

## THE FEDERAL REPUBLIC OF GERMANY

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Like every federal order the German system is characterized by the principle of “strict separation” of powers and functions between the federal government (*Bund*) and the states (*Länder*). Both are vested with the three branches of public power: the legislative, the executive, and the judiciary. And each is responsible and accountable for its own acts and decisions, even if a federal law delegates legislative power to state parliaments. However, unlike the federal system in the United States, the German federal system is not based on two completely distinct and separate columns of federal and state powers with no connections between them; rather the German system is like an unbalanced scale or a seesaw, with a concentration of legislative functions at the federal level and of administrative powers at the state level. This is so because the *Länder* implement not only their own statutes but also a large part of federal law. The judiciary is also organized hierarchically: the lower and middle courts are the jurisdiction of the *Länder*, the higher courts of the federal government. Besides its detailed provisions dividing governmental authority between the federal government and the *Länder*, the German federal system also implies special duties of fidelity and loyalty to the principle of federalism.<sup>i</sup> What this means is that, in exercising their authority, the *Länder* are bound to respect one another’s interests and those of the federal government, and the federal government is required to respect the interests of the *Länder*, including due process and good faith behaviour in bargaining situations.<sup>ii</sup>

This chapter surveys the essentials of these basic features of the distribution of powers and responsibilities in the Federal Republic of Germany. In the process, several major themes emerge. These include: the increasing strength and influence of federal law as compared with *Länder* law making and, thus, the increasing trend towards what I refer to as “unitarization” of the federation; the increasing dissatisfaction in the federation as a whole regarding entangled federal-state programs and financial arrangements that blur proper accountability; the complex interaction of federal- *Länder* matters on European Union (EU) affairs; and, finally, the increasingly important role of the *Bundesrat*, the upper chamber of the federal Parliament, as both a house of review and as the focal point for intergovernmental negotiation not only over domestic matters but also over European and other international affairs.

### THE FEDERAL CONSTITUTION IN HISTORICAL-CULTURAL CONTEXT

The Federal Republic of Germany consists of sixteen *Länder*, including three city states (Hamburg, Bremen, and Berlin). Its population numbers 82.1 million (with a declining trend). The total area of the Federal Republic covers 375,000 square kilometres. The national language is High German, but there are regional dialects and two separate languages (Frisian and Sorbian). The predominant ethnic group is German. In addition, there are some ethnic minorities (e.g., Frisians in the northwest, Sorbs in the east and - spread over the whole country - Turks and others with German citizenship). The Danes in the north also form a national minority. In the course of European integration there is now increasing migration of population from EU member states to Germany, just as Germans migrate to other EU member states. This is due to the freedom of movement of workers guaranteed in the EU treaty. Roughly 55 million Germans are Christians, of whom 28.2 million are Protestants and 27 million are Roman Catholics; in addition there are 1.7 million Muslims and only 54,000 of the Jewish faith (this represents a mere 10 percent of the Jewish population in Germany

before the Holocaust). In 2003 the per capita GDP was approximately US\$28,000.

## HISTORICAL BACKGROUND

The Constitution of the Federal Republic of Germany was drawn up in 1948-49 and came into force as the Basic Law for the Federal Republic of Germany (hereafter referred to as BL) on 23 May 1949. It was based on a draft framed by a group of experts appointed by the prime ministers of the Länder (*Herrenchiemsee* Draft) and passed by the Parliamentary Council, which consisted of sixty-five members elected by the Länder (state) parliaments. Subsequently, it was confirmed by the state parliaments and finally approved by the Allied occupying powers. It was not subject to a referendum at that time since, because of the division of Germany, it was conceived as being only provisional. The decision in favour of a federal political system was, in fact, already predetermined by the Allies' demand for the drawing up of a federal constitution (Frankfurt documents).<sup>iii</sup> However, it is based on a German federative constitutional tradition that dates back to the early Middle Ages.<sup>iv</sup> The first German federal state with relatively weak central powers, the Bismarck Empire, came into existence in 1871, having gradually developed from the initially more strongly confederative structures.

After the First World War a federal order was again created simultaneously with the transition to democracy, but the Weimar Republic was more strongly unitary in outlook than was the Bismarck Empire. This federal order was destroyed by the Nazi regime, which began with the abolition of the Länder as early as 1933. Nevertheless, after the Second World War the new federal structure resulted from two forces. On the one hand, it was pre-shaped by the influence of the Allied powers, who built from the bottom up by re-establishing the Länder (which were distributed between the zones of occupation); on the other hand, and simultaneously, the clear and undisputed belief of the Parliamentary Council in the federal principle resulted in the building of a federal structure from the top down.

The main goals of the framers of the BL consisted, on the one hand, of distributing political power roughly equally to two levels of government (division of powers) in order to strengthen democracy (by "bringing power nearer to the people") and, on the other hand, of counteracting the dangers of too strong a central power in the middle of Europe, which would threaten peace and security. Different approaches with regard to educational and cultural policy were also to be supported by assigning the appropriate responsibilities to the Länder. In addition, in order to preserve national unity and to promote a free market economy throughout the whole of the Federal Republic, and as a kind of precaution against separatist tendencies, the objective of creating equal or equivalent living conditions throughout the federal territory was included in the Constitution (Article 72, para. 2, no. 3; Article 106, para. 3, sent. 3, no. 2 BL).<sup>v</sup>

As an additional unifying incentive the basic rights of citizens (i.e., the individual rights of freedom and equality of human beings) were placed in the very first section of the BL. This was to counteract the experience under National Socialism and to emphasize the outstanding importance of these rights. The BL, however, does not recognize the rights of interest or pressure groups or of other collective identities, beyond assuring their members of their individual rights as citizens<sup>vi</sup> (although, as Germany becomes increasingly multicultural, more discussion is taking place). Nor does it recognize an official language or the preferential treatment of culture or religion. On the contrary, it expressly stipulates that the state is to behave with neutrality and indifference when it comes to cultural and religious points of view. Further, the BL does not provide for any basic duties of German citizens. Nevertheless, it does contain the unwritten principle of the loyalty of the Länder to the federation (and vice versa) as well as the loyalty of the Länder to each other (*Bundestreue*).

## *Cultural Influences*

In their work, the authors of the BL were influenced neither by a particular political theory nor by any religious or ideological orientation but, above all, by certain demands made by the Allies and by the different political interests of the re-established Länder. However, there were differences among the political parties regarding the distribution of responsibilities between the Federation and the Länder. The Social Democrats aimed at a more strongly centralist system, while the Christian Democrats preferred a more decentralized federalism. As a result of the process of unification in 1990 five new Länder joined the federation, all of which were parts of the former German Democratic Republic (GDR) (Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, and Thüringen).<sup>vii</sup> In gaining access to the BL they confirmed the federal system but turned the German culture in a more Protestant and more Eastern direction. Finally, the transborder relationships of some Länder with such countries as France, Spain, Denmark, and the Netherlands functions as a component of European integration, promoting multiculturalism and the internationalization of Germany.

## THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

### *Cooperative Federalism*

In general, the original federal structure laid down in the BL with regard to the distribution of functions and responsibilities between the federal government and the Länder can be described as a cooperative kind of federalism. After a strongly federative phase in the 1950s a creeping centralization has occurred as a result of the federal government's almost exclusive use of its concurrent legislative jurisdiction, to the point where Germany is now described as a unitary type of federalism. Two typical features marked this development. First, the Federal Constitutional Court treated the employment of concurrent legislative powers by the federation in accordance with Article 72, para. 2, BL as a "political question," thus declaring it to be non-justiciable.<sup>viii</sup> Second, in practice, the Länder handed over much of their concurrent responsibilities in exchange for stronger participation in federal legislation through their role in the Bundesrat. In this way the proportion of those laws that require the consent of the Bundesrat has increased from the original figure of about 25 percent to more than 60 percent.

The Bundesrat is a key federal legislative organ. It is involved both in federal legislation and in the administration of federal laws, as well as in EU matters, and it participates in the appointment of justices to the Federal Constitutional Court. In addition, and at the same time, it serves to coordinate affairs among the Länder. Its members are not elected directly by the electorate of the Länder or their parliaments but, rather, are nominated by the governments of the Länder as delegates from their cabinets. It is therefore a focal institution for the processes of "executive federalism." The number of Bundesrat members that each state government can appoint is fixed by the BL, and this varies between three and six, depending on the Land population (discussed further below). The votes of each Land can only be cast unanimously as a block. Therefore, the political composition of the government of each Land plays a leading role in the decisions of the Bundesrat. Moreover, the Bundesrat has an absolute veto over lower house (*Bundestag*) laws requiring its approval and thus acts as a genuine second chamber in the federal Parliament. The same applies to ministerial orders requiring its consent (Article 80, para. 2, BL) and general administrative regulations, provided that they involve the implementation of federal laws by the Länder.

Although from a constitutional perspective the structure of the Bundesrat is based on Länder interests, the operation of political parties at the Länder level means that party differences have a strong influence on the decision-making process in the Bundesrat. In other words, if the parliamentary opposition in the federation has a majority among the governments of the Länder (and thus a majority of the votes in the Bundesrat), it can block federal legislation whenever the consent of the Bundesrat is required. Since this has been the case in more than thirty of the years since 1949, the country has, in all practical terms, been governed by a “Grand Coalition” of the major parties, thus producing a “negotiated federalism.” In addition, each Land election has come to constitute a mini federal election. Under these circumstances the voters have been able to enforce political accountability by assigning credit to policies that they favour and disparagement to those that they do not. Consequently, in most Land elections the federal government is held accountable for its failures as well as for its successes.

Since the end of the 1960s, cooperative federalism has become even more significant in Germany because of the joint tasks<sup>ix</sup> and joint taxes<sup>x</sup> provided by 1969 amendments to the BL. In the meantime, this excessive cooperation has produced many disadvantages, such as a lack of transparency, unclear responsibilities, and an erosion of the power of Land parliaments. An attempt at federal reform is now being made in order to disentangle concentrated and interrelated responsibilities, and to incorporate competitive elements into the federal system. However, essential change to the basic distribution of responsibilities is unlikely. This means that, for the most part, legislation will be centralized and that the implementation of federal laws will, to a great extent, remain decentralized.<sup>xi</sup>

### *Vertical Division of Powers: The Two Levels of Government*

As the federal order of the Constitution primarily deals with the relationship between the Bund (federal government) and the Länder, the BL only contains general regulations concerning the constitutional structure and responsibilities of the local level of government (i.e., municipalities and districts). Thus the communes are not regarded as a third order of government in addition to the federation and the Länder but, rather, as constituent parts of the Länder, which regulate their internal constitutions through legislation. Just like the federal government and the Länder, the communes must, however, provide for the democratic representation of the people through secret ballots at general, direct, free, and equal elections (Article 28, para. 1, BL). Within this legislative framework the communes have the right of self-administration: they have the right to govern themselves regarding all matters of the local community and to do this under their own responsibility (Article 28, para. 2, BL). Their right of self-administration also includes, to a certain extent, responsibility for their own finances and the right to their own constitutional source of tax revenues (local autonomy).<sup>xii</sup>

The two orders of government, federal and Länder, are basically independent of each other. They have governmental autonomy, which is restricted only by their constitutions. Both also enjoy territorial autonomy. Their borders can be changed by federal law (i.e., with the consent of the federal Parliament) within the framework of the so-called new demarcation procedure (Article 29 BL) only with the consent of the people in the Land involved. The situation is different for the communes. Their boundaries are at the disposal of the Land legislature, but the affected communes must be heard by the responsible parliament before territorial reform takes place.

As far as taxation is concerned, the Länder are dependent on federal acts of Parliament. On the other hand, they are largely autonomous with regard to borrowing, provided that they remain within the framework of the limits set out in the constitutions regarding investment levels and those set out in the Stability Pact of the EU (which sets a



limit of 3 percent of the GNP per year on governmental borrowing). The situation with the communes is slightly different: in each case, their right to raise taxes lies in the hands of the federal or Land legislature. And their right to borrow money is dependent on municipal supervision by the Land authorities.

In principle, not only the federal government and the Länder but also the communes have regulatory autonomy, and here the passing of formal laws is reserved to the federal and state parliaments, while the communal councils can only take decisions on by-laws and other regulations (i.e., legal norms of lesser importance, which must remain within the framework of federal and Land law). As long as each of these three levels of government has its own material and natural resources at its disposal, it can redistribute them independently of the others. In the field of executive responsibility, the federal government, the Länder, and the communes are completely autonomous only when carrying out their own laws or regulations. When the Länder administer federal laws, however, they are subject to legal supervision on the part of the federal government. When the communes implement federal or Land laws, they, in turn, are subject to the Land's supervision. In the field of judicial power, the courts of the Bund and the Länder do, in fact, decide matters independently (although not separately, in the sense that they are both equally bound by federal and Land law).

From the financial point of view both the federal government and the Länder can extend their influence to the lower tiers (subnational or local government) by means of special grants, thus restricting their power to shape their own affairs. First, the federal government can give the Länder general supplementary grants within the framework of the tax equalization scheme between the two (Article 107, para. 2, sent. 3). Second, the federal government can grant financial aid for particularly important investments (Article 104a, para. 4, BL). Similarly, a Land can provide its communes with so-called unconditional "key grants" as supplements to their general budgets or with specially appropriated (conditional) grants so that they can fulfill particular tasks. In addition, the federal government has concurrent legislative power with regard to the most important taxes, which it has already exercised fully. The result is that, as far as the type and productiveness of the tax sources are concerned, the Länder and communes have become largely dependent on the federal government.

### *Horizontal Division of Powers: The Three Branches of Government*

In Germany all the responsibilities of the state, not only in the field of legislation but also in the fields of administration and the judiciary, are distributed between the federal government and the Länder. Here, the BL makes use of the subtraction model: all those responsibilities not expressly given to the federal government in the BL are automatically the tasks of the Länder. Article 30 BL states: "Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder." For legislation, a corresponding regulation is to be found in Article 70 BL; for general administration see Article 83 BL; and for the administration of justice see Article 92 BL. Consequently, no order of government has comprehensive powers from which responsibilities are delegated or transferred either to a higher level or to a lower level. Following the wording of the Constitution, one might assume that the focal point of responsibilities lies with the Länder as they are provided with the original residual power. However, in constitutional practice this is not the case. The BL distributes responsibilities to the federal government and the Länder completely, leaving no loopholes in the Constitution. Consequently, the political balance lies in favour of the federal government because its exclusive and/or concurrent responsibilities are more important and more powerful than are those of an individual Land or even of all the Länder together.

## *Legislative Powers*

With regard to the allocation of legislative jurisdiction, the Constitution provides the federal government with three lists of areas. There is a distinction between the exclusive responsibilities of the federal government (Article 71 BL) in the first list (Article 73, nos. 1 to 11, BL) and its concurrent responsibilities (Article 72 BL) in the second list (Article 74, para. 1, nos. 1 to 26; and Article 74a, para. 1, BL). The latter are by nature “Janus-faced”; that is, they are the responsibilities of both the federal government and the Länder, but the former has a one-sided right of access to these with regard to issues concerning equal or equivalent living conditions or the needs of legal and economic unity in the federation as a whole (Article 72, para. 2, BL). The third list of so-called framework legislation (Article 75, para. 1, nos. 1 to 6, BL) represents a subdivision of exclusive federal responsibilities, which is distinguished from those of the first list by the fact that the federal government may only lay down a legal framework that leaves sufficient room for Land legislation. One can thus talk of the shared responsibilities of the federal government and the Länder. In practice, however, the federal government has often laid down such detailed regulations for the Länder that they could only implement federal regulations.

One finds no catalogue of the legislative responsibilities of the communes either in the BL or in the constitutions of the Länder. The relevant texts are restricted to a general clause through which the right to promulgate regulations is passed on to the communes regarding “all matters of the local community.”

The lists of legislative responsibilities are, for the most part, concrete and detailed (above all with regard to the solution of postwar problems), but they also contain very broad descriptions of each field of responsibility (e.g., Article 74, para. 1, no. 6 [public welfare]; no. 11 [economic affairs]; no. 12 [social security]; nos. 11a, 24, and 26 [technology and environmental law]. This enables the federal government to find a suitable basis for almost all its legislation. These lists are by no means complete because, in the BL, one may always find additional exclusive federal responsibility, where a particular article enables the federal government to regulate “further details” by means of federal law. The legislative responsibilities of the federal Parliament in the field of taxes are not to be found in the lists but, rather, in Chapter 10 of the BL, which deals with “Finance” (Article 105 BL). There one also finds the only exclusive legislative responsibility of the Länder expressly formulated by the BL. This concerns local taxes on consumption and expenditures insofar as they are not substantially similar to taxes imposed by federal law. On the basis of this provision, for example, some towns and municipalities in much visited tourist areas have introduced a so-called secondary home tax, which covers the additional expenditure of the infrastructure for inhabitants who have a second home but do not live there permanently.

As far as the individual lists are concerned, the exclusive legislative competence of the federal government includes: citizenship, immigration, and naturalization; elections to the Bundestag, the European Parliament, and political parties; communications; transportation; cooperation between the Länder in the field of internal security; national defence; foreign affairs and international relations; and the diplomatic service. Concurrent legislative responsibility, which, as mentioned above, has, in practice, been fully handled by the federal Parliament, includes: economic policy making (economic union, monetary policy, fiscal policy, international trade and commerce, and interstate and domestic trade and commerce); production and provision of energy; agriculture; protection of the environment; social welfare, labour, unemployment, and workers compensation; health care; civil and criminal law and the organization of the judiciary.

The exclusive responsibilities of the Länder extend to: elections to the Landtag (state parliaments) and to local councils, language policy and culture, religious matters (such as

religious instruction in public schools), natural resources, education, internal security and policing, and foreign affairs (insofar as the Länder are responsible for legislation in, for example, the fields of culture and education [Article 32, para. 2, BL]). In practice, however, along with their limited jurisdiction in the fields of economic cooperation, development aid, and European integration, the Länder also conduct “sideline foreign affairs” (or transnational relations), which is a behaviour not always welcomed by the federal government (see below).

### *Executive Powers*

The BL names only a few areas that are administered exclusively by the federal government (e.g., the foreign service, border police, customs, armed forces, and federal roads and waterways [see Articles 86, 87 and 87a BL]). Within all other policy fields the relevant federal laws are implemented by the Länder, either in their own right under the legal oversight of the federal government (referred to as “execution by the Länder in their own right” [see Articles 83 and 84 BL]) or on the instructions of, and in accordance with, the federal government (referred to as “execution by the Länder on federal commission” [Article 85 BL]). In addition, the Länder naturally have to implement their own laws (i.e., Land administration).<sup>xiii</sup>

Where the federal government has the right to establish its own administrative authorities, it also has the right to privatize its tasks and administrative duties. Provided that rights of sovereignty do not have to be exerted, this means that the federal government not only has the right to transfer administration to a private legal firm (organizational privatization) but that it also has the right to transfer the execution of state tasks by means of private law (functional privatization). Examples of this include the privatization of the postal service, telecommunications, the federal railways, and, in part the construction of roads and tunnels. In all these cases, of course, the federal government maintains certain rights of control (e.g., by retaining a decisive percentage of shares), which are exerted through planning and regulation authorities. In addition to the federal government and the Länder, the forerunners of administrative privatization are, above all, the communes, which have almost completely privatized service-provision facilities (e.g., power and water, waste disposal) and cultural facilities (e.g., theatres, museums, and sports facilities).<sup>xiv</sup>

### *Judicial Powers*

Judicial powers are divided between the federal government and the Länder (Article 92 BL), but here the emphasis is on the Länder. The federal government is only responsible for the five supreme courts of appeal and the Federal Constitutional Court. The five appeal courts are the Federal Court of Justice, the Federal Administrative Court, the Federal Labour Court, the Federal Social Security Court, and the Federal Finance Court. All other courts are in the jurisdiction of the Länder, including the courts of appeal, which become active when the special conditions for access to a federal court are not fulfilled. In addition, almost all the Länder (apart from Schleswig-Holstein) now have their own state constitutional courts, which make decisions regarding the compatibility between state constitutions and acts taken by Land authorities. These courts are constitutional watchdogs, as is the Federal Constitutional Court, whose sole standard is the BL.

### *Intergovernmental Relations*

The BL provides for a close interrelationship between the orders of government within the Federation in the area of executive responsibilities. It expressly obliges the Länder to implement federal laws to the extent that the federal government has not created its own

authorities for this purpose. As a rule, the Länder implement these federal laws at their own discretion (i.e., “administration by the Länder in their own right”). In these cases the federal government retains an oversight concerning the legality of the implementation of these laws, and it issues general administrative regulations guaranteeing the uniformity of this implementation throughout the federal territory (see Articles 83, 84 BL). However, the Länder are even more closely bound to the federal government whenever they “execute federal laws on federal commission” (e.g., in the field of nuclear energy). Here, the federal government can issue individual instructions and even examine the effectiveness of the concrete measures of the Land involved (referred to as “expert control”).

The Constitution itself provides a special procedure for executing federal laws “on federal commission,” in which the federal government retains all the responsibility for their content as well as for their substance. This leaves the Länder with responsibility for carrying out the law but with very little flexibility in doing so. In other words, when the respective law comes into force, the federal government is the master and the Länder are the servants, and possibly even the slaves. This is because they have to follow even unconstitutional instructions that issue from the federal government (Article 85 BL), at least until these have been challenged in court. The only remaining - and of course often substantial - influence wielded by the Länder is their involvement, through the Bundesrat, in the formulation of those laws.

The BL does not prevent the transfer of state tasks from one level to the other (i.e., from the federal government to the Länder or vice versa). This can be done through a law or through an agreement between the Länder, provided that the responsibilities laid down in the Constitution and the limits of constitutional change are adhered to (Article 79, para. 3, BL). In addition to the written responsibilities of the federal government, however, unwritten responsibilities are recognized in three different ways. First, responsibilities in the form of “implied powers” may arise from the “nature of the matter” (e.g., in relation to the design of the federal flag Article 22 BL only states that it should be black, red, and gold). Second, responsibilities can follow from an insoluble “subject connection” (e.g., when a written responsibility cannot be carried out adequately without including a related matter). Third, an unwritten responsibility can be derived from the need to regulate an inessential “annex,” which derives from a written responsibility and which is required in the interest of completeness.

In some areas the federal government has, in fact, renounced its right of regulation or its power for political structuring, either voluntarily or under pressure from certain interest groups. Thus, for example, Article 15 BL provides that property, natural resources, and the means of production can be “socialized” (i.e., transferred to public ownership) by federal law. However, in the interests of maintaining the free market economy, this has so far not occurred.<sup>xv</sup> The same applies to so-called “compulsive intervention” (*Bundeszwang*, Article 37 BL), with which the federal government – if necessary, even with the help of the army – could force the Länder to fulfill their duties in accordance with the Constitution.

Some taxes foreseen in the BL have not in fact been raised, although they are permitted by the Constitution (e.g., entertainment tax, alcohol tax, capital tax – at least to a certain degree). Based on a decision of the Federal Constitutional Court,<sup>xvi</sup> Article 74, no. 25, BL provides for concurrent legislative powers with respect to state liability. The federal government has not yet made use of this provision, however, because it is the Länder, which have to bear the main burden of the administration, that would primarily be affected by it. Finally, under pressure from the trade unions, the federal government, despite its concurrent responsibility for the field of labour law (Article 74, para. 12, BL), has declined to regulate labour disputes through legislation on strikes and lockouts, continuing to leave these matters to the courts.



Since all federal responsibilities must be directly provided for in the BL, whenever there is no constitutional provision for federal regulation, or whenever federal regulation is restricted outright, the field of state responsibilities is a matter for the Länder (Article 30 BL; for legislation see Article 70 BL; for executive power see Article 83 BL). Thus the Länder have a kind of residual power. The communes, which have the exclusive task of dealing with all matters pertaining to local affairs (see Article 28, para. 2, BL), can to this extent also claim some residual power. However, in practice these residual powers are not of great importance because all orders of government tend to make full use of the responsibilities with which they are charged by the Constitution (save only the few exceptions mentioned above).

Finally, in Germany, whenever anybody has the right to competency, as a rule they do not renounce it voluntarily. Thus the clauses that permit the federal government to ignore areas of concurrent jurisdiction or even to return assumed responsibilities to the Länder (see Arts. 72 Para. 3, 125 a Para. 2 BL) have so far not had any practical importance. On the contrary, the BL contains a “regulation of vested rights” that favours the federal government and that means that no federal law can be questioned or challenged subsequent to its implementation (Article 125a, para. 1, BL). The criteria pertaining to the use of concurrent responsibility were considerably tightened by the federal government some time ago (Article 72, para. 2, BL).

## THE LOGIC OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

The federal order in the BL follows neither a fundamental logic nor – apart from its liberal democratic structure – a particular philosophical, cultural, political, or economic theory. In particular, German federalism is not based on the principle of “subsidiarity,” as is the Roman Catholic social doctrine. According to that doctrine the responsibilities within the state ought to be distributed in such a way that the lower unit, within the framework of its capacity, is given precedence over the superior unit in each case. In other words, tasks that local governments can fulfill ought to be situated with the local governments rather than with the Land or the federal government. Resting on hierarchic assumptions rather than on the principle of federal equality of (subnational) states, the principle of subsidiarity may have been the model for some members of the Parliamentary Council. Essentially, however, the restoration of the federal system in 1948-49 was based both on German constitutional traditions dating back to the Middle Ages and on the desires of the Allies. Thus, in spite of some centralist tendencies among the Social Democrats, there was no real alternative to a federal structure either from a practical or a theoretical point of view.

### *Theoretical Aspects of German Federalism*

Nevertheless, even in Germany there has been no lack of attempts to theoretically justify the federal system. Above all, the federal system vertically distributes powers between different orders of government and, thus, serves to limit state power. In addition, it strengthens democracy because it brings power closer to the people and gives them the opportunity to express their political will through elections and votes on various issues. In this way federalism simultaneously promotes both the multiparty system and competition between political parties. It permits political innovation and social experiments through competition among the Länder. As individual constitutional laboratories, the Länder can gain experience with new concepts and policies before these are adopted by other Länder or by the federal government and then applied to the republic as a whole. Last but not least, German

federalism constitutes and supports political opposition within the federation because the political parties constituting the opposition in the federal Parliament always rule in some, if not in a majority, of the Länder. Thus Germany's political leaders receive training before they enter federal politics. With only a few exceptions, since 1949 all federal chancellors in Germany had first been prime ministers of Land governments.

The BL has created a symmetrical type of federalism. The Bund and the Länder are on an equal level: both have state or sovereign qualities within their spheres and thus also have the same constitutional status. Above all, the BL charges all the Länder with the same tasks, independent of the size of territory, size of population, economic performance, and financial strength. Thus the BL distinguishes only between responsibilities of the federal government and those of the Länder, but not, as in Spain or Russia, between functionally different federated units. This means that there is only one type of constituent or subnational unit: the Länder. The only differentiation that the BL makes between the Länder concerns the number of their votes in the Bundesrat: Länder with more than seven million inhabitants have six votes, those with more than six million have five votes, those with more than two million have four votes, and all those beneath this figure have three votes (the current total of Länder votes in the Bundesrat being sixty-nine). Thus, after reunification, the territorially large Länder in the west (i.e., Bavaria, Baden-Württemberg, Lower Saxony, and North Rhine-Westphalia), with their twenty-four votes, have achieved the status of a blocking minority in the Bundesrat.

Although the BL assumes, in principle, that the tasks and responsibilities divided between the federal government and the Länder are to be exercised independently ("principle of separation," Article 104a, para. 1, BL), the framers of the 1969 Constitution nevertheless added other areas of activity. As noted above, these were (1) the joint tasks of the Bund and the Länder and (2) the joint taxes to which both were entitled. The joint tasks include construction and enlargement of institutions of higher education, improvement of the agrarian structure and coastal preservation (Article 91a BL), and educational planning and the promotion of research (Article 91b BL). The preparation and implementation of individual projects to fulfill the joint tasks is a matter for Bund-Länder commissions, in which the federal government, with its sixteen votes together with the six votes from some "poor" Länder (the city states, Mecklenburg-Western Pomerania, Saxony-Anhalt, and, Saarland), has a two-thirds majority and therefore can realize its own interests. This has often met with the resistance of the large and "rich" Länder. For this reason the present federal reform movement, which is pursuing the goal of "disentanglement," is considering abolishing these joint tasks. The same pressure is being applied to the joint taxes (i.e., the income and corporation tax and the turnover tax, which are split roughly equally between the federal government and the Länder, with a small share going to the local governments).

However, Germany's most far-reaching deviation from the dual model of federalism lies in the fact that the federal government does not execute its own laws but, as a rule, relies upon the Länder to do so (Article 83, seq. BL). Thus the BL, by giving the federal government legal control over how the Länder executes its laws as well as the authority to issue directives in the administration of its tasks, has given cooperative federalism a hierarchical component. In constitutional practice, however, this hierarchical component is moderated by cooperative patterns of action arising from the approximately 900 working groups and ministerial forums common to the federal government and the Länder. These have developed in order to debate, coordinate, and even (sometimes) solve problems pertaining to the implementation of laws.

### *Special Features of German Federalism*

Among the special features that characterize the German system of federalism, which is

neither dual nor purely vertical, and that emphasize its cooperative structure are bodies in which the federal government and the Länder function jointly. Foremost among these is the Federal Convention (*Bundesversammlung*), which has the task of electing the federal president and which comprises all the members of the German Bundestag, along with an equal number of representatives nominated by the parliaments of the Länder (Article 54 BL). Another is the Mediation Committee (*Vermittlungsausschuss*), which is composed of one Bundesrat representative from each Land and the same number of representatives from the Bundestag. This committee seeks compromises when the legislative process is bogged down by ongoing disagreement between the Bundestag and the Bundesrat (Article 77, para. 2, BL).

As far as the distribution of state functions and responsibilities in the BL is concerned, the premise that the Federal Republic of Germany sees itself as a “social federal state” (Article 20, para. 1, BL), or as a “social state under the rule of law,” has played a decisive role. If one adds the constitutional goal of “the establishment of equivalent [until 1994, equal] living conditions” (see Article 72, para. 2; Article 106, para. 3, sent. 4, no. 2, BL) to this orientation towards the welfare state, then one sees why the corresponding legislative powers in the fields of public welfare, social security, and the guaranteed living conditions must lie with the federal government. Nevertheless, the Länder and communes also participate in realizing welfare state objectives. Not only do they implement the social laws of the federal Parliament but they also complement them. For example, they may help to fund places in kindergartens and establishments providing childcare, or they may make payments towards supporting blind people. They are also frequently responsible for funding federal social programs. For example, social aid (guaranteeing the subsistence level) is paid by the municipalities but regulated by the federal government. In addition - unlike the BL - the constitutions of the Länder also contain basic social rights (e.g., the right to work, education, housing, and social security), which oblige a Land to gear its policies and finances towards realizing these rights.

## EVOLUTION OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS AND RESPONSIBILITIES

### *Spheres of Constitutional Powers*

Germany has, in effect, two spheres of constitutional law, each separate from the other: the federal Constitution (i.e., the BL) and the constitutions of the Länder. In the interest of uniform constitutional structure, however, the BL specifies that the constitutional order in the Länder must correspond to the principles of the democratic and social state (the so-called homogeneity clause; Article 28, para. 1, sent. 1, BL). Thus the basic structures of the Constitution of the federation (i.e., those pertaining to the republic, rule of law, democracy, social welfare, and federal order) cannot be altered by any amendments to the Constitution. The same applies to the division of the federation into Länder and to the participation of the Länder in federal legislation (Article 79, para. 3, BL). Outside this inviolable core, the wording and content of the BL can be changed at any time by a two-thirds majority of the Bundestag and the Bundesrat. However, such an amendment must take the form of a change to the existing text of the Constitution itself (Article, 79, paras. 1 and 2, BL). This also applies to the distribution of legislative powers and responsibilities, whose shift in favour of the federal government during the past fifty-five years has been the overwhelming reason for the fifty-one amendments to the Constitution made so far. The transfer of Länder responsibilities to the federal government, or of exclusive federal responsibilities to the Länder, thus always require a formal change to the wording of the Constitution. In contrast, the federal

government can, by means of a simple federal law (re-)transfer to the Länder, at any time, the concurrent responsibilities assumed by it (see Articles 72, para. 3; Article 125a, para. 2, sent. 2, BL).

If the Länder want to shift or concentrate their own – mostly administrative – responsibilities among each other, then this can be done by means of interstate treaties. These merely require the consent of the Land parliaments. There is no provision for ratification or other forms of popular participation in the constitutional amendment process. Thus, the people in the federation as a whole have, as a rule, no direct influence on changes in the distribution of powers and responsibilities, either between the federal government and the Länder or among the Länder themselves.

Nor do the federal or Länder constitutional courts have a direct influence on the distribution of powers and responsibilities.<sup>xvii</sup> However, where there is a disagreement these constitutional courts can pronounce judgment on the content and limits of a certain power, and they can also have a decisive influence on the way in which that power is exerted. Thus, for example, the Federal Constitutional Court has to decide on disagreements between the federal government and the Länder concerning their responsibilities, particularly with regard to the exercise of federal supervision (Article 93, para. 1, nos. 3 and 4, BL). In the same way, the increasing proportion of laws requiring the consent of the Bundesrat<sup>xviii</sup> is based on the relevant decisions of the Federal Constitutional Court.<sup>xix</sup> This has occurred largely because, whenever a single provision in a law (e.g., concerning administrative procedure) justifies Bundesrat consent, the court has declared that the entire law requires Bundesrat consent.

With regard to interpreting the federal features of the BL to the advantage or disadvantage of the federal government or the Länder, the Federal Constitutional Court has not pursued a uniform course. When the matter concerns a federal claim to powers, the court has usually favoured the Länder, but when the matter concerns the control and directive rights of the federal government vis-à-vis the Länder's execution of federal laws, the court has favoured the federal government.

### *“Unitarization” of Powers and Attempted Reforms*

Since 1949 state tasks have been increasingly concentrated in the hands of the federal government and, in particular, there has been an increasing shift towards federal legislation. The federal government has not only made full use of its existing responsibilities in the field of concurrent legislation, but, through numerous changes to the Constitution, it has also obtained even more responsibilities. Examples of this may be seen in environmental protection, state liability, transplantation and reproductive medicine, and gene technology.

However, this trend has by no means occurred contrary to the will of the Länder; rather, it has had their express consent in the Bundesrat. Thus the autonomous legislative power of the Länder has, in effect, been exchanged for a co-determination of federal laws.<sup>xx</sup> The winners in these processes have been the federal government (with its greater regulative power) and the Länder governments (with their veto power in the Bundesrat); the losers were obviously the Länder parliaments as they had to give up the option of exercising concurrent legislation. Interest groups, trade unions, and professional associations also benefited from this development as they were able to achieve their demands more easily and more effectively at the federal level than through decentralized negotiations with a large number of Land governments.

In order to stop the trend towards “unitarization,” in 1994 the Joint Constitutional Commission of the Bundestag and the Bundesrat tried to make it more difficult for the federal government to employ its concurrent legislative responsibilities. It did so by replacing the non-justiciable “need clause” for uniform federal regulation with a new criterion of



“indispensability” for equivalent living conditions or the maintenance of legal or economic unity (Article 72, para. 2, BL). The Land parliaments were consequently given the right to take legal action in the Federal Constitutional Court against the federal legislature’s abuse of these criteria (Article 93, para. 1, no. 2a, BL). Nevertheless, these approaches have so far had little effect. To date, the Federal Constitutional Court has ruled against the federal Parliament in only one such case: it declared the federal law concerning the care of the elderly to be unconstitutional.<sup>xxi</sup> Again, the losers in this ongoing development towards a “unitary federal state” are not the Länder but the Land parliaments. This is also why these parliaments are currently the most vocal in demanding the reform of federalism in Germany; above all, they are calling for a revision of the distribution of legislative responsibilities.

Corresponding to increasing legislative unitarization has been a trend towards the federalization of executive power. Here, the federal government often acts as the “paymaster,” and the Länder have to implement the jointly developed programs.<sup>xxii</sup> Despite the intentions of the 1969 reform of financial responsibilities, the basis in constitutional law for this “entanglement of policy” was the introduction of the right of the federal government to grant financial aid to the Länder and communes. This aid was supposed to avert the disturbance of the overall economic equilibrium, to equalize differing economic capacities within the federal territory, and/or to promote economic growth (Article 104a BL). With the help of special federal grants Land governments have undertaken urban planning and the renovation of the historical quarters of towns, supported local transport, built and maintained hospitals, subsidized the coal mining industry and the shipbuilding industry, and undertaken other projects determined to be in the national interest. In accordance with the principle of “whoever pays for the music also calls the tune,” however, the Länder have retained only a small window for decision making and policy shaping in such fields. The Länder fall into a “policy entanglement trap” that makes it almost impossible for them to make a clear distinction between their responsibilities and those of the federal government. This entanglement also reduces transparency in administrative and decision-making processes. So far there have not been any other decentralization processes in the Federal Republic of Germany, although, since around 1994, there have been many calls for reform. However, a decentralization effort could have a real chance of coming to the fore during the course of the reform work currently being addressed by the Commission of the Bundestag and the Bundesrat for the Modernization of the Federal Order.<sup>xxiii</sup>

### *Influence of the European Constitution*

During the past three decades the whole federal system in Germany has been affected and modified by the process of European integration. Right from the beginning the BL has provided by law for the transfer of sovereign powers to international organizations (Article 24, para. 1, BL). As a member of the EU, the Federal Republic of Germany has been taking part in establishing a united Europe. This was constitutionally recognized in Germany in 1993 through the creation of a special constitutional provision for the European integration process (Article 23, para. 1, BL). Consequently, an enormous transfer of responsibilities to the EU has already taken place, largely in the fields of industry and commerce, currency, and international trade. In these areas the EU already has almost exclusive responsibility. The European law created by the EU in these cases takes precedence over all national law (including national constitutions). Due to its sovereignty over external relations, the federal government is not prevented by the BL from transferring the exclusive powers of the Länder to the EU (e.g., in the field of culture, education, and/or internal security). For this reason, Article 23, paras. 2 to 5, BL provide for massive participation rights of the Länder in policy making in relation to the EU. If the transfer of Länder responsibilities to the EU affect essential

Länder interests, then the federal government is required to pay strict and detailed attention to the opinions of the Länder regarding these decisions. In cases of transfer of exclusive Länder powers the Länder can, if necessary, send their own representatives to the bodies of the EU. In such cases they speak on behalf of the Federal Republic of Germany as a whole. However, this external power of the Länder is now being questioned because it is seen as impeding the effective enforcement of German political interests in Europe.

The current draft of a new constitution for the EU leaves the existing system of responsibilities between the EU and its member states largely untouched. However, it strengthens the possibilities of control on the part of the member states with regard to observing the subsidiarity principle through the creation of an early-warning system. This would place the national parliaments in a position to examine whether they could formulate a particular regulation better and more effectively than could the EU. In this case, the member-state parliaments could make a complaint against such European institutions as the European Council and, if necessary, could take legal action at the European Court of Justice. Since the Bundesrat is considered to be part of the national parliament (i.e., its second chamber), the majority of in the Länder will, thus, for the first time be given the right of direct access to the European Court of Justice.

## MAINTENANCE AND MANAGEMENT OF THE DISTRIBUTION OF POWERS AND RESPONSIBILITIES

### *Cooperation between the Governments*

In practice, the handling of the distribution of governmental powers and responsibilities is almost entirely of a cooperative nature, with the struggle for agreement and the search for compromises a dominant feature. From the point of view of the federal government, however, the relationship between it and the Länder can involve conflicts if the respective party majorities in the Bundesrat and the Bundestag drift apart. Elements of collusion may occur when the federal government tries to “buy” majorities in the Bundesrat by means of providing financial help for the poorer Länder. Alternatively, individual Länder may, for party reasons, support the policy of the federal government in the Bundesrat contrary to, or in spite of, their regional interests. In recent years German federalism has assumed certain competitive traits as a result of the lack of economic growth, leading to empty coffers and declining economic resources. This has made it considerably more difficult for the financially weaker Länder (in particular in the eastern part of Germany) to make the necessary investments or to obtain highly qualified personnel.

The main fields in which the senior governments cooperate are: (1) the fulfilment of joint tasks; (2) the horizontal and vertical redistribution of income among federal government, the Länder, and the communes; and (3) the preparation for decisions in the EU. The federal government regularly displays collusive behaviour when it seeks agreement for its policies from individual Länder by means of financial privileges. The federal-Länder relationship also involves conflict whenever the parliamentary opposition in the Bundestag can compensate for its inferiority by a majority in the Bundesrat. This is particularly so in the case of laws requiring Bundesrat consent, thus enabling the majority there to block government policy. In particular, competition occurs over decisions about financial resources - especially the content of fiscal legislation and the right to raise taxes - but also concerning the shape of intergovernmental revenue redistribution. This has been the case since the establishment of the Federal Republic. Taken as a whole, where the regional interests of the Länder are primarily involved, conflict has been mainly among the Länder, whereas in the

case of party or ideological interests, the line of conflict tends to run between the federal government and politically allied Länder on the one hand, and the opposition Länder on the other hand.

In the extensive field of concurrent responsibilities, which comprises more than 90 percent of all federal legislation, conflicts between the federal government and the Länder are, in fact, rare. This is because the BL itself standardizes the preconditions under which the federal government can avail itself of concurrent responsibility and because these preconditions have become justiciable with the new criteria of “indispensability” in Article 72, para. 2, BL. Apart from this, Article 31 BL also determines, clearly and unmistakably, that “Federal law takes precedence over Land law.” As a result of this constitutional provision no further regulations are required to solve a possible conflict of laws in favour of one or the other level. Thus the Federal Constitutional Court has rarely had a role in judging conflicts about responsibilities between the federal government and the Länder.<sup>xxiv</sup> This means that, in practice, the responsible actors at both levels have been forced to gain sufficient clarity among themselves (concerning the distribution of powers and joint responsibilities) to govern their actions.

So far, only the transfer of international agreements previously made by the highly centralized “Third Empire” (under the Nazis) to the new federal order of the BL has caused uncertainty. In this case, the Federal Constitutional Court has decided, for example, that the provisions on education in the 1934 “Reich Concordat” with the Vatican is now the responsibility of the Länder.<sup>xxv</sup> In the case of state liability law, it is unclear whether this is part of civil law (with concurrent jurisdiction available to the federal government) or not (with the result that it would come under the jurisdiction of the Länder).<sup>xxvi</sup> Where doubts arise in practice, or where particularly important matters are involved, the solution has been found in federal-Länder agreements. Thus, for example, the question of preconditions and procedures for the granting of federal approval for the Länder to sign an international treaty that falls within their legislative jurisdiction (Article 32, para. 3, BL) is regulated in a formal agreement between the federal government and the entirety of the Länder. This is known as the Lindau Agreement.

Again, despite the relatively clear distribution of responsibilities laid out in the BL, it is the “cooperatively” exercised responsibilities that frequently provide citizens with reasons for doubt and confusion. If, for example, the Länder become active on the instructions of the federal government and are given a federal directive to establish a permanent disposal site for nuclear waste or to approve the transportation of spent fuel rods through their territory, the population assumes that this decision has been taken by the individual Land. In fact, it had been taken by the federal government. Or, if a Land has to cancel or postpone the building of a planned institution of higher education because the federal government will no longer provide the funding, this is generally believed to be the failure of the Land government responsible for educational matters rather than of the federal government. Individual citizens cannot attach decisions to the correct level and, therefore, cannot realize accountability. For this reason, the disentanglement of joint responsibilities is a key area and was under review by the Commission of the Bundestag and the Bundesrat for the Modernization of the Federal Order.

### *Conflicts among the Governments*

Since so few conflicts or controversies have arisen over the distribution of state powers and responsibilities in the German federation, little change has resulted from legal jurisprudence. In a few cases, however, decisions of the Federal Constitutional Court have had an impact on the way in which responsibilities are exercised. Thus, for example, the judgment on the

authority of the federal government to issue administrative directives has meant that, in cases of administration on federal commission, the Länder have had to obey even unconstitutional directives.<sup>xxvii</sup> Länder administration in these cases has, therefore, been reduced to a masked federal administration, with the Länder merely performing what amounts to a service function. On the other hand, the increase in the number of laws requiring the consent of the Bundesrat has allowed this part of the parliament, contrary to the intentions of the drafters of the Constitution, to become a genuine and active federal second chamber. At the same time, as noted above, the Federal Constitutional Court no longer exercises control by ruling on the need for unified federal regulation in the field of concurrent jurisdiction, with the result that the federal government has assumed virtually exclusive legislative responsibilities.

Finally, in Germany, with regard to resolving conflicts there is not a major distinction between formal institutions and informal political mechanisms. In comparing the role of the Bundesrat (as the only formal organ of mediation) with that of the informal conflict management role of intergovernmental executive forums and institutions, the only difference is that the former deals mainly with conflicts of a political nature (mostly involving party policies) while the latter deal with disagreements concerning particular policy topics. As the formal and independent guardian of the distribution of federal responsibilities, the Bundesrat occupies a hybrid position between the federal government and the Länder. This means that, in principle, it is subject to the influences of both levels. The Bundesrat is made up of members of the Land governments who, of course, not only influence it but essentially pre-form and co-determine its decisions. However, whenever the political majorities in the Bundesrat and the Bundestag correspond, the federal government has a strong influence on the former, particularly since it has the right to speak in that house and must keep it informed about how its business is being carried out at the federal level (Article 53 BL). Nevertheless, the Bundesrat is independent of the Bundestag to the extent that its legislative decisions can be taken autonomously and without regard to the decisions taken in the Bundestag. It is also worth noting that the membership in the Bundesrat and the membership in the Bundestag are derived from different sources.

### *Executive Federalism*

The maintenance and administration of the distribution of powers and responsibilities lie primarily in the hands of the executives.<sup>xxviii</sup> Here, with regard to the duty to implement federal laws, the Länder executives have had most of the practical experience, and they have therefore assumed a particularly significant role. In contrast, the main interest of the federal executives has been in being informed about this experience and in coordinating the Länder executives in order to make them apply federal laws uniformly. This is done primarily with the assistance of the Bundesrat. As noted above, coordination is also achieved with the support of numerous intergovernmental institutions, ranging from joint discussions between experts and heads of federal and Länder departments right up to ministers conferences and the Forum of Prime Ministers (with the participation of the federal chancellor). As in other federations, this predominance of the executive power in making use of and handling federal distribution of responsibility is referred to in Germany as “executive federalism.” In comparison with executive federalism, the importance of the legislatures is, in fact, slight. This is because the federal government has always made full use of its exclusive and concurrent responsibilities, and the Länder, as legislative authorities, have consequently been forced into the background.

### *Federal Supervision of Länder Administration*



As noted above, since the BL distinguishes clearly and unambiguously between federal legislation on the one hand, and Land legislation on the other hand, the federal government has the right to observe and to control Länder when the latter execute (federal) laws in their own right (Articles 83 and 84 BL) or when they are federally commissioned to do so (Article 85 BL). In these cases the federal authorities can send commissioners to the Länder to obtain information on whether federal laws are being executed legally. If federal laws have been infringed the federal government can issue the Länder with a reprimand and require remedial action. Finally, in the case of a dispute both the federal government and the affected Land government can address the Bundesrat and then the Federal Constitutional Court. If the federal law is executed on federal commission, its supervision extends to the appropriateness of the execution. In individual cases this includes the authority to issue directives. However, the federal government has no influence on the Land legislature and the Land authorities' execution of federal laws provided that the Länder fulfill their constitutional duties towards the federation.

The constitutional duty of the Länder includes the precept of friendly behaviour to the federal government based on the principle of federal loyalty. Only if a Land has been shown to offend against its duties to the federation can the federal government, with the agreement of the Bundesrat, take the necessary measures to force the Land to fulfill its duties. In such a case the federal government or its commissioner has the authority to issue directives to all the Länder and their authorities (Article 37 BL). All disputes that arise from measures of federal supervision or federal compulsion can also be dealt with by the Federal Constitutional Court. In such a federal-Länder dispute the Court decides on the constitutionality of these measures (Article 93, para. 1, nos. 3 and 4, BL). The federal supervision of the legitimacy of the execution of federal laws may also involve the Bundesrat, whose decision about whether a Land has violated federal law has to be obtained before the Federal Constitutional Court can be appealed to. Any federal or Länder influence on the decisions of the Court is excluded because Article 97 of the BL establishes the independence of the judiciary. Nevertheless, the Länder have some influence through the election of the justices via the Bundesrat.

In the case of an exceptional situation or a state of emergency with regard to internal security the federal government can become active if the Land in which the danger threatens is not able to combat it. The federal government then has the right to place the police forces of the Land under its direction and to employ units of the Federal Border Police (Article 91, para. 2, BL). If the emergency concerns a natural disaster or a particularly serious accident that can endanger the territory of more than one Land, the federal government can even employ its own forces to support the police forces of the Länder involved (Article 35, para. 3, BL). In all other cases the initiative has to be taken by the Land affected. It can call upon police forces from other Länder, the Federal Border Police, or even armed units of the federal army. In these cases it is only the Land that is responsible for the necessary emergency measures.

All supporting actions on the part of the federal government in exceptional situations and states of emergency rest on the mutual duty of both orders of government to provide each other with legal and administrative assistance (Article 35, para. 1, BL). For this reason it is not possible for the federal government to suspend or remove regional or local office bearers from their positions or even to take over the government of the Land involved. Under the BL this is forbidden by the principle pertaining to the mutual recognition of the independence and sovereignty of each order of government within the federal system. Therefore, in such cases the federal authorities are always limited to issuing directives. However, these directives enable the federal government to subordinate Land authorities to such a degree that the formal assumption of governmental and managerial power or the removal of officials is not necessary. It is only at the level of local government that the supervisory authorities of the

respective Lands have the right to take over the decision-making power of the communes or to install a commissioner to directly manage their self-administrative organs. In the reverse situation, if the Länder are of the opinion that the federal government is not fulfilling its constitutional duties or is violating the distribution of powers laid down in the BL, then they can claim a federal-Länder dispute and appeal to the Federal Constitutional Court (Article 93, para. 1, nos. 3 and 4, BL).

## ADEQUACY AND FUTURE OF THE DISTRIBUTION OF POWERS AND RESPONSIBILITIES

### *Para-Constitutional Tendencies and Shifts in Federal Practice*

If one looks at the actual distribution of the powers and responsibilities within the federal system and compares it with the demands of the Constitution, then one will see that, in this respect, political reality more or less corresponds to constitutional law. The practice of exercising responsibility through the constitutional organs of the federal government and the Länder certainly falls well within the framework of the BL. Of course, there have been some shifts in the system of responsibilities in the form of transfers of constitutional responsibilities to the federal government or the transformation of what were originally Länder tasks into joint tasks. In addition, the relationship between the rules and exceptions in Article 30 BL, according to which, in principle, the Länder are primarily responsible for fulfilling state tasks and exercising state powers, have, in practice, now been reversed. Furthermore, another level of government, involving the so-called self-coordination of the Länder - a kind of grey area within constitutional law - has become increasingly important without being formally recognized. Apart from these largely marginal changes, however, in Germany it is hardly possible to find serious deviations from the written Constitution with regard to the distribution of powers and responsibilities. The reason for this may lie in the fact that, if the federal or a Land government were to make unconstitutional use of its powers, then the Federal Constitutional Court, drawn in by the adversely affected party, would take action very quickly.

The question of whether the constitutional and actual distribution of power produces an adequate and politically acceptable balance between effective government at the federal level and equally effective government at the Land level depends upon what one understands by balance. If one judges it from an objective point of view, one will hardly be able to deny that a balance of this kind does indeed exist. An equilibrium is always formed in every system of power, and this remains effective as long as state decisions have public acceptance. Nevertheless, in Germany one increasingly hears complaints from the Länder as well as from parts of the federal government that this equilibrium is becoming more and more disturbed. This is mostly due to one side or the other being accused of exceeding or misusing its constitutionally guaranteed powers. Thus, for example, the Bundesrat is accused of blocking the policies of the federal government for reasons of party tactics. The parliaments of the Länder insist that the federal legislature has assumed too much legislative power and/or that it has even gone so far as to transfer this power to the EU. Both levels of government regularly complain about the supposed inadequacy of their funds.

On the face of it, one could conclude that, when all sides complain about the lack of balance, it is precisely this that indicates that a balance exists. In fact, it is true that the political scope within which a Land can take action has been considerably reduced in the past fifty years and that the high degree of intertwining of policy making has reduced the transparency and public control of the decision-making process. In recent decades these

developments have actually led to a concentration of powers at both levels of government, with power and finances approximately equally distributed. However, these power blocks, which have a deleterious effect on political accountability, are so closely linked with each other that the political process has become bogged down.<sup>xxix</sup> The federal government and the Länder agree on the diagnosis of immobility, but they do not agree about the therapy for treating it. While the federal government insists on a perceptible reduction of legislation requiring Bundesrat consent, the Länder often misuse their veto power to reject unfunded federal mandates.

### *Deficiencies of the German Federal System*

Even if the practice of exercising the responsibilities of the federal government and the Länder still conforms to the BL framework, the present situation of the federal system in Germany is regarded by many as not very satisfactory and as requiring fundamental reform. Financially, the Länder are practically, and the local governments almost completely, dependent on decisions taken by the federal government. In the fiscal field they have an almost entire lack of legislative responsibility (apart from Article 105, para. 2a, BL). Nor do they have the right to introduce new taxes or to raise taxes themselves. In this situation the federal government tends to raise only those taxes that provide additional income for itself (such as the tobacco tax and petroleum-based fuels tax), without taking note of the needs of the Länder and communes. The current financial situation of the communes is especially threatening. On the one hand they are instructed to take over more and more new tasks, but on the other hand their main source of income, the commercial tax, has almost dried up due to the weak economy. For these reasons, as noted above, the Bundestag and the Bundesrat recently decided to establish the joint Commission of the Bundestag and the Bundesrat for the Modernization of the Federal Order, which is comprised of an equal number of Land and federal representatives, one from each Land and sixteen from the federal government (for thirty-two in total). Its mandate includes dealing with the financial resources of the Bund, the Länder, and the communes.<sup>xxx</sup>

If, in accordance with the recommendations made by this commission, the financial provisions for the Länder and the communes should be improved, then both would no doubt have the capacity to collect, administer, and spend these additional funds. However, the question of whether the political will exists for such reform is frequently raised. The prevailing public impression is that governments already place such a burden on their citizens in the form of taxes, contributions, and levies that there is no room to increase them. And, indeed, the public is no longer prepared to accept tax raises of any kind. In addition, in recent years the efficiency of all governments is perceived to have greatly declined, with people receiving less and less service for more and more money. This widely held public opinion has had a negative effect on the willingness of the political leadership at all levels to make decisions since all fear that this would result in their being punished at the next elections. The parties now outbid each other with suggestions whose half-life is becoming shorter and shorter. Thus the arguments for and against the reintroduction of the capital tax, for and against raising the estate duties, for and against the hazardous waste charges of the communes, and for and against the packaging tax fill entire archives. In this debate, so far there have been no signs of a generally rational, long-term solution that would alleviate the financial problems of the federation and that would receive general consent.

The seemingly permanent financial crisis of the federation has to be considered within the context of the transfer of significant economic powers to the EU, including those pertaining to the restrictive monetary policies pursued by the European Central Bank. In Germany the planned net credit borrowing for the fiscal year 2004 grew to more than two

times the originally planned figure (i.e., from €18.9 billion [or about US\$22 billion] to approximately €42.5 billion [or about US\$51 billion]). Consequently, it exceeded the convergence criteria of the European Stability Pact (which limits the annual net credit borrowing to no more than 3 percent of GDP) by almost one whole percentage point.

Despite this financial weakness, the federal government continues to finance the expenditures of the Länder and the communes to a considerable extent. To enable it to do this, the BL essentially provides it with four instruments: (1) the co-financing of joint tasks (Articles 91a and 91b BL); (2) grants for particularly important investments on the part of the Länder and communes (Article 104a, para. 4, BL);<sup>xxxii</sup> (3) the authority to relinquish parts of the sales tax jointly due to the federal government, the Länder, and the communes; and (4) the federal government's participation in balancing Länder budgets (Article 107 BL). Above all, general, unconditional federal funding is particularly important for the ability of the Länder and communes to shape their own policies based on income from their general budgets (rather than on funding granted for specific projects). In addition to financial support in accordance with Article 104a BL, the general unconditional financial transfers include federal payments to the poorer Länder in order to cover their general financial needs (i.e., fiscal equalization [Article 107, para. 2, sent. 3, BL]). The purpose of this equalization is, on the one hand, to balance out the shortage of funds in the budgets of these Länder (*Fehlbedarfszuweisungen*) and, on the other hand, to cover special needs in the new Länder in the Eastern part of Germany (*Sonderbedarfszuweisungen*). Total equalization payments by the federal government to the Länder and communes in 2003 was about €30 billion (or about US\$36 billion).

So long as there is adequate financial provision for the Länder and communes, these levels of government will have the necessary constitutional powers to fulfill their functions as well as to attract sufficiently qualified and trained personnel. With the increasing privatization of governmental services, the Länder and communes are active in the labour market and are able to recruit suitable personnel without being bound by the strict conditions of the regulations that govern the civil service. There is the general political will to improve the provision of public services and to fulfill all the tasks and functions for which the three levels of government (the federal government, the Länder, and the communes) are responsible in a way that is as efficient and as competent as possible. In particular, the local governments could take over more tasks if they had the necessary funds and were not prevented from doing so by the Länder. The local authorities could also further privatize administrative tasks in order to save money and to free themselves from the rigid guidelines of public budgetary law.

### *Additional Requirements for Reforms*

During the 1980s and 1990s the political decision-making process in Germany became increasingly cumbersome. In fact, there was growing social awareness of the need for fundamental reforms. This awareness, however, met with little response in political practice. The legislative process was blocked as a result of different majorities in the Bundestag and the Bundesrat. Moreover, the experience of the last five decades indicates that different party majorities in the Bundestag and Bundesrat, respectively, represent Germany's constitutional reality. Such a constellation can lead, in the most favourable instances, to grand coalitions based on the lowest common denominator. But the potential for blockage due to different Bundestag and Bundesrat majorities is built into the "marble-cake" federalism of Germany's Constitution. Federal legislative authority has grown continuously while Länder authority has decreased to the point where Länder are now only responsible for the administration and implementation of legislation. In the meantime, the framework for this distribution of



responsibilities has been fundamentally altered by German unification and by the process of European integration. Thus, in the long term the current arrangement threatens to weaken the political capacity for action.

The processes of European integration and economic globalization have fundamentally altered the basic conditions for political management in virtually all federal countries. These processes point to the need to strengthen the legislative authority of the state (i.e., the subnational) order of government. The integration of international markets demands ever-greater business specialization in countries with high production costs. As a consequence, sectoral and regional differentiation is becoming increasingly important in the competition between locations. In countries like Germany this is leading to the growing importance of the *Länder* as economic policy actors. These changing conditions of German federalism are already sufficient to make a review of the German Constitution a pressing political issue. At the core of this issue lies the question of the distribution and disentangling of federal and *Länder* responsibilities as well as financial reform. The “fossilized” federal structures of the Constitution hardly allow for flexible reactions to modern societal changes. Market forces and their systems of distribution demand a more adaptable political system. However, the constitutional reality in Germany - as a result of joint tasks, the integrated system of tax revenue redistribution, and the continual extension of legislation requiring Bundesrat consent - have left the political system even less flexible than it was before.

Today it is a question of optimizing the ability of Germany's political system to act under new circumstances. It is not a matter of reform at any price, and certainly not of change shaped by ideology or even by party politics. In addition to a basic consensus on common assumptions, reform also requires scope for a greater variety of solutions. Such a variety can only be obtained, however, through more autonomy and a willingness to take risks at both an individual and an institutional level (particularly at state levels). The federal state, as understood in the Constitution, needs reforms that will restore the federal balance. There must be less emphasis on establishing uniformity and on the principle of equality, and more emphasis on equality of opportunity and autonomy.

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<sup>i</sup> For more on the “*Bundestreue*,” or principle of federal loyalty, see Bertus DeVillers, “Intergovernmental Relations: *Bundestreue* and the Duty to Cooperate from a German Perspective,” *SA Public Law* 13 (1994): 430-437.

<sup>ii</sup> See David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: Chicago University Press, 1994), chaps. 2 and 3.

<sup>iii</sup> See Johannes Wagner, *Der Parlamentarische Rat 1948-1949: Akten und Protokolle*, vol. 1 (München: Vorgesichte, 1975), p. 31.

<sup>iv</sup> The so-called “*Goldene Bulle*” of 1356, well known as the first constitution of the “Holy Roman Empire of the German Nation,” established a quasi-federal system consisting of seven electorates, fourteen imperial districts, and some free imperial cities. See Hans-Peter Schneider, “Federalism in Continental Thought during

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the 17th and 18th Centuries,” *Federalism and Civil Societies*, eds. Hans-Peter Schneider and Jutta Kramer (Baden-Baden: Nomos, 1999), pp. 43-52.

<sup>v</sup> All articles of the Basic Law quoted in this chapter can be examined in an English version of the German Constitution available in the “German Law Archive,” <<http://www.iuscomp.org/gla/index.html>> (accessed in 2005).

<sup>vi</sup> The only exception in Article 21 BL refers to the status, the functions, and the rights of political parties. In Article 9, para. 3, BL the existence of trade unions and employers’ associations is guaranteed.

<sup>vii</sup> See Hans-Peter Schneider, “Der Föderalismus im Prozeß der deutsch-deutschen Vereinigung,” *Chancen des Föderalismus in Deutschland und Europa*, ed. Tilman Evers (Baden-Baden: Nomos, 1994), pp. 79-93.

<sup>viii</sup> See the following cases of the Federal Constitutional Court: 2 BVerfGE 213, 224 (1953); 4 BVerfGE 115, 127 pp. (1954); 10 BVerfGE 234, 245 (1959); 13 BVerfGE 230, 233 pp. (1961); 26 BVerfGE 338, 382 pp. (1969); 33 BVerfGE 224, 229 (1972); 65 BVerfGE 1, 63 (1983); 65 BVerfGE 283, 289 (1983); 67 BVerfGE 299, 327 (1984); 78 BVerfGE 249, 270 (1988).

<sup>ix</sup> “Joint tasks” are tasks of the Länder, co-financed by the federal government according to decisions of “Joint Planning Commissions” composed of sixteen delegates of the federal government and sixteen representatives of the Länder (e.g., construction of universities, improvement of regional economic and agrarian structures, coastal preservation, educational planning, promotion of research institutions, etc.). For further details, see Articles 91 a and 91 b BL.

<sup>x</sup> “Joint taxes” are taxes that accrue jointly to the federal government, the Länder, and the municipalities (communes) (e.g., the income and corporation tax, the turnover tax). All three orders of government share these taxes, with a specific percentage share being regulated by the Constitution.

<sup>xi</sup> See Nevil Johnson, *Federalism and Decentralisation in the Federal Republic of Germany* (London: HMSO, 1973).

<sup>xii</sup> See Renate Mayntz, “Intergovernmental Relations and Local Autonomy in Germany,” *Rivista Trimestrale di Diritto Pubblico* 32 (1982): 608-624.

<sup>xiii</sup> See Hans-Peter Schneider, “L’execution des lois fédérales par les Länder: Aspects juridiques et financiers,” *Les cinquante ans de la République Fédérale d’Allemagne*, ed. Michel Fromont (Paris: Publications de la Sorbonne, 2000), pp. 65-78.

<sup>xiv</sup> See Peter Katzenstein, ed., *Industry and Politics in West Germany: Toward the Third Republic* (Ithaca, NY: Cornell University Press, 1989).

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<sup>xv</sup> Notwithstanding the fact that, traditionally, some big companies are owned or co-owned by public authorities (Volkswagen, Lufthansa, Deutsche Bahn, Telekom).

<sup>xvi</sup> 61 BVerfGE 149, 173 pp. (1982).

<sup>xvii</sup> See R. Davis and D.J. Burnham, “The Role of the Federal Judiciary in the Development of Federalism in West Germany and the United States,” *Boston College International and Comparative Law Review* 12 (1989): 63-88.

<sup>xviii</sup> An increase from approximately 25 percent in 1949 to more than 60 percent today, thus functionally and institutionally strengthening the Bundesrat.

<sup>xix</sup> See 8 BVerfGE 274, 294 pp. (1958); 24 BVerfGE 184, 195 (1968); 55 BVerfGE 274, 319, 326 pp. (1980).

<sup>xx</sup> See Konrad Hesse, *Der unitarische Bundesstaat* (Karlsruhe: C.F. Müller, 1962).

<sup>xxi</sup> 106 BVerfGE 62, 135 pp. (2002).

<sup>xxii</sup> The inverse situation of unfunded federal mandates that are imposed upon the states (as in the United States of America ) could often be avoided by the Länder thanks to their veto power in the Bundesrat. This always provides a window for bargaining.

<sup>xxiii</sup> The commission was established in October 2003. The organization, the procedures, and all the material produced by the commission (documents, minutes, motions, submissions, legal opinions, etc.) are published on the Internet (<<http://www.bundestag.de/parlament/kommissionen/modern>>) with a link to *Bundesstaatskommission*.

<sup>xxiv</sup> See Prodromos Dagtoglu, “The Change in Federal Conflicts: Some Remarks in Modern West German Federalism,” *Devolution: Essais*, ed. H. Calvert (London: Professional Books Ltd., 1975), pp. 155-173.

<sup>xxv</sup> 6 BVerfGE 309, 340 pp. (1957).

<sup>xxvi</sup> 61 BVerfGE 149, 173 pp. (1982).

<sup>xxvii</sup> 81 BVerfGE 310, 332 pp. (1990); 84 BVerfGE 25, 31 pp. (1991).

<sup>xxviii</sup> See Nevil Johnson, *Government in the Federal Republic of Germany: The Executive at Work* (Oxford: Pergamon Press, 1973).

<sup>xxix</sup> See Fritz Scharpf, “The Joint Decision Trap: Lessons from German Federalism and European Integration,” *Wissenschaftszentrum Berlin* (Berlin: Wissenschaftszentrum Berlin, 1985), p. 62. This article is also available in *Public Administration* 66, 2 (1998): 239-278.

<sup>xxx</sup> See note 23.

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<sup>xxx</sup> Both the joint tasks as well as grants for important investments are being reviewed by the “Commission on Federalism.” There is a tendency in the commission to abolish the joint tasks; but the Länder are still looking for adequate compensation.