The Federal Republic of Germany

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The Federal Republic of Germany "is a democratic and social federal state" (Basic Law, Art. 20I). It was founded in 1949, after the Western Allies gave the prime ministers of the *Länder* (i.e., the constituent states), which were reestablished after the Second World War, the task of drafting a new constitution with a federal character in order to prevent a strong central state from arising in Germany again. However, the federal order in Germany does not follow the example of the United States Constitution, which emphasizes a division of powers between governments, but rather the German tradition, which is characterized by mutual connections, interconnections, and overlapping of the centralized and decentralized state units.[1]

When it was founded, the Federal Republic of Germany consisted of 11 *Länder* (without Berlin, which was a city-state under Allied control) that did not conform to the boundaries of the former Weimar Republic. Since reunification in 1990, Germany has consisted of 16 *Länder*, including three city-states: Hamburg, Bremen, and Berlin. Germany's population is spread across 357,000 square kilometres. The highest population density is in Berlin, which has 3,800 inhabitants per square kilometre; the lowest is in the *Land* Brandenburg, which has only 88 inhabitants per square kilometre. *Länder* sizes differ considerably as well. The smallest *Land,* Bremen, consisting of two cities (Bremen and Bremerhaven), has 680,000 inhabitants; the largest *Land,* North Rhine-Westphalia, has more than 17.9 million inhabitants.

The ethnicity of Germany's population of 82.1 million people is largely homogeneous. German is the only national and official language. Ethnic minorities with a distinct culture and language live only in the extreme Northwest (Frisians) and in the Southeast (Sorbs and Wends of Slavic origin). In addition, there is the national minority of German Danes on the northern border with Denmark. At the end of 2002, more than 7.3 million foreigners were living in Germany. Compared with the end of 1989, this figure had risen by roughly 2.3 million. The proportion of foreigners within the total population rose from 6.4 percent in 1989 to 8.9 percent in 2002. Many foreign families have lived in Germany for two or three generations. Roughly 55 million Germans are Christians, 28.2 million of them being Protestant and 27 million being Roman Catholic; in addition, there are approximately 1.7 million Muslims and only 54,000 Jews (representing a mere 10 percent of Germany's 1933 Jewish population before the Holocaust). The gross domestic product per capita (real) was US$32,962 in 2001.[2]

After 45 years of the East-West political division of Germany due to the Cold War conflict, the reunification of Germany took place in 1990, when the German Democratic Republic (GDR) joined the territory covered by the Basic Law *(Grundgesetz)* after the GDR collapsed politically and economically. Simultaneously, five new *Länder* were established within the territory of the former GDR. On this occasion, no use was made of the possibility, provided for in Article 146 of the Basic Law, of creating a new constitution and of allowing the German people to vote on it. This option had not been exercised in 1949 either, when the Basic Law likewise came into force without a popular vote. Sixty-five years after the outbreak of the Second World War, however, Germany regards itself as a community open to the world that promotes the European process of integration as a member of the European Union (EU) and contributes to the creation of a democratic, social, and federal Europe based on the rule of law and a peaceful coexistence (Art. 23I).[3]

Creation of the Federal Constitution

The constitution of the Federal Republic of Germany, called the Basic Law, was drafted and passed by the Parliamentary Council in 1948-49. This council consisted of 65 members delegated by the *Länder* parliaments. The constitution came into force on 23 May 1949. The basis for the council's discussions and decisions was the so-called Herrenchiemsee Draft, drawn up by a group of senior civil servants and leading politicians from the *Länder*. In addition to the desires expressed and conditions laid down by the Allies, the new constitutions of these *Länder,* dating from 1946-47, had a considerable influence on the content of the Basic Law.

The main goal of the majority of the founding fathers was to establish a Western-style democratic federal state that would guarantee freedom, peace, and security and enable a free-market economy to come into existence. All of these goals were, however, politically controversial in the Parliamentary Council because, at that time, the Cold-War conflict between the Eastern and Western political systems was already dominant. While conservatives preferred a more decentralized type of federalism in agreement with the Allies, left-wing circles were more in favour of a unitary federal state that would, in their view, enable Germany to overcome more easily the difficult problems of postwar reconstruction. As for the form of the democratic system, it was decided, in contrast to the plebiscitary examples in some of the *Länder* constitutions, that the political will should be formed in a purely representative body because, after the experience with the Weimar Republic and National Socialism, there was fear of providing demagogic leaders with a public platform. Finally, the free-market economy was also suspected by some founders of having favoured National Socialism because some business tycoons had supported Adolf Hitler; therefore, the free market was rejected by most people, including many liberals and conservatives. Thus, despite its neutrality regarding economic policy, the Basic Law still contains an article that permits the socialization of the means of production, of banks, and of land (Art. 15). Another heavily debated issue was the structure of the second chamber of the Parliament; the two alternatives have been either the establishment of a senate with directly elected members or the readoption of the former federal council composed of members nominated by the *Land* governments.

Taking a lesson from the inhuman regime of National Socialism, the founders laid special emphasis on guaranteeing human rights and civil rights, which they regarded as fundamental rights, placing them in the first section of the Basic Law ahead of all the other articles, and which they made directly and legally binding for all three branches of government: legislature, executive, and judiciary. In addition, they guaranteed that in the case of any violation of these rights by the state, a person has recourse to independent courts. Apart from the classic civil rights and liberties, guaranteeing the equality of all people before the law also played a special role for the founders. In the future, no one was to be favoured or disfavoured due to his or her language, race, homeland, origin, gender, or political opinions. Basic political rights, such as the freedoms of expression, assembly, and association, were also guaranteed. Thus the authors of the Basic Law not only complied with the wishes of the Allies, but also followed the Western traditions of constitutionalism, basing their ideas in particular on models like those developed in the nineteenth century after the bourgeois revolution in the years 1848-49, which produced the first attempts to draw up a federal constitution in St Paul's Church in Frankfurt.

The Basic Law was thus more a product of political elites than the result of broad participation by the population. After a 12-year break caused by the Hitler regime, the Basic Law replaced the Weimar Constitution of 1919, which, just like its predecessor, the Imperial Constitution of 1871, had established a federal state characterized by the principle of allegiance to the federation in the relationship between the federation and the

Länder and between the *Länder* themselves. Thus a tradition dating back to the early Middle Ages was resumed in 1949.

The Holy Roman Empire founded by Charlemagne in 800 was later provided with the first federal-like structure through the Constitutional Charter of 1356, called the "Golden Bulle." This federal structure consisted of the imperial organs (i.e., emperor, electoral princes, imperial court counsellors, and imperial supreme court) and imperial administrative districts (with their own administrations and armies). After the Thirty Years' War (1618-48), the individual duchies and principalities were given restricted sovereignty in the Treaty of Westphalia of 1648; thus from this time on, the German Empire can be regarded as having been a federal-like polity (not merely a confederation of states). Whereas the federal state came into existence at that time by way of decentralization (through the creation of autonomous subnational states), the creation of today's federal order in Germany was achieved by precisely the opposite means -- namely, through the amalgamation or accession of individual *Länder* in 1949.[4]

Constitutional Principles of the Federation

In accordance with the founders' intentions, the Basic Law was designed with a strongly noncentralized system of federalism in mind. Thus Article 30 stipulates that the exercise of state powers and the discharge of state functions are matters for the *Länder*. Any divergence from this rule governing the distribution of responsibilities must be laid down expressly in the Basic Law. Nevertheless, even during the early days of the Federal Republic, there were numerous interconnections between the responsibilities of the federation and those of the *Länder* (i.e., no "dual federalism" as in the United States). Thus, for example, legislation concerning taxation has always been a federal responsibility shared between the federal Parliament and the Federal Council *(Bundesrat),* while the *Länder* are entitled to a share of the revenues from the taxes collected. From the very beginning, the framework of responsibility in the field of legislation allowed the federal government to draw up such detailed regulations that the *Länder* had hardly any freedom to make decisions about their own political programs.[5]

Since 1969 the trend toward a unitary federal state has been considerably increased (1) by the fact that, in practice, a comprehensive integrated system has developed in which the federation partly finances tasks that were originally financed solely by the *Länder* (e.g., building and expanding institutions of higher education, strengthening regional economic structures, improving agriculture, enhancing coastal protection, and funding scientific research) and (2) by the enlargement of the mechanism of common taxes –- namely, the income and corporate taxes and the turnover tax. Taking a cue from the American model, this integrated system was called "cooperative federalism." However, this system has proved to be not only crippling, but also problematic from the democratic point of view because everybody can be made responsible for everything, and therefore nobody is responsible for anything. For this reason, there has been much discussion about instituting reforms to produce greater transparency with regard to decision making and responsibility and about permitting more competition between the federal government and the *Länder*. However, Germany is still far from having a system of competitive federalism.[6]

From the outset, the Basic Law tried to create a proper balance between unity and diversity. On one hand, it gave the federation the task of creating equivalent living conditions everywhere in Germany; on the other hand, with an extensive catalogue of so-called concurrent legislative responsibilities, it provided the *Länder* with the potential power to shape their own policies. In addition, the Basic Law still mandates that the costs

of carrying out state tasks must, in each case, be borne by the order of government that is also responsible for carrying out the tasks in question (the so-called principle of division).

Regarding the assignment of state tasks, the Basic Law merely distinguishes between two orders: the federation and the *Länder*. This means that all the *Länder* must fulfil the same tasks regardless of their size, number of inhabitants, and economic or financial strength. They also have equal rights in dealing with the federation. Thus Germany's federalism can be considered symmetric if one disregards the different weighting of *Land* votes in the Federal Council *(Bundesrat).* It is surprising that the authors of the constitution decided in favour of symmetry of this kind in 1949, when the *Länder* were burdened to differing degrees by an influx of refugees from the East. It was probably decisive here that traditional reasons spoke in favour of the legal equality of all the *Länder*. The German constitutions of 1871 and 1919 had established a symmetric federal state even though two-thirds of the territory of the Reich at that time consisted of one *Land*, Prussia. The costs of this symmetric federalism are obvious, as the great economic and social differences between the *Länder* must be compensated for by means of an extensive system of equalization payments.

The federal order and also, in particular, the participation of the *Länder* in the legislation of the federation are guaranteed by the so-called "eternity clause" (Art. 79III) of the Basic Law. This clause is not subject to any constitutional change and therefore cannot be removed even with a 100 percent majority in the legislative bodies. In turn, the *Länder* have no right of secession; in fact, the unilateral withdrawal of a *Land* from the Federal Republic would result in a state of emergency and, in the most extreme case, could be prevented by military means. Political parties that pursue the goal of secession can be banned by the Federal Constitutional Court. However, this does not mean that the present system, with its 16 *Länder,* must be maintained forever. Reorganization of the federal territory (Art. 29) could either increase or reduce the number of *Länder*. However, at least two *Länder* would have to be left in place in order to satisfy the demands of the federal system guaranteed by the "eternity clause."

The *Länder*

Like the federation, each *Land* has the quality of a state. The *Länder* can write their own constitutions, and, like the federation, they have their own constitutional jurisdiction, enforced by independent constitutional courts. The Basic Law is bound merely to create homogeneous constitutional structures. The *Land* constitutions must be in accordance with the principles of the German democratic and social state, which is governed by the rule of law, and must have a republican character (Art. 28). Adherence to these principles can be examined by the Federal Constitutional Court, and in the most extreme case, the principles can be enforced by federal compulsion (Art. 37). Apart from this proviso, the *Länder* are free to choose their own system of government. Bavaria, for example, was for many years the only *Land* to have a bicameral legislative system. The *Länder* can create their own organs of government and complement the parliamentary system (with or without a constructive vote of no confidence) with processes of direct democracy. The direct election of the prime ministers in the *Länder* by the people would also be permissible, but so far, this option has only been discussed in some *Länder*. All the members of the government and senior civil servants in the *Länder* are elected or appointed; the federation has no possibility of influencing the filling of these positions.

Differences between the *Länder* constitutions are largely due to the fact that some of them had already come into force in 1946-47, before the promulgation of the Basic Law. They are so-called full constitutions, which also contain a comprehensive catalogue of basic rights. In the case of the *Länder* constitutions that came into force after 1949, either

the basic rights were omitted, or those of the Basic Law were simply adopted, or rights declarations were restricted to those basic rights that fall within *Land* responsibility (i.e., education, schools, religion, and churches). The constitutions of the new *Länder* that came into existence after reunification in 1990 are different. Although they again contain full catalogues of basic rights, which are largely modelled on the basic rights of the federation, they nevertheless complement these rights with social rights (Art. 142).

Most *Land* constitutions were drawn up and passed by the *Land* parliaments. Only in a few cases were there referenda. The parliaments of the *Länder* are also primarily responsible for changes to the constitution, for which a two-thirds majority of their members is required. Only a few *Länder* (e.g., Baden-Württemberg and Bavaria) can hold a referendum on alterations to their respective *Land* constitutions. The Basic Law takes precedence in any contradiction between the Basic Law and a *Land* constitution (Art. 31). However, the organs of a *Land*, in particular the constitutional court of a *Land*, are responsible for interpreting their own constitution.[7]

Municipalities

In Article 28II the Basic Law expressly guarantees the rights of municipalities to regulate all local affairs. This guarantee also extends to the bases of financial autonomy; these bases include the right of municipalities to a source of tax revenues based on the economic ability of each. However, municipalities are not incorporated as a third order in the governmental system; rather, they are a part of *Land* administration. There is, therefore, no direct legal relationship between the federation and the municipalities. Supervision of the municipalities is exclusively the task of the *Land* authorities. In political reality, however, the municipalities are strongly influenced by federal policies. For example, they must fund all social aid from their own budgets. Nevertheless, the relevant laws always require the consent of the Federal Council *(Bundesrat),* wherein the represented *Land* governments not infrequently ease their financial burdens at the expense of their municipalities by passing costs on to them. The financing gaps thus arising for the municipalities are not always completely compensated by the redistribution of funds to them within the *Land.* This is why municipal officials continually complain about a structural financial crisis.

In the Basic Law, the names of the *Länder* are listed only in the preamble, without any distinction being made between the city-states and the other states. The city-states of Hamburg and Berlin are at the same time municipalities divided into dependent districts. Here the state characteristic of being a *Land* coincides with the self-governing character of being a municipality. The situation in the city-state of Bremen is different, as it consists of two municipalities: Bremen and Bremerhaven. Here, the Bremen city parliament acts simultaneously as the *Land* parliament and as the body representing the municipality of Bremen.

Although the municipalities' right to self-government includes only a small amount of tax power, self-government otherwise covers all matters concerning the local community (and its own sphere of government). In particular, these include cultural matters (i.e., museums, theatres, sports facilities, and schools) and public services (e.g., provision of water and power, waste disposal, abattoirs, cemeteries, and hospitals) as well as the maintenance of public roads and streets within a municipality. In this field, municipalities are also independent in matters regarding planning and personnel and have their own independent administration, which is not subject to the specialist supervision of the *Land* administration but only to its legal supervision.

In addition, municipalities carry out *Land* tasks (transferred sphere of government) for the federation and the *Länder*, for the fulfilment of which they have a right to adequate

funds (called the principle of connection). Examples of these tasks are the administration of traffic (e.g., driver's licenses and vehicle registration) and matters concerning registration of the population, aliens, food inspection, job safety, and health control. Within this framework, in addition to legal supervision, municipalities are subject to supervision by the *Land* authorities, which have a right to examine the effectiveness of each local measure. If the municipalities do not observe the instructions of the supervising bodies of the *Land*, the supervising bodies can take over the task themselves (substitution measure). In the most extreme case, they can also replace the head of the municipal administration with a *Land* commissioner (Art. 28III).

The federation itself has no supervisory rights over municipalities. However, if a *Land* does not fulfil its supervisory duties regarding its municipalities, or does not fulfil them satisfactorily, the federation can take steps to compel the *Land* to comply with its duties (Art. 37). If, in the case of an internal emergency, the *Land* is willing to combat the disturbance of internal order but is not able to do so with its own forces, it can request other *Länder* to provide help or call upon the Federal Border Police (Art. 91II). However, this provision has never been applied in the history of the Federal Republic, and it is hard to imagine that this situation will ever occur in the future.

The Basic Law does not contain special regulations concerning the self-government of national minorities or original inhabitants (e.g., Aboriginals). Some *Land* constitutions (e.g., Schleswig-Holstein, Lower Saxony, and Saxony) merely include regulations that compel the *Land* and its municipalities to protect the language and culture of ethnic minorities (e.g., Frisians, Wends, and Sorbs).

The Allocation of Powers: General

The Basic Law lists only the individual tasks and responsibilities of the federation. Consequently, all the tasks and responsibilities not mentioned therein must be fulfilled by the *Länder* and the municipalities. In Article 30 this is laid down in such a way that the discharge of state functions and the exercise of state powers is a matter for the *Länder* except as otherwise determined by the Basic Law. Thus the residual powers lie solely with the *Länder*. The federation is responsible only for foreign relations, defence, protection of the civilian population, questions of nationality and passports, immigration and emigration, the monetary system, customs and foreign trade, air traffic, the railways, and highways. The federation and the *Länder* are jointly responsible for all other legislative tasks, but here the federation takes precedence. In particular, these tasks include civil law, criminal law, procedural law, commercial law, labour law, social-security law, antitrust law, environmental law, and state liability.

This means that only a small number of legislative powers are exercised exclusively by the federation; the greater part of legislative authority lies within the sphere of the concurrent competence of the federation and the *Länder*. In the area of concurrent responsibilities, federal law takes precedence over any concurrent *Land* law when there is a conflict (see Art. 31). However, a conflict of this kind rarely occurs because when authority for a concurrent competence is claimed by the federation, the concurrent *Land* law becomes void. The federation's assumption of authority regarding a concurrent competence, therefore, has a blocking effect on any conflicting *Land* laws. However, the federation can exercise this authority only when it is absolutely necessary in order to guarantee legal and economic unity or to establish equivalent living conditions everywhere in the federal territory. Recently, the Federal Constitutional Court confirmed for the first time that this is the case.[8]

With the introduction of joint tasks, joint-planning committees consisting of representatives from the federation and the *Länder* were also established under the

constitution. These committees decide on the distribution of the funds for carrying out the joint tasks. The Basic Law does not provide for further institutions for intergovernmental relations between the federation and the *Länder* or among the *Länder* themselves. Nevertheless, numerous forums and conferences have come into existence to coordinate policy within the federation and among the *Länder*. These include, above all, the Conference of Prime Ministers and the conferences of the ministers of special portfolios. These forums are of particular importance in matters for which the *Länder* are exclusively responsible, such as education. The Education Ministers' Conference ensures almost uniform courses of instruction and educational qualifications for the whole of the republic in order to make it possible for people to move from one *Land* to another without any difficulty, thus guaranteeing the freedom of movement laid down in the Basic Law.

In addition, at the administrative level, there are more than 950 discussion and working groups in which experts responsible for a particular subject area meet regularly to exchange information and to coordinate their decisions. These networks are one of the essential reasons why the high degree of federal entanglement often paralyzes the nation's political decision-making processes. Because majority decisions are not made in the field of intergovernmental relations, and because the principle of consensus is the determining factor, agreement is achieved in most cases only by means of appeal to the lowest common denominator, which leads to a certain rigidity and inflexibility in the decision-making process.[9]

Jurisdictional Conflicts Between the Federal Government and the *Länder*

As far as conflicts of competence between the federation and the *Länder* are concerned, a distinction must be made between legislative and administrative disagreements. If the federation and the *Länder* cannot agree on which government is responsible for legislation in a particular case, both can call on the Federal Constitutional Court to make a direct decision under the rules dealing with so-called federation-*Länder* conflict. For example, if in the field of concurrent jurisdiction, the federation passes a law for which a *Land* claims to be either entirely or partly responsible, this *Land* can apply to the Federal Constitutional Court to have this federal law declared invalid due to the lack of federal jurisdiction. The reverse is also true, and such cases have occurred many times.

In the field of administration, German federalism is characterized by an atypical peculiarity. In accordance with the Basic Law, the *Länder* implement not only their own laws but also the laws of the federation. As long as the *Länder* are active on their own behalf, the federation has only the right of legal supervision. A special procedure is provided with regard to the federation's right of supervision. Initially, the federation must send representatives to the highest *Land* authorities, and if these representatives determine that legal errors have been made in implementing the federal laws, the *Land* authorities are reprimanded. If these errors are not addressed by the *Land*, and if the *Land* feels that its rights have been violated, the federation or the *Land* can appeal to the Federal Council *(Bundesrat)*, which determines whether the *Land* has violated federal law. The federation or the *Land* can appeal the decision of the Federal Council to the Federal Constitutional Court, which then makes the final decision (Art. 84IV). This procedure of federal overview is only of minor practical importance because the *Länder* have been obedient to the federal government in the past.

However, if the *Länder* become active in executing federal laws when obligated to do so by the federation (which must be expressly provided for in the Basic Law), then they are also subordinate to the expert supervision of the federation, which covers not only the legality but also the suitability of the implementing action. The *Länder* are then obliged to follow the directives of the federation without contradiction, even if the directives are

unconstitutional. Disputes associated with this complicated procedure have been mostly settled by several decisions of the Federal Constitutional Court, such that conflicts of this kind hardly occur any more.[10]

Federalism and the Structure and Operation of Government

The federation and the *Länder* all have parliamentary systems based on the British model to the extent that the government's formation and continued existence depend on the confidence of the majority of the Parliament. The decision in favour of parliamentary systems was strongly influenced by negative experiences with the semipresidential system during the Weimar Republic. When the Reichstag could no longer form a majority at the end of the 1920s, the excessive use of emergency decrees by the German president aided the Nazis' assumption of power. Today the only *Land* with a semipresidential form of government is the Free State of Bavaria. Because its constitution neither provides for a constructive vote of no confidence nor grants the premier the right to dissolve the Parliament during its elected term of office, a change of government can take place only if the government resigns voluntarily. The *Land* Parliament cannot bring about a change of government of its own accord.

Although the separation of government powers is a normative feature of the Basic Law, it is only indirectly standardized in the text of the constitution. Article 20II mentions the "specific organs" of the legislature, the executive, and the judiciary (separation of organs), whose members are, in most cases, permitted to belong to only one body (incompatibility). The one exception is the compatibility of a seat in the Parliament and the position of a minister. In addition, all three organs, or branches, of government are mentioned once more in Article 1III (commitment to the basic rights) and in Article 20III (commitment to the constitution, law, and justice), ensuring the separation of government functions. Finally, the independence of judges is derived from Article 97I.

Although a balance formally exists between all three organs, due to the parliamentary system, the legislative power nevertheless takes precedence in practice because a law is necessary for every state measure that affects the rights of citizens (legal reservation). However, as in every parliamentary system, the legislative and the executive powers are not strictly separated but are concentrated in the governing majority. While the government and its parliamentary majority form a political unit for action, their governance is scrutinized in the Parliament by the parliamentary minority, or opposition. As a result of the multiparty system and the proportional electoral system in Germany, there is, as a rule, a coalition government on the one side and a heterogeneous opposition on the other. As a result of this intermingling of powers, one can even speak of the breaking of the principle of the separation of powers in the legal sense or of the political separation of powers between the majority and the opposition.

The Federal Parliament

Four constitutional organs are involved in the legislative process of the federation: the *Bundestag* (Federal Diet) and *Bundesrat* (Federal Council), the federal government (i.e., the executive branch), and the federal president. Legislative initiatives can be introduced by the federal government, by the *Bundesrat*, and from within the *Bundestag* when at least 5 percent of its members support such a measure. If the federal government introduces a legislative initiative, it is first submitted to the *Bundesrat,* which then expresses its opinion. It is then returned to the federal government, which can then make a counterstatement. Only after the completion of this process is the proposed legislation submitted to the *Bundestag*. If the *Bundesrat* introduces a legislative initiative, it is sent to the federal government (i.e., executive) for its comments and is then submitted to the

Bundestag. This so-called "first stage" provides the *Bundestag* with the opportunity to learn the opinion of the *Länder* in the case of government initiatives and to hear the opinion of the federal government in the case of *Bundesrat* initiatives before it deals with the draft bill. Initiatives from within the Parliament initially remain in the *Bundestag* without the federal executive or the *Bundesrat* having the opportunity to express an opinion on them.

As a rule, each bill is given three readings in the *Bundestag* (i.e., general discussion, special debates, and final vote). If the bill receives support by a parliamentary majority, it then becomes a so-called adopted bill. It is then submitted to the *Bundesrat*, which has an absolute right of veto over legislation requiring its consent. In the case of so-called laws with the right of objection, the *Bundesrat* can force the *Bundestag* to decide once again on the *Bundesrat'*s objection, in which case the *Bundestag* must override this objection in order for the law to be adopted. Whether the *Bundesrat'*s consent is required for a law's adoption or whether the *Bundesrat* can only object to a law depends on its content. If it contains organizational or procedural regulations about its implementation by the *Länder* and municipalities, this will always justify the necessity for consent. If the law has come into existence either because the *Bundesrat* has given its consent or has raised no objection to the law or because the objection by the *Bundesrat* has been rejected by the *Bundestag*, the law is submitted to the federal president, who signs and promulgates it. Finally, the law is published in the *Federal Law Gazette*.

In Germany there is neither a unicameral system nor a genuine bicameral system. The legislature does consist of two bodies, the *Bundestag* and the *Bundesrat*; however, the two bodies do not have equal competences and functions. In the case of laws to which it has the right of objection, the *Bundesrat* has merely a suspensive veto that can be overruled by a majority in the *Bundestag*. Only in the case of laws requiring the *Bundesrat'*s consent does the absolute right of veto enable the *Bundesrat* to block laws -- creating a situation similar to that of a bicameral system. However, before the *Bundesrat* can object or refuse to give its consent, a so-called mediation process normally takes place with the goal of achieving a compromise between the majority of the *Bundestag* and the majority of the *Bundesrat*. The adopted bill is submitted to the so-called mediation committee, which consists of 32 members (1 member for each *Land* and 16 members of the *Bundestag,* who are not nominated by the majority but are nominated by the parliamentary caucuses in accordance with their relative strength in the Parliament). The subject of the continuing legislative procedure in the *Bundesrat* is always the version of the bill that has been agreed upon in the process of mediation. The mediation committee can deal with the same bill three times at most: once on application by the *Bundesrat* (normal case), once by the federal government, and once by the *Bundestag*.

For legislation, the *Länder* are represented in the *Bundesrat*, but this representation extends only to the *Land* governments. The *Land* parliaments have no influence either on the composition of the *Bundesrat* or on the voting behaviour of their *Land* governments. Unlike the members of the United States Senate, the members of the *Bundesrat* are not elected directly by the people. Thus the *Bundesrat* represents only the *Länder* executives; consequently, it is also called the "parliament of the public officials." The members of the *Bundesrat* and their alternates are at the same time members of their respective *Land* cabinets, but they can also be represented by alternates, who, as a rule, are senior civil servants.

The number of votes (and members) in the *Bundesrat* is determined by the number of inhabitants in the *Länder.* Each *Land* has at least three votes (i.e., Bremen, Hamburg, Mecklenburg-Pomerania, and Saarland). *Länder* with more than 2 million inhabitants have four votes (i.e., Berlin, Brandenburg, Rhineland-Palatinate, Saxony, Saxony-

Anhaltina, Schleswig-Holstein, and Thuringia); *Länder* with more than 6 million inhabitants have five votes (i.e., Hessia); and *Länder* with more than 7 million inhabitants have six votes (i.e., Baden-Württemberg, Bavaria, Lower Saxony, and North Rhine-Westphalia). Each *Land* in the *Bundesrat* must cast its votes as a unit (block votes). This block commitment of votes is often a problem for multiparty coalition governments in the *Länder,* which the *Länder* representatives have tried to solve by abstention or by means of special provisions in a coalition agreement, but an abstention is still effectively a "No" vote. Each decision of the *Bundesrat* requires the absolute majority of its votes, which at present means at least 35 of the 69 votes and members.

From the constitutional point of view, the *Bundesrat'*s most important task is its participation in passing or blocking federal legislation through its rights of consent and of objection. However, because it is composed of delegates from the *Land* cabinets, it does, in fact, exert some executive powers. Thus one can also talk of an element of executive federalism in Germany, whereby policy is negotiated and formulated by Land and federal executives. The *Bundesrat'*s executive power is even increased, first, by its required participation in approving important statutory orders of the federal government (so-called statutory instruments requiring its consent under Article 80II) and, second, by the fact that its European chamber has its own right to make final decisions in matters concerning the European Union (Art. 23). Apart from its authority in these matters, the *Bundesrat* has no exclusive or special competence.

The participation of the *Bundesrat* in federal legislation and administration, as well as in European affairs, has a double-edged effect. On one hand, the *Bundesrat* provides the *Länder* governments with a means to introduce their interests and demands directly in the federation's decision-making process. However, because the *Bundesrat* is constructed as, and remains, the representative body of the *Länder*, it is a federal organ and is thus also partly responsible for federal policy as a whole. On the other hand, this dual nature of the *Bundesrat* leads to considerable conflicts when the political majorities in the *Bundestag* and in the *Bundesrat* are comprised of different political parties, which has almost become the rule in the Federal Republic, especially since 1971. When a political group wins the federal elections and forms the federal government over a period of four or more years, the opposition in the federation has regularly succeeded in winning a number of subsequent *Land*-parliament elections, thus gaining the majority in the *Bundesrat*. This situation can lead to a deadlock of federal policy if the large parties do not come to an agreement along the lines of a hidden grand coalition in the *Bundestag* and in the *Bundesrat*. The mixing of responsibilities associated with this situation regularly leads to public irritation and frustration because the voters do not know to which political actors they can attribute particular decisions. For this reason, reform of the *Bundesrat* is being discussed, as is a change at least to its voting procedure, which would force coalition governments in the *Länder* to make a clear decision for or against a measure introduced by the ruling majority in the federation. There is certainly agreement that the present situation not only represents a danger to the functioning of the parliamentary system, but is also, in the view of many observers, a deficit of democracy.[11]

Whereas the *Länder* governments can introduce their own legislative initiatives in the federal arena via the *Bundesrat*, neither the municipalities nor ethnic or national minorities can participate formally in the federation's legislative procedures. At best, they appear as lobbying groups (e.g., the German Conference of Municipal Authorities). Given that *Bundesrat* initiatives introduced by the majority of the *Länder* governments can be blocked by the *Bundestag*, they are introduced either for demonstration purposes in order to sharpen the political profile of an issue or only when there is a good chance that the majority of the *Bundestag* will endorse them. Initiatives from within the *Bundestag* itself

are fairly rare; they mostly serve only to shorten the procedure in order to avoid the *Bundesrat*'s participation during the first stage of consideration. Thus more than 80 percent of all bills originate with the federal government with the expectation that they will be supported by its parliamentary majority in the *Bundestag*. However, the governments of the *Länder* can prevent these bills from becoming law through the majority in the *Bundesrat*, or the *Bundesrat* can alter such bills if they pertain to laws requiring its consent according to the results of a mediation procedure.

The Federal Executive

The executive power of the federation lies with the federal government and the federal administration. The number of ministries and the areas of their jurisdiction are not laid down in the constitution; the federal chancellor formally decides on this matter by recommending to the federal president the appointment of certain ministers. In practice, however, in the case of coalition governments, the decisions about appointing ministers as well as the responsibilities of their ministries and the delimitation of their portfolios are all agreed upon in the preceding negotiations, and the results of these negotiations are included in the coalition agreement. The organization of the federal executive is therefore de facto the concern of the entire federal government. The federal government is made up of the federal chancellor and the federal ministers (i.e., the Cabinet). Each minister is responsible for a ministry, which is headed by a deputy minister, who is an appointed civil servant. The chancellor chairs the Cabinet. The chancellor also determines, and is responsible for overseeing adherence to, the general guidelines on policy. Within these limits, each federal minister conducts the affairs of his or her portfolio independently and according to his or her own responsibility and is therefore responsible to the Parliament. The federal government resolves differences of opinion between federal ministers.

Because the *Länder* execute the majority of federal laws, Germany has only a very small direct federal administration, which is restricted essentially to the exclusive responsibilities of the federation (Art. 87), namely the foreign service, the federal financial administration, the administration of federal waterways and shipping, the Federal Border Police, and the federal armed forces. The federation's further administrative tasks are fulfilled on the basis of a law concerning the highest independent federal authorities. These tasks include, among others, weather forecasts, transport administration, radiation protection, defence of the constitution, and intelligence services. Therefore, the *Länder* do not participate directly in the federal administration. However, the constitution provides that civil servants employed by the highest federal authorities are to be drawn from all the *Länder* in appropriate proportions (Art. 36), but in practice, these civil servants are drawn from all applicants without taking the regional proportions into account. If a particular federal authority is not situated in the capital of Berlin but in one of the *Länder*, its employees, as a rule, are drawn from the *Land* in which they serve.

The Federal Judiciary

The federal courts are exclusively courts of appeal; they examine the decisions of the courts within the *Länder* for legal errors but not with regard to the correctness of the facts. Thus the federal courts' only task is the legal review of decisions rendered by the lower courts of the *Länder*. These federal courts include the Federal Court of Justice (civil and criminal law), the Federal Administrative Court (administrative conflicts), the Federal Finance Court (disputes concerning taxes), the Federal Labour Court (labour law), the Federal Social Court (social jurisdiction), and the Federal Constitutional Court (Arts 93 and 95). The federation has also created other courts (Art. 96) –- namely, the Federal Patent Court (legal protection of industrial property) and the Federal Antitrust Court

(antitrust law). The Federal Constitutional Court is responsible for all constitutional disputes arising from the application or interpretation of the Basic Law.

Federal judges are jointly appointed by the federal minister with competence and by a committee for the selection of judges consisting of the *Land* ministers with competence and an equal number of members of the *Bundestag* (Art. 95II). Half of the members of the Federal Constitutional Court are elected by an electoral committee of the *Bundestag*; the other half are elected by the *Bundesrat*.

The Basic Law does not provide for a supreme federal court that would have the final right of decision over all the other federal courts. All the federal courts are on a par with each other. It is true that the Federal Constitutional Court can reverse decisions of the other federal courts if they violate the constitution, but this does not make it a supreme court because it becomes active only when requested; moreover, through its decisions, it expresses only the precedence of the constitution over ordinary law. So far, no use has been made of the possibility provided for in the Basic Law of guaranteeing the uniformity of judicial procedure by forming a joint chamber of the above-mentioned supreme federal courts -- that is, a supreme court of justice (Art. 95III). All the other courts are those of the *Länder,* which are lower courts subordinate to the federal courts. To this extent, one can speak of a certain hierarchy of judicial power in Germany. Once again, the constitutional courts of the *Länder* are an exception here because they exclusively have the task of overseeing the compatibility of acts undertaken by a *Land* under its own constitution.

The right to declare federal laws invalid is concentrated in the Federal Constitutional Court. There are three ways to have a law declared invalid. For one, if a lower court considers a law, or parts of a law on whose validity the court's decision depends, to be unconstitutional, it must stay the proceedings and obtain a decision from the Constitutional Court (concrete judicial review), as provided for in Article 100. Second, the federal government, any *Land* government, and/or one-third of the members of the *Bundestag* can have any federal law, or parts of it, examined with regard to its compatibility with the Basic Law; these bodies can also have any *Land* law examined with regard to its compatibility with federal law. In the case of incompatibility with the constitution or with a federal law, the Constitutional Court declares the law in question to be invalid (abstract judicial review), as provided for in Article 93I, No. 2. Third, any person can file a constitutional complaint after exhausting all other legal means to reverse an executive decision or law that affects him or her directly (Art. 93I, No. 4a). In such cases, the Constitutional Court examines whether the act of public authority that occasioned the complaint is itself based on a law contrary to the constitution; if so, the Constitutional Court declares both the law and the act of public authority to be invalid. Until 1954 it was possible to obtain an advisory legal opinion from the Constitutional Court on the conformity of prospective laws with the constitution, but this practice was discontinued because experience showed that in this way the Constitutional Court could have a massive influence on the political decision-making process, even before the process had been completed, and that, in addition, the Constitutional Court was in danger of being used by the political powers for their own purposes. The constitutional courts of the *Länder* (including Schleswig-Holstein, which employs the Federal Constitutional Court as its own state constitutional court) make the final decision about the validity of *Land* laws and their compatibility with *Land* constitutions; their decisions are not subject to any further examination by the Federal Constitutional Court.

The *Länder* do not present their candidates directly for the federal courts. However, through their ministers of justice, who are members of the parliamentary committee for the selection of judges, they have considerable influence on filling the posts of the federal

courts. In the case of the Federal Constitutional Court, the *Bundesrat,* as the representative of the *Land* governments in the federal arena, even selects half the judges. In this way, the posts at all the federal courts have a personnel composition that is oriented along the lines of the proportional representation of the *Länder,* without any individual *Land* being able to claim a certain quota of posts. Membership on a federal court does not necessarily require that a person have previously been a judge. Any person who has fulfilled the criteria for admission to the profession of attorney and is at least 40 years old can be elected as a federal judge.

The Basic Law provides only for state courts to decide on all legal disputes. Extraordinary courts for ethnic, traditional, or religious minorities are expressly forbidden (Art. 101I). This ban is based on Germany's experiences with extraordinary courts for Jews and for political dissidents under the Nazi dictatorship. It is only at the municipal level that some *Länder* have justices of the peace or arbitration services, participation in which is a precondition for being able to apply to a general court.

Institutions of the Constituent Polities

The institutional regulations in the constitutions of the *Länder* generally reflect the constitutional structures of the federation. The constitutional order in the *Länder* must have a republican character and must conform to the principles of a democratic and social state governed by the rule of law. The *Länder* and municipalities must also have bodies representing the people, which are elected in general, direct, free, equal, and secret elections (Art. 28I). All the *Länder* have unicameral parliaments and governments elected by the people of the *Länder* according to the principles of the parliamentary system. The governments consist of the prime ministers and the ministers. The *Länder* have no head of state, such as a president. One part of a president's functions (e.g., external representation, the right of appointment, and the right of reprieve) is exercised by the prime minister, and another part (e.g., the drafting and proclaiming of laws) is carried out in some *Länder* by the Speaker of the parliament.

In addition, processes of direct democracy have been introduced in all the *Länder*, some of which have two stages (petition for a referendum and the referendum itself) and some of which have three stages (with a preliminary motion for a petition for a referendum). A derogative referendum, with which the people, as in Switzerland, can rescind a law directly through a single decision, does not exist in Germany. However, using the path of normal popular legislation, the rescinding of a law could be demanded.

The *Länder* have no independent (autonomous) courts whose decision would not be reversible by superior federal courts; it is rather the case that they are built into the prescribed channels of jurisdiction as a whole. As far as the institutions of the administration of justice are concerned, despite their formal independence, Germany has more of a hierarchical than a dual system of courts. Only the constitutional courts of the federation and the *Länder* are totally separated from each other. Therefore, on matters in which a constitutional court of a *Land* is bound by the *Land*'s constitution rather than by the Basic Law, it can come to decisions that are different from those of the Federal Constitutional Court.

Relations Between the Constituent Polities

In accordance with the Basic Law, the Federal Republic of Germany forms one legal area. This means that all the legal actions of one *Land* are recognized in all the other *Länder.* In accordance with Article 33I of the Basic Law, every German has the same political rights and duties in every *Land* and -- according to his or her aptitude, qualifications, and professional achievements -- has equal access to any public office. Thus the freedom of

movement of all German citizens is guaranteed throughout the federal territory (Art. 11), and any discrimination against them is forbidden. The rights to transfer capital, goods, services, and labour are guaranteed by the constitution. Because both the penal code as well as the code of criminal procedure are standardized by federal laws, borders between the *Länder* play no role in the prosecution of offences and in the punishment of criminals even though the severity of sentences declines as one moves from the South to the North. In civil-law procedures, the domicile of the debtor or the defendant is decisive in determining which court is responsible for trying a case, provided that no other court of jurisdiction has been agreed upon under private law between the litigants. In cases of disputes over administrative decisions by governments, the seat of the state authority that made the initial decision is decisive. In criminal cases, the decision always lies with the court in whose area of responsibility the crime took place or in which the commission of the crime began.

The Basic Law does not provide for any formal mechanisms or institutions to deal with relationships between the *Länder*. In practice, however, numerous forums have been developed (see above), in which the *Länder* forge policy agreements among themselves (so-called self-coordination of the *Länder* on a "third level"). These include the regular prime ministers' conferences (with informal "fireside discussions"), the conferences of the individual ministers, and the numerous working groups and discussion groups of experts. The *Länder* also have the right to conclude state agreements between each other and with the federation. As long as these agreements are within the framework of their exclusive legislative responsibilities (i.e., culture, education, mass media, and internal security), the *Länder* do not require the consent of federal organs.

Only when the *Länder* conclude treaties with foreign states within these responsibilities must the federal government give its consent (Art. 32III). In the course of working toward European unification, there is now active cross-border cooperation, which is based partly on international treaties but mainly on mere administrative agreements that do not require the consent of the federation. In order to guarantee cooperation of this kind under administrative law and under constitutional law, the Basic Law permits the *Länder,* with the consent of the federal government, even to transfer sovereign jurisdiction for tasks to transfrontier institutions in neighbouring regions -- provided that the *Länder* are responsible for fulfilling these tasks in the first place (Art. 24IIa). As a rule, these transfrontier institutions deal with such questions as regional planning and traffic management, environmental protection, and joint public services (e.g., Neue Hansa in the Baltic region and the ARGE-Alp in Bavaria, Austria, Switzerland, and Italy).[12]

Fiscal and Monetary Powers

Germany has an entangled system of (1) revenue and tax legislation vested mainly in the federation, (2) tax allocation and revenue apportionment shared jointly by the federation and the *Länder*, and (3) revenue collection administered by the *Länder*. One of the most eminent and distinctive characteristics of German fiscal federalism is a highly developed mechanism of financial equalization between the federation and the *Länder* as well as among the *Länder* themselves.

The Basic Law establishes a system of burden sharing between the federation and the *Länder* in accordance with two principles and many exceptions. The federation and the *Länder* separately finance the expenditures (principle of separation) resulting from the discharge of their respective tasks (principle of connection) insofar as the Basic Law does not provide otherwise. Where the *Länder* act as agents of the federation, the federation must meet the resulting expenditure. Federal laws to be executed by the *Länder* make

provision for payments to be met wholly or partly by the federation. Where any such statute provides that the federation shall meet one half of the expenditure or more, the statute must be implemented by the *Länder* as agents of the federation. Where any such statute provides that the *Länder* shall meet one-quarter of the expenditure or more, the consent of the *Bundesrat* is required. The federation and the *Länder* meet the administrative expenditure incurred by their respective authorities and are responsible to each other for ensuring proper administration.

The federation has exclusive power to legislate on customs and fiscal monopolies and concurrent power to legislate on all other taxes, the revenue from which accrues to it wholly or partly. The *Länder* can legislate on local excise taxes as long, and insofar as, these taxes are not identical to taxes imposed by the federation. Federal laws relating to taxes whose yield accrues in whole or in part to the *Länder* or to municipalities and associations of municipalities require the consent of the *Bundesrat* (Art. 105). The municipalities are entitled to establish minor local taxes (e.g., real-property and trade taxes) within the framework of existing legislation and local excise taxes (Art. 106VI). Although the constitution grants the federation exclusive power over customs legislation and the accrual of related revenue, this is one of the powers that has been shifted to the European Union.

Neither the Basic Law nor a *Land* constitution gives any government ownership of or tax authority over natural resources wherever they are located. In the northern part of Germany, however, there are some oil and gas fields that are exploited by private companies. They have to pay a so-called extracting fee *(Förderzins)*. This fee accrues in total to the *Land* in which the natural resources are located (Lower Saxony and Schleswig-Holstein), and the fee counts as revenue in the horizontal fiscal-equalization scheme.

The Basic Law guarantees the individual right to property and thus creates an inherent limit on the tax authority of both the federation and the *Länder* (Art. 14). The taxes of the federation and the *Länder,* therefore, have to be coordinated in order to establish a fair balance that prevents excessive burdens on the taxpayer, such as confiscation, and to ensure uniformity of living standards in the federal territory (Art. 106III, No. 2). Following the requirement of preventing excessive burdens on the taxpayers, the Constitutional Court recently declared the existing property tax unconstitutional.[13]

The Basic Law also establishes limits on the tax authority of the *Länder* governments insofar as it prohibits the duplication of taxes by two orders of government. The legislative competence of the federation creates a limit on the authority of the *Länder* to legislate on the same tax base. The requirement of equivalent living conditions throughout the federation inhibits competitive taxes between the *Länder* (Arts 28I, No. 1, and 72II). This obstacle is disputed nowadays, as some *Länder* argue that this, together with the highly developed financial-equalization system, is one of the reasons why *Länder* officials do not feel inclined to make an adequate effort to promote their economies and to spend their revenues efficiently.

Customs duties, fiscal monopolies, excise taxes subject to federal legislation, including an import turnover tax, and levies imposed within the framework of the European Union are collected and administered by federal revenue authorities. The organization of these authorities is regulated by federal legislation. The heads of intermediate authorities are appointed in consultation with the respective *Land* government. All other taxes are collected and administered by *Land* revenue authorities. The organization of these authorities and the uniform training of their civil servants is regulated by federal legislation with the consent of the *Bundesrat*.

To the extent that taxes accruing to the federation are also collected by *Land* revenue authorities, the latter act as agents of the federation. In this case, the *Land* authorities have to comply with the directives from the federal Ministry of Finance. Federal legislation provides for (1) cooperation between federal and *Land* revenue authorities on matters of tax collection and administration in the cases of customs duties, fiscal monopolies, and excise taxes, including an import turnover tax and levies within the framework of the European Union, (2) collection and administration of taxes by *Land* revenue authorities, and (3) in the case of other taxes, collection and administration by federal revenue authorities where, and to the extent that, this considerably improves or facilitates the implementation of tax laws.

The collection and administration of taxes, the revenue from which accrues exclusively to the municipalities (or associations of municipalities), are delegated by the *Land* revenue authorities to the municipalities (or associations of municipalities). The procedure to be used by the *Land* revenue authorities is laid down by federal legislation. The procedure to be applied by *Land* revenue authorities for taxes whose revenue accrues exclusively to the municipalities (or associations of municipalities) or by the municipalities (or associations of municipalities) is also laid down by federal legislation requiring the *Bundesrat*'s consent. The federal government issues general administrative rules which, to the extent that administration is entrusted to *Land* revenue authorities or municipalities (or associations of municipalities), require the consent of the *Bundesrat* (Art. 108).

For each fiscal year, borrowing funds and assuming surety obligations, guarantees, or other commitments (deficit spending) require special authorization by a federal law specifying or permitting computation of the amounts involved. Revenue obtained by borrowing must not exceed the total of investment expenditures provided for in the budget estimates; exceptions are permissible only to avert a disturbance of the overall macroeconomic equilibrium (Art. 115). For the *Länder* there are similar limits on borrowing contained in their own constitutions. Furthermore, in accordance with an intergovernmental agreement, all the *Länder,* together with the federation, have to comply with a debt limit that is equal to 3 percent of the total federation budget and that is required by the European Union's stability pact. Following a decision of the Federal Constitutional Court,[14] the federation is obliged to give additional grants to the *Länder* in cases of "fiscal emergency" (i.e., if *Länder* or local governments fail to pay their debts) under the condition that the *Länder* provide for a recovery plan.

The allocation and distribution of tax revenue are governed by detailed rules in the Basic Law. The yield from fiscal monopolies and revenue from the following taxes accrue to the federation: customs duties; taxes on consumption (e.g., the tobacco tax) insofar as they do not accrue to the *Länder,* or jointly to the federation and the *Länder,* or to the municipalities; highway-freight tax; taxes on capital transactions; insurance and bills of exchange; nonrecurring levies on property and equalization-of-burdens levies (nonexistent); income and corporation surtaxes (nonexistent); and levies imposed by the European Community (nonexistent). The yield from the following taxes accrues to the *Länder*: property tax (nonexistent), inheritance tax, motor-vehicle tax, such taxes on transactions as do not accrue to the federation or jointly to the federation and the *Länder*, beer tax, and levies on gambling establishments. All these taxes and levies together do not account for more than 20 percent of the overall revenue of both the federation and the *Länder*.

Revenue from income taxes, corporation taxes, and turnover taxes (i.e., 80 percent of the overall revenue) accrue jointly to the federation, the *Länder*, and the municipalities (joint taxes). The income and corporation taxes are equally shared by the federation and

the *Länder* (42.5 percent each), plus 15 percent of the income tax is distributed to the municipalities on a per capita basis. The respective shares of the federation and the *Länder* in the revenue from the turnover tax (a value-added tax, VAT) are determined by a federal law requiring the consent of the *Bundesrat*. Such determination is based on the following principles: (1) The federation and the *Länder* have an equal claim on current revenues required to cover their necessary expenditures; (2) the extent of such expenditures is determined with due regard to multiyear financial planning; and (3) the financial requirements of the federation and of the *Länder* are coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers, and ensure uniformity of living standards throughout the federal territory. For the time being, the federation receives 45 percent of the VAT, and the *Länder* receive 55 percent, distributed per capita. The municipalities receive a share of the revenue from the income tax (15 percent), the turnover tax, taxes on real property and trade, and local taxes on consumption and expenditures. Furthermore, they receive unconditional grants from the *Länder* according to a specific formula, called the "key system" (Art. 106).

In 1949 the system of allocating and distributing revenue was incomplete due to some highly disputed interventions by the Allied Powers that favoured a very decentralized order. However, the necessity of reconstruction in Germany led to a reform of the system, which came into force in 1955. A second major change based on Keynesian ideas took place in 1969 in order to fight an economic crisis in Germany. The third and last series of reforms started after the reunification in order to finance the five new *Länder* of the former German Democratic Republic (GDR) and to bring their economic standing up to the level of the western *Länder* in accordance with the constitutional requirement for equivalent living conditions in the entire country.

The Basic Law also authorizes the federal government to spend revenue for purposes benefiting the *Länder* and the municipalities (Art. 104a) by two means. First, the federation may grant the *Länder* financial assistance for particularly important investments by the *Länder* or by municipalities or associations of municipalities, provided that such investments are necessary to avert a disturbance of the overall macroeconomic equilibrium, or to equalize differences of economic capacities within the federal territory, or to promote economic growth. Details, especially concerning the kinds of investments to be promoted, are regulated by a federal statute requiring the consent of the *Bundesrat* or by administrative arrangements under the federal budget law. Second, the federation's fiscal equalization policy provides for federal grants to be made to financially weak *Länder* in order to supplement the coverage of their general financial requirements (Art. 107II, No. 3). These complementary grants have to cover, for example, special burdens for the entire country (e.g., harbours and waterways) and promote economic growth in the five new *Länder* of the former GDR.

The Basic Law provides for a highly developed scheme of fiscal equalization (Art. 107). Revenue from *Land* taxes and the *Länder'*s share of revenue from income and corporation taxes accrue to the individual *Länder* to the extent that such taxes are collected by revenue authorities within their respective territories (principle of local yield). The *Länder'*s share of revenue from the turnover tax accrues to each *Land* on a per capita basis (principle of inhabitants).

In accordance with the Basic Law, the equalization procedure follows four steps. First, there is the splitting of the local yield. A federal law (the Financial Equalization Act) requiring the consent of the *Bundesrat* (i.e., the majority of the votes of the *Länder*) regulates the delimitation as well as the manner and scope of allotment of local revenue from corporation and wage taxes. This law may also provide for the delimitation and allotment of local revenue from other taxes. Second, there are supplementary *Land* shares

of the turnover tax. A federal law requiring the consent of the *Bundesrat* may provide for the grant of supplementary shares of the *Land* revenue from the turnover tax (not exceeding one-quarter of a *Land's* share) to *Länder* whose per capita revenue from *Land* taxes and from income and corporation taxes is below the average of all *Länder* combined. Third, there is a horizontal equalization. The same federal law has to ensure a reasonable equalization of the disparate financial capacities of the different *Länder*, with due regard to the financial capacities and needs of municipalities. It specifies the conditions governing the claims of *Länder* entitled to equalization payments (receiving *Länder*) and the liabilities of *Länder* required to make such payments (donating *Länder*) as well as the criteria for determining the amounts of such payments. Fourth, there are additional grants from the federation. A federal law provides for additional grants to be made to financially weak *Länder* from the federation's own funds to assist them in meeting their general financial needs (supplementary grants).[15]

This equalization scheme upgrades the 12 receiving *Länder*, even the poorest, to 98.5 percent of the average *Land*'s tax revenue per capita, and downgrades the 4 donating *Länder* (i.e., Baden-Württemberg, Bavaria, Hamburg, and Hessia) from 130 percent to 103.5 percent of the average. When three of the donating *Länder* took the other *Länder* to the Federal Constitutional Court, the Court confirmed the constitutionality of the system in principle but stated that the federal legislator has to avoid any diminution of the capacity of the *Länder* to raise taxes.[16]

Fiscal policy with respect to spending is assigned to both the federation and the *Länder*. In their budget management, the federation and the *Länder* are autonomous and independent. Through federal legislation requiring the consent of the *Bundesrat*, principles applicable to both the federation and the *Länder* were established governing budgetary law, budget management reflecting economic situations, and five-year financial planning. With a view to averting disturbances of the macroeconomic equilibrium, federal legislation requiring the consent of the *Bundesrat* has provided for maximum amounts, terms, and timing of loans raised by local authorities or joint authorities and obliged the federation and the *Länder* to keep interest-free deposits at the German Federal Reserve Bank (anti-cyclical reserves). Only the federal government, with the consent of the *Bundesrat,* is empowered to issue statutory orders in this matter, but these orders can be repealed if the federal Parliament so requires (Art. 109).

The Basic Law provides for the establishment of a Federal Reserve Bank responsible for issuing notes and stabilizing the currency (Art. 88). The *Länder* are represented on the board of directors of this bank by representatives of their own central banks. However, the responsibilities and the powers of both the Federal Reserve Bank and the central banks of the *Länder* have been transferred to the European Central Bank, which was established in 1998 to manage the European Union's currency union and which is also independent and aims primarily to safeguard price stability within the EU.[17]

Foreign Affairs and Defence Powers

The responsibilities for foreign affairs and defence -- apart from a few exceptions -- lie exclusively with the federation, or to be more precise, with the federal government and the federal legislative bodies: the *Bundestag* and *Bundesrat* (Art. 73I, No. 1). The federal government is responsible for all foreign policy, the diplomatic service (Art. 87I), and the signing of internationally binding treaties in cases where the federal president does not formally represent the Federal Republic of Germany (Art. 59I). In addition, the federal government, or more precisely, the minister of defence, organizes external security and part of internal security (Arts 80a, 87a, and 115aI). In peacetime, command of the armed forces is vested in the minister of defence (Art. 65a); when Germany is in a state of

defence, the power of command over the armed forces passes to the federal chancellor (Art. 115b). The legislative bodies are responsible for the ratification of international treaties (Art. 59II). The committees for foreign policy control the foreign policy of the federal government.

In addition, the deployment of the federal army outside the area of the North Atlantic Treaty Organization (NATO) must be authorized by a special resolution of the *Bundestag* in each case. This reservation of power to the Parliament is not enshrined in the Basic Law but is based on a decision of the Federal Constitutional Court, which expressly characterizes the armed forces as a parliamentary army in accordance with German constitutional law (unlike the German army during the Weimar Republic).[18] Given that, in accordance with the Basic Law, the federal army has the power only of defence against an attack on federal territory or on the territory of another NATO member state, any deployment outside these territories, as in Kosovo, Macedonia, or Afghanistan, requires special parliamentary decisions. In the field of defence, the *Bundestag* makes the decision on measures of mobilization (state of tension), as provided for in Article 80a, and determines whether the federal territory or the territory of a NATO member state is under attack by a hostile armed force (state of defence), as provided for in Article 115a.

The responsibilities of the *Länder* in foreign affairs and defence are strictly limited. The *Länder* have neither their own armed forces nor any other militia. Coastal protection is a task of the Federal Border Police and the customs service and thus also a federal matter. To the extent that the *Länder* are responsible for legislation, they can sign treaties with foreign states; however, such treaties require the agreement of the federal government (Art. 32III). The procedure to be followed is laid down in a special agreement between the federation and the *Länder*, the so-called Lindau Agreement. In addition, through the *Bundesrat*, the *Länder* have an influence on the ratification of international treaties by the federation (Art. 59II). The *Länder* also only have an influence on decision-making processes in the field of defence and external security to the extent that the *Bundesrat* is involved. Any determination that federal territory is under attack, for example, requires the consent of the *Bundesrat* (Art. 115I).

Civilian political control of the armed forces takes place in three ways: (1) through the command of the federal minister of defence and, in the event of a state of defence, through the federal chancellor; (2) through the *Bundestag*'s Committee on Defence, which can also be constituted as an investigative committee (Art. 45a); and (3) through the parliamentary commissioner for the armed forces, who assists the *Bundestag* in exercising parliamentary control of the infringement of soldiers' rights (Art. 45b).

Apart from this, in accordance with Article 4III, no person can be compelled against his or her conscience to render military service. If necessary, one can be guaranteed this basic right by making a complaint about infringement of the constitution to the Constitutional Court. For some time, there has been no special procedure for determining the existence of such conscience-based grounds. As an alternative, community service has been introduced, which lasts three months longer than the term of military service. It is assumed that this disadvantage is sufficient to counteract any abuse of the right to refuse to render military service against one's conscience. Since the end of the East-West conflict, however, the abolition of all general military service and the establishment of a professional army have been under discussion.

European politics play a special role in Germany's governance and are becoming more and more important. Formally, European policy is still a matter of foreign affairs, for which the federation is responsible; in many cases, however, one can talk already about a European internal policy that is no longer foreign policy. Although federal organs also represent the Federal Republic of Germany externally in this field, in recent years, the

Länder have acquired substantial rights to participate in and shape European policy. These rights are essentially exerted by the *Bundesrat* (Art. 23II-V). For example, if the federation transfers to the European Union a field of sovereign jurisdiction that mainly concerns the legislative rights of the *Länder*, the federation must, to this extent, essentially take the opinion of the *Bundesrat* into account. In the case of the relevant decisions undertaken by the European Union in Brussels, the representation of the Federal Republic of Germany can even be transferred from the federation to a representative of the *Länder* nominated by the *Bundesrat*. The *Bundesrat*'s opinion is even important whenever the federation acts within the framework of its exclusive legislative competence and its action also affects the interests of the *Länder* (Art. 23V). Further details are regulated in two so-called Federal Cooperation Laws. Apart from this, all the *Länder* have their own offices at the headquarters of the European Union in Brussels, and today they occasionally even have a kind of "secondary foreign policy" of their own.[19]

The Basic Law contains no explicit regulations about the membership or participation of the federation, a *Land,* or municipalities in international organizations. Article 24II states merely that the federation may enter into a system of mutual collective security with a view to maintaining peace. This regulation refers primarily to NATO. In fact, the Federal Republic of Germany is a member of almost every international organization (e.g., the United Nations, International Labour Organization, World Trade Organization, and World Health Organization). The only body in which the *Länder* and municipalities are directly represented at the supranational level is the Committee of the Regions of the European Union, which participates in the legislative process of the EU in an advisory capacity.

Citizenship

In Article 116I the Basic Law contains a definition of German citizenship. A German is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of 31 December 1937 as a refugee or expellee of German ethnic origin. Further details are regulated by the Citizenship Act, for which the federation has the exclusive legislative powers (Art. 73II). The concurrent legislative competence to regulate citizenship within the *Länder*, which was provided for in 1949, was abolished only in 1994. Since then, only the federal legislator can decide about citizenship and the preconditions for naturalization, although the *Länder* play an essential part through the *Bundesrat*. However, dual nationality in the federation and the *Länder*, as would have been possible until 1994, has never actually existed.

For a long time, citizenship in the federation was based exclusively on the pure principle of descent *(ius sanguinis)*. This principle has been relaxed slightly. Children of foreigners living in Germany are provisionally given German citizenship from birth until the age of 23, when they must decide whether they want to remain German or to adopt the citizenship of their parents. Apart from this exception, for which there is a time limit, dual nationality is not permitted in Germany in principle, although examples do exist in practice. The purpose of this exception is to enable the large number of often second or third generation foreigners (mostly Turks) living in Germany to integrate more effectively.

Although all the citizens of the European Union have the right to vote in local government elections in each member state, no citizenship comparable to nationality yet exists in the EU; however, this might be included in the new constitution of the European Union.

Voting, Elections, and Political Parties

Article 38 of the Basic Law regulates the right to vote in elections to the *Bundestag*. However, it lays down only the basic principles involving voting rights (i.e., general, direct, free, equal, and secret ballots), which also apply to *Land*-parliament, county, and municipal elections (Art. 28I). It does not determine the electoral system, the number of constituencies, and the size of the federal Parliament. In addition, it makes the right to vote and eligibility for political office dependent on reaching the age of 18. All the other regulations for elections to the *Bundestag* are found in the Federal Electoral Act and the Federal Election Regulations. Elections to a *Land* parliament are governed by the laws and regulations of the *Land*, just as county and municipal elections are governed by the laws and regulations of the counties and municipalities. With uniform basic principles concerning voting rights, every order of government thus has its own election rules, which vary considerably with regard both to the electoral system and to voting (one or two votes).

Because the Federal Election Act, like all federal laws, is administered by the *Länder*, they are also mainly responsible for registering voters and running the elections. Because elections are a state matter, the *Länder* have transferred this task to the municipalities. The municipalities are responsible for the electoral register, polling cards, and the administration of postal votes. Assistants from the municipality work in the polling stations; they also count votes after the polling stations have closed. The individual election results are then passed on to the federal returning officer via the *Land'*s returning officer in the case of *Bundestag* elections. In the case of *Land*-parliament, county, and municipal elections, they are passed on to the *Land'*s returning officer. The federal or *Land* returning officers then announce a provisional final result and, after examination, the final election result.

In accordance with the principle of the general vote, the conditions for participation in elections for the *Bundestag*, a *Land* parliament, the counties, and municipalities are German nationality (in county and municipal elections, persons who possess citizenship of a member state of the European Union are also eligible to vote) and the age of at least 18 for federal elections and in some *Länder* at least 16 for the election of *Land* legislators. In addition, the voters must be in possession of their civil rights, of which they can, in special cases, be deprived by a penal judgment. There are no other reasons for exclusion from the right to vote in Germany.

For the first time in German history, Article 21 of the Basic Law regulates the constitutional status of political parties. Thus the parties are required to participate in the formation of the political will of the people. They may be established freely, and their political activities may be freely conducted; to this extent, they can also have recourse to basic rights. In reaction to the "Fuehrer" principle of dictatorship in the platform of the National Socialist German Workers' Party (NSDAP), the Basic Law requires that the internal organization of parties conform to democratic principles. Given that the parties are also partly financed by the state (i.e., up to a maximum of half of their total income), the Basic Law demands that they publicly account for the sources and uses of their funds as well as for their assets.

Parties whose aims and behaviour seek to undermine or abolish the free democratic order and to endanger the existence and the security of the federation or *Länder* are considered unconstitutional but can be banned only by the Federal Constitutional Court. In the case of a ban, their assets and seats in the federal and *Land* parliaments are also forfeited. So far, the Constitutional Court has made use of this possibility of a ban only twice: in 1952 against the *Sozialistische Reichspartei* (a successor organization to the NSDAP) and in 1956 against the Communist Party of Germany (KDP). The procedure to ban the radical right-wing National Democratic Party (NDP), which was introduced a few

years ago by the *Bundestag*, *Bundesrat*, and federal government, failed recently because the identities of informers from the intelligence agencies were not revealed to the Constitutional Court.

Protection of Individual and Communal Rights

Since it came into existence, the Basic Law has contained a complete catalogue of human rights and basic freedoms. It also makes reference to international human-rights agreements. Taking a lesson from the time of the Nazi regime, the Basic Law attaches exceptional importance to basic freedoms and human rights, which is also expressed by the inclusion of these rights in the first article of the constitution. In accordance with Article 1II, the German people acknowledge inviolable and inalienable human rights as the basis of every community, of peace, and of justice in the world.

Insofar as human rights are part of the fundamental rules of an international organization, such as the United Nations' Declaration of Human Rights of 1948, then in accordance with Article 25, they form an integral part of the general rules of international law and thus take precedence over the laws of the federation and the *Länder,* although not over the constitution of the federation. Insofar as human rights are contained in multilateral international conventions, such as the European Convention on the Protection of Human Rights (EMRK/HCPHR), they are, like every international treaty, part of federal law in accordance with Article 59II.

All of Germany's courts, governments, and administrative authorities must observe these human rights and guarantee their validity. Even the legislatures are bound by this stipulation. Overall, one can, therefore, state that basic civil rights and human rights in Germany are binding on the legislature, the executive, and the judiciary as directly applicable law (Art. 1III).

The Basic Law guarantees individual rights as both defensive rights against the state (negative rights) and rights of performance and participation (positive rights). The *defensive rights* include the classic civil rights (e.g., the freedoms of opinion, assembly, association, faith, and occupation). The *rights of performance and participation* include the classic rights of equality, such as the right against discrimination on the grounds of origin, race, sex, homeland, or political or religious opinion as well as the right to the establishment of equal opportunities for disadvantaged groups (e.g., women, the disabled, children, the aged, and the sick). Property rights and inheritance are also guaranteed. In addition, there are the rights to life, freedom from bodily harm, and protection of the personal sphere (e.g., data protection, inviolability of the home and family, and the privacy of mail and telecommunications). Finally, in accordance with the decisions of the Constitutional Court, people have a direct claim on the state for the provision of a minimum living income in the form of social aid.

Insofar as these rights are contained in the Basic Law, they are directed only against the state powers of the federation; most of the constitutions of the *Länder* contain their own lists of basic rights that bind the *Länder* authorities. At both levels, the lists of basic rights contain directly applicable law, which, from the perspective of constitutional law, is protected by the fact that a person can claim that an infringement of his or her rights has occurred. This is done by making a complaint about an infringement of the constitution before the Federal Constitutional Court or the constitutional court of a *Land*.

However, all these rights protect a person only against interventions by the state or justify the special obligation of the state to provide the right of protection; they are not directed immediately against infringements by private persons of others' rights, although the labour law is an exception. However, the courts are obliged to observe the basic rights in a conflict concerning civil rights between private persons. If this does not occur,

the judgment in question can also be a matter of complaint about an infringement of the constitution that produces a direct infringement of a person's civil rights by another individual.

Whoever abuses the basic rights, particularly the freedom of expression, freedom of the press, freedom of teaching, freedom of assembly, freedom of association, the rights of property, or the right of asylum, in order to destroy the free democratic order can be required to forfeit these basic rights. However, this forfeiture can only follow a decision by the Federal Constitutional Court (Art. 18). This procedure has been initiated only once -- against the publisher of a right-wing newspaper -- but the procedure was not completed. The suspension of these basic rights is not provided for. Even in an emergency, these basic rights cannot be revoked or suspended; they can only be restricted. Nor can any person renounce his or her basic rights.

In contrast to the constitutions of some *Länder*, the Basic Law contains no social rights (e.g., rights to housing, education and training, work, social security, and health checkups). However, the constitutional courts tend to deduce the right of action on the part of the legislature from the state's obligations to protect certain basic freedoms, such as life and freedom from bodily harm. The legislature must create proper conditions for exercising such civil rights and liberties.

The Basic Law contains no special group rights or rights for ethnic, cultural, religious, or linguistic minorities. However, all individual rights can also be exerted by a number of people jointly. Thus, for example, freedom of assembly and also assembly as such are protected, as are freedom of association and association as such; the freedom of coalition also protects employers' associations and trade unions. In addition, all domestic legal entities can take advantage of these basic rights to the extent permitted by the nature of such rights (Art. 19III). This even applies to public institutions, as in the case of academic freedom for universities, the freedom of broadcasting for public broadcasting corporations, and the freedom of religion for churches and religious communities.

The basic rights in the Basic Law and in the constitutions of the *Länder* are partly formulated as human rights and partly only as civil rights (i.e., rights for Germans). The human-rights protections are also valid for all people in the country who are not German citizens, such as foreign workers and tourists.

Most of the constitutions of the *Länder* also contain lists of basic rights or, in particular, those basic rights that are associated with the special responsibilities of the *Länder* (e.g., culture and internal security). These lists of basic rights do not differ essentially from those of the Basic Law. The *Länder* are also bound by the basic rights in the Basic Law, but in their own *Land* constitutions, they can incorporate other or more extensive rights. Here, however, they must not contradict the Basic Law and must not fall below the minimum standard of the federal basic rights (Art. 142). For example, the constitution of Saxony contains a right to co-determination in the public service, which, although it does not exist in the Basic Law, is valid in Saxony. In contrast, the constitution of Hessia contains a ban on lockouts by employers, whereas lockouts are permitted to a limited extent in the Basic Law; the regulation in Hessia is therefore invalid.

The basic rights in the *Länder* constitutions are legally protected only in those *Länder* in which a complaint about infringement of the constitution can be made to the constitutional court of the *Land* in question (e.g., in Bavaria, Berlin, Brandenburg, Hessia, Rhineland-Palatinate, and Saxony). Given that the possibility of legal protection for the basic rights of the *Länder* exists in only a few *Länder*, the significance of these rights has remained fairly small in practice.

Constitutional Change

The Basic Law can be amended at any time but only by means of a law that expressly alters or complements the wording of the Basic Law. Simple additions without changes to the text of the Basic Law are not permitted. International treaties that deal with the regulation of peace or serve the defence of the Federal Republic of Germany must not contradict the Basic Law, and any resulting changes or additions to the Basic Law that are needed in order to comply with a treaty must be restricted to the treaty in question. Laws that change the constitution are passed in a normal legislative process, but they require the agreement of two-thirds of the members of the *Bundestag* and two-thirds of the votes of the *Bundesrat*. Procedures of direct democracy with the aim of changing the Basic Law by popular votes are not available.

In addition, the Basic Law provides limits beyond which an amendment to the constitution cannot go. The division of the federation into *Länder*, as well as the rules concerning the participation of the *Länder* in the legislation of the federation, cannot be altered by a change to the constitution, nor can the basic principles of Articles 1 and 20 be altered. These principles include the respect for and the protection of human dignity and the acknowledgement of human rights; the separation of government powers and functions; the commitment of the three branches of government to law and justice and, in particular, to the basic rights; as well as the decisions in favour of the republican form of state, the rule of law, democracy, the welfare state, and the federal order. In accordance with Article 79III, these principles are subject to the so-called eternity clause. The limits to constitutional change also apply if the German people should give themselves a completely new constitution through a total revision (Art. 146).

Constitutional change in Germany is based only partly on changes to the Basic Law. The Federal Constitutional Court plays an essential role by amending the Basic Law through interpretation and especially by adapting it to more recent technical developments or to social and economic challenges. In comparison, the government and the legislature work much less creatively in interpreting the constitution. Since it was passed in 1949, the Basic Law has been amended 50 times, which means once a year on average. Most of the changes concerned shifts of responsibilities to the federation at the expense of the *Länder*.

The number of changes has neither increased nor decreased in the last few years, and one cannot say what form the future development of the constitution will take. The changes to the constitution of the past ten years have been reactions partly to reunification, partly to necessary adaptations to modern social developments, and partly to European integration. Some changes have been brought about by European law (e.g., the admission of women to the federal armed forces). Currently, the governments of the federation and the *Länder* are preparing a comprehensive reform of the German federal system, which will be reflected in the Basic Law within the next few years.

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