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## Mechanisms for Control of the Executive by the *Bundestag*

In modern, democratic states, the most common system of government is the parliamentary system of government.<sup>1</sup> Naturally, in view of the specific political system, traditions and experiences, this system has been modified in individual states, and this modified form is also found in the Federal Republic of Germany. Furthermore, the system of government of the German state has its own peculiar name, and the literature on the subject uses the term “chancellor system.” An analysis of the solutions of the Basic Law of 1949 allows one to accept the thesis that it is a rationalised version of the parliamentary system, the essence of which is to strengthen the position of the head of government.<sup>2</sup> As Michał Domagała emphasises that, in addition to the initial features characteristic of a parliamentary system, the chancellor system is defined by a mixed electoral system for the *Bundestag*, the strong position of the Federal Chancellor, the lack of accountability of federal ministers to the *Bundestag* and the state of legislative emergency.<sup>3</sup>

It is beyond the scope of this paper to analyse and evaluate the assumptions of the chancellor system, an issue to which much space has been devoted in the literature. The focus of this paper is on a segment of the relationship between the legislature and the executive – the legislative control function and the instruments that allow the *Bundestag* to control the federal government. Indeed, the scrutiny function of the parliament is an immanent element of parliamentary systems, and the manner in which it is exercised, the instruments and the possibility of its use, particularly by opposition groups, can be regarded as one of the pillars of a democratic state.

Article 20(2) of the Basic Law of the Federal Republic of Germany<sup>4</sup> adopted in 1949 expresses the principle of separation of powers. Power in the German state comes

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<sup>1</sup> See M. Wallner, *Podziały i typologie systemów parlamentarnych: zagadnienia metodologiczne*, “Annales Universitatis Mariae Curie-Skłodowska Lublin – Polonia” 2014, Sectio K, Vol. 21, No. 2, pp. 85–86.

<sup>2</sup> See M. Domagała, *Recepcja niemieckich rozwiązań ustrojowych w polskim prawie konstytucyjnym* [in:] *Aktualne problemy polskiego i litewskiego prawa konstytucyjnego*, ed. D. Górecki, Łódź 2015, p. 17; B. Dziemidok-Olszewska, *Konstruktywne wotum nieufności w Republice Federalnej Niemiec i III Rzeczypospolitej Polskiej*, “Środkowoeuropejskie Studia Polityczne” 2011, No. 2, p. 106.

<sup>3</sup> M. Domagała, *Recepcja niemieckich rozwiązań...*, p. 18.

<sup>4</sup> <http://biblioteka.sejm.gov.pl/konstytucje-swiata-niemcy/> [accessed: 2023.09.10].

from the people, who exercise it through elections, votes and through the separate bodies of the legislature, the executive and the judiciary. The legislature is made up of the *Bundestag* and the *Bundesrat*, while with regard to the executive, the legislature has adopted its dualism or even, as Paweł Sarnecki argues, its trialism.<sup>5</sup> The organs of executive power are the President of the Republic and the federal government with the Federal Chancellor. Without going into the detailed relations between the head of state and the government, whose position in the state is differentiated,<sup>6</sup> it should be stated that the core of executive power belongs to the federal government headed by the Chancellor. As Jan Wiktor Tkaczyński points out, the importance of the government in the system of organs of the German state stems from the range of competences assigned to it, some of which are exercised under the government's own responsibility, the consequence of which is that they are excluded from parliamentary control.<sup>7</sup> This does not contradict the classical assumption of the parliamentary system and the submission of the activities of the government and the chancellor to parliamentary control. Control is understood as checking the state as it is (the actual state) and comparing it with the state that should be (the required state). At the same time, the broader scope of parliamentary control is related to the fact that it serves the purpose of obtaining information on the activities of the government, allows for the formulation of opinions, conclusions and postulates, but it may also lead to the activation of procedures for the enforcement of political responsibility.<sup>8</sup>

Analysing German solutions, one notices that in their essence they are in line with the characteristic control mechanisms present in other countries, including Poland. Analogous to the divisions used by the representatives of the Polish doctrine of constitutional law, among the instruments present in German parliamentary law one identifies those used by the entire chamber, by committees and those belonging to the individual rights of members. It must be emphasised that the distinction above is of a purely doctrinal nature, as regardless of which group a particular instrument of scrutiny falls into, similar purposes are associated with it: obtaining information, making an assessment and drawing conclusions.

Undoubtedly among the classic, but also the oldest, mechanisms of parliamentary control is the right to control public accounts (Article 114 of the Basic Law). The disposal of public funds falls within the competence of the executive – the federal government. However, it does not have complete freedom in this respect, but is bound by the regulations of the Budget Act, which determines state revenues and expenditures.

<sup>5</sup> P. Sarnecki, *Ustroje konstytucyjne państw współczesnych*, Warszawa 2008, p. 170.

<sup>6</sup> For more on the position of the President of the Republic, read: J.W. Tkaczyński, *Prawo ustrojowe Niemiec*, Kraków 2015, pp. 271–280. See also M. Pach, *Możliwość i celowość recepcji na grunt polski współczesnych niemieckich regulacji prawnokonstytucyjnych w zakresie władzy wykonawczej*, "Kultura i Polityka" 2010, No. 8, p. 108.

<sup>7</sup> J.W. Tkaczyński, *Prawo ustrojowe Niemiec...*, p. 281.

<sup>8</sup> See M. Stębelski, *Kontrola sejmowa w polskim prawie konstytucyjnym*, Warszawa 2012, p. 63 *et seq.*; J. Juchniewicz, *Instrumenty realizacji funkcji kontrolnej Sejmu – próba oceny skuteczności*, "Przegląd Prawa Konstytucyjnego" 2013, No. 1, p. 18.

For this reason, it is generally accepted that the adoption of a Finance Act by the *Bundestag* gives the chamber the right, indeed the obligation, to monitor the implementation of the budget by the government.<sup>9</sup> The duration of the Finance Act, which is limited to one year, determines the frequency of the audit. It is carried out annually, after the Federal Minister of Finance has submitted his financial report, which includes information on all income, expenditure, assets and debts for the period of the following financial year. The Federal Court of Auditors is also involved in the audit process and examines the report submitted and the economy and regularity of budgetary and economic activities. Budgetary control ends with the granting of discharge to the government.<sup>10</sup> The Basic Law does not stipulate the legal consequences of not discharging the government, but the importance of this instrument of control manifests itself in the opportunity to discover all aspects of the financial side of the state's functioning and the government's performance. The granting of discharge can also be seen as an expression of approval of the government's financial policy, whereas if discharge is refused, the federal government receives a clear signal from the *Bundestag* that its activities are subject to critical evaluation.

Whilst scrutiny of the implementation of the Finance Act is a systematic exercise carried out once a year and is limited to the financial sphere of state activity, parliament can also take other measures, for example, by initiating debates in the plenary chamber to obtain information on the work of the government. Above all, however, scrutiny is carried out by committees of the *Bundestag* and by the members themselves.<sup>11</sup>

The committees of the *Bundestag* are part of its internal bodies. Under the Basic Law, the *Bundestag* has to appoint a European Committee, a Defence Committee, a Foreign Affairs Committee and a Petitions Committee.<sup>12</sup> The number, names and terms of reference of the other committees are left to the discretion of the *Bundestag* and may vary from term to term.<sup>13</sup> Each standing committee of the *Bundestag* receives reports on the activities of the appropriate *Bundestag* departments as it sees fit and may also request reports on current issues from representatives of ministries. This scrutiny is continuous in the sense that the committees can call on the relevant ministries at any time, making this method of scrutinising the executive branch an important part of its constitutional function.

In addition to committees of a permanent nature, i.e. committees appointed at the beginning of a *Bundestag* term and remaining in office until the end of that term, the House may also appoint so-called committees of inquiry (*Untersuchungsausschüsse*,

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<sup>9</sup> Read: [https://www.bundestag.de/parlament/aufgaben/haushalt\\_neu/haushalt/haushalt-212614](https://www.bundestag.de/parlament/aufgaben/haushalt_neu/haushalt/haushalt-212614) [accessed: 2023.09.10].

<sup>10</sup> The *Bundesrat* (the second chamber of parliament) also has the right to scrutinise the implementation of the budget law, and it also has a say on the discharge of the federal government.

<sup>11</sup> See [https://www.bundestag.de/parlament/aufgaben/regierungskontrolle\\_neu/kontrolle/grem-255458](https://www.bundestag.de/parlament/aufgaben/regierungskontrolle_neu/kontrolle/grem-255458) [accessed: 2023.09.10].

<sup>12</sup> See 45, 45a, 45c the Basic Law.

<sup>13</sup> [https://www.bundestag.de/parlament/aufgaben/regierungskontrolle\\_neu/kontrolle/grem-255458](https://www.bundestag.de/parlament/aufgaben/regierungskontrolle_neu/kontrolle/grem-255458) [accessed: 2023.09.10].

or committees of inquiry).<sup>14</sup> They are a particularly important instrument, as their activities focus solely on the conduct of investigative activities. The regulations for German commissions of inquiry are contained in three normative acts: the Basic Law (Article 44), the Law of 19 June 2001 on the Regulation of the Rights of Committees of Inquiry of the German *Bundestag*<sup>15</sup> and the Rules of Procedure of the *Bundestag*.<sup>16</sup> Under Article 44 of the Basic Law, committees of inquiry are set up to collect necessary evidence, and in the light of the current arrangements, there are committees of inquiry in the German constitutional system that are appointed on a mandatory basis and committees that are appointed on an optional basis. This duality is due to the formal requirements for the request to set up a commission of inquiry. A motion can be tabled by a group of members accounting for at least 5% of all members of the *Bundestag* or by a parliamentary group. If less than a quarter of the members of the *Bundestag* sign the motion, it is up to the House to decide whether a committee should be set up. If a majority of members vote in favour of setting up a committee, it will be set up, whereas if the motion does not receive the required majority, the committee will not be set up. The situation is somewhat different if a group of at least a quarter of the members requests it, in which case the *Bundestag* is obliged to set up a committee.<sup>17</sup> In the case of the obligatory appointment of a committee, the *Bundestag* may not interfere with the scope of the matter to be investigated, whereas in the case of optional committees, the House is not bound by the contents of the motion and may amend the committee's remit.<sup>18</sup>

A key solution for the possibility of implementing scrutiny measures and influencing the opposition's ability to actually get involved is the way in which the composition of the committee is shaped. In setting up a committee, the *Bundestag* determines the number of members and an equal number of substitute members. All parliamentary factions must be represented on the committee; in addition, the composition must reflect the majority relationship in the chamber, which is done using the St. Lague/Schepers algorithm. The appointment of members to the committee (as well as deputy members) is at the discretion of the parliamentary factions, which can also dismiss a member or deputy member at any time.

The range of matters that committees of inquiry may deal with is not unlimited and must remain within the sphere of competence of the *Bundestag*.<sup>19</sup> Hence, as Tkaczyński

<sup>14</sup> More: M. Godlewski, *Charakter prawny komisji śledczej niemieckiego Bundestagu*, "Ius Novum" 2017, No. 1, pp. 181–199; P. Czarny, *Komisje śledcze niemieckiego Bundestagu*, "Przegląd Sejmowy" 1999, No. 3, pp. 55–71.

<sup>15</sup> Gesetz zur Regelung des Rechts der Untersuchungsausschüsse des Deutschen Bundestages BGBl. I, p. 1142.

<sup>16</sup> [https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/go\\_btg](https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/go_btg) [accessed: 2023.09.10].

<sup>17</sup> Article 44.1 the Basic Law.

<sup>18</sup> J. Juchniewicz, *Status i rola opozycji parlamentarnej niemieckiego Bundestagu – zagadnienia wybrane*, "Przegląd Prawa Konstytucyjnego" 2010, No. 1, pp. 228–229. The Act on the Regulation of the Rights of Commissions of Inquiry provides in Section 2(1) that the right to change the subject matter of the investigation is granted only to applicants.

<sup>19</sup> Paragraph 1 section 3 Act on the Regulation of the Rights of Commissions of Inquiry provides.

points out, the limitations on the possibility of setting up commissions of inquiry are the maintenance of the inviolability of the division of powers between the Federation and the *Länder*, the impermissibility of encroaching on the exclusive competences of state organs and on the decision-making process undertaken by the organs.<sup>20</sup> The overriding principle of the commissions of inquiry is the principle of openness. This not only serves to maintain the transparency of the committee's work, but above all allows the public to be informed of the proceedings. The openness of the committee's work may be excluded, and the decision in this matter rests with the committee itself. The effectiveness of the work of the committees is also guaranteed by the application of the rules of criminal procedure in the proceedings, in addition, the courts and public administration bodies are obliged to provide the necessary assistance to the committees.<sup>21</sup>

The *Enquete Kommissionen* are not the only committees whose powers allow them to carry out actions of a controlling nature *vis-à-vis* the executive. Under § 56 of the Rules of Procedure of the *Bundestag*, the chamber can appoint so-called *Enquete Kommissionen* to "prepare decisions on extensive and important questions." As a rule, their activities are related to the legislative activity of the chamber, but this does not preclude activity in the area of scrutiny either.<sup>22</sup> The provisions for the establishment of commissions are similar to those for the establishment of commissions of inquiry. On a motion tabled by at least a quarter of its members, the *Bundestag* is obliged to set up a committee. If a smaller number of members take the initiative, the *Bundestag* has the option of appointing a committee. The committee may consist of no more than nine members, who shall be appointed by the President of the *Bundestag* with the agreement of the parliamentary groups. Only when such agreement cannot be reached is the composition determined on a proportional basis so as to reflect the political forces in the *Bundestag*. The committees may request documents and information, but not on the basis of a request but on a voluntary basis.<sup>23</sup> The work of the committees shall culminate in a report which the *Bundestag* shall receive in time for debate before the end of the term. If it is not possible to present a final report, the committee presents a so-called interim report on the basis of which the *Bundestag* decides whether or not to continue the committee's work.

In the doctrine of constitutional law, a distinction is made within the framework of control mechanisms between the so-called instruments of individual parliamentary control. In light of contemporary developments, this distinction may be somewhat misleading, as in addition to the instruments that can be used by individual members, there are also instruments that can be used by groups of members, both informal and formalised. In German parliamentary law, among these mechanisms we distinguish

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<sup>20</sup> J.W. Tkaczyński, *Prawo ustrojowe Niemiec...*, p. 248.

<sup>21</sup> B. Banaszak, *Komisje śledcze we współczesnym parlamentarystyce państw demokratycznych*, Warszawa 2007, pp. 48–49.

<sup>22</sup> *Ibid.*, p. 51.

<sup>23</sup> *Ibid.*

between large questions, small questions, questions, individual questions, written questions and the government questionnaire.<sup>24</sup>

Parliamentary procedures allow two types of enquiry to be made, the so-called large questions and “small questions.” What they have in common is the written form required for answers to be given by the addressee, which may be the Federal Government. Large questions, which must be concise and specific and may contain a statement of reasons, may be tabled by a parliamentary group or by members (at least 5% of the members of the chamber) and may relate to important political issues. They are submitted to the President of the *Bundestag*, who asks the government to declare if and when it will answer the question. The *Bundesrat* answers the question in writing, but if the Federal Government refuses to answer or delays its reply for at least three weeks, it is also possible to hold a debate on the matter if a faction or group of at least 5% of the members requests it.

A similar group of members and a parliamentary group can submit so-called small questions, i.e. requests for answers from the Federal Government on specific facts. They are forwarded via the President of the *Bundestag* and, in accordance with the rules of procedure of the House, must not contain biased statements or assessments. Small questions also require a written answer, and this answer must be provided to the inquirer within 14 days. Unlike large questions, small questions do not lead to a debate in the *Bundestag*.

In addition to questions, members of the *Bundestag* may also put questions to the Federal Government in writing or orally.<sup>25</sup> This right is exercised during Question Time, which takes place every week of the session. Up to two questions may be put by a member of the *Bundestag*; the President of the *Bundestag* and the government must be notified in advance.<sup>26</sup> The Rules of Procedure of the *Bundestag* require that questions should be concise and enable a brief answer to be given; they also rule out the possibility of questions containing biased statements and assessments. Questions should deal with matters for which the Federal Government is responsible. However, should a question be tabled on matters of a local nature, the President of the *Bundestag* shall forward it to the Federal Government for a written answer. The questions put are answered orally at Question Time, but the rules allow additional questions to be put (a maximum of two) if the answers given by the Federal Government are considered inadequate. The President of the *Bundestag* may also allow other members to pose a supplementary question, provided this does not disrupt the normal course of the sitting. Question Time shall not exceed 45 minutes. In addition to oral questions during the sitting, members may ask so-called single questions. The number of ques-

<sup>24</sup> [https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/erlaeuterungen\\_geschaeftsordnung/gescho11-244678](https://www.bundestag.de/parlament/aufgaben/rechtsgrundlagen/erlaeuterungen_geschaeftsordnung/gescho11-244678) [accessed: 2023.09.10].

<sup>25</sup> See Geschäftsordnung des Deutschen Bundestages – Annex 4 Richtlinien für die Fragestunde und für die schriftlichen Einzelfragen.

<sup>26</sup> The President of the *Bundestag* must be notified of the question by no later than 10:00 on the Friday preceding the week in which the *Bundestag* meets; the Government must be notified by no later than 12:00 on the Friday preceding the week in which the *Bundestag* meets.

tions is limited as a member may ask up to four questions in one month. They are answered in writing and must be answered within one week of the question being posed. If the government does not provide an answer within the specified time limit, questions may be posed during Question Time. The answers given each week are compiled and published in print by the *Bundestag*.

A special form of questioning is the government question time, also known as the government survey.<sup>27</sup> The procedure primarily serves the purpose of obtaining information from members about the current activities of the government, but the subject of the questions may also be plans for the future of the federal government. During parliamentary session, on Wednesdays after cabinet meetings, for 90 minutes, members can spontaneously ask questions about matters being worked on during cabinet meetings. Answers are usually given by two members of the Cabinet, providing information on Cabinet work covered by the agenda. This item of business may also include topics to be debated by the government in the future. Three times during the year: in the last week of the session before Easter, in the last week before the summer recess and in the last week before Christmas, information is provided by the Federal Chancellor as part of the survey.

Undoubtedly, the control function is one of the key spheres of activity of the representative body and an important element of the rule of law based on the accountability of the authorities. The manner in which it is carried out also determines the level of democratisation of the state. At the same time, it should be borne in mind that the effectiveness of control mechanisms depends not only on the adopted normative solutions, but is largely determined by extra-legal factors, in particular political ones. An analysis of German regulations allows the assertion that the *Bundestag*, chamber committees and members have instruments at their disposal to obtain information on the activities of the federal government and thus conduct effective control over it. This is also evidenced by the ability of the parliamentary opposition to actively initiate scrutiny measures and thereby strengthen its effective position in parliament.

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<sup>27</sup> See Geschäftsordnung des Deutschen Bundestages – Annex 7 Richtlinien für die Befragung der Bundesregierung.

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## Summary

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### **Mechanisms for Control of the Executive by the Bundestag**

One of the functions of the representative body, alongside the legislative function, is the control function. It is a very important element of parliamentary-cabinet rule, and the way it is carried out, the instruments of scrutiny and the possibility for opposition factions in particular to use them are one of the pillars of a democratic state. Among the control mechanisms found in German law, are, among others, discharge, committees of enquiry, big and small questions, and questions to the government. The wide range of scrutiny instruments and the procedural arrangements that allow opposition representatives to use them enable the *Bundestag*, committees and members of the legislature to exercise effective scrutiny of the federal government's activities.

**Keywords:** government, control, *Bundestag*.

## Streszczenie

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### **Mechanizmy kontroli władzy wykonawczej przez Bundestag**

Jedną z funkcji organu przedstawicielskiego, obok funkcji ustawodawczej, jest funkcja kontrolna. Stanowi ona bardzo ważny element rządów parlamentarno-gabinetowych, a sposób jej realizacji, instrumenty kontroli i możliwość ich wykorzystania w szczególności przez frakcje opozycyjne stanowią jeden z filarów państwa demokratycznego. Wśród mechanizmów kontroli występujących w prawie niemieckim można wskazać m.in. absolutorium, komisje śledcze, duże i małe pytania, zapytania do rządu. Szeroka gama instrumentów kontroli oraz rozwiązania proceduralne umożliwiające korzystanie z nich przedstawicielom opozycji pozwalają Bundestagowi, komisjom czy deputowanym na prowadzenie skutecznej kontroli działalności rządu federalnego.

**Słowa kluczowe:** rząd, kontrola, Bundestag.