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Local government in Germany

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1. Historical evolution of local self-government

Local self-government has old traditions in Germany, but after the period of absolutism, its importance raised again in the reforms, influenced by France, of the napoleonic period in western Germany after 1801, and in the Prussian reforms of the same period, with the milestone of the Prussian *Städteordnung* (code of towns) of 19 November 1808, drafted by the *Freiherr vom Stein*. This introduced a large legislation all over Germany in the 19th century. Regulation of local self-government always was a competence of the single States (later: *Länder*), not of the central State (*Reich*, Empire, Federation), with a special position of the City-States which were, as such, members of the central State (1815: Hamburg, Bremen, Lübeck, Frankfurt, since 1945: Berlin, Hamburg, Bremen). For that reason, a different treatment of towns and other local communities was normal. In Prussia, e.g., the rural communities were regulated by law only in 1891.

From the central State's side, a first guarantee of local self-government, binding for the *Länder*, was given only by the Weimar Constitution of 1919 (articles 17.2, 127). Only the Nazi government tried, in 1935, to impose a uniform *Deutsche Gemeindeordnung* for all the local authorities in Germany, abolishing the democratic organisation, and unifying, in this way, the tendencies of legislation.

After 1945, every *Land* established it's code of local authorities. The Basic Law (*Grundgesetz,* 1949, which is the – originally provisional – federal constitution) of the Federal Republic of Germany guaranteed local self-government (article 28), however leaving to the *Länder* – constitutions and laws – the legislative power on the subject. After the German reunification, in 1990, the new East German *Länder* established their own codes of local authorities; therefore, to study local self-government in Germany, one has to take into account, besides the federal constitutional guarantee, the regulation of everyone of the 16 *Länder*. However there are similar tendencies of development, e.g. in the 1970ies

a drastic reduction of the number of local authorities in West-Germany, with corresponding (still enduring) development in East Germany after 1990, in the 1990ies the general introduction of direct popular election of mayors, of referendum and initiative on local level, and towards privatisation of many local services.

2. Basic facts and figures

Nowadays (2008) the 16 *Länder* of the Federal Republic of Germany contain 12629 local communities, between them the 3 City-States. In the other *Länder* exists, besides the local communities, a second tier of self-government in the *Kreise* or *Landkreise* (comparable to counties). Though the bigger towns normally do not belong to a *Kreis*, but they accomplish the functions of first and second tier of local self-government together. Of such *kreisfreie Städte* there are 116, and besides these 323 Kreise, so that the second tier consists of 439 unities.

Furthermore the bigger towns often are subdivised in city districts with more or less their own powers; similar phenomena may be found in merged municipalities where the old communities sometimes maintain some powers. On the other side, smaller communities often (77 % of the local communities) have an united administration with others. That can happen based on State (*Land*) laws, in the old and still used, although constitutionally problematic form of a *Amt* (common office), or a *Gemeindeverwaltungsverband* or *Verwaltungsgemeinschaft*. While these solutions do not suppose the consent of the respective communities, these may cooperate as well in form of voluntary inter-communal cooperation (*Zweckverband*). Though obviously all these solutions reduce the importance of the authorities of the single communities. Therefore there is, in two *Länder*, the alternative to construct local communities on two levels: to unite several local communities (*Ortsgemeinden*) to a second-tier-community with it's own council and administration (*Samtgemeinde*, Lower Saxony, or *Verbandsgemeinde*, Rhenania-Palatinate).

Finally there exist, in some *Länder* and for certain purposes, unions of local communities to higher associations, forming a sort of third tier of local government (*Landschaftsverbände, Bezirksverbände)*, besides the deconcentrated forms of State's administration. For the representation of their interests, local communities are associated in unions on the levels of the *Land* and of the central State, in separate organisations for the bigger towns (*Deutscher Städtetag*), for the other local communities (*Deutscher Städte- und Gemeindebund*) and for the *Landkreise* (*Deutscher Landkreistag)*. These organisations have a specific role to participate in State decisions and on European level (Committee of Regions).

3. Current basic legal framework

a) European Charter of Local Self-Government: Given the historical tradition of local self-government in Germany and the German cooperation on the level of the Council of Europe, the participation of Germany in the preparation and enacting of the Local Charter was obvious. As a matter of fact, Germany belonged to the first signatory States of the Charter. The Charter was approved by a Federal Law of 22-1-1987 (BGBl. II, p. 65) and ratified without reserves; a declaration regarding Berlin is overruled since the German reunification. Therefore the Charter is, in principle, applicable in Germany. However there is the problem that this is based on a Federal Law while, as underlined before, legislation on local authorities is a power regarding the *Länder*. Therefore doubts regarding the constitutionality of the law of approbation are possible. According the practice (Lindau-Agreement of 1957) international treaties touching powers of the *Länder* are accepted, if the *Länder* have agreed to them before, as in the case of the Charter. But there is no Constitutional Court decision confirming that opinion. Therefore many German experts argue in the sense that article 28 of the Basic Law contains all the guarantees of the European Charter and apply this article, perhaps using the Charter as an interpretative instrument.

b) Federal constitutional guarantee of local self-government (kommunale Selbstverwaltung):

Article 28 BL says (in translation proposed by the Federal Ministry of Justice):

"Land constitutions – Autonomy of municipalities

(1) The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law. In each *Land*, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess citizenship in any member state of the European Community are also eligible to vote and to be elected in accord with European Community law. In municipalities a local assembly may take the place of an elected body.

(2) Municipalities must be guaranteed the right to regulate all their local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by a law, associations of municipalities shall also have the right of self-government according to the laws. The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

(3) The Federation shall guarantee that the constitutional order of the *Länder* conforms to the basic rights and to the provisions of paragraphs (1) and (2) of this Article."

The essential principle, based on the Basic Law, is the general guarantee of local self-government regarding all the local communities in Germany, with additional guarantee of the legally granted powers for the unions of communities (*Gemeindeverbände*), especially of the second tier level (*Kreise*). The guarantee includes a financial self-responsibility as well. This guarantee, expressed in article 28.2 Basic Law, is completed by the guarantee of a freely elected representation of the people not only on the level of the *Länder*, but as well on the levels of the *Kreise* and of the local communities (article 28.1 ph. 2). These regulations concern the homogeneity of the Federation and all the *Länder* in the German constitutional system. They are minimal conditions, mandatory for every political power. Normally they are completed and often concretised by additional dispositions in the *Länder* constitutions[1]. For the City-States, their constitutions are the constitutions of the city as municipality as well.

The interpretation of this federal guarantee, cleared by a large discussion and jurisprudence, but still controversial in some details, includes above all that, in the framework of legislation, local self-government concerns *all* the affairs of the local community. The local character of tasks constitutes the power of local authorities. Therefore a special list of single tasks is not necessary. In case of general problems which have a local impact, like planning of motorways or power plants or the international development cooperation, the accent on the local concern may justify the activity of local authorities, although the planning decision of the central administration and State's foreign politics prevail. The universal character of local communities power limits the activities of the *Kreise* on legally attributed tasks. As far as local authorities are concerned, they act in own responsibility, unless legislation does not limit or determinate it; in such fields local authorities may act in the role of delegated State administration. The local power includes a statutory power of local authorities as well.

Nevertheless this situation is limited by the reserve of the framework of legislation: This may transfer a local task to higher levels of administration; it may limit the margin of self-responsible decision; or it may regulate a materia and delegate it as State power to the local authorities. One of the most incisive limitations is the limitation by the constitutional fundamental rights which, according to the prevailing opinion, may be limited only on legal basis, not by autonomous decisions of local authorities. In practice that leads to a strong limitation of local responsibility, e.g. in the fields of taxation and contraventions.

It follows that local self-government is guaranteed as an institutional guarantee which may be concretised in different ways, but in no case abolished or neglected. For the single

[1] See for Baden-Württemberg articles 69-76, Bayern articles 10-12, 83, Brandenburg articles 1, 2, Bremen articles 143-149, Hessen articles 137-138, Mecklenburg-Vorpommern articles 3, 69, 72-75, Niedersachsen articles 57, 58, Nordrhein-Westfalen articles 1, 3, 78, 79, Rheinland-Pfalz articles 49, 50, Saarland articles 117-124, Sachsen articles 82, 84-88, Sachsen-Anhalt articles 2, 75, 86-90, Schleswig-Holstein articles 2, 3, 46-49, Thüringen articles 80, 91-95.

local communities it results in a guarantee of their constitutional and legal position which may be limited, until the possibility of merger of local communities, but necessarily with respect and taking account of the principle of legal self-government. This supposes a balancing of interests and values and is important for the legal protection (see below, nr. 10).

c) Legal concretisation: Therefore there is no further federal regulation of local self-government, but every *Land* – except the City-States – has to complete the constitutional rules and principles by it's legislation. Normally there is a code of local communities (*Gemeindeordnung*) and a code of the communities of second tier (*Landkreisordnung* or *Kreisordnung*), sometimes both objects are united in one law (Brandenburg, Mecklenburg-Vorpommern: *Kommunalverfassung*, Saarland: *Kommunalselbstverwaltungsgesetz*, Thüringen: *Kommunalordnung*; recently, with law of 17-12-2010, Lower Saxony has codified all the local authorities in one *Kommunalverfassungsgesetz*). Often these laws contain rules on intermunicipal cooperation and for unions of municipalities around the big towns; often these objects are ruled by special laws. All these laws have been enacted after 1945, in East Germany after 1990, and they are very frequently modified. For a (loose-leaf) collection, connected with laws on local elections, local finance and others, one has to refer to Gerd Schmidt-Eichstaedt (ed.), Die Gemeindeordnungen und die Kreisordnungen in der Bundesrepublik Deutschland, 2nd ed., 15th actualisation (January 2011), Stuttgart (Kohlhammer). Lists are contained in the actual manuals (see below, nr. 12 b).

d) Influence of federal legislation: Therefore federal legislation does not have a great influence on local self-government, although the local authorities have to execute, together with the legislation of the *Land*, the federal legislation as well. But the power of distribution of tasks, formerly often claimed by federal laws, is limited since the constitutional reform of 2006 which has excluded a direct obligation of local authorities by federal legislation: this always has to be executed by the *Länder*, and it is their power to decide on the execution on local level (article 87.1, ph. 7 BL). A direct transfer to local authorities by federal laws is no longer allowed, unless special constitutional regulations justify it. – Besides that, federal administration, very important on central level, does not have many institutional resources on local level (exceptions: esp. customs, a very limited federal police, military administration, waterways, motorways). In some fields, esp. social security, there are special forms of self-government separated from local authorities, and some others, formerly important like railways and post, have undergone organisational privatisation and appear therefore nowadays as enterprises.

e) Capital city: The German reunification has increased, beginning with the reunification-treaty, the importance of the question, but the fact that Berlin is one of the City-States ensures a special position. Above all the repartition of central administrations (esp.

ministries) between Bonn and Berlin is regulated by a special federal law, and in the consequence of the reform of federalism of 2006, a law on the representation of the entire State (the Federation) in the capital city should be enacted (article 22.1 BL). Nevertheless a law of this kind does not exist yet.

4. Competences, powers and services of local authorities

a) The principle of universality: As said above (nr. 3 b), local communities are, in principle, free to accomplish all the tasks of the local community, and to regulate these fields by statutes, however only within the limits established by the State's legislation. In practice important, above all, are the local services of economic and non-economic character, often summarized as *Daseinsvorsorge* (provision of existence). According to the laws, the citizens are entitled to participate in these services. Non-economic services of this kind are e.g. kindergarten and day nurseries, sports fields, swimming establishments, educational institutes, cultural institutions for concerts, theatres etc., parks, hospitals, cemeteries. This power is completed by the planning power of local authorities, disposal of sewage and refuse, participation in educational institutions. Furthermore, as far as local purposes and needs are concerned, local communities have the right to exercise economic activities, establishing local savings-banks, enterprises for energy- and water-distribution, local traffic, house-building etc. These enterprises may be either a part of the local administration, or separate establishments of public law, or commercial societies in the ownership of the local community. Often these enterprises may be organised in cooperation of several local communities. In case of necessity and public interest, local authorities may, according to the laws, establish an obligation for the citizens to use these services.

b) Practical limitation: In despite of this very extensive power, it's exercise is difficult and limited, by financial-economic (see below, nr. 7) and by legal reasons. These are based on the framework of legislation which may limit local self-government. To understand the importance of this limitation, it has to be noted that local self-government, according to the prevailing opinion in Germany, has to be understood as local self-administration: a part, though separated, of the administration, not of the constitutional system, and even local statutes can not substitute a (parliamentary) law. Therefore, as far as fundamental rights of the citizens are concerned, they may be limited only by law, and only as far such laws allow it, local authorities have the power to act in these fields. For this reason, besides the mentioned obligation to use certain local services, all local taxation, sanctions of contraventions, expropriations, measures in protection of environment are possible only as far as laws legitimate it. There are many legal provisions of this kind, but only these define the power of local authorities in all these fields.

That is why, in spite of the principle of universality which permits accomplishing voluntary local tasks as far as the margin of laws is respected, the competence of local authorities is essentially determined by legislation. It often declares some tasks mandatory for local authorities, especially to ensure the necessary services of a social State (e.g. social assistance, education). With this structure the effective service may be combined with the local self-responsibility for the substance of the task. But more frequently the legal regulation contains the content of the services and measures to be taken by the local authorities as well. In this sense, e.g. urban planning is largely regulated, but has to be actualised by the local authorities, and esp. their economic activities have to take account of an intense regulation, even from the side of the European Union.

Furthermore, on legal basis or even without it, State's financial resources may be allowed to aid certain local investments. With such "earmarked" grants (see article 9.7 ECLSG) local authorities shall be influenced setting their priorities of investment, e.g. in programs to finance certain sport fields, swimming establishments or other voluntary tasks. The constitutional legitimacy of such programs of "golden rein" is doubtful, but they are difficult to avoid.

c) *Mandatory tasks with directives or delegated powers:* In these ways many powers of local authorities are regulated more or less totally by the State's legislation, and the local power is limited on simple execution according to the directives given by the superior State's bodies. This is refers above all to the tasks regarding public order, in fields like trade and crafts, traffic, constructions, foreigners, public reunions, while the police organisation is nowadays generally separated from the local authorities.

For those tasks of order and other completely State-regulated powers different techniques of qualification are possible. While, according to the tradition, they may be regarded, in clear separation from the tasks of local self-government, as State tasks delegated to local authorities, and therefore under general control of the State administration, a tendency more in favour of local self-government after 1945 qualifies them as local tasks like the tasks of local self-government, but mandatory tasks under power of directives of the State (*Pflichtaufgaben nach Weisung*, according to the Weinheim draft, 1948). The former, "dualistic" construction prevails in six *Länder* (Bavaria, Lower Saxony, Rhineland-Palatinate, Saarland, Saxony-Anhalt, Thuringia), while the construction as "monistic" tasks with different intensity of State's directives determines the legislation in seven *Länder* (Baden-Wurttemberg, Brandenburg, Hesse, Mecklenburg-Vorpommern, North-Rhineland-Westphalia, Saxony, Schleswig-Holstein). Both constructions allow State's supervision, as far as the laws dispose of the opportunity of the local measures as well, and directives, but in detail, esp. regarding the position of local authorities calling for judicial review against such limitations of self-government, there are some differences. The solutions in the different *Länder* differ, although there is a tendency to assimilation, esp.

with participation of the council in the execution of delegated powers as well. In both ways, local authorities generally act as the lowest public authorities closest to the citizens (cf. article 4.3, 4.4 ECLSG). A State's administration on that level has a very low importance, except perhaps the police and a few federal authorities (see above, 3 d). Nevertheless, there are cases where the legislation of some *Länder* makes use of certain local authorities – esp. the heads of administration of the *Kreise* – as State's authorities, to ensure the implementation of the aims of State's administration (so called *Organleihe*).

5. Basic Organisation

a) Traditional forms and leading principles: Traditionally the forms of organisation of local authorities in the different parts of Germany differ: There is, in the tradition of Prussian towns, the constitution with magistrate (*Magistratsverfassung*), i.e. a collegial administrative body elected by the council, while in the west German parts (influence of the French system), there is the constitution with mayor (*Bürgermeisterverfassung*) as monocratic organ elected by the council and presiding it. Later, in southern Germany, there was introduced a simultaneous popular election of council and mayor (*süddeutsche Ratsverfassung*), while, in parts of northern Germany, after 1945 all the power was concentrated in the council which, for administrative purposes, employed a executive functionary (*Gemeindedirektor: norddeutsche Ratsverfassung*). On the second tier, instead, normally the influence of the executive function, often with control of the State, prevailed, and the council had less powers.

In this situation two main tendencies influenced the legislation. According to article 28.1 ph. 2 BL (see above, 3 b) the existence of a council elected according to the constitutional principles of general, direct, free, equal and secret elections is generally prescribed as for the *Länder* equally for all the local communities and the *Kreise*; in this way the position of the council is strengthened in comparison with the administration. On the other hand, since 1990 a tendency towards direct popular election of mayors has determined the organisation nearly everywhere in Germany, for the level of local communities as for the heads of administration of the *Kreise (Landräte)*. Therefore the forms of organisation have approached, however preserving elements of the former models. – Besides that, ideas of New Public Management, often supported by experimental clauses in the codes of local self-government, and forms of direct democracy have influenced the local government organisation.

b) The council: In detail, participation at elections of the council (*Rat, Gemeinderat, Stadtrat, Gemeindevertretung, Stadtverordnetenversammlung*, on the level of the *Kreise: Kreistag*) is a fundamental right of all citizens: Germans and, according to a EU-directive which influenced article 28.1 ph.3 BL, citizens of the European Union. There is a tendency in

some *Länder* to give the right to vote from 16 years on. The electoral system, regulated by special laws on the local elections, is proportional everywhere, but in different forms, with more or less influence of the electors on the personalities of the elected. Political parties (of federal and *Land*-level) have an important influence, but local associations of electors as well. While in former years clauses of exclusion of very small parties (under 5% of votes) were frequent, the recent constitutional jurisprudence is very critical against them; so they have no more importance.

The council generally is, according to the codes of local authorities, the supreme organ of the local community, with a number of members according to the population, between below 10 until about 100, and elected for a period between 4 and 6 years. Often the mayor presides it; sometimes there is a special president of the council. There are commissions of the council, in part mandatory according to the code, in part set up autonomously, often regulated in autonomous statutes concerning the interior organisation of the council. Members of the council have their own rights to participate; belonging to the same party they cooperate in a parliamentary group, with certain rights according to the statute. In case of particular personal involvement, members of the council are excluded from deliberation and decision.

According it's position, the powers of the council are, at least in principle, comprehensive; the codes contain long lists of exclusive powers. Nevertheless there is a contradiction. Following the idea of local self-government as part of the administration, the council is not a legislative organ (see above, 4 b). Consequently, there should be a general power of the council in all matters interesting the local community and it's administration. That was the point of departure of the concentration of power in the early post-war period. However the practice insisted on a limitation of powers of council and mayor, introducing a kind of separation of powers and a guarantee of the sphere of the mayor as head of the local administration. Furthermore the directly elected mayor has his own democratic legitimacy and therefore a stronger position. Following these trends, the council has a right of control, but not a general power to treat administrative affairs. There are reserved powers of the council, according to long catalogues mentioning tasks like interior affairs, elections, deciding on local statutes, budget, general problems of organisation, esp. of public services and enterprises, territorial questions. But the interior organisation of the administration and it's single concerns are reserved to the power of the mayor.

c) *Mayor, deputy mayors, administration:* As executive organs, there are nowadays regularly mayors in the municipalities and, corresponding, administrative directors (*Landrat*) on the second tier level of the *Kreis*. They are functionaries, elected by the local population (Baden-Württemberg and Schleswig-Holstein: *Landrat* elected by the council), for a period sometimes equal to that of the council, often longer (5-10 years). Often and with qualified

majority, a destitution of mayors by the population is possible. Furthermore there are, sometimes following the old model of collegial direction (*Magistratsverfassung*, above a), more frequently as substitutes, deputy mayors (*Beigeordnete*), as well functionaries elected by the council for a certain period and competent for certain tasks according to the code or to the local statutes. Sometimes mayor and deputy mayors, together with some elected members of the council, form a preparing committee for certain important administrative tasks (*Verwaltungsausschuss*). In this way the local administration is guided, always under direction of the mayor or/ and the competent deputy mayor. *Nevertheless* there may be, either regulated by the code of local authorities, or by autonomous decision of the municipality, independent commissioners for certain tasks, actually esp. for equalization of women. The legal obligation of larger municipalities to employ such commissioners has been approved by the constitutional jurisprudence.

Tasks of the mayor are above all the direction of the local administration. He prepares and executes the decisions of the council and decides certain matters immediately, esp. current affairs and tasks legally delegated to the mayor as such (see above, nr. 4 c). The importance of these tasks is controversial. Tendencies of New Public Management enforce it; tendencies of democratisation tend to reduce it. - Furthermore in case of decisions of the council violating the laws or, according some codes of local authorities, the interests of the municipality, the mayor may make his objections, demanding a second discussion in the council or, in case of illegality, a decision in way of supervision (see below, nr. 9). Finally it is task of the mayor and, in case of necessity, his substitutes to represent the municipality in affairs of public or private law.

d) *Participation of citizens:* The characterised organisation has to be seen in the framework of the position of citizens in local self-government. All German citizens, and nowadays following to the European law the citizens of the European Union as well (see article 28.1 ph. 3 BL) have certain rights and duties (esp. to accomplish honorary functions and to pay taxes and rates). Between the rights, besides the right of using local services and the above mentioned right to elect the council and the mayor, one speaks of a general right to co-determination in matters of local self-government. Therefore institutions like citizens assemblies, hearings, citizens requests, consultative votes are often regulated in the codes, and they are possible even without formal regulation. But they may be – and are more and more, after first steps since the 1950ies in Baden-Württemberg, in the legislation of the past twenty years in all the *Länder* and for all local authorities – developed to formal rights of decision. Important local issues may be submitted to a popular vote, necessarily limited on powers of the municipality (e.g. not on State competences) and with exclusion of certain financially important affairs, planning decisions etc. In this framework a vote of citizens is binding, at least if a minimum quorum (normally 20 to 30 % of the having right to vote) supports the decision. Voting may be proposed either by the council, or, in

practice more important, by a citizens initiative. For this, a minimum quorum of signatures, depending of the number of inhabitants of the municipality (between 1 and 15%) is necessary, and besides the mentioned limitation of the object, certain formal conditions must be respected. On an initiative, the council may decide in it's sense – in this case the initiative has had success, and a vote is not necessary – or organise a popular vote which decides. Often alternative proposals by the council are possible. In detail the regulations differ, and the experiences with the new instruments are not yet complete, so that the field is in development.

e) Inter-municipal cooperation: The comprehensive extent of local self-government includes the possibility that local communities exercise their powers united, in cooperation, with others. The very limited size of many local communities recommends such solutions or even makes them necessary to accomplish some of the local tasks. Therefore the organisation of local authorities includes, according to special laws of the *Länder*, on the one side the possibility to cooperate with others, either in form of informal working groups and simple agreements, or according to inter-municipal contracts creating common public services or unions (*Zweckverband*). On the other side, the legislation may provide, in most of the *Länder*, for some forms of common organisation of small local communities, with an independent administrative organisation (*Amt, Gemeindeverwaltungsverband*) or the commitment of the common tasks to the administration of one of the participating communities (*Verwaltungsgemeinschaft*, see above, nr. 2).

The problem of these solutions is that the common administrative organisation – often under a special head – can hardly be controlled by the different participating communities and their councils. There normally is a controlling body, but composed by the mayors or some members elected by the councils, without direct democratic legitimacy and separated from the local organisations responsibles for the tasks not conferred to the common organisation. Therefore the solution of the *Amt* has recently (26-2-2010) been declared unconstitutional by the Schleswig-Holstein constitutional court and has probably to be modified.

Following older models, two *Länder* try to mitigate these problems organising for the small local communities (the *Ortsgemeinden*) and besides them a – always local and therefore distinct from the *Kreise* – common local level with a directly elected council and mayor. In that way there are two levels of local communities. The higher level (*Samtgemeinde* in Lower Saxony, *Verbandsgemeinde* in Rhineland-Palatinate) takes care of the important administrative tasks and has its own responsible structure with council, full-time mayor and administration, while the lower level exists with it's honorary organisation of council and mayor in the single communities belonging to the *Samt-* or *Verbandsgemeinde*.

6. Human resources

Public service in Germany is organised traditionally, confirmed by the Federal Constitution (article 33.4, 33.5 BL), in the different forms of properly public servants *stricto sensu* (Beamte) for authoritarian tasks, while State and other public entities have, for other tasks, their employees and workers, regulated by collective contracts of labour law. The public service in strong sense is regulated by laws, for the levels of *Länder* and local self-government prevalently legislation of the *Länder*. To this category, above all, belong the directing civil servants – mayors, deputy mayors and other responsible positions – in the local authorities. As has been explained before (above, nr. 5 c), they often are elected, and for a limited period. It is especially for these civil servants of local authorities that the category of civil servants for a limited period (not for lifetime) has been regulated in the respective laws. In these cases the employment takes place in the way of elections or nomination according to the legally provided procedure.

The other members of the staff of the local authorities are employed by the mayor as head of the administration of the local authority who has the right to employ their staff. Parts of it are public servants, others employees and workers. The employment procedure is regulated by laws, but applied by the mayor. In former times there were rights of influence of the State's authorities, but actually they are abolished or have, with exception of the State's supervision (see below, nr. 9), no more importance. The salaries are regulated by laws and collective contracts, taking account of the function of the employed and of the size of the municipalities, but these regulations leave a certain discretionary power to the local authorities.

7. Financial resources of local government

a) Distribution of tax raising power: A federal State with local self-government is a multilevel system, so that every level, as a principle, has it's own resources. But as German federalism is based on the two levels of Federation and *Länder*, the position of local self-government is weaker and attributed to the *Länder* (see article 106.9 BL). Certainly local communities have their own property and assets (see below, nr. 8) and statutory power (see above, nr. 3 b, 4 b), but legislation, especially tax legislation is reserved to the State, above all the federation. For local taxes on consummation and expenditure, the power of the *Länder* is exercised enacting laws which transfer (and limit) this power to the local authorities; such taxes, regulated in detail by local statutes, constitute, together with contributions and fees, the main own income of local authorities. But the delimitation of consummation and expenditure taxes from federal taxes like the value added tax is very critical and controversial. For instance, taxes on dogs, on entertainment, on second houses (for holidays) are admitted, while, e.g., a taxation of packaging has been declared unconstitutional. More important are the tax revenues based on federal real estate laws

(immovables and trade) where local authorities have the right to determinate the rate (see article 28.2 ph. 3 BL).

b) Right on returns: These resources based on real estate taxation, together with the own local taxes, are the most important own resources of local authorities. For the municipalities, they constitute more than one third of the resources, while the *Kreise* largely depend on the contributions paid by the municipalities. In this sense one can refer to "own" local finance.

However the local taxes are in competition with the income and value added taxes and therefore criticised and limited by the State's legislation and the jurisprudence. Through this trend measures to harmonise the amount of these taxations have been taken. On the one hand, the State levels (Federation and *Länder*) receive a part of the real estate taxes. On the other hand, to equalize and mitigate the consequences, local authorities have the right to participate in the distribution of income tax and, more recently, of the value added tax between the Federation and the *Länder* as well. But these taxes, regulated by federal laws and perceived by the tax authorities of the *Länder* – a special form of administrative organisation in cooperation of the federal and the *Land* levels – are primarily returns of the superior, not of the local levels. Therefore their repartition is, certainly determined by certain constitutional and legal principles, nevertheless a political question, not an original right of local authorities. This participation constitutes nowadays about 40% of the tax resources of municipalities.

c) Financial equalisation: In practice, to realize these transfers, there is a financial equalisation, first on federal level to mitigate the differences of financial capacities of Federation and *Länder* and between the *Länder*. This equalisation, very controversial and influenced by political decisions, constitutional judgments and even constitutional modifications, includes the needs of local authorities as well. But then the *Länder*, according to the federal constitution and to their own constitutional principles, are obliged to operate a similar financial equalisation between the local authorities as well. For this purpose, there are laws in every *Land* regulating financial transfers form the central level to the local authorities. They take into account the needs of the different kinds of local authorities and their concrete situation, using the instrument of key and index numbers, and providing for special subsidies in case of important investments.

Obviously the influence of such measures on the reality of local self-government is important.

They may be used as "golden reins" (see above, nr. 4 b) and limit, in that way, the freedom of decision of local authorities. Furthermore, in a period of limited public resources the temptation for the legislators is large to reduce financing of local authorities,

either diminishing the amount, or charging local authorities with duties to accomplish certain tasks and determining, in that way, the priorities of local self-government. Obligations like providing for a kindergarten-place for every child are classical examples, and they may be justified as tasks of a social State and consequences of the principle of equality.

But the question remains whether such developments must and may limit local self-government. To protect it, recent constitutional developments, on federal and the *Länder* levels, provide for a principle of connexity which guarantees the local authorities additional financial resources if they are obliged to fulfil additional tasks (in that sense article 106.8 BL, similar the constitutions e.g. of Bavaria, article 83.3, North-Rhineland-Westphalia, article 78.3, Rhineland-Palatinate, article 49.5). Furthermore it has been excluded (though with exceptions) that the Federation may charge local authorities directly, leaving this power to the *Länder* (article 84.1 ph. 7 BL). However the efficacy of such rules may be contested and is doubtful: Are the *Länder* the better protectors of local self-government than the Federation? As well as: what task is additional and an inadmissible charge for local authorities? So the interpretation and the effects of the new regulation remain problems, but at least one has to admit that they now are discussed.

d) *Insufficiency of the guarantees:* As a result, one has to note that the ruling of financial resources of local authorities remains unsatisfactory. Within the problems of financing the public tasks, a level not participating with decisive vote on the determining decisions necessarily remains weak. In the conflict between the constitutional guarantees of the social State on the one hand, of local self-government on the other hand the result of the balancing may always be criticised. One may doubt as well whether courts decisions may decide these problems and substitute the necessary political clearing and setting of priorities.

8. Property and assets

a) *The capacity to have property and assets:* As subjects of law and legal entities, local communities and *Kreise* are entitled to have property, and there is no regulation excluding that. On the contrary, property is very important to use the rights of local self-government, and for fulfilling their tasks, all the local communities have to manage with their property. This applies to the property of roads, places, parks, schools, public buildings as well as the property e.g. of houses built by local authorities to provide apartments for inhabitants requiring them. As far as local authorities exercise economic activities, they have property and assets of the necessary objects like factories, technical and commercial plants. The objects may belong to the local community as such, but esp. for economic activities, an organisation as separated legal entities is frequent and normal. In such situations direct owner can be a legal entity of public (institute) or private law (company of commercial

law), and the local community is the owner of this entity or it's shares, often together with other entities – a frequent form of inter-municipal cooperation.

b) *Limitations:* As instrument of local self-government, property of local communities is limited like other fields of it, especially by the framework of laws (see above, nr. 4 b). All the codes of local communities contain rules concerning property and assets of the communities. They limit the acquisition of goods as well as the alienation with respect to the local tasks and a diligent household. Criteria of this kind allow to the State's supervision to control the activities and to take the necessary measures. Especially critical cases (e.g. sale of property below the real value) are subject to the permission of the authority of supervision. The regulation is a part of the very detailed rules concerning the budget. They allow a control and transparency of local finance.

Special limits are provided for the economic activities of local authorities, as a principle, if they are in the public local interest, belonging to the tasks of local self-government, but limited to protect the financial situation of local communities and of their inhabitants, for general economic reasons and – very controversial – perhaps the interests of private economic rivals as well. The trend of these policies may change. Whilst during a longer period there was a tendency to privatisation, based on political choices and the need to improve local finance, recent tendencies are more cautious and underline the necessity to guarantee the essential local services.

Other limits result from the intended use of certain objects of property, esp. roads (and, in a similar way, waters). Their function for public use is determined by State – partly federal, partly regional – laws, and they establish a public regime for the use. It is possible (and the practice in Hamburg) to combine that with private property, establishing a kind of "domaine public", influenced by the French concept, but the normal solution in Germany is the combination of private property of the roads (normally belonging to public legal entities) with the determination (*Widmung*) to public use, regulated by public law.

c) *Property of local communities?* The mentioned limitations illustrate that local communities as owners have a different position to that of private owners. They are owners in the sense of civil law and protected by the guarantee of local self-government, but one may ask whether the guarantee of private property protects them as well. The question has been decided, in a negative sense, for the plaint of constitutional review (*Verfassungsbeschwerde*). According to the constitutional court, it does not protect the property, but only the fulfilling of the tasks of local authorities.

9. Control, supervision and oversight of local authorities activity

a) *The leading principle:* Local self-government is guaranteed, as said above (nr. 3 b, 4 b), in the framework of legislation. Therefore the opportunity in the application of laws by local authorities must not be controlled. Though as far as the legality of the activities is concerned, there is a control whether the limits of local self-government, and concretely the relevant laws have been observed. This control is normally administrative, but besides that, the control of budget and audit – again according to the legal provisions and within these limits – is task of the auditors, first on local level, then of the competent authorities of the Land.

But besides the tasks of local self-government, local authorities accomplish, as explained above (nr. 4 c), tasks delegated by the State (*Land*) or at least completely regulated by legislation, which may provide a State's power to give directives. As far as such activities are in question, the local authorities are inserted in a hierarchy of State's administration. They have to follow and to execute not only the laws, but the directives of the superior authorities in the respective field of administration which my determine the opportunity of the application of laws as well.

Therefore both forms of supervision are different and request a separate treatment.

b) *Supervision regarding legality:* As far as local self-government is concerned, the control of supervision authorities is limited on legality. However the concept is ambivalent. It is enlarged by the fact that many measures of control are very general, like "public interest", "urgent necessity" or the principles of urban planning. This is why, especially as far as such measures are in question, the codes often prescribe a necessity of consent (permission) of the supervision authority. On the other hand, obviously a control of this kind restrains self-government; therefore there is a tendency to diminish the cases of such permissions or to suppose a fiction of permission if the authority does not react on a demand within a certain period. One argues that the principle of local self-government supposes a policy "friendly" to local authorities (*gemeindefreundliches Verhalten*) that may be seen in the neighbourhood of the principle of proportionality.

The exercise of this supervision is in the power of the interior administration, for the big cities and as supreme authority the Minister of the interior (of the *Land*), but with delegation of the task, for most situations, either to an intermediate level (*Mittelbehörden: Regierungspräsident*) in the larger *Länder* (like Bavaria, North-Rhineland-Westphalia), or/ and to the *Kreise* who exercise this power as a delegated task, under control of the higher levels. The instruments of control are regulated in the codes of local communities. There is a general right of information, then the right to object, the right of cancellation, the right to prescribe certain measures and to take substitutive measures, finally the possibility to install a special commissioner and to dissolve the council. These instruments illustrate that, certainly with respect of the principle of proportionality, there are possibilities, concretised by the law of administrative jurisprudence, to suspend an illegal action or to

enforce a legally necessary action of local authorities. But all these acts of supervision are administrative acts, and therefore they may be contested by plaint before the administrative tribunals; they decide whether a suspension or an enforcement may be maintained. Furthermore, plaints of citizens against illegal acts of local authorities and demands for the exercise of supervision may induce to measures of that kind. The Federation, who has no power of supervision of local authorities, can demand from the respective *Land* to exercise it's supervision, if necessary in the way of a plaint before the federal constitutional court.

c) *Supervision in case of delegated powers:* If local authorities, in this case normally the local administration, act in taking care of delegated powers, they are subordinated to the State's administration in the respective field: perhaps the Ministry of the interior (if it is question of public security), but often other Ministries like social welfare, if their powers are in question. Therefore the responsible administration has the right to give directives to the local authorities and to determine their action, with all the necessary instruments. It even may seem consequent to contest a possibility of judicial review of such directives on the plaint of the local authority, because it belongs to the interior sphere of administration. Nevertheless this question is very controversial, especially because according to the concept that qualifies mandatory tasks with directives as local tasks (see above, nr. 4 b), one may argue in the sense of a limitation of local self-government even if mandatory tasks under directives are in question. However if an act of a local authority in the field of delegated powers is contested by a citizen, the control of the opportunity and legality is first exercised by the higher level of administration and may therefore be used as an instrument of supervision.

d) *Informal and technical coordination:* Besides these different constructions it has to be underlined that the action of local authorities is largely determined by coordination measures, taken by the heads of administration of the different fields which coordinate the levels of federal, *Länder* and local levels, all influenced by a common administrative style and culture. Furthermore the cooperation supported by the common organisations of local authorities (see above, nr. 2) harmonises the activities in the local administrations, however here sometimes with a certain distance to the State levels.

10. Protection of local self-government

a) *Ordinary legal protection:* Although the principle of local self-government concerns a question of administrative organisation, regulated in the chapter of the Basic Law regarding the Federation and the *Länder*, and insofar an institutional guarantee, it nevertheless statues a

right of local authorities and is guaranteed by the Federation (so article 28.3 BL). Therefore it is protected, above all by the administrative jurisdiction. If a local community or authority is limited in it's right of self-government, it may bring an action before the administrative tribunal, and the tribunal will control whether there is a violation. For the field of local self-government, this possibility is evident, while in the field of delegated State's powers the possibility of court protection is doubtful (see above, nr. 9 c). Furthermore, if in an other process, e.g. in the control of legality of an act of a local authority, the question of constitutionality of a law limiting local self-government is in question, the tribunal or court will decide on it and, in case of unconstitutionality, submit the question to the constitutional court. The answer to the question whether in case of application of the contested law by the competent court an action of the local authority for constitutional review is possible, is not clear, because local self-government, although a constitutional guarantee with it's specific protection, is not a fundamental right protected by the ordinary constitutional recourse.

Besides the guarantee of local self-government, the legal relations in a local community may give space to other legal issues. The codes of local communities create many rights in the system of local government, of the council, the mayor, commissions and groups of the council etc. If such rights are contested or violated, there can be causes between organs of the local community who, although they are no legal entities, have the right to defend their position in a intra-organ conflict (*Organstreit*).

b) Constitutional review: But in any case, the law on the federal constitutional court (§ 91) and article 93.1 nr. 4 b BL provide for a special action of local authorities against laws violating the right on local self-government. If a violation of this kind is in question, the constitutional courts decide on the compatibility of the law with the guarantee of local self-government; in case of unconstitutionality, the law is declared null and void. In that way local authorities have a special power to ask for constitutional review under this aspect. If a *Land* is in question and if the legislation of the *Land* provides it, the constitutional court of the *Land* decides; otherwise the federal constitutional court. The jurisprudence in this field is quite important. It has influenced, amongst others, the question of merger of local communities, and in that way concretised the procedural rights of local communities in the preparation of laws that may influence local self-government.

11. Local government and the European Union

a) Central State, Länder and local authorities in the European Union: As a Union of the (central) States, the European Union, as a principle, did not take care of the internal repartition and insofar neither of local self-government. This situation has been mitigated since the

Maastricht-Treaty, and the Lisbon-Treaty (esp. article 4.2) recognizes the regional and local structures. But that means, at the same time, that creation and forms of these structures remain in the exclusive responsibility of the States and are not regulated by the European law.

b) *The German solution:* Therefore Germany has enacted, in consequence of the Maastricht-Treaty, two laws connecting the internal structures (Parliament; *Bundesrat, Länder*) with the European decision making process. In consequence of the Lisbon-Treaty the federal constitutional court has conditioned it's approval of the constitutionality of the Treaty with a more effective guarantee of participation of the internal structures; therefore the two laws have been modified and completed by a third (*Integrationsverantwortungsgesetz*, 22-9-2009). These laws give not only to the federal Parliament, but also to the *Länder* and the *Bundesrat* large rights and possibilities to co-determinate. But they are influenced by the construction that the level of local authorities is part of the *Länder*. It is the task of these to protect local self-government, while local authorities themselves have only a very limited influence.

c) *Consequences for the local authorities:* According to the law, local self-government shall be protected, and in questions of local provision of existence (see above, nr. 4 a) the position of the *Bundesrat* shall have a decisive influence, what may be important especially for the European law of services of general interest and of public enterprises. But a direct participation of local authorities is not guaranteed. – A similar result has to be stated for the committee of the regions of the European Union. The 24 German members to be proposed by the German government are presented by the *Länder* governments, so that every Land has at least one representative. But according to the above mentioned law there has to be a procedure that guarantees a proposal of three representatives by the three national associations of local authorities (see above, nr. 2), so that each of them is represented. However there is no representation of the singular local communities at all. – The solutions make evident that participation of local authorities in the decision making of the European Union is linked with their influence on the decision-making in Germany. The associations of local authorities have a certain influence, through their right to be consulted in the parliamentary process and by the governments, but they have no decisive vote, and the single local authorities as such have no influence.

12. Sources of information to know more

a) *Leading cases:* The very rich legislation, the different forms of legal protection and the judicial system lead to an enormously diversified jurisprudence, from constitutional courts of the Federation and the *Länder* and administrative courts; for some questions

(representation of the local communities in legal relations) from ordinary courts as well. To give some examples:

- The leading case for the extent of self-government, esp. the concept of local affairs, own responsibility, limitation by laws and the essence of self-government (see above, nr. 3 and 4) is a judgment of the federal constitutional court of 23-11-1988, BVerfGE 79,127 (esp. 143 ff.).
- An actual consequence: unconstitutionality of the obligation of local authorities to fulfil certain tasks together with State's authorities (see above, nr. 4 a, b): judgment of 20-12-2007, BVerfGE 119,331 (360 ff.). Nevertheless a common financing leaving to the single local authorities the fulfilment of the task has been approved: judgment of 7-2-1991, BVerfGE 83,363 (376 ff.).
- Equality of local elections and problematic of a 5%-clause for them (see above, nr. 5 b): judgment of 13-2-2008, BVerfGE 120,82 (102 ff.).
- Constitutionality of a law obliging local communities to establish a commissioner for equalization of women (see above, nr. 5 c): judgment of 26-10-1994, BVerfGE 91,228 (236 ff.).
- Problem of legitimacy and thus unconstitutionality of the *Amt* for inter-municipal cooperation (see above, nr. 5 e): constitutional court of Schleswig-Holstein, judgment of 26-2-2010, *Norddeutsche Zeitschrift für Öffentliches Recht* 2010, p. 155 ff. (cf. before federal constitutional court, judgment of 24-7-1979, BVerfGE 52,95, 109 ff.).
- Importance and problematic of local taxation, esp. the trade tax and the rate for it (see above, nr. 7 b): judgment of 27-1-2010, BVerfGE 125,141 (153 ff.).
- Guarantee of private property for property of local communities (see above, nr. 8 c): judgment of 8-7-1982, BVerfGE 61,82 (100 ff.).
- Juridical protection of local self-government, esp. in case of merger of local communities (see above, nr. 10 b): constitutional court of Mecklenburg-Vorpommern, judgment of 26-7-2007, *Deutsches Verwaltungsblatt* 2007, p. 1102 ff. and *Landes- und Kommunalverwaltung* 2007, p. 457 ff.

b) Selected bibliography: The leading handbook is the *Handbuch der kommunalen Wissenschaft und Praxis*, 1st ed. (ed. Hans Peters), 3 vol. Berlin 1956-1959, 2nd ed. (ed. Günter Püttner), 6 vol. Berlin 1981-1985, 3rd ed. (ed. Günter Püttner/ Thomas Mann), only vol. 1 published, Berlin 2007.

For practical purposes, shorter manuals are more important, e.g.: Martin Burgi, *Kommunalrecht*, 3rd ed. München 2010; Alfons Gern, *Deutsches Kommunalrecht*, 3rd ed. Baden-Baden 2003.

These presentations are often contained in handbooks of special administrative law (*Besonderes Verwaltungsrecht*), e.g. P.J. Tettinger/ W. Erbguth/ Th. Mann, 10th ed., Heidelberg 2009; Eberhard Schmidt-Aßmann/ Christian Röhl, 14th ed. Berlin 2008;

Otfried Seewald, in: Udo Steiner (ed.), 7th ed. Heidelberg 2003; Meinhard Schröder and Armin Dittmann, in: Achterberg/ Püttner/ Würtenberger, 2nd ed., Heidelberg 2000.

Besides that, there are commentaries to the codes of local communities of all the *Länder* and manuals for most of them, e.g. Alfons Gern for Baden-Württemberg, 8th ed. Baden-Baden 2001, Franz-Ludwig Knemeyer for Bavaria, 12th ed. Stuttgart 2007, Jörn Ipsen for Lower Saxony, 4th ed. Stuttgart 2011, Albert von Mutius/ Harald Rentsch for Schleswig-Holstein, 6th ed., 2 vol., Stuttgart 2003.

For local politics, there are important Hellmut Wollmann, *Reformen in Kommunalpolitik und –verwaltung*, Wiesbaden 2008; Andreas Kost/ Hans-Georg Wehling (eds.), *Kommunalpolitik in den deutschen Ländern*, 2nd ed. Wiesbaden 2010.

Besides the big reviews of administrative law like *Die öffentliche Verwaltung, Deutsches Verwaltungsblatt, Neue Zeitschrift für Verwaltungsrecht* there are some special ones for local government, like *Landes- und Kommunalverwaltung*, and special reviews for the administrative law of nearly all of the single *Länder* (e.g. *Bayerische Verwaltungsblätter*).

c) *Internet resources:* The federal government (ministry of the interior), not competent for the law of local self-government, but involved with the international representation of it (Council of Europe etc.) and therefore for comparative and collective presentation, has a website www.bmi.bund.de/DE/Themen/OeffentlDienst/Verwaltung/.

More relevant are the websites of the ministries of the interior of the single *Länder*. They normally can be found under the name of the *Land* adding .de. – Some examples:

www.innenministerium.baden-wuerttemberg.de
www.bayern.de
www.innenministerium.bayern.de
www.hmdis.hessen.de
www.mi.niedersachsen.de
www.nordrhein-westfalen.de
www.im.nrw.de
www.sachsen.de
www.smi.sachsen.de
www.kommunale-verwaltung.sachsen.de

For the local situation of the single towns, their websites may be interesting as well.

Furthermore, for the general situation of local communities and their authorities, the websites of the unions of towns, of the other local communities and of the *Kreise* (see above, nr. 2) are interesting:

Deutscher Städtetag: www.staedtetag.de
Deutscher Städte- und Gemeindebund: www.dstgb.de
Deutscher Landkreistag: www.landkreistag.de

They also have their organisations on the *Land* level and maintain research institutes like the
Deutsche Institut für Urbanistik: www.difu.de
Kommunale Gemeinschaftsstelle für Verwaltungsvereinfachung: www.kgst.de