

Professional article

State Supervision of Local Government Authorities

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ABSTRACT

State supervision of local government authorities, a requirement of the rule of law, is discussed in relation to municipalities. State supervisory authorities are required to advise and support local government authorities. Supervision at various state levels takes place as legal supervision, which only includes the supervision of legality in matters of the municipality's original competence, and as functional supervision that also supervises expediency in matters transferred by the state. The legality principle (intervention in all cases) is modified by the expediency principle (discretion). A number of remedies are available for implementing both legal and functional supervisory measures. Where municipalities consider that the supervisory measures, whether legal or functional, violate their rights of self-government, they have recourse to the courts.

Key words: municipalities, local government, state supervision, supervisory authority

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1. Required by Rule of Law

The functions of public administration are exercised in a decentralised state by state authorities and a multiplicity of public law bodies. These organisations include, in particular, the self-governing local government bodies.

It is characteristic of a decentralised fulfilment of public functions that decisions are not only made centrally. Instead, the decentralised bodies, particularly

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the local self-governing bodies, make their own decisions in matters within their own competence. Various decision-making centres characterise the decentralised state. But all these bodies that exercise functions of public authority – state authorities as well as public law bodies – belong, in the context of separation of powers (legislature, executive, judiciary), to the executive. The self-governing bodies, local government decision-making centres with their own policy-making processes, do not stand aside from the state legal order; they are not “states within the state”; as “executive authorities” – in the terminology of the Basic Law (GG) – they are bound by “law and justice” (Article 20 par 3 GG). Adherence to law is an inalienable factor in a democratic state and, in accordance with the will of the Basic Law, cannot be infringed (Article 79 par 3 GG). To ensure this adherence to law by local government bodies, state supervision of them has been established by the *Länder* (states) of the Federal Republic of Germany. The *Länder* independently regulate the details of this supervision in their local government laws, as local government law is a *Länder* and not a federal matter. The main features of local-government supervision are nonetheless uniform throughout Germany.

In its judgment of 23 January 1957 (BVerfGE 6, 104 ff, 118), the Federal Constitutional Court declared local-government supervision to be the correlate of self-governing local government authorities. State supervision is accordingly the “natural counterpart” to the right of self-government of local authorities. It would not be in accordance with the rule of law if local authorities were able to act unlawfully without the possibility of intervention by the state. State supervision is thus a requirement of the rule of law. The Constitution of the Free State of Bavaria of 2 December 1946 (BV) accordingly provides in Article 83 par 4 sentence 1 that: “The Municipalities shall be subject to the supervision of State Administrative Authorities.” According to Article 83 par 6 (BV), this provision also applies to other local authorities.

In the following, supervision of local authorities will be illustrated through the example of the municipality (Gemeinde); supervision of other local-government bodies has no special characteristics.

The Bavarian legislature has brought together the rules concerning “State supervision and legal proceedings” in the fourth part of the Local Government Law (Gemeindeordnung – GO), Art.108 to Art.120.

2. Supervision and Advice

The supervising state cannot be regarded as the “legal guardian of municipalities with limited capacity”. The function of the state is also not limited to the control of municipal acts. The state is required by Art.83 par 4 BV to support local government authorities in carrying out their functions. The legislature expresses this obligation in more detail in Art.108 GO as follows: “The supervisory authorities ought to advise, encourage and protect with understanding the municipalities in the performance of their tasks, and they ought to reinforce the decision-making capability and the responsibility for their own action of the municipality bodies.” This obligation to provide assistance is considerably wider than so-called repressive supervision. Smaller municipalities avail themselves more frequently of state assistance; but even the larger municipalities turn surprisingly often to the state supervisory authorities to obtain information and to resolve doubts about appropriate action in critical cases.

The advisory function has increased over the last few decades. This may be due to the fact that the relationship between the municipalities and the state has developed into a good relationship of mutual trust. Alternatively, tasks at all state and municipal levels are becoming more complex, which may also intensify communication between municipalities and the state.

An advisory obligation can be seen in the formulation in Art.108 GO (“The supervisory authorities ought to advise ...”). This obligation can, for example, consist of providing the municipality with verbal and/or written information, or of drawing attention to legal and/or economic problems. The supervisory authorities can also point out alternatives for dealing with particular questions. But those concerned should always be conscious that the decision-making competence rests with the municipality. The officials of the supervisory authorities must therefore exercise their duty to advise with the necessary tact.

3. Legal Supervision and Functional Supervision

In the context of state supervision, a distinction is made between two kinds of supervision: legal supervision and functional supervision.

3.1 Legal Supervision

As far as the municipalities act within their own sphere of activity, they are subject to legal supervision. Here, legal supervision is restricted to supervising the performance of public law tasks and the obligations of the municipalities as laid down by law and adopted, as well as the legality of their administrative activity. The state may thus not interfere in the exercise of discretion where the municipalities have been given discretion by law and where they exercise this discretion lawfully. For example, whether a municipality decides to build a swimming bath or a theatre is a matter for the municipality. It decides the question by exercising its discretion. The state cannot stipulate to the municipality which project it should adopt.

From the statutory formulation, it can be seen that private-law restrictions on the financial activities of the municipality are not overseen by the supervisory authorities. Where, for example, a commercial firm has sold office furniture to a municipality and asks the supervisory authorities to cause the municipality to pay the agreed price, the supervisory authorities must point out to the furniture dealer that the fulfilment by the municipality of obligations under a contract of purchase is not a matter subject to state supervision. The supervisory authority can inform the furniture dealer that he can bring any civil claim that he may have to the ordinary courts. In such a case, the supervisory authority should inform the municipality of the approach by the furniture dealer and the content of its response. The supervisory authorities do not have any more far-reaching responsibilities in cases of this kind.

Where the municipality has an obligation in concluding private-law transactions, e.g. in awarding a contract for the construction of a road, the obligation to observe public law provisions about invitations to tender for building work, and is in breach of them, the supervisory authority may intervene. The connecting factor for the intervention of the supervisory authorities is, however, public law, namely the provisions concerning the invitation to tender for certain works or services. The municipalities do not, after all, exist without restrictions; they are required to comport themselves within the framework of the law (Art.28 par 2 sentence 1 GG).

3.2 Functional Supervision

Municipalities have not only tasks in their own sphere of competence; they also have tasks that have been transferred to them. This transferred sphere encompasses all matters that have been assigned by law to the municipalities for them “to manage on behalf of the state or other institutions under public law” (Art.8 par 1 GO). In matters falling within the transferred sphere, state supervision goes beyond legal supervision and extends to the exercise of municipal discretion (Art.109 par 2 sentence 1 GO) More detailed discussion is contained below in 7.1. This means that the supervisory authorities have the right under certain conditions to intervene by way of directive in the exercise of administrative discretion by the municipalities (see Art.83 par 4 sentence 3 of the Bavarian Constitution). This is logical as the municipalities in the transferred sphere carry out tasks that have been specifically transferred to them by the state. These are therefore state tasks. The interest of the state in having these tasks carried out as it wishes is therefore understandable.

4. Supervisory Authorities

4.1 Legal Supervisory Authorities

Supervision of the municipalities is the responsibility of the state authorities. Since there are three levels of municipal authorities in Bavaria – municipalities (*Gemeinden*), districts (*Landkreise*) and regions (*Bezirke*) – state supervision takes place at three levels of state authority.

Legal supervision over municipalities belonging to a district is the responsibility of the district administrator’s office (*Landratsamt*) as a state administrative function (Art.110 sentence 1 GO). Legal supervision of municipalities not belonging to a district is the responsibility of the regional government (Art.110 sentence 2 GO, Art.96 sentence 1 LkrO). Legal supervision of the regions is the responsibility of the State Ministry of the Interior (Art.92 BezO). The regional government acts as the higher legal supervisory authority for the municipalities belonging to a district (Art.110 sentence 3 GO). The State Ministry is the higher legal supervising authority for municipalities not belonging to

a district (Art.110 sentence 4 GO) and for the districts (Art.96 sentence 2 LkrO). The State Ministry is also the supreme legal supervising authority for municipalities belonging to a district, although this is not expressly regulated in the Local Government Law.

Because the legal supervisory authorities belong to hierarchically different levels of state administration, the higher authority can instruct the subordinate authority as to how legal supervision is to be handled, both in general and in specific cases.

4.2 Functional Supervisory Authorities

Competence for carrying out functional supervision in individual areas of the transferred activities is regulated by the relevant provisions (Art.115 par 1 sentence 1 GO, Art.101 sentence 1 LkrO, Art.97 sentence 1 BezO). Further discussion of this can be found in 7.2.

5. Legality Principle and Expediency Principle

How the legal supervisory authority should react to an unlawful act or omission of the municipalities is a fundamental question: is the legal supervisory authority obliged to intervene in every case (the legality principle) or does intervention lie in its – properly exercised – discretion (the expediency principle)? Until 1997 (see Law of 26 July 1997 – BayGVBl. p. 344), the legal position in Bavaria was differentiated: in the case of municipalities – both belonging and not belonging to districts – the legal supervisory authority, i.e. the district administrator's office or regional government, was obliged to object to unlawful resolutions and orders and to require their annulment or modification (Art.112 sentence 1 old version, which applied until 1977). To this extent, the legality principle applied.

The Bavarian legislature had based legal supervision of the districts and regions on the expediency principle (... can object). This was naturally inconsistent. There were, accordingly, opinions in legal literature and in cases that also called for the application of the legality principle for districts and regions. This was justified on the grounds that it could not be left to the discretion of the supervisory authority

whether it intervenes against contraventions of law. It was argued from the rule of law principle of the legality of administration that the supervisory function requires an objective obligation, not subject to the discretion of the authority, to intervene in all cases against legal contraventions.

The legality principle that applied in Bavaria until 1997 for the supervision of municipalities was an exceptional position in Germany. With the Law of 26 July 1997, the Bavarian legislature decided to introduce the expediency principle for legal supervision across the board, including the legal supervision of municipalities. According to the official justification by the Bavarian State Ministry of the Interior, the introduction of the expediency principle helped to strengthen the self-government of the municipalities (see printed paper of the Bavarian Parliament 13/8037, pp.10 ff). Different views are possible on the persuasiveness of this justification. Legal supervisory measures take place, after all, only against unlawful acts by the municipalities and it is questionable whether it is legitimate to strengthen municipal self-government in an unlawful area. To my view, it also cannot be a matter of improving the “partner relationship” of municipalities and state supervisory authorities by abolishing the legality principle (hence the official justification). That seems like legal encouragement of unlawful advantages. In my view, there are other considerations which could justify the expediency principle and these have been put forward in legal literature. The purpose of legal supervision is not simply “to pursue automatically and without exception every legal contravention and to prosecute as a matter of course every violation of law. It must rather be considered in the light of all the circumstances of the individual case the extent to which there is a public interest in remedying the legal contravention” (thus Rolf Stober, p. 257). The Law of 1997 is now generally approved (see e.g. Franz-Ludwig Knemeyer, *Bayerisches Kommunalrecht*, p. 293). Since the general introduction of the expediency principle in 1997, the district administrator’s office acts legally when it does not pursue trivial legal contraventions of the municipalities (thus also Josef Prandl/Hans Zimmermann/ Hermann Büchner, Art.108 GO, number 7, also Josef Bauer/Thomas Böhle/Gerhard Eckter, Art.112 GO, number 4 and 7, also Meinhard Schröder, p. 374 with fundamental statements about the expediency principle of state supervision). There are no judgments after 1997 that criticise the expediency principle. On the contrary, the Administrative Court Regensburg decided by a judgment of 22 October 2003 that state intervention must be limited to necessary actions (*Bayerische Verwaltungsblätter* 2004, pp. 538; also Knemeyer, *Die Staatsaufsicht...* pp. 217, p. 228). In the case of a serious contravention, the public interest will continue to require the intervention of the supervisory authority.

6. Remedies of Legal Supervision

The powers of the state supervisory authorities are regulated in detail by law. This is necessary in view of the high value of local self-government. The municipalities are, after all, not the extended arm of the state; they are separate organisations with the right to form their own views.

6.1 Right to be Informed

“The legal supervisory authority is authorised to acquire information on all matters concerning the municipality. It may, in particular, inspect institutions and facilities of the municipality, examine the management and finances, and call for reports and files” (Art.111 GO). This does not give the legal supervisory authority the right to call for information on all council decisions. It must instead have a concrete reason for its requests.

Where, for example, a citizen complains to the district administrator’s office about a payment notice from a municipality, the district administrator’s office will call for the relevant files and a report from the municipality on the citizen's complaint. In this way, the supervisory authority can obtain a comprehensive picture of the matter in dispute, and form an independent judgment as to whether the citizen has suffered a wrong.

The right to information also gives the supervisory authority the right to participate in council meetings. This right of participation encompasses the putting of questions; it does not give a right of active participation in council deliberations. The supervising authority is well advised to be restrained in its use of this right of participation, as the sensitivities of local self-government can here be very easily affected. On the other hand, it can be observed in practice that in particular cases the municipality will, of its own accord, invite, alongside representatives of technical authorities, a representative of the supervisory authority to a council meeting. It is usual to accept such an invitation and in principle there is no objection to this.

6.2 Right to Object

The legal supervisory authority can object to unlawful resolutions and decisions of the municipality and require their annulment or modification (Art.112 sentence 1 GO). Unlawfulness can be assumed wherever the municipality

contravenes mandatory law – this can include rules of substantive law as well as procedural rules. As long as the municipality in the sphere of its own responsibility remains within the law, the supervisory authority cannot intervene, even where it considers a resolution of the council to be inappropriate.

Example 1:

When a council discusses whether the municipality should build a swimming bath or a local history museum and finally decides – assuming funding has been secured – to build a swimming bath, the supervisory authority cannot object to this decision on the ground that it considers the building of a local history museum to be more appropriate. An objection by the supervisory authority in this case would be an unlawful interference in the right of self-government of the municipality.

The state must respect the will of the municipalities. Where a state accepts the right of self-government of local authorities, it necessarily thereby recognises other decision-makers in addition to the central authorities. Legal boundaries are thereby set to the powers of the central authorities. It can be seen from this that decentralisation involves a renunciation of state authority.

Example 2:

When the population of a municipality receives its drinking water only from private sources, and the water is continually polluted and gives rise to illness in the population, the municipality is required to remedy the situation, as it is responsible for the provision of drinking water (Art.57 par 2 sentence 1 GO). Possibilities to be considered are, for example, construction of a municipal water supply with laying of water pipes and connection of the built-up areas accompanied by the closing down of the private water sources or a connection with the water supply of a neighbouring municipality. If the municipality does nothing to remedy the water supply situation and instead decides to build a swimming bath, then the legal supervisory authority will have to intervene.

Reason: The decision of the council is contrary to law because the municipality can only proceed with a non-mandatory project (construction of a swimming bath) when it has fulfilled its mandatory tasks. As supplying the population with pure drinking water is a mandatory task of the municipality (Art.57 par 2 sentence 1 GO), the construction of a swimming bath must be put to one side until the problem of the drinking water supply has been resolved. The district administrator's office will accordingly object to the decision

of the council to construct a swimming bath as unlawful and will require its annulment.

The concept of “directive” (*Verfügung*), to which the supervisory authority may object, is given a broad meaning. It encompasses all acts of public authority which affect third parties, i.e. the establishment of rules (e.g. municipal by-laws) and administrative acts.

6.3 The Right to Issue Directives

The supervisory remedy against unlawful omissions is the right to issue directives.

Example: In every municipality, the first mayor must at the request of the council call a meeting of the citizens to discuss municipal matters (Art.18 par 1 sentence 1 GO). If the mayor – for whatever reason – does not comply with this legal obligation, the legal supervisory authority can require, i.e. direct, the mayor to call a meeting of the citizens (Art. 112 sentence 2 GO).

6.4 Substitute Performance

Where the municipality does not comply with the directives of the legal supervisory authority within a reasonable time limit set by the authority, the authority can direct the necessary measures in place of the municipality and enforce them (Art.113 sentence 1 GO). The municipality does not thereby save any costs, since under Art.113 sentence 2 GO the municipality bears the costs of substitute performance.

In the example set out above, the legal supervisory authority can, if the municipality does not comply with the directives within a reasonable time,

- annul the resolution on the construction of the swimming bath;
- call a meeting of the citizens.

It follows from the words “in place of the municipality” that substitute performance has direct effect for and against the municipality. All legal acts that result from substitute performance are deemed to be the acts of the municipality. If such a legal act is, for example, addressed to a citizen, the opposing party in any litigation by the citizen concerning this act will be the municipality – not the state supervisory authority.

6.5 Appointment of a Commissioner

In general, the remedies described above suffice to ensure the legal conformity of municipal actions. The legislature has, however, made provision for more critical cases.

Art.114 GO provides as follows:

Par (1): "Where the orderly conduct of administration is seriously obstructed by the inability of the council to pass a resolution or by its refusal to implement directives of the legal supervisory authority in conformity with law, the legal supervisory authority can authorise the first mayor to act on behalf of the municipality until the unlawful situation has been remedied."

Par (2): "Where the first mayor refuses to act or is prevented for practical or legal reasons from acting in accordance with par. 1, the legal supervisory authority shall commission the other mayors in succession to act on behalf of the municipality as long as this is necessary. If no further mayors are available, or if they are unable or are unwilling to act, the legal supervisory authority shall act for the municipality."

These provisions have scarcely any practical significance as the system of local self-government functions well without the necessity of recourse to this possibility. There has been only one higher court case in Bavaria that has dealt with the provisions of Art.114, and that was in 1959.

6.6 Dissolution of the Municipal Council

Where the unlawful situation cannot otherwise be remedied, the Bavarian State Government can dissolve the municipal council and order a new election (Art.114 par 3 GO). This is the most powerful supervisory remedy, available only to the Bavarian State Government as the supreme governing and executory authority of the Free State of Bavaria. The State Government has not hitherto had to make use of this remedy. This is in accord with the view that for certain areas of the legal system the mere availability of legal sanctions suffices.

7. Functional Supervision

7.1 General

Municipalities – like all local government bodies – do not merely have their own sphere of responsibility. They also operate in the transferred sphere, and here they are subject to functional supervision. This means that state supervision also covers the exercise of municipal discretion (Art.83 par 4 sentence 3 BV, Art.109 par 2 sentence 1 GO). Functional supervision naturally includes legal supervision, but goes beyond it. This is logical, since local government bodies carry out in the transferred sphere tasks that have been specifically transferred by the state. It is a question here of matters that are state responsibilities. The interest of the state in having these responsibilities carried out as it wishes is therefore understandable. The state is thus permitted to intervene in the exercise of administrative discretion. Such intervention is, however, only permitted under certain narrow conditions. It is “to be restricted to the cases in which

1. the public good or public law claims of individuals require a directive or decision, or
2. the Federal Government issues a directive in accordance with Art.84 par 5 or Art.85 par 3 of the Basic Law” (Art.109 par 2 sentence 2 GO).

There is a structural difference between legal supervision and functional supervision. While legal supervisory measures take place after the event (repressive control), preventive measures are permissible in the context of functional supervision. The functional supervision authorities can influence future municipal decisions by general instructions in administrative regulations.

Uniform implementation of the law is justified above all by reasons of the public good. Numerous laws in the field of public safety and order are implemented by the state district administrative authorities and in the case of municipalities not belonging to a district are implemented by the municipalities themselves – naturally in the area of transferred responsibilities. To the extent that laws accord the executive authorities discretion, this discretion must generally be exercised on a state-wide uniform basis. Otherwise, each of the municipalities that does not belong to a district – of which there are 25 in Bavaria – could, for example, in the field of aliens law conduct its own aliens policies within

certain limits. This can be prevented through the remedies of functional supervision. Apart from this, the expanded competence resulting from the transferred responsibilities involves a strengthening of the local government bodies. In the field of transferred responsibilities, local government bodies act as local government and not as the long arm of the state. The areas of transferred responsibilities increase the intensity to which the citizen experiences local government. And, notwithstanding the possibilities of intervention enjoyed by the state in the context of functional supervision, there remains scope for local government authorities to act independently in the area of transferred responsibilities.

7.2 Functional Supervisory Authorities

Competence for exercising functional supervision in individual areas of transferred responsibilities is regulated by the relevant special provisions (Art.115 par 1 sentence 1 GO). The authority for exercising functional supervision is thus not vested in a single authority as in the case of legal supervision. At the ministerial level, the various functional ministries act as functional supervisory authorities. At the ministerial level, i.e. at the highest state level, functional supervision is exercised, e.g.

- in the field of education law by the State Ministry of Education and Culture;
- in the field of trade and industry law the State Ministry for Economics, Infrastructure, Transport and Technology;
- in the field of aliens law by the State Ministry of the Interior.

In the absence of special provisions, the legal supervisory authorities are also responsible for functional supervision (Art.115 par 1 sentence 2 GO, Art.101 sentence 2 LkrO, Art.97 sentence 2 BezO). Responsibility for functional supervision is thus assured in all cases.

7.3 Remedies of Functional Supervision

Functional supervisory authorities can obtain information in the same way as legal supervisory authorities, but naturally only about matters of transferred responsibilities (Art. 116 par 1 sentence 1, Art.111 GO). They can also, in accordance with Art.116 par 1 sentence 2 GO, give the municipality directives for dealing with transferred matters, subject to Art.109 par 2 sentence 2 GO (see

discussion under 7.1). The functional supervisory authorities do not have any more far-reaching powers to intervene in municipal administration (Art.116 par 1 sentence 3 GO). Where a municipality does not comply with a directive from the functional supervisory authority, that authority can turn to the legal supervisory authority, which alone is empowered to have recourse to other supervisory remedies (substitute performance, appointment of a commissioner, etc). The legal supervisory authority has a duty to support the functional supervisory authority in the exercise of its legal responsibilities (Art.116 par 2 sentence 1 GO).

8. Legal Disputes

Municipalities – like all local government authorities – are subject to the supervision but not to the arbitrary power of the state. Municipalities can instigate legal proceedings against supervisory measures; this is ensured by Art.19 par 4 GG. In accordance with this provision, every natural and legal person may have recourse to the courts when they establish that their rights have been violated by a public authority. The Administrative Courts are competent for legal disputes of this kind between municipality and state (§ 40 Administrative Court Procedure Law).

8.1 Legal Supervisory Acts

Legal supervisory measures that go beyond a demand for information, such as objections, substitute performance, appointment of a commissioner and dissolution of the municipal council, constitute adverse administrative acts for the municipality. Where a municipality asserts that a supervisory measure contravenes its right of self-administration, it can commence litigation in the administrative courts with an application to quash the administrative act. The administrative court then examines whether the legal conditions for the legal supervisory measures have been satisfied. Where the municipal action is found to be lawful, the legal supervisory act is unlawful and will be quashed by the administrative court.

8.2 Functional Supervisory Acts

Whether the municipality can also attack functional supervisory acts before the administrative courts depends on whether the functional supervisory measures, in particular the functional supervisory directive, constitutes an administrative act and whether the municipality can establish that its rights have been violated by the functional supervisory directive. The question of whether a functional supervisory directive constitutes an administrative act in relation to a municipality is disputed. According to Art.35 of the Bavarian Administrative Procedure Law, an administrative act has various characteristics, one of which is a "direct external legal effect". Thus the Bavarian Higher Administrative Court once declared in a judgment of 29 September 1976 that a functional supervisory directive only possesses a "direct external legal effect" when the municipality is affected in its own protected legal position. Against this view, it can be argued that the questions of whether an administrative act is present or whether there is a violation of rights should not be mixed. In the case of a functional supervisory directive – e.g. a directive by the state authority (regional government) to a municipality that does not belong to a district to close a business enterprise – there is always the external effect necessary for an administrative act: the state, on behalf of which the supervisory authority acts, and the municipality are different legal persons and different holders of rights. The state directive affects another legal person (i.e. the municipality), which is being told what to do. In a later decision – an order of 31 October 1984 – the Bavarian Higher Administrative Court stated that a functional supervisory directive represents an administrative act in relation to a municipality; and where the municipality has a legal position of its own to defend, then it has a right of action. Art.109 par 2 sentence 2 GO accords the municipality legal position of this kind – the state supervisory authority has only a restricted right to issue directives under this provision (see on this the discussion above under 7.1).

9. Final Comment

State supervisory authorities exercise their supervisory powers only within a legal framework and may not do so in an arbitrary manner. Where municipalities have the impression that a supervisory act of the states violates

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their right of self-government, they do not in practice hesitate to bring an action against the state before the administrative court so that the court may quash the supervisory act. The state supervisory authorities must always be aware that their supervisory acts are subject to judicial control. Arbitrary supervisory acts are accordingly in general not a problem.

Overall, it can be said that the system of state supervision does not adversely affect the idea of local self-government – in theory or in practice.

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Abbreviations

- BayGVBl Bayerisches Gesetz- und Verordnungsblatt (Bavarian Law and Ordinance Gazette)
- BV Verfassung des Freistaates Bayern vom 2. Dezember 1946 (Constitution of the Bavarian Free State)
- BVerfGE Entscheidungen des Bundesverfassungsgerichts, Band ... (Decisions of the Federal Constitutional Court, vol. ...)
- GG Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (Basic Law of the Federal Republic of Germany of 23 May 1949)
- BezO Bezirksordnung für den Freistaat Bayern (Regional Government Law for the Free State of Bavaria)
- GO Gemeindeordnung für den Freistaat Bayern (Local Government Law for the Free State of Bavaria)
- LkrO Landkreisordnung für den Freistaat Bayern (Administrative District Law for the Free State of Bavaria)

POVZETEK

DRŽAVNI NADZOR NAD SAMOUPRAVNIMI LOKALNIMI SKUPNOSTMI

V demokratični državi imajo samoupravne lokalne skupnosti pristojnost odločati o izvirnih samoupravnih nalogah kot njihovem delokrogu neodvisno od centralne vlade. Samoupravne organe v demokratični državi zavezujejo načela pravne države in vladavina prava in pravičnosti, kot je navedeno v nemški ustavi. Naloga zakonsko določenih državnih organov je nadzor samoupravnih lokalnih skupnosti in skrb da le-ti ne prestopijo mej pravnega reda.

Ker Zakon o lokalni samoupravi v Zvezni Republiki Nemčiji ni v pristojnosti centralne vlade, temveč posameznih zveznih dežel, članek izhaja iz Zakona o lokalni upravi ene od 16 nemških (zveznih) dežel, tj. iz Zakona o lokalni samoupravi Svobodne države Bavarske. Vendar se ta načela ne razlikujejo od načel v drugih zveznih deželah.

Državni nadzor ni omejen na nadzor občin. Dolžnost nadzornih organov je tudi, da svetujejo občinam. Konec koncev, občine in država niso nasprotniki, temveč sodelujejo v skladu z osnovnim načelom na osnovi vzajemnega zaupanja.

Ker občine izvajajo funkcije delno iz izvorne pristojnosti in delno iz prenesene pristojnosti z države, se tudi državni nadzor nad njimi razlikuje glede na vrsto funkcij.

Država sme preverjati le akte lokalnih skupnosti, ki izhajajo iz njihovih izvirnih pristojnosti, da bi ugotovila, ali je lokalna skupnost ravnala v skladu z zakonom (nadzor nad zakonitostjo). Ko gre za prenesene obveznosti samoupravne lokalne skupnosti, je pravni položaj drugačen. Tukaj gre za državne naloge, zato je razumljiv interes države, da jih občina opravlja v skladu z »njenimi željami«. Drugače povedano, država pri tem ne preverja zgolj zakonitosti aktov, ki izhajajo iz posredovanih obveznosti, temveč tudi nadzira smotrnost izvajanja državnih nalog, torej, kako občine izvajajo prenesene pristojnosti po načelu primernosti.

V članku najprej razložimo, kateri državni organi izvajajo nadzor nad zakonitostjo in funkcijo, potem preidemo na vprašanje, ali je državni nadzor podvržen načelu zakonitosti ali primernosti.

Drugače povedano: ali mora nadzorni organ posredovati, če ugotovi, da je delovanje občine v nasprotju z zakonom, ali pa lahko ravna po lastni presoji?

Ali se lahko nadzorni organ vzdrži vmešavanja in le "opazuje", ko lokalna skupnost ravna v nasprotju z zakonom?

Do leta 1997 pravno stališče na Bavarskem – za razliko od drugih dežel Zvezne Republike Nemčije – ni bilo enotno: tako v primeru vseh lokalnih skupnosti, kot tudi najmanjše podeželske občine in glavnega deželnega mesta Münchna, so morali nadzorni organi posredovati, ko so odkrili nezakonite odloke ali odločbe občin.

V bavarski zakonodaji je nadzor okrožnih ali pokrajinskih oblasti vendarle vedno slonel na načelu smotrnosti, ki je nadzorne organe pooblastil, ne pa tudi obvezal, da posredujejo v primeru nezakonnosti. To je bilo popolnoma nedosledno. Od leta 1997 zakoniti nadzorni organi uporabljajo načelo primernosti v vseh deželah Zvezne Republike Nemčije.

Tudi bavarska zakonodaja sedaj zastopa stališče, da ni naloga države, da preganja vsako kršitev zakona na občinski ravni.

Sredstva, ki so na voljo državnim nadzornim organom, so zelo različna: segajo od pravice do obveščeniosti, ugovora, izdaje smernic in odredbe o nadomestni izvršitvi do ustanovitve komisije, ki jo imenuje država, in - kot najbolj skrajno sredstvo - razpustitev občinskega sveta.

Kadar občine izvajajo postopke na področju prenesenih nalog, lahko tehnični nadzorni organi razširijo nadzor in poleg preverjanja zakonitosti vplivajo tudi na uveljavljanje diskrecije občin.

Vendar morajo tudi na tem področju državni nadzorni organi upoštevati določene omejitve. Organi državne oblasti morajo biti previdni pri izvajanju nadzora; občine - tako kot druge samoupravne lokalne skupnosti - imajo ustavno zagotovljeno legitimacijo na upravnem sodišču uveljavljati, da to oceni, ali so državni organi pri izvajanju nadzora ravnali v skladu z zakonom.

Lokalne oblasti v Nemčiji so dovolj samozavestne, da sprožijo pravni postopek proti državi, če se jim zdi, da so bile kršene njihove pravice.

Zato v praksi ne prihaja do samovoljnega izvajanja nadzora.

Zaradi tega lahko rečemo, da sistem državnega nadzora ne vpliva na idejo lokalne samouprave.