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# CONSTITUTIONAL ASSEMBLY

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REF No:

## MEMORANDUM

**TO :** All members of Theme Committee

**FROM :** Sandra Haydon

**DATE :** 22 March 1995

**SUBJECT :** ADDRESS BY PROF van MUNCH

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It was my intention to provide you with a transcript of the address by Prof van Munch but due to faulty recording equipment the first tape is blank.

The delay was due to the fact I sent the tapes to an outside company with more sophisticated equipment which I had hoped would be able to assist us.

I have photocopied information which was made available by Prof van Munch.

**PROF van MUNCH**

**BACKGROUND NOTES OF THE ADDRESS**

**TO THE ANC**

**AND**

**MEMBERS OF THEME COMMITTEE 3**

**ROOM V475**

**Thursday 2 March 1995**

**15H00**

## Das Bundesstaatsprinzip (Federalism)

Extracts from the Basic Law of the Federal Republic of Germany

### THE FEDERATION AND THE CONSTITUENT STATES (LÄNDER)

#### Art. 20 GG: *(Political and social structure, defence and the constitutional order)*

(1) The Federal Republic of Germany shall be a democratic and social federal state.

#### Art. 28 GG: *(Federal guarantee of Land constitutions and local government)*

(1) The constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. ..

(2) The municipalities shall be guaranteed the right to manage all the affairs of the local community on their own responsibility within the limits set by law. Within the framework of their statutory functions the associations of municipalities likewise have the right of self-government in accordance with the law. The guarantee of self-government includes the fundamentals of financial responsibility.

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

#### Art. 29: *(Modification of boundaries)*

(1) Boundaries may be modified to ensure that the Länder, by virtue of their size and capacity, can effectively perform their functions. Due regard shall be given to regional, historical and cultural ties, economic expediency and the requirements of regional policy and planning.

(2) Boundary modifications shall be introduced by federal law which shall require confirmation by referendum. The affected Länder shall be consulted.

(3) A referendum shall be held in the Länder from whose territories or parts a new Land or a Land with redefined boundaries is to be formed (affected Länder). The question to be voted on is whether the affected Länder are to remain within their existing boundaries or whether the new Land or a Land with redefined boundaries should be formed. ...

(8) The Länder can regulate the modification of boundaries for their territory or part of their territory by treaty between the Länder (Staatsvertrag) in derogation of paragraphs 2 to 7 of this Article. The affected municipalities and counties shall be consulted.

**Art. 30:** *(Functions of the Länder)*

The exercise of governmental powers and the discharge of governmental functions shall be incumbent on the Länder in so far as this Basic Law does not otherwise prescribe or permit.

**Art. 31:** *(Precedence of federal law)*

Federal law shall override Land law.

**Art. 32** *(Foreign relations)*

- (1) Relations with other states shall be conducted by the Federation.
- (2) Before the conclusion of a treaty affecting the special circumstances of a Land, that Land must be consulted in sufficient time.
- (3) In so far as the Länder have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign states.

**Art. 37:** *(Federal enforcement)*

- (1) If a Land fails to comply with its obligations of a federal character imposed by this Basic Law or another federal law, the Federal Government may, with the consent of the Bundesrat, take the necessary measures to enforce such compliance by the Land by way of federal enforcement.
- (2) To carry out such federal enforcement the Federal Government or its commissioner shall have the right to give instructions to all Länder and their authorities.

**LEGISLATIVE POWERS OF THE FEDERATION****Art. 70:** *(Legislation of the Federation and the Länder)*

- (1) The Länder shall have the right to legislate in so far as this Basic Law does not confer legislative power on the Federation.
- (2) The division of competence between the Federation and the Länder shall be determined by the provisions of this Basic Law concerning exclusive and concurrent legislative powers.

**Art. 79:** *(Amendment of the Basic Law)*

- (3) Amendments of this Basic Law affecting the division of the Federation into Länder, the participation on principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.

**THE EXECUTION OF FEDERAL LAWS AND THE FEDERAL ADMINISTRATION****Art. 83: (Execution of federal Laws by the Länder)**

The Länder shall execute federal laws as matters of their own concern in so far as this Basic Law does not otherwise provide or permit.

**Art. 84: (Land administration and Federal supervision)**

(1) Where the Länder execute federal laws as matters of their own concern, they shall provide for the establishment of the requisite authorities and the regulation of administrative procedures in so far as federal laws consented to by the Bundesrat do not otherwise provide.

(2) The Federal Government may, with the consent of the Bundesrat, issue pertinent general administrative rules.

(3) The Federal Government shall exercise supervision to ensure that the Länder execute the federal laws in accordance with applicable law. For this purpose the Federal Government may send commissioners to the highest Land authorities and with their consent or, if such consent is refused, with the consent of the Bundesrat, also to subordinate authorities.

(4) Should any shortcomings which the Federal Government has found to exist in the execution of federal laws in the Länder not be corrected, the Bundesrat shall decide, on the application of the Federal Government or the Land concerned, whether such Land has violated applicable law. The decision of the Bundesrat may be challenged in the Federal Constitutional Court.

(5) With a view to the execution of federal laws, the Federal Government may be authorized by a federal law requiring the consent of the Bundesrat to issue individual instructions for particular cases. They shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent.

**Art. 85: (Execution by the Länder as agents of the Federation)**

(1) Where the Länder execute federal law as agents of the Federation, the establishment of the requisite authorities shall remain the concern of the Länder except in so far as federal laws consented to by the Bundesrat otherwise provide.

(2) The Federal Government may, with the consent of the Bundesrat, issue pertinent general administrative rules. It may regulate the uniform training of civil servants (Beamte) and other salaried public employees (Angestellte). The heads of authorities at the intermediate level shall be appointed with its agreements.

(3) The Land authorities shall be subject to the instructions of the appropriate highest federal authorities. Such instructions shall be addressed to the highest Land authorities unless the Federal Government considers the matter urgent. Execution of the instructions shall be ensured by the highest Land authorities.

(4) Federal supervision shall extend to conformity with law and appropriateness of execution. The Federal Government may, for this purpose, require the submission of reports and documents and send commissioners to all authorities.

## **FINANCE**

### **Art. 104a: (*Apportionment of expenditure, Financial assistance*)**

(1) The Federation and the Länder shall meet separately the expenditure resulting from the discharge of their respective tasks in so far as this Basis Law does not provide otherwise.

(2) Where the Länder act as agents of the Federation, the Federation shall meet the resulting expenditure.

(3) Federal laws to be executed by the Länder and involving the disbursement of funds may provide that such funds shall be contributed wholly or in part by the Federation. Where any such law provides that the Federation shall meet one half of the expenditure or more, the Länder shall execute it as agents of the Federation. Where any such law provides that the Länder shall meet one quarter of the expenditure or more, it shall require the consent of the Bundesrat.

(4) The Federation may grant the Länder financial assistance for particularly important investments by the Länder or communes or associations of communes, provided that such investments are necessary to avert a disturbance of the overall economic equilibrium or to equalize differences of economic capacities within the federal territory or to promote economic growth. Details, especially concerning the kinds of investments to be promoted, shall be regulated by federal legislation requiring the consent of the Bundesrat, or by administrative arrangements based on the federal budget.

(5) The Federation and the Länder shall meet the administrative expenditure incurred by their respective authorities and shall be responsible to each other for ensuring proper administration. Details shall be regulated by a federal law requiring the consent of the Bundesrat.

### **Art. 107: (*Financial equalization*)**

(2) Such legislation shall ensure a reasonable equalization of the financial disparity of the Länder, due account being taken of the financial capacity and requirements of the municipalities...It may also provide for federal grants to be made to financially weak Länder in order to complement the coverage of their general financial requirements (complemental grants).

**Not written principle:**

The duty of the Länder to be loyal to the Federation (Bundestreue).

See the judgement of the Federal Constitutional Court from 1954 and 1957:

"Whenever the implications of a *Land* statute go beyond the boundaries of the particular *Land*, the *Land* legislator must take into account the interests of the neighbouring Länder as well as to the *Federation*."

**II) JUDICIAL DECISIONS**  
concerning the principle of federalism

1.) The Land Hamburg levied a tax on beverages. The plaintiff was of the opinion that this beverage tax does not comply with Art. 105 par. 2 a GG. He argued that the Land Hamburg did not have the legislative power for that kind of taxes because the beverage tax was identical to the turnover tax imposed by the Federation.

The Federal Constitutional Court decided in 1985 as follows (extract from the judgement):

"The Federal Constitutional Court left open the definition of the term "identical" in Art. 105 par. 2 a GG. A definition of this term would only be required, if a Land invents a *new* local tax, which conflicts with the prohibition of identical taxes. The traditional local excise taxes are not identical with the taxes regulated under Federal law in terms of Art. 105 par. 2 a GG... The Hamburg beverage tax is a traditional community beverage tax..."

2.) Art. 107 par. 2 regulates the "horizontal financial equalization", pertaining to the revenue equalization between financially weak and financially strong Länder. The obligation to compensate the financial strength between the Länder depends on whether the average Länder income, which is calculated by a certain index per inhabitant, lies above or below the average income of the Federation.

The Federal Constitutional Court defines Art. 107 par. 2 GG as a "federal principle of reciprocal solidarity, which doesn't only apply to the relationship between the Federation and the Länder but also between the Länder. This principle obligates each Land notwithstanding their sovereignty as states and their financial independence to provide certain help to other financially weak Länder." (judgement from 1986)

3.) "Cooperative federalism" represents the cooperation between the Federation and the Länder in order to fulfill common aims without infringing upon the independence of the Federation, the Länder or the communities. The Basic Law of the Federal Republic of Germany regulates this principle by the establishment of a financial compound system.

The Federal Constitutional Court stated in 1975:

"The constitution of a federal State needs a stable distribution of the revenues, especially of the Federal and Länder tax revenues. Federal funds given to the Länder for their respective responsibilities result in dependency upon the Federation and hence impair the sovereignty of the Länder. A federal system has to ensure that financial aid from the Federal budget to the Länder is an exception.

Furthermore, the granting of financial aid must be regulated in such a manner that it cannot control the constituent states in discharging their respective responsibilities."

Art. 104 a par. 4 GG does not transfer further powers to the Federation. "The Federation only has the power to grant financial aid on the conditions provided in this article so that the power and responsibility of the Länder remain unaffected. Any attempt to control the freedom of the constituent states to fulfill their respective responsibilities independently is inconsistent with the federal structure of the Federal Republic of Germany and with the right of the Länder to create their scope of duties on their own." (judgement of the Federal Constitutional Court from 1975)

translation of the decisions: Iris Breutz



## 1. The distribution of the tax legislation

### Tax legislation

**exclusive Federal jurisdiction**  
(Art. 105 I GG)

- tariffs
- fiscal monopoly

**concurrent Federal jurisdiction**  
(Art. 105 II GG)

conditions:

- tax revenue is wholly or part due to the Federation

or

- need for uniform regulation throughout the Federal Republic (Art. 72 II GG)

**exclusive Länder jurisdiction**  
(Art. 105 II a GG)

- local excise taxes

**Example:**

spirits monopoly

**Example:**

Income Tax Act, capital tax, church tax, turnover tax, inheritance tax, land tax

**Example:**

entertainment tax, dog tax, secondary residence tax

## 2. The distribution of the tax revenues

**separation system: Federation**  
(Art. 106 I GG)

- tariffs
- excise tax
- capital transaction tax
- surcharge on income tax
- charges in the EC

**Länder**  
(Art. 106 II GG)

- capital tax
- inheritance tax
- motor vehicle tax
- beer tax
- public gambling casino tax

**communities**  
(Art. 106 VI GG)

- impersonal tax
- local excise tax

**compound system: - corporation tax/income tax**  
(Art. 106 III 2 GG)

50 %

**- turnover tax**  
(Art. 106 III 3 GG, § 1 FAG)

65 %

50 %

35 %

**15 % of income tax**  
(Art. 106 VI GG)