

Brief

concerning the scope and meaning of certain provisions in the constitutions of the German *Länder**

Prof. Dr. Matthias Niedobitek, Chemnitz University of Technology

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* Translations of academic literature and of court decisions into English were carried out by the author. Translations of provisions of *Land* constitutions were also carried out by the author or taken from the official websites of the *Länder*.

I. Preface

- Scope of assignment

I have been retained by the Québec Government to submit my opinion relating to certain questions of German Constitutional Law that were submitted to me.

I understand that my opinion is being sought in connection with pending litigation before the Québec Superior Court relating to the Act adopted by the Québec National Assembly entitled: *An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*" (S.Q., 2000, c. 46).

The following questions were submitted to me:

1) In the German federation, what is the meaning and scope attributed to principles proclaimed in the constitutions of the *Länder* such as:

- the Bavarian people;
- the people are sovereign (example: Saxony-Anhalt);
- the power of the state originates from the people (example: Lower Saxony);
- the people shall express their will through elections and votes; decisions shall be arrived at by majority votes (example: Bavaria);
- the people have given themselves this constitution by an act of free self-determination (example: Thuringia);
- the people of the Free State of Saxony?

Are these principles compatible with federal constitutional law respecting the division of legislative powers and the rules governing constitutional amendments?

2) To your knowledge, are there other analogous principles of the Land constitutions that are similar to the principles proclaimed in sections 1 to 5 and 13 of the "*An Act Respecting the Exercise of the Fundamental Rights and Prerogatives of the Québec People and the Québec State*"? If so, what would be the answers in this regard to the questions asked in the previous section?

- Scope of review

I personally wrote this report and did the research upon which it is based.

In preparing this report, I have reviewed and relied upon the relevant academic literature, on decisions by the German Federal Constitutional Court (collection of cases: BVerfGE) and on my own research in the fields of German federalism and the constitutional law of the German states (*Länder*), as described in Appendix 1.

I submit my opinion based on German law. I have not been asked to, nor do I submit any opinion on questions of Canadian or Québec Law.

- Statement of independence and qualifications

This report has been prepared independently and objectively; I have no stake, directly or indirectly, in the outcome of the proceedings.

I attach in Appendix 2 my *curriculum vitae*.

- Aim of opinion

While the German *Länder* are not sovereign states within the definition laid down by international law, their constitutions frequently contain provisions that resemble provisions in the constitutions of sovereign states. This Brief aims to clarify the scope and meaning of these provisions in the light of the German federal constitution, called the *Grundgesetz*, or Basic Law (BL).

- Summary of opinion

My opinion in response to the questions submitted to me concerning the existence in the *Land's* constitutions of principles set out in sections 1 to 5 and 13 of the Québec Act or principles similar to them, and their compatibility with the Federal Constitution can be summarized as follows:

1. (a) The German *Länder* are states. As states they have a people of their own, state power and a territory.
(b) However, the *Länder* are not states as defined in international law but states within the meaning of the Basic Law, being understood that *Länder* statehood is not derived from the Federation but rather is recognized by it.
2. (a) The *Länder* are vested with constitutional autonomy. The *Land* constitutions and the federal constitution are in principal on an equal footing and exist alongside each other.
(b) However, in those fields which are regulated in the Basic Law the *Länder* are subject to the federal constitution.
3. (a) The *Länder* are democratic states which are based on the principle of sovereignty of the people.
(b) However, the peoples of the *Länder* are not "sovereign" in the proper meaning of the word. They are subject to the limitations as imposed by the Basic Law.
4. (a) According to the democratic principle, all *Land* authority must be derived from the respective *Land* people.
(b) However, all *Land* authority is subject to the limitations as imposed by the Basic Law. The peoples of the *Länder* consist of the German citizens living on the *Land's* territory at a given time.
5. (a) The *Länder* are vested with the right to self-determination.
(b) However, the concept of self-determination must be construed in the light of the Basic Law. The right to self-determination of the *Länder* has its roots in the federal constitution.

6. All provisions in the *Land* constitutions on sovereignty of the people, the democratic principle, constitutional autonomy etc. as discussed in this Brief are compatible with the Basic Law, in particular with the rules concerning the division of legislative powers and constitutional amendments.

II. Basic features of the German federal state

The Basic Law established Germany as a federal state (*Bundestaat*, see Art. 20 para. 1 BL). As a federal state, the German state internally consists of two levels, both of which have state character: the Federation and the individual *Länder*. The statehood of the German *Länder* is reflected in many provisions in the Basic Law as well as in the fact that all the *Länder* have adopted their own written constitutions.

It is agreed that the concept of *Länder* statehood must be defined by reference to the Basic Law rather than international law. In my monograph *Neuere Entwicklungen im Verfassungsrecht der deutschen Länder*, 3rd ed., Speyer 1995, I summarized on p. 2 that the *Länder*

" [FREE TRANSLATION] *are not sovereign states as defined by international law but states within the meaning of the Basic Law.*"¹

The relationship between the *Länder* and the Federation is generally characterized by the twofold quality of the *Länder* as "autonomous" states on the one hand and necessarily also as dependent members of the Federation on the other. These two elements must constantly be balanced in order to avoid tensions in the federal system. This has been stressed by the Federal Constitutional Court in its judgment of 11 November 1999 in cases 2 BvF 2, 3/98, 1, 2/99, BVerfGE 101, 158, on p. 222, where the court points to the necessary

" [FREE TRANSLATION] ... *balance between the "own statehood" [Eigenstaatlichkeit] of the Länder and the federal solidary community [Solidargemeinschaft] ...*"²

In those fields which are regulated in the Basic Law, e.g. the division of legislative competences between the Federation and the *Länder*, which according to the decision of the Federal Constitutional Court of 7 May 2001, case 2 BvK 1/00, BVerfGE 103, 332, on p. 350,

" [FREE TRANSLATION] ... *in a federal state can only be effected on the level of the state as a whole [Gesamtstaat]*"³,

the *Länder* are subject to the federal constitution but for the rest the *Länder* are on equal footing with the Federation.

Art. 28 para. 1 BL refers to the constitutional order of the *Länder* and thus safeguards their constitutional autonomy:

¹ German wording: "sind Staaten nicht im Sinne des Völkerrechts, sondern im Sinne der Bundesverfassung."

² German wording: "... Balance zwischen Eigenstaatlichkeit der Länder und bundesstaatlicher Solidargemeinschaft ...".

³ German wording: "... erfolgt in einem Bundesstaat nur auf den Ebene des Gesamtstaates."

" [FREE TRANSLATION] *The constitutional order of the Länder must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law.*⁴

In its constant jurisprudence, for example in its decision of 7 May 2001, case 2 BvK 1/00, BVerfGE 103, 332, on p. 350, the Federal Constitutional Court has interpreted that provision as follows:

" [FREE TRANSLATION] *The Federal Constitutional Court has repeatedly held that in an eminently federative political system such as the Federal Republic of Germany the constitutional spheres of the Federation and of the Länder in principle exist alongside each other [...]. Article 28 para. 1 BL requires no more than a certain degree of homogeneity between the federal constitution and the Land constitutions [...]. Unless the Basic Law regulates the Land constitutions the Länder are free to arrange for their constitutional law and for their constitutional jurisdiction.*"⁵

III. The *Länder* as states

1. Elements of *Länder* statehood

Analogous to the definition of a sovereign state in international law, German federal state doctrine stipulates three essential elements of the statehood of the *Länder*: (1) the peoples of the *Länder*; (2) state power; (3) the territory of the *Länder*. These elements substantiate the statehood of the German *Länder*, which the Federal Constitutional Court somewhat tautologically calls *Eigenstaatlichkeit* ("own statehood") – see e.g. judgment of 26 July 1972, case 2 BvF 1/71, BVerfGE 34, 9, on p. 20. The first element – the peoples of the *Länder* – will be dealt with below (section V. 2.).

2. Originality of *Länder* statehood

According to the constant case-law of the Federal Constitutional Court – see for example the decision of 24 March 1982, case 2 BvH 1, 2/82, 2 BvR 233/82, BVerfGE 60, 175, on p. 207 –

" [FREE TRANSLATION] *the Länder as members of the Federation are states with their own – albeit limited – sovereign authority which is not derived from the Federation but rather is recognized by it.*"⁶

⁴ German wording: "Die verfassungsmäßige Ordnung in den Ländern muss den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen."

⁵ German wording: "Das Bundesverfassungsgericht hat wiederholt ausgesprochen, dass in einem betont föderativ gestalteten Staatswesen wie der Bundesrepublik Deutschland die Verfassungsbereiche des Bundes und der Länder grundsätzlich nebeneinander stehen [...]. Nach Artikel 28 Abs. 1 GG ist nur ein gewisses Maß an Homogenität der Bundesverfassung und der Landesverfassungen gefordert [...]. Soweit das Grundgesetz für die Verfassungen der Länder nichts bestimmt, können die Länder ihr Verfassungsrecht und ihre Verfassungsgerichtsbarkeit selbst ordnen."

⁶ German wording: "Die Länder sind als Glieder des Bundes Staaten mit eigener – wenn auch gegenständlich beschränkter – nicht vom Bund abgeleiteter, sondern von ihm anerkannter staatlicher Hoheitsmacht."

This qualification may seem self-evident with regard to those *Länder* that came into being before the Federal Republic of Germany was founded, but it also applies to those *Länder* which were established or became part of the Federal Republic of Germany after its foundation. The "originality" of statehood of the *Länder* expressed in the afore-mentioned case-law is an essential presumption whose absence would inherently affect the state character of the *Länder*.

Of course, this concept of originality of statehood is not comparable to the statehood of states in international law because it requires qualification in the light of the limitations and requirements imposed on the *Länder* by the Basic Law. Hence, although the statehood of the *Länder* is not derived from the Federation, it is integrated into and partially subordinate to the Basic Law, which serves as an overall binding legal framework. To sum up, the *Länder* are not states as defined by international law (although there are similarities in many respects) but states within the meaning of the Basic Law.

3. Attributes of *Länder* statehood

Statehood of the *Länder* is reflected in several attributes which are typical of (although not essential for) "real" states. Only the more wide-spread attributes shall be mentioned here. To begin with, all German *Länder* have enacted written **constitutions**. According to the prevailing view in the German literature, the adoption of a written constitution by the *Länder* is imperatively required by Art. 28 para. 1 BL, which says the "constitutional order" of the *Länder* must conform to certain principles.

In their constitutions, many *Länder* expressly call themselves "**states**", for example the constitution of Bremen which says in Article. 143:

" [FREE TRANSLATION] *The city of Bremen and the city of Bremerhaven are each a municipality of the State of Bremen.*"⁷

or the constitution of Hamburg which says in Article 3 para. 1:

" [FREE TRANSLATION] *The Free and Hanseatic City of Hamburg is a democratic and social state governed by the rule of law.*"⁸

Three *Länder* even call themselves "Free-States" (Freistaat Bayern, Freistaat Sachsen, Freistaat Thüringen).

Most *Land* constitutions contain provisions on **state goals** and catalogues of **fundamental rights**.

Although no *Land* has established a "**state president**" or a presidential system, the *Länder* are constitutionally authorized in that regard to diverge from the Basic Law, which has installed a parliamentary system. In my contribution to the International Encyclopaedia of

⁷ German wording: "Die Stadt Bremen und die Stadt Bremerhaven bilden jede für sich eine Gemeinde des bremischen Staates."

⁸ German wording: "Die Freie und Hansestadt Hamburg ist ein demokratischer und sozialer Rechtsstaat."

Laws, Constitutional Law, *Germany – Sub-national Constitutional Law*, (eds: André Alen / David Haljan), Suppl. 102 (2013), no. 80, I concluded,

"that Land constitutions may diverge from the model of the Basic Law to a considerable extent which, however, has not even nearly been exhausted so far. For example, a Land constitution could choose a presidential system instead of a parliamentary system."

IV. Constitutions of the *Länder*

1. Constitutional autonomy

The statehood of the *Länder* is particularly reflected in their right to create their own constitutions, that is to say in their constitutional autonomy. The constitutional autonomy of the *Länder* is implied in Art. 28 para. 1 BL, which expressly refers to the "constitutional order" (*verfassungsmäßige Ordnung*) of the *Länder*.

Of course, this autonomy is not unlimited but bound by the federal constitution. This has been stated by the Federal Constitutional Court as early as in its judgment of 23 October 1951, case BvG 1/51, BVerfGE 1, 14, on p. 61, and confirmed, e.g., by the Constitutional Court of Brandenburg in its judgment of 21 March 1996, case 18/95, in: LKV 1996, p. 203 et seq., concerning the then envisaged consolidation of the *Länder* Berlin and Brandenburg where the court held:

*" [FREE TRANSLATION] But it also follows from the sovereignty of the people that a new constitution cannot be made legally dependent on an earlier constitution. This applies with the proviso that the constitution-maker of the Land (people) is bound by unwritten legal principles and by the requirements of the Basic Law pursuant to Article 28 para. 1 BL."*⁹

In that regard, Art. 28 para. 1 BL stipulates that the constitutional order of the *Länder* must conform to the principles of a republican, democratic, and social state governed by the rule of law, within the meaning of the Basic Law. This clause aims to guarantee a certain degree of homogeneity between the federal constitution and the constitutions of the *Länder* (it is therefore called the "homogeneity clause"). In principle, the *Land* constitutions are on an equal footing with the federal constitution. This has been confirmed, inter alia, by the Federal Constitutional Court in its decision of 19 November 2002, case 2 BvR 329/97, BVerfGE 107, 1, on p. 10, where the court stated with regard to the competences of the *Land* constitutional courts:

" [FREE TRANSLATION] When delimiting the competences of the Federal Constitutional Court and the constitutional courts of the Länder it must be assumed that in the federal state as established by the Basic Law the

⁹ German wording: "Aus der Volkssouveränität folgt aber auch, dass eine neue Verfassung nicht rechtlich bindend von einer früheren Verfassung abhängig gemacht werden kann. Dies gilt mit der Maßgabe, dass der Verfassungsgeber des Landes (Volk) gemäß Art. 28 Abs. 1 GG an die überpositiven Rechtsgrundsätze **und an die Vorgaben des Grundgesetzes gebunden** ist." (emphasis added).

*constitutional spheres of the Federation and of the Länder in principle exist alongside each other.*¹⁰

2. Constitution-making

Within the constitutional framework set by Art. 28 para. 1 BL, the *Länder* are basically free to design and build their constitutions. The *Länder* may restrict themselves to so-called "organisational statutes" which fulfil only a minimum set of requirements (only example: the Constitution of Hamburg) or they may enact "complete constitutions" comprising *inter alia* state goals, values and fundamental rights catalogues (as the other *Länder* have done).

The constitutional autonomy of the *Länder* has been recognized by the jurisprudence of the Federal Constitutional Court of 29 January 1974, case 2 BvN 1/69, BVerfGE 36, 342, on p. 368. As Hans Nawiasky wrote in his commentary of the Bavarian constitution *Die Verfassung des Freistaates Bayern*, looseleaf, München 2006, part IV (Die Entwicklung des Verfassungsrechts seit 1946), on p. 5:

" [FREE TRANSLATION] *The Bavarian constitution suggests to be the constitution of a self contained, self-ruled, literally omni-competent Bavarian state.*"¹¹

While having this right, the *Länder* may not enact constitutional provisions which are *actually* in conflict with the federal (constitutional) law. This requirement is couched in Art. 31 BL. According to this provision, "[FREE TRANSLATION] federal law shall take precedence over *Länder* law".¹² This clause is only applicable in case of a *true conflict* between federal (constitutional) law and provisions of a *Land* constitution. For example, fundamental rights in *Land* constitutions with a *larger* scope of protection must be regarded as being 'in conformity' (consistent) with the fundamental rights of the Basic Law if the latter rights can be construed as only granting a minimum standard on federal level and are, consequently, not opposed to a higher degree of protection in the *Land* constitutions (see decision of the Federal Constitutional Court of 15 October 1997, case 2 BvN 1/95, BVerfGE 96, pp. 345 et seq.)

As a matter of course, *Land* constitutions may not regulate issues affecting the federal constitutional order such as the repartition of legislative competences between the Federation and the component states (see decision of the Federal Constitutional Court of 7 May 2001, case 2 BvK 1/00, BVerfGE 103, 332, on p. 350, as cited above, section II., first citation of the decision). Also, the creation of *Land* constitutional law is a matter reserved exclusively to the *Land's* constituent power while the constituent power of the Federation can only create *federal* constitutional law.

¹⁰ German wording: „Bei der Abgrenzung der Zuständigkeit des Bundesverfassungsgerichts von der Zuständigkeit der Landesverfassungsgerichte ist davon auszugehen, dass im Bundesstaat des Grundgesetzes die Verfassungsbereiche des Bundes und der Länder grundsätzlich selbständig nebeneinander stehen“.

¹¹ German wording: "Die BV [Bayerische Verfassung] vermittelt den Eindruck, Verfassung eines nach außen geschlossenen, allein über sich verfügenden, im vollen Wortsinn allzuständigen bayerischen Staates zu sein."

¹² German wording: „Bundesrecht bricht Landesrecht“.

3. Constitutional amendment

All *Land* constitutions provide for constitutional amendment. The amendment procedures differ from *Land* to *Land* but generally speaking the amendment of a *Land* constitution is a sort of legislative process as opposed to the original adoption of a constitution. Constitutional amendment can only take place within the limits set by the federal constitution as described above (section IV. 2.). Accordingly, when amending their constitutions, the *Länder* have to abide by the constitutional frame set by Art. 28 para. 1 BL ("the "homogeneity clause").

V. The democratic principle in the *Land* constitutions

1. The *Länder* as "democratic states"

All the German *Länder* are democracies. This is reflected in the *Land* constitutions in several ways.

First of all, the *Länder* expressly call themselves "democratic states". The constitution of Baden-Württemberg, for example, states in Article 23 para. 1:

" [FREE TRANSLATION] *The Land Baden-Württemberg is a republican, democratic, and social state governed by the rule of law.*"¹³

The constitution of Hessen states in Article 65:

" [FREE TRANSLATION] *Hessen is a democratic and parliamentary republic.*"¹⁴

To give a third example, the constitution of Mecklenburg-Western Pomerania states in Article 2:

" [FREE TRANSLATION] *Mecklenburg-Western Pomerania is a republican, democratic, social state committed to the protection of the natural bases of life and governed by the rule of law.*"¹⁵

2. The peoples of the *Länder*

The democratic principle as well as the *Länder's* state character *inter alia* necessitate their having an own "people". This requirement was confirmed by the Federal Constitutional Court in one of its very first decisions of 23 October 1951, case 2 BvG 1/51, BVerfGE 1, 14, where it stated on p. 50:

¹³ German wording: "Das Land Baden-Württemberg ist ein republikanischer, demokratischer und sozialer Rechtsstaat."

¹⁴ German wording: "Hessen ist eine demokratische und parlamentarische Republik."

¹⁵ German wording: "Mecklenburg-Vorpommern ist ein republikanischer, demokratischer, sozialer und dem Schutz der natürlichen Lebensgrundlagen verpflichteter Rechtsstaat."

" [FREE TRANSLATION] *The Land Baden as a member of the Federation is a state which as such necessarily has a people.*"¹⁶

Legal doctrine confirms that view. Michael Sachs in his article *Das Staatsvolk in den Ländern*, *Archiv des öffentlichen Rechts* 108 (1983), p. 68 (71), concludes:

" [FREE TRANSLATION] *It can be stated that the Basic Law construes the Länder as states with a corresponding people.*"¹⁷

Similarly, Matthias Herdegen, *Strukturen und Institute des Verfassungsrechts der Länder*, in: Josef Isensee / Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Vol. VI, 3rd ed., Heidelberg 2009, p. 271 (276 et seq.) writes:

" [FREE TRANSLATION] *The state quality of the Länder which distinguishes them from mere administrative entities is based on the recognition of an own people being in a closer relationship with state territory and state authority.*"¹⁸

In my contribution to the *International Encyclopaedia of Laws, Constitutional Law, Germany – Sub-national Constitutional Law* (eds: André Alen / David Haljan), Suppl. 102 (2013), no. 209, I summarized that legal situation as follows:

"*Given the state character of the German Länder (see Nos 2, 43), all Länder necessarily have a people of their own that can be distinguished from the people of the Federation as a whole. In terms of state theory a state without a people is inconceivable ...*".

This is reflected in various provisions of the Land constitutions. A few examples may suffice:

The constitution of Baden-Württemberg in its preamble says:

" [FREE TRANSLATION] *... the people of Baden-Württemberg by virtue of its constitution-making power acting through the Constitutional Assembly has bestowed upon itself this constitution.*"¹⁹

The constitution of Bavaria in its preamble says:

¹⁶ German wording: "Das Land Baden ist als Glied des Bundes ein Staat, zu dem notwendigerweise ein Staatsvolk gehört."

¹⁷ German wording: "Damit kann festgestellt werden, daß das Grundgesetz die Länder als Staaten mit einem zugehörigen Staatsvolk sieht."

¹⁸ German wording: "Die Staatsqualität der Länder, welche diese über schlichte Verwaltungseinheiten hinaushebt, beruht auf der Anerkennung eines eigenen Staatsvolkes, das zum Staatsgebiet und zur Staatsgewalt der Länder in einer engeren Beziehung steht."

¹⁹ German wording: "... hat sich das Volk von Baden-Württemberg ... kraft seiner verfassunggebenden Gewalt durch die Verfassunggebende Landesversammlung diese Verfassung gegeben".

" [FREE TRANSLATION] *Mindful of the physical devastation ... firmly intending moreover to secure permanently for future German generations the blessing of Peace, Humanity and Law ... the Bavarian people hereby bestows upon itself the following Democratic Constitution.*"²⁰

The constitution of Mecklenburg-Western Pomerania states in Article 5 para. 1:

" [FREE TRANSLATION] *The people of Mecklenburg-Western Pomerania avows itself to the human rights being the basis of state community, peace and justice.*"²¹

The constitution of Saxony states in Article 5 para. 1 first sentence:

" [FREE TRANSLATION] *Citizens of German, Sorbian or other ethnic origin constitute the people of the Free-State of Saxony.*"²²

The *Land* constitutions frequently refer to "their" people in more general terms, in particular in connection with provisions concerning the elections to the *Land* parliaments. The Constitution of Saxony, for example, says in Article 39 para. 1:

" [FREE TRANSLATION] *The Landtag is the elected representation of the people.*"²³

And in Article 39 para. 3 first sentence the Constitution of Saxony stipulates:

" [FREE TRANSLATION] *The Members of the Landtag shall represent the whole people.*"²⁴

The people of a state is composed of its citizens. Sovereign states in international law are basically free to determine the criteria governing the acquirement of citizenship. The *Länder*, however, must adhere to the requirements and limits set by the Basic Law. So far no *Land* has adopted a "citizenship act" of its own in order to regulate the acquirement of citizenship or to shape a special legal relationship between the *Land* and its citizens. However, minimum durations of residence necessary to vote or to be elected are specified in the *Land* Election Acts.

According to the case-law of the Federal Constitutional Court, the peoples of the *Länder* are composed of all Germans living in the individual *Länder*. In its judgment of 31 October 1990

²⁰ German wording: "Angesichts des Trümmerfeldes ...in dem festen Entschlusse, den kommenden deutschen Geschlechtern die Segnungen des Friedens, der Menschlichkeit und des Rechtes dauernd zu sichern, gibt sich das Bayerische Volk ... nachstehende demokratische Verfassung."

²¹ German wording: "Das Volk von Mecklenburg-Vorpommern bekennt sich zu den Menschenrechten als Grundlage der staatlichen Gemeinschaft, des Friedens und der Gerechtigkeit."

²² German wording: " Dem Volk des Freistaates Sachsen gehören Bürger deutscher, sorbischer und anderer Volkszugehörigkeit an."

²³ German wording: "Der Landtag ist die gewählte Vertretung des Volkes."

²⁴ German wording: "Die Abgeordneten vertreten das ganze Volk."

in case 2 BvF 3/89, BVerfGE 83, 60 (on p. 71), the Federal Constitutional Court while referring to Article 28 para. 1 of the Basic Law stated:

" [FREE TRANSLATION] *In each Land, county, and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections (Art. 28 para. 1 2nd sentence Basic Law). People within the meaning of these constitutional norms is the entirety of all Germans living in the respective electoral area.*"²⁵

The definition given by the Federal Constitutional Court is reflected in some *Land* constitutions. A definition in that sense is provided in the constitution of Rhineland-Palatinate. Article 75 para 2 first sentence says:

" [FREE TRANSLATION] *Citizens of the state are all German nationals living or usually resident in Rhineland-Palatinate.*"²⁶

The constitution of Brandenburg states in Article 3 para. 1 first sentence:

" [FREE TRANSLATION] *Citizens in the meaning of this constitution are all Germans pursuant to Article 116 para. 1 BL permanently resident in the Land Brandenburg.*"²⁷

Less explicit, the constitution of Berlin provides in Article 2 first sentence:

" [FREE TRANSLATION] *Public authority shall be held by all German nationals domiciled in Berlin.*"²⁸

Even more indirectly, with reference to voting rights, the constitution of Saxony states in Article 4 para. 2:

" [FREE TRANSLATION] *All citizens who live in the Land or usually have residence there and have reached the age of 18 by the day of the election or referendum shall be entitled to elect or vote.*"²⁹

Similarly, the Constitution of Saxony-Anhalt states in Article 42 para. 2 first sentence:

²⁵ German wording: "In den Ländern, Kreisen und Gemeinden muß das Volk eine Vertretung haben, die aus allgemeinen, unmittelbaren, freien, gleichen und geheimen Wahlen hervorgegangen ist (Art. 28 Abs. 1 Satz 2 GG). Volk im Sinne dieser Verfassungsnormen ist die Gesamtheit der in dem jeweiligen Wahlgebiet ansässigen Deutschen."

²⁶ German wording: "Staatsbürger sind alle Deutschen, die in Rheinland-Pfalz wohnen oder sich sonst gewöhnlich dort aufhalten."

²⁷ German wording: "Bürger im Sinne dieser Verfassung sind alle Deutschen im Sinne des Artikels 116 Absatz 1 des Grundgesetzes mit ständigem Wohnsitz im Land Brandenburg."

²⁸ German wording: "Träger der öffentlichen Gewalt ist die Gesamtheit der Deutschen, die in Berlin ihren Wohnsitz haben."

²⁹ German wording: "Wahl- und stimmberechtigt sind alle Bürger, die im Land wohnen oder sich dort gewöhnlich aufhalten und am Tag der Wahl oder Abstimmung das 18. Lebensjahr vollendet haben."

" [FREE TRANSLATION] *Entitled to vote and to be elected are all German nationals who have attained the age of 18 and who are resident in Saxony-Anhalt.*"³⁰

Consequently, the capacity of being a citizen of a particular *Land* is dependent on living on the *Land*'s territory. *Land* citizenship necessarily expires when the citizen takes up residence in another *Land*.

3. Sovereignty of the people

Furthermore, the *Land* constitutions unambiguously anchor the principle of sovereignty of the people. This principle is the constitutional cornerstone of the democratic principle. It refers to the people as the very basis of the state, of its institutions and of its powers and imposes numerous requirements concerning e.g. democratic representation, elections, transfer of powers and the possible forms of democratic legitimation. Given its rather abstract nature, the principle of sovereignty of the people has rarely been called upon before the Federal Constitutional Court. This has been the case, e.g., in proceedings instituted by a parliamentary group (*Fraktion*) to safeguard its right to equal representation in parliamentary committees (see judgment of 8 December 2004, case 2 BvE 3/02, BVerfGE 112, 118 [on p. 123]), or in proceedings concerning the scrutiny of *Land* elections (see judgment of 8 February 2001, case 2 BvF 1/00, BVerfGE 103, 111 [on p. 121]). The principle of sovereignty of the people has also been invoked before *Land* constitutional courts, e.g., in proceedings before the Constitutional Court of Brandenburg (judgment of 21 March 1996, case 18/95, in: LKV 1996, p. 203 et seq.) which were instituted against the Treaty between the *Länder* Berlin and Brandenburg aimed at consolidation of both *Länder* and at forming a new *Land* "Berlin-Brandenburg" (this was eventually refused in a referendum).

Many *Land* constitutions, e.g. the constitutions of Baden-Württemberg, of Mecklenburg-Western Pomerania, or of Saxony, have literally adopted the wording of Article 20 para. 2 BL which says:

" [FREE TRANSLATION] *All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.*"³¹

Few constitutions use a slightly different wording, like the constitutions of Bavaria (Article 2 para. 1 2nd sentence) and of Rhineland-Palatinate (Article 74 para. 2) which state:

" [FREE TRANSLATION] *The power of the state belongs to the people.*"³²

³⁰ German wording: "Wahlberechtigt und wählbar sind alle Deutschen, die das 18. Lebensjahr vollendet und im Lande Sachsen-Anhalt ihren Wohnsitz haben."

³¹ German wording: "Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt."

³² German wording: "Träger der Staatsgewalt ist das Volk."

Some *Land* constitutions place even more emphasis on the people's sovereignty, namely the Constitution of Hesse which states in Article 70:

" [FREE TRANSLATION] *State authority inalienably rests with the people.*"³³

and the constitution of Saxony-Anhalt which provides in Article 2 para. 2:

" [FREE TRANSLATION] *The people is the sovereign. All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through legislative, executive and judicial bodies.*"³⁴

4. Democratic representation

The peoples of the *Länder* are also the points of reference of the provisions concerning democratic representation. Many *Land* constitutions contain provisions such as the constitution of Brandenburg which states in Article 55 para. 1:

" [FREE TRANSLATION] *The Landtag is the elected representation of the people.*"³⁵

and in Article 56 para. 1 first sentence:

" [FREE TRANSLATION] *The Members of the Landtag shall be representatives of the whole people, not bound by orders or instructions.*"³⁶

In that regard the commentary by Paul Feuchte et al. *Verfassung des Landes Baden-Württemberg*, Stuttgart et al., 1987, clarifies on p. 305:

" [FREE TRANSLATION] *Representation through the Landtag covers the whole people. The individual member of parliament also represents the whole people, not only an electoral district or a part of the electorate ...*"³⁷

³³ German wording: "Die Staatsgewalt liegt unveräußerlich beim Volke".

³⁴ German wording: "Das Volk ist der Souverän. Vom Volk geht alle Staatsgewalt aus. Sie wird vom Volke in Wahlen und Abstimmungen sowie durch die Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt."

³⁵ German wording: "Der Landtag ist die gewählte Vertretung des Volkes".

³⁶ German wording: "Die Abgeordneten sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden."

³⁷ German wording: "Die Repräsentation durch den Landtag umfaßt das ganze Volk. Auch der einzelne Abgeordnete vertritt das ganze Volk, nicht nur einen Wahlkreis oder einen Teil der Wähler ...".

The principle of parliamentary representation implies that the *Land* parliaments are the main legislators. Although some *Land* constitutions seem to suggest that legislation through the people is on par with legislation through the *Land* parliaments – see in that regard Art. 5 Abs. 1 of the constitution of Bavaria:

" [FREE TRANSLATION] *Legislative power is the exclusive prerogative of the people and their representatives.*"³⁸

– this impression is refuted by many other provisions which regulate the division of legislative power in greater detail. For example, the constitution of Rhineland-Palatinate – like the constitutions of Schleswig-Holstein (Article 10 para. 1 first sentence) and of Thuringia (Article 48 para 1) – states in Article 79 para. 1:

" [FREE TRANSLATION] *The Landtag shall be the supreme organ for the formation of the political will elected by the people. It shall represent the people, elect the minister president ...*"³⁹

Also, the constitution of Saarland in Article 65 para. 2 first sentence mirrors the repartition of legislative competences more realistically:

" [FREE TRANSLATION] *Legislative power is exercised by the Landtag unless reserved for the people directly by the constitution.*"⁴⁰

In fact, though direct legislation, i.e. the involvement of the people in the law-making process, is more rampant in the *Land* constitutions than in the Federal constitution, it plays no important role in the legislative practice of the *Länder*.

5. Summary

The capacity of the *Länder* as democratic states is necessarily linked with the *Länder's* having a people of their own. All the state authority of the *Länder* originates from the peoples of the *Länder*, which are the very sources of legitimation of all state institutions and activities. Although the democratic principle is closely associated with the concept of **sovereignty of the people**, it must be observed that the peoples of the *Länder* are not "sovereign" in the proper meaning of the word, that is to say they are not an omnipotent source of power; rather they are subject to the conditions and restrictions imposed by the federal constitution (The Basic Law) and can exercise their constitution-making power only within those limits (see judgment of the Constitutional Court of Brandenburg of 21 March 1996, case 18/95, cited above, section IV.1.).

³⁸ German wording: "Die gesetzgebende Gewalt steht ausschließlich dem Volk und der Volksvertretung zu."

³⁹ German wording: "Der Landtag ist das vom Volk gewählte oberste Organ der politischen Willensbildung. Er vertritt das Volk, wählt den Ministerpräsidenten ...".

⁴⁰ German wording: "Der Landtag übt die gesetzgebende Gewalt aus, soweit sie nicht durch die Verfassung dem Volke unmittelbar vorbehalten ist."

The **establishment of a democratic system** in the *Länder* is not optional but mandatory. According to Art. 28 para. 1 BL, the constitutional order of the *Länder* must conform *inter alia* to the democratic principle within the meaning of the Basic Law.

VI. Right to self-determination

If it is true that, in a democracy, sovereignty belongs to the people (see section V.), then the peoples of the *Länder* must be regarded as having the right to self-determination. Indeed, the Federal Constitutional Court in one of its first decisions has assigned that right to the peoples of the *Länder*. In its judgment of 23 October 1951 in case 2 BvG 1/51, BVerfGE 1, 14, the court stated on page 50:

*" [FREE TRANSLATION]... It follows from the democratic principle that a people is entitled to decide on its own political basic order and, consequently, on the continuation of the existence of its state. The Land Baden as a member of the Federation is a state which as such necessarily has a people. In a democracy that right of self-determination is assigned to the people of the state [...]. ..."*⁴¹

Accordingly, some *Länder* constitutions refer to the right of "free self-determination" in their preambles:

Constitution of Mecklenburg-Western Pomerania:

*" [FREE TRANSLATION] ... based on the Basic Law of the Federal Republic of Germany the people of Mecklenburg-Western Pomerania have bestowed upon itself in free self-determination this Land constitution."*⁴²

Constitution of Saxony-Anhalt:

*" [FREE TRANSLATION] Acting in free self-determination the people of Saxony-Anhalt has bestowed upon itself this constitution."*⁴³

Constitution of Thuringia:

*" [FREE TRANSLATION] Conscious of the cultural wealth ... the people of the Free-State of Thuringia acting in free self-determination and also in responsibility before God has bestowed upon itself this constitution."*⁴⁴

⁴¹ German wording: "Daß ein Volk über seine staatliche Grundordnung und damit auch über das Fortbestehen seines Staates grundsätzlich selbst zu bestimmen hat, ergibt sich ... aus dem demokratischen Prinzip. [...] Das Land Baden ist als Glied des Bundes ein Staat, zu dem notwendigerweise ein Staatsvolk gehört. Dieses Staatsvolk [...] besitzt in der Demokratie jenes Selbstbestimmungsrecht."

⁴² German wording: "... haben sich die Bürger Mecklenburg-Vorpommerns auf der Grundlage des Grundgesetzes für die Bundesrepublik Deutschland in freier Selbstbestimmung diese Landesverfassung gegeben."

⁴³ German wording: "In freier Selbstbestimmung gibt sich das Volk von Sachsen-Anhalt diese Verfassung."

⁴⁴ "In dem Bewusstsein des kulturellen Reichtums ... gibt sich das Volk des Freistaates Thüringen in freier Selbstbestimmung und auch in Verantwortung vor Gott diese Verfassung."

Even the preamble of Basic Law confirms:

" [FREE TRANSLATION] *Germans in the Länder of Baden-Württemberg, Bavaria, Berlin [etc] have achieved the unity and freedom of Germany in free self-determination.*"⁴⁵

However, both the Federal Constitutional Court and the academic literature point to the fact that the concept of "self-determination" can only be construed in the light of the federal constitution, which may set limits to the exercise of that right. Therefore, the Federal Constitutional Court in its above-mentioned judgment of 23 October 1951 continues as follows:

" [FREE TRANSLATION] *Decisive, however, is that Baden being a component state of the Federation is not autonomous and independent but integrated into the federal order which sets limits to its authority in several directions.*"⁴⁶

Siegfried Jutzi in his commentary on the preamble of the Constitution of Thuringia (*Die Verfassung des Freistaats Thüringen – Kommentar* von Joachim Link / Siegfried Jutzi / Jörg Hopfe, Stuttgart et al., 1994, page 52, note 14) summarizes that situation as follows:

" [FREE TRANSLATION] *The statement that the people has bestowed upon itself the Land constitution in free self-determination is correct and is the result of the success of the peaceful changes of autumn 1989 mentioned at the beginning of the preamble. Although this success was dependent on the cooperation of other states ... and on the acquiescence of the Allies, in particular the USSR, the Constitution, after that time, was given in free self-determination, certainly under the roof of the Basic Law which, however, was reached by way of accession to the Federal Republic of Germany in free self-determination.*"⁴⁷

Therefore, under German constitutional law no *Land* people can invoke a right to self-determination which is directed against the state, which, in other words, has its roots in international law. This has been confirmed by the Federal Constitutional Court in its judgment of 11 July 1961, cases 2 BvG 2/58, 2 BvE 1/59, BVerfGE 13, 54, on p. 93:

⁴⁵ German wording: "Die Deutschen in den Ländern Baden-Württemberg, Bayern, Berlin [etc] haben in freier Selbstbestimmung die Einheit und Freiheit Deutschlands vollendet."

⁴⁶ German wording: „Entscheidend ist aber, daß Baden als Gliedstaat des Bundes nicht selbständig und unabhängig, sondern in die bundesstaatliche Ordnung einbezogen ist, die seine Hoheitsmacht in verschiedener Richtung beschränkt.“

⁴⁷ German wording: "Der Hinweis, daß sich das Volk die Landesverfassung *in freier Selbstbestimmung* gibt, ist zutreffend und Folge des eingangs der Präambel erwähnten Erfolges der friedlichen Veränderungen des Herbstes 1989. Daß dieser Erfolg auf die Mitwirkung anderer Staaten ... und die Duldung der Aliierten, insb. der UdSSR, angewiesen war ..., ändert nichts daran, daß nach dieser Zeit die Verfassung in freier Selbstbestimmung gegeben wurde; **freilich unter dem Dach des Grundgesetzes**, das jedoch ebenfalls im Weg des Beitritts zur Bundesrepublik Deutschland in freier Selbstbestimmung erreicht wurde." (emphasis added).

" [FREE TRANSLATION] A 'right to self-determination' as invoked by the complainants does not exist under German federal state law."⁴⁸

Rather, a "right to self-determination" as provided for in some *Land* constitutions must be construed in conformity with the Basic Law.

VII. Conclusions

The state character of the *Länder* is essentially undisputed in German state doctrine and a necessary element of the German federal state theory. The *Länder* are not defined as sovereign states within the meaning of international law but as being invariably subject to the federal constitution.

This, however, does not mean that the concept of a sovereign state in international law is irrelevant for understanding the state character of the German *Länder*. In fact, that concept shines through in all the debates about the legal nature of the German *Länder*. However, any analogy between the German *Länder* and sovereign states in international law must be qualified in the light of the federal constitution, which provides the overall binding constitutional framework. No term used in international law to describe individual elements of sovereign states (such as "people", "territory", "authority", "constitution", "constitutional court", "self-determination", "democracy", "state goals", "fundamental rights") can be used in the German federal context without being adapted.

The Basic Law, in Article 28 para. 1, requires the *Länder* to adopt a democratic system which includes the principle of popular sovereignty. This principle requires the *Länder's* having a people of their own. Therefore, provisions in *Land* constitutions on sovereignty of the people are not in contradiction with the federal constitution but, on the contrary, compatible with, and indeed required by, it. Sovereignty of the people as applied to the *Land* peoples does not empower the *Land* peoples – or their representative bodies – to exceed the limits set by the federal constitution.


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⁴⁸ German wording: "Ein 'Selbstbestimmungsrecht', wie es die Beschwerdeführer geltend machen, gibt es jedenfalls nicht im deutschen Bundesstaatsrecht." This case concerned the duties of the Federal Government to be respected within the procedure for territorial consolidation as provided for in Article 29 BL.

**List of Publications by Matthias Niedobitek
relevant to the issue of the Brief**

Neuere Entwicklungen im Verfassungsrecht der deutschen Länder
Recent Developments in the Constitutional Law of the German Länder
(Speyerer Forschungsberichte 138), 3. ed., Speyer 1995, 53 p.

Das Recht der grenzüberschreitenden Verträge – Bund, Länder und Gemeinden als Träger grenzüberschreitender Zusammenarbeit
The Law of Transborder Treaties and Contracts – Federation, Länder and Municipalities as Actors in Transborder Cooperation
Jus Publicum Vol. 66, Tübingen 2001, 536 p. (habilitation).

Fundamental Rights in the Constitutions of the German Länder, in: Albrecht Weber (ed.), *Fundamental Rights in Europe and North America, Part A – Basic Work*, looseleaf edition, London / The Hague / Boston 2001, 8 p.

Rechtliche Probleme für die Außenbeziehungen von Regionen, dargestellt am deutschen Beispiel
Legal Problems of External Relations of Regions: the Case of Germany
in: Rudolf Hrbek (ed.), *External Relations of Regions in Europe and the World*, Baden-Baden 2003, p. 17–31.

Die Landesregierung in den Verfassungen der deutschen Länder
The Land Government in the Constitutions of the German Länder
in: Arthur Benz / Heinrich Siedentopf / Karl-Peter Sommermann (eds.), *Institutionenwandel in Regierung und Verwaltung – Festschrift für Klaus König*, Berlin 2004, p. 355–370.

"Europa" als Gegenstand der Föderalismusreform
"Europe" as an issue of the federalism reform
in: Europäisches Zentrum für Föderalismus-Forschung (ed.), *Jahrbuch des Föderalismus* 2007, Baden-Baden 2007, p. 191–204.

Zur "Europatauglichkeit" des deutschen Bundesstaates nach der Föderalismusreform
On the "Responsiveness to the needs of European integration" of the German federal state after the Federalism Reform,
in: Peter Jurczek / Matthias Niedobitek (eds.), *Europäische Forschungsperspektiven – Elemente einer Europawissenschaft*, Berlin 2008, p. 201–229..

Germany – Sub-national Constitutional Law, in: *International Encyclopaedia of Laws, Constitutional Law* (eds: André Alen / David Haljan), Suppl. 102 (2013), Alphen aan den Rijn 2013, 250 p.

Appendix 2**Curriculum Vitae****Prof. Dr. Matthias Niedobitek****Personal Details**

Office Chemnitz University of Technology, Thüringer Weg 9, Room 321,
09126 Chemnitz, Germany

Phone +49/371/531-34912

E-Mail matthias.niedobitek@phil.tu-chemnitz.de

URL <http://www.tu-chemnitz.de/phil/europastudien/euint/mitarbeiter/niedobitek.php>

Private Address Weststraße 99, 09116 Chemnitz, Germany

Phone: +49/371/27550418

Date, Place of Birth 10 April 1961, Berlin

Family Status married, two children

Education

1967–1971 Primary School in Lübeck, Germany

1971–1972 Grammer School in Lübeck, Germany

1972–1973 Primary School in Berlin, Germany

1973–1979 Grammar School in Berlin, Germany

1980–1985 Studies of Jurisprudence at Free University of Berlin

1985 First State Examination in Berlin

1985–1988 Lawyer Training Periods in Ellwangen, Germany

1988 Second State Examination in Stuttgart, Germany

Academic Career

1988–1992 Researcher at the Research Institute for Public Administration Speyer

1992 Doctorate at the University of Administrative Sciences Speyer

1993 Wolters Kluwer Award 1993 for the doctoral thesis "Kultur und Europäisches Gemeinschaftsrecht" (Culture and Community Law)

1992–1998 Postdoctoral post at the Research Institute for Public Administration Speyer

1999–2001 Administrative Manager of the Research Institute for Public Administration Speyer

2000 Habilitation in Public Law, European Law, International Law at the University of Administrative Sciences Speyer

2001/2002 Interim Professor of European Integration at Chemnitz University of Technology

since 2002

Appointed Professor of European Integration at Chemnitz University of Technology

Current Activities in University Self-Administration

Member of the academic advisory board of the International Office of Chemnitz University of Technology (since 2003)

Chairman of the study commission of the B.A.-study course "European Studies" of the School of Humanities and Social Sciences at Chemnitz University of Technology (since 2003)

Member of the group of spokesmen of the "Forum für Europäische Studien (FEST)" – Forum of European Studies – (since 2003)

Chairman of the board of examiners of the M.A. study course "European Integration – focusing Central and Eastern Europe" (since 2004)

Member of the advisory board of the Centre for foreign languages (since 2007)

Chairman of the study commission of the M.A. study course "European Integration – Focus on Central and Eastern Europe" of the School of Humanities and Social Sciences at Chemnitz University of Technology (since 2007)

Memberships

Arbeitskreis Europäische Integration

Deutsche Sektion des Internationalen Instituts für Verwaltungswissenschaften

Deutsche Vereinigung für Internationales Recht

Freiherr-vom-Stein-Gesellschaft

Vereinigung der Deutschen Staatsrechtslehrer

Gesellschaft für Rechtsvergleichung

Societas Iuris Publici Europaei (SIPE)

Deutsche Gesellschaft für Völkerrecht

Chemnitz, 13 May 2013

Handwritten signature: J. Niedobit