

MECHANISMS OF CONTROL OF PUBLIC ADMINISTRATION OUTSIDE LEGAL PROTECTION IN GERMANY

Contribution to the course *Oversight of State Administration* from a comparative perspective

Preliminary remark: At the Faculty of Law of Universitas Gadjah Mada the courses are shared by several lecturers. This material illustrates my lectures on 23.09. and 25.09.2025. They complement those of the colleagues from the perspective of comparison of laws with a special focus on German law. They follow on from my contribution "Legal Protection against Administrative Decisions/Action in Germany"¹ in Semester 2, 2024/2025.

§ 1 Introduction

I. Why studying administrative law with a comparative approach?

- for a *better understanding* of the own administrative law, its particularities and alternatives, strong and weak points and possible perspectives of its development
- as a *source of inspiration*: public administration in different countries often faces similar problems, and legal solutions developed in one country may be useful in others too
- not only the success stories but also the failures of foreign solutions are interesting
 - you must not repeat the mistakes of others...

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

- the need to protect the rights, especially the fundamental 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 execution of the government's policies

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

- for a comprehensive systematic overview, see Diagram 1 from this course in 2022
- internal and external control mechanisms
- control mechanisms for legal protection and outside legal protection of the citizen
- judicial and non-judicial control mechanisms
- 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, civil society organisations and international partners interacting with the authorities and strengthening the role of control institutions

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 (1933 - 1945) and the Communists (East Germany, 1945 - 1989)
 - however, 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 elements of the rule of law are also anchored in special provisions
- requires effective mechanisms to ensure compliance of public admin. with the law

¹ Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

- b) A comprehensive and effective guarantee of fundamental rights
 - fundamental rights as directly binding law (art. 1(3) BL)
 - a comprehensive fundamental rights catalogue, including a *general freedom of action*
 - consequently, any admin. decision prohibiting anything constitutes an encroachment on fundamental rights
 - the legal remedy of individual *constitutional complaint* against any fundamental rights violation before the Federal Constitutional Court (art. 90(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)
 - has made judicial control mechanisms more important than non-judicial control mechanisms in Germany
 - 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, the EU cannot tolerate any deviation from its law in the member states without endangering its existence
 - 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
 - enforcement also *against* the citizen; this made control mechanisms outside legal protection more important
 - 3) Judicial and non-judicial review
 - judicial review plays the most important role in the oversight of public administration in Germany
 - non-judicial remedies do not exclude the right to have recourse to the courts afterwards
 - non-judicial review by public administration itself in the objection proceedings is more effective if there is the threat of a following review by the courts...

VI. Social and cultural backgrounds

- 1) More trust in the courts than in administrative self-control or non-judicial external control of public administration 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
 - will not hesitate to enforce the law against any resistance of the government
 - administrative judges known for their intellectual independence and often critical approach
- 3) A high readiness of the citizens to bring legal disputes before the court
 - citizens 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
 - authorities will usually bring difficult legal questions before their supervisory authority, but sometimes citizens and authorities want a court decision to ensure a sustainable, legally consistent solution
 - legal expenses insurances foster litigiousness by covering the financial risk of the legal proceedings

§ 2 Administrative self-control outside legal protection

- the most important mechanism of admin. self-control has already been discussed in the last semester: the administrative review of administrative acts (= admin. decisions) in the *objection proceedings* [Widerspruchsverfahren]
 - under sect. 68 et seq. of the Code of Administrative Court Procedure [= CACP]
 - however, this control mechanism serves legal protection

I. Functional and legal supervision

- 1) Functional supervision [Fachaufsicht]
 - review of the *legality and expedience* of any administrative action by the superior authority
 - who may intervene for any legitimate reasons of expedience: suitability, practicability, fairness, morality, political or financial reasons, principles of good governance
 - the *standard case* in any hierarchically structured public administration
 - e.g. functional supervision by the state authorities of the performance of tasks delegated to counties and communes
 - supervisory authority is free to issue instructions, which supervised authority must follow
 - supervisory measures are internal affairs of public administration and therefore cannot be challenged before the courts
 - except if they encroach on the field of local self-government
- 2) Legal supervision [Rechtsaufsicht]
 - review of the *legality* (but not of expedience!) of administrative action by the superior authority
 - in case of *self-government activities* of authorities that enjoy autonomy (e.g. counties, communes, universities)

- requires a legal basis and is limited to the instruments provided in the legal basis:
 - requiring information
 - formal complaint
 - binding order
 - substitute performance or
 - temporary substitution of institutions by a commissioner (only in very serious cases)
- serves the public interest, therefore no claim of the citizen for intervention
 - but citizen is free to ask supervisory authority to intervene
- supervisory decisions are *administrative acts* that interfere with the right to self-government (see for the communes and counties [art. 28\(2\) BL](#)) and therefore *can be challenged* by action for annulment *before the administrative court*

3) In particular: supervision of the execution of federal law by the Länder (federal oversight)

- a special aspect of vertical distribution of powers in the German federal state
- a) Legal supervision of the execution of federal law by the Länder in their own responsibility
 - Most federal laws are executed by the Länder in their own responsibility
 - often, they delegate it to the counties and communes.
 - The Federal Government exercises a federal oversight, which is limited to ensuring that the Länder execute the federal laws in accordance with the law.
 - For this purpose, it may send commissioners to the highest Land authorities and, with their consent or with the consent of the Bundesrat [Federal Council], also to subordinate authorities ([art. 84\(3\) BL](#)).
 - If the Federal Government identifies deficiencies in the execution of federal law in a Land [*staatsrechtliche Mängelrüge*] and the alleged deficiencies are not corrected, the Bundesrat, on application of the Federal Government or the Land concerned, decides whether that Land has violated the law. Since the Bundesrat consists of members of the Land governments, thus, *competent peers decide* about the issue. The decision may be challenged in the Federal Constitutional Court ([art. 84\(4\) BL](#)).
- b) Functional supervision of the execution of federal law by the Länder on federal commission
 - In some fields, the Länder execute the federal laws on federal commission.
 - In these cases, the Federal Government may regulate the uniform training of the staff. The heads of intermediate authorities shall be appointed with its approval. The *Land authorities* are *subject to instructions* from the highest federal authorities, which are usually addressed to the highest Land authorities, who shall ensure their implementation ([art. 85\(3\) BL](#)). Sometimes, instructions on sensitive political issues cause tensions.
 - This federal oversight extends to legality and expedience. The Federal Government may require the submission of reports and documents and send commissioners to all authorities ([art. 85\(4\) BL](#)).

II. Other forms of administrative self-control

1) Self-control within the administrative body

- a) Internal audit
 - by independent *internal audit units*
 - common for all public institutions but heterogeneous systems and regulations
 - aa) Financial audit [Rechnungsprüfung]
 - prescribed for self-governing bodies in the relevant laws
 - bb) General internal audit [Innenrevision]
 - usually an audit of efficiency, cost efficiency and financial compliance
 - can be a comprehensive audit of compliance (with all kinds of standards)
 - see for the federal admin. the [General Administrative Regulation on Internal Auditing in the Federal Administration of 2023](#) (admin. provisions issued by the Federal Government)
- b) Self-control by officers with special supervisory or advisory functions prescribed by law
 - e.g. *data protection officers, environmental officers, gender equality officers*
 - independent exercise of these functions - no instructions by superiors!

2) Disciplinary supervision [Dienstaufsicht]

- supervision of the *personal conduct* of the individual officer
- "formlos - fristlos - fruchtlos" [informal - no deadlines - vain] - usually not effective...

3) Soft control by *special government commissioners* [Regierungsbeauftragte]

- a) The phenomenon of commissioners in German law
 - a multitude of specialised government commissioners and independent commissioners on federal and Land level
 - in 2025, after a significant reduction, still [27 Federal Commissioners](#)
 - main fields: data protection issues, migration issues, gender issues, disabled persons issues, IT issues
 - advisory, monitory and participatory functions - but *no decisive powers*
 - important role in the public discourse
- b) Examples
 - [Federal Government Commissioner for Migration, Refugees and Integration](#)
 - [Federal Minister of State for Culture and the Media](#)
 - [Federal Government Commissioner for Matters relating to Persons with Disabilities](#)
 - [Federal Government Commissioner for the Acceptance of Sexual and Gender Diversity](#)
 - [Lower Saxony Land Commissioner for Migration and Participation](#)
 - [Lower Saxony Land Commissioner for Persons with Disabilities](#)
 - [Saxony-Anhalt Land Commissioner for Children and Young People](#)
 - [Baden-Wuerttemberg Land Commissioner for Animal Protection](#)

§ 3 Non-judicial external control of public administration

I. Parliamentary control

1) Classical parliamentary control

- right to require government members to be present & answer questions, committees of inquiry, decisions on petitions

2) Parliamentary control via auxiliary institutions

a) Ombudsmen [Bürgerbeauftragte]

- only in the Länder Rhineland-Palatinate, Mecklenburg-Vorpommern, Thuringia and Baden-Wuerttemberg
- mission: to safeguard the rights of the citizens against public authorities (not against judicial power)
- independent (not submitted to instruction or supervision)
- instruments: negotiations, recommendations, reports, participation in the dealing with petitions
(→ no own binding decisions)

b) Specialised commissioners

- e.g. the Parliamentary Commissioner for the Armed Forces of the Bundestag (→ website in English) (art. 45b BL)
 - mission: in particular to safeguard the fundamental rights of the soldiers and to inspect the armed forces
 - every soldier has the right to submit a case
 - submitted to general guidelines of the Bundestag but not to individual instructions
- e.g. the Ombudsman for Social Affairs and the Commissioner for Refugee, Asylum and Immigration Affairs in the Land Schleswig-Holstein

II. Financial control by the courts of auditors

1) The Federal Court of Auditors [Bundesrechnungshof] (art. 114(2) BL, Federal Court of Auditors Act)

- first German predecessor in the 17th century in Prussia
- supreme federal authority and *independent body of government auditing* (sect. 1 FCAA)
 - nine audit divisions, almost 50 audit units, ca. 1.040 employees
 - not a court of justice but its members enjoy judicial independence (art. 114(2) BL)
 - decisions are usually taken as panel decisions
- the mission: *financial audit* (regularity and compliance) and *performance audit* (economy, efficiency, effectiveness) of the federal financial management
 - reports on its findings in *management letters* [Prüfungsmittelungen] that are sent to the audited bodies for comment
 - delivers recommendations in its management letters and in annual and special reports
 - provides advice to the executive and legislative branch
- cooperates with European Court of Auditors (of EU) and Supreme Audit Institutions of other EU member states

2) The courts of auditors of the Länder

- not subordinated but cooperating with the Federal Court of Auditors

III. Soft control by independent federal or Land commissioners [Beauftragte]

1) Data protection commissioners

a) The Federal Commissioner for Data Protection and Freedom of Information (→ website in English)

- elected by the Bundestag
- supervises and enforces the implementation of the EU General Data Protection Regulation and the Federal Data Protection Act in federal administration
- may give orders and lodge complaints, delivers recommendations, reports and opinions
- has an important role in the public discourse

b) The commissioners for data protection of the Länder

- elected by the Landtag (Land parliament)
- supervise and enforce the implementation of data protection law in Land administration
- also act in most Länder as supervisory authority to enforce data protection in the private sector

2) Others

- e.g. the Bremen Central Office for the Realisation of Equal Rights for Men and Women

§ 4 Topics for discussion (→ in Germany and elsewhere...)

- What is the impact of social and cultural backgrounds on public administration control?
- How to ensure the actual independence of the reviewing institution and the reviewers?
- How efficient and how costly is the present system of diversified control?
- Does the plurality of control mechanisms impede administrative work and progress?
- Does the diversification of control mechanisms foster an administrative culture strictly based on the rule of law?

Annex: Legal provisions in English translation

Basic Law for the Federal Republic of Germany (excerpts)

Art. 19(4)

Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts...

Art. 20(3)

The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

Art. 45b

A Parliamentary Commissioner for the Armed Forces shall be appointed to safeguard basic rights and to assist the Bundestag in exercising parliamentary oversight over the Armed Forces. Details shall be regulated by a federal law.

Art. 83

The Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.

Art. 84

(1) Where the Länder execute federal laws in their own right, ...

(3) The Federal Government shall exercise oversight to ensure that the Länder execute federal laws in accordance with the law. For this purpose the Federal Government may send commissioners to the highest Land authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

(4) Should any deficiencies that the Federal Government has identified in the execution of federal laws in the Länder not be corrected, the Bundesrat, on application of the Federal Government or of the Land concerned, shall decide whether that Land has violated the law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court. ...

Art. 85

(1) Where the Länder execute federal laws on federal commission, ...

(3) The Land authorities shall be subject to instructions from the competent highest federal authorities. Such instructions shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent. Implementation of the instructions shall be ensured by the highest Land authorities.

(4) Federal oversight shall extend to the legality and appropriateness of execution. For this purpose the Federal Government may require the submission of reports and documents and send commissioners to all authorities.

Art. 114(2)

The Federal Court of Auditors whose Members shall enjoy judicial independence shall audit the accounts and examines the management of the budget and the conduct of business as to economy and correctness. ... In addition to the Federal Government, it shall annually report directly to the Bundestag and the Bundesrat [Federal Council]. In all other respects, the powers of the Federal Court of Auditors shall be determined by federal legislation.

Federal Court of Auditors Act (excerpts)

Sect. 1

The Federal Court of Auditors shall be a supreme federal authority and as an independent institution of government audit shall be subject only to the law. Within the scope of its statutory functions, the Federal Court of Auditors shall provide assistance to the Federal Parliament and the Federal Government in their decision making procedure.

Federal Budget Code (excerpts)

Sect. 90 Substance of Audit

The audit shall examine whether the regulations and principles of adequate financial management have been observed, and in particular whether

1. the Budget Act and the adopted Estimates have been adhered to,
2. receipts and payments have been properly substantiated and supported by vouchers, and whether both the budget and capital accounts have been properly prepared,
3. funds are administered efficiently and economically,
4. functions might be performed with fewer human or material resources, or more effectively by other means.

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