



## CHAPTER 8

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# Germany

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Although municipalities in Germany do not have their own constitutional level of government similar to the federal government or *Länder*, they make an essential contribution to the provision of goods and services of general interest. Municipalities, granted autonomy in self-government by the constitution, operate in a highly charged and politically contested area of governance. On the one hand, municipalities enjoy the right to self-government, and neither the federal government nor the *Länder* may interfere with this arbitrarily. On the other, as a constitutional part of the *Länder*, the municipalities are dependent on them, especially so in financial terms. As a result, municipalities constantly have to balance their derived responsibilities with their voluntary tasks as both formal expectations and specific demands from citizens continue to grow due to a constantly changing global conditions and new types of crises. Municipalities in Germany are torn between fulfilling their administrative implementation mandate, on the one hand, and responding to the

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more immediate claims of local politics and their constituencies, on the other.

## I COUNTRY OVERVIEW

The Federal Republic ‘is a democratic and social federal state’, as article 20(1) of the Basic Law (BL) states. The so-called ‘eternity clause’ of article 79(3) BL protects the federal-state principle just as the inviolability of human dignity guaranteed by article 1 BL: ‘Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in articles 1 and 20 shall be inadmissible’.

On the Federal Republic’s 70th anniversary in 2019, many commentators emphasised the stabilising function of the Basic Law. It belongs to the Roman legal tradition of civil law and was originally drafted in 1948/1949 to be no more than a provisional constitution, at the insistence of the Allies. It has, however, gone on to survive even the challenges of German unification, though undergoing various amendments and supplements. All in all, its fundamental constitutional elements remain unchanged, and these include article 20(2) BL which provides: ‘All state authority is derived from the people. It shall be exercised by the people through elections and other votes and specific legislative, executive and judicial bodies’.

At the federal and state levels, the institutions of representative democracy in the municipalities are determined in and through regular elections. In the two-tier state structure of Germany, cities and municipalities remain formally part of the *Länder*, and are assigned autonomous self-government at the local level, with this guaranteed by the Constitution.<sup>1</sup> On Germany’s reunification in 1990, five new states (plus East Berlin) joined the Federal Republic, expanding the latter’s population by about 16 million. To this day, significant differences exist between West and East Germany in political, economic, fiscal, and cultural terms.

While the parliamentary system at the federal level is structured around bicameral institutions (the *Bundestag* and *Bundesrat*), both the *Länder* and the municipalities each has only one directly elected representative body. All citizens are entitled to vote and can take part in the election of

<sup>1</sup> Article 28 BL.

the *Bundestag*. This takes place every four years as a general, direct, free, and secret election. The same system prevails at the state and local levels, although some *Länder* have a five-year election cycle so as to ensure greater political continuity.

The Federal Constitutional Court (*Bundesverfassungsgericht*) has always played a significant role in any conflicts that arise between the federal government, the states, and the municipalities. In addition to the mechanisms for ‘Disputes between the Federation and the *Länder*’ (*Bund-Länder-Streit*) and ‘Abstract Judicial Reviews of Statutes’ (*Normenkontrollklagen*), the municipalities enjoy the right to file a ‘Municipal Constitutional Complaint’ (*Kommunale Verfassungsbeschwerde*) with the Federal Constitutional Court. In addition, in the event of any violation to the guarantee of local self-government, the constitutional court of the respective *Land* or the Federal Constitutional Court can be approached.

With about 83.12 million inhabitants (as of June 2021), the Federal Republic is the most populous member state in the European Union (EU).<sup>2</sup> Of these inhabitants, about 10.5 million are non-German passport-holders, in line with the figure of the country’s 12.6 per cent foreign population. While about 32.2 million Germans are non-denominational, the Catholic and Protestant churches have about 22.6 and 20.7 million members, respectively (though various regions are experiencing a strong downward trend in numbers). According to the Research Center of the Federal Office for Migration and Refugees, in 2019 there were between 5.3 and 5.6 million Muslims living in the Federal Republic, amounting to between 6.4 and 6.7 per cent of the total population.<sup>3</sup>

These figures represent a growth of about 900,000 in the Muslim population from the figures established in the 2015 survey. Muslims of Turkish origin continue to make up the largest proportion of this group (about 2.5 million), though they no longer constitute (at 45 per cent) the majority of resident Muslims. Almost 1.5 million (27 per cent) come

<sup>2</sup> Statistisches Bundesamt, ‘Bevölkerungsstand 30. Juni 2021: Bevölkerung im 2. Quartal 2021 geringfügig gestiegen’ (2021), <https://bit.ly/3JoOrfC> (accessed 20 December 2021).

<sup>3</sup> *Muslimisches Leben in Deutschland 2020. Studie im Auftrag der Deutschen Islam Konferenz. Forschungsbericht 38* (Nürnberg, Bundesamt für Migration und Flüchtlinge, ed 2021) 37–39.

from an Arabic-speaking country in the Middle East (19 per cent) or North Africa (8 per cent). The significant growth in the number of Muslim residents was undoubtedly the result of the global refugee crisis in 2015–2016. In this period, some 1.2 million people applied for asylum in Germany, an increase on the previous average of about 200,000 people per year.

Despite the massive recession arising from the effects of the Covid-19 pandemic, Germany in 2020 was once again the strongest economy in the EU. With its gross domestic product (GDP) of EUR 3.3 trillion (EUR 35.951 per capita), it forged ahead of both France, with about EUR 2.2 trillion Euro (EUR 31.091 per capita), and Italy, with EUR 1.6 trillion Euro (EUR 28 per capita).<sup>4</sup> Germany's economy is strongly export-oriented, taking third place behind China and Russia with its share of about EUR 1.3 trillion. International organisations and European partners are not alone in viewing this strong export orientation with critical eyes, for it is seen as a burden on the local economy, especially in times of global recession. Local authorities in particular regularly feel the effects of this, as companies pay less tax while, at the same time, employees are entitled to municipal social benefits in the event of unemployment.

## 2 HISTORY, STRUCTURES, AND INSTITUTIONS OF LOCAL GOVERNMENT

Forms of local self-government in Germany have changed throughout its history. Until as late as the Weimar Republic (1919–1933), municipalities were not regarded as an original part of the state organisation.<sup>5</sup> Article 127 of the Weimar Reich Constitution (WRV) assured the cities that '[m]unicipalities and associations of municipalities have the right of self-government within the limits of the law'. However, this provision was to be found in the second main part of the WRV dealing with the '[b]asic rights and duties of the Germans' and the section about 'Community

<sup>4</sup> Statistisches Bundesamt, 'Deutschland im EU-Vergleich 2021' (2021), <https://bit.ly/3DWwVy0> (accessed 20 December 2021).

<sup>5</sup> Oscar W Gabriel and Everhard Holtmann, 'Kommunale Demokratie', in Raban Graf von Westphalen (ed) *Parlamentslehre* (München and Wien, 1993) 471–488; Jörg Bogumil, 'Kommunale Selbstverwaltung', in *ARL—Akademie für Raumforschung und Landesplanung* (ed) *Handwörterbuch der Stadt—und Raumentwicklung* (Akademie für Raumforschung und Landesplanung, Hannover, 2018) 1127–1132.

Life'. The actual assignment and the allocation of corresponding competencies made it clear that the municipalities (ultimately in a tradition going back to the Middle Ages) were primarily restricted in their functions to the performance of tasks of local welfare, for example, 'keeping the family clean, healthy and socially supported',<sup>6</sup> or with providing an elementary school system.<sup>7</sup> Nonetheless, with the growing social legislation in the second half of the nineteenth century, the portfolio of tasks assigned to the municipalities grew significantly.<sup>8</sup> Matthias Erzberger's financial reform of 1919/1920 gave the municipalities a share of the federation's overall tax revenue, while the Basic Law of 1949 brought a further fundamental constitutional change by explicitly recognising the municipalities as part of the overall state organisation. Local government autonomy became an integral part of section II of the Constitution as it addressed the foundations of the federal order and the relationship between the federal government and the *Länder*.

As of 31 December 2020, Germany had 10,796 municipalities.<sup>9</sup> Municipalities constitute the smallest municipal unit. In Germany, a city is defined as an entity with more than 5000 inhabitants.<sup>10</sup> Given the existence of a large number of very small municipalities in the *Länder*, municipalities can come together to form an 'association of local authorities' (*Gemeindeverband*). Such mergers (between at least two municipalities) allow the formation of a single public body to undertake the tasks of local self-government, though without the individual municipalities losing any independence. There are currently 4607 such associations in Germany, in a situation which there are 7846 municipalities with fewer than 5000 inhabitants. Just over half of German's population (51 per cent) live in either small or medium-sized towns. Municipalities and associations of municipalities are usually parts of a county (*Landkreis*). There are 294 of these counties in Germany. Only 107 cities are 'county free'—that is, they do not belong to a county.

<sup>6</sup> Article 119 WRV.

<sup>7</sup> Article 144 WRV.

<sup>8</sup> Gabriel and Holtmann (n 5) 1128.

<sup>9</sup> Statistisches Bundesamt, 'Daten aus dem Gemeindeverzeichnis. Gemeinden in den Ländern nach Einwohnergrößenklassen' (2021).

<sup>10</sup> Bundesinstitut für Bau-, Stadt- und Raumforschung, 'Laufende Stadtbeobachtung – Raumabgrenzungen. Stadt- und Gemeindetypen in Deutschland' (2021), <https://bit.ly/3Jsp6RT> (accessed 20 December 2021).

They include—particularly prominently—the three city-states of Berlin, Hamburg, and Bremen. These cities are both cities and federal states. Between the counties and the states, four states (North Rhine-Westphalia, Bavaria, Hesse, and Baden-Württemberg) still have governmental districts (*Regierungsbezirke*) standing as the decentralised administrative units of the *Länder*.

Even by European standards, Germany has a very high number of municipalities. As a result, there has been a great deal of discussion about both territorial and administrative reform and issues arising from inter-municipal cooperation. The latter is, in particular, a sensitive issue, as it involves responsibilities, resources, and forms of agency that political actors in autonomous municipalities prove reluctant to lose or to delegate. However, inter-municipal cooperation has also had some real success stories, particularly with regard to the joint provision of infrastructural features such as water supply and wastewater disposal, local public transport, environmental protection, culture, health care, and welfare.<sup>11</sup>

Various legally institutionalised forms of cooperation have emerged. These include municipal- or special-purpose associations (*Zweckverband*) and institutions under public law (*Anstalten des öffentlichen Rechts*), with these created for specific purposes or to accomplish a narrow range of tasks. Many municipalities or counties have established joint public enterprises to provide services of general interest, particularly so in the area of local public transport. In addition, there are forms of cooperation such as mayors' conferences (institutionalised or informal), expert panels, round tables, and working groups that involve much lower degrees of legal commitment. These have been joined recently by the idea of inter-municipal business parks, though the latter have not, as yet, been translated into practice.

In Germany, the size of municipalities delineates their public policy-making capacities, both within and beyond their city boundaries. The Federal Spatial Planning Act (*Raumordnungsgesetz*) defines the framework and guidelines for spatial planning in Germany. It is based on the 'Concept of Central Places' (*Zentrale-Orte-Konzept*) first developed by Walter Christaller in 1933.<sup>12</sup> This (theoretical) concept categorises

<sup>11</sup> Thomas Gawron, 'Interkommunale Zusammenarbeit' (2005), <https://www.arl-net.de/de/lexica/de/interkommunale-zusammenarbeit> (accessed 20 December 2021).

<sup>12</sup> Walter Christaller, *Die Zentralen Orte in Süddeutschland. Eine ökonomisch-geographische Untersuchung über die Gesetzmäßigkeit der Verbreitung und Entwicklung*

municipalities according to their centrality within the region and determines their characteristics in terms of infrastructure and public services. The larger cities have a natural ‘spill-over effect’ because they also offer important public services to their surrounding areas. The central-places concept describes all municipalities in Germany as upper, middle, or lower centres. Spatial planning then links this categorisation additionally with typical descriptions of the location in space (‘central’, ‘peripheral’, ‘urban’, etc.), making possible a more differentiated classification of the various cities and municipalities. Because they have fewer financial resources and lack adequate staffing, smaller and medium-sized municipalities have less power to shape their affairs, while municipalities covering large areas but with low population densities often have problems with infrastructural maintenance due to a lack of the necessary resources.

Despite being the capital city, Berlin does not enjoy any special status in principle, although it was regulated in a separate law following reunification in 1994. However, the federal scheme for fiscal equalisation treats the capital—as with the other city-states—differently for the purposes of calculation. Here the so-called ‘*Einwohnerveredelung*’ (‘population refinement’) works to artificially inflate the number of Berlin’s inhabitants. This inflation is calculated on the assumption that, because of the city’s increasing population, more public services are offered to the surrounding areas (a principle that also underlies the municipal financial equalisation systems of the *Länder*). In addition, Berlin receives earmarked allocations from the federal government specifically for the fulfilment of its capital-city functions, including representative purposes. These include, for example, grants for the extraordinary cultural and museum landscape for which Berlin is famous.

### 3 CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

The Basic Law guarantees local self-government autonomy in article 28(2):

Municipalities must be guaranteed the right to regulate all local affairs on their 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 in accordance with 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.

By including this provision in section II ('Federation and *Länder*'), the drafters of the Basic Law underlined their firm understanding that municipalities form an essential part of the federation's state organisation. In addition, article 28(2) BL is interpreted in constitutional law as an 'institutional minimum guarantee', one according to which the municipalities are understood to have an 'overall competence' across their sphere of activity. According to this principle, the municipalities do not act on instruction, but according to the nature of the matter.<sup>13</sup> However, their competence is naturally limited by the 'principle of locality'. In this respect, the cities and municipalities act according to the principle of their responsibility: they are not bound by instructions and orders from the *Länder* and are, in that sense, autonomous. A further limit to municipal action is provided by the constraint that the right of self-government may be exercised only within the framework of existing law. In principle, the autonomy of local self-government is broadly defined and is in keeping with the principle of subsidiarity.<sup>14</sup>

The Basic Law does not provide for any specific institutional arrangements for local self-government, but does require conformity to the homogeneity principle: 'The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state

<sup>13</sup> Gabriel and Holtmann (n 5) 473.

<sup>14</sup> Daniel Weinstock, 'Cities and Federalism' (2014) 55 *Nomos* 259–290, <http://www.jstor.org/stable/24220380> (accessed 20 December 2021).

governed by the rule of law within the meaning of this Basic Law'.<sup>15</sup> In this respect, it is the responsibility of the *Länder* to determine the structures, institutions, and competencies of local self-government in their corresponding municipal constitutions or regulations. Since the federalism reform of 2006, the federal government may also no longer transfer tasks to municipalities. The so-called 'prohibition of encroachment' (*Durchgriffsverbot*) under article 84(1) BL provides that '[f]ederal laws may not entrust municipalities and associations of municipalities with any tasks'. Prior to this reform, the federal government had repeatedly defined tasks—especially in the social sector—for the municipalities to execute. Due to insufficient financial compensation, the municipalities had to record considerable increases in expenditure. In this respect, only the *Länder* are now allowed to assign new tasks to their municipalities. However, this rarely happens, since the *Länder* must also ensure adequate financing for their municipalities.

Any form of the asymmetrical or unequal treatment of municipalities is hardly capable of finding political consensus in Germany, so it is not explicitly provided for in law. Instead, Germany's political culture is strongly shaped by the idea of 'the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity',<sup>16</sup> though this is neither a state objective nor a binding constitutional mandate. Nevertheless, the precise wording of the Constitution regularly gives rise to political debate. Most recently, in 2019, the federal government set up a corresponding commission in which various working groups spent more than a year discussing how 'equivalent living conditions' could be defined and how these could be achieved across Germany, particularly in structurally weak regions and municipalities. The commission made a number of proposals and these have been successively implemented. Since municipal law is a matter for the *Länder*, there are natural differences in the competencies, tasks, and financial resources granted to cities and municipalities under state law. The so-called 'degree of municipalisation' (*Kommunalisierungsgrad*)—that is, the share of total expenditure in a federal state which is allocated to the municipal level—therefore exhibits quite discernible differences.

<sup>15</sup> Article 28(1) BL.

<sup>16</sup> Article 72(2) BL.

#### 4 GOVERNANCE ROLE OF LOCAL GOVERNMENT

German municipalities execute various tasks. They include ‘tasks in the local authority’s sphere of action’ and those that are delegated (*Aufgaben des eigenen und übertragenen Wirkungskreises*), as well as ‘voluntary’ and ‘mandatory tasks’ (*freiwillige*’ and *pflichtige Aufgaben*).<sup>17</sup> The municipalities’ sphere of action refers to the direct concerns of the ‘local community’. In addition, however, the municipalities must also take on tasks assigned by the federal and *Länder* governments. This makes it clear that the municipalities form an important administrative level in the German federal state—even if this constitutionally consists of only two levels of government.

The idea behind this is that the municipalities form the state unit with which people have direct contact and which shapes their daily lives through public services and infrastructure. In the 1930s, the concept of ‘services of general interest’ (*öffentliche Daseinsvorsorge*) was developed,<sup>18</sup> and to date it shapes the understanding of the state in general and local self-government in particular. The term *‘Daseinsvorsorge’* is understood to mean the provision of goods and services essential to a meaningful human existence. This includes those that fall in the category of general interest.<sup>19</sup> In Germany, these include the supply of energy and water; the disposal of sewage and waste; the maintenance of a local public transport systems; postal and telecommunications services; the provision of public media; special financial and insurance services; the maintenance of a basic school and education system; social and charitable services; the fulfilment of fundamental governmental tasks; the running of a police service and judicial system; and the guarantee of both external and internal security.

While some of these tasks are already undertaken by the municipalities, they are often referred to as ‘municipal services of general interest’. Their performance is constitutionally anchored in the principle of the welfare state under article 20(1) BL. Here the ‘social’ services of general interest include (along with other services), youth welfare and care; the provision for kindergartens and child care; the establishment of public schools; the

<sup>17</sup> Horst Dreier, ‘Article 28, Rn. 90’, in Horst Dreier (ed) *Grundgesetz Kommentar, Band 2* (Auflage, 2006); Alfons Gern, *Deutsches Kommunalrecht* (3rd edition, Nomos Verlagsgesellschaft, 2003) 16.

<sup>18</sup> Ernst Forsthoff, *Die Verwaltung als Leistungsträger* (Stuttgart Kohlhammer, 1938).

<sup>19</sup> Hartmut Maurer, *Allgemeines Verwaltungsrecht* (München, 2011).

provision of basic security services for job-seekers; promotion of (social) housing construction; and social assistance. An essential characteristic of these services is—in keeping with the understanding of public goods—the guarantee of free access to them in all regions at affordable prices.

Along with their ‘voluntary self-governing tasks’ (culture, sports, economic development, and climate protection), the municipalities are responsible for three types of compulsory duties: self-governance; tasks undertaken on instruction; and contract matters.<sup>20</sup> The municipalities’ degree of autonomy with respect to the legal and technical supervision of the *Länder* is visible in the performance of these duties. Obligatory self-government tasks include wastewater disposal; school transportation; fire brigades; the construction and maintenance of school and administrative buildings; and the upkeep of municipal roads. While the municipalities are obliged to attend to all of these, they are free to decide how to do so. Mandatory tasks according to instruction include, for example, security and public order administration and the reimbursement of the costs of housing and heating within the framework of Social Aid Code II (SGB II). These are subject to the legal and technical supervision of the *Länder*. In this, they are similar to commissioned matters such as passport and registration services; registry; health and veterinary offices; and also the conduct of elections and carrying out of censuses. Here, the municipalities merely act as the decentralised administrative bodies responsible to the federal and state governments.

In 2020, the total public budget in Germany amounted to EUR 1.7 billion.<sup>21</sup> This represented an increase in expenditure of 12.1 per cent compared to 2019. At the same time, incoming revenues fell by 3.5 per cent to EUR 1.5 billion, resulting in a deficit of EUR 1.89 billion. This deficit reveals the huge impact of the Covid-19 pandemic: it was the first deficit since 2013 and the biggest since German reunification. In 2019, a financial surplus of EUR 45.2 billion had been achieved. Municipalities account for about 17.5 per cent of the total of public budget spending. In terms of revenue, the municipal share corresponds to about one-fifth

<sup>20</sup> Dreier (n 17).

<sup>21</sup> Statistisches Bundesamt, ‘189,2 Milliarden Euro öffentliches Finanzierungsdefizit im Jahr 2020. Öffentlicher Gesamthaushalt mit höchstem Defizit seit der deutschen Vereinigung, Pressemitteilung Nr. 169 vom 7. April 2021’ (2021), [https://www.destatis.de/DE/Presse/Pressemitteilungen/2021/04/PD21\\_169\\_711.html](https://www.destatis.de/DE/Presse/Pressemitteilungen/2021/04/PD21_169_711.html) (accessed 20 December 2021).

(about 20 per cent). Despite the Covid-19 pandemic, the municipalities were able to generate a slight increase in revenue in 2020, and consequently a small financial surplus, though this was due mainly to the way the federal government compensated for the loss of local business tax revenue by a series of allocations. Table 1 sets out the public expenditures and revenues of the different federal levels in 2019/2020.

Until the 1990s, Germany had had four different types of council constitutions. The historical roots of this variation are to be found in the small-scale statehood that characterised Germany until 1919. During the nineteenth century, Germany had as many as 48 kingdoms as well as a plethora of dukedoms and principalities on account of a specific tradition of inheritance law and as a result of a multitude of martial conflicts over the centuries. This complex history allowed for distinctions between the ‘South German’ (*Süddeutsche*) and the ‘Rhenish Mayoral Constitutions’ (*Rheinische Bürgermeisterverfassung*), the ‘North

**Table 1** Expenditure and revenue of the Federation, the *Länder*, the municipalities, and the social insurances (2019–2020)

	<i>Total in euro</i>	<i>Federation in %</i>	<i>Länder in %</i>	<i>Municipalities in %</i>	<i>Social insurance in %</i>
<i>Adjusted expenses</i>					
2020	1,678,622	30.48	29.03	17.47	44.59
2019	1,497,437	26.51	27.86	18.48	45.41
<i>Change in %</i>	12.1	14.98	4.20	−5.47	−1.81
<i>Adjusted revenues</i>					
2020	1,489,365	25.64	30.47	19.82	48.39
2019	1,542,690	26.69	28.13	18.30	44.60
<i>Change in %</i>	−3.5	−7.3	8.32	8.31	8.50
<i>Financial balance</i>					
2020	−189,228	−129,860	−33,455	1982	−27,895
2019	45,182	14,814	16,595	5,625	8,148
<i>Change in %</i>	−76.12	−88.59	−50.40	−64.76	−70.79

Source Statistisches Bundesamt (2021)

German Council Constitution' (*Norddeutsche Ratsverfassung*), and the 'Magistrate Constitution' (*Magistratsverfassung*).<sup>22</sup>

The basic structure of all of these was, however, the same. The political structure of the municipalities was made up of a city council directly elected by the citizens, and this formed committees to carry out its work; a mayor; and the administration. The main distinguishing feature between them concerned the election of the mayor and its role, function, and duties. The 'Southern German Mayoral Constitution' has now become established in most German states. It was initially widespread in Bavaria and Baden-Württemberg, providing for a direct election of the mayor as well as the city council.

However, the legislative periods of the two institutions have different terms, with the result that the council majority and the post of mayor may well belong to opposing political parties. This form of checks and balances is intended to avoid partisan thinking and to promote compromises in the interests of the local community. The prerequisites for this are certainly most likely to be met at the municipal level. This is because, in Germany, party affiliations usually play a subordinate role in a local politics, which is dominated by local personalities and where (issue-related) grand coalitions are often formed between the particular local actors involved. The mayor's position in the 'Southern German Mayoral Constitution' is strong: he or she executes the council's resolutions, represents the municipality externally, and is responsible for managing the municipal administration. In addition, he or she is—in most cases—also the chair of council and therefore has responsibilities which the council cannot withdraw (matters of instruction and day-to-day administration).

Council representatives are elected directly by the residents of the city every four or five years and work on an honorary basis. In larger cities, the representatives do receive a small expense allowance for their work, which mainly takes place in the afternoons and evenings. This is why the councils are often referred to as 'after-work parliaments'. The city council appoints a chairperson from among its members, and he or she is responsible for conducting the plenary sessions. Committees are established at the beginning of the legislative period for the preparation of special technical proposals. In most of the *Länder*, the mayors of the

<sup>22</sup> Hans-Georg Wehling, 'Unterschiedliche Verfassungsmodelle: Süddeutsche Ratsverfassung', in Bundeszentrale für Politische Bildung (ed) (2006) 242 *Informationen zur Politischen Bildung*.

cities are also elected by direct vote. The legislative periods of the mayors and the councils are usually not congruent. In most municipalities, the mayor is the head of the administration, so he or she is responsible for implementing the council's decisions and also represents the municipality externally. In larger cities, the heads of central departments of the administration (especially finance, climate protection and construction, social affairs, and public order) are referred to as council members and/or as mayors. Following the departmental principle (*Ressortprinzip*), these have technical and personnel responsibility for their respective specialised administration. The mayor (together with the city council) is responsible for determining policy guidelines.

In line with the collegial principle (*Kollegialprinzip*), important policy measures are usually coordinated on a weekly basis. With the introduction of the 'New Governance Model' (*Neues Steuerungsmodell*) (the German manifestation of the New Public Management approach) in the mid-1990s, many municipalities have externalised or privatised parts of their administrations. Local governance then usually takes the form of a 'corporate' structure. In this structure, the mayor's college is referred to as the 'City's Board of Directors' (*Verwaltungsrat*). In Germany, however, the New Public Management approach has not gained widespread acceptance. The structures of German administration (in the sense understood by Max Weber) proved to be too established and path-dependent.<sup>23</sup>

In contrast with the federal level, forms of direct democracy in Germany are practised at the municipal level. The instruments, procedures, and issues that can be subject to such procedures differ between the *Länder*. Most municipal constitutions provide for a two-stage procedure. The 'citizens' petition' (*Bürgerbegehren*) is the first stage. This serves as a request for the implementation of a citizens' referendum, which forms the second stage. Berlin, Bremen, and Thuringia have a three-stage procedure in which the citizens' petition must be preceded by an application for approval. For a citizens' petition to be successful, people must collect a certain number of signatures within a set period. The threshold to be reached for this varies between 2 and 15 per cent of the eligible voters in the different *Länder* and municipalities. If the necessary signatures are collected, the respective city or municipal council must deal with the petition and hold a referendum—in other words, a vote in which all citizens

<sup>23</sup> Max Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie* (Erste Auflage veröffentlicht, 1921/1922, Tübingen, 1972).

eligible to vote can participate. For this reason, referenda often take place on the same day as the municipal elections. A special type of plebiscite is a petition for a referendum. In these petitions, the citizens do not formulate their political proposal, but rather demand the repeal of a recent decision by the city council. The number of citizens' petitions has increased significantly in recent years.<sup>24</sup>

## 5 FINANCING LOCAL GOVERNMENT

According to article 28(2) BL, the autonomy of local 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'. In principle, the *Länder* must ensure that counties, cities, and municipalities receive adequate funds (constitutionally, the municipalities are constituent parts of them). The 'two-tier dogma' in the German fiscal constitution prohibits any direct or immediate financial relation between the federal government and the municipalities. This ruling also applies to the federal government's grants in the context of mixed financing.

The Basic Law provides for this in the form of the so-called 'Joint Tasks' (*Gemeinschaftsaufgaben*) under article 91(a) to (e) BL and also in the 'Financial Assistance for Investments' (*Finanzhilfen*) under article 104(b) to (d) BL (generally used to promote municipal investment projects). Such federal grants are either passed on to the municipalities via the *Länder* or formally granted by the *Länder*, which—as in the case of 'federal laws providing for money grants' (*Geldleistungsgesetze*) under article 104(a) (3) and (4) BL—receive a corresponding reimbursement from the federal government.

Following the 'federal principle of standing up for one another' (*bündisches Prinzip des Einstehens füreinander*), the task of providing the municipalities with adequate financial resources is thus the responsibility of the respective *Länder*. The federal principle of solidarity (*bündnisches*

<sup>24</sup> Henrik Scheller, Christian Raffer, Katja Rietzler, and Carsten Kühn, *Baustelle Zukunftsfähige Infrastruktur. Ansätze zum Abbau Nichtmonetärer Investitionshemmnisse bei öffentlichen Infrastrukturvorhaben* (Wiso Diskurs 12/2021, herausgegeben von der Friedrich-Ebert-Stiftung, Berlin, 2021).

*Solidarprinzip*) is also taken into account in the municipal financial equalisation systems of the *Länder*, which provide for both participation of the municipalities in the revenues of the *Länder* and a horizontal redistribution of revenues via corresponding financial equalisation apportionments.

The two-tier structure of the German fiscal constitution means that the general principle set out in article 104(a)(1) BL does not apply, or at most applies indirectly, to the relationship between the federation and the municipalities. This provides that the 'Federation and the *Länder* shall separately finance the expenditures resulting from the discharge of their respective responsibilities insofar as this Basic Law does not otherwise provide'. It is true that all constitutions of the *Länder* now also contain such provisions for the relationship between the *Land* and the municipalities. However, these regulations do not apply in the case of the cost-intensive transfers of tasks from the federal government and the EU to the municipalities. After increasing significantly in recent years, these are now no longer allowed.

The municipal constitutions of all *Länder* contain the so-called principles for the generation of income and revenue for the municipalities. There is a fixed order of priority in the sources of income that are allowed. Municipalities can levy user and/or service charges from citizens (in particular contributions and fees); they are also allowed to generate tax revenues; and finally, some borrowing is permitted. Borrowing is allowed only as an exception when no other means of raising funds is possible or if it is otherwise uneconomical. This order is based on equivalence-theory considerations: those who benefit at the local level from special services and infrastructure of general interest should pay a corresponding contribution to them and also exercise political control over the use of these funds. At the same time, there is also the duty to take into account the economic forces of those liable for the levy, to strike an appropriate balance of interests between those liable for the levy, and to avoid the threat of permanent borrowing.

In constitutional practice, the financing of the German municipalities works somewhat differently. It is no coincidence that almost 40 per cent of the revenue structure of the municipalities comes from allocations provided by the *Länder* and federal governments, whereas tax revenues account for more or less another 40 per cent. Fees and contributions (which are supposed to be the main source of municipal funding) account for only about 8 per cent of revenue. Another 12 per cent comes from other revenue sources (donations, sales proceeds, fines, inheritances, and

so on). Among the tax revenues, trade tax (16.6 per cent) and the share from income tax (14.9 per cent) that the municipalities receive from this composite tax play a special role. In addition, there is also the property tax, a share from the value-added tax, and the so-called petty taxes (dog tax, hotel taxes, tourism levies, and so on).<sup>25</sup>

The financial constitution of the Basic Law not only standardises the tax and revenue sources of the federal and *Länder* governments. According to article 106(6) BL, ‘revenue from taxes on real property and trades shall accrue to the municipalities’. In addition, ‘revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by *Land* legislation, to associations of municipalities’. Like the trade tax, the property tax is a real or object tax that taxes the property of the tax debtor regardless of his or her living conditions and ability to pay.<sup>26</sup> The legal basis for the land tax is the Federal Property Tax Act. In Germany, a distinction is made between property taxes A and B. The former is levied on business properties, while the latter (B) is levied on property that belongs to the agricultural or forestry sectors. Other business and residential properties are subject to property tax B. In terms of revenue, property tax B is much more important than property tax A. According to article 106(6) BL, ‘[m]unicipalities shall be authorised to establish the rates at which taxes on real property and trades are levied, within the framework of the laws’.

For decades, this measure was subject to intense criticism. In 2018, the Federal Constitutional Court ruled that the property tax in its current form was legally valid only until 2024 and needed comprehensive reform. Criticism was not only directed at the assessment basis (decisive for calculating individual tax liability). To determine the assessed value of a property, the tax assessment figures from 1964 and 1935 were used. There were also complaints about multiple taxation, since the real estate tax was added to the existing taxation on personal income. In the meantime, the federal government—after protracted negotiations with the *Länder*—has passed a constitutional reform and, with it, proposed a new version of the Property Tax Act. However, the *Länder* now have to pass their Property Tax Laws by 2024, and the many critics of the proposal fear

<sup>25</sup> Bundesvereinigung der kommunalen Spitzenverbände, *Durchschnittliche relative Einnahmen der Gemeinden in Flächenländern 2018*.

<sup>26</sup> Klaus Tipke and Joachim Lang, *Steuerrecht* (Otto Schmidt, 2002) 544.

that this leaves insufficient time for due consideration, especially when this will involve a revaluation of about 80 million properties.<sup>27</sup>

According to article 106(6) BL, municipalities have the right to levy trade tax in addition to property tax. All domestic commercial enterprises are subject to this trade tax, irrespective of the individual capacity of the shareholders. However, self-employed professionals such as lawyers, doctors, and architects (as well as agricultural and forestry enterprises) are not considered under this article as commercial enterprises, and are consequently exempt from trade tax liability. This is a sore point for critics and continues to feed debates around tax reform. The assessment rates that the municipalities are entitled to levy on property and trade tax under article 106(6) BL are set independently by the municipalities on an annual basis. Cities in metropolitan areas, which usually have a high concentration of commercial enterprises as well as a well-developed infrastructure, tend to levy higher rates of trade tax than the smaller municipalities, which already have comparatively few enterprises.

The trade tax is thus an important factor in the location of businesses. The smaller, economically weak municipalities (which only have a low tax capacity) try to attract businesses by offering low trade tax rates. Unfortunately, this tactic, when combined with the tax concessions offered as an incentive for companies to relocate, contributes to the oft-lamented financial weakness of the municipalities. All in all, criticism of the existing municipal finance system in Germany is focused on the trade tax, and academics have repeatedly called for either the abolition or replacement of this tax. The municipalities and the municipal umbrella associations are also inclined towards corresponding reforms—albeit in a mirror-image of this, advocating for a ‘revitalisation of the trade tax’ and thus calling for an abolition of the various exceptions.

The most important pillar of municipal financial resources is the allocations that come from the municipal fiscal equalisation systems of the *Länder*. With the exceptions of the city-states of Berlin and Hamburg, all *Länder* constitutions provide for these. Their constitutional basis for these equalisation systems is given by article 106(7) BL. This stipulates that

<sup>27</sup> Henrik Scheller, ‘Die Reform der Grundsteuer – Strukturerehalt statt Föderalisierung?’, in Europäisches Zentrum für Föderalismusforschung Tübingen (ed) 2020: *Jahrbuch des Föderalismus 2020. Föderalismus, Subsidiarität und Regionen in Europa* (Nomos, 2020).

an overall percentage of the *Land* share of total revenue from joint taxes, to be determined by *Land* legislation, shall accrue to the municipalities or associations of municipalities. In all other respects, *Land* legislation shall determine whether and to what extent revenue from *Land* taxes shall accrue to municipalities (associations of municipalities).

This provision of the Basic Law already specifies the important distinction that exists between the ‘obligatory’ and the ‘voluntary’ tax-revenue-sharing system that obtains between the individual *Länder* and their municipalities.

In contrast to the federal-state fiscal equalisation system, the municipal schemes are tax-needs equalisation schemes. These try to take into account not only the financial strength of the municipalities but also to balance this against financial needs. Fiscal equalisation generally has four functions: fiscal, redistributive, spatial planning, and stabilisation.<sup>28</sup> To fulfil these, the *Länder* grant their municipalities what are called ‘untied key allocations’ (*ungebundene Schlüsselzuweisungen*) and ‘earmarked investment allocations’ (*zweckgebundene Investitionszuweisungen*). These allocations are drawn from the combined tax base, which itself has been standardised in the respective Fiscal Equalisation Acts of the *Länder*. These allocations are usually granted in advance from the fiscal equalisation fund. They can be used only for investment projects in areas such as schooling, science, public transport, road construction, social welfare, and health, with all of these granted only according to often quite detailed specifications. The remaining ‘key mass’ (*Schlüsselmasse*) is then used to grant untied key allocations to the individual municipalities so as to equalise the differences in financial strength. Such allocations include both allocations for financially struggling municipalities and lump sums for investment purposes.

In constitutional practice, however, the financial and budgetary situation of the municipalities in Germany has been complex and ambivalent for some years. From 2015 until the outbreak of the Covid-19 pandemic in 2020, the municipalities (as aggregated without the city-states) generated a surplus both in core and additional or extra budgets due to positive macroeconomic development. As is shown in Table 1, even in 2020 the municipalities were able to generate a surplus of about EUR

<sup>28</sup> Hans Pagenkopf, *Der Finanzausgleich im Bundesstaat: Theorie und Praxis* (Kohlhammer, 1981) 276.

1.9 billion due to the extensive support measures put into action by the federal government, with the result that the feared budget slumps initially failed to materialise. When the overall economic situation is positive, this is usually marked by high trade tax and income tax revenues, along with relatively low social spending (due to high employment rates). The outbreak of Covid-19 and the social distancing measures imposed as a result have impacted severely on this development, though even now the full extent of the damage to public budgets is only slowly becoming apparent.

In point of fact, some municipalities were already heavily indebted even before Covid-19. By the end of 2020, municipalities were indebted to the non-public sector by a total of about EUR 132 billion. This is about 6 per cent of the approximately EUR 2.171 billion assigned to the overall public budget (comprising funds for the federal, state, and local governments and social security funds). Seventy-two per cent of the municipalities' debt was made up of loans and securities debts, and 28 per cent by cash credits.<sup>29</sup> For years, this kind of indebtedness had been seen both as general evidence of inadequate funding but also, and more specifically, as an indicator of disparities between municipalities (the distribution of credit market debt per capita in the core municipal budgets shows a considerable spread between the *Länder*). In 2020, Saarland (with debts of EUR 3419 per capita), Rhineland-Palatinate (EUR 2958), and North Rhine-Westphalia (EUR 2597) were the worst offenders, with their average per capita debt standing at a higher level than the overall German average. Municipalities in the states of Brandenburg (EUR 566), Saxony (EUR 548), and Baden-Württemberg (EUR 494) were the least indebted.

With the imposition of the economic lockdown in reaction to the Covid-19 pandemic, public sector budgets could also be seen to be undergoing drastic changes. Given the collapse in tax revenues and the resulting budget deficits, it will no longer be possible to continue along the consolidation path of previous years. Instead, it is more likely that municipal debt, for the time being at least, will continue to grow. For example, in a survey conducted by the German Institute of Urban Affairs (DIFU)

<sup>29</sup> Statistisches Bundesamt, '2021 Pro-Kopf-Verschuldung steigt im Jahr 2020 auf über 26 000 Euro. Öffentliche Schulden binnen Jahresfrist um 273,8 Milliarden Euro gestiegen, Pressemitteilung Nr. 357 vom 28. Juli 2021' (2021), <https://bit.ly/3M9YtmH> (accessed 20 December 2021).

in April 2020, almost all municipal treasuries stated that they expected revenues to fall sharply in the current year, particularly so in the areas of taxation and revenues from economic activity. At the same time, expenditures will increase, especially in the areas of material expenditures and social expenditures.<sup>30</sup>

The pandemic will have also other negative consequences for budgets. Since municipalities realise about 55 per cent of all public investments in the Federal Republic in spending on the reconstruction and expansion of various public infrastructures (such as roads, bridges, schools, administrative buildings as well as water and energy supply), massive losses of tax revenue will be correspondingly consequential. Any reduction in investment would bring an end to all the positive achievements of recent years. According to information and analysis from DIFU, the investment backlog for all municipalities with 2000 or more inhabitants already amounted (in 2021) to some EUR 159 billion.<sup>31</sup>

At the moment, municipalities are under conflicting pressures with regard to their fiscal and budgetary responsibilities. The urge to consolidate is met by the rise of spending requirements at a time of growing investment backlogs. The Covid-19 pandemic has only increased these pressures and exacerbated the conflict between objectives. Municipalities have had to weigh up the extent to which investment activities and budget consolidation can or should be postponed due to the fact of rising social spending in the face of the growing number of both unemployed and short-term employees. Increases in expenditure on compulsory social tasks and high consolidation pressure lead necessarily to less investment, as this is one of the few areas of expenditure in municipal budgets that can be most easily dispensed with. Many municipalities are also now obliged to reduce their deficits (most of which have accumulated over many years) before they can contract new liabilities. In this situation, they often only have recourse to cash credits or liquidity protection loans. According to *Länder* municipal budget ordinances, however, these can only be used to finance current administrative expenses, and not investments.

<sup>30</sup> Stephan Brand, Johannes Steinbrecher, and Elisabeth Krone, 'Kommunal Finanzen in der Covid-19-Krise: Einbruch erwartet, Investitionen unter Druck' (2020) 289 *KfW Research Fokus Volkswirtschaft*.

<sup>31</sup> Christian Raffler and Henrik Scheller, *KfW-Kommunalpanel* (herausgegeben von der KfW-Bankengruppe, Frankfurt/Main, 2022).

## 6 SUPERVISING LOCAL GOVERNMENT

Since local self-government in Germany must take place ‘within the limits prescribed by the laws’,<sup>32</sup> the Federal Constitutional Court has stated the need to monitor compliance with these laws.<sup>33</sup> Such supervision is the responsibility of the *Länder*. In principle, there are two main forms of supervision. First, when municipalities carry out the tasks assigned to them by the *Länder*, they are subject to technical supervision. Secondly, with regard to tasks undertaken within their sphere of action, municipalities are subject merely to legal supervision, and their performance of these tasks is simply checked for compliance with the relevant *Länder*, federal, and EU laws.<sup>34</sup> The municipal supervisory authorities are organised according to the respective constitutional law of the *Land* in question.<sup>35</sup> Here, all that has to be monitored is the compatibility of municipal actions with the applicable legal system. This characteristic explains the origin of the terms ‘legal supervision’ (*Rechtsaufsicht*) or ‘general supervision’ (*allgemeine Aufsicht*). Municipal supervision may not include any expediency or discretionary control of voluntary or obligatory self-government tasks. Above all, the supervisory authority may not substitute its own discretion for municipal discretion.<sup>36</sup>

The municipal supervisory authorities of the *Länder* are organised in several tiers.<sup>37</sup> Distinctions are made between the lower, upper, and highest supervisory authorities. The lower supervisory authority for municipalities belonging to counties is the chief administrative officer of the county, the *Landrat*. In the case of county-free cities and the larger cities belonging to counties, the lower supervisory authority is usually that of the district government (*Bezirksregierung*). In *Länder*

<sup>32</sup> Article 28(2) BL.

<sup>33</sup> Uwe Lübking and Klaus Vogelsang, *Die Kommunalaufsicht. Aufgaben—Rechtsgrundlagen—Organisation* (Erich Schmidt Verlag, 1998) 33.

<sup>34</sup> *Ibid.*, 50.

<sup>35</sup> *Ibid.*, 71 and 74; Steffen Zabler, Christian Person, and Falk Ebinger, ‘Finanzaufsicht in den Ländern: Struktur, Recht und ihr (fraglicher) Effekt auf die kommunale Verschuldung’ (2016) 16(1) *Zeitschrift für Kommunal Finanzen (ZKF)* 6–12 (8).

<sup>36</sup> Lübking and Vogelsang (n 33) 81.

<sup>37</sup> Falk Ebinger, René Geißler, Friederike-Sophie Niemann, Christian Person, and Steffen Zabler, ‘Die kommunale Finanzaufsicht. Strukturen, Rationalitäten und Umsetzung im Ländervergleich’ (2017) 1 *Analysen und Konzepte* 7.

which do not have an intermediate level (Brandenburg, Mecklenburg-Western Pomerania, Saarland, Schleswig–Holstein), the lower supervisory authority is the minister of the interior. Thuringia is the only *Land* with a special feature in that the municipal supervision of the independent cities is assigned to the *Land's* administrative office (*Verwaltungsamt*). The state minister of the interior is the highest municipal supervisory authority in all *Länder*.<sup>38</sup>

It is generally understood that supervision by the municipal supervisory authorities should not be conducted in a patronising manner: municipal supervisors must rather act in a ‘community-friendly’ manner.<sup>39</sup> Only clear violations of the law may provoke interventions by municipal supervisors.<sup>40</sup> When exercising legal supervision, supervisory authorities must not be influenced by political considerations or base their decision on expediency. The municipal supervisory authorities play a special role in matters of budgetary policy since every municipal budget must be approved by the responsible authority. If this approval is not yet given, municipalities must work with a provisional budget only. Given the large number of municipalities, it often happens that municipalities are only allowed the right to limit expenditure up to halfway through the budget year, excepting obligatory liabilities (payment of salaries, debt service, and expenditure for maintenance measures).

Municipal supervisors have to check whether a municipality’s budget is balanced and does not stand in danger of becoming overindebted and advise accordingly.<sup>41</sup> Any objections by the supervisory authorities may only extend to the budget volume of the municipalities under review as a whole, or to the obligation taken on to balance the budget. No particular task or action envisaged by a municipality may itself be the ground for an objection. The point at which the municipal budget is no longer compatible with the principle of ‘economy and thrift’ (and is therefore subject to objection by the supervisory authority) is decided on a case-by-case basis. Neither can the supervisory authority prescribe any specific savings

<sup>38</sup> Lübking and Vogelsang (n 33) 74.

<sup>39</sup> Ebinger, et al. (n 37) 8; René Geißler, ‘Das Verhältnis zFinanzaufsicht und Kämmerereien in Nordrhein-Westfalen’ (2018) 1 *Der Gemeindehaushalt* 1–5, 6.

<sup>40</sup> Lübking and Vogelsang (n 33) 82–84.

<sup>41</sup> *Ibid*, 90. Geißler (n 39) 6.

measures since the idea of voluntary self-governing expenditure stands at the core of the autonomy of local self-government.

With regard to municipal staffing plans, objections can be lodged with regard to overstaffing or the violation of salary regulations. Even if the financial and budgetary situation of the municipality is strained and the fulfilment of mandatory tasks consequently endangered, the supervisory authority does not have the power to object to any specific voluntary services. In such cases, the supervisory authority may only recommend a reduction of funding to voluntary services as a whole, without the promotion or cancellation of specific individual projects.<sup>42</sup>

## 7 INTERGOVERNMENTAL RELATIONS

The Basic Law does not provide for municipalities to have a formal say in federal and state legislation, despite the fact that they are responsible for the local implementation of various laws. However, the Joint Rules of Procedure of the Federal Ministries (*Gemeinsame Geschäftsordnung der Bundesministerien*—GGO) do grant municipalities the possibility of a special right to be heard. Paragraph 47(1) of the Joint Rules states that the ‘draft of a bill shall be submitted to the *Länder*, central municipal associations and the *Länder*’s representations to the Federation as early as possible if their interests are affected ...’.

Municipal interests are represented in legislative processes by three municipal umbrella organisations. These are the Association of German Cities (*Deutscher Städtetag*—DST), which represents about 3400 large cities and almost 53 million inhabitants; the Association of Towns and Municipalities (*Deutscher Städte- und Gemeindebund*—DStGB), representing about 10,000 medium-sized and smaller municipalities; and the German County Association (*Deutscher Landkreistag*—DLT), which covers the 249 counties and thus 56 million inhabitants and about 96 per cent of Germany’s surface area.

The associations must be heard in the parliamentary meetings held to discuss draft bills. In addition, the Chancellor holds both regular and informal meetings with the presidents and chief executives of the three umbrella associations. There were many such exchanges during

<sup>42</sup> BayVerfGH 1989; Lübking and Vogelsang (n 33) 123 f.

both the refugee crisis and the Covid-19 pandemic, as it was clear that municipalities played a significant role in managing these crises.

Despite the emphasis in Germany on the self-governing autonomy of municipalities, urban development policy is understood as cross-sectional in nature. As such, it aims at the further development of the urban area as a whole, in the context of regional development. It thus seeks to ensure careful coordination between various individual policies. Following the 2021 federal election, the new Ministry of Housing, Urban Development, and Construction has assumed responsibility for the conduct of urban development policy. Since municipalities are constitutionally part of the *Länder*, a large proportion of the measures initiated by the federal government in this field are carried out in close coordination with them. Already in the 1970s, Fritz Scharpf characterised such cooperation as *Politikverflechtung* ('joint-decision-making').<sup>43</sup>

The Spatial Planning Act (*Raumordnungsgesetz*—ROG) and the Building Code (*Baugesetzbuch*—BauGB) provide the legal framework for urban development policy. According to article 74(1) BL, the federal government is responsible for 'urban real estate transactions, land law (except for laws regarding development fees), and the law on rental subsidies, subsidies for old debts, homebuilding loan premiums, miners' homebuilding, and pit villages'. Other sources of law relevant to urban development policy include the Federal Act on Protection against Harmful Effects on the Environment caused by Air Pollution, Noise, Vibrations and Similar Processes (*Bundesimmissionsschutzgesetz*), and the Ordinance on the Use of Land for Building Purposes (*Baunutzungsverordnung*). At the *Länder* level, further legislation includes the state-planning laws, the state spatial planning and development programmes, and the building codes of the 16 *Länder*, which are based on a model-building code of the Working Group of the *Länders'* Ministries of Construction (ARGEBAU). The federal government supports urban development measures by the *Länder* and municipalities with various funding programmes.

At the municipal level, urban development policy has various planning instruments at its disposal, with most of these designed for a medium- to long-term planning horizon. These include (in addition to the usual land use, project and development plans, and zoning plans): Integrated Urban Development Concepts (*Integrierte Stadtentwicklungskonzepte* [INSEK]);

<sup>43</sup> Fritz W Scharpf, Bernd Reissert, and Fritz Schnabel, *Politikverflechtung. Theorie und Empirie des Kooperativen Föderalismus in der Bundesrepublik* (Kronberg i.Ts., 1976).

urban development plans or programmes; district development plans; individual specialised plans, such as traffic development and noise abatement; and economic, housing, and cultural development plans. In addition, many municipalities are now putting in place climate protection programmes and local sustainability strategies in line with the United Nations Sustainable Development Goals (SDGs).

Aside from the question of the technical coordination of the various sub-plans and strategies and their binding effect and obligation, such a wide range of instruments already illustrates that most municipalities are striving to organise urban development as an integrated process. In this context, the effects of ‘glocal’ megatrends (including climate change, demographic change, digitalisation, and changes in ecosystems) are becoming more and more visible, especially at municipal level, and are resulting in a wide array of new transformation needs for urban infrastructures. As part of this constant change, urban policies and governance approaches need to be constantly reoriented and adapted. Methods for achieving this in urban development are diverse: continuous monitoring and benchmarking; the use of statistical indicators, population forecasts, demand and trend analyses of public services, scenario techniques, and policy analyses; in addition, planning forums and quantitative and qualitative methods of citizen participation are important contributions.

## 8 POLITICAL CULTURE OF LOCAL GOVERNANCE

In recent decades, the party system in the Federal Republic has become increasingly diverse. There are now six parties represented in the *Bundestag*: the CDU (Christian Democratic Union); the CSU (Christian Social Union); the SPD (Social Democratic Party of Germany); Alliance 90/The Greens; the Left Party; and the right-wing populist AfD (*Alternative für Deutschland*). In the *Länder* and in the municipalities, the party systems broadly correspond to this structure, but (at least in the past) there have been challenges to it where strictly regional parties have been able to win that were able to attract significant shares of the vote in individual *Länder*. One such party is the Free Voters (*Freie Wähler*), which has won representation on many city councils in Bavaria and currently at the *Land* government level. In the cities, the ‘splinter parties’ have also asserted themselves and been especially successful in doing so by addressing city-specific problems. Such small and locally organised parties (which usually see themselves as representing protest movements) have

proved to be able to hold their own in some elections and have managed to get their representatives onto city councils.

In Germany, municipal elections are often held at the same time as other elections (to the *Bundestag* or the *Länder* parliaments), although this is not necessary. When local elections take place halfway through the tenure of a *Länder* parliament, these elections can also act as a litmus test for the *Land* government in question, though in most instances it is the local conditions and context that prove to be decisive. Local elections are often highly personalised around well-known local figures. First-ballot elections for mayor are rarely decisive and run-off elections are often necessary, with personality and popular appeal playing a large role in deciding these. Another factor here is the candidate's visible commitment to the city, held to be evident in very specific local issues, such as the construction of schools, roads, and leisure facilities; the financial situation; or the city's image beyond the region. It is not for nothing that many mayors—and especially in the smaller or medium-sized towns—will often hold on to their position for many years and across successive elections.

In Germany, local politics is regarded as a training ground and a necessary staging point for up-and-coming politicians. The local association (*Ortsverband*) provides the smallest unit in the federal structure of the established parties and in the cities, individual neighbourhoods and districts usually have such local associations. The next highest units are the associations at district, regional, and *Land* levels; their representatives are delegated at the municipal level. All in all, there are many opportunities available for politically active people to make their mark and raise their profiles. At the same time, the incumbents of many city councils are ageing and there is a preponderance of male representatives. According to a 2020 survey, some 91 per cent of mayors were male, with only 9 per cent female (down from 11 per cent in 2015); the larger the municipality, the less likely it is to have a woman at its head. The reasons cited for this gender imbalance in the top municipal offices are the large number of candidates, but also the 'dirty election campaigns' to which women, in particular, are exposed. About a third of German majors are over 60 years old, and only one-fifth of them are younger than 45.<sup>44</sup>

<sup>44</sup> Kathrin Mahler Walther and Helga Lukoschat, 'Bürgermeisterinnen und Bürgermeister in Deutschland 30 Jahre nach der Wiedervereinigung' (Europäische Akademie für Frauen in Politik und Wirtschaft Berlin e.V. (EAF), 2020) 5–6.

## 9 COVID-19'S IMPACT ON THE ROLE OF LOCAL GOVERNMENT

The long-term consequences of the Covid-19 pandemic for the municipalities in Germany are yet to be seen. The municipalities proved their worth as courageous crisis managers in this unprecedented situation, even though the lockdown measures were imposed by the federal and *Länder* governments and the federal crisis management as a whole was criticised for being inconsistent as the pandemic progressed. Cities, for example, organised the vaccination campaign in specially established vaccination and testing centres, albeit with regional variations in delivery.

In the summer of 2020, the federal government launched an extensive Covid-19 stimulus package. For municipalities alone, this package provided (depending on the form of calculation adopted) about EUR 21 billion for 2020 and in parts also for 2021.<sup>45</sup> From this amount, about EUR 11.8 billion was earmarked to compensate for the short-fall in municipal trade tax revenues in 2020. The remainder was divided between an increase in the federal government's share of expenditure on housing and heating benefits (about EUR 3.4 billion per year); a one-off increase in regionalisation funds to compensate for Covid-related burdens on local public transport (about EUR 2.5 billion); and the launch of both new and an increase in existing funding programmes like the 'Investment Program For Daycare Expansion' (*KiTa-Ausbau-Programm*), the 'DigitalPact' (*DigitalPakt*) for the digital modernisation of schools, the 'All-Day Care Programme' for children (*Ganztagsbetreuungsprogramm*), and the 'Joint Task for the Improvement of Regional Economic Structures' (*Gemeinschaftsaufgabe Wirtschaftsförderung*).<sup>46</sup>

Despite this financial support, the municipalities are currently focused on the question of how reduced tax revenues will be treated in the calculation for allocations in the *Länder's* municipal financial equalisation systems. For years to come—depending on the development of the overall economic situation and on federal-state financial programmes—the scope

<sup>45</sup> Bundesministerium der Finanzen (BMF), Monatsbericht April 2020, 8; Sebastian Dullien, Silke Tober, and Achim Truger, 'Wege aus der Wirtschaftskrise: Der Spagat zwischen Wachstumsstabilisierung und sozial-ökologischer Transformation' (2020) *WSI-Mitteilungen* Jg. 73(06/2020) 403–410.

<sup>46</sup> Koalitionsausschuss der Großen Koalition 2020, 'Corona-Folgen bekämpfen Wohlstand sichern, Zukunftsfähigkeit stärken' (Ergebnisse des Koalitionsausschusses 3. Juni 2020, Berlin).

for municipal budgets will remain restricted by the considerable revenue shortfalls and the simultaneous increases in social spending necessities. This will be exacerbated by the fact that social and technical infrastructure (such as local public transport, day-care centres, and sports facilities) have had to be maintained without revenue from fees. At the same time, the investment backlog of municipalities (which has existed for years) continues to grow, including for the provision of digital infrastructure.<sup>47</sup>

Looking beyond Covid-19, other issues and trends are likely to become important for urban development in Germany. Attention is starting to focus on the future digitalisation of urban development and on the growth of smart cities. Covid-19 made it clear that German administration in general (and local government in particular) was lagging behind in terms of digitalisation. The social fears and social distancing associated with the lockdown led to a surge in the acceptance and adoption of digital communication technologies in a surprisingly short space of time.<sup>48</sup> The digitalisation push is likely to have a lasting negative impact on brick-and-mortar retail in particular and so on the vitality of many city centres already suffering from the spate of store closures resulting from the lockdown. Covid-19 accelerated a trend that has been taking place for some time and further endangers the urbanity of many German city centres. A central question for the post-Covid-19 city is therefore likely to be how retailers can cooperatively combine digital and analogue sales. It is highly likely that many city centres will be stabilised only if their residential, and leisure functions are considerably strengthened.<sup>49</sup> In regard to such questions, pre-Covid discussions about new city-compatible forms of ‘urban production’ (with regard to the intersection of work, habitation, leisure and urban culture) are coming back into focus.<sup>50</sup>

<sup>47</sup> Raffer and Scheller (n 31) 19; Stephan Brand and Johannes Steinbrecher, ‘Kommunalfinanzierung in der Covid-19-Krise – Einschnitte, aber keine Zeitenwende’ (2021) 101(1) *Wirtschaftsdienst* 46–53.

<sup>48</sup> Roger Keil, ‘The Space and Time a Pandemic Makes’ (2020) 56(3) *disP—The Planning Review* 4–9.

<sup>49</sup> Ulrich Hatzfeld and Petra Weis, *Die “Neuen Innenstädte”*: Zwischen Multifunktionalität und Gemeingut (Friedrich-Ebert-Stiftung, Abteilung Wirtschafts- und Sozialpolitik, 2021).

<sup>50</sup> Jens Libbe and Sandra Wagner-Endres, ‘Urbane Produktion in der Zukunftsstadt. Perspektiven für Forschung und Praxis’, <https://bit.ly/361QNDy> (accessed 20 December 2021); Dieter Läßle, ‘Perspektiven einer Produktiven Stadt’, in Klaus Schäfer (ed)

The first lockdown in spring 2020 highlighted the importance of the need for public open spaces in residential areas. The recognition of this need can only exacerbate the pre-existing conflicts for municipalities between those supporting open space preservation and those promoting residential and commercial land development. Covid-19 promoted the advantages of working from home, something Germany had been somewhat behind in recognising in comparison with the rest of Europe.<sup>51</sup> Working from home is likely to have a significant long-term impact, and particularly with regard to the existing structures of urban–rural linkages and the forms of inner-city commuting.<sup>52</sup> Demand for residential as opposed to workplace locations is likely to increase and with this, the additional demand for residential forms that enable the integration of workplaces will rise. On the other hand, there is likely to be a significant decline in the demand for office space, both in city centres and in decentralised locations. The lockdown saw a decrease in the overall number of transport movements.<sup>53</sup> At the same time, transport purposes also changed in their weighting, for example, as a result of forced online trade and the modal split shifted from public transport to private transport. All in all, the long-term post-Covid-19 impacts on transport remain unclear, though the loss of confidence in public transport is likely to be recovered.

Many of these topics and trends are now being examined by means of a variety of pilot projects in cities across Germany. Practice-oriented urban research has also taken up many of these issues in association with individual cities and the municipal umbrella associations. The federal government is providing support for this research through extensive research funding programmes. The goal of all of these efforts is to strengthen the resilience of municipalities and minimise the risks arising from such crises in the future. What remains an open question is whether any of these initiatives will bring urban development more closely into

*Aufbruch aus der Zwischenstadt. Urbanisierung durch Migration und Nutzungsmischung* (Bielefeld, 2018) 150–175.

<sup>51</sup> Darja Reuschke and Alan Felstead, ‘Changing Workplace Geographies in the COVID-19 Crisis’ (2020) 10(2) *Dialogues in Human Geography*.

<sup>52</sup> Arno Bunzel and Carsten Kühl, *Stadtentwicklung in Coronazeiten—eine Standortbestimmung* (Sonderveröffentlichung Deutsches Institut für Urbanistik, 2020).

<sup>53</sup> Mahmudur Rahman Fatmi, ‘COVID-19 Impact on Urban Mobility’ (2020) 9(3) *Journal of Urban Management* 270–275.

alignment with the transformation of cities necessary for the realisation of the SDGs.

## 10 EMERGING ISSUES AND TRENDS

In both political and academic discourse, federalism in Germany has, for many years, been the object of considerable (sometimes intensely critical) analysis and debate. The use of terms such as ‘unitary federal state’, ‘disguised unitary state’, ‘screwed-up federal state’, or ‘cooperative central state’ all illustrate the extent to which critics in Germany dispute the meanings of federalism.<sup>54</sup> The main fault lines are perceived as the mechanisms for joint-decision-making between the different levels and the sluggishness, and supposed blockages of political reform due to the specific compounded structure of German federalism. For this reason, the model of ‘hourglass federalism’ is repeatedly proffered as an alternative. With the shrinkage of the competencies of the *Länder*, the municipalities gain in importance as does the federal government, which benefits primarily because of its greater budgetary autonomy. Ultimately, the 2015–2016 refugee crisis and the 2020 Covid-19 crisis significantly strengthened both the role and the self-confidence of municipalities as local crisis managers.

The key principle of subsidiarity is also under pressure. It is increasingly seen as a rather theoretical approach to justifying federal services of general interest from the smallest unit or the lowest level. This raises the question of the extent to which a normative ‘re-foundation’ of the federal principle can take subsidiarity as a starting point. What concrete constitutional and practical implications would this have? German federalism is based on a two-tier state structure that, *qua* prohibition of encroachment,<sup>55</sup> does not permit direct relations between the federal government and local authorities. The deviation from the historical path would therefore be significant were this to be adopted. However, the Federal Constitutional Court has also repeatedly strengthened the

<sup>54</sup> Konrad Hesse, *Der Unitarische Bundesstaat* (Müller, 1962); Heidrun Abromeit, *Der Verknappte Einheitsstaat* (Opladen, 1993); Roland Lhotta, ‘Der “verkorkste Bundesstaat”’: Anmerkungen zur bundesstaatlichen Reformdiskussion’ (1993) 24(1) *Zeitschrift für Parlamentsfragen* 117–132.

<sup>55</sup> Article 84(1) BL.

autonomy of municipal self-government and has spoken of a ‘modified two-tier structure’.<sup>56</sup>

Municipalities in Germany do not have their constitutional level, but they make an essential contribution to the provision of goods and services of general interest. Municipalities, granted autonomy in self-government by the constitution, operate in a highly charged and politically contested area of governance. On the one hand, municipalities enjoy the right to self-government, and neither the federal government nor the *Länder* may interfere with this arbitrarily. On the other, as a constitutional part of the *Länder*, the municipalities are dependent on them, and especially so in financial terms. As a result, municipalities constantly have to balance their derived responsibilities with their voluntary tasks as both formal expectations and specific demands from citizens continue to grow. Municipalities in Germany are torn between fulfilling their administrative implementation mandate, on the one hand, and responding to the more immediate claims of local politics and their constituencies, on the other.

In this situation, even the oft-repeated demands for more subsidiarity, municipal self-determination, and solidarity turn out, on closer examination, to be by no means as municipal-friendly as might at first be thought. This is because the granting of more competencies would logically also have to entail adjustments to the financial autonomy of the municipalities. This is something that the federal and state governments remain reluctant to discuss because of their own financial shortages. Along with the many ‘glocal’ megatrends (digitalisation, climate change, new types of pandemics, and the economisation of many areas of life, and so on), what we are observing is both the emergence of new forms of deterritorialisation and also entirely new forms of spatial connectivity due to the new mobility and communication technologies. At the same time, we may also be witnessing a renewed intensification of the urban–rural conflict as, in the rural regions, the conclusions of policy-making processes generated in transnational terms are met with incomprehension. With the transnationalisation of a growing number of policy-making processes, their results meet with growing incomprehension and, in some cases, even resistance in the more rural regions.

<sup>56</sup> BVerfGE 101, 158–238.

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