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## The German *Bundesrat* and Executive Federalism

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## Abstract

The German Basic Law constitutes federalism as a unique political system which is characterised by intertwined decision-making of the Federation (*Bund*) and the component units (*Länder*). The executives of the two federal tiers and the *Länder* executives within the *Bundesrat* play a major role in making joint decisions. They are forced to make decisions in the ‘joint-decision mode’ (*Politikverflechtung*) which is detrimental to accountability. Reform efforts were made to unbundle competences and to reduce the number of bills which require the *Bundesrat*’s consent. Due to the dominance of the executives and the distribution of powers between the federal tiers (legislation is dominated by the *Bund*, execution is dominated by the *Länder*), German federalism is rightly called ‘executive federalism’. German federalism can even be regarded as an embodiment of that concept since it covers all possible aspects of ‘executive federalism’. The *Bundesrat* has an important share in that classification.

## Key-words

executive federalism, second chamber, German parliament, distribution of legislative powers, asymmetric federalism



## 1. Introduction. The main characteristics of German federalism

The Basic Law establishes Germany as a federal state (*Bundestaat*, cf. Article 20 para. 1 BL). As a federal state, Germany consists of two federal tiers, 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.

Besides the two federal tiers there is no third federal tier representing the entirety of *Bund* and *Länder*, a so-called ‘entire state’ (*Gesamtstaat*). Rather, the *Bund* combines two qualities: (a) internally, in its relationship to the *Länder*, it is a ‘central state’; (b) externally, in its relationship to third countries, international organisations etc. it is the ‘entire state’, now including the *Länder* (cf. Niedobitek 2001: 52 et seq.)

Without doubt, the *Länder* are subordinate to the *Bund* insofar as the Basic Law provides for a hierarchical order between the *Bund* and the *Länder* (cf. BVerfGE<sup>1</sup> 13, 54/78 et seq.). To mention only a few examples: (a) Pursuant to Article 31 BL federal law shall take precedence over *Land* law; (b) Article 72 para 1 BL stipulates that on matters within the concurrent legislative power, the *Länder* shall have power to legislate only so long as and to the extent that the Federation has not exercised its legislative power by enacting a law; (c) international treaties of the *Länder* require the consent of the Federal Government pursuant to Article 32 para 3 BL; (d) territorial reform of the *Länder* can be enacted by a federal law pursuant Article 29 para 2 BL.

But apart from this, the *Bund* and the *Länder* are on an equal footing as the Federal Constitutional Court has constantly held (cf. Niedobitek 2013, no. 43, 73). Accordingly, the Court has confirmed that the *Länder* are not derived from the Federation but are rather recognised by it (BVerfGE 60, 175/207).

As a rule, the exercise of state powers and the discharge of state functions are matters for the *Länder* (Article 30 Basic Law). However, as a result of the constitutional distribution of competences between the *Bund* and the *Länder*, the *Bund* is dominant in the field of legislation while the *Länder’s* domain is execution of federal laws (alongside *Land* laws). This division of responsibilities is, however, not as clear as it may seem at first glance. Rather, ‘it is a system of cooperation, interconnections, and interrelationships’ (Gunlicks



2003: 61): On the one hand, the *Länder* take part in federal legislation via the *Bundesrat*; on the other hand, when carrying out federal laws the *Länder* ‘may be subject to many federal instructions and restrictions which they can usually influence via the *Bundesrat*’ (Gunlicks 2003: 61; cf. Articles 84, 85 BL).

The unique features of the German federal system have created a particular mode of decision-making which Fritz W. Scharpf and others have called *Politikverflechtung* (Joint-Decision Mode). The Joint-Decision Mode applies to bills that require the *Bundesrat*’s consent (Benz, Detemple and Heinz 2013: 155). This mode, which cannot be dealt with in detail here (cf. the contribution of Benz in this volume), is a particular form of coordination between the *Bund* and the *Länder* which compels the legislative actors to perform their shared competences jointly (Benz 2015: 196 et seq.). It is argued that performing public tasks in the Joint-Decision Mode results in inefficient decisions (although according to Sturm 2009, p. 147, this is not proven). Therefore, the unbundling of legislative competences between the *Bund* and the *Länder* and between the *Bundestag* and the *Bundesrat* has become a constant issue on the German federalism reform agenda (Benz, Detemple and Heinz 2013: 155 et seq.).

Questions of symmetry in German federalism continue to be raised. Generally speaking, it is clear that all federal systems comprise more or less elements of symmetry and asymmetry (Burgess 2008: 105). But from a *de-jure* standpoint the German federal system must be classified as a symmetric system since all German *Länder* have basically the *same legal status* under the Basic Law (Sturm 2008: 31 f.). It goes without saying that modifications such as differences of votes in the *Bundesrat* (cf. below, 3.) are implied. If one, however, considers other elements of the German federal system such as the role of the *Bundesrat* it clearly has asymmetrical tendencies (Sturm and Winkelmann 2014: 61).

This article concentrates on the German *Bundesrat* as a unique manifestation of German federalism. It aims at a description of the *Bundesrat*’s present constitutional design with a view to allowing a comparison with other bicameral systems. It first points to the legislative function of the *Bundesrat* and its political clout (2.). Next, it outlines the *Bundesrat*’s characteristic features (3.) which make it a qualified form of ‘territorial representation’. This, subsequently, enables us to qualify the *Bundesrat* as the second chamber of the German parliament and, thus, to classify German federalism as a bicameral system (4.). Furthermore, it is possible to localise the *Bundesrat* within the multifaceted concept of



‘executive federalism’ which among other concepts characterises German federalism particularly accurately (5.). The *Bundesrat*’s constitutional design as outlined in the previous sections is not unchallenged. Reform efforts are, however, improbable (6.). The main findings are summarised in the concluding section (7.).

## 2. The two legislative bodies of the German federation

The German constitution, the *Grundgesetz* (Basic Law = BL), provides for two ‘legislative bodies’ (cf. Articles 55, 59 para. 2, 122 para. 1 BL): the *Bundestag* and the *Bundesrat*. While the *Bundestag* is the main legislative body whose primary task is to adopt bills (Article 77 para. 1 BL), the *Bundesrat*’s task as a legislative body is either to give or to refuse its consent or – depending on the constitutional arrangement – to object to the bill in question if necessary (Article 77 paras 2–4 BL). Thus, bills are not jointly adopted by the *Bundestag* and the *Bundesrat* but by the *Bundestag* alone with, however, different forms of participation of the *Bundesrat* (cf. Article 78 BL).

Depending on the constitutionally stipulated form of participation of the *Bundesrat* in the law-making procedure – either a necessity for consent or the possibility to object to a bill – the political composition of the *Bundesrat* may become important. In the early years of the German constitution, the *Bundesrat* was considered ‘unpolitical’: a *bureaucratic* institution without strong political power. But this changed in the early 1970s; from that time on, the *Bundesrat* emerged as a ‘politicised’ institution, a (potential) opponent to the federal government (Oeter 1998: 322 et seq.).

However, compared to the *Bundestag*, the *Bundesrat* is still an institution that is dominated by administrative expertise rather than by political debate (Sturm 2009: 147). The reason for this is the composition of the *Bundesrat*, which consists of members of the *Land* governments, which are not necessarily – and are often not – composed in the same way as the federal government or the majority in the *Bundestag*. Rather, depending on the outcome of the *Land* elections, the *Bundesrat* may form a forum for the federal opposition (Oeter 1998: 322 et seq.). Irrespective of its composition, the *Bundesrat* is a federal institution (Risse 2005: 11) and as such not only dedicated to the *Länder*’s interests but also to the interests of the Federation.



Federal elections last took place on September 24, 2017. After lengthy negotiations among several parties, a new ‘grand’ coalition was formed on March 14, 2018, consisting of the CDU, the CSU and the SPD.<sup>ii</sup>

Elections within the *Länder* do not take place at the same time as the federal elections; this follows, *inter alia*, from the fact that the legislative period in the *Länder* lasts five years (except Bremen) while federal elections take place every four years. The coming *Land* elections are scheduled as follows: Bavaria: 14 October 2018; Hesse: 28 October 2018; Bremen: Spring 2019; Saxony: Autumn 2019; Thuringia: Autumn 2019; Brandenburg: Autumn 2019; Hamburg: Spring 2020.<sup>iii</sup> Each election can change the composition of the *Bundesrat* and, thus, its general political attitude towards the federal governments’ politics.

Today (April 30, 2018), the composition of the German *Land* governments and the number of votes in the *Bundesrat* (in brackets) are as follows:

<b>Baden-Württemberg</b> (6)	Grüne / CDU	<b>Lower Saxony</b> (6)	SPD / CDU
<b>Bavaria</b> (6)	CSU	<b>North Rhine-Westphalia</b> (6)	CDU / FDP
<b>Berlin</b> (4)	SPD / LINKE / Grüne	<b>Rhineland-Palatinate</b> (4)	SPD / FDP / Grüne
<b>Brandenburg</b> (4)	SPD / LINKE	<b>Saarland</b> (3)	CDU / SPD
<b>Bremen</b> (3)	SPD / Grüne	<b>Saxony</b> (4)	CDU / SPD
<b>Hamburg</b> (3)	SPD / Grüne	<b>Saxony-Anhalt</b> (4)	CDU / SPD / Grüne
<b>Hesse</b> (5)	CDU / Grüne	<b>Schleswig-Holstein</b> (4)	CDU / Grüne / FDP
<b>Mecklenburg Western-Pomerania</b> (3)	SPD / CDU	<b>Thuringia</b> (4)	LINKE / SPD / Grüne

Source: Own table on the basis of the *Bundesrat*’s website: <https://www.bundesrat.de/DE/bundesrat/verteilung/verteilung-node.html> (accessed on April 28, 2018).

The above table shows that at least six *Land* governments are likely to support the federal government’s legislative proposals in the *Bundesrat* given that their composition by and large conforms with the composition of the federal government (*Bundesrat*-votes in brackets): Bavaria (6), Mecklenburg Western-Pomerania (3), Lower Saxony (6), Saarland



(3), Saxony (4), maybe also Saxony-Anhalt (4). The number of votes in favour of the federal government would be 26, which is not a majority (= 35). However, the member parties of the new ‘grand’ coalition also participate individually in other *Land* governments. Thus, currently a clear ‘blocking potential’ cannot be deduced from the above table.

The ‘politicisation’ of the *Bundesrat* and the – prior and continuing – increase in the number of bills requiring the *Bundesrat*’s consent has raised concerns. Depending on its political composition the *Bundesrat* was ascribed the putative power to block the legislative activities of the *Bundestag*, or the Federation as such, and to cause legislative gridlock. Even though no empirical verification has been provided for this assumption (cf. Schöbener 2010, Article 50 BL mn. 129; Eith and Siewert 2010: 116; Sturm 2009: 145), the *Bundesrat*’s potential for blockade was seen as problematic. Therefore, reform efforts were made to reduce that potential. Those efforts will be dealt with below (6.).

### 3. The German *Bundesrat* as a federal constitutional body representing the German ‘regions’

#### 3.1. The *Bundesrat*’s functions

From the perspective of European Union law the German *Länder* are ‘regions’ (Blanke 2016, Artikel 300 AEUV mn. 92) albeit with legislative competences. The *Bundesrat* primarily serves to represent the interests of the *Länder* on the federal scene. The *Länder* are territorial (and political) sub-units of the Federation and their representation must thus be classified as ‘territorial’ (cf. Sturm 2009, p. 148). In that perspective, the distinction between ‘federal’ and ‘territorial’ representation (cf. Groß 2003: 36, Kotzur 2006: 272) is not relevant. The concepts of ‘federal’ or ‘territorial’ representation are not categorically different; rather, ‘federal’ representation must be regarded as a qualified form of ‘territorial’ representation.

More generally, the *Bundesrat* is also regarded as an element of vertical separation of powers between the *Bund* and the *Länder* (Robbers 2018, Artikel 50 GG mn. 11). Others stress the relationship between the *Bundesrat* and the *Bundestag* as federal organs and consider the *Bundesrat* as an element of horizontal separation of powers (Leunig 2009b: 15).



### 3.2. The *Bundesrat*'s tasks

The German 'regions' are represented in, and by, the *Bundesrat*. Article 50 BL says: 'The *Länder* shall participate through the *Bundesrat* in the legislation and administration of the Federation and in matters concerning the European Union.' This wording makes it clear that the German *Länder* do not participate in the Federation's legislation or administration directly but are, as a rule (exception e.g. Article 138 BL), mediated by the *Bundesrat*. This is confirmed by Article 23 para. 2 sentence 1 BL with regard to matters concerning the European Union.

As a 'legislative body' the *Bundesrat*'s task is to take part in the Federation's legislation. As already mentioned above (2.), in that regard the Basic Law (Article 77) provides for two kinds of bills: (a) bills that need the *Bundesrat*'s consent in order to become law (veto option); (b) all other bills against which the *Bundesrat* can raise objections (suspensive veto that can be outvoted by the *Bundestag*). The requirement of the *Bundesrat* to give its consent to a bill must explicitly be provided for in the Basic Law (*numerus clausus*). The original idea of the authors of the Basic Law was to construe the 'consent option' as the exception while the 'objection option' was to be the rule (Oeter 1998: 159). Surprisingly, however, as of the early years the number of bills that required the *Bundesrat*'s consent, exceeded the number of bills that could be objected to. One important reason for this situation was the then Article 84 BL which required the consent of the *Bundesrat* for federal bills which provided for the establishment of administrative authorities or which regulated administrative procedures (Oeter 1998: 159).

The description of the legislative task of the *Bundesrat* would be incomplete without mentioning its right to legislative initiative as provided for in Article 76 BL. Importantly, the right of the *Bundesrat* to legislative initiative is not substantially limited; in particular it is not restricted to *Länder* interests (Reuter 2007, Artikel 50 GG mn. 127). The number of legislative initiatives of the *Bundesrat*, however, is comparatively small (Reuter 2007, Artikel 50 GG mn. 130).

Besides legislation the *Bundesrat* fulfills many other tasks (for an overview cf. Schmidt 2012, p. 674 et seq.) among which its participation in the administration of the Federation is a particularly important role (Robbers 2018, Artikel 50 GG mn. 29). Furthermore, the *Bundesrat* is involved in matters concerning the European Union (cf. Article 23 BL).





### 3.3. Composition of the *Bundesrat*

The *Bundesrat* has no legislative period: instead, like the Council of the EU or the European Council, it is an ‘eternal’ institution (Kotzur 2006: 273 et seq.). Pursuant to Article 51 para. 1 BL the *Bundesrat* ‘shall consist of members of the *Land* governments, which appoint and recall them’. The composition of the *Bundesrat* distinguishes it from ‘real’ second chambers. This is an (*almost*; cf. Russell 2001: 108 et seq.) unique feature of the German federal system. In fact, the ‘real members’ of the *Bundesrat* are not its determined members pursuant to Article 51 BL but the *Länder* themselves (cf. Schöbener 2010, Article 51 BL, mn. 14). Thus, the *Länder*, or rather the *Land* governments, have the right – and duty – to instruct their members of the *Bundesrat*. This does not follow from the wording of the Basic Law but from an interpretation of its provisions. Furthermore, some *Land* Constitutions confirm that interpretation (cf. Leunig 2009a: 98).

An *asymmetric* element of German federalism is the unequal (over- or under-) representation of the *Länder* in the *Bundesrat*. Pursuant to Article 51 para. 2 BL each *Land* shall have at least three votes; *Länder* with more than two million inhabitants shall have four, *Länder* with more than six million inhabitants five, and *Länder* with more than seven million inhabitants six votes. This provision amounts to the number of votes of each *Land* as demonstrated in the table above (2.). In European Union law the principle described here is called ‘degressive proportionality’ (cf. Article 14 para. 2 TEU). It provides for a compromise between federative and democratic representation (Eith and Siewert 2010: 105). Thus, an exception to the general principle of *equality* of the *Länder* applies.

The governmental (or executive) composition of the *Bundesrat* continues through to its committees. Article 52 para. 4 BL assigns a large margin of discretion to the *Länder* in that it entitles the *Länder* to send not only other members but also ‘representatives’ (*Beauftragte*) of the *Land* governments into the committees of the *Bundesrat*. The term ‘representatives’ is not defined and implies no particular personal requirements (Reuter 2007, Artikel 52 GG mn. 56). In practice, work in the committees of the *Bundesrat* is dominated by the *Land* bureaucracy and its (executive) expertise (cf. Kluth 2011: 214; Leunig 2009a: 97 et seq.). The primary role of the *Land* bureaucracy in the decision-making process of the *Bundesrat* is evidenced by the huge number of meetings of the committees and subcommittees of the *Bundesrat* compared to its plenary sessions (Sturm 2009: 147). Unlike in the plenum of the *Bundesrat*, in its committees each *Land* has one vote (cf. § 42 para. 2 of the *Bundesrat*’s Rules



of Procedure). This may lead to committee decisions which do not anticipate the plenum's decision (Leunig 2009a: 99).

### 3.4. Voting in the *Bundesrat*

Pursuant to Article 52 para. 3 sentence 1 BL decisions of the *Bundesrat* shall require at least a majority of its votes (35 of 69). The members of each *Land* must cast the *Land* votes as a unit (Article 51 para. 3 sentence 2 BL). It suffices that one *Bundesrat* member of a *Land* is present in the meeting. This member is entitled, and obliged, to cast all votes of the *Land*. This provision proves to be problematic in coalition governments which may have split opinions on an issue which is on the *Bundesrat's* agenda. In fact, today all *Land* governments are coalition governments except Bavaria (cf. the table above, 2.). Usually, coalition agreements provide for the possibility of diverging opinions within the government in that the *Bundesrat* members have to abstain from voting if no prior agreement has been reached (Schmidt 2012: 673; cf., e.g., the coalition agreement between the LINKE, SPD and Bündnis 90/Die Grünen of December 4, 2014, p. 95). The requirement to cast all votes as a unit was infringed in 2002 when the *Land* Brandenburg, when voting on the Immigration Act (*Zuwanderungsgesetz*) did not cast its votes uniformly but openly differently. After reprimanding the *Land*, the then President of the *Bundesrat* Klaus Wowereit asked the Minister President of Brandenburg, Manfred Stolpe, to clarify the *Land's* position, which he did ('yes'). The Federal Constitutional Court subsequently declared the Immigration Act void (BVerfGE 106, 310). It stated that the President of the *Bundesrat* was not permitted to count the casting of the votes for the *Land* Brandenburg by the Minister President as an agreement of the *Land* to the Immigration Act. The Minister President, the Court said, cannot be regarded as the holder of the block votes if a *Bundesrat* member of the *Land* in question contradicts.

### 3.5. Role and constitutional status of the Conciliation Committee (*Vermittlungsausschuss*)

It is clear that the Basic Law does not provide for a classic two-chamber parliament; however, the Conciliation Committee can be regarded as a sort of 'nucleus' of a 'German Diet' (cf. Kotzur 2006: 267 and 281: '... the '*Vermittlungsausschuss*' can become the true legislator'). The Conciliation Committee (cf. Schmedes 2017: 279 et seq.) is neither an



institution of the *Bundestag*, nor of the *Bundesrat*, but a joint institution of both legislative bodies, a ‘sui generis’ institution (Kokott 2014, Artikel 77 GG mn. 91; Schöbener 2010, Artikel 50 GG mn. 21). According to its Rules of Procedure (§ 1) the Committee is composed in parity: It consists of 16 members of the *Bundestag* and 16 members of the *Bundesrat*. The Conciliation Committee’s task is to jointly consider a bill (cf. Article 77 para. 2 sentence 1 BL). This is particularly important when the *Bundesrat*’s consent is required. In that case the *Bundesrat*, the *Bundestag* and the Federal Government are entitled to convene the Committee. When the *Bundesrat* can only raise objections to a bill, solely the *Bundesrat* can convene the Committee. To object to a bill requires the prior convention the Committee (Eith and Siewert 2010: 108).

#### 4. The *Bundesrat* as a ‘second chamber’ of the German parliament

As already mentioned (cf. above, 3.5.), it is obvious that the Basic Law doesn’t provide for a classic two-chamber parliament. No mention is made in the Basic Law of a ‘parliament’ that incorporates the *Bundestag* and the *Bundesrat* as two chambers or houses. Rather, the Basic Law establishes two legislative bodies (cf. Articles 55 para. 1, 59 para. 2, 122 para 1 BL) of which the *Bundestag* is the main legislator while the *Bundesrat*’s involvement in legislation is reduced (cf. above, 3.2.). Formally, thus, the *Bundesrat* is not a classic second chamber.

This was confirmed by the Federal Constitutional Court which argued in its decision of June 25, 1974 (BVerfGE 37, 363/380) that ‘pursuant to the Basic Law, the *Bundesrat* is not a second chamber of a uniform legislative organ that participates in the legislative process on an equal footing with the first chamber’ (translation from German by the author). What the Court, however, did not do, was to rule out categorically the possibility of classifying the *Bundesrat* as a second chamber. With its statement the Federal Constitutional Court allowed for the fact that the ‘*World of Second Chambers*’ (cf. Luther, Passaglia and Tarchi 2006) is colourful and highly differentiated (Leunig 2009b, p. 16). Only a broad definition such as that given by *Thomas Groß* (Groß 2003: 31) is adequate to grasp the manifold manifestations of second chambers in the world. Thus, irrespective of its atypical composition, its reduced participation in federal law-making and other features, the *Bundesrat* must functionally be regarded as a second chamber (Leunig 2009: 16).



The constitutional role of the *Bundesrat*, expressed in its functions, tasks and rights, is not dependent on it being classified as a second chamber. In that regard, the second-chamber question is purely terminological in nature (Schöbener 2010, Artikel 50 GG mn. 19) and without legal significance. However, from the perspective of EU law the classification of the *Bundesrat* as a second chamber is legally important in order to justify the inclusion of the *Bundesrat* in the task assigned to the national parliaments of ‘seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality’ (Article 12 lit. b) TEU). For this purpose, the *Bundesrat* must be, and is in fact, viewed as a ‘chamber of a national Parliament’ in the meaning of Protocol No. 2 on the application of the principle of subsidiarity and proportionality annexed to the Lisbon Treaty.

To conclude, German federalism is constituted as a bicameral system with two legislative bodies which are functionally the two chambers of the German parliament.

## 5. The German *Bundesrat* and ‘executive federalism’

The German constitutional system is often referred to as ‘executive federalism’; it even seems that German federalism can be regarded as an embodiment of that concept, and the *Bundesrat* plays an important role in that characterisation. Before dealing with the concept of ‘executive federalism’ it must be distinguished from other types of federalism. Dann (2004: 40 et seq.) has identified three structural types of federalism: (1) separative federalism (*Trennföderalismus*; example: USA); direct democratic interlaced federalism (*direktdemokratischer Verflechtungsföderalismus*; example: Switzerland); executive federalism (*Exekutivföderalismus*; example: Germany).

It goes without saying that the three types mentioned above represent very broad concepts. As Federico Fabbrini has stated, the notion ‘executive federalism’ is multifaceted (Fabbrini 2015: 289). Not surprisingly, the definitions proposed by scholars from several disciplines differ considerably in detail but have a common core in that they stress the modes of execution of laws or the dominant role of the executive branch. All in all, it seems that scholars use their own definition tailored for their particular purposes. This is reflected in the following definitions.



*Robert Schütze* calls ‘executive federalism’ a decentralised model which ‘entrusts the execution of federal law principally to the Member States’ (Schütze 2010: 1389). This model, as Schütze correctly says, characterises German federalism. *Federico Fabbrini* finds that Schütze’s definition is specific (Fabbrini 2015: 289 et seq.). Referring to *Ronald Watts*, he applies a ‘more general’ definition that points to the modes of intergovernmental negotiations which are dominated by the executives of the governments of the federal tiers. A similar definition is applied by *Philipp Dann* (2004: 41). *Hans-Jürgen Papier* stresses the process of strengthening of the *Land* governments at the cost of the *Land* parliaments: The former receive participatory rights at the federal level (within the *Bundesrat*) in exchange for a loss of legislative competences of the *Länder* (Papier 2012: 370). He also calls this compensatory mechanism ‘Beteiligungsföderalismus’ (*participative federalism*). *Jacques Ziller* submits an approach, that, he says, ‘is more appropriate for a legal analysis than the usual political science perspective’ (Ziller 2010: 261). He calls ‘executive federalism’ the ‘organization of the executive function amongst levels of government’. *Ines Härtel*, to mention a last example, conceives ‘executive federalism’ as bargaining of the executive in *Bund-Länder* or *Länder* commissions which, even though regularly not legally binding, are *de facto* binding for the *Land* parliaments (Härtel 2012: 439).

The *Bundesrat*’s significance within the definitions listed above differs. Some definitions primarily refer to the distribution of powers between the Federation (legislation) and the *Länder* (execution) and, thus, affect the *Bundesrat* only indirectly. Others stress the need for intergovernmental coordination and bargaining between the federal tiers. The narrowest definition refers to the existence of a Council that consists of members of the component units and takes part in federal legislation (Dann 2004: 41) which is, of course, modelled on the German system. However, it is not necessary to apply the narrowest possible definition of ‘executive federalism’ in order to include the *Bundesrat*. Rather, most definitions mentioned above describe features which refer, directly or indirectly, to the German *Bundesrat*.



## 6. Implications of German federalism reform for the German *Bundesrat*

Over the course of time, German federalism has repeatedly been subject to reform efforts (cf. Gunlicks 2012: 115 et seq.). Inevitably, those reforms did not leave the *Bundesrat* unaffected, sometimes only by reflection, sometimes by intention. Major criticism was raised concerning the *Bundesrat's* power to veto the *Bundestag's* legislative decisions. Before the federalism reform of 2006 more than 60 % of federal bills were estimated to have required the *Bundesrat's* consent (Sturm 2009: 145). In recent times the number of legislative cases that have required the consent of the *Bundesrat* have reduced significantly (cf. Benz, Detemple and Hein 2013: 155; Sturm 2012: 737). From then on, for example, the Federation could regulate the establishment of *Land* authorities and their administrative procedure without the consent of the *Bundesrat* (cf. new Article 84 BL). In return, the *Länder* were assigned the right to deviate from federal legislation enacted in that field (cf. Niedobitek 2013: no. 9 et seq.). The third and last part of the recent federalism reform, which essentially concerned the introduction of a new model of fiscal equalisation, (Amendment of the Basic Law of July 13, 2017, BGBl. 2017 I 2347) reversed the trend, increasing requirements for the *Bundesrat's* consent and the joint-decision mode (Gamper 2017: 121 and 123).

There is no lack of reform options and proposals for the German *Bundesrat* as such, however improbable they may be. A few examples may suffice. *First*, it has been proposed to replace the *Bundesrat* by a 'Senate' whose members are elected by the *Land* parliaments or directly by the *Land* people (Papier 2012: 381 et seq.). This proposal refers to the discussions that took place when the Basic Law was founded (cf. Eith and Siewert 2010: 101). *Second*, a change of the voting requirements has been proposed, from absolute majority voting to a relative majority (Eith and Siewert 2010: 118). *Third*, a proposal to allow the *Länder* to no longer cast their votes *en bloc* but in accordance with their political affiliation has been made (cf. Eith and Siewert 2010: 118 et seq.). This could avoid abstentions, as provided for in coalition agreements in the case of split opinions with the government. *Fourth*, territorial reform of the *Länder* is being discussed (cf. Papier 2012: 379 et seq.). The issue is important for the composition of the *Bundesrat* since it could justify an equal distribution of the votes of the *Bundesrat*. However, in the light of previous federalism



reforms, it is doubtful whether fundamental changes of the constitutional design of the *Bundesrat* will happen in the near future.

## 7. Summary

Germany is a federal state with two state tiers: the *Bund* (federation) and the *Länder* (component units). As a rule, the exercise of state powers and the discharge of state functions is a matter for the *Länder* (Article 30 Basic Law). A closer look at the German Basic Law reveals, however, that the *Bund* dominates legislation while the *Länder's* domain is execution. This is a first justification to call German federalism 'executive federalism'. Legislation of the *Bund* is not protected from *Länder* influence. This influence is, however, only indirect. The *Länder* are represented (mediated) in the *Bundesrat* which is, legally speaking, a federal organ, not a *Länder* organ. The *Bundesrat* consists of appointed members of the *Land* governments who are (to be) instructed by their respective *Land* government. This is a second, and the most convincing, justification to speak of 'executive federalism' in the German context. Thus, the existence of the *Bundesrat* and its constitutional design justify German federalism's appellation of 'executive federalism'.

The *Bundesrat* takes part in the legislation and administration of the *Bund*. As regards legislation, the powers of the *Bundesrat* are strong when its consent is required; against other laws the *Bundesrat* can raise objections (which can be outvoted by the *Bundestag*). The number of laws requiring the consent of the *Bundesrat* was reduced by Federalism Reform I (2006) in order to unbundle the competence spheres of the *Bund* and the *Länder*.

The legislative function of the *Bundesrat* makes it a 'legislative body' (Article 55; cf. also 59 para. 2 Basic Law). However, the question of whether to call the *Bundesrat* a 'second chamber' of a German parliament is disputed; formally, this is not the case but functionally the *Bundesrat* must be regarded as a 'second chamber'. However, to call the *Bundesrat* a 'second chamber' or not is not significant for the legal scope of its constitutional role. At the EU level, though, it is important for the *Bundesrat* to be regarded as a second chamber.

The constitutional design of the *Bundesrat* has necessarily led to intertwined (joint) decision-making (according to Fritz W. Scharpf) which has frequently drawn criticism, and reform efforts are aimed at unbundling legislative competences of the two federal tiers as well as at reforming the *Bundesrat* itself. The latter proposals include the introduction of a



Senate model of territorial representation, new voting mechanisms in the *Bundesrat* or the abolishment of the requirement to cast the votes of each *Land* as a unit. In the light of the long tradition of the *Bundesrat* model and its close relationship with German federalism as such, however, it is doubtful whether fundamental changes of the constitutional design of the *Bundesrat* will occur.

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<sup>1</sup> BVerfGE = Decisions of the Federal Constitutional Court.

<sup>ii</sup> Cf. the coalition agreement on the federal government's website: <https://www.bundesregierung.de/Content/DE/Anlagen/2018/03/2018-03-14-koalitionsvertrag.html>.

<sup>iii</sup> Cf. <https://www.bundeswahlleiter.de/service/wahltermine.html>.

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