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GERMANY

I. The Structure of Government and Administration in the Federal Republic of Germany

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I. Constitution, Government, and Administration of the Federal Republic of Germany

1. Constitutional System

1.1 General Description of the Constitutional System¹

The constitution of the Federal Republic of Germany dating from 1949 is called the Basic Law (*Grundgesetz*). It deals with a number of aspects, enumerates basic rights, and, in Articles 20 ff., lays the foundations of government. The fundamental structural principles of the Federal Republic of Germany are:

- federalism,
- democracy,
- the rule of law,
- the “social state” (government based on social justice).

Federalism:

According to Article 20 (1) of the Basic Law, the Federal Republic of Germany is a democratic and social, federal state.

The federal structure laid down by the constitution provides for statehood at two levels. The federal state is composed of a central government (*Bund*) and a number of constitutive states (*Länder* or *Bundesländer*).² The states have united to form a Federation under the name Federal Republic of Germany (*Bundesrepublik Deutschland*). The constitutions of the 16 constitutive states of the Federation vest them with state authority and with territorial and personal sovereignty.³ Apart from the tripartite, horizontal division of powers between legislature (law making), executive (government and subordinate administration), and judiciary (courts), state authority in the federal state is distributed between the Federation (*Bund*) and the member states (*Bundesländer*).⁴ The Basic Law assigns the exercise of state authority and the discharge of state functions to the constitutive states of the Federation, except as otherwise provided or permitted by the Basic Law itself. Competence is deemed to lie with the states unless otherwise specified.⁵ The functions or powers of the Federation as central government are enumerated in the Basic Law. In questions of competence, the Basic Law must always be consulted to ascertain whether it assigns jurisdiction to the Federation in the field at issue. If this is not the case, the states alone are competent.⁶

The Social State

Article 20 (1) and Article 28 (1) of the Basic Law address the social function as an explicit objective of government. This “social” function is very broad in scope, requiring and inviting substantial legislative effort, since its satisfactory performance is strongly affected by changing economic and political conditions. The “social state”

¹ *Grundgesetz für die Bundesrepublik Deutschland* of 23 May 1949 (BGBl. 1949, 1), amended by statute on 28.08.06 (BGBl. I 2034).

² Cf. Badura, *Staatsrecht*, D, Rn. 69, 336.

³ Cf. Badura, *Staatsrecht*, D, Rn. 69, 336.

⁴ Cf. Badura, *Staatsrecht*, D, Rn. 69, 336.

⁵ Cf. Katz, *Staatsrecht*, Rn. 250.

⁶ Cf. Katz, *Staatsrecht*, Rn. 250.

principle alone cannot provide independent justification for any subjective rights of the individual.⁷ Social state rights can therefore not be derived from the principle. The more specific constitutional directives drawing on the social state provision can be called “rights” only in a general and non-technical sense. A number of basic rights (Articles 6, 7, 12 (1), 9 (3) of the Basic Law) can be described as social state rights. The Social Code – General Part – describes fundamental social policy goals as “tasks of the Social Code” and lists a number of “social rights” to be addressed by statutory social services and benefits (promotion of education and employment, social security, social assistance, etc.). These social rights have no constitutional status; they summarise entitlements in areas dealt with by social law and cannot in themselves found claims.⁸

Democracy

Article 20 (2) of the Basic Law gives a detailed description of popular sovereignty, the key characteristic of the democratic state:

“All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.”

In Germany, all state authority is derived either directly or indirectly from the people. In this sense, the people are the sovereign in the state, and, so to speak, rulers over themselves. The people, the “nation” exercise their authority directly by means of elections and other forms of ballot. Beyond elections and other voting procedures, the people exercise their state authority only indirectly through the institutions of the legislature, executive, and judiciary.⁹ The principle of popular sovereignty legitimates the exercise of all state authority by the people. This means that government institutions must be constituted by popular election (e.g., the federal parliament, the *Deutscher Bundestag*) or be put in office by elected representatives (e.g., the Federal Chancellor, the head of government, who is elected by the *Bundestag*). At the federal level, direct democratic procedures (plebiscites, referendums) have played no role, so that the Federal Republic can be described as a representative democracy.¹⁰

Article 20 of the Basic Law also stipulates the separation of powers. The separation of powers is intended to provide constitutional limits to the exercise of power, and to ensure democratic representation and the rational discharge of functions.¹¹ The aim is not to divide state authority but the exercise thereof, and to distribute it among different institutions.¹² Article 20 (2) sentence 2 of the Basic Law lists the classical lawmaking, executive, and judicial functions of government and prescribes their exercise by special institutions, without at this point naming them. Later constitutional provisions set forth the details.¹³ Legislation is largely entrusted to the Bundestag, executive powers to the Federal Government and the administration subordinated to it, and judicial powers are vested in the courts.¹⁴

The institutions of the state are interlinked by a dense network of participatory and supervisory powers.

The Rule of Law

⁷ Cf. Badura, Staatsrecht, D, Rn. 36.

⁸ Cf. Badura, Peter, Staatsrecht, D, Rn. 37.

⁹ Cf. Badura, Peter, Staatsrecht, D, Rn. 6, 271 f.

¹⁰ Cf. Katz, Staatsrecht, Rn. 142 ff., 73 ff.

¹¹ Cf. Maurer, Staatsrecht I. Grundlagen - Verfassungsorgane - Staatsfunktionen, Rn. 5.

¹² Cf. Maurer, Staatsrecht I. Grundlagen - Verfassungsorgane - Staatsfunktionen, 379 Rn. 1

¹³ Cf. Maurer, Staatsrecht I. Grundlagen - Verfassungsorgane - Staatsfunktionen, Rn. 13.

¹⁴ Cf. Maurer, Staatsrecht I. Grundlagen - Verfassungsorgane - Staatsfunktionen, Rn. 13.

Article 20 (4) of the Basic Law names key elements in the principle of the rule of law: *“The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”*

The Basic Law details the rule of law in numerous individual provisions. These provisions give expression to the fundamental objectives of the rule of law, the safeguarding of personal freedom, and the subjection of state authority to the law.¹⁵

Public administration must not violate valid law (constitution, statutes, ordinances) and must conform with prevailing legal principles. At the same time, administration requires a basis in law,¹⁶ precisely defining and limiting the powers of administrative authorities, for all measures that encroach upon the freedom of the citizen. The principle of “proportionality” comes to bear in this connection. It requires that civic liberties be not excessively restricted; that the purposes of government and the means chosen to achieve them must be proportionate.¹⁷ All public authorities are bound by these principles in performing their functions.

The judiciary is the third branch of government. The arrangements for the administration of justice and the extent of individual legal protection are yardsticks for the rule of law. Article 19 (4) of the Basic Law states: *“Should any person’s rights be violated by public authority, he may have recourse to the courts.”* It is the task of the judiciary to reach binding and impartial decisions through special procedures in the event of legal dispute or violation of the law.¹⁸ In the Federal Republic, the judiciary is divided into five, independent court systems: ordinary courts (civil and criminal), administrative courts, social security courts, finance courts, and labour courts. Each system is differently structured. Jurisdiction is divided between the Federation and the states; the supreme courts in each system are federal courts, while all lower courts are state courts (cf. chapter 2.2).¹⁹

Safeguarding the Structural Principles of the Constitution

The principles laid down by Article 20 of the Basic Law (federalism, social state, democracy, and the rule of law) cannot be changed by legislation. This also applies for the protection and recognition of human dignity and for the subordination of government to the basic rights enumerated in the Basic Law (Article 1). These constitutional principles are core components of the Basic Law, and, according to Article 79 (3), cannot be modified even by constitutional amendment (so-called “perpetuity clause”).²⁰

1.2 The History of the Constitutional System

19th Century

The concept of the rule of law (*Rechtsstaat*) entered the political discourse in the first half of the 19th century and has since played a key role in German legal and constitutional history. In the mid-19th century, the middle-class constitutional movement led to the introduction of constitutions pledging the rule of law in almost all the countries of Germany. They promised:

- the recognition of civic liberties,
- equality before the law,

¹⁵ Cf. Katz, Staatsrecht, Rn. 162, 84.

¹⁶ Cf. Katz, Staatsrecht, Rn. 189 ff., 93 ff.

¹⁷ Cf. Katz, Staatsrecht, Rn. 205 ff., 102 ff.

¹⁸ Cf. Badura, Staatsrecht, D, Rn. 62

¹⁹ Cf. Katz, Staatsrecht, Rn. 516 f., 254.

²⁰ Cf. Katz, Staatsrecht, Rn. 134, 67.

- the involvement of representatives of the people in legislation, and
- independent courts.

Unlike the rule of law, democracy made no decisive headway in the 19th century. The middle classes proved too weak to assume the dominant role in government: the first constitution of the Germans, the “German Imperial Constitution” was adopted on 27 March 1849 by the National Assembly meeting in St. Paul’s Church in Frankfurt.²¹ It was the product of the democratic and liberal movement, which sought to achieve the national unity of the German people by parliamentary means. The king of Prussia, Frederic William IV, was elected German emperor by the National Assembly. But he never accepted this election, since he regarded himself as a ruler by the grace of God.²² The March Revolution of 1848 failed to produce any constitution that came into force.²³

The middle classes made a compromise with the traditional foundations of monarchical government. Under the *system of constitutional monarchy*, the middle classes waived political leadership in government, and in so doing safeguarded their economic and social interests. The political core of constitutional monarchy is the sharing of legislative power between the monarch, an upper chamber primarily representing corporative interests and the nobility, and a lower, popularly elected chamber.²⁴ Because suffrage for the lower house was not equal but depended on property status (three class franchise), the predominance of the propertied classes was secured in parliament and legislation. By the end of the 19th century, the demand of the middle class that the monarch should be bound by the law was met. This found expression in the concept of the lawfulness of the administration.

Not until 1871 did Bismarck found the German nation-state as a federation of German princes. This German Empire, a constitutional monarchy, came to an end in the aftermath of defeat in World War I in 1918 and the revolution of 1918/19.²⁵

Weimar Republic (1919-1933)

As a consequence of these events, government was established on the basis of a different political principle, the sovereignty of the people.²⁶

On 31st July 1919, the empire became a parliamentary, democratic republic, the so-called Weimar Republic, by adoption of the “Constitution of the German Empire.” It was given this name because the explosive situation in Berlin obliged the newly formed national assembly to meet in Weimar.²⁷ This renewed attempt to turn Germany into a liberal and democratic country met with considerable resistance from the very outset. In many cities, workers’ and soldiers’ councils formed. It was a time of political radicalism and economic crisis.

Parliamentary democracy was sickly from the start. Any provision of the constitution could be amended by a two-thirds majority. Even basic rights could be abolished by this means.

The unsettled political conditions caused by, among other things, the Versailles Treaties, the Great Depression of 1929 and the consequent mass unemployment

²¹ Cf. Badura, Staatsrecht, A, Rn. 25, 28.

²² Cf. Katz, Staatsrecht, Rn. 79, 33 f.

²³ Cf. Maurer, Staatsrecht I. Grundlagen – Verfassungsorgane – Staatsfunktionen, 26

²⁴ Cf. Katz, Alfred, Staatsrecht, Rn. 83, 35.

²⁵ Cf. Badura, Staatsrecht, A, Rn. 26, 28 f.

²⁶ Cf. Katz, Staatsrecht, Rn. 88, 37.

²⁷ Cf. Badura, Staatsrecht, A, Rn. 27, 29 f.

turned many people away from democracy,²⁸ strengthening the growth of radical, extremist parties (especially the NSDAP). From 1930 onwards, the parliament (*Reichstag*) was dissolved a number of times, and there were only minority governments, which ruled with the aid of the Reichspräsident's extraordinary powers.²⁹

The Third Reich (1933-1945)

These developments bear a major part of the blame for the demise of the Weimar Republic and the establishment of the Third Reich on 30th January 1933. The Act to Remedy the Distress of the People and the Empire (Enabling Act) passed on 24th March 1933 by the *Reichstag* empowered the government to make laws without the participation of parliament (Articles 1 and 2).³⁰ In effect, it transferred legislative power to the executive, abolishing the principle of the separation of powers.³¹ On the basis of the Gleichschaltung Act, federal and state governmental organisation was forcibly coordinated, the principles of the Enabling Act were extended to the states, and the "Führer principle" was imposed at all levels.³² The death of Reichspräsident Hindenburg on 2nd August 1934 finally paved the way for Hitler to introduce a totalitarian regime, since the powers of the president devolved to him as chancellor.³³ In the field of foreign policy, the following developments took place: in 1933 Germany left the League of Nations; in 1934 it unilaterally denounced the limitation of armaments imposed by the Treaty of Versailles. In 1936 the Rhineland was occupied, and Austria and the Sudetenland annexed in 1938.³⁴ With the German invasion of Poland on 1st September 1939, the Second World War began. It ended with Germany's capitulation on 7th / 8th May 1945 and the fall of the National Socialist dictatorship.

After 1945

Capitulation did not lead to the extinction of the German Empire but only to the complete military defeat of Germany³⁵. In the Berlin Declaration and Potsdam Agreement of June / August 1945, supreme authority was transferred to the supreme commanders of the four victorious powers, the United States of America, the Soviet Union, the United Kingdom, and France over their respective zones and to the Allied Control Council, composed of the four commanders-in-chief, for the whole of Germany.³⁶ Owing to political differences with the Western powers, the Soviet Union ceased collaboration on the Allied Control Council in the spring of 1948³⁷. The establishment of the West German state proceeded step by step. After the West German zones had amalgamated economically in January 1947 to form the Bi-Zone and in March 1948 to constitute a Tri-Zone, the eleven state premiers were called upon in July 1948 to convene a national assembly and draft a constitution.

The constitution of the Federal Republic was to be designed to exclude any rejection of the rule of law. Binding all state authority to the law was no longer to mean solely

²⁸ Cf. Katz, Staatsrecht, Rn. 92, 39 f.

²⁹ Cf. Der Brockhaus in einem Band, 976.

³⁰ Cf. Katz, Staatsrecht, Rn. 93.

³¹ Cf. Katz, Staatsrecht, Rn. 93.

³² Cf. Katz, Staatsrecht, marginal no. 93.

³³ Cf. Badura, Staatsrecht, A, Rn. 28, 31 f.

³⁴ Cf. Der Brockhaus in einem Band, 617.

³⁵ Cf. Katz, Staatsrecht, Rn. 125.

³⁶ Cf. Katz, Staatsrecht, Rn. 125.

³⁷ Cf. Katz, Staatsrecht, Rn. 125.

that it was bound by statutory law: legislation itself was to be bound by certain supreme legal principles.

A 65-member assembly elected by the state parliaments (*Landtage*), the so-called Parliamentary Council, drafted not a constitution but a Basic Law, since they feared that the division of Germany would be consolidated constitutionally if the term constitution was used. Agreement was thus reached on a provisional arrangement.³⁸ The Basic Law was created in rejection of the Weimar constitution, drawing on tried and tested, earlier German and European constitutional traditions and introducing important new elements.³⁹ Despite some differences of opinion, it was signed by the minister presidents of the states in the three Western zones of occupation on 23rd May 1949.⁴⁰

1.3 Basic Principles of the Political and Administrative System⁴¹

The *democratic principle* calls for general legitimation of all state authority by the people. The people exercise their state authority directly by means of elections and other forms of ballot. Apart from elections and other ballots, the people exercise state authority only indirectly through the institutions of the legislature, the executive, and the judiciary. Thus, in keeping with the tenets of indirect, representative democracy, the German people delegate their sovereignty to the legislature and executive for a limited period and subject to revocation.

The *principle of the rule of law* requires all government action to be bound by law and justice. The crux of this principle is the (horizontal) separation of powers: the functions of government are assigned to the institutions of the legislature, executive and judiciary. This renders any abuse or arbitrary use of state power more difficult. The Basic Law places particular weight on the judiciary. This is evident in the status of the Federal Constitutional Court as supreme constitutional body, in the comprehensive guarantee of recourse to law provided by Article 19 (4) of the Basic Law, in the independence of judges, and in their strict commitment to the law.⁴²

The social state principle requires government to establish equality of opportunity and social equity, and hence to protect the socially weak.⁴³ There is therefore a far-reaching network of social security legislation, encompassing, for example, the provision of security in the event of illness, accident, and old age, and the provision of child, housing, and unemployment benefits. Encroachment on basic rights is possible in the interests of implementing the social state principle.

The *federalism principle* is realised by distributing state authority between the constitutive states and the Federation. This principle of the vertical separation of powers, which contrasts with that of the unitary state, is crucial in understanding the structure of government and administration in Germany. The distribution of state authority in Germany between the Federation and the 16 individual states means that

³⁸ Cf. Katz, Staatsrecht, 69 ff.

³⁹ Cf. details in Katz, Staatsrecht, Rn. 126.

⁴⁰ Cf. Pötzsch, Die deutsche Demokratie, 10 ff.

⁴¹ Cf. Turowski, et al., Deutsch-Schwedisches Handbuch der Planungsbegriffe, Akademie für Raumforschung und Landesplanung, 157 f.

⁴² Cf. Katz, Staatsrecht, Rn. 509.

⁴³ Cf. Badura, Staatsrecht, D, Rn. 35, 301.

not only the Federation itself but also the constitutive states possess statehood. The distribution of functions between the overall state (Federation) and member states must be fully specified by the Basic Law.⁴⁴ The states accordingly have no static and immutable catalogue of functions and competencies, but they do have a genuine core of vested, non-derived powers, which include certain areas of legislation (e.g. cultural affairs).⁴⁵ Within the framework of the federal constitution, the states have limited sovereign powers in certain areas, which they exercise through their own legislative, executive, and judicial systems. Most legislation is in the hands of the Federation, whereas the states are primarily responsible for administration. The federalism principle, in other words, the construction of the federal territory out of autonomous states with their own constitutional orders, is of crucial importance for spatial structure and development in Germany, since, unlike in centralised, unitary countries, this system lends greater weight to regional particularities and initiatives, and favours the development of numerous economic, cultural, and political centres, as well as more balanced spatial structures. The relationship between the Federation and the states has been reorganised with respect to legislative competence under the so-called “federalism reform”⁴⁶ (cf. details in chapter 2.2.1).

2. The Political System

2.1 General Description of the Political System

As the preceding sections have shown, the Basic Law specifies representative democracy as the organising principle for government in the Federal Republic of Germany. State authority is not exercised directly by the people; they delegate it to elected, representative or parliamentary bodies.⁴⁷ At the federal level, the parliamentary body is the Federal Diet (*Bundestag*), in each state the state diet (*Landtag*), in counties the county council (*Kreistag*), in cities the city council (*Stadtrat*), in municipalities (*Gemeinden*) the municipal council (*Gemeinderat*).

These assemblies enjoy particular legitimacy, since they are the constitutional bodies directly chosen by the people.⁴⁸ The Deutscher Bundestag elects the Federal Chancellor, each Landtag elects the minister president of the given state. At the local government level, arrangements differ considerably depending on the applicable local government constitution.⁴⁹ But what they all have in common is that the representative body (by whatever name it is known, *Gemeinderat*, *Gemeindevertretung*, or *Rat*) is elected by the citizenry. Under the North German council constitution, for instance, the council is competent in all matters. It chooses its chairman, usually with the title of mayor (*Bürgermeister*) and the chief executive (*Gemeindedirektor*), who heads the administration. Under the South German council constitution, by contrast, both the council and the mayor are directly elected. The

⁴⁴ Cf. Katz, Staatsrecht, Rn. 243.

⁴⁵ Cf. Katz, Staatsrecht, Rn. 243.

⁴⁶ Cf. *Gesetz zur Änderung des Grundgesetzes* of 28 August 2006, BGBl. I 2034.

⁴⁷ Cf. Katz, Staatsrecht, Rn. 149, 76.

⁴⁸ Cf. Katz, Staatsrecht, Rn. 149, 76.

⁴⁹ The arrangements in force in non-city states include the North German and South German council constitutions (*Ratsverfassung*), the collegiate executive constitution (*Magistratsverfassung*), and the mayoral constitution (*Bürgermeisterverfassung*).

mayor is ex officio chairman of the council and head of the municipal administration as a public authority.⁵⁰

Article 20 of the Basic Law stipulates the separation of legislature, executive, and judiciary. Over the past 50 years, the accent in relations between executive and legislature has shifted from a separation of powers to an “interlinkage of powers.”⁵¹ Apparently, the traditional tasks of government – defining government policy at the highest level and governing the country – are now, so to speak, carried out jointly by parliament and government.⁵² Nevertheless, the classical tension between parliament and government persists to a certain degree in discharging governmental functions.⁵³ However, in constitutional reality, this dualism has clearly been more and more displaced by political cleavage between government / governing coalition and opposition.⁵⁴

The power of the Federal Government is checked and controlled by:

- the opposition in the Bundestag,
- the federalism principle with the distribution of government functions and powers between federal, state, and local government,
- the independent judiciary, especially the powers of the Federal Constitutional Court (*Bundesverfassungsgericht*), and
- public opinion.⁵⁵

2.2 The Federal Level of the Political System

The constitutional bodies or institutions of the Federal Republic of Germany are:

- the Deutscher Bundestag (or Federal Diet),
- The Bundesrat (or Federal Council),
- the Federal President,
- the Federal Government, and
- The Federal Constitutional Court.

Deutscher Bundestag (Federal Diet)

The Deutscher Bundestag is the parliament of the Federal Republic of Germany. It represents the German people in the exercise of state authority. It is the supreme popular representative body of the Federal Republic of Germany.

The Bundestag is elected by direct universal suffrage in a free and secret ballot for a four-year term. It has a statutory membership of 598.⁵⁶ As a rule, members of the Bundestag are organised in parliamentary groups (*Fraktionen*). The term is applied to a grouping of all the members of parliament who belong to one political party. A parliamentary group currently consists of at least 30 members.⁵⁷ The parliamentary work of the Bundestag is characterised by a division of labour. Much parliamentary work takes place in committees. The present, 16th Bundestag has 22 standing

⁵⁰ Cf. details in Bundesakademie für öffentliche Verwaltung im Bundesministerium des Innern, Bonn/Bayerische Verwaltungsschule (eds.), *Kommunale Selbstverwaltung. Handbuch der Internationalen Rechts- und Verwaltungssprache*.

⁵¹ Cf. Katz, *Staatsrecht*, Rn. 399.

⁵² Cf. Katz, *Staatsrecht*, Rn. 399.

⁵³ Cf. Katz, *Staatsrecht*, Rn. 399.

⁵⁴ Cf. Katz, *Staatsrecht*, Rn. 399.

⁵⁵ Cf. Pötzsch, *Die deutsche Demokratie*, 67 ff.

⁵⁶ Cf. Stein/Götz, *Staatsrecht*, 75.

⁵⁷ Cf. Badura, *Staatsrecht*, E Rn. 33

committees.⁵⁸ The job of these committees is to discuss bills and other initiatives, and thus to prepare the decisions of the Bundestag. In addition to the standing committees, which are constituted at the beginning of the legislative period, there are ad hoc committees set up from time to time for a special purpose, which are dissolved once that purpose has been fulfilled (e.g., committees of inquiry).

Membership of the committees is determined by the parliamentary groups in proportion to their numerical strength. Parliamentary groups prepare committee work in internal working circles and groups.⁵⁹

The Bundestag chooses its president and vice-presidents from among its members (Article 40 (1) sentence 1 of the Basic Law). They form the Presidium of the Bundestag. The Council of Elders is composed of the Presidium and a further 23 members. It liaises between Presidium and parliamentary groups. The functions of the Bundestag President include representing the Bundestag, organising its business, and exercising proprietary and police powers.

The Bundestag elects the Federal Chancellor, exercises parliamentary control over the Federal Government, adopts the budget, and controls finances.

The Bundestag is the legislative body at the federal level. The legislative powers of the Federation and the states, as well as the requirement of Bundesrat assent for certain legislation were reorganised in the course of the so-called “federalism reform” in 2006.⁶⁰ The main changes include:

- the abolition of framework legislation (Article 75 of the unamended Basic Law),
- reorganisation of the catalogue of the Federation’s exclusive legislative powers,
- reorganisation of the catalogue of concurrent legislation in conjunction with a reduction in the area of application of the requirements clause under Article 72 (2) of the Basic Law and introduction of a derogation clause in certain areas of legislation,
- abolition of the assent rights of the Bundesrat pursuant to Article 84 (1) of the Basic Law and introduction of new cases requiring assent to federal legislation involving considerable costs for the states (Article 104a (4) of the Basic Law).⁶¹

Article 73, points 1 to 14 of the Basic Law lists the areas in which the *Federation* has *exclusive legislative powers* to regulate matters uniformly for all states. The main fields are foreign affairs; defence; border protection; currency, money, and coinage; matters relating to the registration of residence or domicile and to identity cards; air transport; and protection against international terrorism.⁶² Article 72 (1) of the Basic Law gives the states the right to pass laws in matters of *concurrent legislation* as long as and to the extent that the Federation does not exercise its legislative powers. Among the pertinent areas listed under Article 74, points 1 to 33, are civil law, criminal law, economic and labour law, real property transactions, land law (except for laws respecting development fees), the law relating to housing benefit, the regulation of assistance with old debt, road transport, waste disposal, clean air and noise abatement, nature conservation and landscape management, spatial planning, civil service law, as well as admission to higher education, and higher educational degrees. While under the old legal conditions, the Federation had to furnish evidence of the necessity for regulation by federal law in all matters of concurrent legislation, the proof required under Article 72 (2) of the Basic Law (unamended) now applies

⁵⁸ Cf. Pötzsch, *Die deutsche Demokratie*, 57 ff.

⁵⁹ Cf. Stein/Götz, *Staatsrecht*, 75.

⁶⁰ *Grundgesetz für die Bundesrepublik Deutschland* of 23 May 1949 (BGBl. 1949, 1), amended by statute on 28.08.06 (BGBl. I 2034).

⁶¹ Cf. BR-Drs. 651/06, 04. 09. 06.

⁶² Cf. Katz, *Staatsrecht*, Rn. 425, 214.

only to matters listed in Article 74 (1) points 4, 7, 11, 13, 15, 19a, 20, 22, 25, and 26 of the Basic Law (unamended). If the Federation exercises its right of concurrent legislation, the states may legislate for deviating arrangements in the areas listed in Article 72 (3) points 1 to 6. They include spatial planning, land distribution, as well as nature conservation and landscape management (except for the general principles of nature conservation, the law relating to species conservation or marine nature conservation).

Bundesrat (Federal Council)

Through the Bundesrat or Federal Council, the states participate directly in the decision-making and legislative processes of the Federation (“Chamber of the States”). The federalism principle requires a governmental institution that both defends the interests of the constitutive states in the political and legislative decisions of the Federation and acts as a mediator and intermediary institution between the Federation and the states.⁶³ The Bundesrat is composed of members of state governments. Depending on their population, the 16 states delegate between 3 and 6 members to the council (Article 51 of the Basic Law). The minister presidents and ministers of the respective states can be members of the Bundesrat.⁶⁴ From the city states of Berlin, Hamburg, and Bremen, mayors and senators may be delegated. State secretaries can be members of the Bundesrat if they have cabinet rank. The votes of each state government must be cast en bloc. In contrast to members of the Bundestag, who exercise a free mandate, members of the Bundesrat are bound by the instructions of their state government and can be instructed on how to vote (imperative mandate).

The minister presidents of the states are each elected President of the Bundesrat in turn for a period of one year. His duties include convening and chairing plenary sessions. The President of the Bundesrat deputizes for the Federal President (Article 57 of the Basic Law).

The Presidium of the Bundesrat includes the President and three vice-presidents. The main tasks of the Presidium are the annual preparation of the budget and decision making on certain internal matters unless they are the concern of the plenum.

As in the Bundestag, much of the actual work of the Bundesrat is carried out in committees. For this purpose, the Bundesrat has set up 16 functional committees grouping the relevant ministers from each of the states.⁶⁵

The constitutional status and importance of the Bundesrat is grounded essentially in its legislative rights, since certain laws require its assent. The Basic Law stipulates what categories of law are concerned. They include:

- laws amending the constitution, which require a two-thirds majority;
- federal laws dealing with government liability and with the status rights and duties of civil servants of the states, local authorities and other corporations under public law, and of judges in the states, with the exception of matters concerning careers, remuneration and pensions and related benefits (Article 74 (2) as amended);
- federal legislation regulating administrative procedures of the states without derogation options (Article 84 (1) sentences 5 and 6 of the Basic Law as amended; where derogation is possible and a state has adopted diverging provisions pursuant to Article 84 (1) sentence 2 of the Basic Law as amended, such provisions come into effect at the earliest six months after promulgation

⁶³ Cf. Katz, Staatsrecht, Rn. 369, 188 f.

⁶⁴ Cf. Katz, Staatsrecht, Rn. 375, 190.

⁶⁵ Cf. Pötzsch, Die deutsche Demokratie, 2004 70 ff.

unless otherwise provided with the assent of the Bundesrat (Article 84 (1) sentence 3 of the Basic Law as amended;

- general administrative rules of the Federal Government (Article 84 (2) of the Basic Law;
- federal legislation that commits the states to cash and non-cash expenditures or comparable services for third parties, which is to be implemented by the states in their own right or on behalf of the Federation (Article 104a (4) as amended).

With respect to other legislation, the Bundesrat may enter an objection to a law adopted by the Bundestag, which can be overruled by a majority of the members of the Bundestag. If the Bundesrat adopts the objection by a majority of at least two thirds of its votes, its rejection by the Bundestag requires a two-thirds majority, including at least a majority of the members of the Bundestag (Article 77 (3) and (4) of the Basic Law).

The Bundespräsident (Federal President)

The Federal President is the head of state of the Federal Republic of Germany and represents the country at international law vis-à-vis other countries; foreign policy itself, however, is in the hands of the Federal Government.⁶⁶ Although the Federal President's functions are predominantly ceremonial, his neutral position allows him to help reconcile political interests and provide the citizens with guidance on socio-political issues.⁶⁷

Apart from his ceremonial and external representative duties, the Federal President exercises certain other rights. However, he may do so only in collaboration with other constitutional institutions. His instructions and orders are valid only with the assent of the Federal Chancellor or the competent federal minister. They assume full political responsibility. The Federal President himself bears no direct responsibility. This applies with regard to:

- the signing of laws
- the appointment of federal ministers,
- the appointment of federal judges, federal civil servants, officers and non-commissioned officers, and
- the prerogative of pardon.⁶⁸

The Federal President may act independently only in situations of crisis:

- If a candidate for the chancellorship fails to obtain an absolute majority on the third ballot, gaining only a simple majority, the Federal President may appoint him/her or dissolve the Bundestag to enable a new general election (Article 63 (4) of the Basic Law).
- If the Federal Chancellor obtains no majority on a vote of confidence, the Federal President may dissolve the Bundestag on the proposal of the Federal Chancellor.⁶⁹

The Federal President is not directly elected by the people but by a Federal Assembly (*Bundesversammlung*) convened for this purpose alone. It consists of the members of the Bundestag and an equal number of members elected by the parliaments of the states on the basis of proportional representation (Article 54 (2) of the Basic Law). These delegates need not be members of a Landtag.⁷⁰ The 12th Federal Assembly, which met on 23rd May 2004 and which elected the incumbent

⁶⁶ Cf. Badura, Staatsrecht, E Rn. 86, 508.

⁶⁷ Cf. Katz, Staatsrecht, Rn. 384, 195 f.

⁶⁸ Cf. Katz, Staatsrecht, Rn. 385 ff., 196 f.

⁶⁹ Cf. Badura, Staatsrecht, E Rn. 81, S. 506.

⁷⁰ Cf. Badura, Staatsrecht, Rn. 382, 194 f.

Federal President, had a membership of 1205.⁷¹ Any German who is entitled to vote in Bundestag elections and has attained the age of forty may be elected Federal President (Article 54 (1) of the Basic Law). The person receiving the votes of a majority of the members of the Federal Assembly is deemed elected. If after two ballots no candidate has obtained such a majority, the person who receives the largest number of votes on the next ballot is elected (Article 54 (6) of the Basic Law). He is appointed for a term of five years. Reelection for a consecutive term is permitted only once (Article 54 (2) of the Basic Law).

Bundesregierung (Federal Government) and Bundeskanzler (Federal Chancellor)
Executive power is vested in the Federal Government.⁷² The Federal Government handles the governmental and political business incumbent on the Federation.⁷³ The action of the Federal Government is determined by three principles laid down by Article 65 of the Basic Law:

- the chancellor principle,
- the departmental principle, and
- the collegial principle.⁷⁴

The Federal Government consists of the Federal Chancellor and the federal ministers. The Federal Government is a collegial body in which the Federal Chancellor occupies a prominent position because he or she determines and bears responsibility for the general guidelines of policy. This power lends the Chancellor the leading role in the cabinet, since he/she cannot be outvoted by a majority in the cabinet (chancellor principle).⁷⁵ Federal ministers manage the area of responsibility assigned to them independently and on their own responsibility within the framework of the government policy guidelines set by the Chancellor (departmental principle).⁷⁶ The Federal Minister of Transport, Building, and Urban Development is responsible for spatial planning at the federal level.

The Federal Chancellor is elected by a majority of the members of the Deutscher Bundestag. If after two ballots no candidate has obtained a majority, the candidate winning the highest number of votes is elected. If the absolute majority is not obtained on the third ballot, the Federal President may dissolve the Bundestag and call new elections if he does not see fit to appoint the candidate thus elected. Federal ministers are appointed and dismissed by the Federal President upon the proposal of the Federal Chancellor.

The Federal Chancellor is accountable to the Bundestag. The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its members and requesting the Federal President to dismiss the Chancellor. The Federal President must comply with the request and appoint the person elected (Article 67 (1) of the Basic Law). This process is termed a constructive vote of no confidence.

Bundesverfassungsgericht (Federal Constitutional Court)

⁷¹ Cf. Fehndrich, Martin, Die 12. Bundesversammlung 2004, <http://www.wahlrecht.de/lexikon/bundesversammlung-2004.html>, accessed on 31.07.2006

⁷² The concept "executive power" is not to be understood in the narrow sense of merely carrying out laws but in a broader sense as the sum of governmental and administrative activities. Cf. Katz, Staatsrecht, Rn. 396, 200.

⁷³ Cf. Badura, Staatsrecht, E Rn. 89,509 f.

⁷⁴ Cf. Katz, Staatsrecht, Rn. 408, 205.

⁷⁵ Cf. Badura, Staatsrecht, E Rn. 90, 510.

⁷⁶ Cf. Katz, Staatsrecht, Rn. 410, 206.

The Federal Constitutional Court is both an independent constitutional body and part of the judiciary with competence for constitutional and international law. Its chief responsibilities are to assess the compatibility of federal and state law with the Basic Law, to decide conflicts between federal institutions or with the states, and to hear constitutional appeals brought by citizens or local authorities.⁷⁷ The work of the Federal Constitutional Court contributes to enhancing the reputation and effectiveness of the free democratic basic order, especially in enforcing basic rights. The decisions of the Federal Constitutional Court are binding on the constitutional institutions of the Federation and the states and on all courts and public authorities (Article 31 (1) of the Basic Law).

Types of proceeding before the courts include constitutional appeal, concrete and abstract judicial review, inter-institutional disputes, disputes between the Federation and the states, and competence surrogation with respect to concurrent legislation.

The court is composed of two senates and six chambers with differing substantive competence. The Federal Constitutional Court consists of federal judges. Half the members of the court are chosen by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding institutions of a state. (Article 94 (1) of the Basic Law). They are appointed for a single term of 12 years. There is an age limit of 68 years. The judges wear scarlet robes with a white jabot.

The seat of the Federal Constitutional Court is Karlsruhe.

2.3 The State Level of the Political System⁷⁸

In keeping with the federal principle of government, the states have their own constitutions and territories, as well as independent state power encompassing legislature, executive, and judiciary.⁷⁹ The federal principle is among the inviolable constitutional principles in Germany. However, the number and boundaries of states can be modified. The national territory can be reorganised pursuant to the Basic Law.⁸⁰ The creation of economically more efficient, larger states by restructuring the constitutive states of the Federation has therefore been a constant subject of discussion in Germany. The only measure so far taken in this direction has been to form the state of Baden-Württemberg from three smaller states (1952).⁸¹

The 16 states differ widely in population and size of territory. Whereas the three most populous states (North Rhine-Westphalia, Bavaria, and Baden-Württemberg) all have a population of well over 10 million, the city states of Bremen and Hamburg, as well as the non-city states of Mecklenburg-West Pomerania and Saarland have fewer than 2 million. The territory of the smallest non-city state, Saarland, is only 4% the size of the largest, Bavaria.

⁷⁷ Cf. Badura, Staatsrecht, H Rn. 50, 692.

⁷⁸ The common structure of the COMMIN Project provides for a description of the “regional level” of the political system in chapter 2.3. It should be noted that the states (*Bundesländer, Länder*) are regions for European purposes (e.g., as EFRE programme areas (NUTS 1)), but, unlike regions in other European countries, they possess statehood, so that in German linguistic usage they cannot be referred to as regions. However, the concept *Region* is used in Germany for the planning areas subject to regional planning. These planning regions are situated between states and counties. There are considerable differences in their territorial extent and definition between the states (see chapter 3.4).

⁷⁹ Cf. Katz, Staatsrecht, Rn. 70, 28.

⁸⁰ Cf. Badura, D Rn. 71, 339 f.

⁸¹ Cf. Badura, D Rn. 71, 339 f.

The states perform the governmental functions assigned to them by the Basic Law and the state constitution. The focus of their activities is in the administrative field⁸² and in their contribution to federal legislation, which they provide through the Bundesrat in respect of laws requiring the assent of the states.⁸³

From the constitutional point of view, local authorities form part of the states. The local government level, which is extremely important with regard both to its constitutional status (“local self-government”) and its actual significance, for instance in the field of spatial planning (“local planning autonomy”), is dealt with in chapter 3.4.

Landtag (State Diet)

The legislative body of a state is the state parliament (known as *Landtag* in non-city states, as *Bürgerschaft* in the city states of Bremen and Hamburg, and *Abgeordnetenhaus* in Berlin).⁸⁴ The states have the right to legislate unless the Basic Law grants the Federation exclusive legislative powers or the Federation fails to exercise its right of concurrent legislation (cf. details in chapter 2.2.1).

The state parliament is the representative assembly in the state. It is the only government institution that has direct, democratic legitimacy, in that it is elected by the people. Apart from legislation, the Landtag has the task of electing the Minister President and supervising the exercise of executive power by the state government.

Landesregierung (State Government)

The governments of the states (termed *Landesregierung*, except in Bavaria, Saxony, and Thuringia, where they are called *Staatsregierung* and in the city states of Berlin, Bremen, and Hamburg where the name is *Senat*) consist of the Minister President (*Ministerpräsident*) and the ministers. The Minister President – or Governing Mayor (*Regierender Bürgermeister*) in the city states Bremen, Hamburg, and Berlin – is elected by the state parliament.⁸⁵ The Minister President / Governing Mayor is responsible for appointing and dismissing ministers, in some states with the assent of state parliament. Every state has a minister whose portfolio includes spatial and state spatial planning.

State Courts and Tribunals

State court systems usually have several tiers: e.g., ordinary courts: local court, regional court, higher regional court; or administrative courts: administrative court, higher administrative court.

3. The Administrative System

3.1 General Description, History of the Administrative System and Key Data

In contrast to many other European countries, the Federal Government in Germany possess a local administrative machinery of its own in very few fields. As a rule, states and local authorities are responsible for administration. The Basic Law lays down that the exercise of governmental powers and the discharge of governmental

⁸² Cf. Stein/Götz, Staatsrecht, 109.

⁸³ Cf. Badura, Staatsrecht, F Rn. 50, 566.

⁸⁴ Cf. Stein/Götz, Staatsrecht, 142.

⁸⁵ Cf. Stein/Götz, Staatsrecht, 142.

functions is incumbent on the states except as otherwise provided or permitted by the Basic Law (Article 30).

The Basic Law distinguishes the following categories of administration:

- direct implementation of federal laws by the Federation (Article 86 ff.),
- implementation of federal legislation by the states on behalf of the Federation (Article 85),
- administration in joint responsibility (Articles 91a and 91b),
- implementation of federal legislation by the states in their own right (Article 83),
- implementation of state legislation by the states (Articles 30, 83 ff.)⁸⁶⁸⁷

3.2 Federal Administration

Since the states are primarily responsible for administration, the Federation has only a relatively thin network of administrative authorities throughout the country.⁸⁸ In the implementation of federal legislation by federal authorities, a distinction can be drawn between *direct federal administration* (*unmittelbare Bundesverwaltung*) for which the Federation sets up a system of public authorities, for some areas with its own substructures at all levels (e.g., foreign service, federal financial administration, federal police), and *indirect federal administration* (*mittelbare Bundesverwaltung*), which is the implementation of laws by independent federal corporations or institutions established under public law. Use has been made of this system in the field of social security (e.g., Federal Agency for Employment or German Pension Insurance). The following section deals with the various levels of direct federal administration.

Figure: Structure of Federal Authorities

Supreme Federal Authorities

They include the Federal President, the Federal Chancellery (Bundeskanzleramt), the federal ministries, and the Federal Audit Office (Bundesrechnungshof).⁸⁹

Higher Federal Authorities

Higher federal authorities are hived-off, autonomous and centralised government agencies responsible for the entire national territory. They are under the control of the competent federal ministry. Important higher federal authorities are the Federal Environmental Agency, the Federal Statistical Office, the Federal Motor Transport Authority, and Federal Office of Civil Aviation, and the Federal Armed Forces Administrative Office.⁹⁰

Intermediate Federal Authorities

⁸⁶ Cf. Katz, Staatsrecht, Rn. 465.

⁸⁷ The changes introduced by the 2006 federalism reform should be noted. Cf. *Grundgesetz für die Bundesrepublik Deutschland* of 23 May 1949 (BGBl. 1949, 1), amended by statute on 28.08.06 (BGBl. I 2034).

⁸⁸ Cf. Katz, Staatsrecht, Rn. 468.

⁸⁹ Cf. Katz, Staatsrecht, Rn. 468.

⁹⁰ Cf. Badura, Staatsrecht, G Rn. 73 ff., 633

Intermediate federal authorities are subordinated to a supreme federal authority. They have jurisdiction over only part of the national territory.⁹¹ Important intermediate federal authorities are regional finance offices, military district offices, and regional waterways and shipping directorates.

Lower Federal Authorities

Lower federal authorities are subordinated to higher and intermediate federal authorities. They are competent for an even more limited section of the national territory within the responsibility of the superior authority.⁹² Examples are principal customs offices and district draft boards.

3.3 State Administration

At the state level, the following constellations can be distinguished: *delegated federal administration* (or *state administration on behalf of the Federation*) provides for the states to discharge administrative functions for the Federation. In spatial planning, the most important example of delegated federal administration is the planning, building, and maintenance of federal motorways and highways. *State administration*, in contrast, is concerned with *carrying out state laws* and *carrying out federal laws* that do not as a rule belong to a different type of administration. The states discharge these functions in their own right. Administrative competence and structures in the states, as at the federal level, are extraordinarily differentiated from a legal, organisational, and material point of view because administration is organised by the states themselves. *State administration* performs tasks within the exclusive remit of the state.⁹³ This is the case with schools, the police, and state spatial planning. Moreover, most federal laws are also carried out by the state in its own right and responsibility. This is the case for urban planning law, industrial law, and for much of environmental law.

Organisational Aspects

Administrative structures in the states are characterised by collaboration between public authorities (direct public administration) and local autonomous agencies (indirect public administration).⁹⁴

Figure: State Administrative Structures

The *highest level of general public administration* is constituted by state ministries with their specific areas of responsibility (e.g., finance, economics, justice).⁹⁵

The *intermediate level of public administration* in most states is entrusted to administrative districts, termed *Regierungsbezirke*. With the exception of the city states and smaller non-city states like Brandenburg, Mecklenburg-West Pomerania, and Saarland, the states have divided their territory into such administrative districts each with a district authority (*Regierungspräsidium*).⁹⁶ These district authorities (called *Bezirksregierung* in some states) discharge all functions in the district not

⁹¹ Cf. Katz, Staatsrecht, Rn. 468, 233.

⁹² Cf. Katz, Staatsrecht, Rn. 468, 233.

⁹³ Cf. Katz, Staatsrecht, Rn. 472, 235.

⁹⁴ Cf. Badura, Staatsrecht, G Rn. 52 ff., 617 ff.).

⁹⁵ Cf. Badura, Staatsrecht, G Rn. 53, 617.

⁹⁶ Lower Saxony, however, a relatively large non-city state has recently abolished these intermediate authorities.

entrusted to special purpose authorities. District authorities are responsible for horizontal coordination, as well as vertical mediation and supervision functions between ministries and both lower state authorities and local authorities/municipalities. This intermediate authority is headed by a chief executive with the title of *Regierungspräsident*. Among the major functions of the *Regierungspräsidium* is state spatial planning.

The lower level of public administration in the states is formed by counties (*Landkreise*) each under a county administration (*Landratsamt* or *Kreisverwaltung*) or the mayor's offices (*Bürgermeisterämter*) of county-free cities (*kreisfreie Städte*). In these county-free cities, which are generally cities with a population of over 100,000, the county and municipal level coincide. Some governmental functions are discharged by the mayor's office of major county towns (*große Kreisstädte*). A *große Kreisstadt* is a larger town or city forming part of a county. If, in its capacity as a lower administrative authority, it performs government functions (e.g., as building authority), it is bound by instructions and subject to functional supervision by the district authority (*Regierungspräsidium*).⁹⁷

In addition to the general state administration outlined above (district authorities and counties), there are special public authorities at the intermediate and lower levels of administration with various degrees of specialisation (e.g., state school authority with central and local supervisory boards (*Oberschulamt* and *Schulamt*)). In this context, too, various models of administrative organisation have been adopted by the different states.

3.4 Local Self-Government.

At the local government level, a distinction is to be drawn between territorial authorities (*Gebietskörperschaften*) and other local bodies. Territorial authorities are bodies governed by public law with jurisdiction over their territory. Territorial authorities include municipalities forming part of a county (*kreisangehörige Gemeinden*) and county-free cities (*kreisfreie Städte*). In contrast, counties, districts, and other local authorities discharge functions assigned to them either by statute or by-law.

Municipalities (*Kommunen*), as corporate local self-governing bodies, have the right to manage all the affairs of the local community on their own responsibility within the limits set by law (self-government tasks). In this respect they are exempt from direction and subject only to supervision limited to the question of the legality of administrative activities.⁹⁸ Over and beyond this, they are required to perform certain functions on behalf of the federal and state governments (delegated functions).

Municipalities/Local Authorities

Number and Structure of Local Authorities in Germany

Germany contains over 13,000 local authorities. In the 117 county-free cities in Germany, the municipality and county coincide. Around one third of Germany's population live in such independent cities. The size of local authorities varies considerably, depending on differences in settlement structure and in state policy on merging communities (local authority territorial reorganization). Thus, North Rhine-

⁹⁷ Cf. Badura, Staatsrecht, G Rn. 53, 617.

⁹⁸ Cf. Badura, Staatsrecht, D Rn. 92, 356 f.

Westphalia, with a population of 18 million, has just under 400 local authorities, whereas Rhineland-Palatinate, with 4 million inhabitants, has over 2,300.⁹⁹

Local Authority Functions

From a legal point of view, a distinction can be made in terms of the degree of responsibility and autonomy that local authorities enjoy in assuming and discharging functions:¹⁰⁰

- In the first place, they are concerned with the affairs of the local community, with respect to which the local authority acts within its own remit (self-government tasks). So-called “self-government tasks” can be matters that a local authority is under obligation to handle (mandatory functions) – like urban land-use planning – or non-mandatory functions with regard to which the local authority decides itself whether or not to take action – like culture or sport. To ensure the effective performance of their autonomous functions, municipalities have the right to adopt bye-laws as generally binding legislation for managing the affairs of the community.¹⁰¹
- In second place, there are delegated functions, i.e., federal or state government functions that the local authority discharges on behalf of these higher levels of government. Such tasks are delegated functions or mandatory functions to be performed as directed.

In performing self-government tasks, local authorities are subject only to supervision of the legality of these administrative activities, while delegated functions and mandatory functions to be performed as directed are also subject to functional or special supervision.¹⁰²

Figure: Functions of Local Authorities, e.g., Figure: Informationen zur politischen Bildung 242, 19)

Local Government Finance

Local government revenue comes primarily from taxes, charges, and contributions, and from federal and state government allocations. The importance of the various sources of income differs in West and East Germany. Whereas the most important source of revenue for West German local authorities in 2005 was taxes, which provided 40% of income, the most important source of revenue in East Germany was federal and state government allocations, which made up no less than 60% of local authorities' revenues.¹⁰³ The most important source of income for local authorities is trade tax (*Gewerbesteuer*), which is levied on the earnings of businesses in the community, and the local authority share in income tax levied by the Federal Government, which is distributed in terms of the taxpayer residence. With respect to both trade tax and real property tax, local authorities have the right to set their own assessment rates. In view of the two most important sources of tax revenue, local authorities can benefit both from flourishing businesses (trade tax) and affluent residents (local authority share of income tax). A system of local financial equalisation between the local authorities of a state (horizontal financial equalisation)

⁹⁹ Cf. Wehling/Kost, *Kommunalpolitik in der Bundesrepublik Deutschland – eine Einführung*, in idem. (eds.), *Kommunalpolitik in den deutschen Ländern*, 14 f.

¹⁰⁰ Cf. Schmidt-Eichstaedt, *Städtebaurecht*, 42.

¹⁰¹ Cf. Badura, *Staatsrecht*, D Rn. 93, 360 f.

¹⁰² Cf. Schmidt-Eichstaedt, *Städtebaurecht*, 42 f.

¹⁰³ Own calculations on the basis of Karrenberg/Münstermann, *Gemeindefinanzbericht 2005*, in: *Der Städtetag*, Heft 5, 2005, 13 ff.

and between local authorities and the state (vertical financial equalisation) ensures a certain harmonisation of local financial strength.

Administrative costs (personnel and material) were the biggest item of expenditure (some 50%) in 2005 in both West and East Germany. The second biggest expenditure item (25%) was social security. Spending on fixed assets currently accounts for 12% of expenditure by local authorities in West Germany and 16% in East Germany.¹⁰⁴

Local Government Constitutions

The institutions of local authorities and their powers are determined by local government constitutions or local government acts. For historical reasons, they differ considerably from state to state. In the 1990s, however, major moves towards harmonisation were undertaken. Common to all states is the basic structure of local government with a local representative assembly (local council) elected by residents (*Gemeinderat/Stadtrat*), which is the political decision-making body, together with a local administration (*Kommunalverwaltung*) headed by a mayor (*Bürgermeister*, and in large cities *Oberbürgermeister*).

The figure gives a schematic outline of the local government constitution in Baden-Württemberg and Bavaria (South German council constitution)

Figure: South German Council Constitution: Informationen zur politischen Bildung 242, 19, top)

In the majority of states, the mayor is both chairman of the local council and chief executive of the administration. A few states restrict the functions of the mayor to heading the administration, providing for separate leadership of the council (e.g., Brandenburg, Mecklenburg-West Pomerania, Lower Saxony).

Local Administrative Organisation

The following figure provides an overview of the individual areas of responsibility in German local public administration. The division of the administrative apparatus into separate departments, sections, and offices depends on the size of the community in question.

Figure: Organisation of Local Public Administration, e.g., Figure: Informationen zur politischen Bildung 242, p. 18)

Generally speaking, the local council and local administration are the institutions which provide the citizenry with solutions for the problems directly affecting them and which deliver the most necessary services. It is becoming more and more apparent that the growing need for regional coordination in spatially relevant planning and activities is tending to shift major decision-making from the local level to the regional, state, or even national level. Local authorities therefore find themselves increasingly caught between local government autonomy and the necessity to comply with or take account of supra-local planning projects.

Groupings of Local Authorities

In some states, a number of local authorities can collaborate in a joint organisation to perform administrative functions. These associations of local authorities differ in

¹⁰⁴ Cf. Karrenberg/Münstermann, Gemeindefinanzbericht 2005, in: Der Städtetag, Heft 5, 2005, 13 ff.

name from state to state: *Verwaltungsgemeinschaft*, *Samtgemeinde*, *Verbandsgemeinde*, or *Amt*. The so-called *Amtsgemeinde* model found favour particularly in the new states of East Germany with their very small-scale local authority structures (e.g., Brandenburg). It offers a fitting combination of community democratic structures (small municipalities with their own local council) and adequate administrative resources (an administrative authority serving several associated municipalities). The competencies of municipalities can be transferred voluntarily (Section 203 (1) of the Building Code) or by force of law (Section 203 (2)) to another territorial authority or association, or to united municipalities, associations of administrations or other comparable statutory groupings of local authorities charged under state law with the discharge of autonomous local government functions. Section 204 of the Building Code provides for joint preparatory land-use plans and urban land-use planning in the context of planning associations and in the event of local government reorganisation. Section 205 of the Building Code provides for the creation of planning associations. Section 9 (6) of the Federal Spatial Planning Act provides for joint preparatory land-use plans.

Counties

The 323 counties in Germany are territorial authorities with the right of self-government provided that their autonomous functions have been transferred to them by law or bye-law. The territory of a county encompasses a number of municipalities (*kreisangehörige Gemeinden*). The county performs functions beyond the administrative and financial capacity of smaller municipalities (e.g., hospitals, vocational training schools, special schools), or where supra-local arrangements are in the nature of the task, as in the construction of county roads or for public transport. On the other hand, counties, being lower administrative authorities, are also charged with government tasks assigned to them by law. The administrative institutions of a county are the county council (*Kreistag*), the popularly elected political decision-making body, and the chief executive or county administrator, the *Landrat*. The Landrat is both chairman of the county council and head of the county administration. County constitutions can differ considerably from state to state. For instance, in some states the Landrat is directly elected by the people and in others he or she is chosen by the county council. The names of bodies also differ.

3.5 Further Information on the Administrative System and Links between the Different Levels and Institutions

Administrative Reform

Reform for all levels of administration has been under discussion mainly since the early 1990s. One issue – especially at the state level – has been the concentration or decentralisation of public authorities and administration, another – in which local authorities have played a pioneering role – has been the introduction of business-management models of administrative control with the aim of improving efficiency (“New Public Management”). In recent years, many local authorities have reformed administration, cutting staff, and spinning off or privatising divisions. This process is not yet at an end and, given the tight financial situation of many local authorities, is likely to intensify.

Financial System

The federal system of the Federal Republic of Germany requires the appropriate sharing of fiscal autonomy between the Federation and the states. Basically, the Federation and the states each have to bear the costs incurred in discharging their functions. In the case of functions delegated to the states, the Federation bears the costs. If the states implement federal legislation that involve expenditure, the participation of the Federation can be required by law.

In the overall interests of the economy, the Federation can grant the states financial aid for particularly important investments by states, counties, and local authorities.

The distribution of tax revenue between Federation, states, and local authorities is a central problem crucial for the survival and functioning of the entire governmental system. The sharing of proceeds from taxes and other levies between Federation, states, and local authorities (vertical financial equalisation) and equalisation between financially strong and financially weak states (horizontal financial equalisation) are accordingly issues that causes frequent political controversy. Particularly affected is the local level, for municipal income from taxes and charges is far from sufficient to cover local authorities' financial needs, so that they depend on compensation from higher levels of government. Overall, this is an unsatisfactory state of affairs and an increasing threat to local government autonomy.

Local Government Umbrella Organisations

Local authorities have no direct co-decisional competence at the state or federal level. However, via their umbrella organisations, local authorities play a role in policy making (e.g., through participation in hearings on state and federal bills). Local government umbrella organisations are voluntary groupings which defend the interests of local authorities vis-à-vis state and Federal Government. They include:

- the German Association of Cities and Towns (*Deutscher Städtetag*), grouping major cities,
- the German County Association (*Deutscher Landkreistag*), and
- the German Association of Towns and Municipalities (*Deutscher Städte- und Gemeindebund*), grouping smaller and medium-sized communities.