GERMANY

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I. OVERVIEW

The German Constitution - the *Grundgesetz* - is a federal constitution. Three levels of government may be distinguished: At the federal level, the *Bund*; at component state level, the 16 *Länder*; and at local level, the *Gemeinden* (municipalities), which are part of the *Länder* administration. The *Länder* are very different in size and population: Size ranges from around 400 square kilometers (Bremen) to over 70.000 square kilometers (Bayern), and population from around 660.000 (Bremen) to nearly 18 million (Nordrhein-Westfalen). In the "city-states" of Berlin, Bremen and Hamburg, local and state levels are identical.

Historically, federalism is a well-known concept in Germany: The constitution of the German Reich of 1871 created a federal state as well as the - albeit less federal - *Weimar* constitution of 1919. Then, the totalitarian national-socialist German state abolished virtually all federal elements, concentrating powers of government at the central level. Thus, when the Parliamentary Council met to deliberate over a new constitution in 1948, historical precedence was not the only reason to opt for a federal system; there was also a strong feeling that history had painfully proven centralism a dangerous concept. This view was certainly shared by the Western Allies who constantly pushed towards a more decentralised structure, although not always with success.

When analysing the actual state of federalism in Germany, it is helpful to keep in mind that the *Grundgesetz* was created under very peculiar historical circumstances, and that today's circumstances are very much different. During the sixty years of the *Grundgesetz* as the German constitution, German society and politics have experienced great changes; Germany has become reunited; and - maybe most important for the way in which the concept of federalism is working in German constitutional law and politics today - Germany has become part of a European Union, which has a federal structure of its own.

In general, there has been a centralization of federal legislative powers through numerous constitutional amendments between 1949 and the 1990s. Since then, two reforms in 1994 and 2006 gave some legislative powers back to the states. The problem remains that not all states are actually interested in legislating on their own and/or are too small and too understaffed to organize a professional legislative process. Legislative autonomy is mainly a project of the larger states.

II. THE FEDERAL DISTRIBUTION AND EXERCISE OF LAWMAKING POWER

Within the general framework of the German constitution, distribution of powers between the federal, state, and local government levels is often described as a system of "vertical separation of powers" (Konrad Hesse). Somewhat contrary to this picture, the *Grundgesetz* strongly concentrated legislative powers at the federal level where they have been widely used. Whereas in theory, legislative powers are generally vested in the *Länder* and the *Bund* must rely on a specific catalogue of enumerated competences, in practice the *Bund* enjoys broad liberty as to the subject of its legislation and the remaining areas of *Länder* powers are quite narrow.

1. *Areas of Law Subject to the Legislative Jurisdiction of the Central Authority*

The *Grundgesetz* expressly provides for two types of federal legislative competences: exclusive and concurrent. The Federal Constitutional Court (*Bundesverfassungsgericht*; hereinafter "FCC") has also recognized certain forms of unwritten - or implied - powers.

A. *Exclusive Powers*

Exclusive powers are enumerated in Article 73 *Grundgesetz* (GG). Article 73 GG lists 17 main areas of federal competence, including foreign affairs and defence, citizenship in the Federation, the operation of federal railways, postal and telecommunication services, the legal relations of persons employed by the Federation, intellectual property and copyright, the prevention of international terrorism, laws on weapons and explosives, and production and use of nuclear power for peaceful means. It should be noted that some areas of legislative competences listed here - for example, "currency, money, and coinage" and the "unity of the customs and trading area" - have in fact been transferred to the European Community to a significant degree.

Other areas of exclusive federal powers of legislation may be found throughout the *Grundgesetz*. To a large extent, they are concerned with the internal organization of the federal government. Examples for this kind of competence are (i) the regulation of the election of the *Bundestag* and of electoral review (Art. 38 sec. 3, Art. 41 sec. 3); (ii) the federal budget, borrowing of funds, and the assumption of pledges, guarantees, and similar commitments (Art. 110 sec. 2, 112, 115 sec. 1); and (iii) the organisation and jurisdiction of the FCC and the other federal courts, as well as the status of their judges (Art. 93 sec. 3, 94 sec. 2, 95 sec. 3, 98 sec. 1, 96 sec. 2).

The foreign affairs and defence power of Article 73 Number 1 is supplemented by provisions assigning to the *Bund* the general task to maintain relations with foreign states (Art. 32 sec. 1), to conclude treaties (Art. 59), to determine a state of defence in cases in which the federal territory is under attack by armed forces (Art. 115a sec. 1) or to declare such a state of defence terminated and conclude peace (Art. 115l sec. 2, 3), and to transfer sovereign rights to international organisations (Art. 24), with special provisions governing the transfer of powers to the European Union (Art. 23).

An important competence, finally, is located in Article 79 sec. 2 GG: It is the power to amend the constitution itself. A majority of two thirds in the *Bundestag* and in the *Bundesrat* is needed, which ensures that besides consent of the parliamentary opposition (at least in "normal" political times), a broad majority of the *Länder* is needed. However, the hurdle proved not to have been set too high, as the *Grundgesetz* has been amended well over 50 times since 1949.

B. *Concurrent Powers*

Concurrent powers of the Federation are listed in Article 74 GG. They include:

- No. 1: The complete fields of civil law/private law, criminal law, civil and criminal procedure including the court system, and regulation of the legal professions;
- No. 7: Public welfare;
- No. 11: Economic affairs, namely mining, industry, supply of power, crafts, trades, commerce, banking, stock exchanges, private insurance, with certain exceptions;
- No. 12: Labor law, including the organizations of enterprises, occupational safety and health, and employment agencies, as well as social security including unemployment insurance;

- No 19: Large areas of public health, namely measures against dangerous and communicable human and animal diseases, admission to the medical professions, regulation of pharmacies, drugs, medical and health products, narcotics, and poisons;
- No. 20: The law on food products including animals used in their production, the law on alcohol and tobacco, essential commodities and feedstuffs, as well as protective measures in connection with the marketing of agricultural and forest seeds and seedlings, the protection of plants against diseases and pests, as well as the protection of animals;
- No. 22: Road traffic, motor transport, construction and maintenance of long distance highways;
- No. 25: State liability;
- No. 27: Rights and duties regarding the status of civil servants, including judges, of the *Länder*.

With regard to a certain number of concurrent competences - for example, the economic affairs power mentioned above - Article 72 sec. 2 states that the Federation will have the right to legislate on matters falling within Article 72's scope if and to the extent that establishing equivalent living conditions throughout the federal territory, or the maintenance of legal or economic unity, renders federal regulation necessary for the national interest. Before 1994, this requirement had been weaker, and the FCC had all but refused to enforce it, holding that assessment of necessity was a prerogative of the federal political process. The constitutional reform of 1994 then limited the exercise of central concurrent power in general by a new necessity clause. After the reform, the Court felt compelled to apply the new formula strictly and struck down several federal laws because of lack of necessity for a federal rule. This led to today's compromise: With regard to the concurrent powers not mentioned in Article 72 sec. 2, the *Bund* is now at complete liberty as to whether and to what extent the powers are used. Within the scope of Article 72 sec. 2, federal laws may provide that federal legislation that is no longer "necessary" may be superseded by *Länder* law (Art. 72 sec. 4).

As in the case of exclusive competences, it must be kept in mind that to a certain - and growing - extent, concurrent powers of the *Bund* have been transferred to the European Community. For example, the federal power to pass laws preventing the abuse of economic power (Art. 74 sec. 1 no. 16) is currently relevant only to the extent to which EC antitrust law (Art. 81, 82 of the EC Treaty and secondary legislation) leaves room for member state legislation.

C. *Unwritten Powers (Implied Powers)*

Unwritten or implied powers acknowledged by the FCC and constitutional doctrine are usually divided in three groups: "Natural" competences, "contextual" competences and "annex competences". "Natural" competences (*Kompetenzen kraft Natur der Sache*) apply if it is evident that a matter can only be regulated by the central authority, e.g. the seat of the federal government or the federal flag. "Contextual" and "annex" competences (*Kompetenzen kraft Sachzusammenhang / Annexkompetenzen*) encompass matters bearing a close relationship to matters explicitly referred to in federal legislation. For example, court fees are viewed as standing in a context with court procedure, and with regard to federal highways, highway patrol is characterized as an annex matter.

D. *Use of Federal Powers*

The *Bund* has made extensive use of virtually all applicable sources of legislative power. For example, the complete field of classical private law - contracts, torts, property, family law and the law of successions - is covered by the (federal civil) code (*Bürgerliches Gesetzbuch*); criminal law is governed by the (federal) penal code (*Strafgesetzbuch*). The organization of civil, criminal, administrative, tax, and social security courts is governed by the (federal) court organisation statute (*Gerichtsverfassungsgesetz*), and there are also (federal) codifications of civil as well as criminal procedure (code of civil procedure - *Zivilprozessordnung*; code of criminal procedure - *Strafprozessordnung*). All these matters are covered by

Article 74 sec. 1 number 1, and they are not subject to the "necessity" clause of Art. 72 sec. 2 described above. This may serve as an example of the extent of legal unification that is obtained through federal legislation. Notably, the codifications mentioned here were passed already under the constitution of 1871; however, they have been widely amended under the *Grundgesetz*. "Introductory statutes" (*Einführungsgesetze*) passed with the civil code and the penal code regulate the (small) extent to which *Länder* powers remain in these areas.

2. *Areas of Law Remaining within the Legislative Jurisdiction of the Component States*

Turning to the powers left to the *Länder*, it is helpful to start with a look at the principles governing the relations of state and federal powers of legislation.

A. *Constitutional Principles*

Article 30 and Article 70 sec. 1 GG formulate as a general principle that all residual powers not mentioned in the federal constitution are vested exclusively in the component states. On matters within the exclusive legislative power of the Federation, the *Länder* have power to legislate only when and to the extent that they are expressly authorized to do so by federal law (Art. 71 GG). On matters within the concurrent legislative power, the *Länder* have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law (Art. 72 sec. 1). Therefore, use of the concurrent legislative power has an effect of preemption. As a consequence, true conflicts of federal and *Länder* law arise rarely. If they do, federal law prevails according to the supremacy clause of Article 31 GG.

An exception providing for a complicated scheme of interacting state and federal powers is stated in Article 72 sec. 3, which was passed as an amendment only in 2006. According to this provision, in certain fields like hunting, protection of nature, and distribution of land the *Länder* may enact laws at variance with federal legislation. Federal laws on these matters enter into force no earlier than six months following their promulgation unless otherwise provided with the consent of the *Bundesrat*. As for the relationship between federal law and law of the *Länder*, the supremacy principle is not applied. Instead, the latest law enacted will take precedence. This could create a certain ping-pong effect between the levels.

B. *Powers of the* Länder

There is no positive catalogue of legislative powers reserved to the *Länder*. Given the great number of federal competences and the degree to which the *Bund* has made use of them, not too many areas remain untouched areas of competence for the *Länder*. Nevertheless, there are several worth mentioning:

- Police law: Organisation, procedure and substantive powers of the police are still to a large degree subject to *Länder* legislation. Federal police power is basically limited to national and international cooperation in the field of major crimes prevention and to national infrastructures like federal highways, airports, and trains. Yet, where police are investigating crimes that have already taken place (rather than working to prevent future dangers to the public), they are subject to the federal code of criminal procedure, which also regulates the powers of public prosecutors.
- Culture: School and university education, state and church relations. This field used to be quite untouched by federal influence, and it is customary to talk of *Kulturhoheit* (cultural sovereignty) of the *Länder*.
- Procedure in and organization of the respective states themselves: The *Länder* have each their own constitutions, and may freely regulate matters like election of their state parliaments, their

budget, their administrative organisation and procedure including that of local governments, as long as Article 28 GG is observed (see below 3. and III.1.A.). Nonetheless, some important areas are partly subject to federal legislation, especially civil service (Art. 74 sec. 1 no. 27), state liability (Art. 74 sec. 1 no. 25), and public procurement (heavily regulated by the EU and the federal act against restraints on competition).

In these fields, all *Länder* have passed extensive legislation.

C. *Coexistence of Central and Component State Regulation*

Federal and *Länder* regulation coexist in fields in which federal power is legally limited or has factually been limited to certain aspects of law, e.g. in the field of public service law of the *Länder*, or as far as "regulatory competition" is introduced by Article 72 section 3 GG (see above).

Joint tasks (*Gemeinschaftsaufgaben*) are defined by Articles 91a and 91b GG as matters of co-financing in the area of infrastructure and university planning. This legal instrument, which adds to the powers of the Federation, has been severely restricted by the constitutional reform of 2006.

3. *Lawmaking Power of Municipalities*

Municipalities are subject to *Länder* legislation. However, Article 28 section 1 GG guarantees a right to self-administration. Therefore, the *Länder* cannot strip local governments from certain core competences. Most local government codes distinguish between original powers of local governments and state powers delegated to municipalities; autonomy of municipalities is more limited with regard to the latter. The most important case of municipal rule-making is probably the power to pass zoning ordinances. Within the hierarchy of norms, these rules enjoy a lower rank than *Länder* legislation; they are a special form of administrative law-making.

III. THE MEANS AND METHODS OF LEGAL UNIFICATION

1. *Legal Unification or Harmonization through the Exercise of Central Power*

By and large, legal unification has been accomplished through federal legislation and its interpretation by federal and state courts to such a high degree that other centrally controlled means, such as centrally managed coordination or information exchange among the component states, do not play a role.

A. *Directly Applicable Constitutional Norms*

The basic human rights conferred on citizens by the *Grundgesetz* (Arts. 1 to 19) are directly applicable with regard to every act of government in Germany, be it federal or state (Art. 1 section 3 GG). This has led to a certain degree of unification in many fields in which the states have legislative powers, as these areas encompass several basic rights: Article 5 section 3, guaranteeing the freedom of academic teaching and research, corresponds to the *Länder* powers regarding university education; Article 6, guaranteeing parental freedom of education, and Article 7, providing for the government's general responsibility for schooling, bear relevance for matters of primary and high school education. Another example from the school sector in recent times is the influence of Article 4 section 1 - freedom of religion - on *Länder* regulation of teachers and students wearing headscarves for religious reasons. The FCC and the Federal Court of Administrative Law have, in several landmark cases during recent years, ruled on limits of the *Länder's* discretion to ban especially wearing of headscarves by teachers.

Another source of unification is Article 28 GG. According to section 1 of the Article, the constitutional order of the *Länder* must conform to the principles of republican, democratic, and social government, as well as to the rule of law as it is shaped by the *Grundgesetz*. In each of the *Länder*, counties, and municipalities, the people must be represented by a body chosen in general, direct, free, equal, and secret elections. Section 2, guaranteeing autonomy for municipalities, has already been discussed (II.3).

B. *Federal Legislation*

As already described (0), federal legislation has unified many important areas of law in Germany. It might be added that the unifying effect of federal law is further strengthened by the federal cabinet's power to pass administrative guidelines for the execution of federal statutes by the *Länder* (Art. 84 sec. 2, 85 sec. 2 GG).

Federal statutes mandating state legislation exist today mainly in the form of parliamentary acts by the *Bundestag* empowering the *Länder* administrations to issue regulations (*Rechtsverordnungen*). The power to issue regulations must always be limited by parliamentary statute under the *Grundgesetz* (Art. 80 section 1 GG). *Rahmengesetze*, federal laws defining a legal framework within which the *Länder* could regulate details by their own legislative means, were abolished in the course of constitutional reform in 2006; Article 72 section 3 (see above II.2,A) was inserted as a replacement.

Federal instruments inducing states to regulate by conditioning the allocation of central money on compliance with central standards or indirectly forcing states to regulate by threatening to take over the field in case of state inaction or state action that does not conform to centrally specified standards are currently not known; due to the prominent role of directly applicable federal legislation there is hardly any need for such means.

C. *Judicial Creation of Uniform Norms by Federal Courts*

The influence of the judiciary will be discussed below after an overview on the judicial system in Germany (IV.1).

2. *Legal Unification through Formal or Informal Voluntary Coordination among the Component States*

In many areas, there is close cooperation of the *Länder* in matters of legislation. This is mainly a domain of the executive branch. There are committees on all levels from the prime ministers to much more inferior sub-heads of divisions of special ministries. Some co-ordination structures like the conference of ministers of culture even have administrative staff of their own.

Legislative bodies come into play as soon as formal treaties between the *Länder* are involved. For example, this is the case in the field of radio and TV, and also with regard to university admission: The *Länder*, running public universities in Germany, have installed a central (but not federal) agency handling admissions for subjects like medicine in which demand regularly exceeds capacities. This example illustrates at the same time the unifying influence of the basic rights as interpreted by the FCC: The central admissions agency was founded in the first place because the FCC required the states to handle admissions efficiently in order to comply with the constitutional freedom to choose a profession guaranteed by Article 12 GG.

Model Codes have played a certain role in the legislation of the *Länder*, especially in the 1970s, e.g., with regard to municipal law and police law. In the field of administrative agency procedure, the federal statute that regulates federal agency procedure serves as model code. Virtually all *Länder* have passed statutes

basically identical to the federal model. Administrative *court* procedure, on the other hand, is regulated uniformly by the federal code of administrative courts procedure - *Verwaltungsgerichtsordnung* - under the "procedure" clause of Article 74 section 1 Number 1 (see above II.1.D.

The role of component state judiciaries is discussed separately (IV.1).

3. *Legal Unification Accomplished by Non-state Actors*

As an example of non-state actors accomplishing legal unification to a certain degree, the German Standards Institute (*Deutsches Institut für Normung* - DIN) may be mentioned. It is a private organisation in the field of - mostly technical - standardisation and may be compared with the ISO on the international level. The DIN,for example, plays an important role with regard to certain fields of contract law and public procurement law. Traditionally, the DIN has issued so-called "*Verdingungsordnungen*" consisting of model terms for construction and services contracts and for tender procedures preceding the conclusion of these contracts. The *Bund* and the *Länder* used to prescribe application of these model terms by public authorities through executive orders. These executive orders were usually regarded as binding authorities and used only internally. Thus, (potential) contractors could enforce the model terms only insofar as they were formally integrated into a contract. As contractual terms, however, they were subject to interpretation not only by trial and state courts, but also by the federal courts, as the federal courts are authorized to interpret contractual terms as soon as they are standardly used in an area overlapping the jurisdictions of the state courts of appeal.

The procurement rules were hardly enforceable at all. Even there, however, an indirect unifying effect resulted from the civil case law on pre-contractual liability, which could in certain cases arise from a breach of the DIN model terms. Meanwhile, the model terms of procurement have been transferred into statutory law for procurement projects exceeding the thresholds of the EC directives on public procurement.

In the field of commercial law, commercial custom is recognized as a source of law by section 346 of the federal commercial code (*Handelsgesetzbuch*). Via this clause, model regulations like the INCOTERMS may be used by the courts to define contractual obligations if an individual contract does not regulate certain questions.

4. *The Role of Legal Education and Training in the Unification of Law*

Legal education in Germany consists of two phases, a phase of university education (about 4 years) and a phase of practical training (2 years). A state examination organised (mainly) by state ministries of justice takes place after each phase. Law schools draw students from throughout the federal system. Legal education focuses mostly on federal law with the exception of administrative law, which covers police law and municipal law. In general, mobility of graduates is high, starting with the possibility to switch to another state for practical training after the first state exam. After the second state exam, graduates tend to set up their practice or take jobs anywhere in the Federation. Testing for bar admission is state-wide; however, the actual admission to the bar is for the entire federal system except when applying for the bar of the *Bundesgerichtshof* (federal Supreme Court) in civil matters.

5. *External Factors Influencing Legal Unification*

As repeatedly mentioned before, European law is an important external factor in unifying the legal order in Germany. The EU has legislative powers in many fields subject to *Länder* jurisdiction and may regulate matters either directly (via regulations) or indirectly via directives which the *Länder* then have to implement. Currently, for example, *Länder* have long realised the influence exerted upon their sphere of

competence from Brussels and are actively involved in the European legislative process through the Committee of the Regions. They also have own representations in Brussels. A staged system of *Länder* participation in the decision-making process of the European Union depending on the grade of involvement of state interests is prescribed by Article 23 GG.

To a lesser degree, the European Convention of Human Rights and the case law of the European Court of Human Rights may lead to unified rules in certain fields. Decisions of the Court are not directly applicable in Germany, but according to the FCC, they have to be taken into account to a degree that for practical purposes comes close to direct applicability after all.

International voluntary coordination has been an increasing factor since the 1990s, especially in the field of education through the Organisation for Economic Co-operation and Development OECD. The *Länder* participate in the PISA studies, a comparative study between member states on the state of school education with the conference of ministers of culture playing a central role. The PISA results have been subject to an intense public discussion, and may have increased competitive elements in German federalism, as the *Länder* aim at good results especially for their own educational systems. Another example is the Bologna process aiming to unify academic credit systems and grades and to foster Europe-wide mobility of students. It has been implemented to a large degree by the *Länder*. Nevertheless, critical voices are still to be heard, especially in the field of legal education which so far has remained quite untouched by the Bologna process (see also above).

IV. INSTITUTIONAL AND SOCIAL BACKGROUND

1. *The Judicial Branch*

A. *Overview*

State and federal courts form parts of an integrated judicial system in Germany. The judiciary as a whole is heavily regulated by federal law. It is divided into five branches: There are ordinary courts (with civil and criminal sections), labor courts, administrative courts, tax courts, and social security courts. In each of these branches (with the exception of tax courts), there are trial courts and appellate courts on state level and a supreme appellate court at the federal level. Appeals to the federal courts are in general limited to cases of a certain importance. At the trial courts, suits are in most cases decided by mixed panels of one to three professional judges and two lay judges. In civil matters, no lay judges are involved. The courts of appeal and the federal courts in labor and social security matters also have lay judges drawn from competing social groups (such as employers and employees as lay judges in labor courts).

There is in general no formal principle of *stare decisis*; theoretically, a court may disregard all kinds of precedents as long as it is convinced that its own interpretation of the law is correct. However, in practice, courts are taking case law from courts throughout the Federation into account. The chance that a judgment may be appealed, however, will often lead to special attention being paid to the case law of the courts that would decide on an appeal.

Limited *stare decisis* is provided for by federal law with regard to the state courts of appeal and the federal courts. If one of these courts intends to decide a question of federal law in a way differing from existing decisions of courts at the same level, it has to refer the question to the court of next higher instance. In the case of the federal courts, this means that the question will have to be decided by a joint senate of the five federal supreme courts.

B. *Judicial Creation of Uniform Norms*

As precedents are not formally binding under German law, with the sole exception of certain decisions by the FCC (sec. 31 of the FCC statute), courts cannot in a technical sense create norms. However, decisions by the higher courts - especially the federal supreme courts - will usually be followed. *Rechtsfortbildung*, i. e. the development of the law, is named explicitly as a task for the federal courts in several federal statutes. The influence of courts upon the law as it is applied is traditionally strong, especially in the field of civil law. For decades, rules of pre-contractual liability (*culpa in contrahendo*) have been applied by the civil courts according to landmark decisions going back to around 1900, although there were no statutory norms providing for such liability to be found within the civil code. State liability is another interesting case: Although some basic provisions exist (partly in the civil code and partly in the *Grundgesetz*), important legal doctrines have been developed entirely by the (federal) judiciary. Interestingly enough, an attempt of the *Bund* to pass a statute on state liability failed in 1982; the statute was declared void by the FCC for lack of federal competence. In 1994, a federal legislative competence for state liability was inserted into the *Grundgesetz*, but so far it has not been used.

Thus, the federal courts' "case law" does have a strong unifying effect. Technically, however, what the federal courts do is interpretation of federal statutory law. As a rule, they are not entitled to interpret state law. Certain exceptions apply in the field of administrative law to the extent it is textually identical with federal law; also, the *Länder* may delegate the power to decide appeals on questions of state law to the federal courts (Art. 99 GG). But for the most part, there is no court at the central level with power authoritatively to interpret component state law.

When looking at the role of the *Länder* judiciaries, one must keep in mind that the law that most state courts enforce most of the time is federal law. This is especially true with regard to civil and criminal courts. Only administrative courts have to deal with state law to a significant degree. As far as interpretation of federal law goes, courts will usually take into account decisions of courts throughout the republic, regardless of the *Land* they belong to. The same is probably true with regard to state law to the extent that the *Länder* norms concerned are similar.

C. *Constitutional Courts*

Constitutional courts play a special role within the judiciary. Citizens may invoke the FCC's jurisdiction, for example, only after the ordinary course of remedies against an act of government has been exhausted. The Court may then decide only questions of federal constitutional law, while state constitutional courts may review decisions of state courts and agencies with regard to state constitutional law. The *Grundgesetz* allows a *Land* to delegate jurisdiction over state constitutional matters to the FCC (Art. 99 GG). Until a few years ago, the *Land* of Schleswig-Holstein had made use of this possibility. Nowadays, constitutional courts exist in all states; their practical impact, however, should not be overestimated.

The FCC is explicitly appointed to resolve conflicts between the Federation and the *Länder* (*Bund-Länder-Streit*), or among the *Länder* in the case of alleged breaches of constitutional obligations (Art. 93 section 1 no. 3, 4). The FCC also has competence to decide upon the compatibility of state law with federal law or the constitution, as well as the compatibility of federal law with the constitution (see explicitly Article 93 section 1 number 2 GG; this power can become relevant in other kinds of procedures as well). The latter competence includes the power to police whether federal legislation has exceeded the lawmaking power allocated to the federal government. A "compatibility" decision of the FCC can be requested by state governments, by one third of the *Bundestag*, or by the federal government. There is also a special procedure of federal character affecting the compatibility of federal statutes with Article 72 section 2 GG. Municipalities have the possibility of lodging a constitutional complaint alleging that their guaranteed autonomy rights under Article 28 GG have been infringed by the legislature (Art. 93 section 1

no. 4b GG). In the past, the FCC has repeatedly struck down federal statutes as well as *Länder* statutes for lack of competence.

2. *Relations between the Central and Component States Governments*

A. *Power of the Central Government to Force Component States to Legislate*

While one can argue that the legislative "framework" power formerly stated in Article 75 included the Federation's power to make the *Länder* pass legislation, no such power is to be found in current constitutional law after the repeal of that Article. It is not clear how the FCC would react if the *Bund* tried to "commandeer" legislation by the states. This has not been attempted in practice.

Therefore, the question whether the *Bund* could enforce such obligations is largely theoretical as well. Procedurally, the *Bund* could file a *Bund-Länder-Streit* at the FCC. Reasons for such a lawsuit could arise in the context of implementation of EC directives. The *Bund* might be interested in forcing a *Land* to implement a directive on matters within the *Länder* competences, since the Commission could sue Germany - that is, the Federation - for breach of the EC Treaty due to a lack of correct implementation (Art. 226 EC). In the case of a verdict for penalty payments against Germany (Art. 228 sec.2 subsec. 2 EC), the *Bund* could also try to sue for damages against the *Land* or the *Länder* responsible for the delayed implementation. However, there have not been any such suits so far.

B. *Execution of Federal Law*

The basic rule of the *Grundgesetz* is that the *Länder* execute federal laws in their own right (Art. 83 GG). "In their own right" means, first, that there is no direct hierarchical control exerted by the federal government. While the Federal Government may, with the consent of the *Bundesrat*, issue general administrative rules (Art. 84 sec. 2) and exercise oversight to ensure that the *Länder* execute federal laws properly (Art, 84 sec. 3), it cannot order the *Land* to act in a certain way. Its only method of enforcement is to ask the *Bundesrat* for a determination whether that *Land* has violated the law, and if the *Bundesrat* refuses, to file a suit with the FCC (Art. 84 sec. 4).

Second, administration in the *Länder's* "own right" allows the *Länder* to establish the requisite authorities and regulate their administrative procedures themselves. If federal laws provide otherwise, the *Länder* may enact deviating regulations (see Art. 84 sec. 1 for further details).

In certain - rare - cases, the *Länder* execute federal laws not in their own right, but on federal commission (Art. 85); this is the case, for example, in the field of production and utilization of nuclear energy (Art. 87c). Most important, this means that the *Land* authorities have to follow instructions from the competent highest federal authorities (Art. 85 sec. 3).

Third and finally, in some areas federal law is executed by federal agencies. Article 87 states that foreign service, federal financial administration, and administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures, and that a federal law may establish Federal Police authorities. There is also a federal defence administration (Art. 87b). Another example of federal administration is the federal bank, whose competences have - in accordance with Article 88 GG - been transferred to the European Central Bank to a significant degree.

Financial administration is, as an exceptional case, to a certain degree "mixed". Most taxes are administered by the financial authorities of the *Länder*; federal tax authorities administer customs duties and some other taxes. The organization of the *Länder* authorities and the uniform training of their civil servants may be regulated by a federal law requiring the consent of the *Bundesrat*. Inasmuch as

intermediate authorities have been established, their heads are appointed in agreement with the Federal Government (Art. 108 sec. 2). The Federation, on the other hand, has to consult *Land* governments when appointing heads of federal intermediate authorities (Art. 108 sec. 1). A federal law requiring the consent of the *Bundesrat* may provide for collaboration between federal and *Land* revenue authorities in certain matters of tax administration (Art. 108 sec. 4).

In general, however, "mixed" administration is not tolerated by the *Grundgesetz*. In 2003, the Federation passed a law establishing "mixed" agencies in the field of social security. The idea was that the federal employment agency and the municipalities should form joint ventures in order to provide a "one-stop system" for welfare benefits for the unemployed. After some municipalities and counties had sued against the reform, the FCC struck down the provisions about the joint ventures in December 2007, arguing that because such a form of mixed administration was not provided for in the *Grundgesetz*, it infringed the guarantee of local autonomy in Article 28 sec. 2 GG. The Court has set a deadline for the federal legislature to reform the law by December 2010. Currently, it is debated whether the *Grundgesetz* should be amended to allow joint ventures as they were introduced by the 2003 reform.

C. *Representation of Component States at the Central Level, and their Role in the Central Legislative Process*

The *Länder* participate in the legislation and administration of the Federation and in matters concerning the European Union through the *Bundesrat* (Art. 50). The *Bundesrat* consists of members of the *Land* governments appointed (and recallable) by these governments (see Art. 51). A *Land's* number of votes depends on its population and ranges from three to six. Depending on the subject matter of a bill adopted by the *Bundestag*, the *Bundesrat* either has to consent to it or only has the possibility to object. While the *Bundestag* may overrule an objection by the *Bundesrat*, there is no comparable possibility when consent of the *Bundesrat* is necessary. A Joint Committee made up of members of both the *Bundestag* and the *Bundesrat* will attempt to find solutions in cases of differences between the two chambers of parliament (Art. 53a GG). Reduction of the number of cases in which consent of the *Bundesrat* is needed was a main purpose of the constitutional reform 2006, because the permanent need for consent among the *Länder* governments made it very difficult for the parliamentary majority at the *Bundestag* to pass laws on controversial subjects. Since the late 1970s, the political majority in the *Bundestag* has often differed from the majority in the *Bundesrat*. This made it necessary in many cases to organise all-party coalitions in order to pass legislation.

According to Article 76 sec. 1 GG, the *Bundesrat* (i.e. its majority) may introduce bills in the House of Representatives (*Bundestag*). The *Bundesrat* is entitled to state its position on bills of the Government before they are submitted to the *Bundestag*.

3. *Taxation and Revenue Sharing*

A. *The Power to Tax*

Article 105 sec. 1 of the Basic Law empowers the Federation to legislate on customs duties and fiscal monopolies and allocates to the Federation the concurrent power to legislate on all other taxes the revenue from which accrues to it wholly or in part or where the conditions provided for in Article 72 sec. 2 apply. The Federation has partly transferred its competences to Brussels - customs duties are regulated as well as collected by the EU - and has exhausted its concurrent powers. For practical purposes, the component states' legislative powers are limited to the ones explicitly named in Article 105 sec. 2a, i.e. the power to legislate on local excise taxes (which, however, has mostly been delegated to the municipalities) and, since 2006, the power to set the rate for the tax on real estate sales.

Identical taxes are prohibited. Taxes are identical when the facts justifying the taxation coincide and the same source of economical capability is charged. This is especially the case when the object and criteria of taxation coincide. This prohibition is explicitly mentioned in Article 105 IIa to restrict the exclusive power of the *Länder*.

B. *General Constitutional and Legislative Rules on Revenue Sharing*

A highly complicated system governs revenue sharing in Germany.

In a first step, Article 106 GG distributes the yield of different taxes between the Federation, the *Länder*, and the municipalities ("primary vertical financial balancing"). While the yield of certain taxes is given exclusively to either the Federation or the *Länder* (Art. 106 sec. 1, 2), the most lucrative tax revenues accrue to the *Länder* and the Federation jointly: Article 106 sec. 3 names the income taxes, corporation taxes and turnover taxes. The revenues of income taxes and corporation taxes accrue to the Federation and the component states in equal shares. The sharing of the revenue of the turnover taxes is determined by federal statute (requiring the consent of the *Bundesrat*) following certain constitutional principles.

In a second step, tax yields accruing to the *Länder* are attributed to the single states by Article 107 ("primary horizontal financial balancing"). In a third step, Article 107 provides for the so-called secondary horizontal financial balancing process: In order to ensure a reasonable equalization of the disparate financial capacities of the *Länder*, with due regard for the financial capacities and needs of municipalities, the Federation is required to pass a law governing claims of "poorer" *Länder* against "richer" ones for equalization payments, as well as the criteria for determining the amounts of such payments. Finally, as a fourth step, financially weak Länder may receive - and in extreme cases be entitled to - supplementary allocation of funds from the Federation ("secondary vertical financial balancing").

The whole process does not aim at total equality of financial resources but at a compensation for structural disadvantages of certain states. As one can easily imagine, it leads to a lot of disputes between the Federation and the *Länder*, and also (or even more) between "rich" and "poor" states.

4. *The Bureaucracy*

The Federation and the *Länder* each have their own civil service. So far, the cultures and legal frameworks are very similar for several reasons. First, Article 33 section 5 states that the law governing the public service shall be regulated and developed "with due regard to the traditional principles of the professional civil service". These principles, including life-long employment, due financial compensation, and eligibility of any citizen for public office according to his or her aptitude, qualifications and professional achievements (Art. 33 section 2), are strictly enforced by the FCC; they are binding on the Federation and the *Länder* as well. Second, until 2006, the Federation had a "framework" legislative competence for matters of the civil service, leaving very limited freedom for regulation by the *Länder*. But since the reform of 2006, the states have the power to define careers and salary of their civil service as they like. This will probably lead to greater differences between the states in the future.

Lateral mobility between civil services of different states is theoretically possible but - apart from the case of university professors – difficult and rare in practice. Mobility from state civil services to federal civil services is much higher. Many holders of federal offices have started their careers within the civil services of the states. This is especially true with respect to federal judges and prosecutors; virtually all of them (with the FCC being an exception) are drawn from state judiciaries.

5. *Social Factors*

Racial, ethnic, religious, linguistic or other social cleavages within the Federal Republic of Germany should not be overestimated. However, some aspects may be highlighted.

There is probably still a certain cultural cleavage between traditionally Protestant regions - e.g., the very north of Germany or Württemberg (a region in the southwest of Germany around Stuttgart) - and Catholic areas such as the Rhineland (Bonn, Cologne, and their surroundings) or Bavaria.

Then, due to obvious historical reasons, differences exist between the "old" *Länder* in the west and the eastern *Länder* forming the GDR before 1990. There is still a considerable amount of special federal legal regulations directed at the situation of the "new" states, e.g. special taxation rules. However, different states perform differently beyond these group identities. To give but one example, former East German states are to be found among the groups of most and least indebted states in the Federation as well.

Since the eighties there has been a social asymmetry between southern states (Bavaria, Baden-Württemberg, Saxonia, Thuringia) and northern states in which the south performs better in many regards and is socially and politically more conservative than the north. The most important legal effect is the distribution of taxes and its consequences for the financial balancing process mentioned above. In historical perspective, natural resources have played a certain role in this context: Nordrhein-Westfalen, for example, was a financially strong state as long as its coal deposits were an important economic factor. Today, coal mining in Germany is economically possible only with large sums of state subsidies, and Nordrhein-Westfalen has become one of the receiving states in the financial balancing process.

Distinct ethnic groups play a role on a state level rather than on a federal level. In Schleswig-Holstein there is a Danish minority with special provisions guaranteeing their representation in Parliament. Parts of the population of Brandenburg and Sachsen belong to the Slavic people of the *Sorben*; they enjoy certain privileges such as speaking their language in court.

V. CONCLUSION

In Germany, the central instrument for unification of the legal order has always been the federal power to regulate matters directly. This starts with the great codifications of German private, commercial, and penal law under the constitutional monarchy in the nineteenth century. On the whole, this has led to a highly uniform legal order within Germany. Legislative powers of the states remain mostly in the realm of administrative and somewhat technical law. Most matters subject to intense public discussion, such as penal law, family law, or labor law, are federalized. In this situation, other ways and means of legal harmonisation are rarely used.

German federalism can be characterized as an "executive federalism" (*Böckenförde*), meaning that the political meaning of federalism lies in the power of the states to implement federal laws and in the political influences of the *Länder* executives on the federal level, above all through the *Bundesrat.*