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WORKING STRUCTURES OF FEDERALISM IN GERMANY:
CROSSROADS GERMAN AND EUROPEAN UNIFICATION
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THE WORKING STRUCTURES OF FEDERALISM IN GERMANY: CROSSROADS GERMAN AND EUROPEAN UNIFICATION

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h The paper reflects the personal views of the author and should thus in no way be identified with the institution or Land to which he is affiliated.

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0. TERMS OF REFERENCE

In much of the writing and debating on federal institutions the intricate details of the actual working structures. within which these institutions perform their roles as basic cogwheels within the overall machinery of government. have all too often been taken for granted. Such omissions often lead to misunderstandings in evaluating the roles of institutions. Regarding German federalism. this would seem to underline the need for a predominantly but. of course. not exclusively descriptive paper on the working relationships between the Federation and its component parts. in which the Bundesmt is cettainly the central. but in fact not the only cog which keeps the system going. Therefore this paper will discuss the working relationships in their constitutional. political and administrative aspects, between the organizational entities which together constitute the German federal structureJ-2 .

An analysis of financial working procedures and arrangements IS ruled on; as being mainly beyond the scope of this paper. A further study wouid be necessary to explain why the distribution of financial resources in Germany ultimately results in what might be tenned a federalism by negotiation. Nchr the less. i. should be borne in mind throughout the dcscriptitm of the. institutioml network undertaken tn lhlS paper that Financial questions often fill. mat least underlie. the agendas of many of the institutions under discussion.

The. various categories of legil instruments used as the tools of internal fedora! ieiationshipmm uiso excuded from the ambit of this paper These range tram official treaties to executive agreements between .Btmd and Lander and between the Ldiider hemselves. and include the various, more or less formal agreements between the Federal Chancellor and the Minister-Prcsidents of the Lender and betveen the Minister-Presidents themselves. it is sufficient to state that a wide variety of such toots is employed alongside the constitutional arrangements in federal legislation (including delegated legislation) by either the FctleralSovemme’nt or by any of the executive branches in the Lander authorizcdto do so by Federal law.

Moreover. the emphasis in th paper is on executive, rather than on legislative cooperation. While stresing this aspectihowever. the paper does not wholly exclude the cooperatiut of the executive branches of both the federal and the Land levels of government in the preparation of federal legislation. Rather. it is intended to indicate that cooperation between the executive branches is more prominent in the German system than cooperation between the legislatures of Bund and Lander

Last but not least. with the exception of one specific reference to the election of justices of the Federal Constitutional Court by the Bundcsrm. the organization of the judicial branch (and in particular the recruiting of judges for other federal courts) falls outside the scope of this paper.

I. THE COMPONENTS OF THE INSTITUTIONAL STRUCTURE OF GERMAN FEDERALISM

As in any genuine federal form of government. there is not one single working relationship between Band and Ldinder in the German system, but a multi-faceted network of such relationships. both fonnal and infomiai. bilateral and multilateral. individual and collective.

This multi-faceted network of Btmd-Ld’nder relations is one of the distinguishing features of the German model and reflects the peculiar division of responsibilities in the German system. One of the essential characteristics of this system is that the bulk (though of course not all) of legislation is enacted at the Federal level. while the Lander are the main administrators. even in the field of federal legislation. This might seem paradoxical in the face of Article 30 of the Basic Law. which states in general terms that. except as otherwise provided or permitted by the Basic Law. the exercise of government powers and the discharge of governmental functions shall be incumbent on the Lander. However. in the practical process of filling the statute books. this constitutional stipulation has been all but eroded in the legislative sphere by the impact of both the broadening of the criteria. and the expansion of the catalogues.of the concurrent. exclusive and framework legislative powers of the Federation. as enshrined in Articles 72 to 75 of the Basic Law. The progressive exemption of the bulk of legislation under these articles from the rule that the Lander shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation (Aniclc 70) has only left a fairly small.

though by no means unimportant. amount of legislative powers for the Lender.

However. this has in no way diminished the central role of the Liz’nder in administering not only their own. but also federal legislation. This role is defined in Anicle 83 of the Basic Law. which confers upon the Liinder both the right and the duty to "execute federal statutes as matters of their own concern in so far as this Basic Law does not otherwise provide or permit" In this field. whose ambit is set out in Articles 84 and 85. the Ldnderare clearly the predominant bodies, while Federal administrative powers. which are defined in Articles 87 to 90. are classed more as exceptions than as the rule.3

It is this fact. then. which explains that in spite of the diminishing role of the Lander in the passing of legislation as such. their impact in the process of preparing Federal legislation has constantly expanded rather than receded. Moreover. this fact (in conjunction with historical factors) is the underlying reason why the Bundesrat has always been an intergovernmental organ. However, it is by no means the only one.

While it is necessary for the purpose of explanation. it is nonetheless a hazardous undertaking to try to isolate and categorize the components of the entire network of federal institutions. because these components are all more or less always in communication with each other. and are also often linked with each other by organizational mechanisms. Bearing in mind these limitations. three levels. or areas of relationships may be discerned:

Firstly. there is the level of the "Whole State" (Gesammaat) i.e. the level which comprises institutions in which both the Federation (the Bundl. and its component pans (the Lender) are represented on terms of equal status. This arrangement of equal status allows no room for majority decision-making. All decisions in this sphere must consequently he arrived at by accommodation and compromise. or they must be limited by "agreement to disagree". In addition. decisions taken in this sphere may also require approval in the federal or Lam/ legislatures.

Secondly. there is the level of the "Federal State" (Bundessmat), ie the constitutionally organised structure of inter-relationships between Bund and Ldnder institutions. whose decisions are subject to majority voting rules. The subject matter of all such decisions must be located within the field of federal competence. or hey must be subject to federal procedures. as in the case of the ’Joint Tasks’ (Gemeinsc/iaftmuquaben). in which Federal participation takes place in areas of competence originally exclusive to the L&nder and in which the Federation and the Lander cooperate by virtue of specific agreements.

Thirdly. there is the level of horizontal coordination between the Lander themselves (i.e. excluding the Federation). which in a strict sense is not part of the field of Bund-Ldnder relations. but without which neither the decisions of the Federal State. nor those of the Whole State. could be properly prepared. On this level. the agendas can consist both of federal and Land matters. In both fields. decisions must be unanimous and may also require approval in either the federal or Land legislatures. This area is commonly known as the "Third Level".

2. THE SYSTEM AS IT STANDS

On the basis of this distinction between the three levels of the Gesammaar. the Bundesra! and the Third Level. the main institutions in the working relationships between Band and Liinder can be outlined as follows:

2.1. The Gesamtstaat

At the level of the Gesammaa! or "Whole State". there are three main groups of coordinative and cooperative institutions.

2.1.1. The C onferencc of the Heads of Governments of Bund and Lander

At the top. regular Conferences between the Federal Chancellor and the Heads of Governments of the Ldnder are held in a more or less regular sequence of roughly every two or three months. Their legal basis is set out in ml of the Standing Orders of the Federal Govemmcnt. Although this rule has been part of these Standing Orders ever since the Federal Government came into existence in I949, those Conferences did not become a regular institution until Chancellor Willy Brandt took office in 1969. His predecessors. Konrad Adenuuer. Ludwig Erhard and KurI-Genrg Kicsingcr (in particular Adcnauer) only converted them in cases of more or less

extraordinary or special need. because they were anxious not to let the Minister-Presidents and the Heads of the City-States interfere too much. let alone regularly. in what they apparently considered to be exclusively federal business. Brandt then made these Conferences a permanent part of what he rightly considered to be a structure of the Whole State by including in their agendas topics on which either the Federation is dependent on the Ldnder or on which the competences of both sides are so closely connected with one another that separate action would compromise the effectiveness of any of the pans of the system. This view. and the regular convention of these Conferences which followed from it. have since been a feature of the Chancellorships of both of Brandt's successors. Hclmut Schmidt and ilclmut Kohl.

Nowadays. it has also become a regolar practice that these Conferences of the Heads of Governments of Federation and Ldnder are prepared and preceded by meetings of the Chief of the Chancellor's Office with his colleagues in the Lander (the C hefs der Sraars- und Serra!skan:leicn). Moreover, it is not only here. but also in all other Fields of Bund-Ldnder relations. that the Chancellor's Office performs the role of the central coordinator at the federal level. This too is an innovation which dates back to Brandt's time in office. Until then. there had been a Federal Minister of cabinet rank with particular responsibility for "Affairs of the Bundcsra! and the L(indcr". These so-called Bundesrar Ministries proved. however. to be too weak and thus inadequate in performing the central task of coordination. a factor which led Brandt to entrust the Chancellor's Office with this coordinating function.

2.1.2. C oordinaling Machincries ofllie Political Parties

The second group of coordinativc institutions comprises the top-level machineries of the political parties. Here. the relevant bodies are mainly established within specially created Bund-Ldndcr structures. among them in particular the institutionalized Conferences of Party Leaders in the Bundestag and the Land Legislatures. which are partly assisted by permanent staffs. Also. the party executive committees or presidiums at the federal level, assisted by the party headquarters. play a prominent role in the handling of Buml-Liimlcr business. This is especially so in the case of the CDU. where the coordination of Bund-La'nder matters often needs to be pre-prepared with view to subsequent negotiations with the independent sister-party in Bavaria. the CSU. The impact of the CSU is so strong. particularly in constitutional questions with relevance to the federal system both in domestic and European Communities legislation. that the CSU group within the joint CDU-CSU Parliamentary Party in the Bundcsrag even has a veto right of its own in all political projects which touch upon this field. This leads to the point where the Liindcr groups of Bundestag members within each of the parliamentary party fractions need to be mentioned. These consist of all the members of one specific party who come from one specific Land. Each of these groups has a chairperson of its own. and they convene regularly at intervals of one to three weeks in their Land's Mission to the Federation in Bonn to discuss Bundesrag business relevant to their Land.

2. I .3. Inrcr-Parliamenlary C nordinarimz

The third group of institutions in the field of the Whole State is concerned more specifically with intenparliamentary coordination. It is represented in the Conference of Parliamentary Presidents of Bund and Ldnder and its more frequently convened nucleus. the Conference of Presidents of Land Legislatures. Like the Conferences of the Heads of Gmemments. these meetings are also prepared by senior officials (the clerks or "directors" of the parliaments).

2.1.4. The Permanent Treaty Commission

in addition to these three widely known groups of conferences. there is one further coordinative institution. which operates in the field of foreign relations and has remained largely outside the public view. Its place is. so to speak. on the borderline between the institutions of the Whole State and the Federal State. This is the Permanent Treaty Commission set up by the Agreement between the Federal Government and the Cabinet Offices of the Lander on the Treaty-Making Power of the Federation of 14 November 1957 (the so-called Lindau Agreement). The purpose of this body. which is composed of representatives of thc L(imlcr (civil servants working in the

Lander Missions in Bonn). is to receive information from. and to reach agreements with. the Foreign Office and other federal ministries if and whenever international treaties. whose provisions encroach partly or wholly on the exclusive legislative powers of the Lc’inder or their "essential interests". are under negotiation. In most cases. this Commission. in which representatives of the Federal Government have speaking. but not voting rights. is concerned with treaty-making in the field of cultural affairs. However. it is neither in theory nor in practice confined to this sector. Its structure and functions were later developed into the organizational model which today shapes the relations between Bund and Lander in European Community matters to be developed at greater length further below.
Present plans are aiming at strengthening the rights of the Lander in the area of the treaty-making power by amending Article 32 of the Basic Law to this effect!

2.2. The Bundesstaat

At the level of the Bundesstaat, or "Federal State". the number of organizational units is. naturally. the greatest. and the intensity of interaction between them is at its highest.

22.! . Tlrc Bundesmt and its Institutional Structures

Here. the Bundesra! is at the centre of the stmcture. In constitutional terms and in working practice. the Bundesrat is both the legislative organ of the Lander within the Federal State and. at the same time. the federal organ of administration in the "Whole State". This dual role has its origin in the twofold effects of Articles 50 and 84 of the Basic Law. Article 50 clearly rules that "the Ldnder shall participate through the Bundcsra! in the legislation and administration of the Federation" Further. Article 84 states that all federal statutes which regulate the institutional and/or procedural aspects of the role of the Ldmlcr in the execution of those statutes. require the consent of the Bumlesral. This reflects the general responsibility of the Ldndcr in the implementation of federal legislation. Thus the role of the Bundcsra! is a double one in a double field: It is both a co-legislator (with the Bundestag) and a representative of the Ldnder in their function as the H)
administrators of federal legislation. Its place. therefore. is predominantly within the Federal State. bitt also partly within the "Whole State". In the performance of this combined role. it is assisted by the bodies outlined below.

All Bundesrat plenary business5 is prepared in a system of highly efficient committees which sit every third week and submit their recommendations to the plenary session which follows two weeks after the end of the committee week. Some committees have permanent sub-committees. such as the Sub-Committec for European Secondary Legislation in the Committee for Legal Affairs. Others. and again in particular the Committee for Legal Affairs. frequently create ad hoc sub-committees. All sub-committees report their recommendations to the committee which created them. In most cases. both committees and sub-committees are manned by civil servants of the Lander (predominantly from their Missions in Bonn). while federal civil servants represent the Federal Govemment. With the exception of the Finance Committee and the so-called "political" committees (Foreign Affairs. Defence and German Unity. which succeeded the pre-unification Committee for Internal German Relations in I99I). Federal and Lander ministers rarely participate personally in committee meetings unless they hold the chair. Committee chairmanships are distributed between the Lr’inder by the Bundcsrat in plenary session according to a pre-ammged and rarely altered pattenm

The preparation of committee and sub-committee meetings. minute-taking and the drafting of the committees’ recommendations to the plenary sessions of the Bundexrat. are the main tasks of the Secretariat of the Bundcsral. The Secretariat is headed by a Director. who assists the President of the Bundesrat in preparing for and presiding over the plenary session held on every third Friday.

’Ihc Pennunent Advisory Council (Slandigcr Berra!) formally advises the President of the Bumlcsrat. However. the President rarely ever participates in the weekly meetings of the Council as.he is normally preoccupied by his primary function as a MinistervPresident or one of thc Mayors of the City-States. Thus. in practice. the Council. under the chairmanship of the longest-serving member. manages the political business of the Blllltde.W’u! together with the Director of the Secretariat.7 In addition. the Council has the important function of receiving regular infomnition on Federal Cabinet

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meetings immediately after the Cabinet has sat every Wednesday. As a rule. this information is conveyed to the Council by the Minister of State in the Chancellor’s Office in charge of Bund-Ldnder relations. or by the Chief of the Chancellor’s Office (at present a minister of cabinet rank). The Council is composed of the Plenipotentiaries (Bevollniiz’chtigte) of the Lc’inder to the Bund. who are in most cases (but need not necessarily be) members of their Land Cabinets.

If the Plenipotentiaries have not been successful in reaching agreement on the handling of any particular item of plenary business (either in the Advisory Council or in bi- or multilateral discussions). a funher attempt is made to resolve the disagreement immediately before the plenary session is opened. This occurs in the regular. unofficial and non-public. so-called preliminary discussions of the Bundesral, which begin half an hour before the official plenary session. If. however. this informal conference (which takes place in the plenary chamber under the chainnanship of the Bundesra! President) does not arrive at a solution. a very peculiar "institution" comes into play. The Heads of Governments of the Liinder and/or their Plenipotentiaries meet in Room 13 of the Bundesra! building (adjacent to the plenary chamber) in a final. last-minute attempt to solve crucial problems. In most cases the delay to the start of the plenary session caused by "Room 13" is the only indication to the public that some complicated knot in the arrangement of Bundesrat business has had to be disentangled.

2.2.2. The Committee of Mediation

This is not so. of course. in cases in which legislative conflict has arisen between Bundestag and Bundesra! or between the Bundcsra! and the Federal Government. On such occasions. the public will be informed officially of the demand by any of these constitutional organs that the Committee of Mediation (Vermirtlungsausschu/J) be convened. Both Bundestag and Bundcsra! have sixteen representatives on the Committee of Mediation. the Ilumlcsra! nominating one member for each Lam! and thc Bmulcxlug selecting its sixtccn members in proportion to party strength. The rules of the Committee are laid down in Article 77. Section 2 of the Basic Law and in the Joint Standing Orders of Ilmulcslag and Iluudcsra! on the Committee of Mediation. The Committee meets privately in order to enable it to work

out compromises on matters of conflict. Moreover. to make compromise possible the Bundesra! members (all of cabinet rank) are not subject to instructions from their Land Cabinets or Heads of Government. Furthermore (and in contrast to the Conference Committees of the American Congress). the composition of the Mediation Committee is stabilised by the fact that it is a permanent body for the lifetime of one Bundestag and by the rule that its members and their deputies can only be recalled a maximum of four times within the lifetime of the same Bundesrag. In order to ensure the passage of the compromise worked out by the Committee. it also has the power to mle in its recommendations that Bundeslag and Bundesrat can only vote on the whole set of recommendations. and thus cannot reject particular pans of the compromise package. In almost all cases the Committee makes use of this power.

The need to convene the Mediation Committee is very much dependent on the relationship between the party-political majorities in Bundestag and Bundesrat. Conflict is naturally more frequent if different party or coalition majorities exist in each House If the same party or coalition dominates both Houses, the Mediation Committee is convened only infrequently.

2.2.3. The Missions of (he Lander lo the Federation

In contrast. the permanent Missions of the Ldnder t0 the Federation are constantly at work. These are headed by the Plenipotentiaries of the Lander most of whom personally spend at least a third of their time in Bonn. The Ld’nder civil servants who work in the Missions. however. are permanently resident in Bonn. and many of them commute from there more or less regularly for one or two days per week into their respective Land capitals. In the overall structure of Bund-Ldnder relations the Missions act. in effect. as the "spiders in the web" for their Lander. and in this respect they can justifiably be termed as the nucleus of the working relationships between Bum! and Lr’inder. In most cases their civil servants staff the Bundcsrul committees for their respective Land. In addition. the Missions also serve as the overall liaison institutions between Land and federal ministries and between each other. This is. of course. particularly the case in Bundcsra! business. Moreover, (he Missions must. by vinuc of the Standing Orders of thc Cabinets in both the Federation and thc L("indcr also

be informed of all other business conducted between any branch of the Federal Government and the executive authorities of their Lander. Funhermore. they report back to their Land capitals on all important or otherwise specifically relevant political and committee business in the Bundestag. For this purpose their civil servant have the constitutionally guaranteed right of access to all Bundestag plenary sessions and committee meetings (Article 43. Section 2 of the Basic Law). The same provision also gives them the right to be heard at any time in the Bundeslag committees. while in plenary sessions this right is in'practice exercised by the Lander ministers or heads of government alone. In the Bundeslag committees the civil servants of the Ld'nder Missions only rarely make use of the right to speak. but they very frequently attend in order to report back as quickly as possible to their Land capitals. The reasons for this practice of reporting as soon as possible on the deliberations and results of committee work are to be found in the calendar of legislative procedure. which is enshrined in Article 77. Section 2 of the Basic Law. This stipulates that the right of the Bundesrat to demand the convening of the Committee of Mediation in case of a conflict is restricted to a time period of just three weeks. dated from the receipt of the adopted bill from the Bundestag. in cases when the Bundeslag has re-adopted a bill after considering the recommendations of the Mediation Committee. the time-span in which the Bundesrat is able to raise an objection is even only just two weeks. These time limits would. in most cases. be far too restrictive for any of the Lander governments to make up its mind on its attitude in the Bundesrat if the Missions in Bonn could not report immediately on the decisions of Bundestag committees. Besides performing these vital functions within the legislative process. the Missions also serve as constant information sources on important developments in the federal ministries. as well as in the parliamentary party fractions. Moreover. in all financial (particularly budgetary) matters and in economic policy developments in Bonn which have relevance for their Ijimlcr the Missions have the legitimate and acknowledged task of acting as official lobbyists for their Lander. ,

The Missions also undertake public relations work in Bonn on behalf of their Ldnder (for example by organizing cultural and economic exhibitions. lectures. press conferences. concerts. receptions and other social gatherings of various kinds). Similarly. they often organize so-callcd parliamentary

evenings which enable regional or other interest groups. and even individual firms. to discuss their aims and problems with Members of the Bundesmg and/or representatives of the Federal Government. Within the field of public relations the Missions also receive numerous patties of visitors from the constituencies ol' Bundestag members in their Land and give them information on constitutional questions and current issues. The total number of guests of various kinds who visit the Missions is quite considerable.

Last. but not least. the Missions serve as regular meeting places for the groups of Bundestag Members within each of the parliamentary party fractions, who sit for their respective L(inder, and assist them in the performance of their functions.

Seen in total. this rather wide-ranging scope of the tasks of the Lander Missions in Bonn has led them sometimes to be termed the C orps F ederal in open allusion to the Corps Diplomatique.

2.2.4. Civil Servants' C omacrs and Meetings on the Bund-Liinder Level

The description of the functions of the Missions has already indicated that numerous permanent contacts exist between the civil servants of the Federation and the Ldnder. These are. however, by no means restricted to contacts between the Missions and federal ministries. Alongside these. many meetings are called between civil servants of federal ministries and their equivalents in the Lender either under permanent or ad hoc arrangements. The purposes of these are manifold: Most of them are held in the process of preparing Federal government bills and the drafting of delegated legislation in statutory instruments. The need for the federal ministries to call such meetings is based in the fact that about fifty per cent of all federal legislation (including statutory instruments under Article 80 of the Basic Law) require the consent of the Bmidexral. Thisagain renects the fact that most federal statutes are administered by the authorities of the Lr'imlcr with the result that the federal ministries are dependent on their practical advice in drafting bills and statutory instruments. In addition. Federal statutes may empower ministries or other authorities of the Ld'nder to issue ordinances. under their own responsibility. to facilitate the execution of federal statutes. Other reasons for the calling of meetings between federal and Lil'mlcr civil

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servants may arise from the process of allocating federal funds or by a wide range of other matters of joint relevance.

Conferences of Federal Ministers and their counterparts in the Lander are very often prepared by such contacts. In some Fields these conferences have an institutional and regular character. In others. they are convened on an ad hoc basis for some special reason (but nonetheless fairly frequently).

2.2.5. Institulion: of C ooperative F ederalism

Besides this day-to-day cooperation in federal matters in various bodies and conferences. there are also the special institutions of "cooperative federalism". The most prominent among these are the Financial Planning Commission (Finanzplanungsrat) and the Planning Commissions for the Joint Tasks. in which. again. the Federation and the L&nder community have sixteen votes each.

2.3. The Third Level

The Final level of coordination is that of horizontal cooperation among the Liinder themselves (the "Third Level").

2.3.1. The Conference of Mini.rter-Presidems
e

The highest ranking of the institutions in this field is the Conference of Minister-Presidents (Heads of Govemments of the Lander) which meets formally once a year, but which convenes in practice more regularly at least once before the conferences with the Chancellor. and quite often more frequently than that. The chairmanship in these meetings altemates between the Ld’nder and all of them are prepared by Conferences 0f the Heads of the Lander Cabinet Offices.

2 .3 .2 . Ldndcr Departmental Mt’nixlcrx C mtfcrenrt’x

One step below this level there are the conferences of equivalent ministries from different Lander, whose responsibilities cover the same area of policy (for example interior affairs. justice and so on). These are

staffed and prepared partly by the Bumlesral committee secretariats. and partly (as. for example, in the case of the Conference of Ministers of Housing). by organizational units of their own. which may be attached to one of the Missions of the Lander in Bonn. The Permanent Conference of Ministers of Education and Science is assisted by a Secretariat of its own outside the Bundesrat structure and its surrounding institutions.

2.3.3. C iril Servanrs’ Contam ant! Meetingx on Ilw Ldnr/er Level

In addition. there are numerous formal and informal contacts between the civil servants of equivalent ministries in different L(imler which exclude their federal counterparts. Their purpose is either to prepare meetings on the Federal level. or to coordinate among themselves specific actions or legislation in either the federal or the Liinder sphere.

2.4. Shifted from the Third Level to the Federal State: European Affairs

Irrespective of the distribution of legislative powers between the European Community and between Bum! and Ltindcr. the impact of EC policy-making on the federal structures in Germany has been of crucial significance since the Treaty of Rome came into force in 1957. The reason for this is also embodied in the nature of the German system. in which the Lc’z’nder rather than the Federation have the main responsibility for the execution and administration of European secondary legislation. Since federal legislative powers in the economic field are much stronger than those of the Liinder. their administrative responsibilities were the predominant reason for their right as laid down in Article 3 of the Statute of Ratification to the Treaty establishing the European Economic Community in I957 to be infomtetl via the I3mu/mrul on all steps of Iiuropettn poliey-making by the Federal Government. This innate input on tleeisitm-ntttking on BumI-Liimlcr relations hats been constantly enhanced by the growth of legislative competences of both the EC :tnd (inasmuch :13 it has been caused by EC developments) of the Federation between I957 and the ratification of the Single European Act in 1986. The encroachments of EC policy-muking into the legislative domains of the Lander. hitherto

disguised in a multiplicity of picce-meal detail and often under the implied powers clause 01’ Article 235 of the EEC-Treaty. had their open climax. however. with the transfer of substantial new powers to the Community by the Single Act. particularly in fields like regional policy. environment and research.

2 .4 .I . Institutions and Procedures up to the Single European :1 cl

Long before this. however. both the Lander as such in the Whole State and the Bundesrat as their organ within the "Federal State" had already responded with due consequence to the implications of EC-integrution for their roles in the constitutional system by instituting:

- the Bundesra! Committee for EC Affairs (as early as 1957);
- the Permanent Observer of the Lander at the EC (also in 1957);
- and an intricate and thus fairly unsatisfactory system of Ldnder coordination in cooperation with the Bmtd for evaluating draft European legislation. the so’culled MztuBcr Procedure of 1977/79.

Mounting dissatisfaction with the complicated. time-consuming and thus relatively ineffective nature of this procedure on the "Third Level" then co-incided with the approach of the Single Act. This combination of factors led the Liz’nder community to the (constitutionally rather difficult) conclusion that in the treatment of European affairs. even within their exclusive legislative fields. they should ban the principle of unanimity which governs "Third Level" procedures in favour of incorporating EC-business fully into Bumlerrat procedure which is governed by majority mles.

2 .4 2. Strengthening of Bundesra! and La"mler Rights

Carrying out this change 01’ principle. the Liimlcr and the Btmdesra! then successfully improved their structures and strengthened their rights in the field 01’ EC-rc1evant relations to the Federal Government by enforcing in Article 2 of the Statute of Ratification to the Single European Act 1986:

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- the obligation of the Federal Government to take into account Bundesrar comments on draft European legislation inasmuch as its subjects touch upon the exclusive legislative competences or on ’cssentiai interests’ of the Lander;
-the need for the Govemment to specify its reasons in cases of EC-bound deviations from this obligation;
- the right of sending Liz’nder representatives as members of the German delegation into all negotiating bodies of the Commission and the Council if and whenever subjects or interests of this kind are under discussion.

These legal improvements in relations with the Federal Govemmcnt (followed by a BmtdsLdnder Agreement on details in 1987") were accompanied by several organizational measures. in particular:

- the introduction of the majority rule already mentioned in the evaluation of EC legislative projects by the Bundesrat Procedure;
- the creation of the EC-Chamber 01’ the Bundesrar, empowered to act on behalf of the Blmdesra! under special rules 01’ the Standing Orders in cases of urgency and/or confidentiality:9
- the setting-up of individual and direct liaisomoffices of the Ldnder in Brussels with both economic lobbying and political reporting functions. alongside a reinforcement of the Office of the Pemiancnt Observer;
- the instituting or (where these had existed before) the strengthening of working groups on EC matters and their co-ordination within and among the various Lander ministries. particularly in the large Liz’ndor. and likewise within the Federal Depanments in their relations to the Btmdesrut and the Ldnder;
- and finally the provision of information to the Lam! Legislatures by their Governments on specifically relevant projects of European legislation. partly in select committees set up for this purpose.

All in all. these steps have since 1957 resulted in the deliberation of approximately 6.000 documents of draft European legislation and other EC-projects (such as Programmes of Action. resolutions of the European Parliament and memoranda of the Commission) in the Bundesrat up to the end of 1991 .

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Furthermore. the negotiations of the EC Governments Conferences on European Political Union and on European Economic and Currency Union (in which L&nder participation was secured through the inclusion of high-ranking representatives within the German delegations) led to:
- the creation of a Commission on Europe (Europa-Kommission) of the Liz'nder Cabinet Offices. which will be succeeded by
- a Conference of the L(indcr Departmental Ministers in charge of European Affairs after the completion of the EC Single Market at the end of I992.

2.5. Political Coordination in and between the Three Levels

All institutions on all three levels (Gesamtstam. Bundessraat and "Third Level") are interlinked by a network of bilateral or multilateral contacts. and. in some fields. by further bodies and institutions with a party-political orientation. which are activated if and whenever issues of potential party-political controversy arise. These serve both as alarm systems and as coordinating machineries. particularly in the relationships between the federal structure and the parliamentary party fractions in the Bimrlcsmg. Some of them (especially the Conference of Party Leaders in the Btmdesmg and the Land Legislatures and the Executive Committees of the panics on the federal level) have been depicted already. Others include the regular meetings of the Plenipotentiaries of those Ldnder in which the majority party or coalition is either politically aligned with. or opposed to. the Federal Government. The timing of these is coordinated with the calendar of Bundesrat plenary sessions. There are also ad hoc conferences of representatives of politically aligned Liinder which precede crucial Bundesrat committee meetings. and which take place either on the political or the civil service level.'0 Similar conferences can also precede any of the other institutional contacts already discussed if the political need arises. This is regularly the case before the Conferences 0f the Federal Chancellor with the Heads of Lander Governments. the meetings of the Mediation Committee and the Conferences of the Minister-Presidents and the Heads of their Cabinet Offices.

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Very discreetly organised contacts also take place whenever the need arises for the Bundesrat to elect one of the sixteen justices of the Federal Constitutional Court. According to Article 94. Section 1 of the Basic Law. half of the justices are to "be elected by the Bundestag and half by the Bundesrat". While the Bundesrag has delegated this power to a special Committee for the Selection of Justices (Richterwahlausschu/J). the Bundesrat elects its justices in plenary session. However, informal political contacts conceming the selection process do. of course, precede the plenary session. For some time now. the custom has developed that the Minister-President of North Rhine-Westphalia on behalf of the SPD-govemed L&nder (or so-called "A-Ldnder") and one of his colleagues on behalf of the Lander governed or led by the CDU/CSU (the so called "B-Liinder") coordinate the contacts between each other and with their respective parliamentary parties within the Bumlestag.

3. DEFECTS IN, AND REFORMS OF. THE WORKING STRUCTURES - UP TO, DURING AND AFTER UNIFICAtlON

It must certainly be admitted that the Gcnnan system of federal working structures is a complicated network. However. this is always - and inevitably - both the trademark and the price of any federal system. It is the 3 price to be paid for the addition of a vertical dimension of the separation of I powers to the horizontal one between the legislative. executive and judicial branches of government. The broad political and popular acceptance of federalism in Germany today indicates that this price is felt to be well worth paying. It is also certain that the system "works". at least in terms of executive efficiency. Less certain. however. is whether or not the "system as it stands" provides for an adequate constitutional relationship between Bum! and Ldnder, whether or not it sufficiently fulfils democratic requirements and - most important at present - whether or not it is capable not only of standing up to. but also of surviving. the burdens of German unification and its political. economic and constitutional consequences. This section will focus on these multi-faceted questions.

Germany's concept of federalism is not that of the "dual state" as embodied in the philosophy (though perhaps not the practice) of American

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Federalism. It does not consist of two separate structures. each fully equipped. institutionally and administratively. in its own field of competence. Instead. it represents an interwoven system characterized above all by the fact that the Ldnder both execute federal legislation and participate in its creation under a clearly defined responsibility of their own (as in Articles 30. 50 and 83 of the Basic Law).

In addition. it should be emphasized that there have always been substantial elements of "cooperative federalism" in the German system - even before the constitutional reforms of l966 to 1969 with the introduction of the Joint Tasks - which will certainly be maintained in the future. The German system has never been one of discrete units existing beside or below one another. with clear-cut and separate catalogues of competences. The attempts at instituting such a system - more or less imposed on the original federal constitution at the behest of the Occupying Powers in 1949 - only led to the so-called "grey zones" of federal financing which developed in the years from 1949 to 1966. The concept of cooperative federalism recommended by the Troeger Commission in 1966. which led to the constitutional reforms of the Grand Coalition between l966 and 1969 was. therefore. nothing but a logical consequence of the practical needs for close cooperation between Bund and Liindcr. These needs had been neglected in constitutional terms in the early years of the Federal Republic not so much because of the views of the framers of the Basic Law. but because of the influence of the Occupying Powers (predominantly the French) in their clearly understandable post-war desire to prevent a revival of German nationalism by - perhaps even excessively - decentralizing and dividing political power.

Nevertheless. there has at all times also been a strong doctrine within the Basic Law that Bum! and Ldndcr have a "separate but equal" relationship. Although this phrase is admittedly taken from quite a different context." it can be used here as a means of illustrating the defects and pointing out the criticisms of the "system as it stands". ’ihis constitutional doctrine - and the problems it incorporates - is reflected in two main areas. line first is the requirement in Anicle 29. Section l of the Basic Law "that the Ldmlcr by their size and capacity are able effectively to fulfil the functions incumbent on them" in both the political and the economic spheres. The second "problem area" - closely connected with the First is contained in Article 72.

Section 2.3 and in Article 106. Section 3.2 of the Basic Law which require i the whole system to guarantee equality in the conditions of life in the entire 5 federal territory in order to ensure a "uniformity" (or rather: equivalence) "of living standards".

These two problem areas were already the crucial fields of German i federalism when unification rather unexpectedly came onto the political , agenda.

3.1. The Way to German Unity and on to Constitutional Reform

The chain of events. which was sparked by the dismantling of the Hungarian iron curtain in September 1989 and which led to the peaceful ’ revolution in the former German Democratic Republic and the opening of the frontier between the two Gennanies on 9 November I989. not only drastically changed the context of German politics on entering the 19905 it also produced a whole series of proposals in the attempt to plot out the future political. constitutional and economic development of a united Germany. In institutional terms they ranged from "confederate structures" (Chancellor Kohl in the Bundesrag on 28 November 1989) to confederation between the two states alongside associate or even t’ull EC-membership for the GDR through to - finally - the accession of the five rc-established prc-I952 L(inder of the GDR and East Berlin to the Federal Republic under Article 23 of the Basic Law.’2 In constitutional terms the highly controversial public debate centred around the question whether united Gemtany should have an (at least formally) entirely new constitution drawn up by an assemblee cmtstiluumc and adopted by plebiscite under the terms of Article 146’3 as understood by the promoters of this concept or whether only modifications to the Basic Law should be outlined in the process of implementing accession to the existing federal system under Article 23 once this path had been decided upon and also cleared with the former Four Powers of Occupation in the so-calletl ’liwo-plus-liour Negotiations

This is not the place for an attempt to write the institutional and constitutional history of the process of unification. Needless to say. however. both the process itself and its results heavily inlluenced. still shape and will. for a long time yet. have repercussions on. the working structures of federalism in Gennany. Alongside the part of the Federal Republic’s

"old" L(z’nder in the process of unification." it is the question of both legal and factual changes in the federal system which is of predominant interest here.

3.1 .l The Act of Accession and (lie C onstirurion

Such legal changes in the field of the constitution were partly effected by the act of accession itself as embodied in the Treaty of Unification (Einigungsvertrag - EV) of 31 August I990. including several clauses of federal relevance Otherwise. they were vaguely instrumentalized in the same Treaty by a recommendation to the legislative bodies of the unified Germany to consider within two years the questions raised by German unity requiring alterations of, and amendments to. the Basic Law (Article 5 EV). The same article enumerates specific fields for such alterations and/or amendments. among them (in first rank!) "the relations between Bund and Ldnder".

While the Treaty stated the need for. and even some fields of. constitutional revision. it left open the way to it by including "the question of an application of Anicle 146 of the Basic Law and in its context the question of a plebiscite" in these fields (again Article 5 EV). In doing so it deliberately left the main political controversy undecided: whether unification should be followed by a new constitution or by an adaptation of the Basic Law. while clearly tending. however. to the latter solution. Although this course certainly did not satisfy the protagonists of a completely new start.’5 it had to be. and consequently was. taken (even with their consent) under the growing urgencics of time stemming from the developments in the Soviet Union as well as from the danger of new waves of migration from the GDR. So this flexible formula which left open the options of both constitution-making and constitutional reform was essential in smoothing the passage of the Treaty with the necessary two-thirds majorities not only through the first freely elected Volkskammcr in the GDR. but also through both erdcslag and Bundcsrar.

3 .I.2 C Imracterixlics 0f the Process of Umjicau’on

Despite raging public controversies about the need for more parliamentary and Lander participation in the process of achieving German unity. the Final act of ratification by the legislative bodies should not conceal the fact that this process was carried out above all on the level of intra- and l inter-govemmental relations. As unification did Finally take place under the terms of Article 23 of the Basic Law, the terms of an accession of the GDRM (acting on behalf of its five Lr’imler, which had not yet been re-created. and for East Berlin) had to be the subject of negotiations between the Federal Government and the Council of Ministers of what was for the First time a genuinely German Democralic Republic. As the Basic Law did not even theoretically. let alone politically. give any chance of rejecting a plea for accession on the Western side. the new East German parliament actually had a more considerable say in defining the conditions and expectations concerning accession than did Brmdexrag and Bundexrar. Nonetheless. as accession did from its beginning require certain amendments to the Basic Law.l7 it was clear rather early that it would need also support from the opposition in the West. This meant on the one hand that political consensus had to be achieved both in principle and detail. as constitutional amendments were embodied in one and the same document together with the bulk of necessary transitional statutory regulations. On the other hand. however. it explains at the same time why the solution of crucial constitutional questions. including many in the federal sphere. had to be left over to be dealt with at a later date in an organizational structure still to be determined.

31.3. 0n (0 C nnslr’mrional Reform

The first steps towards such a stmcture actually preceded accession and were simultaneously its logical precondition: ()n 22 July 1990 the Volkskammer passed with a two-thirds majority the Constitutional Act for the Creation of Liinder in the German Democratic Republic (Ldndercinfiihrungsgeselz - LEG).’3 With the exception of more or less marginal alterations in territories and names it plainly r&instituted the five Lander which had been represented in thc L(imler/mmmcr of the GDR

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(comparable to the Bundcsrat) up to 1952: Mecklenburg-Vorpommern (formerly Mecklenburg).’9 Brandenburg. Saxony-Anhalt. Saxony and Thuringia, while giving "rights of a Land" (Landesbefugnissel to East Berlin. At the same time. the Act made it clear that "the state territory of the GDR is indivisible" G2 LEG). thus eliminating the danger of separate accessions to the Federal Republic the debate on which had previously been mooted and had resulted in much confusion in the discussions on accession as such!0 The legally rather strange construction of the Act. however. consisted in the fact that the Lc’z’nder were (re-)created "as of 4 October 1990". when the first free elections for their legislatures were to be held simultaneously. On 3 October I990 then. when accession of the GDR came into effect under Article 23 of the Basic Law. the Ldnder named in the Treaty of Unification (Article 1 EV) were neither legally nor factually as yet in existence although they became "Lander of the Federal Republic of Germany" on that day. In accordance with $3 LEG they constituted their legislative and executive organs not earlier than during the course of November 1990. so that for a transitional period they had to be represented in the Bundesrat by preliminary Plenipotentiaries who acted in an advisory capacity without voting rights (Article 43 EV).

By December 1990. however. all the necessary constitutional steps for their full reconstitution had been taken and. in particular. their Minister-Presidents had all been elected. This had two implications of major importance: Firstly. from then on each of the new Lander could and can claim any of the rights established in favour of the GDR or of any of themselves by the Treaty of Unification (Article 44 EV). Secondly - and presently more relevant for constitutional reform - their representatives were all able to participate in the First all-German Conference of Minister-Presidcnts after unification held in Munich on 20 and 2l December 1990.

3 .I.4. The Bundesra! C ommissinn for C onstitulional Reform

This conference immediately took the opportunity of instmmentnlizing the process of revising the Basic Law from the Liimlcr side which had been initiated by Article 5 EV: lt recommended to the Gnvemments of all the now sixteen Ldndcr that they should convene a Bumlcxrm Commission for Constitutional Refurm which was to be concerned primarily. but not exclusively. with the federal aspects of amendments to the Basic Law. However.this Commission did not come into existence until 19 April 1991 after the Bundesra! had resolved on it according to the recommendations of the Ministcr-Presidents on 1 March 1991.31 Its deliberations began with the creation of two Working Committees to prepare suggestions in the fields of:

- "the strengthening of federalism in Gennany and (l) Europe";
- and all other amendments to the Basic Law presently under discussion.

The terms of reference of the Commission do not. however. include "the presentation of a report for the further development of the financial constitution". as this area has been reserved to either a later devolution of responsibility by the Bundcsra! to the Commission or to a specialized body still to be set up .

Up to the end of l99l the Working Committee on the strengthening of federalism met five times, while the other one sat six times. On 17 October 1991 they presented their provisional results to the Commission in its second (but first public) session22 which led to the passing of recommendations in two partial fields. both of them in the area of federal reform:

- in the field of international relations. a revision of Article 24 of the Basic Law was suggested aiming at a substantially stronger constitutional . position of L(z’nder and Bundesral in matters concerning the European Community;23
- in the field of legislation, several functional improvements in the . procedures in favour of the Bundesra! and the state legislatures were ’ claimed within the scope of Articles 76.77.79.80 and 83 of the Basic Law!4

The essential details of both groups of suggestions will be referred to further below (in puns 3.3.3 and 4.2).

3.1.5 Organization of Constitutional Reform by the Bundeslag jointly with the Bundesrat

While, nonetheless. the Bundesrat thus at least started work on constitutional reform with a clear preference for n revision of the Basic Law by the leglslutlve bodles themselves. at a fulrly curly date. the old controversy on the creation of some kind of an assemblee constituante still lingered on in the plenary debate of the Bundesmg on the matter on 14 May l99l. It was based on a motion tabled by the SPD Parliamentary Fraction to the effect that a "Constitutional Council" (Verfassungsrat) be summoned by the Federal Assembly (normally only entrusted with the task of electing the Federal President) consisting of l20 members from "all walks of public life" who need not be members of either Bundestag or Bundesrat,

According to this motion,35 their task was to be the discussion of all suggestions and drafts hitherto introduced into public debate and "to present a suggestion to Bundestag and Bundcsrat on this basis. As expected even by the initiators themselves. however. the motion was sent to the Council of Elders to be considered there together with a motion of the parties of the governing coalition in favour of a Constitutional Committee.26 On the lines of that motion. this Committee was to consist of sixteen members each from Bundesmg and Bundesrat with the function of deliberating and presenting drafts on the range of constitutional reform as set out in Article 5 EV.

After lengthy negotiations about the composition of a joint body of Bundestag and Bundesrat in and between the Bundeslag’s parliamentary fractions. in its steering committee (the Council of Elders), between that body and its equivalent on the Bundesrar’s side (the Permanent Advisory Council) and between numerous Ldnder cabinets and their state legislatures. who claimed the right of participation. decisions were finally arrived at in the Bundestag on 28 November l99lZ7 and in the Btmdesrat on the following day". A Joint Constitutional Commission was set up by identical resolutions of both Houses?) to consist of 32 members of each of them. Each of the 16 Ldnder now sends two of its’Bumlcsrat members. while the equivalent number of 32 Bundesmg commissioners is divided up proportionally between the parliamentary fractionsl0 (including one seat each for the two fractions too small for proportional representation, but enjoying the special privileges conferred by a recent judgement of the

Federal Constitutional Court.31 With this result. the demand of the state legislatures for participation was finally turned down under their heavy protest but in compliance with Article 5 of the Treaty of Unification. which had entrusted the task of constitutional revision to "the legislative bodies of the united Germany" and by doing so had ruled out the state legislatures in favour of the Btmdesra! (and thus cabinet) members on the Lander side. Nevertheless. there will be political co-ordinating bodies surrounding the Joint Commission on party level comprising leading representatives of the political groups within the state legislatures.

With and within this rather intricate framework. the Joint Commission began work on 16 January 1992 - i.e. after a valuable part of the two-year time-span of time recommended by the Treaty of Unification had been lost through organizational controversies. This meant that the resolutions setting up the Commission had to extend the deadline for report until the 31 March I993. In order to fit in its own recommendations properly into the deliberations of the joint commission. the Bimdesral Commission for Constitutional Reform thus intends to terminate its work by April I992.

The incorporation of the Bundesral proposals into the proceedings of the Joint Commission as well as the task of co-ordinating the entire field of reform with the state legislatures on the party levels. therefore. still remains to be done. However. these procedural questions could be considered to be relatively trivial.

The problems of actual substantive reforms would seem to be far more difficult to solve. These problems. in so far as they impinge on the federal system. will be explored in the following sections.

3.2. Territorial Reform and the "Uniformity of Living Standards"

From the beginnings of the Federal Republic doubts about the ability of all of the L(imlcr - whose size and resources vary greatly - to fulfil their political and economic functions adequately and to ensure a uniformity of living standards frequently led to pressure for reform.

J.2.l. Up to Unification

After the failure of a first commission on territorial reform set up by Adenauer in 1951 (which reported in l955) two reform commissions were created during Willy Brandt’s Chancellorship in the early 19705 to look at both of these problem areas: the Federal Government Commission on the Reorganization of the Federal Territory. the so-callcd Ernst Commission. which sat from 1970 to 1972 and reported to the Chancellor in I973. and the Parliamentary Commission of Inquiry on Constitutional Reform. which was set up in I970. was reinstituted after the general elections in l972. and which reported to the Biuulcsrag in l976. These commissions submitted far-reaching recommendations with regard to decreasing the number of the Lt’inder (Ernst Commission) and to introducing a joint federal and Lander framework system of planning which was meant to enable the Federation to guarantee equivalence of living conditions (Commission of lnquiry). However, due to a combination of adverse political circumstances. none of these recommendations could be implemented.

So the problems which motivated the recommendations for reform in the 19705 still await resolution. In particular. the working relationships between the executive branches of Bum! and Lander are too complex and too dense in some areas. This limits the transparency of Bund-Ldnder relations as far as the general public is concemcd and tends to undennine the autonomy and responsibility of the Land legislatures. It is also evident that the dense network of Bund-Ldnder relations allows the Federation to interfere in many areas which are constitutionally the domain of the Liz’nder by the mere impact of its ’golden lead’. This means that in the field of co-financing it feels invited. and in many instances even compelled to do so by the fact that some of the Lander are not in the position to offer their proper share in the task of guaranteeing equivalent living standards. Some critics of the system have gone as far as to say in this respect that the step has been taken from a cooperative to :t cnrruptivc federalism as the conditions of cn-financing hy the federation naturally tend to be dictated by the federal side all the more strongly in direct proportion to the economic weakness of the recipients 0n the Lander side.

Even if we ignore this rather provocative formulation of the problem. the fact remains that the present shape of Gennan federalism ltas led to the

paradox where the constitutional requirement to guarantee equivalent living standards is faced by the fact that the performance of the individual Lander in achieving this goal is clearly uneven. The reason for this paradox lies in the preservation of a Lander community. whose members are grossly unequally equipped. in terms of territorial. financial and administrative capacity. to fulfill that goal. The inequalities in the abilities of the Lander in performing their constitutional roles and. more generally. the relatively large number of Lt’indcr on a relatively small territory would seem to call for a reduction in their number combined with an improvement in the balance between them both individually. as compared with each other, and collectively between them and thc Bund. Refomis in this field would thus substantially enhance the political vitality and economic productivity of the system as a whole. It would also slim the necessary machinery of Bund-Lijnder relations. would make the system more transparent and leave more room for autonomous and responsible parliamentary dccision-making in the Lander. Even the failure of the reform initiatives of the 1970s and the dilution of Article 29 ofthe Basic law in l976 (when the original obligation of the Band to reform the size and number of the L(imlcr was changed into a mere option to do so) have. therefore. not abolished the underlying ratio legispf the constitutional demand for comparability. This would seem to be underlined by the various (but up to now rather ineffective) attempts at coordination between the city-states of Hamburg and Bremen and their neighbouring Lander. Schleswig-Holstein and Lower Saxony. in the north of the Federal Republic. These parts of the federation in particular will hardly survive in the long run in their present organisational form without some kind of federal territorial reform. The same applies to Rhineland-Palatinate and the Saarland as well to the Rhine-Main and the Rhinc-Neckar regions. where densely populated and highly industrialised urban areas are cut into several parts by state borders.

3.2.2. During Unification

This then. was the situation which existed prior to the process of unification in I990. ln its earlier stages, when the re-institution of Lander in the GDR began to be discussed. suggestions were submitted to the so-called Round Table in East Berlin by a Govemment Commission for the

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Preparation and the Carrying out of Administrative Reform which provided for an alternative to the re-creation of the old five Ldndcr by suggesting the establishment of only four Lander (by dividing Saxony-Anhalt between Brandenburg and Saxony). Discussions originating in the Federal Republic itself also included proposals to amalgamate Schleswig-Holstein and Hamburg with Mecklenburg-Vorpommem and Hesse with Thuringia. The most intensive debate of all concerned an amalgamation of the urban areas of Berlin with the surrounding Land of Brandenburg. either in conjunction with or following a re-unification of East and West Berlin. Compared with such projects. which would have all resulted in a diminution of the number of former and/or existing Ldndcr ideas suggesting the opposite such as the creation of new city-states in Rostock and Leipzig were short-lived. However, under the pressure of time in the accelerating process of accession. nothing came out of any such scheme. It was felt that in order to restore Lander as such as the basis for any implementation of a federal system. one should for the time being quickly return to the traditional structures while leaving their preservation or reform open to later action. This resulted in the re-instituting of the five Ld’nder by the LEG.

Still. the debate in the East had re-stimulated the topic in the West as well. In a bold attempt to strike at the root of the problem. the Federal Minister of the Interior32 included the idea of reshaping Article 29 of the Basic Law into a better workable procedure for the reform of Lander boundaries in his first working draft for the Treaty of Unification of 13 June 1990. Within this concept, a simpler and less plebiscitary method of reform combined with a trcaty-making option for neighbouring Lander wishing to amalgamate was to be part of the package’of constitutional amendments embodied in the Treaty of Unification itsell’.33 This highly constructive idea. however, became a victim of La"nder participation in the unification process: As the Federal Minister had made it clear that he would only pursue the plan any further, if the existing community of Ldmlcr would go along with it. he had. naturally. asked for trouble. The small states. in particular l3rcmen.:tnd the Saarland. objected "in due course" and the project was killed before it had even been fully bom. as the bigger states were unwilling to spark a controversy in the Lt’imlcr camp on this matter. They were even indulgent enough towards their smallest hrcthrcn to consent to a Bundesra! resolution tabled in committee by Bremen which demanded

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in effect than the present unworkable shape of Article 29 should be left unchanged forever.34 In the debate on this resolution. however. a representative of one of them (Dr. Wallmann, Minister-President of Hesse) clearly warned Bremen not to take this consent too scriously35 as it had been given under the extraordinary conditions of the need for speed in the process of unification. This process. then. passed by without its ideal opportunities for territorial reform having been seized.

3.2.3. After Umficarion

Nevertheless. it did leave behind one remarkable anchor for the problem to be picked up again after the completion of unity: The second of the fields enumerated for constitutional reform in Article 5 of the Treaty of Unification is the examination of "the possibility of territorial reform for the Berlin-Brandenburg area deviating from the rules of Anicle 29 of the Basic Law by agreement of the L(iua’er concerned".36 This provision can certainly not be simply neglected. If it were to be implemented in an amalgamation of the twoLdnder, then a signalling precedent would be created touching on the future of the only two city-statcs. Hamburg and Bremen. which would then remain. This might well. in time. get the train going as the further existence of these two anachronisms despite the abolition of the third would then hardly be defendable much longer. Negotiations between Berlin and Brandenburg. in which Berlin seems to be the driving force. are on their way already. They include proposals for an amendment to the Basic Law (Article 118) aiming at a special procedure for territorial re-organization in this area based on agreement between the Ld’nder concerned (as in the previous case of re-organisation in the South West - now Baden-thrttemberg - in l951). It remains to be seen whether or not the Joint Constitutional Commission of Bmtdcstag and Bundesrm will widen the scope of its deliberations from here to a reform of the general procedural rules for territorial reform in Article 29 of the Basic Law. in the Bmtdcsrm Commission for Constitutional Reform it was. remarkably enough. the initiative of one of the new Lander which brought the matter on the agenda: Saxony demanded that these rules should be reshaped into an operable concept."

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All in all. the accession of the new Lander to the federal system has. indeed. made the solution of the territorial problem even more urgent than it had already been before unification:

- The number of federal units in the new Germany now totals sixteen. This would seem too high to secure an effectively functioning federal system in the long run within the relatively small territory even a united Germany represents (certainly compared to other successful federal systems like the USA. Canada. Brazil or Australia). That applies all the more so since the population density and, consequently. the degree of regional interdependence. is on average much higher in Germany than in the other federal states mentioned above.
- Even if we leave aside such cross-country comparisons. the double structure of the ’Whole State’ and the ’Federal State’ in Germany will scarcely be able to fulfill its functions either in an efficient or in a democratically transparent manner if it were to consist permanently of sixteen Lander alongside the enlarged Federation. As was shown earlier. the existing system in the Federal Republic alone is already facing very strong criticism because of its complexity and impenetrability to the public eye.
- Further. if the Lr’indcr as a whole. and in particular those (re-)established in the GDR. wish to maintain and even enlarge their share of decision-making in European Community matters at both the federal and EC levels. they will have to secure not only their collective ability. but also their individual administrative capacity to do so. Present doubts about the ability of the West German Lander to meet this challenge would be multiplied if too many relatively weak units were added to the system for a longer time.
- Much the same applies with regard to the internal ability of the federal system to achieve and maintain intra-regional and inter-regional equilibrium within and between its component parts. The difficulties already experienced in the ’old’ Federal Republic in providing for equivalent living standards have already been massively exacerbated by the process of economic reconstruction in the East. They will tend to be enhanced by the fact that the number of weak and very weak units in the system has become too large.

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- The need for territcrial reform has become even more imperative if one considers the fact that some of the Lauder boundaries represent severe impediments to intra-regional cooperation by cutting across densely populated and economically strongly interlinked areas in no less than now five parts of the Federation. i.e. in the urban regions of Hamburg. Bremen tmd (united) Berlin us well as in the thine-Mttin and RhinclNceknr regions.

3.3. Functional Reform and the "Strengthening of Federalism"

Though for all of these reasons territorial reform would obviously appear to be the fundamental prerequisite for a ’strengthening of federalism’ in Germany. this notion has almost come to be occupied by a multiplicity of postulates related mainly to the functional division of legislative powers between Bum! and Ld’ndcr and to the procedural position of the Bundesrar in legislation. Because of their multiplicity it would not be possible to discuss them here in their substances and on their merits in any detail. It must. therefore, be sufficient to recount their main topics up to. during and after unification:

3.3.1. Up to Unification

The Parliamentary (Bundextag) Commission of Inquiry on Constitutional Reform of 1970 to 1976 has already been mentioned in connection with its suggestions on a joint federal and Ld’nder framework-system of planning. which began to be drawn up at the same time as did the schemes of the Ernst Commission on the Reorganization of the Federal Territory.3ll In the functional field as described above. that Commission of Inquiry mainly suggested the following measures:39

- The catalogues of concurrent powers of the Federation for full-scale and for framework legislation should be combined and the Federation should have power to legislate within them. if and inasmuch as uniform federal law is necessary.
- In favour of the Lander the so-culled lclause of need’ (Bcdtirfnis/t’lausell for the evaluation of a necessity for concurrent legislation in Article 72 of the Basic Law should be defined more clearly

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and concretely with regard to its subject matter as well as to any single legal norm and its intensity of regulation.
- The legislatures of the Lc’inder should have access to the new field of filling in federal framework legislation in cases in which the new clause of need leads to the result that such framework legislation is sufficient.
- The Federal Constitutional Court (which has hitherto regarded the utilization of the clause of need as a political question) should have additional powers and obligations in this field in order to protect effectively the legislative domains of the Lander.
- Future Federal Acts in the areas which lay hitherto in the field of framework legislation should be subject to Bundesra! consent if they touch upon Ldnder interests particularly strongly.
- In cases of amendments to the Basic Law. the legislatures of the Ldnder should have an improved chance to give political though not legally binding recommendations to their state governments regarding the use of the executive’s vote in the Bundesrar. For this purpose the span of time within which the Bundesra! has to cast its first vote on a bill should be prolonged from six weeks to three months as the bill concerns constitutional amendments.

None of these recommendations came to be put into effect.

3.3.2. During Unification

During the process of unification the "old" Lander were. therefore. eager to seize the opportunity of revitalizing these suggestions in their essence and to add other demands which they felt had become necessary in the meantime between I976 and I990. A new catalogue of postulates was embodied in a document called "Comerstones of the L(indcr for a Federal Structure in Unified Germany".40 which was resolved upon by the Conference of the Heads of L(imlrr Cabinet Offices on 5 July I990 and then endorsed by the Ministcr-Prcsidents. ’Exprcssly referring to the recommendations of the Commission of Inquiry in l976. it stresses the necessity for a new clause of need regarding concurrent legislation. Furthermore. it demands a full scale examination of all catalogues for the distribution of legislative powers in the Basic Law "with the object of

strengthening the legislative powers of the Lander". Also. uall Federal Acts which are to be executed by the Lander or are connected with consequences of costs for the Lander. should be subject to the consent of the Bundesrat." Finally in this field. the document states generally that the short spans of time for the Bundesrar’s votes on bills diminish it’s constitutional rights in cases of lengthy legislative proposals and should. therefore. be prolonged on Bundesrat demand.

3.3.3. After Unification

After unification had taken place. these ’Comerstones’ were repeated by resolution of the first all-German Conference of Minister-Presidents in Munich on 20 and 2l December 1990 which has already been mentioned. They were thus also adopted by the Heads of Governments of the new Ldnder. Simultaneously. they were made the basis of that Conference’s recommendation to set up the Bundesra! Commission for Constitutional Reform. in whose terms of reference they were later also included by the Bundcsral itself. The Commission. when instituting its Working Committees on 19 April l99l. even widened these terms of reference by ordering the additional examination of also "the need of Bmidcsrar consent in all cases in which the execution of federal law is a matter for the Lander either within their own responsibility or as agents of the Federation."4’

Meanwhile. the Bundesrat Commission for Constitutional Reform has already submitted substantive functional proposals in the field of legislative procedure. These are aimed in particular at prolonging the deadlines for Bundesrat decisions (partly also favouring the state legislatures). the introduction of a first reading in that chamber of bills initiated in the Bundeslag. an obligation of the Bundesmg to decide in due time on bills initiated by the Bundesrat. a strengthening of the Bumlesrat’s position in the procedure of mediation, and - last but not least - at an extension of the need for the Btmrlesral’s consent on legislation to all Federal Acts which are to be executed by the Lander either under their own responsibility or in their capacity as agents acting on behalf of the Federation.42

3.4. Financial Reform and the "Golden Lead"

In the opening remarks of this paper it was emphasized that a description of the financial procedures and arrangements in German federalism would in itself necessitate a paper of its own in order to explain why the distribution of financial resources in Germany results in what might be called a ’federalism by negotiation’. For an analysis of the working stmctures as such this can and must be held valid without restriction. For a depiction of the scope of constitutional reforms under discussion. which naturally touch closely upon the shape of the working structures. it will. nevertheless. be necessary to hint at least at some of the crucial problems in this field. too. The following section will. therefore. be confined to such hints.

3.4.l. Up to Unification

The status quo in this area is marked by five characteristics:

- The basic (theoretical) rule is that Bum! and Lrimlcr ’shall be autonomous and independent of each other in their budget management’. but that they shall on the other hand ihave due regard to the requirements of overall economic cquilibrium’ (Article l09. Sections 1 and 2 of the Basic Law).
- Inland revenue is divided between Bund, Ldnder and local authorities according to a mixed system of both separate and shared taxes: Within the separate elements. the revenue raised from taxes specifically enumerated in the constitution goes to either Bum! or Lander: Much more important than these. however. are the shared taxes. Of these. income and corporation taxes (amounting to approximately 45 per cent of all inland revenue) are shared half and half between the Federation and the Lander (in the case of income tax after deduction of IS per cent l’or’local government bodies). Most important for the working of the system is-the role of the value-addcd tax (VAT) as the second of the big shared taxes. lts revenue is divided between Bum! and L(imlcr at varying rates of. on average. 60:40 (currently 65:35) in favour of the Federation. These rates are. however. not fixed in the constitution (as in the case of income and corporation tax) but have to be

negotiated anew approximately every second year in order to be fixed then by a Federal Act needing Bundesrat consent (Article l06 of the Basic Law).
- This mechanism of regular modification is all the more necessary as Federal Acts giving financial grants to individuals or corporations (Geldleismngsgeselze des Bundesl are by no means necessarily financed at the cost of the Federation. On the contrary. their costs are frequently to be met predominantly by the Lander, so that the effects of new legislation of this kind have to be ironed out.
- Apart from these corrections. a highly intricate system of financial adjustment tries to distribute the burdens equally while at the same time being bound by constitutional principle not to equalize all of the Lander completely in order to maintain their individual financial responsibility as well as their competition among each other. This system works in five steps: a vertical and a horizontal adjustment of income and corporation tax revenue. a horizontal adjustment of taxable capacity relating to VAT, :1 horizontal adjustment of financial capacity concerning the sum-total of revenue going to each of the Lander individually and finally vertical - additional payments of the Federation (Bundescrgdn:ungs:uwcisungcn) to the financially weak Lander (Article 107 of the Basic Law).
- Added to the so-called financial constitution in I969. the Joint Tasks with co-financing by the Federation were meant to have an additional advantage of financial adjustment. Because of their effects of mixed policy-making (Polirikverjleclttung) and. even more so. because they tend to give to the Federation a substantive power of the "Golden Lead" in offering co-Finance. they have. however. since been criticized frequently (Articles 91a. 91b and l04a of the Basic Law).

3.4.2. During Unification

During the process of reunification the "Comcrstones" of 5 July 1990 pointed out the defects of the system by demanding in particular:

- "powerful Lander as sustainers of a viable federalism" (in that they clearly referred also to territorial reform and hence were promptly objected to by Bremen and the Saarland. who interpreted this postulate as concerning the financial constitution only):

- the "abolition of economic and social disparities";
- adjustments on the basis of objectivized criteria related to measured needs of the La’nder;
- the consideration of legislative powers for the Lander to raise substantial revenues of their own;
- a coincidence of legislative power and responsibility for the financial consequences of legislation (relating to Article 104a. Section 3 of the Basic Law):
- and alterations in the system of the Joint Tasks and of mixed financing in general. aiming at a clear separation of functions and going along with a strengthening of the financial capacities of the Liinder.

Besides raising these postulates of principle. the old Lander were understandably anxious not to be overburdened by the incalculable costs of unification itself. For this reason. they insisted that their financial share in it should be limited by their contributions to a newly created Fund for German Unity in the form of interest rates partially paid by them for loans taken on the capital market as the substance of that fund. When it became obvious. however. that the means of the fund together with federal financial aid would not be sufficient to meet the needs of the L(imlcr acceding to the Federal Republic. the old Liindcr pressed for limitations in the participation of the new Ldndcr in the traditional system of revenue sharing and financial adjustments. This resulted in highly complicated temporary exemptions from such participation in Anicle 7 of the Treaty of Unification.

3.4.3. After Unmcatirm

After unity had been achieved. however. pressure grew strongly on the Eastern side for a revision of these regulations. Beginning with intricate negotiations between Eastern and Westem Heads of Ldnder Governments at the Minister-Prcsidents’ Conference of Munich in December I990 and leading to a formal agreement of the same body on 28 February l99l (which was signed in Joint Conference with the Federal Chancellor). this process of revision brought about the result that the exemptions from revenue sharing in the Field of VAT were removed as of 1 January I991 .

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Even with this result. however. it seems certain that the financial constitution will. for a long time have to offer massive subsidies to the new East Geman Lander. While this problem has long been recognized. it . nevertheless incorporates considerable dangers for the development of the t federal system in the next few years. in short. the longer the time-span of ’i the need for massive financial redistribution. the more the Band will have I the opportunity to employ its Financial ’golden lead’ and thereby to increase ; its intervention in areas which are. constitutionally at least. responsibilities . of the Lc’inder. Moreover. the larger the number of "needy" Lander. the i stronger will be the impact of the "golden lead" on the federal system as a ’ whole. This could introduce a prolonged period of centralization in German i federalism such as happened in the years following the foundation of the Federal Republic through to the financial reforms of 1966 to 1969. Constitutional safeguards against abuses of the ’golden lead’ will thus primarily have to be included among the revisions of the Basic Law. As partly indicated in the "Cornerstoncs". these safeguards could include constitutional definitions of the Financial needs of poorer Lander in order to save them from having to negotiate away autonomy in return for financial lrewards’. They could also include the abolition. or at least modification of the present rule that the Federation can pass legislation which imposes financial burdens upon the Lander with the consent of only a simple majority in the Bundcsrat. Some modification of the majority needed there for measures like this could also act as an additional protection not only for the poorer Lander but also of the Liz’ndcr community as a whole against the encroachment of the Bund.

Regarding the necessary steps both in territorial and in financial reform together. the effect of not taking them in due course could well be that instead of a "strengthening of federalism" there would be a gradual. if not accelerating abolition of it in favour of a clearly centralized system in substance though not in appearance.

3.5. Party Strength, Liinder Votes and the "Abuse of the Bundesrat"

Criticism of another problem-field. the frequency and scale of party-political influence within the German federal structure. also has a lung

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history. Such criticism focuses on the notion that legitimate regional interests. constitutional institutions (such as the Mediation Committee) and the role of administrative experience in the legislative process tend to be deformed or eroded by the sometimes misplaced use of party pressure.

3.5.1. Up to Unification

During the period of the Social-Liberal coalition from 1969 to 1982. when the SPD-FDP majority in the Bundeslag was countered by a Bundesra! dominated throughout the entire time-span by CDU/CSU-led Lander, this was a highly controversial and much debated matter. The political and constitutional discussion focussed around the fact that the conservative majority in the Bundesrat very frequently (and. in the eyes of many observers. excessively) called upon the powers of the Committee of Mediation to alter or even block decisions of the Bundeslag. During this period. the Mediation Committee was convened at the request of the Bundesra! 213 times and the consent of the Bundesra! to federal bills was withheld 43 times. The picture has changed substantially since 1982. when the CDU/CSU. in coalition with the FDP. regained the majority in both houses. Since then until 2 June I990, when the majority in the federal chamber changed for a short time (see below). the Bundesrar has only demanded the convention of the Mediation Committee on seven occasions and there was no refusal of consent to federal bills.

Nonetheless. there have. of course. been vital conflicts between federal and regional interests since 1982. such as. for instance. those arising from the various financial implications the Tax Reform Act 1990 has had for the Ldnder. However. these conflicts were no longer resolved in the Committee of Mediation. although this is the institution created by the Basic Law for that purpose. Instead. the practice was developed of ’coordinating them away behind closed doors’ in special and non-public meetings of the CDU/CSU Lander with top-lcvel representatives of the Federal Government. This resulted in a certain erosion in public awareness of the needs of federalism as distinct from those of the political panics.

While the controversies during the period of 1969 to I982 centred in the accusation that the Bundesrat was being abused for the purposes of opposition in the Bundestag. complaints after I982 concentrated on the lack of consultation with the SPD-led Lander and. consequently. the political and financial injustice being done to them. Such complaints were particularly numerous and strong when the combined effects of the Tax Reform Act! 1990 and the need for reconstructions in the financial arrangements between ! Bund and Ld’nder (stemming from a judgement of the Federal Constitutional E Court) led to the passage of an Act on stmctural aid for the economically 1 weaker parts of the Lander community. It was obvious that this Act clearly 3 discriminated against those economically weak Lander who were governed by SPD-led cabinets. while privileging in particular Lower Saxony (then led ’ by a CDU/FDP coalition) in reward for its consent to the Tax Reform Act , I990 which would have foundered without that state’s votes.

3 .5 .2 . In Unification

While unification was already on its way. however. the conservative majority in the Bundesra! was lost for the first time since I949 when on 22 1 June 1990 a Social Democrat Minister-President of Lower Saxony (Gerhard ’ Schroder) took his seat in the chamber. after the CDU and the Liberals had ! lost in the state elections there in May. Under the national pressures of unification. however. party differences tended to be pushed aside to a considerable extent in favour of more long-tenn calculations during the ’ months immediately after the change of thc Bundcsral majority.

As a result of this. quite a different majority problem all of a sudden governed the scene: The large Liinder had discovered that after accession of the states still to be created in the GDR they would lose their onc-third minority of votes in thc Bundesral which had hitherto enabled them to block constitutional amendments which they did not favour. Considering the burdens of economic disaster in the GDR and the financial consequences arising from them for both Band and Ldnder. such amendments had to be feared. Several schemes were. therefore. developed mainly by Baden-Wtirttemberg. Bavaria and North Rhinc-Wcstphalier in order to draft a new system for the distribution of votes in the Bunrlcsrut.

Up to date then. the largest number of votes was 5 for all states having more than 6 million inhabitants irrespective of their population numbers beyond that limit. Thus North Rhine-Wcstphalia with l7. Bavaria with ll.l. Baden-Wiirttemberg with 9.5 and Lower Saxony with 7.2 million each haul

this maximum of 5 votes. amounting to 20 out of a total of 45 (including Berlin whose 4 votes had only just been admitted to full scale-use by the waiver of the Allied Powers' reserved rights).
In an enlarged Bundesrat that would not have been one-third of the votes. After intense consultation and negotiation between the Ldnder and in the committees. the Bundesrar on 24 August 1990 resolved on a motion for an amendment to Article 51 of the Basic Law to the effect that in future up to 2m. there should be 3. from 2 to 3m. 4. from 3 to 5m. 5. from 5 to 7m. 6. from 7 to 12m. 7 and above l2m. inhabitants 8 votes.M This would have sufficiently secured the obstructive minority of one-third in the case of constitutional amendments also after accession of the new Lc'z'nder with a sum of 29 for the "Big Four" within a sum-total of 79. However. only five days later on 29 August the whole troublesome scheme was overthrown in a Conference of the Chancellor with the Minister-Presidcnts on the draft of the Treaty on Unification after objections had been raised against it from the side of the GDR. The result was that a clause was embodied in that Treaty (Article 4. No. 3) to the effect that Article SI of the Basic Law was amended by the Treaty itself.

3.5.3. After Unification

This amendment now rules since accession of the five new L(z'ndcr that while states between 6 and 7m. (of which there are none at present) have five votes as before. any of them over 7m. inhabitants have 6 votes irrespective of their further size in population. Again with 24 out of 68 this leaves one-third for the "Big Four". so that the reason for the manoeuvre can only be found in emotional reservations of the new Lander (then not even yet in existence) against a too visibly strong role of the Four.
Although another alteration of Article 51 seems hardly likely in the upcoming constitutional revision after all that bargaining, it remains a pity that the chance was not seized to adapt voting strengths in the Ilunrlcsra! to more plausible standards of reasoning and'proportionalization. Considering the importance of thc Bundmrar in competition and not rarcly even in confrontation with the fully proportionally elected Bundcstag, it would have been worthwhile to draft a voting system which would have better corresponded to democratic standards and which would not have been so

widely open to accusations of being haphazard in its distribution both of state and party power. A very plain solution meeting such objections could have been a scheme under which each Land would have had one basic vote expressing its sovereign quality as a state within the Federation (comparable to the American Senate's system) plus one vote each for every two million inhabitants (thus remaining within the German tradition of differentiating between the states). In the new Bundesrar. this would have totalled 63 of which the "Big Four" would have again commanded more than one-third with 28. so that their basic requirement would have been fully met while at the same time offering a clear-cut constitutional ratio by means of a logically duplicable rule. It can hardly be said that such a rule should be discernible in the present scheme nor that it should have been embodied in the previous one or in any of the former attempts to alter it on mere grounds of retaining specific voting power for any group of states defined by either size. regional interest or party affiliation.
As regards relations between voting power and party strength. events then very soon showed even doubly that political Bundesrat majorities are not to be held forever: As a result of the first free state elections in the former GDR on l4 October 1990. the SPD-majority only just won in June was lost again. However. in consequence of the elections in Rhineland-Palatinate on 2l April l99l it was regained for now cenainly a longer period with 37 votes out of 68. The new majority now politically opposed to the Bundeslag will certainly have to take care that the accusation of "abusing the Bundesrat" for the Bundestag opposition. as raised in the opposite constellation during the Social-Liberal Coalition. will not be allowed to apply to their own use of power!5 This will be all the easier. though. as a new grouping of genuine and massive regional interests beyond party-political affiliation is beginning to organize itself among the five new Liindcr, claiming their share in the struggle for financial and economic aid so desperately needed by all of them jointly.

3.6. Administrative Aid for the New Liz’nder and the "Burdens of the Gesamtstaat"

Though only partially touching on the field of potential constitutional revision in Buml-Ldmlcr relations. mention must be made here of the outstanding importance of administrative aid given to the new Lander.

3.6.1. Up to Unification

Before unification came into sight. there had been virtually no preparations for the way in which it could be brought into practice should it happen one uncertain year and day. Although there had been a Federal Ministry for lntemal German Relations (or "All-German Questions" as it was called earlier) ever since I949 and’ although the two legislative bodies had always had select committees in this Ministry’s field of activities. there were e.g. only very few lawyers and civil servants in the entire Federal Republic who had any substantial knowledge of law and administrative structures in the GDR. Neither were subjects of this kind taught at the universities to any considerable extent nor had any preparatory steps been taken in the legal regulations on the civil service which could have been utilized from one day to the next in order to meet the needs of a sudden and massive "export" of knowledge and experience from the Western side.

3.6.2. During Unification

The Lander were the first to realize the need to build up at least the nucleus of working structures for a new administration. It was clear to them from the end of I989 that a transfer of the entirely different legal and administrative systems of the Federal Republic and its states could not work unless accompanied by the sending of both acting and training personnel of high motivation and qualification as well as in large quantities. For these and a multiplicity of other reasons they established partnerships with the districts in the territories of the pre-l952 L(imlcr in the GDR to give aid in urgent fields like health. transport. housing and environment. such as for example that of Schleswig-llolstein and Hamburg with the districts of what was l’omtcrly Meeklenhurg. Lower Saxony with those of former Saxony-

Anhalt. North Rhine-Westphalia with those of l’onner Brandenburg. Hesse and Rhineland-Palatinate with those of former Thuringia. Baden-Wiirttemberg and Bavaria with those of former Saxony and. of course. West with East Berlin. Within these partnerships several thousand") civil servants and judges were and still are sent on a voluntary and mostly preliminary basis to help first to keep administration going and then to build up new stmctures from local govemment. Lander ministries and state legislatures to the law courts and specialized administrative agencies. in all of this. hamionization between the Western Lander and the effects of their measures on salary payments. regulations on leave of absence and the gaps in their own administrations became a fast growing problem long before accession actually took place.

3.6.3. After Unification

The Federation which had up to then mainly restricted its activities in this field to the instituting of a coordinating Clearing-Olfice in the Ministry of the Interior only reluctantly stepped in after unification had already been achieved. It was more or less compelled to do so predominantly for two reasons: Firstly. the aforementioned need for hannonization called for federal action in the form of delegated legislation conceming the payment of salaries and expenses. Secondly the increasing economic problems in the territory of the former GDR were and are closely connected with the fact that the purchase of land as well as the legal confirmation of landed property were and are highly difficult and time-consuming mainly due to the lack of trained personnel. It took an appeal of the Federal Minister of Justice to his colleague in the Finance Department. urging the joint responsibilities of L(z’nder and 810ch as the "burdens of the Gesamtstam" in this matter. to speed up the train of federal cooperation substantially together with the Minister of the Interior. In the Conference of the Chancellor with the Minister-Presidcnts of 28 February l99l the necessary governmental and legislative measures were coordinated. Since then. the land registry offices in the new L(inrlcr have been a focus of special attention and the financial and career incentives for service in the East in general have been substantially enhanced (whereas beforehand some administrators had even lost out). So the "export" of the statute books

effectuated by the Treaty of Unification is now being more systematically implemented by the accompaniment of those who learnt and can teach how to use them and how to build up the working structures belonging to them. Mention should also be made here of the fact that the Bundesrar Commission for Constitutional Reform has demanded an amendment to Article 36 of the Basic Law. which aims to introduce a more evenly decentralised location of Federal as well as of European and intemational administrative agencies throughout the federal territory. This is particularly intended to favour the new Lander. With the same intention. a joint body of Bundeslug and Bundesrat under the rather misleading title of a "Federalism Commission" was also set up in autumn l99l with the sole task of redistributing such locations to the advantage of the new L(imler. However. the need for this Commission (lid not originate in that intention but in the decision of the Bumlcslag to make Berlin the future seat of parliament and government which necessitated compensatory measures for Bonn in connection with the schemes to move Federal authorities into the Ldndvr newly integrated into the Federal Republic.

3.7. Federal Relevance of the Controversy "llonn versus Berlin"

Article 2 Section I of the Treaty of Unification mics that the "capital of Germany is Berlin". However. it continues in its second sentence that "the question of the seat of parliament and govcmment will be decided after the implementation of the unity of Germany". Since then. public argument about the geographical location of the constitutional organs has been a major preoccupation of the printed and broadcast media.

Some of this argument. though highly emotional in large pans. does in fact touch very rationally and closely on the political viability and the practical functioning of federalism and its working structures in Germany. The implications of the struggle "Bonn versus Berlin" cannot. therefore, be neglected as some kind of an irrelevant vanity contest between the two cities. although they cannot possibly be reviewed here at full length.

3 7.1 .The Basic F ederal Implications

The political nucleus of the federal aspects in that controversy is . enshrined in the question whether or not the size of Berlin and the ’ connotations connected with that city in German history would be ; detrimental to the federal state as it exists today. Within this question. one will certainly have to exclude the images of the Nazi rule and of the 4 troubled years of the Weimar Republic as being allegedly associated with Berlin. because such associations would be simply unfair and there would i also be plenty of proof to the contrary. Further. and going closer to the actual federal relevance. it would be incorrect to maintain that Berlin would always dominate because it had dominated both the Empire and the Weimar Republic. The reason for its political preponderance then was plainly the fact that besides and before being the capital of Gennany it was and had been the capital of Prussia, which by itself - and less through Berlin - mlcd the Reich in the structures of power and the constitution. Today. there is no Prussia anymore. and. consequently. there is a completely different federal system.

However. that alone does not answer both sides of the question. The fact remains that big agglomerations of population. of economic strength and of cultural concentration tend to overthrow the delicate balance of any federal stmcture. if the full political power of the constitutional centre is shifted to them alongside the existing potential for domination. lt was this fact which kept the Americans. the Canadians. the Australians and also the Swiss from leaving or installing their capitals in New York. Montreal or Toronto. Sydney and Zurich in favour of Washington. Ottawa. Canberra and Bernfi7 German history did not offer such an opportunity for choice up to the end of World War ll. but it laid the groundwork for it with the foundation of the Federal Republic and it does offer it now. That chance should not be missed. Instead. it should be recognized and seized all the more because the delicacy of the balance in the German federal system is already a highly touchy one as has been shown in its territorial. functional. financial. political and unity-bound problem fields.

3 .7.2 Needed: A Workable C (may)!
On the other hand. any solution to be found must avoid two other mistakes: It must tieither be unhistorical nor unworkable. It would be unhistorical (and. regarding the Treaty of Unification. now even illegal) if there were no substantial functions of constitutional impact attached to Berlin inspite of her title as "capital of Germany". It would be unworkable if the division of functions thus necessary between Bonn and Berlin were to destroy or substantially impede the practical functioning of the day-to-day interaction between constitutional organs directly and constantly dependent on each other.
This means in the first place that "parliament and government". so explicitly and jointly refered to in Article 2 of the Treaty. should not reasonably be located in different and geographically widely distant cities. In all of the argument, this seemed to be a generally acknowledged fact. but politically forceful suggestions to the contrary were made shortly before the decision was taken.Ml However. if the parliamentary system requires such a joint location of parliament and govemmcnt and if. at the same time.its federal structure demands that the seat of primary power should not be in the weightier place. then an institutionally balanced solution could have only seen Bonn as the seat of Btmdcstag and Federal Govemment. An ensuing. workable and. indeed, very substantial solution for Berlin would have been in such a concept that besides ranking as the official residence of the Federal President the city could also have been the plenary seat of the Bundesral.49 While this would have offered no essential difficulties for the functioning of the system. it should have been clear. however. that Burtdesrat committee proceedings, the meetings of its Advisory Council and the work of the Lander Missions would have had to be continued predominantly at the seat of parliament and govemment because of the constant and close interactions between these institutions which have been depicted above. For Berlin those practical necessities could hardly have meant :tuy infringements on the status of the capital. Thus the city which for the sake of federalism should not have been the seat of parliament and govcntmcnt would at the same time have offered the regular public forum for federal debate. This may have appeared to be paradoxical at first sight. but the inclusion of reason in a paradox is. in fact. not such a rare thing.
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3.7.3. The Decision and (I: F ederal and European Implications
The decision of the Bundestag for Berlin and against Bonn as the future seat of parliament and government of 20 June 199150 could well tend to overthrow the delicate balance of the federal structure which has already become a highly touchy one anyway as has been shown in the preceding parts of this paper. Moreover. the political. financial and administrative capacities of the entire system to cope with the work leads imposed by ; unification will suffer substantially from the intended changes.
The following decision of the Bundesrat of 5 July l99l5’ to stay in Bonn and to have second thoughts later will require a choice between two evaluations of federalism after (and inasmuch as) Btutdesmg and Federal Government will have moved to Berlin: on the one hand the view that the Bundesrar would be the loser if separated from these two organs and on the other hand the concept that besides Berlin as the national capital there should be a "capital of federalism" in the "Federal City" of Bonn. At present. concepts are being shaped to substantiate that idea.
The final shape of the implementation of all of these decisions will. in any way. also have to take into account that the German centres of political gravity should stay close to. rather than move away from, the seats of the European institutions in Brussels and Strasbourg. This would seem to be all the more relevant at a time in which Political Union as well as Economic and Currency Union in Europe have been firmly sent on their way by the conclusions of the European Council of Maastricht in December I991.
4. GERMAN FEDERALISM WITHIN A nEUROPE OF THE REGIONS"
Beginning with the European Parliament’s resolution on Regional Policy and the Role of the Regions in the Community of IX November W8852 to which a Draft Community Charter of Regionalisation was added, political interest in Germany and in other EC Member States has been focussing on the implementation and the innate limitations of the concept heading under the preliminary working title of a "Europe of the Regions". Still being
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rather vague and partly ambiguous. this concept offers both chances and misgivings such as:
- on the one hand a direct participation of the regional organisational level (where it exists) in EC policy-making within the institutional framework of the Community itself. but also
- on the other hand the danger of weakening by such participation both the Member States' and the Community's capacities to cope with new tasks arising from the developments toward a Greater Europe.

4.1. The Need for a Clarification of the Concept: Approaches and Successes

Attempts to clarify the concept of a "Europe of the Regions" and to make it workable dominated the federal scene in Germany in the approach to. and during the negotiations of. the EC Government's Conference on European Political Union. The climax of these negotiations on various levels in the meetings of the European Council at Maastricht on 9 and 10 December l99l secured several substantial successes on this road.

4.1.1. The Position of the German Lander in Approarhing Maastricht

The commitment of the Lr'inder and the Bundesra! for a start to be made in the institutionalization of the regional concept materialised in four main demands:
- the creation of 3 Chamber or Committee of the Regions alongside the European Parliament and the Council of Ministers in a position comparable to that of the Economic and Social Committee:
- the embodiment of the principle of subsidiarity in EC primary (treaty) law in order to ensure that all non-exelusive powers of the Community will only be exercised inasmuch and insofar as the aims behind intended measures cannot be sufficiently arrived at on the level of the Member States or their subnational units;
- a direct right of litigation for the regions in the European Court of Justice:

- and a right of the Lander to represent Germany in the Council of Ministers in matters concerning any of their own exclusive competences.

Beyond these institutional demands the Ldnder have for some considerable time already been active in the establishment of bilateral partnerships between them individually and regions not only in other EC Member States but also in European countries outside the Community. such as Austria and Switzerland.

ln forwarding the four demands enumerated above both Liinder and Bundesra! were well aware of the political dangers for Germany's position within the Community if they created the impression that the attempt might be launched to "export federalism" into traditionally centralized Member States of the EC by means of the Community's constitution. They felt. however. that emerging tendencies toward a new centralism on European level should be met in time by adequate institutional and legal means. This applied in particular to the scheme of the Regional Committee. It was in the dual interest of the Liindcr that they would not be prepared to accept a regional EC-institution empowered only with restricted rights to be heard in limited fields yet without the rights to an - at least potentially - genuine share in European dccision-making: Firstly. the effects of being bound into an institution as weak as that would have tended to damage the intemal standing Lander and the Bumlcsra! in EC matters within the Federal Republic. Secondly. bearing in mind the large number of European regions and their wide heterogeneity in size. internal coherence and legal status. the danger of arriving at a rather powerless institution on EC-levcl was obvious anyway. The Memorandum of the Commission for thc Govemments' Conference on European Political Union of 2l October I990 strongly implied a direction which pointed toward more European centralism instead of the opposite. Some observers felt. therefore. that the encouragement and promotion of regionalism from within the other Member States by regional co-operation and partnerships providing infonnation on federal structures might be the more feasible approach rather than running the risks of a dilemma which could develop in thix field.

It was predominantly the awareness of these risks which made the Bundcxru! openly threaten not to ratify the Treaty on Political Union in a

unanimous resolution of 8 November l99l53 unless its demands were met satisfactorily. after it had emphasized its position on 9 November I990 and in another resolution of 26 April I991."

4.! .2. The Successes Arrived al in Maastricht

In spite of the hostilityagainst the notion of European Federalism as applied to the level of the Member States themselves. which marked much of the final stage in Great Britain. the result of the Maastricht Conference on regionalism as the second tier of federalism in Europe turned out to be fairly satisfactory:

- A Regional Committee of 189 members (of which Germany will send 24) will be created with the right not only to be heard in specific cases and if Council and Commission think fit. but also to articulate its own views on regional interests whenever the Committee considers this to be necessary.
- The principle of subsidiarity will be part of the Treaty in a shape which is not dominated by a mere efficiency approach that would have favoured the Community rather than strengthened its component parts on the national and sub-national tiers.
- However. there will be no right of litigation in the Court of Justice either for the regions individually or for the Committee of the Regions as such in matters of regional concern. including the subsidiarity clause.
- But the right of representation in the Council of Ministers will no longer be confined to members of the national governments only.

Clarification of the concept of a "Europe of the Regions" has thus been achieved in a number of essential starting points for further institutional development: The key success is the fact that the constitutional structure of the EC has been opened up to include a regional tier. This will be of substantial help for the further development nl’ processes toward internal regional autonomy wherever such processes have started already and it can encourage them where they are coming into existance. The creation of the Regional Committee in particular will immediately pose the question how representative institutions can be built up in regions which are up to now not yet constitutionally organized (which means. of course. in the majority of them). If it were to be manned simply by nominees of the national governments rather than by representatives of the regions. it would quite obviously fail to meet the requirements of its functions. In the case of Germany. anyway. such a nomination would never be accepted by the Ldndrr and it has also not been intended by the Federal Govcmment at any time.

The prospects of a positive institutional development along that road should. nevertheless. not hide the dangers for it: They would seem to be located mainly in the large number of regions in the EC and in the vast differences between them in almost all conceivable constitutional. political. administrative. cultural. economic. financial and social categories. The invitation of this scenario to a strong centre to govem it by the classical game of "divide and nile" appears to be only too tempting. Both skill and self-restraint on all sides will be needed to avoid its abuses.

Relating all this to the institutional agenda of the German Ld’nder within their own system. the maintenance and further strengthening of their internal position in EC matters within the federal structure will. therefore. remain of essential importance alongside the promising but nonetheless also potentially hazardous project of European regionalization.

4.2. European Integration in Constitutional Reform

Following from this. present plans are to embody the internal rights of the Ldnder and the Bundestag in European affairs as described already in an amendment to Article 24 of the Basic Law and to include in this amendment also their rights of participation within the EC structure itself, As at present. Anicle 24 entitles the Federation to transfer powers of sovereignty to inter- and supranational organisations such as in particular the EC without clear reference to the position of the Bundcsrat in that field.

A bill to the effect of subjecting such transfers to the Bmulrxrar’s consent was already initiated by it on l6 March l99().55 lts aims have now been widened substantially by a recommendation of the Bundcsrm’x Commission for Constitutional Reform of 17 October l99l including alsoz-V’

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- the guarantee of an essential influence of the Lander on decision-making within inter- and supranational organizations. wherever their competences or "essential interests" are at stake:
- the power of the Lander to exercise the rights of the Federal Republic within such an organization if their competences are touched upon in essence:
- the right of the Lander to maintain relations of their own to such organizations and to have missions of their own established at them;
- and the possibility for the Lt’inder to transfer their own rights of sovereignty not only to such organizations but also to institutions of inter-regional co-operation.

These are. indeed, rather wide-ranging projects. both politically and legally. ln pursuing them the Lender will have to be prepared for a balanced position taking into account also the impact of Gennan unification and its effects on the future of federalism: The five new Lander will urgently need not only the institutional devices developed for internal Ldnder and Bundcsrat participation in EC matters but equally the influence of the Federal Govemment in the Council of Ministers in order to have their specific interests articulated and furthered on the European level. As has been pointed out earlier. the vast financial and economic need of the new Lander will tend to make them extremely dependent on the Federation. With the resulting danger of a re-emerging rule of the "golden lead" over the entire federal structure. all of the Lander will have to be aware of an imminent weakening of their constitutional and political position in EC policy-making within the internal system as well. Moreover. federal processes such as those in the EC field will tend to become even more intricate and intransparent with now sixteen as compared with eleven L(indcr before unification. Needless to say. a direct participation of the Lander on the EC-Icvel itself will necessitate all the more sufficient administrative and political capacities iIt order to cope effectively with the multiplicity of liC business. ’l’hus territorial reform has its relevance also within a concept of a "Europe of the Regions".

4.3. Visions for Federalism: A "Europe with the Regions"

If this concept means a "return to the Old Nations of Europe" (such as Scotland or Catalonia) by a dissolution of some of its Member States into independent regional units of the Community. it will. therefore. hardly be a feasible vision for the newly united Germany in the near future. Neither. could it be such a vision for Europe as a whole: In such a shape it would: lead to a severe weakening of the Community in a phase of history in which? the EC is challenged by vast new tasks in a Greater Europe. Moreover, it would tend to give rise to a new nationalism and separatism in both West and East rather than help to integrate legitimate regional claims to autonomy all over the continent. Nonetheless. this does not simultaneously mean that the component parts of the European Community in the let century will of necessity have to be identical with its present Member States or the states aiming to accede to it in the near future. But even in the face of this. a "breaking-up" of Member States in favour of a restitution of what in some quarters has come to be termed a "Europe of the Old Nations" will neither be achievable nor desirable at the cost of higher priority political. social and economic aims.

A concept which is both more reasonable and more realistic is thus that of a doubly federalised Europe wherever it is wanted anti possible: Though presently resisted. and for partly understandable but partly also misconceived reasons. even rejected in countries like Great Britain, the emergence of a Political Union into a federal structure of the Community on the level of the Member States themselves will hardly be faced with any substantial alternative. To make it workable under the guidance of a correctly applied principle of subsidiarity. however. it will have to be coupled to the maintenance and the encouragement of constitutionally organized regionalism as the second tier of federalism below the national level. But this tier should neither be forced upon any existing national structures nor should it be created artificially where it would be out (if place. as in the ease of member States which are either humngenenus in themselves regionally or simply too small for regional subdivision.

Bearing in mind both these limitations and the misunderstandings associated with the idea of the "Old Nations of Europe". the concept of a "Europe of the Regions" should rather be reviewed and re-natnetl into one

of "Europe with the Regions". The considerations leading to this conclusion would have several. indeed. useful and necessary effects: That new and better notion would imply:
- an avoidance of the misgivings attached to the rather aggressive character of a "Europe of the Old Nations":
- a clear distinction. therefore. from all destructive battle-cries for separatism and new nationalism;
- an emphasis. instead. of the pannership concept embodied in it;
- an appeal. simultaneously. not to ruin the idea by the application of the political mechanics of "divide and mle" on the higher levels:
- and finally. a restriction of its validity to only those structures which are ready and suited for subdivision into bodies of internal autonomy.

Together with the leading federal goal of the United (Member) States of Europe such a concept of a "Europe Willi the Regions" would seem to make more sense than a both misunderstandable and abusable one of a "Europe of the Regions". More than that: within its terms a doubly federalised European idea would be feasible and thus free of any detrimental smell of utopia. Last but not least, by achieving this it would take into constructive account the cultural and ethnic multiplicity which distinguishes the Old Continent from all of the others and which. therefore, calls for unique and particular shapes of federalism within its frontiers.

Under these premises and by relating them to the development of a Greater Europe including the East in the years ahead. (the then) Foreign Minister Genschcr was certainly right when suggesting in January I990 that "confederations and federations will determine the future picture of Europe")7 Germany’s experience with her working structures of a troubled but deeply rooted federalism could well contribute to the implementation of this picture.

Notes

The author owes sincere gratitude to Charles Jeffery (see note 2) for many thoughtful ’ corrections of his English as well as to Mrs Elisabeth Wallenfang for her patient typing of the f manuscript - with all the numerous revisions it needed in the course of events.

I This is a revised version of a paper presented at the XVth World Congress of the l International Political Science Association in Buenos Aires 21 - 25 July l99l. It has bee n 1 revised to take into accountdevelopmenu up to l January 1992.

2With regard to facLs. developments and evaluations up to the first free elections in the GDR l on IR March 1990(which marked the fotmal start of the process of German unification). thi s , paper is mainly based on the author’s chapters on The working relationships between Btmd and Lander in the Federal Republic of Gennany’ and lnto the 1990’s: Federalism and German unification. in: Charlie Jeffery and Peter Savigear (Eds). Gonna" F edm’alixm Toda y. Leicester University Press I991. pp, 40-62 and pp.l38-l48 of which a combined and shortened German version entitled ’Gegenwart und Zukunt’t der Arbeitsstrukturen des deeralismus: Status quo. "Europa der Regionen" und staatliche Einheit Deutschlands’yas published in: Zeitscliri/i fi’ir Parlamenlsji’agen. I990 pp. IXO-ZOO, As to notes relatin g to those pans of the paper. reference can (and. for reasons of space. must). therefore. be m ade here predominantly to the notes in these publications. Fnotnoting here thus concentrates on references during and after the process of unification and. within this scope. mainly on official documents up to 25 May l99l.

3 However. this should certainly not conceal the fact that the Federation does have substantial powers to give administrative instnictions to the ministries and other authon ties of the Ld’nder in fields in which the binder execute federal legislation as agents of the Federation. These powers have just recently been re-cmphasized by the Federal Constitutional Coun in matters concerning nuclear energy plants and related facilities; s ee BVcrfG (Uneil des Zweiten Senats) l0 Apn’l l99l 2 BvG l/9l - conceming such facilities in Lower Saxony: published in: Nle I991, p. 870.

4 K ommixsimi Verfasxungsreform Bundesrat: K omniissimisdritckwche 5. pp, 9 - 12 and SIthroI, 2.Sitzimg (17 October l99l). pp.l l-l6. 55-56

5 Plenary business consists of federal legislation (including any statutory instruments a rising from it. if they require the consent of the Bundcxrat). the reviewing and passing of stat

ements
on draft European secondary legislation. general administrative mles which facilitate the execution of federal statutes. any Bimdesrm resolutions tabled on the above-mentioned are as
of business. elections of IIum/esmi or Ldmlrr representatives to Federal Administrative Boards. election of justices to the Federal Constitutional Coun. and - rather more rarely -
comments by the Bumlcsrai on law suits pending in this Coun.
6 Substantial changes in the pattern had to be negotiated and organized after Gemmn unification since the claims of the Five new Lander had to be taken into account. These changes came into effect on 18 October I991 with the distribution of the now 17 Committee chairmansllips - IImu/mrauaDI-urlsurhc 680/91 (Bcschlull). The new pattern also includes the abolition of the previous (and now redundant) Committee for Internal Gennan Relations (between the Federal Republic and the Getman Democratic Republic up in unification) and the creation of a Committee for Gennan Unity instead (chaired by the Minister-Presidcnt 0 f
Saxony as one of the new Li’imlcr).
7 Discussions on Bumlesrai plenary business are regularly held in preparation for the Advisory Council’s work by an informal. but indispensable conference bringing together lh t’

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civil servants who coordinate Btmrlesrm business in the Missions of the Ldnder and the secretanes of the Bmtdesral committees.
8 See Handbuch dc: Btmdesrulc: 1991/92. pp.157-161.
9 $45 a-k of the Blmdesrar Standing Orders as of 10 June 1988; Handbuch (1e: Bundesrale: 1991/92. pp.117-121.
’0 In most cases civil servants of the Missions also panicipate in the meetings of the va rious poltcy commtttees of the parliamentary parties which precede Btmdcslag committee sessions .
I I 1.e. one of the phases in the jurisdiction of the US. Supreme Court concerning racial discrimination.
’2 Up to the Treaty 01’ Unification. under which it was deleted as of 3 October 1990. Art icle 23 ruled that "in other pans of Germany (as distinct from the territories of the founding Ldndrr) the Basic Law shall be put into force on their accession".
’3 "This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force."
14 For the participation of the Liindcr in the early phases of this process and for thc agreements with the Federation on this matter concluded up to 18 March 1990 see the author’s chapter in the publication quoted in footnote 1 (’Into the 1990s: Federalism and German Unification’). pp.139-143.
’5 Especially in parts or the Social Democratic Party (SPD).
’6 Acceding as :1 whole under Article 1 of the Treaty of UniFtcation.
’7 Particularly regarding the Preamble, the deletion of Article 23 itself. certain transi tional regulations specifically on infn’ngements of the rights of property. and a revision of Ar ticle 146 (quoted in its old text in footnote 1 1); see Article 4 of the Treaty of Unification.
18 First published in Regit?rungspmtsmlielm DeuIsr/u- Dr’nmkrulisrhr Rt’publik No.29 of 30 July 1990.
19 See Friedrich-Ebcrt-Stiftung (m). Zur Gexchichm der DDR . Van umn’cm :u Ilnnecker. Bonn. 1986. p.38 (there: footnote 53).
20 See in more detail footnote 8 to the author’s chapter on Gcnnan unification quoted in footnote 2 here (p.147).
Zl Bundcsrals-Drurk.mche 103/91 (BeschluB)
22 K ommission Verfassmtgsrefnrm Btmdesral: SIcanI. 2. Silzung (17 October 1991).
23 Kommission ijbssttngsrefnrm Bumlasrals Komm1’ssionsdrucksache 5. pp.2-9 and (concerning Art. 36 BL) p.12.
24 Kommission Vetfummgsrcform Bundexmr: Kommixsimtsdrucksache 6.
25 Buudextags-Dr1tcksarht’ 12/415zaccompanied by a similar but still more plebiscritary concept of the Parliamentary Group of Alliance 90/1’he Greens. Bumlcsmgs-Drurk.tache 12/ 563.
2(’ Hululrslugx-/)Iut1.1111/11’ 12/567 ((1)11/(311 and NW); I’lt’anL Il’l’ 1-1 May 1991, pp. 171511- 1747C. .
37 I’lthrm IIT 211 November 1991. pp.5250-5260.
28 Plt’nPrnI BR 637. Silzung (29 November 1991). pp.558-59. 574-576.
29 Ilumlt’slugx-Dr1u’ksuthe 12/ 1590 and Bltndr’sruls-Drurk.mche 741/91 (BeschluB)
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30 Bundexlags-Drurk_tachen 12/1764. 17/1777. 12/1791. 12/1807 and 12/1810; SlenProl BT 12 December 1991. p.5672.
3’ BVerfG 161u1y 1991. published in: NJW 1991 p.2474
32 Then Dr. Wolfgang Schtluble (CDU).
33 Following the lines su gested in the publications quoted in footnote 2 (p.145 of the English and p.198 of the erman version).
34 BtmdesralsDruduache 551/2/90. No. 4.
35 PIenProI. BR 611517211113 (24 August 1990).
36 This was explicitly welcomed by the Btmdesral in point 5 of its resolution cited in footnote
37 C1. Hcribcn Prantl. ’Deutschland . neu glicdern’. in: Stiddcmsrhe Zeinmg 18 October 1991.
38 Report: Sachversttindigenkommission fitr die Neugliedcrung des Bundesgebiets. Vorschldge :m’ Neugliedenmg dex Btmdesgebielx gcmdss Ari. 29 des Grtmtigesetzes. Bonn 1972. The author served as the liaison officer of the Federal Chancellors Office in this Commission.
39 Bundeslags-Dr1tck.rache 7/5924. pp.129,130 e! seq. The Federal Chancellor’s Office followed the deliberations of this Commission through its Planning Division. in which the author had responsibility for this field from 1971 to 1973.
40 Eckpunkte dcr Uinder l’iIr die buntlesstuutlichc Ordnung itn vcrcintcn Deutschland. published in Zeilschriflft’lr Par/amculerugen 1990. pp.46l.463.

4’ Kommission Verfaxstqurefm’m Bundesrar: Knmmissirmsrlrucluac/w 2. No. 1.
42 Sec notes 22 and 24.
43 Btmdcsrals-Druck.mchcn 551/90. 557/90.
44 Btmdcsrals-Druck.rache 551/90 together with 551/1 1/90. Nos. 1-3.
45 In the period when it held the majority between June and November 1990. it demanded the convention of the Committee of Mediation ten times.
46 According to numbers compiled by the Federal Ministry of the Interior there were altogether 2904 civil servants and judges of the old Lander in the new ones in April 1991 (mostly on secondment), but these numbers are. ofcourse.constant1y changing. Within the quoted number. Nonh Rhine-Westphalia leads with 833 followed by Baden-Wiintemberg with 421. Bavaria 414. Lower Saxony 410. Hesse 314. Schleswig-Holstein 205. Hamburg 124, Bremen 69. Saarland 62 and Rhineland-Palatinate 52. while in re-united Berlin the administration is directly re-organized on a fu11-sca1e basis. For a report of the Federa
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Govemment see also Btmdexlags-Drnchache 12/347 of 11 April 1991. By the end of 1991 the sum-toutl of Federal. (old)L&11dcr and (westem) local government officials and judges working in the new Lti’nder had risen to approx. 20,000.
47 The former Federal President Professor Dr. Karl Carstcns very clearly pointcd out lhcs t’
foreign examples in :1 speech held 111 a special meeting 01 the CDU/CSU Palliamcntnry Fraction in the Btmdexmg on the Bnnn-Berlin issue on 24 April 1991. which was published in Gmieral-Anzeigcr on 14 May 1991. p.14,
48 See GcncruI-Anzt-iger. Bonn 01’ 15 May 1991. quoting the Chainnan of the CDU-CSU Parliamentary Fraction in the Bundcsmg (Dr. Dregger) with the idea of moving the Bmulcsmg to Berlin and leaving the Federal Govcmment in Bonn
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49 A suggestion mainly to this effect was recently also made by one of the Deputy Chainne
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of the CDU-CSU Parliamentary Fraction in the Bundestag. Dr. Heiner Geisslcr (former Secretary General of the CDU).
50 StenProt. HT 20 June 1991. pp.2735 et 5:11.. and 2840; Bundextags-Drucksache 12/817.
51 PlenProl. BR (633. Sitzung). 5 July 1991. pp.279 e! w. 279. 293/4; Bundcsrals-DruckJache 422191 (Beschlu/I).
52 057cm! Gazette om: EC (German Edition). No. c 326. 19 December 1988, p.289.
53 Bundexratx-Drucksache 680/91 (BeschluB).
54 Btmdesrars-Druckxache 780/90 (BeschluB) and 252/91 (BeschluB)’
55 On the basis of BuudesraIs-Drucksache 703/89.
56 Kommiuion Vedantmgsre/nrm Bundesml: Kmnmissimudrurkxarlw 5,pp.2-9 and StequI. 2. Sitzung (17 October 1991). pp. 12. 55.
57 Quoted in :’Die EG erdffnet "Beitrittsperspektiven" fur die DDR’fruaniu-tcr Allgemeine Zet’mng. 13 January 1990.
62
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Born 1935. German Lawyer (Universities of Kiel and Hamburg. Grand State Examination 1964. Master of Arts. Political Science. University 01’ Kansas (USA). 1962. Legislative Counsel. State Legislature (Landtag) of Schleswig-Holstein. 1964-67 and Legal Adviser to the Leader of the Opposition there. 1967.70. Assistant Ministerial Counsellor (Regierungsdireklor) in the Federal Chancellor’s Office, Bonn. 1970-74 (Bundesrat Division, Planning Department and Personal sassistant to the Federal Minister for Special Tasks of the Chancellor). Head of Division (Ministerialral) in the Mission (Lamlm’vertrelung) of Lower saxony to the Federation in Bonn, 1974 to date (inter alia: constitutional and legal affairs. Btmd-Liinder relations. German and European unification). Sccondment to Secretariat General of the European Parliament. Luxembourg for one year (1979). Various publications on federal and parliamentary topics.
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