

§ 3 The structure of central and local government

I. The decision for a unitarian or federalist system

1) The model of the unitary state: one level of statehood with ultimate control and responsibility

- competences, structure and functioning, finances, supervision and even existence of regional collectivities regulated by statutory law that can be altered at any time
- some constitutions prescribe existence or autonomy of regional collectivities (see for Indonesia art. 18 ff. Const. 1945) but this can be changed by constitutional amendment

2) The model of the federal state: two independent levels of statehood within one sovereign state

- the basic idea of federalism: *unity in diversity*
- two concepts of statehood: state in the sense of public international law and of state law
- existence, autonomy, competences and basic finances of federated states guaranteed and regulated in the national constitution
- federal structure cannot be abolished by constitutional amendment
- constitutional autonomy of the federated states
 - each has its own constitution and its own state law
- different models of - usually complicated - distribution of competences
 - in Germany, the federated states also execute the federal admin. law
 - usually, each federated state has its own local government law

II. The decision for centralism, decentralisation or local and regional autonomy

1) The concepts

- *centralism*: concentration of powers, control and responsibility at the central government
 - prevailing in Europe until the last decades of the 20th century
- *deconcentration*: shift of decision making within the central government from the central office to regional or local offices
- *decentralisation*: transfer of competences and responsibility from the national level to local and regional collectivities
 - a process started in many countries in all parts of the world
- *local autonomy*: the right of local collectivities to regulate, with their own means and on their own responsibility, all the affairs of the local community within the limits set by the law and under the legal supervision of the state
 - basic ideas: principle of *subsidiarity*; *structured democracy*
 - introduced in the German state of Prussia already in 1808
 - introduced in many European countries at the end of the 20th century

2) The guarantee of local self-government in Germany

Art. 28(2) of the German Basic Law:

The communes must be guaranteed the right to regulate, on their own responsibility, all the affairs of the local community within the limits set by the laws. Within the framework of their statutory functions, the associations of communes also have the right of self-government in accordance with the laws. The guarantee of self-government also comprises the basis of financial autonomy...

- a *constitutional right of the communes* and counties, defensible by legal action before the the admin. court and by *constitutional complaint* (against laws) before the Federal Constitutional Court (art. 93(1) no. 4b BL)
- similar guarantees in the Land constitutions with remedy of constitutional complaint to the Land constitutional court
- a constitutional *guaranty of local self-government as a legal institution*
 - includes guarantee of existence of local collectivities
 - but no guarantee of the existence of the individual commune
- *comprehensive jurisdiction for all affairs of the local community*, including
 - territorial jurisdiction
 - right to self-organisation (also concerning human resources)
 - financial autonomy
 - planning autonomy
 - regulatory power
 - autonomy to cooperate with others
- legislator may transfer individual tasks to other authorities, if proportional; the *core area* of self-government is *absolutely protected*
- only *legal supervision*, no functional supervision by the state

3) **The European Charter of Local Self-Government**

- drafted by the Congress of Local and Regional Authorities, an influential institution of the Council of Europe for the strengthening of local and regional democracy
- signed 1985, ratified by 47 European states
- absolutely binding core standards plus optional standards for local self-government in European states
- most important *core standards*:
 - principle of local self-government to be recognised in domestic legislation, and where practicable in the constitution (art. 2)
 - guarantee of the right and ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population (art. 3(1))
 - principle of local representative democracy (art. 3(2))
 - right of local authorities to exercise their initiative with regard to any matter not excluded from their competence nor assigned to an other authority (art. 4(2))
 - guarantee of sufficient financial resources (art. 9(1, 2))
 - right of local authorities to cooperate and associate (art. 10(1))
 - restriction of administrative supervision to legal supervision except for tasks delegated by the state to the local authorities (art. 8(2))
 - right to legal protection (art. 11)
- optional general commitment to the *principle of subsidiarity* (art. 4(3))

III. The distinction between the gubernative and administrative functions of the executive

- a common distinction in political and legal science between two different parts of the executive: government (political decision-making and regulation by statutory instruments etc, by a body directly legitimated by the parliament or the people) and public administration (politically neutral execution of the law by professionals)

IV. The structure of "central" government - the example of Germany

1) Two levels of "central" government in a federal state

- execution of the laws by the Länder and by the Federation with independent administrative systems and structures (cf. art. 30, 83 ff. BL)

2) The distribution of the administrative competences and the administrative structure

a) The execution of Land law:

- by and in the responsibility of the Land
- administrative structure and administrative procedure regulated by Land law
- many administrative tasks delegated to the counties and communes
- general and specialised Land authorities
- traditionally 3 levels of Land authorities
 - Land ministries & other central authorities, regional Land authorities (eliminated in some Länder) and local authorities

b) The execution of federal law:

- *generally by the Länder* in their own right and responsibility but under federal legal supervision (art. 83, 84(4) BL)
 - administrative structure and administrative procedure usually regulated by Land law (cf. art. 84(1) BL)
 - many administrative tasks delegated to the counties and communes
- *in some cases* by the Länder *in federal commission* under functional federal supervision ("Bundesauftragsverwaltung", art. 85 BL)
 - in these cases, often the admin. structure is regulated by federal law with consent of the Bundesrat
- *in few cases* (e.g. federal police) by *federal administrative authorities* with own administrative substructures (art. 87 BL)

c) The execution of European Union law:

- same distribution of competences as if it was German law (art. 84 et seq. BL applied analogously)

V. The structure of local government - the example of Germany

1) A different local government law in every Land

2) Types of local collectivities

a) Communes

- the heart of local self-government
- exclusive competence in all matters on their territory unless legal provisions provide otherwise
- various kinds of communes of different size and different competences delegated by the state; the independent cities ["kreisfreie Städte"] are not part of a county and perform all functions of a county on their territory
- usually performant since *comprehensive territorial reforms* (mergers) since the 1970s reduced the number and increased the size and capability of the communes

b) Counties ["Landkreise"]

- perform tasks exceeding the territory and capabilities of the communes

c) Other associations of communes ["Gemeinverbände"]

- general associations of several communes on a voluntary basis for achieving a better general performance
- Region Hannover (legal merger of several counties including the capital city of a Land to a new regional collectivity)

3) **The institutions of the local collectivities**

- nowadays usually a *City/County Council* ["Gemeinderat"/"Kreistag"] (elected for 4 to 6 years), a directly elected *Mayor/County Administrator* ["Bürgermeister"/"Landrat"] (with a term of 5 or more years) and an Administrative Committee
- various options of citizens' participation, including referenda
- the problem of low participation in the local government elections

4) **Voluntary self-government tasks, mandatory self-government tasks and delegated tasks**

- some self-government activities are prescribed by law and must meet certain standards
- delegated tasks are always mandatory
- different kinds of ***administrative supervision***:
 - *legal supervision* (control of legality) of self-government activities
 - *functional supervision* (control of legality and expediency, including instructions) of performance of delegated tasks

VI. **Special phenomena**

- unitarian federal states and highly autonomous regions in unitarian states
- cooperative federalism
- inter-municipal cooperation
 - often the only way to make local self-government performant
- transnational cooperation