Basic Principles of Federalism in German Constitutional Law

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From Princely States to the German Empire

Rather federalist structure:
- Heiliges Römisches Reich (*Sacrum Romanum Imperium*) (10th century – 1806)
- Rheinbund of 36 princely States (1806)
- Deutscher Bund (1815)
- Norddeutscher Bund (1867): dominated by Preussen
- Deutsches Kaiserreich (1871)

Rather centralist structure:
- Deutsches Reich (so called Weimarer Republic) (1919)

Centralist structure
- Deutsches Reich (1933-45): Fascist dictatorship
From the German Empire to Modern Germany

After WW II:
- Foundation of German States (Länder) in occupied Germany

Different developments in East and West Germany after 1949:

Centralist structure:
- East German Democratic Republic (1949-90)
- Reunification/Affiliation (1990)

Federalist structure:
- West German Federal Republic (since 1949)
Modern German Constitutions

- Constitution of the German Empire 1849 ("Paulskirchenverfassung")
- Constitution of the first Republic 1919 (Weimarer Reichsverfassung)
- Nazi-fascist dictatorship 1933-45
- Constitution of the German Democratic Republic (1949-90) and
- Basic Law/Constitution of the Federal Republic of Germany of 1949 (Grundgesetz)
- Latter one “confirmed” after German reunification in 1990
Federalism in the German Constitution

Art. 20 – 37: Federation and States (*Bund* and *Länder*)

Art. 50 – 53: State Chamber (*Bundesrat*)

Art. 70 – 74: Federal Legislation

Art. 83 – 91 Execution of Federal Laws by the States and Federal Administration/Emergency

Art. 91a – 91e: Joint Tasks of Federation and States

Art. 104a – 115: Finances
The German States (Länder)

- 16 German States of which 3 are „City-States“
- Population varying from 6 lakh to 1.8 crore
- Each *Land* has its own *Constitution*, including provisions on fundamental rights
- „Better“ protection of fundamental rights than in the Federal Constitution is permissible
- Each Land has own *Parliament* with full legislative powers within the federal constitutional framework [Art. 70 – 74 *Grundgesetz*]
- Each *Land* has *Constitutional Court* with full jurisdiction on State Constitution and Laws
- Protection of fundamental rights under Federal Constitution guaranteed only by Federal Constitutional Court
Constitutional Principles and Right of Resistance

Article 20 Constitution

- The Federal Republic of Germany is a democratic and social federal 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.
- The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.
- All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.
Constitutional Order in the 16 States

Art. 28 Constitution

(1) The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law.

(2) [Rights of Municipalities]

(3) The Federation shall guarantee that the constitutional order of the Länder conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article.
Sovereign Powers of States and Execution of Federal Law

Article 30 Constitution

Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.

Article 83 Constitution

The Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.

[see also Art. 84-86]
Supremacy of Federal Law

Art. 31 Constitution

*Federal law shall take precedence over Land law.*

[But see Art. 70 – 74 GG on legislative powers]
Equal Citizenship

Article 33 Constitution

(1) *Every German shall have in every Land the same political rights and duties.*

[In fact, there is no State citizenship. See also slides on Citizenship in Germany]
Functions of the Bundesrat

Article 50 Constitution

(1) The Länder shall participate through the Bundesrat in the legislation and administration of the Federation and in matters concerning the European Union.

[with respect to European Union see also Art. 23]
State Chamber, not Second House of Parliament

Art. 51 Constitution

- The Bundesrat shall consist of members of the Land governments, which appoint and recall them. Other members of those governments may serve as alternates.

- Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.

- Each Land may appoint as many members as it has votes. The votes of each Land may be cast only as a unit and only by Members present or their alternates.
Division of Legislative Powers Between Federation and States

Art. 70 Constitution

(1) The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.

(2) The division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.
Constitutional Provisions on Legislative Powers

- **Precedence** for State legislation (rather theoretical) [Art. 70]

- **Exclusive** legislative powers of Federation [Art. 71 and list in Art. 73]

- **Concurrent** legislative powers of Federation and States according to list [Art. 72 and list in Art. 74]
Bills and Procedures

- Bills may be introduced in the Bundestag by the Federal Government, by the Bundesrat, or from the floor of the Bundestag [Art. 76 (1)]

- Within three weeks after receiving an adopted bill, the Bundesrat may demand that a committee for joint consideration of bills, composed of Members of the Bundestag and of the Bundesrat, be convened [Art. 77(2)]

- Different procedures for Bills that require consent of Bundesrat and those that do not [Art. 77(2a)-(4)]
Résumé

- 16 Länder with very different size and economic power
- Since 1949 well settled federal structure in FRG
- In general, most constitutional provisions are uncontested

- In reality, States much „weaker“ than provided by constitutional framework due to, *inter alia*:
  - Small size of some States
  - Lack of own financial resources
  - Delegation of many tasks by federal legislation with financial compensation from Federation
  - Unsound and „irrational“ distribution of legislative powers, especially sind last reforms (*Föderalismusreform*)
More information

Slides can be downloaded at:

www.hwr-berlin.de/prof/clemens-arzt/lehre/

Go towards end of page: „Lectures at Symbiosis Law School“

German Constitution in English:

www.gesetze-im-internet.de/englisch_gg/index.html

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