition Committee of the German *Bundestag*.
90 Kofter 2008, p. 207.
91 Bär, p. 6.
92 § 1(3) Act on the Ombudsman.
93 Kofter 2008, p. 209.
94 § 10(3) Act on the Ombudsman.
95 § 3(1) Act on the Ombudsman.
96 § 3(2) Act on the Ombudsman.

The Ombudsman will review the legality and the *zweckmässigkeit (efficiency)* of administrative action.[97] Upon the conclusion of an investigation, the complainant is to be informed about its conclusion in writing.[98]

All entities subject to the Ombudsman's control are required to provide assistance.[99] He can request oral and written explanations from these institutions and has access to all files and premises.[100] However, he has no means to enforce the duty of cooperation on the administration.[101]

When confronted with a complaint, the Ombudsman will first try to achieve an amicable settlement. If this is not possible, he can send a report to the Petitions Committee, or he can send a recommendation to the respective institution, which is to report within a reasonable period on the measures taken, the progress or the outcome of the issue.[102]

The Ombudsman cannot investigate a complaint if this would interfere with pending court procedures, nor can he review a court judgment.[103]

6. A Report from Bavaria on an Experiment with the Abolition of the *Widerspruch* in Administrative Procedure[104] – and Further Comments

Between 2004 and 2006, the Government and legislature of Bavaria, one of the states of the German Federation, undertook an experiment with the *Widerspruch* procedure in the regions of Mittelfranken and Schwaben. The purpose of the experiment was to find out about the advantages of such procedures (easily accessible proceedings, cheap, unbureaucratic and a rapid way of legal protection; self-control of the administration, a contribution to peaceful conflict resolution and unburdening the workload of the administrative courts – a filtering function). Furthermore, interested persons and the authority are fully informed about the reasons and outcomes of the procedure. The possible disadvantages are lengthy proceedings and the low success rate of objection proceedings in a certain area of the law (meaning that the outcomes of objection proceedings do not convince citizens not to go to court), and therefore not a lower workload for the courts.

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97 § 1(2) Act on the Ombudsman.
98 § 5(5) Act on the Ombudsman.
99 § 6 Act on the Ombudsman.
100 § 4 Act on the Ombudsman.
101 Kofter 2008, p. 210.
102 § 5 Act on the Ombudsman.
103 Kofter 2008, p. 210.
104 <www.stmi.bayern.de/imperia/md/content/stmi/service/gesetzesentwuerfe/abschlussbericht_gutachten.pdf>.

In Mittelfranken the *Widerspruchverfahren* was (temporarily) abolished; the region of Schwaben functioned as control group, and there the *Widerspruch* procedure was not abolished. From both regions data were gathered at administrative authorities and at the regional administrative court (*Verwaltungsgericht* Ansbach). For several areas of administrative law the number of objections and the number of appeals to the administrative court were measured, as well as the numbers of successful objections and the time necessary from filing the objection until the decision by the court.

In the region of Mittelfranken, about 2% of administrative acts are contested, in the region of Schwaben this is 3%. The number of cases filed at the administrative court rose in the first year by 182% and in the second year by 152%. The court dealt with these cases on average in about 6 months in the first year and on average in about 7 months in the second year. The control court took on average 9 and 10 months in the same period, and the difference can be explained by the fact that in a *Widerspruch* procedure all the simple cases are filtered out, mistakes are corrected etcetera. In Schwaben this was about 50% of all objections! Only the more complicated cases make it to court, and therefore the court on average needs more time to prepare, hear and decide these cases.

For that reason, for the total length of proceedings between filing an objection and the court decision it did not make a great difference as the average time to decide on objections by administrative authorities was about 3½ months.

An outcome of this experiment is that in the areas of law where objections are filed in high numbers, the *Widerspruchsverfahren* makes sense, as a citizen-friendly way of dealing with problems with the administration. However, in other areas, *e.g.* concerning water, animal protection and waste treatment, the objection proceedings did not have such effects and therefore the advice was given to abolish objection proceedings in these areas altogether.

As discussed above, the objection procedure has not always been as benevolent as originally intended. The fact that the obligatory pre-trial procedure has been abolished for quite a number of legal areas in quite a number of states does not mean that citizens with an interest in administrative decisions have no rights whatsoever. The attention shifts from the time after the initial decision, to the time before the taking of the initial decision. Interested parties should be heard beforehand and their interest taken into account when actually taking the decision; not doing so invokes the risk of court proceedings that may be costly for the administration.[105] In other words, the mediation aspects during initial decision making are being stressed. We mention the remark by Backes *et al*. in a

105 Dieter Kallerhoff, pp. 186-188; Ines Härtel, Rettungsanker für das Widerspruchsverfahren?, *Verwaltungs Archiv* 2007, pp. 70-71.

comparative study that the involvement of citizens in decision making does not automatically imply that the decision making takes more time.[106]
Other authors doubt that objection proceedings are dysfunctional and bureacratic and point to the numbers of filed court cases relating to objection proceedings.[107] Between 5% and 25% of those cases make it to court, the rest are solved otherwise. But those authors are realistic enough to see a development in the direction of a facultative objection proceeding, very much the same as in France.[108] Also the costs for citizens are considerably lower in objection proceedings than in court proceedings. If self-control by the administration via the involvement of higher authorities is abolished, other ways for such self-control should be organized, *e.g.* by internal 'objection committees'.[109] There are also indications that the numbers of cases in administrative courts are on the rise again.[110]

Further observations and experiments are recommended.

7. Conclusion

German administrative law is designed and functions to protect the individual rights of citizens. Administrative authorities and the administrative courts fulfil essential roles in this system. German administrative legal protection is accessible for those who have a real interest in the decision. It is predominantly not about objective legality control of the actions of the administrative authorities, but about the protection of individual rights. The overall suspensive effect of filing a complaint and the restriction of the circles of interested parties all fit this description. Next to that, the authorities in the German states try to find out how to differentiate between administrative pre-trial proceedings where mistakes can easily be rectified on the one hand, and cases where opposing interests are irreconcilable from the beginning that might as well go directly to court on the other. Thus, they try to find a good balance between content quality in the protection of individual rights and the timeliness of proceedings in administrative legal protection. In order to preserve the best practices from a legal protection perspective, further observations and experiments are to be encouraged, also involving the conflict resolution practices in German administrative courts.

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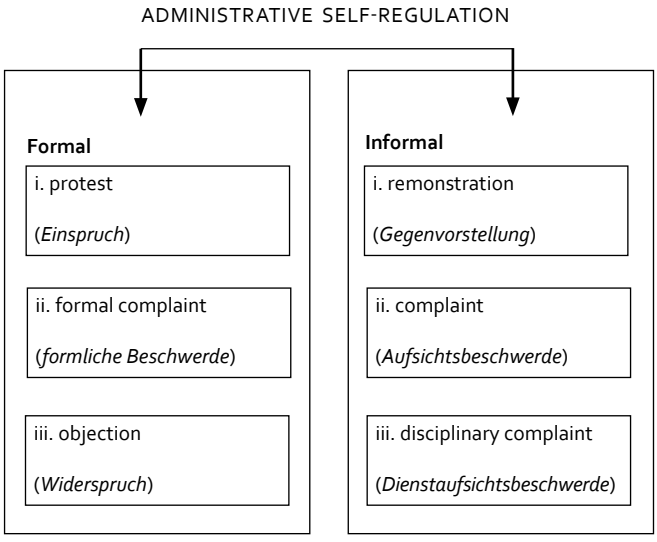
106 Ch. Backes *et al.*, *Snellere besluitvorming over complexe projecten vergelijkend bekeken*, WODC/ ministerie van Justitie, Den Haag 2009, p. 104.
107 Christine Steinbeisz-Winkelmann, Abschaffung des Widerspruchsverfahrens – ein Fortschritt?, *NVwZ* 2009/2, p. 689.
108 Steinbeisz-Winkelmann, p. 692; Härtel, p. 69.
109 Härtel, pp. 73-75.
110 Statistisches Bundesamt, Fachserie 10 Reihe 1, Rechtspflege 2011.

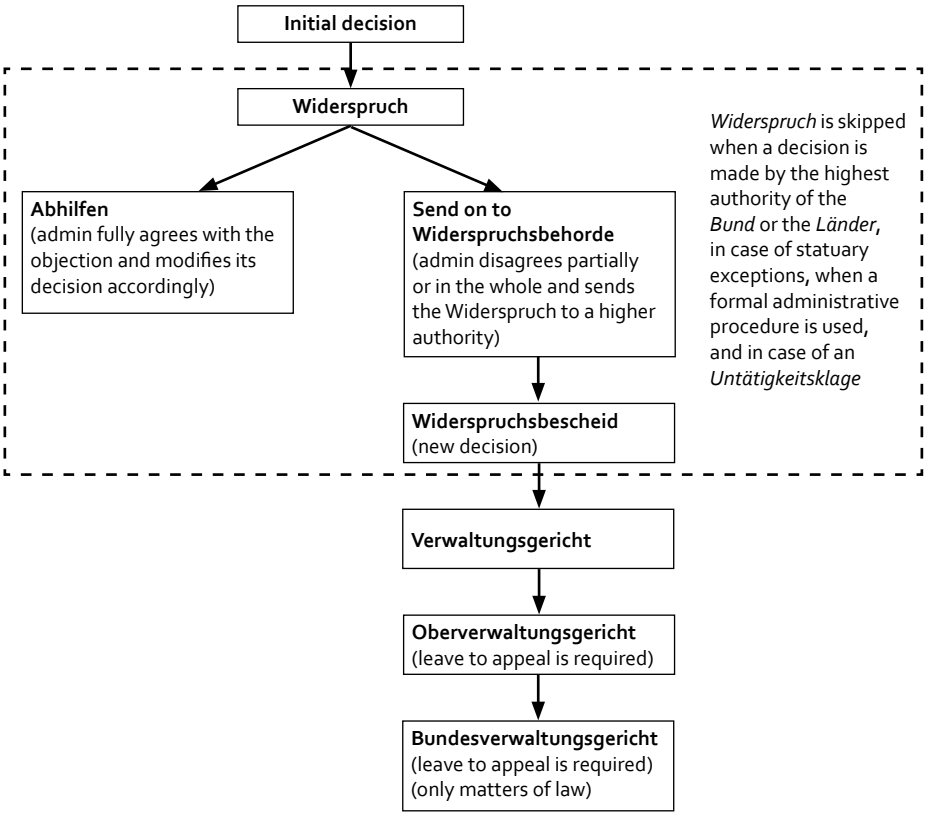
Annexes

Annex 1 Administrative Procedures for Redress within the German Administration



Source: Buck 2004

Annex 2 Flow Chart Depicting Administrative Proceedings in Germany



Annex 3 Statistical Information

Percentage of cases successfully resolved:
Widerspruch: 90%
Ombudsman: 73%
Mediation: unknown
Petitions: negligible

Average length of proceedings before the Bundesverwaltungsgericht*:*
2007: 10 months
2008: 10 months
2009: 12 months

Number of judgments by the Bundesverwaltungsgericht*:*
2007: 2097
2008: 1848
2009: 1709

V Pre-Trial Proceedings in Dutch Administrative Law

1. Introduction[1]

In this chapter we will start with the history of the development of legal protection against the administration in the Netherlands, which culminated in the General Administrative Law Act (GALA) of 1994. This history is relevant because the most important recent changes were stimulated by the jurisprudence of the European Court of Human Rights. Next, we will describe the pre-trial objection procedure contained in the GALA, by focusing on the following aspects:

- The administrative body; its competences under public law;
- Standing (decision);
- Interested party/ third party;
- The organization of proceedings (administrative body, advisory committee),
- Defence rights, and
- The relations between pre-trial and judicial proceedings.

We will conclude this chapter with some data on the evaluation of administrative objection procedures.

2. History of the Development of Dutch Administrative Law

The Netherlands has a civil law system, which was initially introduced by Napoleon's armies. Administrative law has developed since the last decades of the 19th century and came to full maturity 100 years later: in the 1990s. When

1 This chapter is based on standard Dutch literature on administrative law:
H.D. van Wijk, W. Konijnenbelt & R.M. van Male, *Hoofdstukken bestuursrecht*, Kluwer 2011; L.J.A. Damen, P. Nicolaï, J.L. Boxum, K.J. de Graaf, J.H. Jans, A.P. Klap, A.T. Marseille, A.R. Neerhof, B.K. Olivier, B.J. Schueler, F.R. Vermeer & R.L. Vucsán, *Bestuursrecht* 1, Boom Juridische uitgevers 2009; L.J.A. Damen, H.E. Bröring, K.J. de Graaf, A.T. Marseille, A.J.G.M. van Montfort, B.J. Schueler & H.B. Winter, *Bestuursrecht* 2, Boom Juridische uitgevers 2012; J.B.J.M. ten Berge & F.C.M.A. Michiels, *Besturen door de overheid*, HD Tjeenk Willink, 2001; J.B.J.M. ten Berge & R.J.G.M. Widdershoven, *Bescherming tegen de overheid*, HD Tjeenk Willink, 2001.

it was apparent that administrative law would become a major issue, rational proposals to establish a system of legal protection against administrative acts were developed and discussed even before 1920. However, there was a great deal of resistance against administrative courts having the competence to control administrative decisions. There were two basic arguments for this resistance. First, the opponents argued that the administration itself was reliable and that a system of internal appeals was sufficient to guarantee the legal position of citizens. Second, judges would not have enough expertise to be able to assess administrative acts accurately. The proposals were eventually withdrawn and a situation evolved where the civil courts had jurisdiction over administrative acts. It was the standard jurisprudence of the Dutch Supreme Court (the '*Hoge Raad*')[2] that appeals to specialized administrative tribunals and to the judicial division of the Council of State were adequate alternatives to court proceedings which guaranteed a fair trial to citizens, even though the result of proceedings of the Council of State was not a decision, but an advice to the government (the cabinet). As a result, the civil courts only had jurisdiction when neither the Council of State nor an administrative tribunal had it. Internal administrative appeals and appeals to specialized administrative tribunals were prescribed in specialized legislation. Within this context the Supreme Court developed the principles of proper administration, mainly following French examples.

In 1976 an administrative judicial division was established at the Council of State. This division acted as a general administrative court for decisions (an order which is not of a general nature) under public law of decentralized administrative bodies and of the central government, when there were no specialized administrative tribunals that had jurisdiction. Pre-trial administrative proceedings were obligatory before a case could be filed at the judicial division of the Council of State.

Between 1900 and 1994 a system of specialized administrative tribunals developed. There were tribunals for social insurances (appeals councils), there was the industrial relations appeals tribunal, there were courts of taxation and students' grants and loan courts, and many others. They all had their own rules of procedure, and were considered to be specialized instances.

In 1985 the appeal proceedings at the judicial division of the Council of State were declared contrary to the fair trial rights of Article 6 ECHR, because the Council was not an independent court, as it could only advise the government on how to decide on the appeal.[3] Later the Trade and Industry Appeals Tribunal was also judged not to be an independent court, because the Minister of Economic Affairs had the formal competence to reverse the decisions of this tribunal.[4]

Eventually, this led to the drafting of the General Administrative Law Act (GALA), which made administrative proceedings uniform for all administrative courts, and

2 The '*Hoge Raad*' is a court of cassation.
3 ECtHR October 23, 1985, *AB* 1986 no. 1 *Benthem*, CEDH, Série A, Vol. 97.
4 ECtHR 19-04-1994, *NJ* 1995, 462 *Van den Hurk*, CEDH Série A Vol. 288.

which entered into force in 1994. Along with the GALA, a major reorganization of the system of legal protection against the government was introduced. Special administrative law divisions were established at the then existing 19 first-instance courts, with a possibility to appeal against their decision to the Central Appeals Council and to the Judicial Division of the Council of State. Today, the General Administrative Law Act regulates more than just legal protection. It also provides the main framework of concepts for the entire body of Dutch administrative law. It should be noted that it maintains this position while the ministries provide for specialized legislation on, for example, the railroads, education, nature preservation, competition, taxation, agriculture etc. That is not an easy task, because the GALA does not have a superior legal status compared to specialized statutes. But this should not lead to confusion: special administrative legislation concerning specific subjects as mentioned above should follow the definitions of the General Administrative Law Act. Legislation on specific subjects is harmonized with the General Administrative Law Act by means of internal guidelines, known as the 'instructions for designing legislation', to be applied by the separate legislative departments of the different ministries of the Netherlands.[5] Therefore the legislative department of the Ministry of Justice must be consulted by other ministries on all legislation relating to administrative decision making and to legal protection against the government. They do check the compliance of legislation prepared by other ministries with the legal definitions of concepts like: 'administrative authority', 'decision' and 'interested party'.

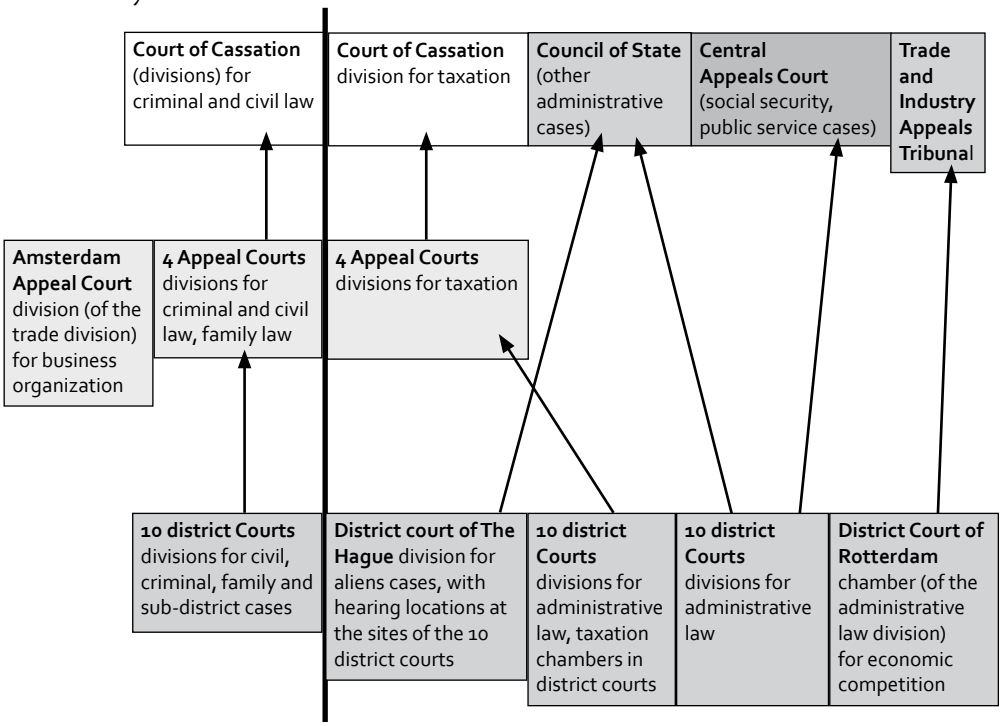
3. The Current Court System in the Netherlands

The latest developments are related to organizational arrangements and specialization within the courts, and date back to 2002. The youngest changes concern a radical change of the court map, reducing the number of first instance courts from 19 to 10 and reducing the appeal courts from 5 to 4. To date, there are 10 first-instance courts, with separate divisions ('sectors' or 'chambers') for criminal, civil, administrative and for minor crimes/small claims cases. Within each division, different procedures are possible. For civil and criminal cases, appeals can be lodged at the appeal courts, as they can for taxation cases. The administrative cases can be appealed at either the Central Appeals Court or the Council of State. Civil, criminal and taxation decisions of the Appeal Courts can be appealed against at the Supreme Court (the Court of Cassation), the *Hoge Raad*, as is shown in the next figure:

5 Aanwijzingen voor de regelgeving, last amended on 1 April 2011, See: <http://wetten.overheid.nl/BWBR0005730/geldigheidsdatum_04-09-2011/informatie>.

Civil and Criminal Jurisdictions, Family law included[7]

Administrative Jurisdictions[6]



Explanation:
Division = organizational part of a court (sector)
Chamber = organizational part of a court division

Apart from the first-instance courts with their administrative law divisions,[8] there are specialized courts. The ordinary courts deal with almost all types of cases but there is a special chamber for competition cases at the Rotterdam District Court, with the possibility to appeal to the Industrial Appeals Tribunal. The Judicial Division of the Council of State deals with first-instance environmental law cases and spatial planning cases.[9]

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6 The chart does not show the first and only instance competences of the three highest administrative courts.

7 The military courts as sub-units of the Arnhem district Court and the Arnhem Appeal court are not included in this chart.

8 According to the Dutch Judicial Organisation Act, these divisions are called 'sectors'.

9 For more information, also in English see: <www.raadvanstate.nl/the_council_of_state/>, accessed on 22 June 2012.

Furthermore, the Central Appeals Tribunal and the Trade and Industry Appeals Tribunal function as specialized secondary appeal courts in social insurance cases and social-economic, economic competition and telecommunication cases respectively. For tax cases the first instance courts have jurisdiction, but appeals against their judgements must be lodged at the tax division of the ordinary Appeal Courts. The Judicial Division of the Council of State is the appeal court in all cases that fall outside specialized administrative jurisdictions.

It should be noted that the court map of the Netherlands is under revision and the Minister for Justice and Security is planning to establish 10 large first instance courts with several hearing locations and specializations. Also the Public Prosecution Service will be revised. Legislation is being prepared and has been presented to Parliament at the end of 2011. The Dutch Senate finished deliberations on 20 June 2012.[10] Changes are being implemented at the time of publication of this text. As a consequence of this reorganization measure the first instance courts will have several hearing locations with some specializations, and a central location with a back office.[11]

4. Dutch Administrative Law: The Main Concepts

As indicated above the General Administrative Law Act is a milestone in 100 years of the development of Dutch administrative law. It regulates the decision-making process for administrative court proceedings, for pre-trial proceedings (so-called objection proceedings) and for administrative appeal proceedings (= appeal to a higher administrative body). The GALA contains several chapters on initial administrative decision making and on administrative law enforcement for all administrative authorities in the Netherlands. They regulate inspection and law enforcement, subsidies, the supervision of administrative authorities, mandates and the delegation of administrative competences, but there is also a general normative chapter.

These chapters use common definitions of the concepts of "administrative authority"; "administrative decision" and "administrative order", and "interested party". These definitions create a complicated legal language game:

For example, Article 1.1 states:

1. 'Administrative authority' means:
(a) an organ of a legal entity which has been established under public law, or
(b) another person or body which is invested with any public authority.

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10 TK 2011-2012, 32 891 no 1-20; EK 2011-2012, 32 891, no A-F.

11 The new court map can be found at: <www.rechtspraak.nl/Recht-In-Nederland/ThemaDossiers/herziening-gerechtelijke-kaart-nederland/Pages/default.aspx>.

Article 1.3 states:

1. 'Order' means a written decision of an administrative authority constituting a public law act.
2. 'Administrative decision' means an order which is not of a general nature, including rejection of an application for such an order.

And Article 1.2 states:

1. 'Interested party' is a person whose interest is directly affected by an order.
2. As regards administrative authorities, the interests entrusted to them are deemed to be their interests.

Thus it is possible to substitute words used by their definitions:

'interested party' is a person whose interest is directly affected by a written decision of an organ of a legal entity, which has been established under public law, constituting a public law act.

These definitions are important because they define whether and in how far a decision-making process should comply with the demands of the GALA, whether there is a decision or another type of act, and if the affected person or organization will have standing in an administrative court. The latter also determines whether this person or organization will have standing in pre-trial objection proceedings with an administrative authority, as the GALA states in Article 7.1 that the interested party that has a right to appeal against a decision at an administrative court must first file an objection at the administrative authority that took the contested decision. Pre-trial proceedings against administrative decisions are *mandatory* in Dutch administrative law.

5. Legal Protection in the General Administrative Law Act

Because administrative appeals (= appeal to a higher administrative body) have become a rarity, in this chapter we will focus on objection proceedings only. These can be described as an obligatory administrative procedure for redress at the administrative body that took the original decision. Article 7:1 of the GALA states that those who have a right to file an appeal at an administrative court must first file an objection with the administrative authority that adopted the challenged decision.

The main purposes of objection proceedings are:
– The legal protection of interested parties, and
– Prolonged decision making with a view to repairing mistakes.

Prolonged decision making refers to the possibility for the administrative authority to correct errors in the original decision, and to supervise civil servants with a mandate to issue administrative orders. Many decisions by administrative bodies are taken by civil servants in accordance with a legal mandate. Objection proceedings attract the attention of higher-level functionaries within the organization to the issued order. The objection proceedings can sometimes remedy errors that are a consequence of the mandate construction. There is also a learning function, because the objection procedure gives the administrative authority the opportunity to compensate and improve its possible earlier mistakes. It should be noted that *e.g.* taxation decisions and decisions on social insurance benefits or aliens concern decision making in large numbers (many thousands each year). These services are sometimes called 'decision factories'. A number of their decisions will inevitably contain mistakes and objection proceedings can and do remedy them.

To a certain extent objection proceedings also function as a way of preventing interested parties from going directly to court. Its aims are to either convince them that the contested decision was legally inevitable, or to correct mistakes and satisfy complainants entirely or partially. The aim is not to deny citizens their road towards justice but to provide an alternative dispute resolution mechanism before they take their case to a court. The procedure also serves to make as clear as possible what a conflict entails and what the facts and circumstances are that should be taken into consideration.
Recent evaluation research commissioned by the Ministry for Security and Justice has shown that citizens are fairly dissatisfied with their treatment in objection proceedings, because in their experience civil servants representing the administrative authority tend to take rigid and defensive stances during hearings in objection proceedings, and because they feel misinformed about the entire decision-making process.[12]
Of course, if interested parties are not satisfied with the outcome of the administrative proceedings and not convinced by the reasons provided for the decision, they can file a case at one of the 10 district courts.[13] In contrast to objection proceedings for filing a case at a court, a court fee is levied against appellants.[14]

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12 B.W.N. de Waard, K.F. Bolt, C.J.A.M. Merkx, J.A. de Muijnck, M.J. Oude Vrielink & W.M.C.J. Rutten-van Deurzen, *Ervaringen met bezwaar,* Boom Juridische uitgevers, The Hague 2011, pp. 179-180.

13 Plans to reduce the number of district courts to 10 are being implemented.

14 Besluit van 12 november 2010 tot wijziging van de Algemene wet bestuursrecht en enkele andere wetten (indexering griffierechten bestuursrechtelijke wetten 2011), *Stb.* 2010, no. 768. The amount of the fee is different for natural persons than for organizations, and it also differs per type of case

The territorial jurisdiction of the administrative law divisions of the district courts is organized in accordance with the place of residence of the appellant.

Nevertheless, in 2004 a new provision was issued under the GALA, Article 7.1a, stating that if both the administrative authority and the party filing an objection agree, they can appeal to court immediately without objection proceedings. The evaluation of this provision in 2005 showed that parties, advocates and administrative authorities demonstrated great reluctance in using this provision, especially because they value the meaning of objection proceedings.[15] Apparently this provision did not serve its purpose to reduce administrative burdens for administrative authorities.

During the last two decades a debate has evolved amongst policymakers and administrative lawyers about the efficiency and expeditiousness of administrative procedures including legal protection. The debate has focused on complex decisions for public, infrastructural works, like highways, railroads and the like. This has resulted in 'Not in My Back Yard' legislation with public preparatory proceedings, where the objection proceedings can be skipped.[16] Recently there is also the Crisis and Recovery Act that restricts the length of administrative proceedings and the access to legal protection of these proceedings.[17] A comparative study commissioned by the Ministry of Justice has advised concentrating and coordinating the preparation of complex public works in public preparatory proceedings with a restriction of second instance appeal, and a restriction of appeal rights for public bodies.[18]

Consequences of Filing Objections against a Decision

A basic feature of the system of legal protection contained in the GALA is that appeal or objection proceedings do not suspend the legal effect of a contested decision. However, the risk of starting to make use of a licence that is contested lies on the addressee. So if a licence is withdrawn in objection proceedings or quashed on appeal, the addressee of the decision may be liable towards third parties. If a third party wants to prevent the licensee from using the licence during objection proceedings, he may commence summary proceedings as an annex to objection proceedings with the administrative court, requesting the legal effect of the

– first instance cases or second instance appeals – between €41 and €454. Announced austerity measures contain radical increases in court fees, also in administrative court proceedings.

15 B.M.J. van der Meulen, mr. ir. M.E.G. Litjens & A.A. Freriks, Prorogatie in de Awb, *Invoeringsevaluatie rechtstreeks beroep,* WODC Den Haag 2005.

16 Tracéwet *Stb*. 1993, 582, lastly amended by *Stb*. 2011, 303.

17 Crisis- en herstelwet, *Stb*. 2010, 135.

18 It also advises applying the German "*Schutznorm principle* in administrative procedure legislation and to increase the decision-making powers of administrative judges. See Ch.W. Backes, E. Chevalier, A.M.L. Jansen, M.E. Eliantonio, M.A. Poortinga & R.J.G.H. Seerden, S*nellere besluitvorming over complexe projecten vergelijkend bekeken*, The Hague 2009, pp. 82-85.

contested decision to be suspended (usually until the 6-week term for an appeal against the decision on objections has passed). The same holds true, of course, for the addressee of the decision to impose a non-pecuniary sanction under the threat of immediate execution.

Standing

From a formal point of view it makes sense to distinguish between the competence of the court and the standing of the appellant. In practice, however, the courts do not state their competence (*e.g.* when there was no decision within the context of the GALA, but a civil legal act). This can be explained by the fact that the right to appeal is formulated in terms of there being a decision within the context of the GALA and explicitly denying this right concerning civil legal acts.
Before being able to file a case at an administrative court, one has to follow the objection proceedings. Standing in the objection proceedings therefore follows the same conditions as standing before an administrative court. Standing is related to four factors:

There should be an *order*, by an *administrative authority* and the appellant should have a *directly related interest* in that decision. Furthermore, the objection should be filed within the statutory *time limit* following the decision. We repeat here that an order is a legal act under public law. Contracts with the government or with a legal person within the state are therefore not 'orders' within the meaning of the GALA. They are based on the Civil Code and have a status similar to contracts between ordinary civil parties. Contracts with the government therefore do not fall within the scope of objection proceedings in accordance with the GALA.

Administrative Order

An administrative order is a legal act under public law, issued by an authority within the context of the GALA. An 'administrative decision' is an order which is not of a general nature, including the rejection of an application for such an order (Article 1.3)
This concept focuses on the existence of some legal act. The refusal to perform such an act is also defined as an administrative decision. The distinction between an administrative order and an administrative decision is relevant, because an administrative order comprises not only decisions for individual, concrete cases but also delegated legislation. Such general rules cannot be appealed against before an administrative court. And where the enactment of delegated legislation cannot be appealed, the refusal to enact delegated legislation or to amend it can also not be appealed before an administrative court.
So a plaintiff will have standing with regard to orders as far as they do not contain general rules or policy rules. If there is no legal act but a real act, the administrative

court is not competent to hear the case and will declare the appeal inadmissible. Where there is no standing at an administrative court, a party will also not have standing in administrative objection proceedings.

Administrative Authority

The Dutch state is organized relying on the concepts of legal persons, administrative authorities and civil servants. The state is a legal person, but the ministers and the government are administrative authorities. Municipalities are legal persons, but their organs, the representative council, mayor and aldermen are administrative authorities. The same holds true for the province and its provincial council, deputies of the council and the Queen's commissioner. Of course, other authorities have been established by law, such as the authorities for market competition, for financial markets, but *e.g.* also authorities for Food and Consumer Product Safety etc. This follows from the definitions in Article 1.1 of the GALA.
Administrative authorities are represented by their office holders. The office holders exercise the competences of their office; civil liability for the actions of these authorities rests with the legal person they belong to. Civil servants can exercise the competences of the authority that employs them if these competences have been transferred to them by a legal mandate. However, this does not affect the legal accountability of the authority itself; the mandate only stipulates that the civil servant represents and legally acts for the authority. Sometimes statutory acts create a special competence for civil servants, *e.g.* for a taxation officer to impose and collect taxes. For the exercise of that competence the taxation officer is considered to be an administrative authority in the sense of the GALA.
Last but not least, sometimes a specific competence is attributed to a functionary of an organization under civil law, for example an association or a limited company. Two examples should suffice here: the director of a private school may take decisions on exceptional leave for a pupil under the compulsory education law; and a garage manager may provide periodic motor vehicle test certificates. In both cases these functionaries perform a legal act under public law, and they are considered to be administrative authorities for the performance of this task.

Interested Party/Third Party

An interested party is a person whose interests are directly affected by an administrative order, as defined in Article 1.2 paragraph 1 of the GALA. Still, it is almost impossible to give a full, positive definition of what 'directly affected' actually means in this context, because the courts and especially the Council of State and the Central Appeals Tribunal have developed the concept on a case by case basis. Of course, and first of all, the addressees of administrative orders are interested parties to that order. Think of taxation decisions, or social benefit decisions.

'Directly affected' means that the interest should be:
- personal;
- objectively verifiable;
- currently existing and certain (not in a possible future), and
- causally directly affected by the administrative order.

This applies equally to legal persons and to natural persons. The GALA also recognizes the possibility that collective interest groups can be affected by administrative orders and grants them standing. As regards legal entities, their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objectives and as evidenced by their actual activities (Article 1.2 para. 3 of the GALA). This opens the possibility for environmental organizations to contest administrative orders (*e.g.* licences to drill for oil in the Wadden Sea, a nature reserve etc.).

Further examples may clarify this:
- My neighbour receives a permit to open a bar selling alcoholic beverages. I live next door, and no one has asked me what would be the consequences of that administrative act for me. Would this be an infringement of my "rights and legitimate interests"? I think so, because it directly affects my interest, it is objectively verifiable, the hindrance is not imaginary, and there may be a direct causal relationship between the decision and the hindrance near my home.
- The municipality decides to cut down a beautiful two-hundred year old chestnut tree in front of my house, and grants itself a licence to do so based on a general regulation that wants to protect the 'green heart' of the town. The tree is on the street and the street is owned by the municipality. Would this directly affect my "rights and legitimate interests"? Probably, because the tree provides shade, maybe a certain value for my house. That is objectively verifiable, and there is causality. Therefore it is likely that I will have standing in objection proceedings (whether my objections will be upheld by the mayor and alderman is another question, the answer to which depends on the reasons for the decision, *e.g.* the tree is old and dangerous, the sewer system should be renewed, etc.).
- The municipality decides to cut down the same kind of tree, and grants itself a permit, but now it is not in front of my house but it is in another street where I walk every day and where I enjoy and admire this magnificent tree. Would this be a violation of my "rights and legitimate interests"? I do not think so. Of course, such an administrative act influences my daily experiences, but the question is whether administrative law should protect something personal and subjective like this. There is no direct relation between my legitimate interests and the decision.

– The municipality decides to cut down the same Chestnut tree in front of my house, and grants itself a permit to do so. In my town there happens to be a foundation (a legal person) which has the aim of protecting the natural environment and especially the conservation of old trees (this aim has been laid down in the articles of the foundation). The board of this foundation lodges a complaint against this administrative act (the permit). Would this administrative act directly affect the "rights and legitimate interests" of this foundation? Under the GALA this foundation certainly would have standing in objection proceedings. (Again, it is questionable whether the objections will be upheld by the administrative authority, but that is another matter).

It should be noted that giving standing to general interest groups may have the effect that important political questions are brought before the court. On the other hand, giving standing to general interest groups also facilitates judicial control over the administration. From a designer's perspective, the question is to what extent environmental groups should use political lobbying rather than legal protection to achieve their aims.

Relativity

Currently, a debate that has been instigated by politicians is taking place amongst lawyers about the question whether the right to appeal should concern only the interest of the party whose interest is protected by the legislation on which the decision was based, or that an interested party may rely on other interests as well.[19] The Building Construction Act, for example, gives the Mayor and Aldermen of municipalities the competence to grant building permits. There is a connection with spatial planning. If spatial planning so allows, they can grant the permit, taking into account the construction process, the safety of the building's design and the 'appearance' of the building. Imagine that a supermarket company has applied for a building permit for a certain site. A relevant question is whether a competing supermarket company should have standing to contest the building permit in order to protect its economic interests. The primary purpose of the Building Construction Act is not to protect economic interests, but to enhance safe building constructions. The competing supermarket is not interested in enhancing the safety of building construction, but wants to protect its economic interests. The question is whether it should be allowed to use a court procedure for this purpose. In the debate, different answers have been given.

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19 B.S. Schueler, *Het zand in de machine*, Inaugural lecture University of Amsterdam 2003; Gerdy Jurgens, *Relativiteit in het bestuursrecht?*, Inaugural lecture Utrecht University 2004; also see: Gerdy Jurgens, Introduction of a Relativity-related Requirement in Dutch Administrative Law, Will the Introduction of a Relativity-related Requirement in Dutch Administrative Law be in Breach of Community Law?, *Journal for European and Environmental Public Law*, 2007, issue 4, pp. 260-269.

On the one hand, giving the competing supermarket standing enhances judicial control and law enforcement, also against the administration. That the competing supermarket has ulterior motives is of no consequence: the court still has to review whether the relevant legislation has been complied with.
On the other hand, giving standing to such a party will delay decision making. From a strict legal protection angle, granting standing is not necessary, as the competing supermarket is not defending an interest that is recognized in the applicable legislation. Whether and when such parties should have standing remains a point of dispute. However, more restrictive rules on standing in court proceedings will inevitably lead to a lower number of appeals at the administrative courts.[20]

It should be noted that the right to appeal to an administrative court entails an obligation (the right is implied) to first file objection proceedings at the administrative authority that gave the administrative order. A decision by an administrative authority concerning the standing of an interested party can therefore be reviewed by an administrative court.

Organization of Proceedings (Administrative Authority, Advisory Committee)

In this section we explain the organizational demands and the logistic aspects of objection procedures. We will describe who will take the decision on objections and who may conduct the hearings. In a later section we will describe the defence rights of the parties.

The GALA insists on pretrial proceedings, unless a special procedure for the initial decision making was used (a public preparation procedure). An objection should be filed with the administrative authority that took the contested decision. This authority will review its earlier decision and take a new one. The new decision must take account of both matters of fact and of law as they are at the time of the decision on the objection. This is important, because there may be up to four months or even longer between the filing of the objection and the decision on the objection.
There are a few exceptions where there is no obligation to file an objection:

– the administrative body agrees to skip the objection proceedings at the request of the plaintiff; or

20 In this respect for environmental issues the Aarhus Convention is said to restrict the possibilities to restrict access to the courts for environmental groups. See: Hanna Tolsma, Kars de Graaf & Jan Jans, The Rise and Fall of Access to Justice in The Netherlands, *Journal of Environmental Law* (2009) 21(2), pp. 309-321.

– a special public procedure for the preparation of decision making was followed (with guaranteed access to participation for interested parties); or
– the appeal is directed at the administrative body's failure to take a decision.

The Logistics of Informing Parties, Hearings and Decisions

The objection should be submitted in writing and must be received within a timeframe of six weeks after the original decision was taken. No fee may be charged for filing an objection, and representation by an advocate is allowed, but is not obligatory. The objection received should be registered by the administrative authority. An objection can be delivered electronically if the administrative authority has chosen to provide the possibility to do so.
Interested parties should be informed of the objection and the administrative body must organize a hearing. Parties should be informed about the time and place of the hearing, and the person or the committee which will actually conduct the hearing. In addition, they should be informed about the possibility to give (further) reasons for their objections, including the provision of evidence, until 10 days before the hearing date. Furthermore, the announcement should state where the interested parties can view the relevant documents. The administrative authority should offer this possibility for at least one week during the period before the hearing date, but the parties can declare that they have no interest therein.

Who Should Conduct the Hearing?

The rule that the administrative authority must decide on the objection has several consequences for the organization of the objection procedure which will depend on who, de facto, has taken the contested decision. Many administrative decisions are taken by civil servants under a legal mandate of the administrative authority. Parties have a right to be heard, also in objection proceedings. The question is who should conduct the hearing. This organizational question is also related to the important norm that bias or appearances of bias in the objection proceedings should be prevented. Several situations may occur.

The Original Decision Was Taken by a Mandate Given to a Civil Servant by the Responsible Administrative Authority

In order to prevent bias, the civil servant who took the original decision on behalf (by a mandate) of the responsible administrative authority should not participate in the objection proceedings. However, the decision-making competence in objection proceedings may be given in a mandate to another civil servant, provided that this civil servants did not function in the same organizational hierarchy as the civil servant that originally took the decision.

The Original Decision Was Taken by the Responsible Administrative Authority Itself

If the original decision was taken by the responsible administrative authority itself, the decision in objection proceedings must also be taken by the authority itself; a mandate to a civil servant is not allowed.

Advisory Committee

There are two different types of committees that can conduct the hearing in objection proceedings: internal and external committees. An *internal* committee usually consists of civil servants working under the responsibility of the administrative authority. The GALA demands, however, that the hearing be conducted by a chairperson who was not involved in the original decision making, and if the committee consists of several persons, the majority should consist of persons who were not involved in the original decision making. An internal committee delivers an advice or may take a decision on objections in mandate, provided the authority did not take the original decision itself.

The administrative authority may establish an *external advisory committee* to conduct the hearing and to advise on how to decide on the objections. If the authority chooses to establish an external advisory objections committee, it is obliged to take the advice explicitly into account when taking a decision on the objection. If it deviates from the advice, the advice should be sent to the parties, together with the decision and its reasons. Usually such advisory committees are established on a permanent basis, for example as an advisory committee for the mayor and aldermen and for the council. In accordance with the Municipalities Act, office holders may be members of such an advisory committee. However, the chairperson of the committee must be someone who does not work under the responsibility of the administrative authority. Therefore the chairperson is often a judge, an advocate, an academic with expertise in administrative law, or a person working for another administrative body. Members are often specialists in *e.g.* spatial planning or social benefits or may have other (legal) expertise.

Based on evaluation studies, there is evidence that external committees often resort to a court-like hearing and evaluation of objections filed, whereas the task of such committees is to assess the objection both from a legal and a policy point of view. They deliver an advice, and it is up to the administrative authority to take a decision on the objection filed. One could argue that a law-oriented composition of a hearing committee is more likely to stress the legal aspects of the assessment

than to mediate a solution to real-life problems, of course within the context of administrative law.[21]

The internal organization of the objection procedure determines the time frame within which the administrative authority needs to take a decision on objections:
- For objection proceedings heard by the administrative authority or by an internal advisory committee the time frame is six weeks with the possibility of prolonging this by another six weeks (twelve weeks maximum).
- For objection proceedings heard by an external advisory committee, the time frame is 12 weeks with the possibility of prolonging this by another six weeks (18 weeks in all).

Unfortunately, decisions on objections are seldom rendered within the legal time frame, whereas redress has so far been difficult. To remedy this, a new amendment to the GALA has entered into force. It requires an administrative authority to pay a fine of € 20 for each day by which one of its bodies exceeds the time frame for taking a decision on objection, with a maximum of 42 days.

Exceptions to the Obligation to Organize a Hearing

It will not be necessary to organize a hearing if it is self-evident that the objection is not admissible, *e.g.* because the party has no legal interest, or there is no public legal act. It is also possible to abstain from a hearing if it is self-evident that the objection must be rejected, or if the interested party has declared that a hearing is not necessary. A hearing can also be omitted if the administrative authority announces that it will take a decision on the objection which fully meets the objection made.

The Decision Following an Objection

After the hearing an advice may be given to the administrative authority, and otherwise the administrative authority or the civil servant having the mandate must take a decision itself. This decision must be taken based on the facts and on the law pertaining to the situation as it is at the time of the decision. Therefore, not only can mistakes be corrected but new information can be taken into account as well. In the three to four months between the filing of an objection and the decision, certain circumstances, policies and the law may have changed. So, even if the original decision was not flawed, the decision on objection may still change the original decision. If the authority considers changing the content of the decision,

21 A.A.J. de Gier, M.L.P. van Houten, I. Tappeiner, J.J. Vermeulen, T. Zwart, R. van der Bij, R. Straathof & M. Verberk, *De ketenbenadering in de AWB*, Boom Juridische uitgevers, The Hague 2001, who hold that the juridical approach is too dominant in Dutch advisory comittees for objection proceedings; also see H.D. Tolsma, 'Bemiddelen in de besluitvormingsfase. Een plicht voor het bestuur?', *Nederlands tijdschrift voor bestuursrecht* 2006, 11, pp. 73-74.

parties with an interest in that change should be given a fair opportunity to react to the proposed change and therefore they too should be given enough time to react.

If the objection is considered to be justified, or if circumstances or policies have changed, the original decision will be *recalled* and replaced with a new one. We use the word 'recalled' here, because the administrative authority is unlikely to *quash* its own original decision.

As a consequence, the decision on objection needs to be well reasoned, and take all relevant aspects into account. In principle the interested party that filed the objection may not become worse off because of the objection. For example, if a theatre company receives a grant, but it is not satisfied with the amount, it can file an objection, but this may not result in a lowering of the grant (we call this: the *prohibition of reformatio in peius*). Other parties might be worse off, however: if a third party has filed an objection against a license, it may well be that the addressee of the original decision will be worse off because the objection filed by the third party, has led to tighter conditions for the use of the license.

The demand that a decision, especially a decision on an objection, should be well reasoned is directly linked to the defence rights of interested parties. Only if the reasons for the decision are transparent can they be contested effectively before an administrative court. If the conflict cannot be solved, the objection proceedings will also function to crystallize the conflict, building a file and making clear on what points the parties do not agree.

Defence Rights

The GALA was designed, on the one hand, from the perspective that the government should be able to take decisions in order to maintain public order, but also in order to realize policy objectives. On the other hand, it is based on the perspective that citizens, natural persons, and organizations should be able to defend their interests in their relation with the administration. Lying at the heart of the GALA is the idea that the administration is politically and juridically accountable for its actions. The balance is on the side of the administration as far as the time limit for objections and appeal is limited to six weeks. Beyond that time limit interested parties will not have standing (with some exceptions). On other points, the balance is on the side of the citizens, because administrative orders and decisions must be made public. They must be reasoned and basically interested persons must be heard if a decision under preparation will affect them negatively. In their contacts with the administration citizens have a right to legal representation. However, in principle in objection proceedings they have to hire such representation at their own expenses. This might not be desirable though,

because administrative law has become a very complicated legal field. Interested parties are at liberty to provide proof concerning their claims and the administrative authority must take proof-based arguments into account. The check on these rights of the citizens and these obligations of administrative authorities is the possibility to appeal to an administrative court that has effective competence to uphold the law against citizens but also against the administration. If necessary a court can quash an administrative decision on objection proceedings, but in most cases it cannot replace it. Instead, the judgment of the court has, as a consequence, that the administrative authority must take a new decision on the (still pending) objection filed. Of course, this offers new opportunities for the administrative body to take a better decision, especially as circumstances, policies and law may have changed in about a year's time.

Based on the jurisprudence of the European Court of Human Rights the reasonable time limit for Article 6 ECHR requires that a final decision is taken within four years after the first objection was made. Administrative authorities and courts usually manage to do this within that time limit.[22] In fact, most administrative divisions of the district courts decide a case within one year after filing. This means that, on average, there may be less than two years between the initial decision and a possible new decision on objection following a judgment of the district court. This is still considered to be too long, but the courts do not manage to deal with a case in less than 46 weeks on average.[23]

6. Relation between the Objection Proceeding and Court Proceedings

An issued licence has immediate legal effect. Filing an objection does not suspend it. Summary proceedings at the administrative court are directed at suspending the legal effect. They may be filed at the court at the same time as the objection with the administrative authority. Such a suspension will only be granted by the court if there is a clear interest in the suspension and if there are indications that the contested administrative order will not be upheld in ordinary court proceedings. The presiding judge must balance the required speediness with the interests involved, as Article 8:81 of the GALA states.
With regard to the main proceedings in the administrative courts it is important to note that the reasons against the decision that were used in the objection proceedings determine the scope of the conflict before the court. This is judge-

22 For the Netherlands, judgment of the ECtHR of 9 December 1994, *Schouten and Meldrum v. The Netherlands*, A-307 is relevant because it stated that the reasonable time limit starts with filing an objection and ends with the final execution of the judgment.

23 Council for the Judiciary, Annual Report 2007, p. 23. In 2011, 77% of administrative cases were decided within one year by the district courts. In 2009 that was 71%, Council for the Judiciary, Annual Report 2011, accessed online <www.rechtspraak.nl> on 22 June 2012.

made law, and the exact lines are still unclear. This also has to do with the position of third parties. If a licence is granted as a result of objection proceedings, the third party may come up with new reasons on appeal *as far as it did not have an opportunity* to assert them in the earlier objection proceedings. But if the licence was rejected, the party that applied for the licence cannot come up with entirely new arguments on appeal. As a general rule, therefore, the scope of the conflict in objection proceedings defines the scope of the conflict on appeal at the administrative court.

7. Proceedings in Administrative Courts

Proceedings in administrative courts are also regulated in the General Administrative Law Act, in Chapters 8 and 6. The administrative courts are the next instance, following objection proceedings. With the (written) decision on objection, the administrative authority must state where the interested party can appeal the decision and within what time frame. The normal time frame to file an appeal is within six weeks after the publication of the decision on objection. A court fee must be paid in order for the appeal to be admitted. Parties need not be represented by a lawyer. Of course, the appeal must be reasoned. After the case is registered, the administrative authority is requested to submit the file of the decision on objection. Parties can exchange views and documents until 10 days before the court hearing which is oral and, in principle, of a public character. Based on the important Article 8:69 of the GALA, the court has discretion to conduct a further inquiry into the facts, but it is obliged to supplement the legal grounds for the appeal. This is especially relevant where there are legal provisions of "public order", like legal time frames and defence rights, which must be upheld by the court.

Administrative courts have competences to review a decision on objections only on points of law. The judgment must be reasoned. As a result, the court can reject the appeal, or it can quash the decision on objection. If it quashes the decision on objection, the consequence is that the administrative authority needs to take a new decision on the objection. Only if there is no discretion left for the administrative authority may the court replace the decision on objection with its own decision. This will never occur in cases where there are third party interests. These cases often concern licences that require technical knowledge, and generally judges do not have such knowledge and skills. This may however occur in social insurance cases. Often, such cases are a matter of recalculating entitlements and then sometimes an administrative court does replace the decision appealed against.

Of course, when a case should have been declared inadmissible by the administrative authority, the court can declare the decision void and replace the decision with the judgment that the objection is inadmissible, *e.g.* because the person had no standing or no administrative decision was taken.

In general, if the administrative authority loses the case, it has to compensate in part the costs of the citizen. If the appellant loses the case, every party bears its own costs.

8. Complaints and Ombudsmen

The GALA contains a chapter on complaints proceedings. They are not directed at any legal effect, but at restoring a good relationship between the administration and citizens. Virtually all administrative authorities fall within the scope of the National or a local ombudsman. Local administrative bodies can choose to have their own ombudsman or to use the National Ombudsman. The three largest cities in the Netherlands (Amsterdam, The Hague and Rotterdam) have their own ombudsmen. They have the same competences as the National Ombudsman, based on Chapter 9 of the GALA. The intention is that all administrative bodies in the Netherlands fall within the scope of an ombudsman.

The National Ombudsman is a complaints instance, but he can also conduct an inquiry at his own initiative. The office of the National Ombudsman is embedded in the Dutch Constitution: he is one of the High Offices of State, just like Parliament, the King, the Court of Cassation or the Council of State. He is appointed by the Lower House of Parliament for a six-year term. Everybody with a complaint against an office, officeholder or civil servant within his jurisdiction can contact the National Ombudsman's office in The Hague, or the local ombudsman. A complaint will only be admissible when the complainant has first filed the complaint with the administrative authority that caused the distress. It should be stressed that a complaint is not an objection in the GALA terminology.
A complaint to the National Ombudsman will only be accepted after the administrative authority has been given the opportunity to deal with the complaint itself. So, *e.g.*, complaints about the conduct of a police officer should be dealt with first by the police organization.
The National Ombudsman is competent in the case of national public bodies, and in the case of decentralized public authorities, as far as they have indicated that the National Ombudsman is their local ombudsman. Otherwise, they have to appoint an ombudsman of their own.
The work of the National Ombudsman is closely related to the terms and concepts of the General Administrative Law Act. This act defines legal concepts like: 'administrative authority'; 'decision' and 'complaint', and also operates and legally defines most principles of good governance. The competence of the Ombudsman is linked to the definition of these concepts, and, by his reports, he also contributes to the development of administrative law in the Netherlands.

The legal definition of a complaint refers to a written document; however, oral complaints may be delivered at the office and will be written down by Ombudsman

staff. The Ombudsman may not conduct an inquiry into complaints about decisions of administrative authorities that are suitable for legal action against, or for civil law suits against the public body concerned. In practice the ombudsmen operate their jurisdiction in a very flexible way. They only refuse to conduct an inquiry if the complainant has the same case pending in court, or if an objection has been filed.

In the case of a complaint, the ombudsman attempts to solve the case. He does this by means of a mediation effort, which is called an "intervention". If the mediation does not end with an amicable solution, or if the case is of substantial social relevance, the ombudsman will consider publishing a report. Out of about 12,000 complaints per year, only about 400 result in a report. This is an indication of the success of informal solutions for complaints. A solution can take many forms, *e.g.* an apology for misbehaviour, sometimes accompanied by a bouquet of flowers, or a small voluntary compensation in the form of money, or just an explanation as to why something has gone wrong within the administration and what has been done to prevent the error from occurring again. The standard against which the administrative conduct is assessed is "propriety". This is stated in the GALA, but the concept has deliberately not been defined by the legislature. It is up to Dutch public administration ombudsmen to develop this concept.[24]

The result of an inquiry by the Ombudsman is of a restricted nature: if the Ombudsman delivers a report, a judgment of 'proper' or 'improper' is given. The Ombudsman is not able to perform any legal act as a response to complaints, although the outcome of an inquiry may be used as proof in court proceedings, *e.g.* in a civil lawsuit for damages against the government. The evaluation of that proof remains a judicial responsibility, however. The fact that the ombudsman cannot give any binding decision but just recommend a certain solution is the most important difference between the ombudsman and a court.
Normally, a report will contain a detailed description of the events that led to the complaint, a description of the internal complaints procedure, an extensive description of the applicable law, and an elaborate check on the lawfulness or unlawfulness of the behaviour that is the subject of the complaint. The ombudsman may also make some recommendations to the public authority concerned. During the last five years, the local ombudsmen and the National Ombudsman have worked with a clear set of good governance norms – "ombudsnorms". The ombudsmen assess administrative behaviour based on these principles, thus a body of "ombudsprudence" has developed that helps to understand what good

24 Apart from the annual reports in Dutch, there is also a website in English with summaries of the annual reports. For a statement by the Dutch National Ombudsman, see: Alex F.M. Brenninkmeijer, Management and Fairness, in *Nispacee Journal of Public Administration and Policy*, Volume IV, no. 2 Winter 2011/2012 special Issue: Law and Public Management Revisited (also available via <www.nationaleombudsman.nl/english>).

governance means in countless administrative practices.[25] It also shows that next to a legal assessment of administrative behaviour, a meaningful ethical assessment of administrative behaviour is also possible.[26]

9. Evaluation Research on Objection Proceedings in Administrative Law

Recent empirical research on the filtering effects of objection proceedings and on user satisfaction on a national scale has not yet been published. In the past, evaluation research has been carried out and published, especially as part of evaluations of the General Administrative Law Act. Sanders also conducted research into objection proceedings which was published in 1999.[27] More recently published studies, conducted at the instigation of the Ministry of Justice are of a more exploratory nature. From those studies it appears that the context in which a decision was taken affects the filtering effect of an objection. Most financial decisions (taxation law, migration law, students' grants and loans, social insurance benefits, traffic fines) are taken in very large numbers (between 1½ million and 30,000 per agency, annually). These organizations are called "*decision factories*". These decisions are very often made with the help of information and computer technology. This means that presumptions may be faulty, because of administrative mistakes. The objection procedure helps the administration to correct its errors or to explain the decision to the citizen in these cases. The effect is huge, as only about 3% of the addressees of all original decisions commence court proceedings after decisions on objections.
Other types of decisions are taken in much lower quantities and depend on much more complex decision-making processes. This is the case for *e.g.* spatial planning decisions, but also for licences under environmental law. One can imagine how complex a licence for oil drilling or for a windmill park on the North Sea can be. The organizations that deliver these decisions are called "*decision workshops*". Here the filtering effect of objection proceedings is much less. We estimate that between 25 and 50% of the decisions on objections against 'workshop decisions' are probably appealed. These numbers are based on research carried out more than 10 years ago, so their accuracy today may be questionable, but that is the trend. We can conclude that pre-trial proceedings require some fine-tuning as to where they are really helpful and for what kind of decisions they can maybe be missed. This can only be done accurately based on periodic empirical evaluations.

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25 Philip M. Langbroek & Peter Rijpkema, Demands of proper administrative conduct, A research project into the *ombudsprudence* of the Dutch National Ombudsman, *Utrecht Law Review* 2006, pp. 81-98.

26 On this issue: Milan Remac & Philip Langbroek, Ombudsman's assessments of public administration conduct: between legal and good administration norms, *The NISPAcee Journal of Public Administration and Policy Special Issue: Law and Public Management Revisited* | Volume IV, No. 2, Winter 2011, pp. 87-15. For more information see <www.nationaleombudsman.nl>, accessed on 22 June 2012.

27 K.H. Sanders, *De heroverweging getoetst: een onderzoek naar het functioneren van bezwaarschrift procedures,* Deventer: Kluwer, 1999.

A serious point of attention is the deep dissatisfaction felt by most Dutch citizens with experience of objection proceedings. Some 61% value the services rendered with a 4.7 on a 1-10 scale.[28] Research by Roell shows that trust by civil servants in citizens can be considered as a decisive factor for the success or failure of establishing trust between citizens and the administration.[29] A recent report by the scientific council for government policy also advocates a more active approach by civil servants involving citizens in decision making and investing in mutual trust.[30] So far the thoughts about citizen-administration relations are much more developed than practice, and this means that there is still some way to go. However that may be, the government has taken the initiative to stimulate civil servants and citizens to take an active informal approach and to cooperate instead of hiding behind formal rules, also by starting the project: <www.prettigcontactmetdeoverheid.nl> (nice contact with public administration).

10. Conclusion

Legal protection in Dutch administrative law is focused almost entirely on decisions by the administration. The General Administrative Law Act generally makes it mandatory to follow objection proceedings before resorting to a court. A balance has been struck between the legal protection of individual rights and legality control over administrative decisions. On the one hand, the circles of interested parties have been drawn quite wide. On the other hand, the debate amongst scholars and policy makers has evolved around the theme of how to restrict standing in administrative proceedings, by discussing the relativity and Schutznorm concepts and introducing those in legislation of a temporary character. Like the possibility to voluntarily skip pre-trial proceedings if parties agree to this and to address the court directly, those changes were based on periodic evaluation research into the system of pre-trial proceedings in Dutch administrative law. From interaction between scholars and policymakers, and the periodic evaluation research, adaptations to the Dutch system of legal protection in administrative law can be expected to be the outcome of an ongoing process. The newest branch on the tree of public decision making focuses on building trust between civil services and citizens, an approach that has been propagated by the Dutch National Ombudsman during the past seven years. This approach has found support from the 'think-tank' of the Dutch Government, and from the government itself. We will have to wait for the effects of this initiative.

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28 Peter Kanne & Henrike Bijlstra, Onderzoek naar de kwaliteit van de Overheidsdienstverlening-2, tnsnipo, Amsterdam, September 2010, p. 52.

29 Emilie Röell, *Het vertrouwen van ambtenaren in burgers*, The Hague: The National Ombudsman, <www.nationaleombudsman-nieuws.nl/sites/default/files/vertrouwen_in_burgers.pdf>, accessed on 22 June 2012.

30 WRR, *Vertrouwen in burgers*, Amsterdam University Press, Amsterdam 2012. <www.wrr.nl>, accessed on 22 June 2012.

Annexes

Statistical Data

No statistical data on objection proceedings are available. However, a commonly accepted estimate is that about 15% of decisions in objection proceedings are appealed against at a court.

	Production in 2009	Production in 2011
Admin. Law divisions district courts[1]	113,550	118,510
Special tribunals[2]	8,570	8,750
Tax courts	25,180	27,330
Council of State[3]	7,879	12,111
Total	155,179	166,701

These numbers are somewhat flawed because we should only count first instance appeals and the numbers of the Central Appeals Council also contain second instance appeals. The other figures are accurate, however. Based on this assumption, the number of objection proceedings and complaints in the Netherlands in 2009 was about 850,000.[31]
Again, this is a rough estimate, also because the production of the courts is also based on cases that were filed in 2008, and 2010, respectively, and the definition of 'objection' may differ from organization to organization (*e.g.* 'decision factories' versus 'decision workshops', as for their annual reporting they are not obliged to follow GALA terminology).

National Ombudsman	2009[4]	2011[5]
complaints	12222	13519
interventions	3550	2657
Reports	295	379
Referred	6630	8177

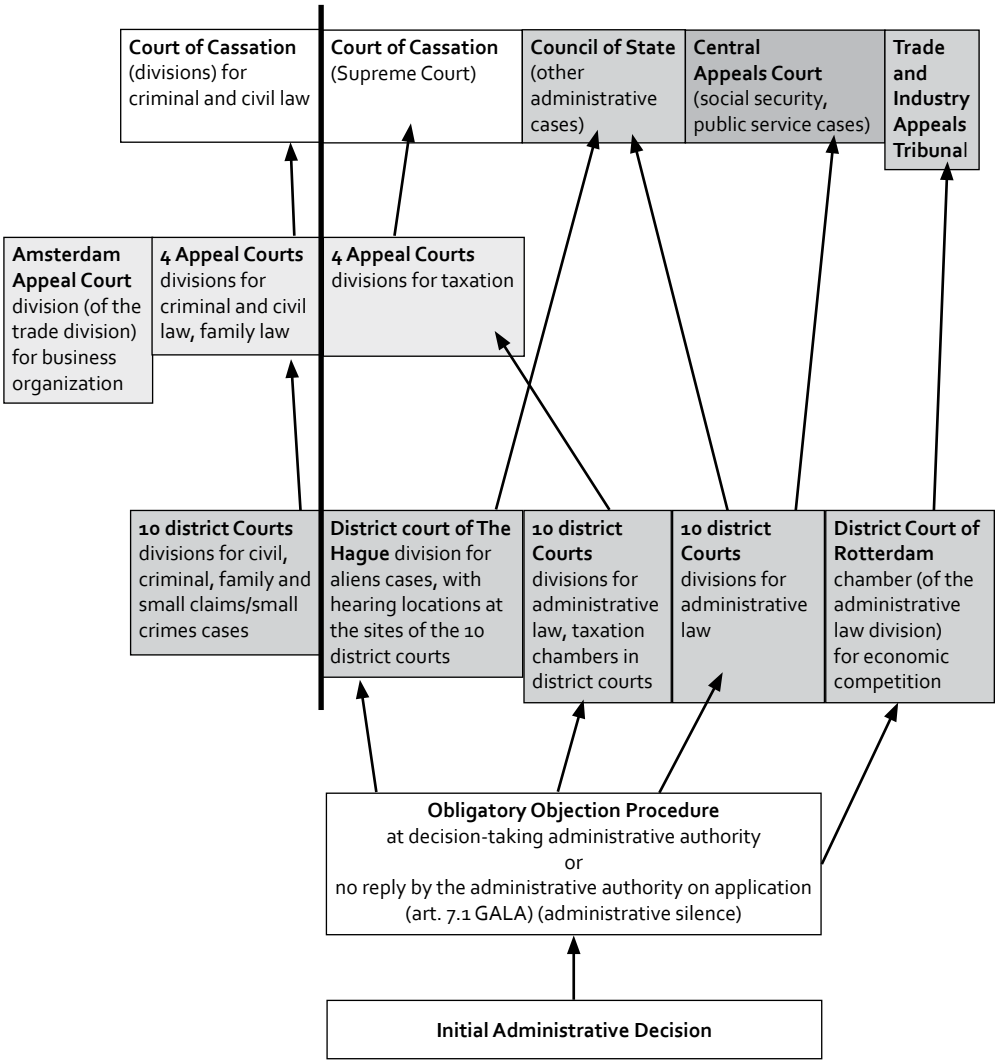
1 Sources: Jaarverslag De Rechtspraak 2009, p. 61; Jaarverslag De Rechtspraak 2011 table 5.
2 The Central Appeals Council and the Industrial Appeals Tribunal.
3 Sources: Jaarverslag Raad van State 2009, p. 264; jaarverslag Raad van State 2011, via <http://jaarverslag.raadvanstate.nl/bedrijfsvoering-cijfers/bestuursrechtspraak-in-cijfers/de-totale-in-en-uitstroom-van-zaken-in-2011/cDU140_De-totale-in-en-uitstroom-van-zaken-in-2011.aspx>, accessed on 22 June 2012.
4 Source: Jaarverslag Nationale Ombudsman 2009.
5 Source: Jaarverslag Nationale Ombudsman 2011.

31 Kanne & Bijlstra, 2010, p. 51.

Flowchart Relating to Administrative Pre-Trial Objection Proceedings and Appeals to Administrative Courts – The Netherlands

Civil and Criminal Jurisdictions, Family law included[33]

Administrative Jurisdictions[32]



Explanation:
Division = organizational part of a court (sector), Chamber = organizational part of a court division

32 The chart does not show the first and only instance competences of the three highest administrative courts.

33 The military courts as sub-units of the Oost-Nederland District Court and the Arnhem-Leeuwarden Appeal court are not included in this chart.

VI Comparative Analysis

1. Introduction

Although all countries which we included in this project have some form of prejudicial procedure, differences abound. There are many possibilities to organize an administrative review, from the highly systemized German Widerspruch to the often facultative and form-free procedures in France. Where Dutch administrative procedure has become standardized by the General Administrative Law Act, England and Wales have a relatively unsystematic patchwork of paths for legal protection against the administration. There are large differences in the obligatory character of the proceedings, in the extent to which they are regulated, and in their accessibility.[1]

What they have in common are their goals. They offer the administration the opportunity to correct its own mistakes – including the opportunity to review the merits of its decision – they offer a measure of legal protection to affected citizens and they alleviate the burden on the administrative court system. At the same time, the pre-trial proceedings should not place a disproportionate burden on the authorities that are competent to deal with them, either in terms of time or expense. These goals can conflict with each other; for example, the burden on the courts may be best alleviated by compromising on the protection of citizens' rights. The goals are best realized in different ways and often there are choices that must be made about the organization of administrative review procedures if the different goals have to be balanced. This means that there is no overarching single best practice that can be distilled from the country reports.

When designing a pre-trial procedure one can choose to give standing to a wide range of parties, in the interest of offering maximum legal protection but at

1 There are also differences in context, but they are not part of this comparative analysis. However, we try to give some indications as to how innovation in administrative law may adapt to different circumstances.

the expense of efficiency – such broad standing would after all result in a larger number of procedures that need to be dealt with. This can be balanced, for example, by obliging complainants to bring all their arguments to the fore during the administrative proceedings, and not allowing them to bring new arguments before the court. Arguably, this goes at the expense of legal protection, but it increases the efficiency of the procedure as a whole. The point is that the different goals need to be somehow balanced, as it is impossible to offer maximal legal protection and to have a highly efficient but low-cost procedure at the same time.

2. Legal Protection

An important function of prejudicial proceedings is to protect the rights of individuals, both natural and legal persons, from unjust interference by the administration. To accomplish this, the legality of administrative decisions is reviewed in prejudicial proceedings in all countries involved in this project. However, the effectiveness of the protection of individual rights is dependent on the specifics of these procedures. The three main factors of effective legal protection are:

- *Standing* (who will have the legal position to challenge a decision);
- *Procedural guarantees* that ensure that the rights of citizens are respected during the procedure; and
- *Formal and substantive requirements* placed upon participants in administrative proceedings.

Standing

In order to be able to protect their interests, individuals and organizations have to be able to challenge those decisions of administrative authorities that interfere with their rights. Those rights can only be protected in administrative proceedings if the individuals and organizations whose rights are jeopardized are allowed to participate in those proceedings. It is therefore very important to regulate the persons who can initiate pre-trial proceedings to protect their interests.

In the French facultative proceedings, the administrative authority has some discretion in this matter, as long as it stays within the boundaries set in the case law. French case law does seem to require that a plaintiff has some interest in the decision. In the obligatory proceedings, only the interested party – usually only the addressee of the decision – is involved. This does not mean that legal protection is limited to the addressees. Third parties whose interests are affected by the decision can generally go directly to court. They miss out on the expediency review that can only be conducted by the administration, but the legality of the decision can still be fully reviewed by the administrative court.

In the UK, third parties can address administrative tribunals only in as far as a statute gives them the opportunity to do so, but they can eventually go to the

ordinary courts anyway. Admission to the Administrative court is not granted automatically, however, but is dependent on having followed all possibilities of statutory review.
In the Netherlands, anyone who has a personal and direct interest in a particular decision can challenge a decision before the administrative court, and in most cases anyone who can go to court should file an objection at the original decision-making administrative authority before the court is addressed. Third parties are relatively well off, but the system is under pressure.
In Germany, the system is similar to the Dutch one; anyone who has standing before the court will have to initiate an administrative objection procedure first. The rules for standing before the court are different, though. The general rule is that a decision must affect one's personal rights. This will automatically be the case for the addressee of a decision. Third parties must not only have an interest in the decision, they must also show that the violation of this interest is the result of the administration violating a norm that aims to protect that interest. An adverse effect on one's interest is in itself not enough to give one standing. This mechanism somewhat limits the number of parties who can engage in objection procedures, and therefore also the number of procedures that will be initiated.
An interesting aspect of the German system is the power of administrative bodies to ignore the fact that an objection was filed too late. Although such a plaintiff will no longer have standing before the courts, the administrative authorities can choose to deal with the objection as usual, provided no third party interests are involved.

A pertinent question is who should have the right to appeal against an administrative decision? Strong limitations can result in unsatisfactory legal protection for interests that should be protected. A generous right to appeal can enhance the possibilities for reviewing the compliance of administrative decisions with the law, but will also lead to an increase in the number of objections filed and to an increase in expenses (time and money) for the administration.
There is no need to have a one-on-one relation between standing before the courts and standing in prejudicial procedures. For that reason, one might consider some sort of prejudicial procedure as an alternative to court proceedings for certain parties, such as interest groups (*e.g.* environmental groups, associations of shopkeepers etc.).

Suspensive Effect

If the initiation of prejudicial procedures has suspensive effect, this will prevent people's rights being harmed by implementing unlawful decisions. Therefore, from the perspective of legal protection, it would be desirable that when an objection is filed against an administrative decision, the effects of the decision are suspended. However, this is rather a rare practice. The counter-argument for

suspensive effect is that it might give rise to fake objections, which are filed with the sole purpose of delaying the implementation of an administrative decision. But if the implementation of a decision causes irreversible effects, for instance on an environment or on a building classified as a monument that should remain in its original state, suspensive effect may be desirable.
In Germany, filing an objection often still results in the impugned decision being suspended, although not as often as used to be the case. The consequences of this approach are somewhat ameliorated by the fact that the decision still has legal effect – it is only the administration that is prevented from executing it. This means that when a third party objects to the granting of a building permit, the holder of the permit can still legally start building.
In the Netherlands filing an objection has no suspensive effect, but when someone files an objection he can subsequently approach the administrative court to suspend the decision in summary proceedings. In France, administrative legal protection is organized in a similar fashion, and in Germany, if suspensive effect is not automatic, the court can be approached as well. This allows the courts to suspend the decision (and its implementation) only where this appears to be justified, *i.e.* in cases where the decision-making process showed errors, the decision appears to be ill-justified, and adverse consequences cannot be reversed. Usually a decision will no longer be suspended when it has been upheld by a first instance court. Again, this is to prevent illusory appeals, only aimed at slowing down the administrative process.

Accessibility of the Procedure

Ideally, in order to grant a maximum of legal protection, both prejudicial procedures and court procedures should be as accessible as possible, also apart from standing arrangements. If one has standing, access should be as open and easy as possible. However, that might have a negative impact on the efficiency of the procedure. Think of requirements like a fee, or the assistance of an advocate, but also the obligation for authorities to help the addressees of their decisions and actions. Again, some choices need to be made.
The costs of pre-trial procedures for complainants are generally kept low. Even so, plaintiffs can often apply for legal aid, and might have their costs refunded if their objection was successful in its entirety or partially.
In all countries the administrative authorities are obliged to give guidance to possible complainants. A decision should indicate how it can be challenged by its addressee. This means that addressees and other interested parties should be instructed where to file an objection or to initiate court proceedings. A failure to do so by the administration can lead to certain consequences. In Germany, for example, it results in a prolongation of the time limit for filing an objection.
In all countries included, an authority that receives an objection which should have been addressed to another authority is obliged to forward it to the competent

authority. Usually, filing the objection at the wrong authority should be done within the term for filing the objection anyway. Only then does the wrongfully filed objection count as timely.
If filing an objection is an easy, form-free affair, like in Germany, everyone is able to obtain legal protection. This aspect of the German system is further magnified by the fact that there is no real connection between the arguments one uses in the objection procedure and those used before the courts. One can always introduce new facts and arguments.
This is very different in France, where the objection should be accompanied by all relevant arguments and documents, and the courts will not accept new arguments, but decide based on the file formed during the objection procedure. The Dutch system is somewhere in between. Needless to say, the German authorities have a lot more work on their plate than the Dutch and the French. If there are substantive requirements for filing an objection, the use of standardized forms, like in the UK, is advisable. This will ensure that a citizen knows what points he should address in his appeal.

Rights of the Defence

If a procedure is to grant legal protection, it has to respect the rights of the defence, which enable individuals to effectuate their rights vis-à-vis the administration. This obligation is firmly enshrined in the case law of the ECtHR on Articles 6 and 13 of the ECHR. Those rights are generally accepted to have a double effect; they do not only help addressees and interested parties to defend their interests, but they also improve the quality of the decision-making process – although not necessarily its speed. In practice, defence rights may be experienced as a burden by the administration.
An important element of the rights of the defence is the right to be heard, which essentially applies when an administrative authority wants to take a decision that negatively impacts someone's interests. There is very little consensus about what this means for prejudicial procedures. In France, the objection procedure is usually conducted in writing, and oral hearings are exceptional. In Germany, the authorities will hear someone if he has new information or new arguments, or if the decision they intend to take in the objection procedure has an adverse effect on someone's interests compared to the original decision. In the Netherlands, hearing a complainant is the norm, and the administration can only deviate from this if the complaint is obviously void. In the UK, informal oral hearings before tribunals are very common. The benefits of conducting a hearing are clear. The administration will be able to check and gather new information, and the complainant will be able to express his objections and concerns in a direct and personal way. He will likely feel that he and his arguments are taken into account, and this may help enhance the acceptance of the decision even if the final decision turns out to be negative. On the other hand, hearings take some organization, and

require time and resources, which may help explain the wide variety of pre-trial proceedings we have found.
Another element of the rights of the defence is that the complainant should be granted access to the file. After all, if a complainant successfully wants to challenge an administrative decision, he must know on what legal rules the administration has based its competence, on what information the administration has based the decision, and how different interests have been balanced. In France, for example, this is effectuated by granting a right to complainants to respond to all arguments and evidence brought to the fore by the administration. However, there may be good reasons to keep certain information confidential, like general interests such as public safety, or third party interests, as is the case for business secrets in public procurement procedures. The solution is usually that there is a general right to access the file, but that the administration can balance this against other interests, especially if this concerns information which is relevant for the investigation of illegal acts that can lead to imposing administrative sanctions, or if the information concerns confidential business processes, for instance information on an enterprise that applied for a licence under environmental law. The courts can review this decision.

Using legal counsel is not obligatory in pre-trial proceedings, but it is allowed. Usually, some sort of financial compensation is available, at least when the plaintiff is successful. One could argue that legal assistance is more essential to achieve effective legal protection in strict systems, like in France, than in lenient ones, like Germany. After all, it may be sensible to require interested parties to use legal counsel when the way in which they conduct the prejudicial procedure determines their chances of success in the proceedings before the court. Alternatively, hiring legal counsel could be stimulated by being more generous with the granting of legal aid, or other financial compensation. However, our findings do not support that such a link exists. Complainants in prejudicial proceedings need to accept that they are responsible for coping with certain juridical risks, by hiring or not hiring legal counsel. A question that can be asked here is if and how such juridification contributes to open and service-oriented relations between the administration and citizens. In all countries in our sample developing the "helping hand" of the administration for the citizen is under consideration. But it may take years to change the mentality of civil servants so that they actually engage in interactions with citizens based on mutual trust, instead of using procedural rules to protect themselves against mistakes and possible sanctions.

3. Self-Correction

Prejudicial proceedings offer administrative authorities the opportunity to correct their own errors. Providing the administration with this opportunity can prevent unnecessary court cases from being filed. This will save both the administration

and the citizens' time and money, and it allows the administration to learn from its errors, and thereby improve its future decisions. If an administrative authority shows that it is willing to correct its own errors, this may also improve citizens' trust that subsequent decisions will be the result of unbiased decision-making processes. In the long term, providing generous opportunities for self-correction might therefore lead to an increase in trust in the administration. Unfortunately, it is hard to measure such an effect, as confidence in the administration is also connected to other factors.[2] However, it is possible to conduct user-satisfaction surveys amongst complainants in prejudicial proceedings. This will provide administrative authorities with feedback on their performance by participants in prejudicial proceedings. If necessary, they can adapt the way in which these proceedings are conducted.

In France, the opportunities for self-correction are relatively limited. The facultative procedure leaves it to the interested parties to decide whom to appeal to. If they choose to file an objection with the administrative authority that took the initial decision, they allow that authority to correct its errors. However, they can also opt to file their objection with a higher authority, or approach the administrative court directly.

If there is an obligatory objection procedure, the applicable legislation determines the authority that has to be addressed. In the majority of cases, this is an authority of a different body from the one that took the initial decision, and the control function appears to be more important than the opportunity to correct errors internally. This procedure has the benefit of offering the possibility of a speedy, low-cost solution to conflicts between the administration and its constituents.

In the UK the procedure before the administrative tribunal does not offer much opportunity for self-correction. After all, the goal of the pre-trial procedure is to provide simpler, speedier, cheaper, relatively informal, and more accessible justice. The procedure before the tribunals is more a pseudo-court than an administrative review, but with the difference that, depending on the relevant legislation stating the competence of the tribunal, a tribunal does not need to restrict itself to quashing a decision of the administration but can also replace it. Furthermore, the tribunals do have the option to correct their own decisions. In addition, the less-regulated internal administrative review procedures do offer the administration the possibility to correct its own decisions.

In Germany, on the other hand, the authority that took the initial decision is always given the opportunity to review its own decision. If a plaintiff files an objection with the higher administrative body designated as the Widerspruchsbehörde, this will have no impact on his rights. However, the Widerspruchsbehörde cannot yet review the decision. Instead, it is obliged to send it on to the authority

2 See for example S. van de Walle, Confidence in the civil service: An international comparison, in K. Schedler, & I. Proeller (eds.), *Cultural aspects of public management reforms*. Amsterdam: Elsevier, 2007, pp. 171-201.

that took the initial decision, to allow it to correct any mistakes it might have made. If it feels its decision was correct, it has to send the objection back to the Widerspruchsbehörde, which will review the decision in full.
The initial decision-maker always has a second chance, but not at the cost of an impartial review by a higher authority. Of course, this does potentially lengthen administrative proceedings.

In the Netherlands the objection is always filed with the authority that took the initial decision, allowing the Dutch administrative authorities plenty of room to correct their mistakes, and learn from them for the future. Unlike the German system, there is usually no higher administrative authority that will review the case when the original authority does not agree with the objection. The Dutch procedure has fewer steps than the German one. It is potentially more time-efficient, but in general does not offer higher administrative authorities the opportunity to control the decisions of lower authorities (*e.g.* ministers, provinces, municipalities, water boards). Earlier evaluation research has shown that objection proceedings follow a juridical approach; later developments show more attention for problem solving.

In the Netherlands and Germany, administrative authorities are given an opportunity to correct their errors even after the procedure before the court has started. The rationale is that it is better to have them correct their decisions during the procedure, so that there will be a final decision at the end of it, than to punish them for their errors by quashing a decision and forcing them to take a new decision. This enhances final conflict resolution in administrative proceedings because only quashing the contested decision has as a consequence that the administrative authority takes a new decision *after* the court proceedings. This new decision would again be subject to an appeal, and this might lengthen the procedure considerably.
Usually, the relation between administrative courts and administrative authorities is governed by the constitutional principle of separation of powers. This limits the possibilities to give courts the competence to replace administrative decisions with their own. Giving administrative authorities the competence to correct a decision challenged in court is a way to enhance the efficiency of legal protection in relations between citizens and the administration. It enhances final conflict resolution.

In all jurisdictions the decision taken at the end of the objection procedure must be well reasoned and communicated to the complainant. This means that the administrative authority is given another opportunity to explain the reasons behind its decision, but it also enables the citizen who files and objection or complaint to actually challenge such a decision elsewhere – possibly in court. Giving elaborated reasons for a decision on objections is constitutive for the defence rights of citizens and businesses with an interest in that decision.

4. Law Enforcement

Prejudicial procedures also serve to improve the legal quality of decisions and thus they contribute to legal certainty and the predictability of administrative decision making. To this end, the competent authorities will always review the legality of a decision during the pre-trial procedure. In Germany, the additional review by the Widerspruchsbehörde is considered particularly important to achieve this. As the Widerspruchsbehörden usually employ experienced lawyers, their decisions will be of a high legal quality, comparable to that of the courts. The Dutch system allows for advice by external committees, and administrative authorities use these very often. Many members of those committees are legal professionals. The British administrative tribunals have a clear focus on legal aspects rather than policy aspects and score highly in this respect as well, even though the internal redress procedure precedes the appeal to tribunals. The accessibility of the tribunals stimulates administrative authorities to reconsider their decisions from a legal point of view, even though internal redress is within the discretion of the administrative authority. So far there are similarities with the French recours gracieux. Even so, in France, the situation is highly dependent on the applicable procedure. When there is a compulsory objection procedure, the competent authority will often be a specialized body, and in those cases the legal quality of its decision is likely to be high.
However, a strong focus on the legality of the decision might lead to the formalization of the pre-trial procedure, and friendly conflict resolution might become difficult. In the German system, this problem is alleviated by the two-tier system of the Widerspruch procedure. In France, the voluntary nature of many objection procedures could have a similar effect. If a citizen has faith that the administrative authority that took the initial decision will listen to his complaint, he can approach that authority. If he feels that the authority is just simply wrong, he can file his objection with a superior authority instead. In most other countries, there are alternative dispute resolution mechanisms, such as ombudsmen or mediation, which focus on an amicable resolution of conflicts. In the Netherlands, administrative authorities try to develop conflict-solving methods in decision-making processes and objection proceedings, in order to avoid court proceedings.

A second option to improve the legal quality of administrative decisions is to grant the right to challenge them to a larger group of persons. In the Netherlands, this is achieved by granting standing to interest groups in cases where the interests they defend are at stake. In Germany there is a similar option, although only for environmental organizations in the defence of environmental interests. In France, this is usually not an option, unless an administrative authority grants such a right in a facultative objection procedure, taking into account the relevant case law. In the UK, one needs to have a sufficient interest to go to court, and usually only the addressees of a decision can approach a tribunal.

The problem with granting standing to interest groups is that it will increase the number of procedures. It also carries the danger that the courts will be confronted with what is essentially a political struggle. However, this is an effect of the relation between court proceedings and the objection procedure in terms of standing that exists in the Netherlands and Germany. As objection procedures are a suitable forum to review the policy aspects of a decision, there is no reason to exclude interest groups from objection procedures. Denying them standing in court would suffice to keep political discussions out of court. Even so this also is a point of consideration, as interest groups can bring a lot of knowledge and experience into the decision making process and into court proceedings.

So who should decide on the objection? If this is the same authority that took the initial decision, the possibilities for self-correction are best. If the emphasis is on administrative control by a higher administrative body, it makes sense to file objections there. The inclusion of trained lawyers in a committee that decides on objections will help to achieve a high level of legal quality, but may be to the detriment of achieving conflict resolution. Combinations of self-correction and external control are possible, like in Germany, but they may delay proceedings.

5. Timeliness and Efficiency

Article 6 of the ECHR requires that cases do not linger on forever. This is not only in the interest of the addressee of a decision, but also brings certainty for the administrative authorities and any third parties. So, although thorough pre-trial proceedings may result in high-quality decisions, their thoroughness might lead to long procedures, and thus can be undesirable as well.

Pre-trial proceedings can resolve many conflicts, and thus prevent many court cases from being filed, but if they do not lead to a resolution of the conflict, they will mostly just prolong the proceedings. Even in those cases, though, they do have some function, because the courts will receive an elaborate file specifying what the case before them is all about and what arguments have already been exchanged. This file-building function is best served by conducting the procedure in writing, like in France. In case of an oral hearing, minutes should be taken.
However, when the possibilities for a successful conflict resolution are slim or non-existent, it might be better to skip the objection procedure entirely. Those jurisdictions where pre-trial procedures are compulsory do offer this option. In Germany there is no obligatory Widerspruch procedure for the decisions of high authorities, which are deemed to be sufficiently thoroughly prepared. Likewise, if the so-called special administrative preparation procedure has been followed, the preparation for the decision is deemed to have been so thorough that there is no need for a 'second chance'.

In the Netherlands there are also a number of exceptions to the general obligation to file an objection before going to court. There is no such obligation when the elaborated procedure has been followed, and the obligation to file an objection can be waived by the administrative authority if it deems it unlikely that an objection procedure will resolve anything.
In France, the objection procedure is usually voluntary, so the problem is less pressing. However, unlike in Germany, when a complainant voluntarily files an objection, the period within which he has to go to court will stop running. Even voluntary procedures can cause a delay. The French system appears to counter the delaying effect of the objection procedure by limiting the options available to a plaintiff before the administrative court. When he has used a compulsory objection procedure before going to court, he cannot change his claim, and he cannot raise new issues before the court. It is unclear whether this also holds true if he has followed a facultative objection procedure.
In general, pre-trial proceedings can be skipped for complex administrative decisions which have been prepared using special procedures that guarantee that the views of interested parties are already taken into account. Such cases will be resolved in pre-trial proceedings only rarely. For other cases, it is probably the parties themselves that are best suited to determine whether pre-trial proceedings are likely to lead to a satisfactory outcome. The Dutch system, in which pre-trial proceedings can be skipped if the parties agree to this, is based on this idea. Alternatively, empirical evaluation research into the effectiveness of pre-trial proceedings can be used to determine which categories of decisions should be exempted from (obligatory) pre-trial proceedings.

Similarly, the duration of proceedings can be limited if the administration is allowed to skip steps in the procedure that it deems to be unnecessary. The organization of a hearing is often optional in objection proceedings. Although the data on England and Wales show that it is usually not in the interest of the applicant to skip the hearing, this problem can be remedied if the administrative court can subsequently review whether it was justified in dispensing with the hearing.

Another way to limit the total length of proceedings is to set time limits for both complainants and administrative bodies within which they have to undertake certain actions. This will only have the desired effect if there is some way to force them to adhere to those limits. For complainants, this is not a problem. If they are too late with their objection, the administrative authorities are usually at liberty to ignore their complaint, or they may even be obliged to do so, *e.g.* because third party interests are at stake. If a complainant fails to meet a time limit, but there are weighty reasons to respond anyway, the administrative authority can or should often do so. This shows that, usually, efficiency considerations cannot trump the interests of legal protection and good administration.

There is no easy way to force the administration to adhere to the time limits that have been set. In most countries, if the administration does not respond to an objection, after a set period of time the complainant can file his case with the court. This might not be sufficient, though. In the Netherlands, recent legislation imposes a fine upon administrative authorities who exceed the time limit set for responding to an objection. Because of its recent introduction, it is difficult to say what the effects are.

The timeliness and efficiency of procedures can also be increased by limiting the arguments a plaintiff can raise before the court. In France, and to a limited extent in the Netherlands, a plaintiff can use arguments on appeal only if he has relied on them in the objection procedure as well. This will limit the scope of the case before the court and will probably shorten the total length of the proceedings. The disadvantage of this system is that people will often not have legal representation during pre-trial proceedings and may make errors that cause them to be unable to effectively defend their rights before the courts at a later stage.

In theory, it would be convenient if the courts had the power to end a procedure by taking a final decision in the case brought before them. However, this is only possible in exceptional circumstances in France, the UK and the Netherlands. In Germany, court competences depend on the type of complaint that was filed; declaratory decisions and obligations for administrative authorities to take a certain decision are possible. Also here, the separation of powers prohibits the courts from taking over responsibility from the administration. The reason behind this is that the administration usually exercises discretionary powers, and there are several decisions they can take that comply with the law. It is not for the courts to determine which of those decisions should be taken. In jurisdictions where the courts can replace the decision of the administration with their own, they can only do this when there is only one decision that is legal, or when the administration informs the court of the decision it would take if it were to take the decision itself. Usually, the administration will have to take a new decision, which will again be liable to an objection or appeal.
Alternatively, the court can allow the administration to change its decision during the court proceedings. This will also lead to there being a final decision upon the conclusion of the proceedings before the court, while still giving interested parties the opportunity to comment thereon and the court to review it.
Most pre-trial procedures also have some sort of safeguard to prevent them from being abused. Such procedures should allow people to defend their legitimate interests, but they should not be allowed to use them for the sole purpose of delaying administrative procedures, or averting the course of justice.
One way to avoid this is to have the complainant bear the costs of the procedure in the case of obviously ill-founded objections, as is the case in Germany. Another

option is to deny suspensive effect to filing an objection or an appeal in such cases. Finally, an insincere litigant might be liable for damages.

One may wonder whether it is better to have a uniform general procedure, like in Germany and the Netherlands, or to have many procedures tailored to a specific type of decision, like in France and the UK. The latter allows the procedure to be tailored to the nature of the decision, whereas the former is more desirable in terms of legal certainty and transparency.[3] Note, however, that in the countries where there is a uniform procedure, there is still some flexibility in the design of that procedure, the time limits that apply, and even whether the objection procedure needs to be followed. It is often left to the administrative body to determine the specifics of the procedure. An example from Dutch law would be that it is up to the administration to decide whether a hearing should be conducted, whether to extend the time limit for responding to an objection, and even to decide that the objection procedure can be dispensed with.

6. Auxiliary Roles of Ombudsmen

Ombudsmen fulfil an important auxiliary role in the relation between citizens and the administration. It should be noted that they are not courts, but function in the countries in our sample as a mediating third part in relations between citizens and the administration They offer an accessible possibility to get a helping hand when seeking redress for (alleged) administrative wrongs. Ombudsman reports are the outcome of an investigation, often, but not always, based on a complaint about the behaviour of a civil servant or of an administrative authority.
The outcome of the investigation results in recommendations for the administrative authority. They always have only an advisory character. Ombudsmen do not need to stick to the legal description of the cases as they use different concepts to assess administrative behaviour, *e.g.* the concept of fairness, good administration norms or équité to assess administrative behaviour.
Because ombudsmen base their evaluations of complaints and administrative conduct not only on law but also on norms of administrative propriety, they can become moral authorities. They do not act as inferior courts and they cannot compel the administrative authorities within their competence to follow their recommendations. However, following the well reasoned advice of ombudsmen is a matter of good administration. The fact that a large number of ombudsman reports are followed up by the administrative authorities in Western Europe shows that they fulfil an important intermediary role between the administration and citizens, next to the lines of legal protection for citizens against the administration. The most outstanding difference between ombudsmen and the courts is that an ombudsman cannot take any binding decisions, whereas it is a characteristic of

3 Although for lecturers in administrative law, it could be more difficult.

the courts that they can impose such a decision. Nevertheless, ombudsmen are an easily accessible and cheap alternative to (administrative) court proceedings. Their main concern usually lies outside the legality review in the sphere of good administration review or good governance review. Ombudsmen can offer citizens a helping hand when they have somehow become lost in governmental bureaucracy. The effectiveness of ombudsmen depends on their abilities to persuade administrative authorities to help solve the problems of citizens. Their actions are bound by the law, but because the result of ombudsmen interventions is not legally binding, their actions are not restricted by the separation of powers as strictly as courts and judges are, and therefore they are also much more flexible. If necessary they can take personal and policy considerations into account. The ombudsmen in our sample of countries have become quite an effective form of redress for individuals against the administration. On the one hand, they are successful in keeping some citizens out of the courts, because they often offer real-life solutions that cannot be reached by court proceedings. On the other hand, they can positively influence the practices of the administration. While doing so, they try to maintain a good working relationship with administrative authorities, so that these can react on the recommendations of the ombudsman and when necessary change the way they deal with particular problems. In that sense, ombudsmen also contribute to the quality management of administrative bodies and to their legitimacy and the acceptance of their actions by the citizens.

7. Intentions and Effects: The Need for a Periodic Evaluation

Based on the limited sources we could find and use concerning administrative pre-trial proceedings in Germany, the Netherlands, France and England and Wales, pre-trial proceedings need monitoring and maintenance. If pre-trial proceedings are considered to be proceedings which give addressed citizens and third parties a fair opportunity to have their grievances redressed and seriously considered by the administrative authority that took the contested decision, there is a good chance that the simplest cases, in the largest numbers, are kept out of court. This may be different for more complicated decisions. But here also the rule is that if parties can be convinced that the hearing and decision making in pre-trial proceedings are fair and open, they may refrain from going to court with their case. In the end that is up to them.

It takes integrity and diligence, but also good and responsible administrators to make this work. If people do not trust their administration, they may choose to go to court anyway. Efforts to improve open and trust-based interactions between citizens and the administration have been developed everywhere, and, when effective, will contribute to preventing conflicts from arising even before decisions to act have been taken. Here, monitoring and evaluation, the inventorying of best practices etcetera are necessary. That also applies to administrative pre-trial proceedings, complaint handling, and even to court proceedings, in different

areas of government activity. Decision making and conflict resolution in relations between the government and citizens can thus become a mutual learning experience.

Comparative Table

		France	Germany	The Netherlands	The United Kingdom
1.	**Facultative pre-trial admin. proceedings (PTAP)**	Yes	Yes, in exceptional cases	No	Yes
2.	**Obligatory PTAP**	Yes, in prescribed cases	Yes, but with exceptions	Yes, but with exceptions	Yes
3.	**Objection to the author of the decision**	Yes	Yes	Yes	Yes
4.	**Objection to the superior admin. Body**	Yes	Automatic if the author does not agree with the objection	Yes, but very rarely	Tribunal
5.	**Objection to other body (committee, council, etc.)**	Yes, in prescribed cases	No	Rarely	Yes, in prescribed cases
6.	**Right to file objections**	Person affected by the decision, right of third persons is limited	Person affected by the decision, parties whose interests are protected by the norms the administration has violated	Person affected by the decision, parties with direct interest, organizations that specifically promote an interest affected by the decision	Person affected by the decision; third parties can file their case at a court.
7.	**General time limit to start the PTAP**	2 months since the notification of the decision of the admin. body	1 month	6 weeks	21 days
8.	**Time limits for the admin. Body**	2 months, or see lex specialis	3 months	Either 6 or 18 weeks, prolongation possible	Depending on statute or practice rules
9.	**Suspensive effect of the PTAP**	No	In general not, but there are countless exceptions. If suspensive effect is not automatic, a complainant can start summary proceedings, or ask the admin authority to suspend the decision.	No, but a complainant can ask for it in summary proceedings	Unknown

		France	Germany	The Netherlands	The United Kingdom
10.	**Self-correction by admin. body**	Sometimes, if an objection is filed with the author of the decision.	Yes, all objections are handled by the authority that took the initial decision first.	Yes, all objections are handled by the authority that took the initial decision.	Yes, if the optional internal review procedure is used
11.	**Type of proceedings**	Mostly written	Mostly written	Mostly written	Oral or written
12.	**Oral hearings**	If the admin. body considers it necessary and if the legal act so requires	Only if there was no earlier hearing, or if new circumstances or arguments have emerged.	Yes, unless there are reasons why a hearing is not necessary.	If the admin. body considers it necessary, if the party to the proceedings requires it or if the legal act so requires
13.	**Administrative fee**	No	No	No	No
14.	**Representation during the PTAP**	Facultative	Facultative	Facultative	Facultative
15.	**Exclusivity of PTAP**	No in the case of facultative PTAP, Yes in the case of obligatory PTAP	Yes	Yes	Yes
16.	**Prohibition of reformatio in peius**	Yes	No	Yes, but third party objections can lead to the addressee of a decision being worse off.	No
17.	**The PTAP are in general terms described in legal act**	No	Yes	Yes	No
18.	**Existence of National Ombudsman**	Yes	No	Yes	Yes

VII Designing Administrative Pre-Trial Proceedings: Choices

1. Introduction

Before describing the choices to be made in the design of formal pre-trial proceedings, we want to stress the importance of transparency in the functioning of the administration and its accessibility for all citizens. This requires intelligence and flexibility on the part of those persons working in public administration and, of course, integrity. Street-level civil servants sometimes have a tough job, and may therefore be inclined to engage in formal behaviour to protect themselves from difficult conversations. For policymakers and civil servants it is also important to gain support from different kinds of communities, to be open to the wishes and requests of citizens. Where public decision making often places civil servants and policymakers in the position of a disinterested third party, they have to be prepared to negotiate and actively search for solutions that make life bearable also even for contesting parties.
If a citizen files and objection or a complaint, something has gone amiss that might have been prevented with an informal attitude. Even though administrative decision making is also part of a state's tasks of creating and maintaining order, there is often sufficient legal flexibility for open interactions between citizens and the administration.[1]

The design described in this chapter focuses on how public administration proceedings may be designed to deal with situations that have gone wrong. In a way, the design is focused on creating fair outcomes and, if necessary, redressing situations where the civil service has made mistakes.

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1 As is also the point of departure of the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority, see: <http://conventions.coe.int/Treaty/en/Treaties/html/207.htm>, accessed on 22 June 2012. Public participation in administrative decision making is also regarded as a right: H. Addink, Gordon Anthony, Antoine Buyse & Cees Flinterman (eds.), *Human Rights & Good Governance*, SIM Special No. 34, Utrecht, 2010, pp. 64-76.

Although it is impossible to distill a single best practice from the findings in the country reports and the comparative analysis, it is possible to discern certain points that require attention when designing administrative pre-trial proceedings. There are a number of concerns that arise in all countries, and although there are different methods to address them, the fact that they must be addressed still remains. These issues concern questions of:
- general design;
- the organization of proceedings;
- the rights of complainants; and
- decision-making competences of administrative courts.

It is inevitable that certain choices have to be made. We discuss the most important choices in the following pages.

2. General Design of Administrative Pre-Trial Proceedings

The first set of issues is related to the *general design* of the system of pre-trial proceedings. Should there be legislation on pre-trial procedures? Should there be a uniform procedure? When should such a procedure be obligatory? Which acts of the administration should be challengeable?

Our first concern is the *codification* of pre-trial procedures. Should there be legislation that prescribes if and when there should be a pre-trial procedure, and how it should be conducted, or can such matters be left to the administrative authorities?
The advantages of codification in terms of legal certainty are obvious, and in most cases there is indeed legislation on pre-trial procedures. However, the voluntary objection proceedings in France have remained unregulated to this day. This theoretically allows the French administrative authorities unlimited freedom to organize these proceedings in a way they think is most effective. Unfortunately, if pre-trial proceedings are not regulated in legislation, the courts will be forced to set the boundaries within which the various administrative organs are allowed to organize their own pre-trial proceedings. They will do this on a case by case basis, and for a general overview one usually has to rely on the work of scholars and on specific information provided by administrative authorities. In Europe, such proceedings have to comply with the requirements of international law, mainly Article 6 ECHR, also regarding the demands of timeliness. As has happened in France, this will result in rules which have been developed in case law. These rules will be less accessible than similar rules contained in legislation, while still restricting the manoeuvrability of the administration in their application.

The second choice that must be made is whether to adopt a uniform procedure for all administrative authorities and decisions, or to have a variety of specific

procedures for different kinds of decisions. The first option ensures a high degree of transparency and legal certainty, while the second allows for the tailoring of the pre-trial procedure to specific categories of competences (for example, licensing and social insurance benefits like pensions, or sanctions by a competition authority) and circumstances.
Even if there is a uniform procedure it will be possible to adapt to the demands set by specific decision-making processes. This can be done in two ways. First, the uniform procedure can leave certain matters to the discretion of the administration. In this case, it will merely provide a framework for the procedure. There will be some requirements, but a number of aspects of the organization of the procedure in a specific case will be left to the discretion of the administration. Second, even if there is a uniform procedure, the legislator can enact specific legislation that deviates from the general act as specific rules in legislation rank higher than general rules. Both options will diminish the legal certainty and transparency resulting from having a uniform act: an increase in flexibility will come at a cost. It is also possible to have different procedures for specific types of decisions, like those that are produced in large numbers (*e.g.* tax decisions, social benefit decisions), and those that are crafted on a case by case basis (*e.g.* environmental licences). This may result in more efficiency because the pre-trial procedure will better fit the case at hand.

The third question that must be addressed is whether pre-trial procedures should be *obligatory* for all kinds of actions by administrative authorities, before parties are allowed to appeal to an administrative court. The underlying issue here is whether pre-trial procedures are helpful to solve conflicts and who is the most suitable to determine whether they are. Ideally, after monitoring and empirical analysis, the legislator or the administration will decide if pre-trial procedures are likely to contribute to conflict resolution or not, and then make them compulsory in those cases where they are. The applicable legislation can create the option for the administration to dispense with pre-trial proceedings in particular situations where they do not appear to solve conflicts, and the case could just as well be filed at a court immediately.

In the case of *voluntary pre-trial proceedings* in France, the procedure is considered to be a right for citizens. Here, the option to skip proceedings has little to do with the effectiveness of the procedure. Quite to the contrary, since the compulsory procedure is still the exception, the right to voluntarily file an objection ensures that complainants always have a cheap alternative to court proceedings. Of course, if they expect no solution from pre-trial proceedings, they can decide to skip the pre-trial proceedings, but that is up to the complainants to decide. In this respect it can make a difference if citizens and the administration interact on the basis of mutual trust.

A question related to the obligatory or voluntary character of administrative pre-trial proceedings concerns the question of who has standing and what type of arguments parties should present in order to defend their interests. This question will be dealt with below in the section on the *rights of complainants*.

Another issue to consider is the question whether only parties that have the right to appeal to an administrative court will have access to administrative pre-trial proceedings or also parties that do not have such a right. Defending such interests relates primarily to the work of democratically elected office holders and not to the authority that offers the floor to participants in objection proceedings. When allowing subjects other than those with a direct interest to participate in administrative pre-trial proceedings, the chances are high that such proceedings will become a political platform for defending wider societal interests than the interests that are closely related to the decision that is being challenged. This may not always be desirable. For decisions where these interests are already taken into account in the legislation on which they are based upon, a repetitive debate during pre-trial proceedings will add little. However, if the administration has a great deal of discretion when taking its decision, there is little need to limit the debate during the pre-trial procedure.

A further choice to be made relates to *the purpose of the proceedings for administrative legal protection*. The choice is about what the most important function of administrative and judicial control of administrative action is: offering *legal protection to individual interests* or controlling the actions and decisions of administrative authorities with a view to the general interest (*objective law enforcement*)? In most practices, of course, those purposes are somehow combined. The choice relating to the purpose of administrative proceedings has two consequences. The first consequence concerns the type of arguments that can be raised by complainants. Unrestricted argumentation possibilities in legal proceedings fit better with a choice for general control as a purpose in legal proceedings, and restricted argumentation possibilities fit better with individual legal protection as a purpose of legal proceedings. Because the Schutznorm restricts possible argumentation to the purpose of the legislation the contested act or decision was based upon, it fits best with a choice for individual legal protection. The second consequence concerns the choice of who will have standing in pre-trial and court proceedings. If legal protection aims predominantly at control over administrative authorities in the general interest, this purpose is best served with easy access for parties with quite different interests and which are possibly distant from the act or decision of the authority. But the choice for legal protection that aims predominantly at protecting the (subjective) legal interests of complainants requires the restriction of the circles of interested parties that can participate in administrative pre-trial proceedings. Furthermore, objective law enforcement can also be served by filing the objections at a higher administrative authority.

Finally, it must be decided *what kind of administrative acts can be challenged*. Usually, most specific legal acts can be challenged. General rules are usually excluded from pre-trial procedures. In addition, since, in many systems, claims for damages resulting from administrative acts and claims concerning administrative contracts are adjudicated by the civil courts, they are also excluded from pre-trial proceedings.

3. Organization of the Procedure

The next set of issues is related to the *organization of the procedure*. Which authority should be competent to decide in pre-trial proceedings, what administrative acts can be challenged, how the hearings should be organized, what time limits should be set, and how the costs of the procedure must be dealt with? The organization of the proceedings should guarantee a fair procedure for the complainant, and comply with the *prohibition of bias*, which means that many organizational details should aim to prevent such bias on the side of the administrative authority that decides on the objection.

The first question, of course, is the following: which is the *competent administrative authority*? There are three basic choices: the authority that took the initial decision, its hierarchical superior authority, or some external body. The first option is desirable from the point of view of administrative self-correction and learning, but there is a risk that the authority will appear biased – especially if it stands by its original decision. This can be countered by enacting strict procedural rules on who can be involved in the decision-making in the pre-trial procedure, and maybe even more about who cannot be involved. The option of an external body has the advantage that the decision-maker in the pre-trial procedure is fairly distant from the original decision-maker, but it fails to offer the option of self-correction. This third option is similar to the English tribunal system, and the administrative tribunals are increasingly looking like courts. The second option is somewhere in the middle and has the additional benefit of enhancing hierarchical administrative control. This option also better fits the aim of objective law enforcement by hierarchical superior administrative bodies and by the courts.

All legal systems set *time limits* within which objections have to be filed. Likewise, there are time limits for the administration that determine when it should respond to an objection. The actual length of these limits varies between countries and procedures, but their existence is crucial. When complainants exceed these limits they lose their rights, but the administrative authority usually has some options to rectify this failure and conduct the proceedings anyway, provided that third party interests are taken into consideration.
It is more difficult to enforce time limits imposed on the administration. The usual solution is to allow complainants to file their case with the administrative court

if the administrative authority fails to respond to their objection. However, in the Netherlands an administrative authority that exceeds the time limits will be liable to pay a fine.

There appears to be a strong preference for predominantly *written* pre-trial proceedings. Indeed, there are considerable advantages to this approach. If the case goes to court, there will be a written file, which will allow the court to review how the pre-trial procedure was conducted, and this file will provide a comprehensive picture of what the conflict is all about. This will ensure that even if the objection procedure does not lead to a satisfactory solution, it will speed up the proceedings before the court. On the other hand, it is also beneficial to include an *oral* hearing in the procedure. This will help to communicate to the complainant that he or she is being taken seriously, and – as was found in empirical studies in the UK – it has a large impact on the outcome of the procedure. If a complainant has been given an oral hearing, he or she is much more likely to sway the administration. From the point of view of protecting individual rights, an oral hearing is highly desirable. Of course, written pre-trial proceedings are less accessible for ordinary people. One can also imagine that the administration offers complainants who cannot afford a lawyer a helping hand by writing a complaint report based on the oral presentation of their complaint – or that this is made mandatory in the legislation on procedural rules.

That does not mean that *oral hearings* should be mandatory in all cases; in fact, there is no country where such a requirement exists. Usually, it is left to the administrative authority to determine whether a hearing is necessary, with the applicable legislation offering criteria for the decision. Again, to avoid any appearance of bias, it is necessary to pay some attention to who conducts the hearing. This should be someone who was not involved in the original decision making. The legislator can choose to set additional requirements with regard to his or her professionalism and impartiality.

Finally, the *costs of the procedure* must be considered. There is *no fee* that has to be paid to initiate pre-trial proceedings anywhere. That would be at odds with the purpose of the pre-trial procedure as an easily accessible way for conflict resolution prior to court proceedings. Other costs for complainants can consist of costs in hiring expertise to support their case as regards its content (for instance a medical examination, or an environmental impact report) and the costs of legal counsel.
A first choice to be made concerns the following question: should complainants be reimbursed for their costs? In many simple cases the costs will be very low, but in more complicated cases, such costs may be very high. If the legislator does not decide on this issue, complainants will not have the costs refunded, even if they are proved to be right. If they are proved to be right and incur real costs, they may even consider going to court to have their real costs refunded anyway. Therefore,

making some arrangement is advisable. Costs can be compensated in total or in part, based on a fixed compensation scheme. We do not advise that complainants should compensate the costs of the administration if their complaint is rejected. That would imply a financial interest on the part of the administrative authority in rejecting the complaint, and therefore possibly raise questions relating to appearances of bias. People will be discouraged from filing objections with the sole purpose of delaying the decision-making process, but some sincere complainants may also be deterred due to a fear of having to pay those costs. The latter consideration may be mitigated by allowing the courts to decide on the costs for the participants in administrative pre-trial proceedings.

4. Rights of Complainants

The third set of questions is concerned with the *rights of complainants*. After all, pre-trial proceedings should provide people with an easily accessible way to defend their rights in their relation with the administration. The procedure should be organized in such a way that complainants are given this opportunity.
The first question that needs to be addressed is who will have *standing* to file an objection. To realize the goal mentioned above, only those parties whose rights are affected should be able to challenge a decision. This always includes the addressee and third parties. Third parties need to show that their specific personal interests are affected.

An option to limit the number of parties that can effectively participate in the pre-trial proceedings is to introduce a 'Schutznorm', that is a norm of protection relative to the interest protected by the legislation on which the contested decision is based. Under this limitation, a third party can only file an objection if it is adversely affected because the administration has violated a norm which aims to protect its rights. This means that *e.g.* an economic competitor cannot appeal against a decision based on legislation aiming solely at promoting public health, or safe building construction, in order to defend his economic interests. Such a choice would also increase the juridical complexity of pre-trial proceedings, and a relevant question is whether administrative authorities are able to deal with these complexities adequately. On the other hand, standing in pre-trial proceedings can also be broadened by including organizations that promote a public interest. This stimulates public interests being brought to the attention of the administration in pre-trial proceedings, and this may help to improve the quality of decisions. However, it also carries the risk that political debates are brought to the courtroom, and that the number of procedures increases. As mentioned above, choices on standing are related to the aim of administrative legal protection procedures in general. If the choice is that administrative bodies should be controlled by higher administrative bodies or by the courts, objective law enforcement is best served by giving standing in administrative pre-trial proceedings and in court

proceedings to a larger group of interested parties. If the choice is made that court proceedings and administrative pre-trial proceedings primarily concern the legal protection of individuals and that the courts have no other role in controlling the administration, standing in pre-trial proceedings can be restricted to parties who have a direct or personal or individual interest in the contested action or decision of the administrative authority at hand. Of course, this choice is also related to the legislator's evaluation of the capacities and integrity of administrative authorities in a country. More control implies less confidence in the capacities and integrity of the authorities under control.

To ensure that complainants are able to protect their interests effectively, they are allowed to have *legal representation*. Representation is not compulsory in pre-trial proceedings and the authorities often do not reimburse the costs, even if a decision is withdrawn or changed. Legal representation is not compulsory because administrative pre-trial proceedings are supposed to be easily accessible and understandable. In practice, the average citizen will not always experience it in that way, and he or she might make mistakes that have to be corrected at a later stage, *i.e.*, during court proceedings. It is worth considering making legal representation compulsory in complicated cases, or to stimulate its use through (partially) reimbursing costs in the case of a successful objection.

Another matter that will have a considerable impact on the rights of interested parties is whether a *reformatio in peius* (*i.e.* a revision of the decision to the disadvantage of the complainant) is allowed or not. In court proceedings, this is prohibited everywhere, but in pre-trial proceedings it is allowed in Germany, and it can effectively occur in the Netherlands as well. Allowing this can have a negative impact on the interests of the addressee of a decision, and may violate her or his legitimate expectations. However, it is perfectly reconcilable with the nature of pre-trial proceedings, which require the administration to fully reconsider its original decision, taking into account new legislation, policy and actual circumstances.

If pre-trial proceedings aim to guarantee that the complainants' rights are respected, filing an objection would ideally have a *suspensive effect*. If a contested decision is executed despite the fact that a pre-trial procedure has been initiated, the rights of the addressees may be violated, and such a violation may be irreversible. Giving suspensive effect to the filing of an objection will prevent this. However, such a feature might lead to an abuse of the pre-trial procedure. A party could initiate a procedure only to delay the execution of a decision that is detrimental to it. Therefore, it is fairly rare for pre-trial procedures to automatically result in the suspension of the original decision. In Germany, where suspensive effect is still automatic in many cases, insincere complainants are deterred in another way; they are liable to pay the costs of the administration. In the other countries,

complainants can start additional proceedings to have the initial decision suspended. A suspension will usually only be granted if the consequences of the decision are irreversible, and if the objection is considered likely to be successful, based on a preliminary legality check. In this way, insincere complainants can be filtered out.

5. Restriction of the Decision-Making Competence of Administrative Courts?

Finally, a matter that does not fall within the other categories deserves attention. This is whether the administrative court should be able to replace an administrative decision with one of its own. If the courts are able to do this, there will be a final decision at the end of the court proceedings, and this will prevent potential new pre-trial and court proceedings. This will potentially shorten the total length of the decision-making process considerably. However, the options to do this are usually limited, because the administration often has some discretion in reaching its decision, and the courts cannot interfere with this. Under the separation of powers doctrine, this would engage independent courts in administrative decision making and it would replace the responsibilities of the administration. Courts are not accountable for their decisions in a democratic, political sense. Nevertheless, it may be considered a good idea to give courts this option when it is appropriate – that is, when the administration has no discretionary room left, because in those cases, it will shorten proceedings without having negative effects.

The box below gives an overview of the main points that require attention when designing pre-trial procedures.

Points for Attention in Designing Pre-Trial Procedures

General Design

Flexibility v. legal certainty
- Codification
- Uniform procedure
- Obligatory nature
- Objective legal control or Individual legal protection
- Challengeable acts

Organization of Pre-Trial Proceedings

Prohibition of bias
- Competent authority
- Time limits
- Written procedure
- Organization of hearings
- Costs

Protecting Complainants' Rights
- Standing
- 'Schutznorm'
- Legal representation
- Reformatio in peius
- Suspensive effect

Decision-Making Competences of Administrative Courts

6. Ombudsman

At this point we do not want to make remarks on *designing* ombudsman functions. Generally, they are auxiliary to the effectiveness of legal protection proceedings. They are closely connected to the system of administrative legal protection. Their success or failure depends for the most part on their ability to adapt to the evolution of systems of administrative legal protection.The flexibility of the office, a clear foundation of assessments of complaints in good administration norms and the enhanced social and investigating capacities of staff to handle legally and socially

tense situations between citizens and administrative bodies, authorities and civil servants seem to be crucial. Last, but not least, a (constitutionally) recognized institutional position for the ombudsman office and absence of appearances of (political, partisan) bias of any kind concerning office holders and staff are crucial for building trust with citizens and administrative authorities.

VIII Options for Actions

1. Goals

Based on the analysis in the previous chapters and the points for attention highlighted above, it is possible to formulate a tentative roadmap with some options for action. The goal of pre-trial proceedings is three-fold: (1) to provide accessible and effective recourse for citizens without having to go to court, (2) to alleviate the case-load pressure on the courts by operating as a filtering mechanism, and (3) to provide a way for public authorities to reconsider their own decisions. The comparative analysis of different approaches to pre-trial administrative justice mechanisms clearly shows that there is no one best practice model that could be adopted as such in a country. It is therefore important not to proceed with large-scale reforms without having tested some of the available options in pilot schemes. These pilot schemes, if successful, can then be adopted on a countrywide basis.

2. Recommendations

1. *Enact a law allowing the introduction of pre-trial proceedings in selected representative court districts to be tested.*

Since there is no single model that could be introduced, it is advisable to test different options and to identify those that are most suitable for the national context. In order to provide a sound legal basis for this approach, it seems reasonable to enact legislation allowing this kind of testing within the boundaries defined by the Constitution and International Treaties. This approach has been successfully adopted in Germany, for example, to test the functionality of pre-trial procedures in administrative proceedings.

2. *Establish an Expert Committee to carry out the test and to formulate recommendations based on test results.*

The Expert Committee should be composed of a small number of technical specialists to allow for effective work processes. The composition of the Committee should reflect the various institutional stakeholders such as the Civil Service, the Ministry of Justice, Administrative Courts, the Statistics Office and others. The Expert Committee should receive a clear technical and apolitical mandate. The Expert Committee needs to be given the necessary resources to carry out its mission. We recommend that scholars, *e.g.* sociologists of law, with a good record in conducting empirical research and a good knowledge of and experience in the methodology of data gathering and data analysis should take part in the work of the committee.

3. *Establish baseline data by undertaking a statistical analysis of the caseload of pilot and comparator administrative courts to identify areas of law and the respective caseload they generate. Define parameters to be considered.*

In order to ensure a timely and high quality analysis, a limited number of "average" pilot districts should be selected. A comparator group of similar districts where no pilot schemes will be carried out should be determined. In all these districts an empirical analysis of the caseload in the administrative courts should be carried out. The goal of the analysis is to establish baseline data on the typology of cases, their trajectory into the courts, the parties initiating them, and other relevant aspects allowing for the future measuring of the impact of the pilot schemes.

In this context, it is important for the Expert Committee to agree on a set of parameters to be considered to measure this impact. They should cover aspects which are relevant for citizens (the overall duration of proceedings from being initiated to the final outcome, a pacification function based on litigation and appeal rates, success rates, the costs for those seeking redress etc.) and for the authorities (a filtering function based on litigation and appeal rates, staff costs etc.; and the volume of the relevant caseload). The empirical findings based on these parameters will ultimately determine the content of the recommendations.

4. *Scientifically test the introduction of various mandatory and voluntary objection procedures and measure their impact.*

Based on the analysis of the existing caseload and its characteristics, the Expert Committee can formulate a plan with different options for mandatory and

voluntary objection procedures and other mechanisms to be tested. The various systems and the approaches described and analyzed in this comparative study may provide some inspiration for the development of such test options.
A considerable amount of data will have to be processed during and after the testing. Based on the parameters defined earlier, the impact of various pre-trial procedures on different types of cases and areas of law can be determined by comparing the relevant parameters in the pilot districts to those in the comparator districts.
Some flexibility should be built into the testing process to fine-tune approaches, correct mistakes, and incorporate any lessons learned during the test phase.

5. *Formulate recommendations to policy makers.*

The mandate of the Expert Committee is a technical one. A sound scientific approach to baseline data, piloting, and impact analysis is therefore the key to be able to make recommendations based on objective findings. If value judgments are necessary, they should be clearly identified as such. As there may be natural tension between some of the aspects considered (for example, effective legal protection for the citizen, on the one hand, and low costs for the State, on the other), different options for policy makers may crystallize and the decisions may imply political choices. These different options as well as their implications for the relevant evaluation criteria should therefore be clearly identified and documented with as much relevant objective data as possible to inform the decision-making process.

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About the Authors

Miss Anoeska Buijze LLM is working as a PhD candidate at Utrecht Univerity's Institute for Constitutional and Administrative on the development of the principle of transparency in European administrative law. She graduated cum laude with an LLM in legal research at Utrecht University in 2008 with a thesis on legal effectiveness norms in administrative law that won the KienhuisHoving prize for 2007/2008. She can be contacted via A.Buijze@uu.nl

Prof. Dr. Philip Langbroek is Professor of judicial administration and justice organization at the Montaigne Centre of Utrecht University. He is managing editor of the International Journal for Court Administration (<www.iaca.ws>). He is a member of the Editorial board of the Utrecht Law Review (<www.utrecht lawreview.org>) and was chairman of the EGPA Study group on Law and Public Administration. He is currently the chairman of the EGPA Study group on Justice and Court Administration. He has published widely on court administration and on administrative law. He can be contacted via P.M.Langbroek@uu.nl.

Mr. Milan Remac LLM studied general law at the University of P.J. Šafárik in Košice, Slovakia from 1998-2003. Later, in 2007, he received his master's degree in International and European Law at the University of Amsterdam, the Netherlands. Between 2004-2006 he worked for the Ministry of Environment of the Slovak Republic and between 2007-2009 for the Office of the Agent of the Government of the Slovak Republic before the European Court of Human Rights. At the moment he is working as a PhD candidate at Utrecht University's Institute for Constitutional and Administrative Law. He conducts research in the field of Ombudsman studies. He can be contacted via M.Remac@uu.nl.