

THE FEDERAL SYSTEM OF THE FEDERAL REPUBLIC OF GERMANY*

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PART I: FEDERAL STATE AND FEDERALISM

The key provision of the Basic Law, the German constitution, in which the principles governing the state structure of the Federal Republic of Germany are defined, is Article 20, paragraph 1:

The Federal Republic of Germany is a democratic and social *federal* state.

This gives the political system of the Federal Republic of Germany a federal structure. This basic decision works on the conviction that political development shaped by the beliefs and convictions of the population, economic prosperity, and social and cultural development can better be promoted in a federal system than in a unitary system.

a) Strengthening democratic legitimacy

Federalism strengthens democracy. The citizens have more possibilities to participate in politics and to uphold their interests. They have the right to vote at several levels: at the federal, the Land (federal state) and, finally, at the local level. The essential basis for the legitimacy of state power through the citizens is that citizens principally identify themselves with the political system and that they are willing to take part in the formation of political will. A federal system, as opposed to a unitary system, opens up additional institutional and procedural possibilities for participation, consensus-building and for identification, thus promoting the functioning, performance and stability of the political system.

b) Promoting the division of powers, strengthening the rule of law

A federal system counteracts concentration of power. The horizontal division of powers where state authority is separated into executive, legislative and judicial powers is supplemented by the vertical division of powers and tasks between a central state and constituent states, in the Federal Republic between the Federation and the Länder. In a federal state, political decisions and

* Translated from German.



developments are made more transparent and balanced, and are subject to the need to find a consensus, which helps to avoid extremes. The powers of the Federation and the Länder are limited, and they have mutual “checks and balances”, which means that they also depend on one another. They must co-operate in order to discharge their tasks efficiently. This means that the “balance of powers” and the “system of checks and balances” is enhanced. At the same time, this political structure supports the rule of law, which, through both the division of powers and the restriction and balance of powers, safeguards human dignity, freedom and justice.

c) Promoting political competition

Federalism promotes political competition between parties and holders of political offices. Regular elections to the parliaments of the Federation, the constituent states, and the local communities force them to constantly fight for voters. The opposition in the Federation tends to be the party that is in power in some of the Länder and makes its contribution to federal policies via the chamber of the Länder, the Bundesrat. It therefore has the opportunity to take on actual responsibility for its political concepts. The state as a federal entity furthermore enhances the political management potential, as the need for people with political leadership qualities is greater than in a unitary state. Land governments and Land parliaments also serve as a basis for taking on responsibility and as places of administrative and parliamentary-democratic practice.

d) Promoting economic competition and development

A federal state provides the structural requirements needed for political and administrative decision-making at the appropriate level. A unitary state tends to locate important and fundamental decisions at the central level and to leave only the details to the regional or local level. By comparison, the relevant decision-making level in a federal state is essentially governed by the aspect of what would be commensurate with, and appropriate to, the subject matter in question. In other words, the decision-making level must be as close as possible to the subject matter of the decision itself and to the place where the decision is to have its impact. By the same token, decision-making must be located on higher levels when uniform criteria having a wide span are needed. The federal state is better able to respond to differing regional circumstances through adapted framework conditions and purposeful assistance measures than the unitary state, which, by its very nature, intervenes indiscriminately by means of uniform regulations. Thus, the federal state is better able to promote economic development in a purposeful and efficient manner. At the same time, the resulting competition increases economic performance as a whole.

e) Promoting social development

The maxims of the unitary state are to establish uniform living standards, to balance differences in performance, and to achieve solidarity and social justice. Notwithstanding the foregoing,



transparent social security institutions which maintain the people's willingness to take over responsibility and play an active part themselves, in particular, institutions building on the self-governing principle, can decisively increase the performance of social security systems and counteract setting standards at a low level.

f) Promoting the flowering of cultures and cultural diversity

The federal state allows for diversity in unity. It is in a better position to tackle regional problems and discharge regional tasks, for instance in terms of town and country planning and minority policies. One of the strongest arguments in favour of a federal system is the fact that it takes into account regional particularities. As a result, cultural diversity is maintained and promoted allowing citizens to identify with their community.

g) Co-operative federalism versus unwieldiness and mutual obstruction

Serious inherent disadvantages of a federal state may include the unwieldiness of political decision-making processes, the division of responsibility between several orders and constituent units, potentially giving rise to mutual obstruction and to a tendency towards bureaucratic procedures. Political common sense, as well as co-operation of all parties concerned, taking account of all practical requirements, however, may turn these inherent potential weaknesses into a particular strength of the federal system, and establish stability and performance of the political system. Co-operative federalism avoids extremes and promotes expediency, balance and sustainability.

PART 2: FEDERALISM IN THE FEDERAL REPUBLIC OF GERMANY

Under constitutional law, the Federal Republic of Germany is a federal state with 16 Länder forming its constituent states. Both the constituent states and the nation have their own original sovereign authority. The constituent states are not provinces or departments but states with their own Land constitution, parliaments and administrative structures.

The exercise of sovereign power is split between the Federation and the Länder by the Basic Law. In this process, the Basic Law assumes that the Länder are generally competent (Art. 30, 70, 83 of the Basic Law). In the fields of legislation, administration and jurisdiction, the Federation has its own competencies only if the Basic Law explicitly assigns such competencies to it, or if unwritten competence can be derived by way of interpreting the Constitution.

a) Responsibility for legislative process lies predominantly with the Federation

In constitutional reality, the Federation dominates legislation, while the Länder dominate administration. This is in line with practical requirements. In the administrative area, decen-



tralised decision-making is best able to accommodate differing circumstances and conditions in many walks of life. Because many situations in life cannot be regulated properly by legislation at the local or regional orders alone, a trend towards harmonisation is occurring in the field of law-making both in the national and supranational arenas. This applies in particular to the necessary harmonisation of law within the European Community. Accordingly, the Federation has been making full use also of its merely optional legislative powers (concurrent legislative power of the Federation pursuant to Articles 72, 74, 74a of the Basic Law and framework legislation pursuant to Article 75 of the Basic Law). The result is that the constituent states' scope for legislation has been restricted.

The most important legislative competencies, which have remained with the Länder in practice, include cultural questions, school and university education law, broadcasting law, building regulations law and general police and regulatory law.

b) Responsibility for administrative process lies predominantly with the Länder

In the field of administration, the picture is a different one. The Länder not only execute their own Land laws, but also the vast majority of federal legislation. It is in only a very few sector-specific fields that the Federation has direct administrative responsibility. These fields include for instance the Foreign Office, the Federal Army Administration, the Federal Border Police and specialised central federal authorities such as the Federal Criminal Police Office or the Federal Office for the Protection of the Constitution.

c) How the Länder contribute to federal legislation through the Bundesrat

Even though legislative authority is predominantly with the Federation, and the Länder have limited scope to enact legislation, the latter can exert a strong influence on federal legislation through the Bundesrat. The Länder are entitled to introduce bills in the Bundesrat. The Federation's legislative process provides that the Bundesrat must be heard with regard to all federal laws considered by the Bundestag. The Länder can also influence the content of federal legislation through the exercise of their absolute or suspensive veto. The nature of the veto is dependent on the type of legislation under consideration. The Basic Law provides for a conflict resolution mechanism between the Bundestag and the Bundesrat in the so-called Mediation Committee.

d) Fiscal federalism within the Federal Republic of Germany

The federal structures of the Federal Republic of Germany are not only characterised by a division of powers between the Federation and the Länder, but also by the constitutional provisions governing state finance. The Federation and the Länder can only act independently and efficiently in political terms, if they have sufficient finance. Under the constitutional provisions of the



Basic Law governing state finance, the Federation and the Länder each bear the respective costs incurred by them in the performance of their functions. Since the Länder basically have to execute federal legislation as their own affairs, alongside their Land-specific laws, they also have to bear the costs associated with these functions. By the division of authority over tax legislation between the Federation and the Länder, the Bundesrat's rights of participation in tax legislation, and the standards set for the distribution of tax earnings, the Basic Law guarantees that the Federation and the Länder have the necessary funds to discharge their tasks. This is ensured through a balanced system of tax legislation, adjustment of tax authority as a result of changing conditions, as well as through the entitlement of the Federation and the Länder to tax revenue.

The tax legislation competencies and the entitlement to tax revenue on the part of the Federation and the Länder are supplemented through regulations on revenue equalization. Revenue equalization works:

- vertically, between the Federation and the Länder
- horizontally, between the Länder,

to equalize differences in economic and financial capacities within the federal territory.

Furthermore, the Federation may grant the Länder financial assistance for particular investments by the Länder or by municipalities, provided that such investments are necessary to avert a disturbance of the overall economic equilibrium, to equalise differing economic capacities within the federal territory, or to promote economic growth. The regulations adopted to achieve this end reflect a particularly high degree of co-operation, co-ordination and solidarity in the federal state. The regulations are also a crucial prerequisite and guarantor of the approximation of living standards between the eastern and western Länder after the reunification of the two Germanys in 1990.

PART 3: FEDERALISM IN REAL LIFE

a) The Federation and the Länder act together in the field of federal legislation

The above description of the constitutional provisions governing the relationship between the Federation and the Länder shows that a high degree of co-ordination and co-operation is required in a federal state. Diverging interests and developments add to this requirement. Co-ordination between the Federation and the Länder should be effected in the spirit of "co-operative governance". The legal relationship between the Federation and the Länder and among the Länder themselves includes the obligation of the Federation and its constituent states to be "loyal to the Federation". As a result, there are, among other things, obligations to co-operate by sharing information and co-ordinating action.

The Basic Law and the Rules of Procedure of the Bundestag, Bundesrat and the Federal Government regulate in depth to what extent the Länder are involved in federal legislation. In this context, the Bundesrat acts as the second legislative chamber of the Länder and must be involved in approving all legislation. As already noted, the Länder are entitled to introduce legislation in the

Bundesrat and to influence the content of federal laws by withholding their consent. The mediation proceedings between the Bundestag and the Bundesrat in the Mediation Committee have proven to be very efficient and successful.

Furthermore, legislative proposals are thoroughly discussed between the Federation and the Länder before draft laws are submitted to parliament. The Land Governments are involved early in the process of drafting Federal Government bills. Thus, they are in a position to influence decisively the content of bills before the legislation is submitted to parliament. At the same time, early involvement of the Land Governments enables the Federal Government to remove potential conflicts before the cabinet decides on the draft law.

After involvement of the cabinet, the Federal Government bill is submitted to the Bundesrat, the chamber of the Federal Länder, for the so-called first passage. The Bundesrat is entitled to make comments on the draft law, to which the Federal Government may respond. After that, the draft law, together with the comments by the Bundesrat and any response by the Federal Government, is forwarded to the Bundestag as the decisive legislative body.

When the Bundestag has decided on the draft law, it is forwarded the Bundesrat for the second passage. If the Bundesrat and the Bundestag disagree, a convening of the Mediation Committee may be called for. The Mediation Committee consists of members from both the Bundestag and Bundesrat.

If and when legislative proposals require Bundesrat consent in accordance with the Basic Law, the Bundesrat may refuse to give its consent. If it does, the draft law “has failed”. The number of bills requiring Bundesrat consent is considerable, because it includes all legislation regarding the establishment of authorities or regarding Länder administration.

The Länder can bring their influence to bear at several stages of the legislative process, which means that the Federation greatly depends on finding a consensus. The Federation must work to find the necessary majorities in the Bundesrat. It is difficult to push through legislation against the will of the majority of Länder.

b) Political consultation and co-ordination

The institutional arrangements for co-operation of the Federation and the Länder regarding the passage of federal statutes as laid down in the Basic Law and the Rules of Procedure of the Bundestag and Bundesrat provide only part of the picture. In addition, a great number of bodies and procedures for consultation and co-ordination between the Federation and the Länder have emerged in response to political realities.

Consultation and co-ordination take place mainly at three levels:

(1) Between the Federal Chancellery and the Bundesrat

A Minister of State on the level of a Parliamentary State Secretary has been entrusted with this task for many years at the Federal Chancellery. His main point of contact at the Bundesrat is its Consultative Council, which is composed of the 16 Land plenipotentiaries representing Land



interests vis-à-vis the Federation. As a rule, this body meets with the Minister of State at the Federal Chancellery on a weekly basis. They primarily come together to prepare Bundesrat meetings. They also discuss on a confidential basis, all other issues requiring co-ordination between the Federation and the Länder.

(2) In the Conference of Minister-Presidents

The Conference of Minister-Presidents meets at least twice a year. The Federal Chancellor is a participant in the Conference. There are also conferences of specialised ministers of the Federation and the Länder, which are also convened at least once every six months.

The preparation for the Conference of Minister-Presidents is done by the heads of the state chancelleries and senate chancelleries and the head of the Federal Chancellery, who generally meet one week prior to a meeting. The same applies to the conferences of specialised ministers. In these cases, the state secretaries of all ministries concerned at the Land and federal level also meet one-week before the conferences actually take place. In practice, both the Conference of Minister-Presidents and the conferences of specialised ministers are very important, because they make political decisions - in general solely on the basis of unanimity - which are binding on all parties.

(3) Land-based parliamentary groups of the Bundestag

The political importance of the Land-based parliamentary groups of the Bundestag cannot be overlooked, either. They prepare the negotiations of the working group and parliamentary group meetings, thus ensuring that the views and weight of the individual Land associations and Land governments are brought to bear in the parliamentary negotiations and decisions.

c) Co-operative federalism

The above-mentioned co-ordination institutions and procedures form the basis of intensive co-operation between the Federation and the Länder, and among the Länder themselves. This has been termed “co-operative federalism”. This term reflects the principle that all holders of public office work together in order to benefit the citizens.

Co-ordination and co-operation go hand in hand with the interconnection of those holding responsibilities in the various areas and at the different levels. Such interconnection is ever increasing, so that the political action between the Federation and the Länder is becoming more and more closely intertwined, a fact which has not been universally approved. Critics say that this interdependence has led to the unacceptable blurring of lines between political tasks, functions and responsibilities. Furthermore they argue that it makes the holders of political office less inclined to assume responsibility and removes the line between the governing and opposition parties, leading to an “all-party government”.

To a certain extent, the criticism is justified. Admittedly, there have been attempts to over-

come institutional barriers, a situation that can be overcome to a certain extent through legal arrangements. These attempts should not be overstated though. An important and effective safeguard against the institutional barriers losing their weight and importance in political life is the dualism between government and opposition in the Federation, between the Federation and the Länder, and among the Länder themselves, leading to the synergy of co-operation and competition. Thus, in sum, co-operative federalism promotes the functioning, performance and stability of the political system in the Federal Republic of Germany.

d) The Federal Constitutional Court as the guardian of federalism

Finally, the Federal Constitutional Court is of particular importance when it comes to preserving the federal state structure. The Länder may turn to this Court whenever they feel that their rights or competencies are impaired in breach of the constitution. The Federation, too, may turn to the Federal Constitutional Court, when it feels that a Land law is unconstitutional. In these cases, the Federal Constitutional Court hands down final decisions binding on all those concerned.

Part 4: FEDERAL STATE AND EUROPEAN UNION

With the 1986 Single European Act, the 1992 Maastricht Treaty, and the 1997 Amsterdam Treaty, a development has been initiated transforming the European Community from the original trade and economic union towards a political union. Over time this development has advanced to the point that the emergence of a European federal state can be discerned. The question of how Europe should develop in constitutional terms is being asked more and more frequently. This evolution is reflected by the discussion – both public and in expert literature – about a European constitution in which a number of leading politicians and European and constitutional law experts have engaged. The adoption by the European Council in Nice in December 2000 of the Charter of Fundamental Rights has furthered this discussion. Ever since the Community started to develop into a political union, it has been clear that it had to act not only in terms of trade and economic policy, but also in traditional policy fields, such as foreign and security policy, interior policy and finance and monetary policy.

This development has already come a long way, reflected specifically by the

- Common Foreign and Security Policy,
- gradual determination of a common defence policy,
- establishment of an area of freedom, security and justice, including for instance judicial co-operation in civil matters, and police and judicial co-operation in criminal matters,
- economic and monetary union, with the common euro currency at its core,
- development of a common social policy.

One could therefore safely say that European co-operation already includes core areas of national identity.



From the German point of view, the only logical and possible development in constitutional terms is a move towards a European federal state. This is the only way to accommodate national cultural, economic and social particularities and the nations' diversity. By contrast, it is not conceivable to turn the Community into a centralist Europe, a view which is not actually held by anyone. Therefore, those who (still) object to the development of a federal Europe do not argue about whether Europe should be a centralist state or a federal state, but, understandably, about whether the development towards a political union should also be advanced in constitutional terms. Probably it continues to be reasonable, in the foreseeable future, to promote the European development step by step, as held by Jean Monnet, without having the blueprint for the final state in mind. On the other hand, we must not overlook that the questions concerning the European Union are becoming more and more urgent, as reflected by the deliberations concerning the institutional structure of the Community at the European Councils of Amsterdam and Nice.