Subnational Constitutionalism in Germany

Ulrich Karpen, University of Hamburg

1. The Basic Law, Germany's constitution, came into force on May 23rd, 1949, established the federal system as an integrative one. After a 12 year break caused by the Hitler regime it replaced the Weimar Constitution of 1919, which, just like its predecessor, the Imperial Constitution of 1871, had established a federal state characterised by the principle of allegiance of the federation in the relationship between the federal government and the *Länder* and between the *Länder* themselves. While the federal state of the German Empire before 1806 came into existence by way of decentralisation through the creation of autonomous individual states (dutchies, principalities, a.s.o.), the creation of the federal state order in 1871 occurred in precisely the opposite direction and must be understood as a product of the amalgamation or accession of individual *Länder*. The Federal Republic of Germanyin terms of international law is identical with the Empire of 1871, the *Länder* are states in full sense. Thus Article 30 of the Basic Law (BL) lays down that the exercise of the state powers and the discharge of state functions is a matter for the *Länder*. Any divergence from this rule for the distribution of responsibilities had to be laid down in the BL. Nevertheless, even during the early days of the Federal Republic there were numerous interconnections between the responsibilities of the federal government and the *Länder*, i.e. no pure "dual federalism" as in the United States. The framework of responsibility e.g. in the field of legislation allowed the federal government from the very beginning to draw up such detailed regulations that the *Länder* hardly had any freedom to make decisions regarding their own political programmes.

2. Germany consists of 16 *Länder*, including three city states (Hamburg, Bremen and Berlin). The size of the *Länder* differs considerably. While the smallest *Land*, Bremen, has 680,000 inhabitants, the largest *Land*, North Rhine-Westphalia, has more than 17.9 million inhabitants, i.e. more than 25 times as many as Bremen. The composition of the German population which now consists of 82.1 million people is largely homogenous from the ethnic point of view. The German population is spread over a total area of 357.000 square kilometers. After 45 years of political division due to the East-West-conflict, the reunification of Germany took place in 1990, when the German Democratic Republic had collapsed politically and economically.

Five new *Länder*, which were established on the territory of the former GDR, joined the eleven of the "old" FRG and were covered by the Basic Law.

3. All subnational units, the *Länder*, like the Federation, have full quality of states, namely the competence to self-organisation, to writing their own constitutions, jurisdiction and cultural affairs, representation versus the Federation and other *Länder*, fiscal autonomy and equal treatment with all other *Länder*. All *Länder* have to fulfill the same tasks regardless of their size, number of inhabitants and economic or financial strength, and they have equal rights in dealing with the Federation. It is thus so called symmetric federalism, if one disregards the different weighting of votes in the Federal Council which may be addressed as being the "Second Chamber" of parliament. All *Länder* have their own constitutions, mostly "full constitutions" in the sense that they cover basic rights and organisation and functions of the state. In fact, most of the constitutions of the *Länder* have been adopted prior to the establishment of the Federal Republic and the coming into effect of the Basic Law (May 23rd, 1949). Many of the *Länder* constitutions have been amended after the establishment of the Federal Republic, following the main lines of the BL.

4. In accordance with the intentions of the founding fathers of the constitution, the BL was originally designed with a strongly decentralised system of federalism in mind. The BL lists the tasks and responsibilities of the Federation. Conversely, this means that all the tasks and responsibilities not mentioned there must be fulfilled by the *Länder* and the municipalities which are part of the constitutional domain of the *Länder*. So the residual power of the federal system rests with the *Länder* and their constitutions regulate on their discharge. The Federation is responsible for foreign relations, defence, a.s.o. Some matters – like schools, police a.s.o. – are completely in the responsibility of the *Länder*. The Federation and the *Länder* are jointly responsible – as detailled in different participation in legislation and administration – for all the other tasks, and here the Federation takes precedence. This includes civil law, criminal law, procedural law, a.s.o. Generally speaking, the Federation prevails in legislation, the *Länder* prevail in administration.

5. The *Länder* can write their own constitutions and, in addition to that of the Federation, they also have their own constitutional jurisdiction. The BL only is bound merely to create homogenous constitutional structures. Their constitution must be in accordance with the principles of the democratic and social state governed by the rule of law and must have a republican character (Article 28 BL). The observation of these principles can be examined by the Federal Constitutional Court and, in the most extreme case, it can be enforced by means of federal compulsion (Article 37 BL). Apart from this, the *Länder* are free to choose their own system

of government. The *Länder* can create their own organs of government and compliment the parliamentary system with processes of direct democracy. The direct election of the prime ministers in the *Länder* by the people would be permissible, but so far it has only been discussed and has not been introduced. All the members of government and senior civil servants in the *Länder* are elected or appointed. The Federation has no possibility of influencing the filling of these positions.

6. As a rule, the constitutions of the *Länder* were drafted and passed by the *Länder* parliaments. The same procedure is true for amendments. In general, a two-third majority of the members of the house is needed. In some *Länder* in addition a referendum is required. Even the initiative for an amendment may be taken by a referendum. The BL takes preference in any contradiction between the Federal and the *Land* constitution (Article 31 BL). The federal government has no role in the *Länder* constitution adopting or amending process. Amendments of *Länder* constitutions which are in conflict with protection of human dignity and human rights, democracy, rule of law, social state principle and the basic elements of German federalism shall be inadmissible (Article 79, 28 BL).

7. The BL and the *Länder* constitutions are very much homogenous. The Federation and the *Länder* all have parliamentary systems of government based on the British model in which the existence of the government, i.e. its formation and its continued existence, are dependent on the majority of the parliament. The decisions in favor of parliamentary systems were strongly influenced by the negativ experiences with the presidential system during the Weimar Republic. The position of the chiefs of government, namely the chancellor and the *Länder* Prime Ministers, are strong since they determine the general guidelines of policy. Most constitutions know the constructive veto of no confidence, i.e. the chief of government (and cabinet) are dismissed, if parliament elects a successor by a vote of the majority of its members. There are differences as far as the form of democracy is concerned. Whereas the BL is imprinted – with negligable exceptions – by the representative democracy, most *Länder* constitutions introduced – namely after accession of the new *Länder* in the unification process in 1990 – different forms of direct democracy. Legislation, even amendments of the constitution, may be initiated by the people; laws may be adopted by plebiscite. The laws of election differ, partly significantly (personal or list-voting systems). Bavaria was the only *Land* which had for fifty years a bicameral system which then was abolished by a referendum. The city *Länder* Bremen, Hamburg and Berlin are states and municipalities as well. This requires, of course, special constitutional provisions for organisation and function of government.

As a lesson from the inhuman system of National Socialism, the founding fathers of the BL and the *Länder* constitutions laid special emphasis on guaranteeing individual human rights and civil rights which are directly applicable and binding on all state activities and may be enforced by the courts. All *Länder* constitutions – except one – contain basic rights catalogues. They differed – although always covering the classical bill of rights – very much in the *Länder* constitutions as adopted before the BL (1949). After subsequent amendments of harmonization with the BL, nowadays the human rights sections of the *Länder* constitutions are widely homogenous. Since the *Länder* are bound by the basic rights provisions of the BL and all German citizens enjoy them, the importance of *Länder* basic rights is understood as being limited. But *Länder* constitutions can incorporate other or more extensive basic rights than the BL and some do. This applies, e.g., to fields where the *Länder* have special responsibilities (culture, internal security). Some *Länder* constitutions contain basic rights in the economic or social security spheres. *Länder* basic rights, however, must not be in contradiction to the BL and must not fall short of the minimum standard of the federal basic rights (Article 142 BL).

11. All *Länder* – except one – have constitutional courts. They have exclusively the task of watching over the compatibility of acts undertaken by the state power of a *Land* with its own *Land* constitution. This decision is not subject to any further examination by the Federal Constitutional Court. Since the law of each *Land*, however, cannot be in contradiction with the BL, the Federal Constitutional Court can declare any *Land* law, including provisions of the *Land* constitution, as void for breach of the BL.

12. The federal constitution, the BL, has been amended a total of 50 times since it was passed in 1949, which means an average once a year. Most of the changes concern the shifting of responsibilities to the federation at the expense of the *Länder*. Other amendments have been caused by reunification of the country, social developments and the European integration. As a whole, the BL is a very stable constitution. The same is true for the *Länder* constitutions. They underwent in general fewer amendments than the BL, some of them to harmonize the *Land* constitution with the BL, many to introduce procedures of referendum and plebiscite and changing local and municipal self-government.

13. Most *Länder* constitutions are significantly smaller than the BL. The latter has 150 Articles, the former have between 70 and 100 Articles. Many *Länder* constitutions have small civil rights sections. The legislation competences and finance sections are more condensed. An exception is the Bavarian constitution of 1946, which is much more detailled than the BL. It covers, indeed, many provisions ordinarily associated with statutory law. The same obser-

vation applies to the *Länder* constitutions of Bremen, North Rhine-Westphalia and Hessen. Regulations cover the right to access to lakes, participation of workers in enterprise-boards, nomination of civil servants, details of labor law, right to vacation and entitlement to receive school books on free.

14. In the perception of the citizens the Federal Constitution (and its interpretation by the Federal Constitutional Court) is strong. Some speak of a "patriotism based on the constitution". In comparison, the impact of *Länder* constitutions is weak. They certainly are a factor of identity-building, integration of the *Länder* citizens. They add to the colours of the supreme law, are an element of diversity in unity. An essential factor of their weakness is the creeping powerlessness of the *Länder*, due to mainly three reasons. Firstly there are too many *Länder*, some of them not capable of fulfilling their functions. Instead of 16 *Länder* a reorganisation and condensation to 5 or 6 units is urgently necessary. Second, the *Länder* lose more and more competences to the centre and to Europe. There are – except culture, police, civil service (as limited) – few fields of genuine responsibility of the *Länder*. And third, mechanisms of cooperative federalism are more and more used. Cooperation, coordination, conferences of *Länder* governments and ministers, uniform model legislation form a "third level" in between the Federation and the *Länder*. In the meantime, this system has not only proved to be rippling, but also problematic from the democratic point of view because everybody can be responsible for everything and therefore nobody is responsible for anything. For this reason efforts are currently being made to break up this integrated system again, thus achieving greater transparency with regard to decision-making and responsibility, and permitting more competition between the federal government and the *Länder*. So German Federalism is under discussion and has to be improved, but this is more a matter of the Federal Constitution and not of the constitutions of the *Länder*.