

NON-JUDICIAL CONTROL OF PUBLIC ADMINISTRATION IN GERMANY

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

Contents

Preliminary remark: At the Faculty of Law of Universitas Gadjah Mada the courses are shared by several lecturers. This material illustrates my lectures on 01.12. and 03.12.2020. They complement those of the colleagues from the perspective of comparison of laws with a special focus on German law.

§ 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 execution of the government's policies

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

- internal and external control mechanisms
- judicial and non-judicial control mechanisms
- legal, political, financial and specialised control
- "hard" and "soft" control of public administration
- 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. 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]

IV. 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
- 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 of 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)
 - 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

- 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

3) Judicial and non-judicial review

- non-judicial remedies do not exclude the right to have recourse to the courts afterwards
- non-judicial review is more effective if there is the threat of a following review by the courts...

V. 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
 - 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 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

§ 2 Administrative self-control

I. Administrative review of administrative acts: the **objection proceedings** [Widerspruchsverfahren] (sect. 68 et seq. Code of Administrative Court Procedure [= CACP])

1) The functions of the objection proceedings

- a) Protection of the citizen's rights
 - a legal remedy but more simple and cheaper than judicial review
- b) Administrative self-control
 - the admin. authority shall be given the chance to correct wrongful acting itself
- c) Relief for administrative courts
 - therefore a **legal precondition for judicial review**
 - however, in practice many citizens have recourse to the courts if their objection is not successful

2) The scope of administrative review in the objection proceedings

- a) Review of the *legality* of the administrative act (= admin. decision)
- b) Review of the *expediency* of the administrative act
 - something that cannot be achieved by the way of judicial review!
 - the admin. act may be repealed for any legitimate reasons of expedience (suitability, practicability, fairness and morality, political reasons, financial reasons etc.)

3) The admissibility of the objection

- a) Dispute within the jurisdiction of the administrative courts
 - only non-constitutional public law disputes
- b) Suitable subject-matter
 - legality and expedience of an admin. act or of failure to pass an admin. act applied for (cf. sect. 68 CACP)
- c) Right of objection
 - objector must claim that *his rights* (not just interests) have been *violated* (or, in case of review of expedience, encroached on)
- d) Objection lodged in writing *within one month* at the concerned authority (sect. 70 CACP)
- e) General interest in bringing proceedings

4) The well-foundedness of the objection

- a) Illegality or inexpediency of the admin. act / the failure to pass the admin. act applied for
- b) Violation of (or, in case of review of expedience, encroachment on) the rights of the objector

- 5) The (automatic) *suspensive effect* of the objection (sect. 80 CACCP)
 - in principle, the controversial administrative act cannot be executed
 - where the law provides for exceptions, citizen may ask administrative court to order/restitute the suspensive effect
 - a powerful mechanism to protect the objector's rights - with the risk of detrimental side-effects on the efficiency of public administration or interests of third parties (therefore later restricted, cf. sect. 80, 80a, 80b CACP)
- 6) The course of the objection proceedings and the ruling on the objection
 - if the authority who issued the admin. act does not remedy the objection, except in matters of self-government the case is in general decided by the next higher authority (sect. 73(1) CACP)
 - in some Länder, special commissions are involved or decide on the objection
 - the *rulings* on the objection *must be reasoned*; they often resemble court rulings
- 7) The future of the objection proceedings
 - in order to save time and financial resources, some Länder abolished the objection proceedings for many or even most cases; however, after some years of experience without, some Länder partially reintroduced them because it helps to avoid long and costly court proceedings
 - discussion on whether advantages or disadvantages prevail is still going on

II. Functional and legal supervision

- 1) Functional supervision [Fachaufsicht]
 - review of the *legality and expedience* of administrative action by the superior authority
 - 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
 - supervisory measures are internal affairs of public administration and therefore cannot be challenged before the courts
- 2) Legal supervision [Rechtsaufsicht]
 - review of the *legality* (not of expedience!) of administrative action by the superior authority
 - in case of *self-government activities* of authorities enjoying autonomy (e.g. counties, communes, universities)
 - limited to the instruments provided in the relevant laws, such as requiring information, formal complaint, binding order, substitute performance or temporary substitution of institutions by a commissioner
 - serves the public interest, therefore no claim of the citizen for intervention
 - supervisory decisions are admin. acts interfering 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*) [skipped in the online lecture]
 - a) Legal supervision of 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 federal oversight to ensure 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 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).

III. 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 *Recommendations for internal audit in the Federal Administration* of 2007 (admin. provisions issued by the Federal Ministry of the Interior)
 - 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
 - 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 Information Technology
 - Federal Government Commissioner for Matters relating to Persons with Disabilities
 - Lower Saxony Land Commissioner for Migration and Participation
 - Lower Saxony Land Commissioner for Persons with Disabilities
 - Saxony-Anhalt Land Commissioner for Children
 - Baden-Wuerttemberg Land Commissioner for Animal Protection

§ 3 Non-judicial external control of administration

I. Parliamentary control

- 1) Classical parliamentary control
- 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)
 - 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]
 - first German predecessor in the 17th century in Prussia
 - supreme federal authority and *independent body of government auditing*
 - nine audit divisions, 51 audit units, 7 regional audit offices (ca. 1.150 employees)
 - not a court of justice but its members enjoy judicial independence
 - 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
- 2) The courts of auditors of the Länder

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...)

- I. What is the impact of social and cultural backgrounds on public administration control?
- II. How to ensure the actual independence of the reviewing institution and the reviewers?
- III. How efficient and how costly is the present system of diversified control?
- IV. Does the plurality of control mechanisms impede administrative work and progress?
- V. How significant is the diversification of control mechanisms for the development and safeguard of an administrative culture strictly based on the rule of law?
- VI. Does a mandatory prior administrative review in objection proceedings enhance or weaken the legal protection of the citizen?
- VII. Conclusion

This material can be downloaded at www.thomas-schmitz-yogyakarta.id. The links in the pdf file allow direct access to internet resources and materials. For any questions, suggestions and criticism please contact me in my office (Building A, room A.IV.11) or via e-mail at tschmit1@gwdg.de.

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 examine 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.

Code of Administrative Court Procedure (excerpts)

Sect. 68

(1) Prior to lodging a rescissory action, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings. Such a review shall not be required if a statute so determines, or if

1. the administrative act has been handed down by a supreme federal authority or by a supreme Land authority, unless a statute prescribes the review, or
2. the remedial notice or the ruling on an objection contains a grievance for the first time.

(2) Subsection 1 shall apply mutatis mutandis to the enforcement action if the motion to carry out the administrative act has been rejected.

Sect. 69

The preliminary proceedings shall begin on the lodging of the objection.

Sect. 70

(1) The objection shall be lodged in writing within one month after the administrative act has been announced to the aggrieved party, in writing or for the record of the authority which has carried out the administrative act. ...

Sect. 72

If the authority considers the objection to be well-founded, it shall remedy it and rule on the costs.

Sect. 73

(1) If the authority does not remedy the objection, a ruling on the objection shall be handed down. This shall be issued by

1. the next higher authority unless another higher authority is determined by law,
2. if the next higher authority is a federal or supreme Land authority, the authority which has issued the administrative act,
3. in self-administration matters the self-administration authority unless otherwise determined by law. ...

(3) The ruling on an objection shall be reasoned, supplemented with a notice on appeals and served. ...

Sect. 80(1)

(1) An objection ...and an action for annulment shall have suspensive effect. This shall also apply to constitutive and declaratory administrative acts, as well as to administrative acts with a double effect (section 80a).

(2) The suspensive effect shall only fail to apply

1. if public charges and costs are called for,
2. with non-postponable orders and measures by police enforcement officers,
3. in other cases prescribed by a federal statute or for Land law by Land statute ...
4. in cases in which immediate execution is separately ordered by the authority which has issued the administrative act or has to decide on the objection in the public interest or in the overriding interest of a party concerned. ...

(5) On request, the court dealing with the main case may completely or partly order the suspensive effect in cases falling under subsection 2 Nos. 1 to 3, and may reconstitute it completely or partly in cases falling under subsection 2 No. 4. The request shall already be admissible prior to filing of the action for annulment. ...

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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