Federal Republic of Germany

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German federalism offers a striking example of path-dependency. Historically, there were strong reasons why a united German state could be constructed only as a federal polity. Once this was done, however, the federal character of the polity proved difficult to change, even when powerful political forces wished to do so. The same phenomenon is responsible for central features of the institutional structure of the German federation and, in particular, for the constitution of the Federal Council, or *Bundesrat*. Germany has a two-level parliamentary system. In theory, a traditional model of parliamentary government is in use at both levels. However, the particular distribution of competences, which assigns most legislative power to the federation but gives administrative power to the states, makes federal and state politics highly interdependent. The Federal Council embodies this interdependence and is a key institution through which it occurs. Both the strengths and the problems of the institutional structure of the German federation are linked to the constitution of the Federal Council as the centerpiece of German "executive," or "administrative," federalism.

BACKGROUND

In terms of its population and economy, Germany is the biggest country in western and central Europe. In 2004 its per capita GDP was US$28,700. It has a population of 82.4 million people, living on a territory of 357,023 square kilometres. The resulting ratio of 231 people per square kilometer means that the country is quite densely populated in contrast with, for example, France, Poland, or Italy, with corresponding ratios of 109, 124, and 192 people per square kilometre, respectively. Nevertheless, there are large areas in Germany, particularly in the north and the east, in which a relatively small population can be found. In the most densely populated southern and central parts of Germany, the rather rugged topography tended to favour a fragmented political structure. As a result, southern Germany was governed historically as a series of small principalities. Only in the nineteenth century were some bigger states formed in the region, thanks to the reordering by Napoleon, within the framework of the so-called *Rheinbund*. The plains of northern and eastern Germany, by contrast, were dominated by Prussia from the eighteenth century on.[1]

In the late nineteenth century Prussia controlled two-thirds of the entire German territory. In consequence, the first federal state of 1871 was very asymmetric. After 1945 Prussia was divided into medium-sized states. In the Soviet zone the states, or *Länder*, that were formed wholly or partly out of Prussian territory (Brandenburg, Sachsen-Anhalt, and Mecklenburg) were relatively small, with around two million inhabitants each. In the British zone, two somewhat larger states were formed (Northrhine-Westfalia and Lower Saxony, with 18 million and eight million inhabitants, respectively). Accordingly, the size and importance of the sixteen *Länder* now forming the Federal Republic vary greatly. Three of them have populations of more than ten million and thus, if they were independent, would count as medium-sized European countries. Two other *Länder* have populations of six-to-eight million people (Lower Saxony and Hesse), and another group has populations of around four million people each (Rhineland-Palatinate, Saxony, and Berlin). Six *Länder* have about two million people each (Schleswig-Holstein, Brandenburg, Sachsen-Anhalt, Thüringen, Mecklenburg-Vorpommern, and Hamburg). The two smallest *Länder* are the Saarland, with some one million people, and Bremen, with 700,000.

Some *Länder* are historic entities with a very long tradition of independent statehood: Bavaria and Saxony in particular, but also the city states of Hamburg and Bremen. Other *Länder* are well established historical centres with a strong pre-existing identity: Schleswig and Holstein,

the two former Mecklenburg principalities in the North, Brandenburg and Thüringen in the East, the old Kingdom of Hannover in Lower Saxony, the two former principalities of Hessen, the Palatinate, Baden, and the old Kingdom of Württemberg in the Southwest. Others, however, are purely artificial creations of postwar reconstruction, such as Northrhine-Westfalia and Sachsen-Anhalt.[2] Yet even these *Länder* have developed a strong political identity. The history of territorial restructuring, which has been a prominent issue since the founding of the Federal Republic, is interesting in this regard. Over the entire period of 58 years, there has been only one successful attempt to restructure the *Länder*: the merger of southwestern German states into Baden-Württemberg in the early 1950s. Even this success was due to some manipulation of the terms of the referendum. Under current constitutional rules, experience suggests that proposals for restructuring are doomed to failure.[3]

Both the federation and the *Länder* are republics with democratic traditions going back to 1918 – the year of the democratic revolution, when the monarchies were overthrown. In the two city-states, Hamburg and Bremen, the republican tradition dates back farther still. The system of government may be characterized as a strictly representative form of parliamentary democracy.[4] In the federal arena, there is practically no direct democracy, although some *Länder* constitutions provide for elements of direct democracy.[5]

The government system established by the Basic Law in 1949 has been very stable. Two major parties, the Christian Democrats and the Social Democrats, regularly attract between 30 percent and 45 percent of the total vote. Two smaller parties, the liberal Free Democrats and the Greens, receive between 5 percent and 10 percent; since 1990 a regional leftist party in the former GDR, the Party of Democratic Socialism (PDS), has attracted around 20 percent of the vote in all the eastern *Länder*.[6] Christian Democrats and Social Democrats have alternated in power in the federation as well as in the *Länder*. In the federal sphere, big parties have always needed a smaller party as a coalition partner in order to form a stable government. In *Länder* elections, however, either the Christian Democrats or the Social Democrats sometimes win absolute majorities. In some states majorities have been extremely stable. In Bavaria, for example, the local branch of the Christian Democrats, the Christian Social Union (CSU), has governed for nearly 50 years. Fundamental swings in majorities are rare, and there tend to be long intervals in which majorities are relatively stable.[7]

The institutions of government broadly follow the pattern that is typical in a parliamentary system. [8] The key political personality in the federal government is the chancellor, elected by the majority in Parliament. The main departure from the familiar structure of parliamentarianism is the institution of the Federal Council, or *Bundesrat*. The *Bundesrat* performs the legislative functions of a second chamber. It is not an elected organ, however, but represents *Länder* governments in federal decision making.[9] The *Bundesrat* is an integral component of the model of executive federalism,[10] which has developed in Germany since the late nineteenth century. It is characterized by the substantial interdependence of federal and *Land* politics and, thus, also of the governing coalition in the federal government and the opposition that has often controlled a majority of *Länder* governments. Together with the complex system of distribution of financial resources that binds together federation and *Länder*, the *Bundesrat* has been perceived in recent years as one of the principal obstacles to fundamental structural reform.[11] A bicameral reform commission was established in 2003 to develop proposals to reform the federal system. The negotiations between the major parties and between the federal government and the *Länder* executives failed in late 2004, however, due to severe divergences of opinion on several issues of distribution of competences.[12]

The People

The composition of the German population is not a pressing reason for federation. In comparison to most other European countries, Germany's population is fairly homogeneous. Some 90 percent

of the population is German in cultural and linguistic terms. There are some traditional minorities: the Danes along the Danish border in Schleswig-Holstein, the Frisians at the northern (Schleswig) end of the North Sea coast, the Slavic Sorbs in the southeastern corner of Saxony and Brandenburg, the Sinti, and the Roma. These comprise only 0.4 percent of the German population, however, and live mostly in peripheral border regions. Much more important in quantitative terms are the "new minorities" formed by families of migrant workers and refugees.[13] Around 10 percent of the inhabitants of Germany belong to this category. The most important group comprises people of Turkish origin.

Beneath the veneer of national homogeneity, however, even the German people are rather diverse. Historical experiences and traditions are very different in different parts of the country. Linguistically, also, the regional languages assembled under the roof of standard German vary greatly. The Alemannic and Bavarian dialects of the South are unintelligible to northern Germans. Southern Germans find it difficult to understand Lower German.

In terms of religion, also, historically Germany has been a complex puzzle. There are regions in the west and the south that used to be homogeneously Roman Catholic, whereas most of northern and eastern Germany consisted of purely Protestant territories. In other regions, such as the southwest, religious faith varied from village to village, mirroring the political map of the sixteenth and seventeenth centuries, when the territorial compromise was struck between Roman Catholics and Protestants. Religious diversity was one of the principal reasons why Germany had to be organized in a decentralized manner; thus, it is part of the historic background of federalism. Religion today, however, no longer plays a decisive social or political role. As a result of internal migration, there is also a strong tendency for people of different faiths to converge, at least in urban centres.

The boundaries of the constituent units of the federation, the *Länder*, are not drawn deliberately to reflect cultural and religious differences between segments of the population; rather, they are primarily rooted in political history. Some borders may coincide with cultural and religious boundaries. The political changes of the Napoleonic period, however, caused the creation of states that, in the nineteenth century, already had very diverse populations - an experience repeated in the course of the territorial restructurings of 1919 and 1945-49.

Interestingly, this has not led to a significant weakening of regional identities. This is obvious in "historic" states like Bavaria, Saxony, Hamburg, and Bremen. In other cases, traditional regional identities have sometimes shifted to the new political entities, as in Hesse and Lower Saxony. In the case of the newly formed *Länder* of postwar Germany, regional identification is more complex. In these states traditional identities, linked to historic territories, persist. They coexist, however, with regional identities, which have been created more recently.

History

The starting point of German federalism is the medieval era, when Germany was fragmented into hundreds of quasi-independent feudal territories. Above a host of local rulers, the person of the emperor constituted some kind of (largely symbolic) supreme power. However, when it came to conflict, the emperor proved to be more or less powerless beyond his own (dynastic) territories.[14] Some of the regional dynasties managed to effectively consolidate their territories and ultimately formed "sovereign" states in a long process that continued from the fourteenth century to the seventeenth century. With the Peace of Westphalia of 1648, this complex pattern of semi-sovereign states and autonomous territories was preserved for a further 150 years.

Not until the downfall of the Holy Roman Empire of the German Nation in 1803 was the way free to rationalize the territorial structure.[15] The still relatively complex patchwork of sovereign states of different sizes was organized after 1815 in the German Union (*Deutscher Bund*), a confederation of German states jointly controlled by Austria and Prussia. An attempt to unify Germany in a federal state with a constitutional monarchy failed in 1848.[16] Some two

decades later, Prussia's prime minister, Otto von Bismarck, managed to outmanoeuvre Austria and to force the remaining states of northern and central Germany into a union with Prussia. Some years later, in 1871, the four southern German states joined the union, thus forming a new (federal) German Empire with the king of Prussia as emperor.

Unification was possible only on federal terms. At the beginning, there were few federal institutions. The chancellor was appointed by the emperor and, in the absence of responsibility to any parliament, directed a kind of secretariat. There were no regular ministries and no cabinet. A directly elected federal parliament had a decisive say in statutory law making and in budgetary questions but no influence on the executive. As a second chamber Bismarck created a federal council uniting the monarchical executives. Administration remained in the hands of the states as constituent units, most of which were only semi-parliamentary monarchies.[17]

When the monarchical system broke down in the revolution of 1918, important actors in the new democratic polity tried to change the system from a federal arrangement to a more unitary form of governance according to the French model. They succeeded to a large degree, although nominally Germany remained a federal state. Plans to transform Germany into a centralized state failed because the (now democratic) governments of the constituent states rejected moves towards centralization.[18] When the Weimar Republic became ungovernable in 1930, an authoritarian government drawing on the emergency powers of the president was instituted in the federal sphere. In the states, including Prussia, parliamentary governments remained in power. But when the Nazis took over Germany in 1933, the federal structure was soon abolished.

After 1945 the occupying powers reconstructed democratic governance in the states first. The state governments and parliaments soon acquired a central role in German politics.[19] The Parliamentary Council, which drafted the Basic Law in 1948-49, was composed of delegates of state parliaments. Accordingly, it was impossible to create anything but a federal state – a condition also set explicitly by the allied military governors. During the drafting process, the nature of the second, "federal," chamber was heavily debated. An important group favoured a senate on the U.S. model, while others advocated the traditional German *Bundesrat* solution. Finally, a deal was struck. The delegates voted in favour of a bicameral system with a *Bundesrat*, or Federal Council, but also opted for a somewhat centralized system of distribution of revenues and financial resources.[20]

The unification of Germany, which technically was construed as an accession of the five East German *Länder* to the Federal Republic, did not significantly change the institutional structure. The numbers of seats and the weighing of votes in the *Bundesrat* were adapted, but the arrangement of "cooperative federalism" that had evolved since 1949 and that closely links federal and *Länder* executives in a kind of consociational arrangement remained largely unaffected. The growing disparity in economic wealth between the different *Länder*, however, has put the system of redistributing financial resources under severe stress.

THE FEDERAL LEGISLATURE

The federal legislature plays an extremely important role in the federal system. Germany has an integrated style of federalism, in which competences, for the most part, are not distributed horizontally between the states and the federation according to subject matter but, rather, are distributed vertically, dividing legislative and executive competence and conferring most of the former on the federation. In consequence, the federal legislature is the main law maker.[21] The legislative competences of the *Länder* are very limited. The major challenge to the traditionally dominant role of the federal legislator comes from the European Union. In an increasing range of areas, the European Union decides on the framework for future legislation, leaving the national parliaments to transform it into statutory law.

The federal legislature is bicameral. A federal parliament, the *Bundestag*, is elected directly by popular vote. A federal chamber, called the *Bundesrat*, represents the constituent units - that is, the *Länder* - or, more precisely, the *Länder* governments. The *Bundestag* and the federal government are closely linked by the strictly parliamentarian design of the governmental system. The *Bundestag,* with its majority, elects the federal chancellor (the prime minister). The chancellor then nominates the members of the cabinet, which finally are appointed by the federal president. Ministers are usually members of the *Bundestag* and, accordingly, sit on the benches of the parliamentary majority. The head of state, the federal president (*Bundespräsident*), does not play any role in the legislative process, apart from signing legislation at the end of the process.

The interplay between the two chambers, the *Bundestag* and the *Bundesrat*, however, significantly modifies a legislative process that otherwise is typically parliamentary in character. Due to voting patterns that developed from the 1970s, the *Bundesrat* tends to be controlled by a majority of *Länder* governments belonging to the opposition parties.[22] The divergence of majorities in the two chambers offers a strong temptation for opposition leaders in the *Bundesrat* to block any significant move of the federal government.[23] This forces both party blocs towards a certain degree of cooperation in law making in order to prevent the legislature from becoming paralyzed. A large dose of (hidden) consociationalism thus characterizes the German system.[24] The decisive deals between political blocs are usually struck in the joint committee of both chambers, the *Vermittlungsausschuss*, where leading politicians of the major parties (from both the federal parliament and the state governments) can negotiate a compromise in sessions held in camera.[25]

Parliament (Bundestag)

The Parliament, or *Bundestag*, is elected in a direct popular vote every four years. The regular number of seats is fixed at 598 by statute, but in practice five to ten seats are usually added because the regional majority party wins more direct seats in some *Länder* than strict proportional representation would generally allow (the so-called *Überhangmandate*).[26] The electoral system is based on the principles of proportional representation, but it also has a majoritarian component. Half of the regular seats (299) are allocated to local districts, where the candidate who has gained a (relative) majority of votes wins the seat. The remaining seats are allocated to party lists drawn up in each state in order to make up the number to which each party is entitled on the basis of proportional representation.[27]

In practice the mixed electoral system means that the representatives of the majority party in a state are mostly (sometimes even all) elected directly in local districts, whereas the representatives of smaller parties are elected by party lists. Big majority-parties thus find it more difficult to control their members, most of whom owe their seats to support in local districts. The representatives of smaller parties, by contrast, are directly dependent on the party lists drawn up by party organizations in the *Länder*. In neither case, however, does the federal umbrella organization of the relevant party decide the fate of politicians when new elections are due. The net effect of this arrangement is a strong role for state party organizations and relatively weak federal, umbrella party organizations. Members of parliament must campaign mostly at the state level in order to defend their seat, and in this way are linked to state politics and to their colleagues in the state government. From this perspective, the electoral system has a clear federal dimension.

The electoral rules are regulated by the federal legislature in a federal statute. The internal (party) rules on drawing up the party lists and on selecting local district candidates are made in the states, however. The result is that federal politicians have a strong background in state politics. Young politicians often serve first as a member of a state parliament before gaining a district seat or a promising place on a list. Sometimes members of state governments, when going out of office, are elected to the *Bundestag* or become members of the federal government.

Sometimes also, however, members of the federal Parliament become party leaders in the states and move to the state Parliament in order to become members (or even leaders) of state governments later (when their party has won an election). When an opposition party in a state wins an election, sections of the new government usually are recruited from the ranks of prominent deputies from the federal government.

In general, gaining a seat in the federal Parliament thus involves a route through state politics. Because most state parliaments are professionalized, with their members fully paid, "professional politicians" are common.[28] The average member of parliament becomes a party member early, is active for a long time in party politics at the local level, and, after finishing her/his academic education, goes into politics as a profession. With regard to their career, these people depend completely on their party. Party leaders thus have strong leverage over members of parliament, most of whom depend for their chosen career on the support and patronage of the party leadership. In consequence, most delicate political issues are decided by small circles of party leaders and are implemented by parliamentary groups, without much discussion.

Federal Council (*Bundesrat*)

The Federal Council, or *Bundesrat*, is not a parliamentary organ in a strict sense. It is not elected by popular vote but constitutes a "federal" chamber representing *Länder* governments in the federal legislature. Its model is not the United States Senate but the council (or assembly) of an international organization.[29] The *Bundesrat* has long roots in German constitutional history. It originated in a union of states, the *Deutsche Bund* of the early nineteenth century, and resembles the Council of Ministers of the European Community more closely than does any known second chamber of a federal type.[30] In this, as well as other respects, there is a close analogy between the supranational executive federalism in the European Union and German executive federalism. In both cases, the member states of the federal polity control the administration and implement legislation enacted by the overarching government. The participation of member-state governments in legislation through a council of delegates is entirely rational in such an arrangement because it provides the means for necessary feedback between two spheres of government, one of which is primarily responsible for legislation and the other of which is primarily responsible for implementation.

Members of the *Bundesrat* are delegates of *Land* governments with an imperative mandate. A member of the Federal Council remains in office as long as a *Land* government wants him or her as its delegate. Ordinary members are usually ministers of the state governments. In committees, however, the *Länder* are usually represented by high-level bureaucrats from state ministries. Their vote is not personal: a state must give its votes en bloc.[31] One delegate may cast all the votes of a state if entrusted with this task by the *Land* government. If members of the *Bundesrat* representing a state do not agree on how the state should vote, no valid vote can be cast.[32] The votes are weighted, in the sense that big *Länder* have more votes than do small ones, over a range between three votes for small states to six votes for the largest states. The weighting is of the utmost importance in financial matters because it prevents the emergence of a majority of small states that can outvote the five big ones, which represent two-thirds of Germany's population. Experience shows that it is much easier for a federal government to entice smaller states into a package deal with financial implications than it is to compromise with the larger and, in this sense, more important states.

The power of the *Bundesrat* in relation to legislation varies between two different categories of laws. In the case of ordinary federal legislation, the *Bundesrat* can only lodge a formal objection against a proposed bill. The *Bundestag* may overrule the objection by an absolute majority (*Einspruchsgesetzgebung*), which means that, in this case, the *Bundesrat* has only a suspensive veto.[33] The *Bundesrat* has an absolute veto in relation to the other category of laws, however, the so-called *Zustimmungsgesetze*. Here the active consent of the *Bundesrat* is

needed, so that a majority can effectively block the adoption of a statute.[34] In the basic law, *Zustimmungsgesetze* are treated as an exception, in systematic terms, but in practice they make up more than 50 percent of all statutes adopted by the federal legislature.[35]

The clauses requiring the consent of the *Bundesrat* are scattered throughout the Basic Law. The main examples are statutes that have significant financial implications, changing the distribution of financial resources between the federation and the states, and statutes that prescribe the administrative procedures to be followed when the *Länder* implement a federal law (which is the common case with federal legislation).[36] The latter comprise the overwhelming majority of federal statutes needing the consent of the *Bundesrat*.

This arrangement obviously has a federal purpose. The participation of *Länder* governments in federal legislation ensures that the states do not become completely marginalized over time. It offers leading *Land* politicians a perfect stage to gain attention in the national media and gives them an important voice in federal politics. The use made of this opportunity differs with the subject matter, however.[37] Where legislation has severe financial implications for the *Länder*, it is difficult for parties to control "their" *Land* governments. Alliances between *Länder* with different political majorities but similar interests are not uncommon in such cases. The dynamic is different in relation to legislation of a programmatic-ideological character, suitable for use as an instrument of party politics. Here Christian-Democrat *Länder* and Social-Democrat *Länder* usually form closed blocs. Difficulties might arise where one of the big parties governs in a coalition with a small party generally linked to the other side, or where Social Democrats and Christian Democrats govern a *Land* in a "grand coalition" (as was the case in three *Länder* in 2005). Here *Land* governments usually take refuge in abstention, which makes constructing a majority for consent even more difficult.

When majorities in both houses differ (as was the case in 2005), quite often a deadlock between the houses may occur. The main instrument to overcome such a deadlock is the joint mediation committee (*Vermittlungsausschuss*), comprising an equal number of 16 members of both the *Bundestag* and the *Bundesrat*. Leading members of parliament of both political blocs, together with prominent *Land* leaders, negotiate in the committee in camera in order to find a compromise on disputed legislative projects.[38] The result of such negotiations, often a compromise deal between the leaderships of Social Democrats and Christian Democrats, must then be accepted or rejected as a whole by both houses. This means that neither the mass of representatives in the *Bundestag* nor the *Land* governments that have not participated in the negotiations have a say on the details of the compromise package. Transparency of the legislative process also suffers, but there is no other way to keep the legislature working efficiently.

THE FEDERAL EXECUTIVE

The federal government plays a dominant role in preparing legislative proposals. It also manages those parts of the executive that lie within the competence of the federation, such as the foreign service, the armed forces, the intelligence services, the federal police (*Bundespolizei*) and Federal Bureau of Criminal Investigations (*Bundeskriminalamt*), the customs services, the labour agency, and some semi-autonomous bodies in the field of social security as well as regulatory agencies and federal offices in the field of economic governance.[39] In addition, the ministers of the federal government (*Bundesregierung*) represent Germany in the Council of the European Union and thus determine the positions taken by Germany in negotiations on European issues.

Constitution of the Political Executive

The system of government is purely parliamentary. The head of government, the federal chancellor, or *Bundeskanzler*, is elected by the *Bundestag*. Once elected, the chancellor nominates the candidates for the cabinet (i.e., the federal ministers) for formal appointment by the federal

president.[40] Because no party ever wins an absolute majority in federal elections, coalition governments are routine. As a result, the composition of federal governments is a complex issue decided after long negotiations leading to a so-called "coalition agreement." The coalition parties decide on their own terms which candidates to nominate for the ministries allocated to them. This limits the impact of the federal chancellor on the composition of the government.

By its nature, the federal government is an institution with a unitarian orientation. Nevertheless, a federal influence is clearly visible in the personal background of the chancellors and senior ministers. All federal chancellors for the last forty years (with the exception of Angela Merkel, the chancellor elected in autumn 2005) had first been prominent as leading *Land* politicians and, usually, as *Land* prime ministers. In addition, most senior ministers in the federal government have usually had experience as a minister (or sometimes even prime minister) in a *Land*. The explanation for this phenomenon is obvious. For opposition parties at the federal level, *Land* prime ministers and members of *Land* governments are the most likely reservoir of leaders with executive experience. *Land* prime ministers are also natural candidates for party leadership positions in times of opposition because they have the best opportunities to gain media coverage and political profile. When taking office after an election in which the previous government has not been returned, federal governments are usually well linked to *Land* executives. The longer a federal government is in power, the more it loses this connection, until it is blocked, in its turn, by an opposing majority of *Land* governments and has to enter into more formal consociational arrangements.

Head of State

The separate head of state, the federal president, or *Bundespräsident*, performs mainly ceremonial functions. The president ratifies the formal entry into force of statutes, handles the ratification procedure for international treaties negotiated by the executive and adopted by the legislature, formally appoints all the higher public officials of the federation (mostly on the proposal of the federal government), and represents the state externally and internally.[41] The powers of the president are largely symbolic, and in practice the president plays no part in real political decision making, except in situations of constitutional crisis, where the Basic Law grants the president some "reserve powers." Contrary to most other heads of state, the president has no control over the armed forces, which are placed under the authority of the federal government. The mode of election bears a clearly federal character. The president is elected by the Federal Assembly, a giant institution meeting only once every five years for the sole purpose of electing the federal president. The Assembly comprises members of the *Bundestag* and an equal number of delegates of *Land* parliaments. In principle, an absolute majority is needed to elect the president, but if this is not achieved, a relative majority may suffice, after several rounds of voting.

Administration

The scope of federal administration does not correspond to federal legislative responsibilities. The federation has much greater legislative than administrative power. The normal scheme provides for implementation of federal legislation by *Land* administrations as a matter of *Land* competence (so-called *landeseigene Verwaltung*). In some exceptional cases administration takes a more integrated form, in which the *Land* administrations act under supervision and subject to the orders of the federal government (so-called *Bundesauftragsverwaltung*). This arrangement, however, needs the express authorization of the Constitution, which is given only sparsely and requires the federation to pay a large part of the financial burden of the policy set out in federal legislation, which the federation usually tries to avoid.[42] In the more usual situation, where federal law is administered by the *Länder* in the exercise of their own, direct authority, *Land* executives are legally bound to respect the requirements of the federal law, but the federal executive has no

special authority over them. The Basic Law provides for the possibility of federal control and intervention (the famous *Bundesaufsicht* and *Bundeszwang)*. However, this option is so cumbersome in procedural terms - requiring, in particular, the consent of the *Bundesrat* - that it has practically never been used.[43]

The model works well only because *Land* administration is deeply embedded in a culture of legality with long historical roots.[44] If a *Land* is not implementing federal law faithfully, the final sanction for the federal government is to begin judicial proceedings against the disloyal state in a federal court (either the Federal Administrative Court or the Federal Constitutional Court). In most cases of illegal administrative practice, however, proceedings will be commenced by the citizens concerned; there is no act of government exempt from judicial scrutiny by administrative courts. In practice, therefore, there are only a few cases in which the federal government considers it necessary to take the matter to court itself.

In certain specific fields enumerated in the Basic Law the federation uses its own administration. However, there are relatively few circumstances in which the federation conducts its own administration through its own regional and local branches (*bundeseigene Verwaltung*). The foreign service, customs and excises, the armed forces, and the administration of certain means of transport of a national or international character are the only instances specified in the Basic Law. In addition, the Basic Law authorizes the federation to establish certain central police forces and agencies, as well as intelligence services, under its administrative control.

The Basic Law also allows the administration of federal legislation to be transferred to separate federal agencies. This option is not often used, however, for financial reasons. Examples typically are found in the field of economic regulation and governance - for example, the regulatory agency for post and telecommunications, the federal cartel office, the supervisory agency for financial services, the federal office for foreign trade, and the federal office for agriculture implementing the common agricultural policies of the European Community. Such federal offices and agencies are centralized in a specific location and work without decentralized offices or branches. Decisions on the seat of such agencies are an issue of obvious federal importance, which has led to a complex policy, the result of which is the even geographic distribution of such federal institutions throughout Germany. Most of these agencies are located not in Berlin but in places like Bonn, Cologne, Nürnberg, Munich, and the Rhein-Main area with Frankfurt.

Other Institutions

Other central institutions are only indirectly affected by the federal character of the polity. Traditionally, the central bank (*Bundesbank*) had an explicitly federal organizational structure, with regional banks in the *Länder* (*Landeszentralbanken*) and with the governors of the regional central banks as members of its governing board. As a consequence of the creation of the European Central Bank, however, the structure of the German Central Bank was rationalized. The *Land* central banks were abolished as independent organizational units, becoming regional directorates under the control of the central board of directors. The remaining influence of the *Land* centres upon the composition of the *Bundesbank´*s board of directors; some of its members are still elected by the *Bundesrat*. Some other federal agencies, and in particular regulatory agencies such as the agency for post and telecommunications, have advisory councils, some members of which are elected by the *Bundesrat*.

THE FEDERAL JUDICATURE

The organization of the judiciary follows an integrated model. There are no separate hierarchies of *Land* and federal courts, but there is a horizontal separation. Courts of first and second instance are *Land* courts, whereas the highest courts of the various branches of the judiciary (ordinary,

administrative, labour, social security, and tax law courts) are federal courts.[45] All cases, accordingly, start in *Land* courts. These courts apply *Land* law as well as federal law in an integrated fashion. Even administrative cases against the federal authorities are dealt with at first and second instance by *Land* courts, and actions of federal authorities can be declared null and void by these *Land* courts (including executive orders and regulations promulgated by the federal government).

The federal courts serve as supreme courts within their respective branches, controlling the interpretation and application of federal law by the *Land* courts. The control is limited to mere legality; in other words, it is restricted to questions of law. Questions of fact are a prerogative of the *Land* courts of first and second instance. The various federal courts are spread throughout Germany. The Federal Supreme Court (*Bundesgerichtshof*), the highest court in matters of civil and criminal law, sits in Karlsruhe, the Federal Administrative Court (*Bundesverwaltungsgericht*) in Leipzig, the Federal Labour Court in Erfurt, the Federal Social Court in Kassel, and the Federal Financial Court in Munich.

The Federal Constitutional Court, which, like the Supreme Court, is located in Karlsruhe, constitutes a special case. Its predecessor, the *Staatsgerichtshof* of the Weimar Republic, was created specifically for federal disputes. The Federal Constitutional Court continues this tradition, having a broad competence to deal with constitutional disputes between the *Länder* and the federation.[46] It can also deal with constitutional disputes between federal organs. In addition, there are two specific procedures for controlling the constitutionality of parliamentary statutes, plus an individual complaints procedure that may lead to constitutional control as well. First, on the initiative of the federal or a *Land* government or of the federal Parliament, the Federal Constitutional Court may decide on the constitutionality of statutes of either the federation or the *Länder* and may declare them null and void. Second, on the initiative of an ordinary court, whether *Land* or federal, the Federal Constitutional Court may also examine the legality of a statutory provision. The ordinary courts are obliged to consider the constitutionality of statutes; if they come to the conclusion that a statute is unconstitutional, however, they may not declare it null and void but must refer the case to the Federal Constitutional Court. A statute may be declared null and void by the Federal Constitutional Court following an individual complaint as well, although in this case the procedure is indirect. Any person negatively affected by an action of a public authority of the federation or the *Länder* may, after exhausting ordinary legal remedies, lodge a constitutional complaint with the Federal Constitutional Court. The court may declare the action itself to be null and void, and in the course of doing so, in an implicit control, it may also supervise the constitutionality of the legislation upon which the action was based.[47]

The overtly political relevance of such broad judicial control of the constitutionality of all acts of public authorities is reflected in the openly political nature of the procedure of selecting constitutional court judges. The right to select and appoint Federal Constitutional Court judges is divided between the *Bundestag* and the *Bundesrat*. Both houses appoint half of the bench, which consists of 16 judges altogether (divided into two chambers of eight judges each). In both cases, be it in the electoral committee of the *Bundestag* or the *Bundesrat*, a two-thirds majority is needed, which means that both major political blocs have to agree on candidates. In practice, there is an informal quota system, distributing the right of nominating the candidates between the parties; one bloc, however, may veto another's candidate. The result is to ensure that lawyers of mainstream orientation come to the court and to exclude political appointees with a history of political partisanship that is considered to be too radical. A certain number of the judges must be career judges who come from the bench of the federal courts; the others are mostly law professors, high-level bureaucrats, and politicians. The mandate is limited to one term of twelve years.

Judges of the other federal courts are elected by a committee composed of the federal minister of justice and the 16 ministers of justice of the *Länder*, on one hand, and an equal number of members of the *Bundestag*, on the other.[48] The procedure again bears some traits of

consociationalism because a cross-cutting consensus between major parties is needed and gives the *Länder* a decisive influence over the appointment of federal judges. In practice the process is less political than is the election of constitutional court judges because the reservoir for the recruitment of federal judges is mainly the judiciary of the *Länder*. Practically all federal judges have served for 15 to 20 years as judges on the *Länder* courts, where the judicial service is a life-time career. Thus, such judges are career judges, with long experience in lower courts in the *Länder*.

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

Legislatures

The *Länder* enact their own constitutions upon which the institutions of the *Land* are based. All *Länder* have majoritarian parliamentary systems in which the parliamentary majority dominates political decision making. In a sense, the parliamentary character of the system is even stronger than it is in the federal sphere; this is due to the absence of a second chamber in the *Länder* mediating (and, hence, weakening) the influence of parliamentary majorities.[49] *Land* parliaments are elected according to the principles of proportional representation. In all the bigger *Länder* a mixed system analogous to the election system for the *Bundestag* is used. In other words, half of the seats in these *Länder* are allocated to local districts from which candidates are elected by majority. The remainder comes from party lists, to reflect the proportion of votes gained by a party overall.[50]

Most *Land* parliaments are professional parliaments in which the members are fully paid and work entirely in politics.[51] Only the two city states of Hamburg and Bremen have part-time parliamentarians, working in evening sessions. The high degree of professionalism in parliamentary work in the *Länder* contrasts with the limited importance of *Land* parliaments as legislators. As explained earlier, the overwhelming share of legislative competences lies with the federal legislators. *Land* parliaments have been the big losers during the constitutional evolution of the last decades[52] - a phenomenon exacerbated even further by the growing dominance of European Union legislation in most policy fields.[53] The scope of *Land* legislation now is limited, focusing on schooling and education, internal security and police, cultural affairs, and administrative organization and procedure. *Land* parliaments have few responsibilities in financial matters; they must adopt annual budgets, but they have practically no decision-making power in relation to the revenues of their *Land* because all the important taxes are governed by federal legislation, with the resulting revenues distributed in accordance with fixed quotas.[54] Accordingly, public interest in the work of *Land* parliaments is limited, and this finds its expression in the very poor media coverage of parliamentary work in the *Länder*.

The size of *Land* parliaments differs greatly, mirroring in some degree the diverging sizes of the *Länder* themselves. The smallest *Land* parliament (Saarland) has 51 members, whereas the two biggest *Länder* of Nordrhein-Westfalen and Bayern have parliaments with 187 and 204 seats respectively. Most *Land* parliaments have between 80 and 130 members. Usually three or four parties are represented in *Land* parliaments. In some *Länder* one of the two major parties manages to gain an absolute majority. In most cases, however, the winning party needs a smaller party as coalition partner, with which it negotiates a common program consolidated in a coalition agreement. In four *Länder* there are "grand coalitions" between Christian Democrats and Social Democrats.[55]

Land parliaments are completely independent of the federation. Their basic structure is regulated in the *Land* constitution, and the electoral system is provided for in *Land* legislation. It is not possible for the federal government or the federal president to dismiss a *Land* government from office or to dissolve a *Land* parliament. The term of office of the *Land* parliament is decided by the *Land* itself, with the consequence that each *Land* has its own electoral cycle, which differs

from the federal electoral cycle and that of the other *Länder*. There is a trend towards terms of five years; various attempts to coordinate *Land* parliament elections, however, have failed. The *Land* parliament has no direct influence on the selection of government delegates to the *Bundesrat*, but the *Land* government is responsible to its parliament and might be voted out of office.

State Executives

State parliaments elect the *Land* prime minister (and sometimes also the cabinet ministers) with an absolute majority of members present. Usually this requires forming a coalition between two (or sometimes even three) parties. Cabinet posts are divided in advance between the participating parties. Most of the members of *Land* governments are also members of *Land* parliaments, but personalities from the outside are also sometimes appointed as ministers. As in the federal government, it is difficult for the head of a *Land* government to exercise detailed influence on the actions of ministers; this is because most governments depend on "coalition agreements" and there is risk of a coalition crisis if a prime minister intervenes too much in the daily business of ministers from an allied party. The size, composition, and distribution of portfolios are matters for the coalition agreement. Often the size of cabinet and the distribution of portfolios are readjusted after an election according to the needs of the day (as a matter of "coalition arithmetic"). In principle, each party in a coalition decides independently on the selection of ministers for the positions allocated to it, although usually there is some consultation with the coalition partners. Candidates generally come from the *Land* branch of the party, either from members of the *Land* parliament or from the bench of members of federal parliament representing the *Land* at the federal level. If suitable candidates for a government position are lacking, however, a prominent party politician from another *Land* is sometimes brought in to form a competent *Land* government. Some such members have even become *Land* prime ministers.

There is no separate head of state in a *Land*. The prime minister is the top representative of the *Land* and, thus, a prominent political figure throughout Germany. *Land* prime ministers are also very influential in the federal sphere; they participate in federal decision making through the *Bundesrat*, and they are usually also members of the party presidium in the federal sphere, playing a decisive role in the internal decision making of the party. When a party is in opposition in the federal sphere, it may be difficult for the federal party leaders to determine the course of opposition politics, while *Land* prime ministers use their power and influence to determine the course of federal politics for themselves.

The role and self-perception of *Land* governments is ambivalent. On one hand, they clearly perceive themselves as trustees of the corporate interests of the *Land* itself. At the same time, they are prominent representatives of a certain party, which means they have to take into consideration the interests of their party on a national level, and they also depend on the good will of the party and their reputation within it. This dependence, however, is once again mitigated by the decentralized structure of parties, whereby decisions that affect a political career are likely to be taken in the *Land* sphere, even for persons who enter federal politics.

Subnational regulatory agencies exist only in a very limited number of cases as most regulatory agencies are the responsibility of the federation. The most important case in the *Länder* is the electronic media sector, for which every *Land* has its own regulatory agency (*Landesmedienanstalt*).[56] This creates some problems, as regulatory competition is used by big media enterprises to play one *Land* executive against the other.

State Administration

Administration is the stronghold of the *Länder*. As explained earlier, the institutional architecture of the Basic Law is based on the systemic principle that federal legislation is carried out

administratively by *Land* authorities. Article 83 of the Basic Law explicitly provides for this by declaring that administration by *Länder* is the norm, making all other cases exceptions that require express constitutional authorization.

Administrative organization and procedure is regulated by *Land* legislation,[57] although, if the *Bundesrat* consents, administrative arrangements may also be included in the relevant federal statute. The federal government may issue general directives on the operation of the law and on the use of discretion, but it needs the consent of the *Bundesrat* in order to do so. Usually it is the *Land* government that issues directives and decrees binding lower administrations in the use of discretion. In certain special cases, it is also possible for federal legislation to reserve to the federal government the right to give direct orders to land authorities, although this again requires the consent of the *Bundesrat*.

State Judicature

The judiciary is largely controlled by the *Länder*. Courts of first and (usually) second instance are always *Land* courts. Only the supreme courts of the various branches of the judiciary are federal institutions. This means that all cases, even cases against federal authorities, start before a *Land* court. Actions of the executive of either the *Land* or the federal executive may be declared invalid by these courts (usually administrative courts are competent in such cases). This jurisdiction extends even to government decrees and regulations. Parliamentary statutes, however, must be submitted to the Federal Constitutional Court for control if another court considers that they are unconstitutional. Statutes of the *Land* legislature are also subject to control by *Land* constitutional courts, which may also declare them to be invalid (15 of the 16 *Länder* have their own constitutional courts).[58]

The federation has no particular influence on the *Land* judicature, except that the basic guidelines of court organization are regulated in federal statutes. The details of court organization are an exclusive matter for the *Land*, however, as is personnel policy. Judges are *Land* officials recruited and paid by the *Land*. The appointment of judges at courts of first and second instance is a matter for the *Land* minister of justice. In some states, the minister of justice is obliged to consult a self-government body elected by the judges. There is strong public pressure to create such bodies and consultation mechanisms as a general scheme in all *Länder*.

LOCAL GOVERNMENT

The structure and organization of local government is regulated by the *Land* legislatures. Historically, there have been quite divergent models of local government in the various parts of Germany.[59] In northern and central Germany mayors used to be elected indirectly by city councils. They had a largely ceremonial role, while the municipal administration was led by an (again indirectly elected) top official (*Oberstadtdirektor*). In southern Germany, mayors were always elected directly in popular elections. They thus combined the ceremonial role of a leading representative of the municipality with the office of a chief of municipal administration. During the last ten years, there has been a significant shift towards this model.

The details of municipal organization still vary considerably from *Land* to *Land.* The most common scheme now, however, is characterized by an independent municipal executive headed by a directly elected mayor, on one hand, and a municipal council elected in a popular vote based on proportional representation, on the other. The municipal council has rule making and budgetary functions and usually has certain control functions in relation to the administration. Sometimes it also elects the members of the city government heading the various departments of municipal administration. In some states a system of proportional representation is used in the composition of municipal governments. In these cases all the major forces in the local political arena are included in the municipal government.

The rules for the establishment and structure of local government are, as has already been mentioned, fixed in statutes enacted by *Land* parliaments (*Gemeindeordnungen*). Thus, municipalities depend for their organizational structure on the *Land* legislature. This is also true for the main fields of activity of the municipalities which are, generally, regulated either by federal or *Land* legislation. In addition, for budgetary purposes municipalities depend to a large degree on the federation and the *Länder*. Their finances stem (at least in part) from a share in taxes regulated by the federation and collected by *Land* authorities, and there are elaborate schemes to equalize municipal revenues that are regulated by *Land* legislation. In most of the *Länder* legislation also delegates some tasks of the *Land* administration to the organs of municipal administration. These organs thus acquire a hybrid character, providing local self-government as well as performing the functions of a decentralized *Land* administration. In the latter capacity municipal authorities are subject to detailed orders of the hierarchically superior *Land* authorities,[60] which is not the case in self-government matters.

The same is true for the districts, or counties (Kreise), which function as local self-government units while also acting as organs of control over the municipalities. These are also hybrids, traditionally serving as the lowest level of regular state administration but also having some genuine self-government competencies.[61] So-called county-free cities (*kreisfreie Städte*), which are usually bigger cities, perform the same function as counties and also serve as a basic unit of state administration.[62] The administrative role of the counties is changing in most *Länder* due to two parallel processes: first, regional authorities are being dissolved, and their responsibilities transferred to the counties; second, at the same time, at the municipal level the responsibilities of counties are being transferred closer to communities.

INTERGOVERNMENTAL RELATIONS

The federal distribution of competences under the German Constitution, with legislation lying mostly with the federation and administration (including the implementation of federal laws) lying with the *Länder*, creates a high degree of interdependence between the federation and the *Länder*, which requires an extensive network of institutionalized intergovernmental cooperation. The centrepiece of formal cooperation is the *Bundesrat*, which ensures participation of *Land* executives in federal law making. Beyond the *Bundesrat*, however, a labyrinthine structure of joint standing conferences, committees, and working groups brings together the specialized branches and desk-officers of the executives of the various *Länder*, sometimes also including their counterparts from federal ministries.[63] At the apex of this informal structure of intergovernmental cooperation between the *Länder* is the conference of prime ministers, where the heads of government come together regularly in order to coordinate their government activities, as far as they perceive this to be necessary. Below, there is a structure of standing conferences of branch ministers from *Land* governments (with the relevant federal minister often invited as a guest). There is such a conference for each branch of government, in which ministers discuss and coordinate policies between the *Länder* (and often also with the federation). One of these conferences, the conference of the ministers of culture, even has its own secretariat acting as a kind of interstate agency. At further remove still, the various departments and branches of ministries, specializing in the same matters, have their own coordinating committees and working groups. Federal officials participate regularly in these networks. On the other hand, cooperation between the legislatures of the federation and the *Länder* is rare.

The purpose of this extensive network of cooperation institutions is twofold:[64] the federal and *Länder* executives use it to prepare legislation, on one hand, and to assess the political and technical impact of proposed legislation, on the other. The reactions from the other *Länder* and the federal government are a considerable help in identifying the weak points and the political risks of draft statutes and make it possible to minimize the latter by negotiating a consensual solution. A dense cooperative network is also needed to coordinate administrative activities, with

particular reference to the implementation of federal legislation by *Land* administrations. Federal ministries need to understand the problems that occur in the course of implementing legislation in order to improve it. Also, it is often necessary to harmonize the way in which a certain law is implemented in practice in order to obtain the desired effects of the federal legislation. But even where legislative competence lies with the *Länder*, there is a strong need to cooperate in order to avoid negative externalities and unwanted side effects. In consequence, *Länder* legislation is often harmonized to a degree by model statutes drafted in the cooperative institutions.

A new qualitative push has been given to intergovernmental cooperation by the necessities of bringing a *Land* voice to bear in European Union politics. The *Länder* have suffered from the exclusive authority of the federal government to represent Germany in the European arena. They have complained of being bypassed, even in relation to matters that, internally, fall in the exclusive domain of the *Länder*. In consequence, they sought a right of participation in European Union matters. A new Article 23 was inserted into the Basic Law in 1992, making any future transfers of sovereignty subject to approval by the *Bundesrat*; providing for exchange of comprehensive information between the federal government, the *Bundestag*, and the *Bundesrat*; and giving the *Bundesrat* an opportunity to state its opinion before the federal government participates in the European Union legislative process. In some cases there are even clearly defined rights for *Länder* to participate in the decision-making process. If an exclusive power of the federation is concerned, but the interests of the *Länder* are affected, the federal government must take into account the opinion of the *Bundesrat*. Where autonomous rights of the *Länder* are affected, the opinion of the *Bundesrat* can prevail, although the Basic Law provides that the overall responsibility of the federal government must be preserved. Where the exclusive legislative authority of the *Länder* is involved, however, Germany is represented in the councils of the European Union by a representative of the *Länder*, nominated by the *Bundesrat*. The federal government participates in these cases as well, and, once again, the overall responsibility of the federation is required to be preserved.[65]

ANALYSIS AND CONCLUSIONS

German federalism is highly regulated by law. It depends to a large degree on explicit constitutional arrangements. This is particularly true for the division of powers between the federation and the *Länder*, regulated by the system of distribution of competences. The federal Constitution tries to provide clear and precise rules in this regard. The same is true of the arrangements for the institutions of government. Aspects of this institutional architecture are covered in what is sometimes very detailed form in the Basic Law (regarding federal institutions) and in the *Land* constitutions (regarding *Land* institutions).[66] The major questions of cooperation between the federation and the *Länder* are also regulated in the Basic Law, although much of the detail of such cooperation (and most of its institutions) has evolved as a kind of convention over time.

As far as the administration and the judiciary are concerned, only a framework of rules is provided in the written constitutions. Most of these institutional arrangements are embodied in legislation of either the federation or the *Länder.* Convention plays a significant role only in relation to cooperation arrangements between the federation and the *Länder,* which are often laid down in formal "state treaties."

The constitutional framework for institutional arrangements has been very stable in recent decades, although the spirit of constitutional thinking has changed considerably over time. The original institutional framework was very much dominated by the allied powers' insistence on a clear division of powers between federal and *Land* institutions. In the 1960s and 1970s, however, a preference developed for the informal arrangements of cooperative federalism. In the 1990s there was a shift back to a more clear-cut separation of powers between federal and *Land*

institutions.[67] In each phase the prevailing paradigm affected the directions of state practice so that the same constitutional provisions have been construed rather differently over time.

The legalistic approach that is characteristic of German federalism must be viewed against the background of the broad competences and important role of the Federal Constitutional Court. German federal politics tends to leave unresolved political problems to adjudication, where ultimately they are decided by the Constitutional Court. This approach has its strengths because it leads to relatively clear and stable legal rules about institutions and their competences, procedures, and responsibilities. Nevertheless, strong reliance on legal mechanisms for dispute resolution often fuels inflexibility in political issues because actors in federal arrangements rely on their legal positions and are not really willing to compromise politically. Federalism, however, is an arrangement that requires a strong dose of pragmatism. A dynamic system of federalism can function only if all governments show a strong interest in keeping the system working, even if this means sacrificing certain legal positions.

The Interaction between Federalism and Representative Institutions

The basic dilemma of German federalism becomes most clearly visible in relation to the role of the *Bundesrat*. The institutionalized interdependence between federal legislation, on one hand, and the administrative implementation of federal legislation by *Länder*, on the other hand - a mutual dependency that finds its most extreme symptom in the quagmire of financial relations between the federation and the *Länder* - makes a body like the *Bundesrat* unavoidable. In such a system the *Land* executives have a strong influence on federal legislation because they know what a certain kind of legislation will mean in practice. At the same time, however, the constitution of such an institution creates a strong incentive to use its influence for the pursuit of particular interests, be they specific regional (or *Land*) interests or interests of the party forming the relevant *Land* governments. This temptation becomes particularly strong at times when the majority in the *Bundesrat* is formed by *Land* governments linked to the parties in opposition in the federal arena. At such times the *Bundesrat* is in danger of becoming transformed into a bulwark of opposition politics. In extreme circumstances this strategic use (or misuse) of the institution can lead to an almost complete paralysis of federal politics because most of the important legislative projects of the federal government usually need the consent of the *Bundesrat*.

This tendency is not the fault of the constitutional arrangements alone. The drafters of the Basic Law conceived cases of *Zustimmungsbedürftigkeit*, requiring the consent of the *Bundesrat*, as an exception (at least in systemic terms). Responsibility for the way in which these arrangements have evolved lies rather with the increasing tendency of the federal government and legislature to choose to regulate matters of administrative organization and procedure in federal statutes, making *Zustimmungsbedürftigkeit* the norm. In consequence, German federalism forces the major political blocs to govern in a kind of hidden consociationalism. As long as the majority parties are incapable of deciding alone on a particular political course, they must find a basis for agreement with the other side. If this works well, it might lead to pragmatic forms of cooperative decision making. The individual responsibility of the legislative and executive organs is dissipated by such an arrangement, however. It becomes impossible to allocate clear responsibility for a particular decision to a specific organ because no single organ ever decides alone. Major political decisions in such a scheme are always the result of complex negotiations and joint decision making. Political responsibility thus becomes diffuse.

Diffuse political responsibility creates severe problems for the functioning of democracy. Genuine elections require that voters understand what is going on. Without such understanding, voters find it hard to attribute responsibility to political actors. Hence, dysfunctional decisions may lead to a crisis of the political system in general because the public is not capable of attributing wrong decisions to specific institutions.

The reconstruction of clearer lines of responsibility in the institutional arrangements of federalism is one of the major issues in the ongoing debate in Germany on reform of federalism. Public pressure on this issue was so high that the *Bundestag* and *Bundesrat* instituted a joint reform commission in 2003. The "federalism commission" seems to have come close to reaching a consensus. Some important changes to the institutional arrangements were effectively agreed upon, on condition that there be an overall consensus on the entire reform package.[68] In particular, these agreed-upon changes concerned the degree of participation of the *Bundesrat* in federal law making. The *Länder* conceded that, in future, the federal Parliament may legislate on matters of administrative organization and procedure (the main reason why the consent of the *Bundesrat* is required for more than 50 percent of all federal statutes) without the consent of the *Bundesrat*. The federation accepted that, in such cases, the *Länder* may depart from federal legislation to a certain degree if they so wish. Some other minor causes of interdependent decision making were also identified for abolition.

In the end, however, the negotiations failed because of controversy over the distribution of competences.[69] Nevertheless, the reform process will go on. It appears that the grand coalition that was formed in autumn 2005 will take up most of the issues agreed in the federalism commission and will likely amend the Basic Law accordingly. The current level of diffuse responsibility is widely regarded as unsustainable, both by the public and by major forces in the political parties.

Notes

[1] As to the constitutional history of Germany in the nineteenth century, see Arthur B. Gunlicks, The Länder and German Federalism (Manchester and New York: Manchester University Press, 2003), 16-26; for a more detailed narrative, see Thomas Nipperdey, Deutsche Geschichte: 1800-1866 (München: C.H. Beck, 1983), in particular 69-79, 320-357n; and Dietmar Willoweit, Deutsche Verfassungsgeschichte, 4th ed. (München: C.H. Beck, 2001), 229-315. In addition, see Jutta Kramer, "Federal Republic of Germany," Constitutional Origins, Structure, and Change in Federal Countries, ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 144-178.

[2] For the history of Länder formation after 1945, see Gunlicks, The Länder and German Federalism, 32-41.

[3] See more detail in Stefan Oeter, Integration und Subsidiarität im deutschen Bundesstaatsrecht (Tübingen: Mohr Siebeck, 1998), 185-191, 398-402; see also Uwe Leonardy, "Territorial Reform of the Länder: A Demand of the Basic Law," German Public Policy and Federalism, ed. Arthur B. Gunlicks (New York: Berghahn, 2003), 65-90.

[4] See Gunlicks, The Länder and German Federalism, 1-6.

[5] See Susan E. Scarrow, "Party Competition and Institutional Change," Party Politics 3 (October 1997): 451-472; Gunlicks, The Länder and German Federalism, 149-151.

[6] For a general overview of the German party system, see Gerard Braunthal, Parties and Politics in Modern Germany (Boulder: Westview Press, 1996); and Geoffrey K. Roberts, Party Politics in the New Germany (London: Pinter, 1997). See also The Transformation of the German Political Party System, ed. Christopher S. Allen (New York: Berghahn, 1999).

[7] As to the institutional system of government, see David P. Currie, The Constitution of the Federal Republic of Germany (Chicago: University of Chicago Press, 1994).

[8] See also Gunlicks, The Länder and German Federalism, 265-285.

[9] From a political science perspective, see Uwe Thaysen, "The Bundesrat, the *Länder* and German Federalism," German Issues 13 (Washington, DC: American Institute for Contemporary German Studies, 1993): 5-13; and Gunlicks, The Länder and German Federalism, 339-356.

[10] See Gisela Färber, Efficiency Problems of Administrative Federalism (Speyer: Forschungsinstitut für öffentliche Verwaltung/ Research Discussion Paper No 1, 2002).

[11] See Christian Hillgruber, „German Federalism – An Outdated Relict?" German Law Journal 6 (October 2005):1270-1282, at 1271-1272; and Peter Michael Huber, Deutschland in der Föderalismusfalle? (Heidelberg: C.F. Müller, 2003), pp. 21-33.

[12] See Udo Margedant, "Ein bürgerfernes Machtspiel ohne Gewinner," Aus Politik und Zeitgeschichte 13-14/2000 (29 March 2005): 23-25.

[13] Data from Fischer-Almanach 2004, p.269.

[14] For detail, see John G. Gagliardo, Reich and Nation: The Holy Roman Empire as Idea and Reality, 1763-1806 (Bloomington: Indiana University Press, 1980).

[15] See Eric Dorn Brose, German History 1789-1871: From the Holy Roman Empire to the Bismarckian Reich (Providence and Oxford: Berghahn, 1997), pp. 52-58.

[16] See Gunlicks, The Länder and German Federalism, pp. 22-24.

[17] As to the constitution of the Bismarckian Reich, see Ernst Rudolf Huber, "Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung," Handbuch des Staatsrechts, ed. Josef Isensee and Paul Kirchhof, 3rd ed. (Heidelberg: C.F. Müller, 2003), § 4 paras. 26-51; and Thomas Nipperdey, Deutsche Geschichte: 1866-1918, vol. 2 (München: C.H. Beck, 1992), pp. 40-46, 85-109.

[18] Oeter, Integration und Subsidiarität, pp. 56-66.

[19] See Gunlicks, The Länder and German Federalism, 32-40; and Michael Stolleis, "Besatzungsherrschaft und Wiederaufbau deutscher Staatlichkeit 1945-1949," Handbuch des Staatsrechts, ed. Josef Isensee and Paul Kirchhof, 3rd ed. (Heidelberg: C.F. Müller, 2003), § 7 paras. 43-114. See also Oeter, Integration und Subsidiarität, 96-138.

[20] Oeter, Integration und Subsidiarität, 127-138.

[21] For a more detailed analysis, see Oeter, Integration und Subsidiarität, 405-411.

[22] See more in detail Gunlicks, The Länder and German Federalism, pp. 289-332, in particular pp. 325-330.

[23] See Stephen J. Silvia, "Reform Gridlock and the Role of the Bundesrat in German Politics," West European Politics 22 (April 1999): 167-181; see also Christian Hillgruber, "German Federalism – An Outdated Relict?" *German Law Journal* 6 (October 2005): 1270-1282, at 1271-1274.
[24] Oeter, Integration und Subsidiarität, pp. 321-322. See also the classical study of Gerhard Lehmbruch, Parteienwettbewerb im Bundesstaat, 2nd exp. ed. (Opladen: Westdeutscher Verlag, 1998).
[25] See Diether Posser, "Der Vermittlungsausschuss," Vierzig Jahre Bundesrat, ed. by the *Bundesrat* (Baden-Baden: Nomos, 1989), 203-211.
[26] See Hans Meyer, "Wahlgrundsätze und Wahlverfahren," Handbuch des Staatsrechts, ed. Josef Isensee and Paul Kirchhof, 2nd ed. (Heidelberg: C.F. Müller, 1998), § 37 paras. 25-31.
[27] The best explanation of the (complex) electoral system is given by Meyer, "Wahlgrundsätze und Wahlverfahren," paras. 1-31.
[28] See Gunlicks, The Länder and German Federalism, pp. 243-261.
[29] For more detail, see my analysis in Oeter, Integration und Subsidiarität, pp. 465-474.
[30] Peter Graf Kielmannsegg, "Vom Bundestag zum Bundesrat: Die Länderkammer in der jüngsten deutschen Verfassungsgeschichte," Vierzig Jahre Bundesrat, 43-61.
[31] See the decision of the Federal Constitutional Court in the case of the immigration law – Bundesverfassungsgericht, Judgment of 18 December 2002 – 2 BvF 1/02 -, BVerfGE 106, 310, at 330 et seq.
[32] Gunlicks, The Länder and German Federalism, pp. 343-348.
[33] Johannes Masing, "Commentary to Art. 77," Das Bonner Grundgesetz: Kommentar, ed. Hermann v. Mangoldt, Friedrich Klein, Christian Starck, 4th ed. (München: Vahlen, 2000), vol. 2, pp. 2695-2696.
[34] Peter Lerche, "Zustimmungsgesetze," Vierzig Jahre Bundesrat, ed. by the Bundesrat (Baden-Baden: Nomos, 1989), pp. 185-189; and Masing, "Commentary to Art. 77," 2677-2681.
[35] Gunlicks, The Länder and German Federalism, pp. 349.
[36] See Hans Schneider, Gesetzgebung (Heidelberg: C.F. Müller, 1982), pp.86-91.
[37] This has led to a debate on the dominance of territorial versus partisan politics in the *Bundesrat*. See Charlie Jeffery, "Party Politics and Territorial Representation in the Federal Republic of Germany," West European Politics 22 (April 1999): 159-161.
[38] See Masing, "Commentary to Art. 77," pp. 2681-2693; and Gunlicks, The Länder and German Federalism, pp. 352-353.
[39] Peter Badura, Staatsrecht, 2nd ed. (München: C.H. Beck, 1996), pp. 537-552.
[40] Ibid. 442.
[41] Ibid. 435-439.
[42] As to the case of *Bundesauftragsverwaltung*, see Peter Lerche, "Commentary to Art.85," Grundgesetz-Kommentar, ed. Theodor Maunz, Günther Dürig, et al. (München: C.H. Beck, 1987); and Badura, Staatsrecht, pp. 531-534.
[43] See Oeter, Integration und Subsidiarität, pp. 442-443.
[44] But see also Philip Blair, "Federalism, Legalism and Political Reality," Recasting German Federalism: The Legacies of Unification, ed. Charlie Jeffery (London: Pinter, 1999), pp. 119-154.
[45] See Badura, Staatsrecht, pp. 576-578; and Gunlicks, The Länder and German Federalism, pp. 70-72.
[46] As to the importance of these powers for the development of German federalism, see the classic study of Philip Blair, Federalism and Judicial Review in West Germany (Oxford: Clarendon, 1981).
[47] Concerning the role, organization, and powers of the Federal Constitutional Court, see Badura, Staatsrecht, 598-611.
[48] Ibid. 579-580.
[49] Gunlicks, The Länder and German Federalism, pp. 147-152.
[50] Ibid. 274-275.
[51] Ibid. 246-259.
[52] Ibid. 216-239.
[53] See Rudolf Hrbek, "The Effects of EU Integration on German Federalism," Recasting German Federalism: The Legacies of Unification, ed. Charlie Jeffery (London: Pinter, 1999), pp. 217-233; and Udo Diedrichs, "The German System of EU Policymaking and the Role of the Länder: Fragmentation and Partnership," Gunlicks, German Public Policy and Federalism, 165-181.
[54] See Gunlicks, The Länder and German Federalism, pp. 173-190; and Arthur B. Gunlicks, "Financing the German Federal System: Problems and Prospects," German Studies Review 23, 3 (October 2000): 533-555;

see also Gisela Färber, "On the Misery of the German Financial Constitution," Gunlicks, German Public Policy and Federalism, 47-64.
[55] See also the data collected by Gunlicks, The Länder and German Federalism, pp. 290-325.
[56] Günter Herrmann, Rundfunkrecht (München: C.H. Beck, 1994), pp. 410-428.
[57] For an overview of the common organization of Land Administration, see Gunlicks, The Länder and German Federalism, 85-114.
[58] See Badura, Staatsrecht, 611-613.
[59] Otfried Seewald, "Kommunnalrecht," Besonderes Verwaltungsrecht, ed. Udo Steiner, 7th ed. (Heidelberg: C.F. Müller, 2003), pp. 80-108; see also Arthur B. Gunlicks, Local Government in the German Federal System (Durham: Duke University Press, 1986).
[60] See Gunlicks, The Länder and German Federalism, 99-100.
[61] Ibid., 94-98.
[62] Ibid., 100-102.
[63] See Jost Pietzcker, "Zusammenarbeit der Gliedstaaten im Bundesstaat: Landesbericht Bundesrepublik Deutschland," Zusammenarbeit der Gliedstaaten im Bundesstaat, ed. Christian Starck (Baden-Baden: Nomos, 1988), 17-76; Walter Rudolf, "Kooperation im Bundesstaat," Handbuch des Staatsrechts, ed. Josef Isensee and Paul Kirchhof, vol.4 (Heidelberg: C.F. Müller, 1990), 1091-1132; Oeter, Integration und Subsidiarität, 474-480.
[64] See more in detail Fritz Scharpf, "Der Bundesrat und die Kooperation auf der ´dritten Ebene´", Vierzig Jahre Bundesrat, ed. by the Bundesrat (Baden-Baden: Nomos, 1989), pp.121-162.
[65] As to the content and the problems of the relevant article, (Article 23) see Elisabeth Dette-Koch, "German Länder Participation in European Policy through the Bundesrat," German Public Policy and Federalism, ed. Arthur B. Gunlicks (New York: Berghahn, 2003), 182-196.
[66] Concerning the significance of *Länder* constitutions, see Arthur B. Gunlicks, "State (Land) Constitutions in Germany," Rutgers Law Journal 31 (Winter 2000): 971-998.
[67] In this regard, see Oeter, Integration und Subsidiarität, in particular 143-156, 233-272, 318-329, and 361-376.
[68] See Rainer-Olaf Schultze, "Die Föderalismusreform zwischen Anspruch und Wirklichkeit," Aus Politik und Zeitgeschichte 13-14/2000, 29 March 2005, 13-19; and Wolfgang Rentzsch, „Bundesstaatsreform – nach dem Scheitern der KOMBO?" Die unvollendete Föderalismus-Reform: Eine Zwischenbilanz nach dem Scheitern der Kommission zur Modernisierung der bundesstaatlichen Ordnung im Dezember 2004, ed. Rudolf Hrbek and Annegret Eppler (Tübingen: Europäisches Zentrum für Föderalismus-Forschnung, Occasional Papers 31), 11 et seq.; for a detailed documentation, see Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung, ed. Deutscher Bundestag and Bundesrat (Berlin: Bundestag/Bundesrat, 2005); and the Web site of the reform commission under <http:///www.bundesrat.de>, viewed 16 December 2005
[69] See Udo Margedant, "Ein bürgerfernes Machtspiel ohne Gewinner," Aus Politik und Zeitgeschichte 13-14/2000, 29 March 2005, 23-25; and Arthur B. Gunlicks, "German Federalism and Recent Reform Efforts," German Law Journal 6 (October 2005): 1283-1295, 1291-1295, available at <http///:www.germanlawjournal.de>, viewed 16 December 2005