

§ 1 Introduction

I. Why do we need control mechanisms for public administration?

- the need to protect the rights of the citizen
- the need to ensure the rule of law in public administration
 - in particular to prevent corruption
- the need to ensure an economical use of the taxpayer's money
- the need to ensure the correct and efficient execution of the government's policies

II. The plurality of mechanisms to control public administration in modern constitutional states

- see overview in **Diagram 1**
- internal and external control
 - from inside or outside of public administration?
- legal, political, financial and specialised control
 - of legality, expedience, financial accuracy and frugality, or under special criteria?
- "hard" and "soft" control of public administration
 - reversing decisions and giving orders or just criticising and giving advice?
- last but not least: the political control by the public in the democratic discourse
 - by the media as "fourth power" in the democratic state
 - by political parties, social organisations, NGOs and international partners interacting with the authorities and strengthening the role of control institutions

III. In particular: Judicial and non-judicial control mechanisms

- control by professional judges with the authority of the Third Power or just by other civil servants in superior authorities or auditors or politicians?
- in Germany, non-judicial remedies do not exclude the right of the citizen to have recourse to the courts afterwards
- experience shows that *non-judicial review is more effective if there is the threat of a following review by the courts...*

IV. Historical backgrounds of the control of public administration in Germany

- strong tradition of rule of law (the concept of → *Rechtsstaat* [negara hukum]) since the 18th century
- introduction of independent administrative courts in the 19th century
- total decline of rule of law and human rights under the totalitarian regimes of the National Socialists under Adolf Hitler (1933 - 1945) and the Communists (East Germany, 1945 - 1989)
 - however, even then there was still an - often informal - supervisory control by the superior authorities
- very effective implementation of the rule of law and protection of human rights under the Basic Law for the the Federal Republic of Germany of 1949 [= BL]

V. Legal backgrounds

1) Constitutional backgrounds

a) **The fundamental constitutional principle of the rule of law** (art. 20(3) BL)

- concretised in detail in a rich constitutional jurisprudence
- some rule of law elements also anchored in special constitutional provisions
- requires effective mechanisms to ensure compliance of public admin. with the law

b) **A comprehensive and effective guarantee of fundamental rights**

- fundamental rights as directly binding law (art. 1(3) BL)
- a comprehensive f.r. catalogue which even includes a *general freedom of action* - derived from art. 2(1) BL; consequently, every order or prohibition to the citizen constitutes an encroachment on f.r. and, thus, is illegal if it is not justified under the constitution
- the legal remedy of individual *constitutional complaint* against any fundamental rights violation before the Federal Constitutional Court (art. 93(1) no. 4a BL)

c) **The fundamental right of the citizen to have recourse to the courts against any violation of his rights by public authority** (art. 19(4) BL)

- usually recourse to the administrative court
- *courts must provide effective legal protection*, including interim relief

2) The influence of European Union law

- the supranational integration within the EU is based on law (→ integration through law) - therefore, EU cannot tolerate any deviation from its law in the member states
- the compliance of all public institutions in the member states with EU law is thoroughly monitored by the European Commission, to which every citizen can complain
- the European Court of Justice has developed a rich jurisprudence on the duties of the member states to effectively implement and enforce EU law

VI. Social and cultural backgrounds

1) More trust in the courts than in administrative self-control in Germany

2) A high degree of professionalism, integrity and actual independence of the judges

- judges highly qualified, even at the lower courts
- almost no risk of corruption
- judges not only *de iure* (cf. art. 97 BL) but also *de facto* independent
 - do not allow any influence of personal relations, political parties, religious groups etc.
 - will not hesitate to enforce the law against any resistance of the government
- administrative judges particularly known for their intellectual independence and often critical approach

3) A high readiness of the citizens to bring legal disputes before the court

- citizens strongly determined to fight for the defense of their subjective rights
- citizens often more willing to accept dispute settlements in legal proceedings and based on law
- sometimes both, citizens and authorities may prefer to bring difficult legal questions before the court in order to achieve a sustainable, legally consistent solution
- legal expenses insurances foster litigiousness by covering the financial risk of the legal proceedings