

Author:

Circulation: 22'000
(distributed electronically)

Dr. iur. Bernhard Madörin

Tax and Fiduciary expert
Licensed audit expert RAB
Licensed insurance broker FINMA

State supervision versus supervising the state

Dear Ladies and Gentlemen,

We lead our lives believing we can enjoy the freedom of a liberal system. However, immense economic growth has led to a huge regulation of all aspects of our lives. Not a second goes by without us being faced with governmental supervision.

State supervision

To list a few examples (by no means exhaustive) which areas are regulated:

- Food and drink, from tap water (and waste water) to milk, bread and processed and unprocessed food products
- Our health, sickness, diseases, doctors, medication, health insurance, tobacco and alcohol, the whole mile from recovery to compulsory health care, BMI and DNA
- The Swiss Franc as a synthetic nominal value
- The prices' watchdog as a regulator of the market
- Our walking, like that of many other pedestrians, in public spaces
- Our journeys and travels, cars, motor vehicle inspections, trams, trains, aerial cableways, ships
- Work, working hours, breaks, contracts, remuneration, permits and permissions
- Our faiths and churches, both with and without governmental recognition
- Taxes, social insurances, fees and mandatory fees

In recent times a number of new regulatory bodies have been added:

- FINMA commanding authority for banks, stock exchanges and financial matters
- ELCOM supervising the electricity industry
- The Federal Audit Oversight Authority FAOA

Distrust replaces the principle of mutual trust, the state's comprehensive cover mentality sweeps self-responsibility aside.

Supervising the state

While the nanny state takes over more and more aspects of life, there is a significant lack of adequate measures to supervise this immensely growing nanny state itself. For anyone the first legal options are lodging complaints and appeals against governmental decisions; however, the decision process has remained unchanged for a century. On one side is the citizen, the legal subject lodging appeals, on the other side are all those appeal bodies that are either run by public sector employees or civil servants or,

as best-case scenario, by elected personnel who get their salary paid by the state. Thus 90-99% of all appeals are dismissed.

Significant deficiencies of governmental activities

In the private sector a joint signature is the norm. However, in the public sector and in public administration just one signature is sufficient. The private sector relies on continuous professional training, sometimes it is even mandatory and will be supervised; the state, however, does not have any regulations regarding further education of public sector employees and civil servants. In the private sector restructuring and, as a consequence, changes in staff numbers are part and parcel of a permanent process; the public sector and the public administration, however, still believe in the unwritten law of jobs for life. For the state, downsizing or reductions on staff numbers are out of the question, an act of sacrilege.

In the private sector quality control systems, internal control systems, internal audits and many other measures are the norm and to some extent compulsory. The state, on the other hand, does not have any such system controls.

First Example: Tax Appeal Commission

The Tax Appeal Commission of the canton of Basel-Stadt can serve as a concrete example. It is the first "independent authority" responsible for the administration of justice over annual public revenues by the canton of Basel-Stadt of around CHF 2.5bn and thus for around 120'000 taxpayers. The electoral body is the governing council that for several decades has elected registered lawyers as members of this commission. Lawyers generally cover all aspects of law, there are only a few that have gained specific experience with tax law. Most of them spend only 1-10% of their work with cases involving tax and tax law. For quite a few of those newly elected into this body it is the very first time that they actually have to deal with tax law. Thus the position to start from is that the Tax Appeal Commission is a court specialising on tax matters, set up with members that are anything but tax specialists. Further participants are those subject to tax who once a year have to fill in and hand in their tax declaration, and, as main player, the cantonal tax authority with 200 employees who are specialists in the field of tax law. Finally there is the Tax Appeal Commission, made up of members who are only partly familiar with tax matters, but still they have to adjudicate on fiscal matters.

This constitutes a startling initial position, as an adjustment by the Court of Appeal, the highest court in the canton of Basel-Stadt, cannot be expected. This court assumes that both the cantonal tax authority and the Tax Appeal Commission have reasonably used their discretionary powers. The Federal Supreme Court in Lausanne cannot be asked to make a decision, either, as it only acts on the premise of arbitrariness, which is notoriously absent in 99% of the cases.

Second Example: Public Prosecutor

According to law, the Public Prosecutor's Office Basel-Stadt is subject to unlimited supervisory powers of the Governing Council (§ 50 of the Court Organisation Act). However, the government limits its activities to administrative governance which solely includes receiving an annual report. The Justice Department supports the government that periodically receives information by the Public Prosecutor's Office, with the "information correct beyond a shadow of a doubt", as I was told after I had made an enquiry. While a supervisory body for the Federal Supreme Court was created, due to deficiencies, the Public Prosecutor's Office BS can do as it pleases, and it is not subject to any kind of supervision that actually deserve to be called thus. Any complaints to the Court of Appeal are fruitless as they will be rejected in 95% of the cases.

Any limits to the expanding state?

These examples prove that the state and the government have reached the limits of their growth. Deficits in Basel-Stadt are clearly visible in the cases of the Cantonal Bank, the public transport company BVB, the theatre, the Public Prosecutor's Office, and the government itself, as a consequence of uncontrolled remuneration. In the canton of Basel-Landschaft the situation is filled with similar problems: pension funds, government remuneration, public prosecutor, and so on. At the federal level there are considerable deficiencies with procurement, army, financing of social expenditures, and so on.

The state protects the state

The recent public deficits point to an inherent problem. A great deal needs to happen before mismanagement comes to light. Failings and mistakes will be covered up, and public sector employees are protecting other public sector employees. It is a case of repetitive arbitrariness before someone reacts, and a number of public sector employees willing to clear the matter are required. In all other cases the matter is swept under the carpet.

Parliamentary supervision

The final authority for cases against the public administration is parliamentary supervision, as laid down constitutionally. This sounds promising, but these are little more than empty words. Only once every few years is a case referred to this legal institution. In all other cases it is just unused theory about the teachings of the separation of power according to Montesquieu.

Elimination of deficiencies

De lege ferenda, the legal system, over the passage of time, needs to address our jurisdiction over the state and its institutions. A first, simple and pragmatic step would be to ensure that no more than 80% of appeals as means of legal redress are rejected. This may be a far cry from a decent jurisdiction, but the current system is not much better, either.

Kind regards

artax Fide Consult AG

Member of Morison International

Gartenstrasse 95, Postfach, 4002 Basel
Tel: +41 61 225 66 66, Fax: +41 61 225 66 67
info@artax.ch, www.artax.ch