



## I. Introduction

- Effectiveness of access to justice access **yes** – success **no**?
- Is judicial control limited on
  - procedural legality?
  - obvious errors?
- Is (wide) discretion conferred
  - to the administration?
  - to the court?

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## II. The discretionary power

### 1. German terminology

- Condition for discretion = no binding rules for the legal **consequence** exist
- Different solutions may be legal (unless in case of shrinking to an obligation)
- Discretion  $\neq$  margin of interpretation

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### 2. The limits of administrative discretion

Article 114 VwGO

*“Insofar as the administrative authority is empowered to act in its discretion, the court shall also examine whether the administrative act or the refusal or omission of the administrative act is unlawful because the statutory limits of discretion have been overstepped or discretion has been used in a manner not corresponding to the purpose of the empowerment...”*

### 3. Judicial discretion?

- Separation of powers
- The judge is subject *only to the law*

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### 4. The field of administrative discretion

- Application of legislation in environmental matters
  - General considerations
    - Constitutional limits for the legislation
  - Licensing: binding rules
  - Orders: classical field of discretion
- Planning
  - Wide *strategic* discretion, but
  - *equitable balancing of interests* requested

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## III. Interpretation of unspecific legal terms

- Principally no margin of interpretation for the administration (= full review by the court)
  - Article 19 (4) Basic Law
    - “Should any person’s rights be violated by public authority, he may have recourse to the courts. ...”*
- Case law of the Federal Constitutional Court:
  - Effective* recourse guaranteed

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#### IV. The power of the judge

Last instance of interpretation,  
whether a statutory rule grants

- discretion or
  - a margin of assessment
- to the executive  
is ...the judge.

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7

#### V. Judicial review in environmental cases

- Focus on large projects
- Assessment of immissions
  - governed by many ordinances and administrative regulations
- Nature protection legislation
  - Few scientifically based and generally recognized rules
  - Many unspecific legal terms
  - Case law of the Federal Administrative Court :  
*no margin of interpretation for public authorities*
- "Prognosis privilege"
  - recognized in certain areas by the jurisprudence

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8



#### „Westumfahrung Halle“

Blocked by a judgement of the Federal  
Administrative Court from 17 January 2007

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9

#### VI. Concluding remark

- Restriction by the *protective norm doctrine*,  
but  
high intensity of judicial review
- Influence of EU law and  
CJEU case law (towards wide access) →
- New national legislation tendencies ←  
(intending less intensive judicial review)

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10



The session is  
closed !

11