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Local Government in Germany

Responses to Urban-Rural Challenges

edited by

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The H2020-MSCA-RISE-2018 project aims to provide solutions for local governments that address the fundamental challenges resulting from urbanisation. To address these complex issues, 18 partners from 17 countries and six continents share their expertise and knowledge in the realms of public law, political science, and public administration. LoGov identifies, evaluates, compares, and shares innovative practices that cope with the impact of changing urban-rural relations in major local government areas (WP 1-5).

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Christoph Krönke, *Ludwig Maximilian University of Munich*

Types of Local Governments

In Germany, government at the local level is administered through municipalities (*Gemeinden*) as well as second-tier local governments such as counties (*Kreise*). Larger municipalities with more than 100,000 citizens are often assigned the status of independent city or county-free city (*kreisfreie Stadt*); in addition to their municipality responsibilities, these cities also carry out (second-tier) county responsibilities. In some of the German *Länder*, there are even third-tier local governments, for example districts (*Bezirke*) in Bavaria.[1] There are no areas that fall directly under federal or *Länder* rule, as the system of local government extends to the entire territory of the country. However, as jurisdiction over the organizational powers of local authorities lies with each of the 16 *Länder*, 'local government' may come in different shapes. This is particularly true for its internal organization, but may equally be said of its precise powers and responsibilities. Nevertheless, there are several common features of local government.

The German concept of local self-government, as enshrined in Article 28(2) of the Basic Law, implies that local government entities have a general competence (*Allzuständigkeit*) to carry out all responsibilities that are relevant to the local community. Since this general competence is comprehensive, there is, as a result, no such thing as single purpose local governments in Germany. This means that local governments in Germany may, for instance, run public libraries, museums, theaters, opera houses or concert halls, that they can provide airport facilities, energy/water supply, waste/sewage disposal, run hospitals, kindergarten facilities or homes for the elderly. Of course, these vast competences do not go unchecked; local authorities may engage in such activities only within their financial capacity and, in all their activities, local authorities have to abide by the laws and limitations of federal and *Länder* legislation. Nevertheless, contrary to the Anglo-Saxon concept of 'ultra-vires'[2], local authorities do not act illegally if they take measures in areas that do not fall within responsibilities explicitly transferred to them by federal or state legislation. In view of their general competence, they just need not to be empowered specifically to take action at the local level.

[1] For these and the following considerations see Martin Burgi, 'Federal Republic of Germany' in Nico Steytler (ed), *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen's University Press 2009) 140-142.
[2] See Veith Mehde, 'Steering, Supporting, Enabling: The Role of Law in Local Government Reforms' (2006) 28 Law & Policy 164, 165.

Legal Status of Local Governments

The right of local governments to self-government (i.e. to carry out all responsibilities falling within their 'general competence') is constitutionally enshrined at the federal level in Article 28(2) of the Basic Law (BL).[3] This provision reads as follows: 'Within the limits prescribed by law, municipalities shall be guaranteed the right to regulate all local affairs in their own responsibility. Within the limits of their responsibilities as defined by law, associations of municipalities shall equally have the right of self-government according to the laws. The guarantee of self-government shall include the basis of financial autonomy; it shall comprise the right of municipalities to a source of tax revenues that corresponds with the economic ability of the tax debtors (e.g. business tax – *Gewerbesteuer*), and the right to fix the rates at which these sources shall be taxed.' Provisions similar to Article 28(2) BL are also contained in the constitutions of the 16 *Länder* which thus reinforce the constitutional recognition of local authorities and their right to self-government. The constitutional recognition of local government is generally the same for all municipalities, regardless of size or socio-economic importance.

In contrast, the constitutional standing of counties and districts is weaker. Compared to the comprehensive self-government of their constituent municipalities, these second- and third-tier local government entities may not carry out all responsibilities of local importance but are granted the right to self-government only 'within the limits of their responsibilities as defined by law' (Article 28(2) BL).

It is important to stress that Article 28(2) BL as well as the corresponding constitutional provisions at *Länder* level do not grant local autonomy as an absolute right. Local autonomy is only guaranteed in principle, while its precise scope is subject to legislation. Thus, it is the law-makers at federal and *Länder* level that define the precise extent and limitations of local self-government. In practice, the sheer volume of (sometimes very detailed) federal and *Länder* statutes has considerably limited local autonomy. However, as local autonomy is constitutionally guaranteed in principle, local governments are protected by virtue of Article 28(2) BL against excessive and immoderate restrictions of local autonomy and preserves a 'core sphere' (*Kernbereich*) of responsibilities that must remain with municipalities (i.e. finances, local planning, personnel matters, organizational autonomy and the freedom to engage in joint administration with neighboring communities). In addition to that, Article 28(2) BL protects local authorities, to some extent, against the revocation of responsibilities (*Aufgabenentzug*) e.g. by reallocating them at a higher (more centralized) administrative level (*Hochzonung*). As a result, only *very substantial* gains in cost-efficiency, for instance, may justify that responsibilities are taken away from local governments.

[3] See Burgi, *Federal Republic of Germany*, above, 143-146.

(A)Symmetry of the Local Government System

As pointed out, the legal status is primarily the same for all municipalities regardless of their size and socio-economic importance, although larger municipalities (and especially independent cities) have, with no doubt, more political bearing. As a general principle, the German system follows a symmetrical approach towards the legal status of local governments. However, this symmetry of responsibilities de jure can be modified in various ways which may result, de facto, in an asymmetrical allocation of responsibilities.

Local authorities may, for example, agree among themselves to join forces and create joint administrative units to carry out specific responsibilities in forms of what is called inter-municipal cooperation (*interkommunale Zusammenarbeit*). For instance, they may, with regard to capacity and cost-effectiveness, share their resources and establish a joint inter-municipal corporation (*Zweckverband*) which is assigned to take care of sewage and/or waste disposal. Such cooperation is particularly common between smaller municipalities but are equally practiced within larger conurbations and between counties and independent cities.

Because of their size, independent cities are capable of carrying out both municipal and county responsibilities through their city administration as a single unit. In rural areas, by contrast, county responsibilities are carried out by counties along with their constituent (smaller) municipalities. The precise division of duties between counties and their municipalities is laid down in *Länder* statutes and may therefore vary. As a general rule, the allocation of responsibilities depends on the capacities of the individual local unit. This means that for reasons of administrative efficiency, counties will regularly assume the execution of duties that cannot be effectively handled by their constituent municipalities. For instance, hospitals will usually be run at county (or even district) level while minor administrative duties such as citizen registration may remain with the constituent municipalities.

Political and Social Context in Germany

Despite the recent turbulences in the course of the financial and migration crises, the political system established under the Basic Law has proven to be relatively stable. In the overall perspective, two parties, the Christian Democrats (CDU/CSU) and the Social Democrats (SPD) still each win between 20 to 40 per cent of total votes while four smaller parties, the Liberal Free Democrats (FDP), the Greens (*Bündnis 90/Die Grünen*), the Left Party (*Die Linke*) and the Alternative for Germany (AfD), attract between 5 and 20 per cent of all voters. In the East German 'new' *Länder*, *Die Linke* and AfD are usually stronger in elections than in West Germany. On the *Länder* level and on the local level, the landscape of political parties is more diverse. In addition to the aforementioned parties, there are several parties which are particularly active in certain regions and municipalities, taking account of political issues with specific relevance for the respective region or municipality. In Bavaria, for example, the

Independent Voters (Freie Wähler) are usually quite strong in the elections – they won 11,6 per cent of the votes during the 2018 elections for the Bavarian *Landtag* and are hence currently part of the Bavarian government, and they are represented in numerous municipal councils.

The spatial distribution of the population still reflects, to a certain extent, the decentralized structure of the Federal Republic of Germany. 27 per cent of the population (i.e. around 22 million people) live in smaller municipalities with 5,000 – 20,000 inhabitants. Another 27 per cent live in medium sized cities (*Mittelstädte*) with 20,000 – 100,000 inhabitants. 31 per cent of the German population live in major cities (*Großstädte*) with more than 100,000 inhabitants. The largest cities with more than 1,000,000 inhabitants each are Berlin (3,700,000), Hamburg (1,890,000), Munich (1,470,000) and Cologne (1,080,000). Of course, many smaller municipalities and medium sized cities are part of a metropolitan area (*Ballungsraum*). Together with Böblingen (50,000), Waiblingen (55,000), Sindelfingen (64,000), Tübingen (89,000), Ludwigsburg (93,000) and Esslingen (93,000), for instance, Reutlingen (115,000), Heilbronn (123,000) and Stuttgart (634,000) as well as all surrounding municipalities form the Stuttgart metropolitan area (total population: 5,300,000). In this perspective, around 77 per cent of the German population nowadays live in metropolitan regions.

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Local Responsibilities and Public Services

2.1. Local Responsibilities and Public Services in Germany: An Introduction

Christoph Krönke, *Ludwig Maximilian University of Munich*

Urban local governments and rural local governments (hereinafter: ULGs and RLGs) traditionally have a wide range of responsibilities and, in particular, offer numerous public services. In the face of the growing urban-rural divide, these responsibilities are undergoing profound change. This change is influenced by other factors such as demographic changes and migration movements, and it can affect both the scopes of the responsibilities and the modalities of carrying them out.

While certain material responsibilities might be pushed into the background or released in their entirety (by way of a 'material privatization'), new challenges can become the focus of local government. At first glance, this applies above all to rural areas, many of which are typically affected by a significant population decline, with all its negative economic and social consequences as well as certain positive impacts, including more favorable housing conditions and a better natural environment. However, it is also the large cities and metropolitan regions that are subject to substantial segregation processes and difficulties, for example, in maintaining an efficient public transportation service, in providing sufficient housing opportunities and in dealing with the tensions following from a growing cultural and ethnic diversity. As a result, the scopes of the responsibilities carried out by ULGs and RLGs are de facto increasingly divergent and differentiated, as opposed to a de jure symmetrical approach towards responsibilities.

As regards the modalities of carrying out the responsibilities and offering the services, the changes mainly (but not exclusively) affect organizational and structural aspects. For reasons of efficiency and effectiveness, rapid changes and specific challenges may, for example, make it necessary to mobilize significant private resources in order to fulfil particularly pressing tasks through the award of public contracts or concessions as well as public private partnership undertakings. Also, local government entities might decide to provide certain public services through commercial (instead of sovereign) activities. In addition to these forms of commercialization, privatization and public private partnership, smaller local governments in particular may be forced to join forces and to cooperate with each other for the purpose of carrying out their respective responsibilities with pooled resources. Similar to their diverging substantial scopes, the different organizations and structures of responsibilities of ULGs and RLGs show more and more asymmetries.

These upheavals of local governance often necessitate policy changes – be it for the financial support of certain types of projects, be it for the (re-)definition of responsibilities, be it be it for the (re-)structuring of local government. Such structural reforms may include the reallocation of responsibilities (e.g. a transfer upon umbrella entities), the creation of new

cooperative structures (e.g. inter-municipal corporations) or – as a last resort – amalgamations of smaller local government entities (e.g. by way of a comprehensive territorial reform).[4] In many jurisdictions, these and other policy changes are triggered and coordinated (or blocked and restricted) by powerful single local government entities or local government associations.

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[4] See for these different structures of local government Francesco Palermo and Karl Kössler, *Comparative Federalism – Constitutional Arrangements and Case Law* (Hart Publishing 2019) 305-314.

2.2. Municipal Housing Companies

Christoph Krönke, *Ludwig Maximilian University of Munich*

Relevance of the Practice

One of the crucial challenges of our time for local governments is the ensuring of adequate housing opportunities. In principle, both urban local governments (ULGs) and rural local governments (RLGs) bear core responsibilities in this field. As a result of the urban-rural divide, however, the socio-economic context and (subsequently) the political objectives of providing housing opportunities vary considerably in urban and rural areas respectively. This results in an increasing divergence of ULG and RLG responsibilities which can be perfectly illustrated by the example of the activities of municipal housing companies. The activities of these companies can serve as one of the top practices for the comparison of ULGs and RLGs with respect to all report sections.

Description of the Practice

Housing construction by municipal enterprises is one of the many (and most important) instruments of local governments to ensure adequate housing opportunities for their populations. In principle, the responsibility of local governments under Article 28(2) of the Basic Law (BL) to provide adequate housing, including the establishment and operation of municipal housing companies, is comprehensive and relates, de jure, to both ULGs and RLGs in a symmetrical manner.

Despite this uniform (symmetrical) legal starting point, however, the socio-economic contexts of ensuring adequate housing opportunities by ULGs and RLGs are quite different. In rural areas, housing activities must take account of the situation of the respective municipality against the backdrop of the urban-rural cleavage, and they need to address, in particular, the increased social and economic attractiveness of larger metropolitan regions and – as a result thereof – the possible population decline. For RLGs, future-oriented sustainable housing construction does therefore not mean building up all accessible spaces. For them, quality in individual buildings and in local planning (along with other quality services such as culture and infrastructure) seems to be of utmost importance in order to create an attractive living environment. Hence, each municipality must determine its specific needs, for example for young families, employees of local companies (and companies in cities nearby) or those in need of social assistance.

In contrast, ULGs typically face a significant quantitative shortage of affordable housing. According to recent studies, there is a total lack of almost 2 million apartments and houses in German urban municipalities. While the quality of urban housing, including the consideration of demographic aspects (such as age, gender and ethnic origin of the population), must not be neglected either, these figures illustrate that in mere quantitative terms the public providing of affordable housing is a much more urgent task in urban areas than in rural areas.

From this perspective, the activities of municipal housing companies seem very suitable for a comparison of the effects of the urban-rural divide on local responsibilities and public services (report section 2 on local responsibilities). Almost all of the relevant research parameters are addressed: With regard to organization, housing activities are not only carried out at the lowest level of local government, i.e. the municipal level, but also at the level of the German *Länder* and within forms of inter-municipal cooperation. Furthermore, they are an example of carrying out local responsibilities and providing public services by public enterprises, as an alternative to other instruments of local government (such as the conclusion of contracts with private actors). Moreover, local governments must pay particular attention to the demographic structures of their populations when providing housing services. And finally, the issue of housing is high on the agenda of municipal lobby organization with substantial influence on policy makers.

The activities of municipal housing companies are also highly relevant for the other WPs. They are among the most capital-intensive responsibilities and services provided by local governments, and they quickly raise questions about financing (report section 3 on local finances). Moreover, especially smaller local governments can quickly reach their financial and performative limits in carrying out housing responsibilities; this can require changes in the structure of local government, ranging from simple inter-municipal cooperation to the transfer of tasks to larger governments and amalgamations of local governments (report section 4 on local government structure). From this perspective, excessive housing activities of local governments and their municipal housing companies might quickly become a question of mandatory state supervision (report section 5 on intergovernmental relations). And finally, the issue of public housing is also highly relevant for forms of direct democracy, as illustrated, for example, by the referendum in Berlin on the naturalization of large private housing companies (report section 6 on people's participation).

Assessment of the Practice

The objective of municipal housing companies is to contribute to adequate local housing opportunities. On a preliminary basis, municipal housing companies in both ULGs and RLGs have considerable difficulties in achieving this goal. Quite obviously and despite ULGs' and RLGs' qualitative and quantitative housing efforts, urban areas continue to detract people from rural areas while housing shortage is worsening dramatically in certain areas. While the City of

Munich, for example, does not even get close to meeting its target of building 8,000 new living units per year (which could accommodate about 20,000 inhabitants), it still attracts around 30,000 persons per year. In view of these difficulties in carrying out their responsibilities through single undertakings, ULGs and RLGs should consider creating joint ULG-RLG housing companies. It appears, however, that ULGs and RLGs are rather reluctant when it comes to joining forces in this field. In general, relevant factors for successful housing activities include – above all – political willingness as well as sufficient financial resources and real estate available to the respective local governments.

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2.3. Public Health Care

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Relevance of the Practice

The principle of the welfare state (Article 20(1) of the Basic Law [BL]) obliges the federal government, the *Länder* and the local governments to ensure a functional and efficient health infrastructure within the scope of their respective responsibilities. The urban local government's (ULG's) and as well rural local government's (RLG's) task is not to guarantee health care (in terms of planning and funding), but rather to provide services, especially the actual medical treatment.[5] Regarding this medical treatment, it is important to differentiate between inpatient and outpatient treatment.[6] The satisfactory fulfilment of this commitment is faced with a number of challenges: The demographic development not only changes the clinical pictures of patients, but at the same time an above-average number of older people live in rural areas which have a higher and more differentiated need for care than younger people who tend to move to urban areas. In addition, the average age of general practitioners in particular is very high.[7] This leads to the danger of considerable gaps in rural care and overprovision in the urban region.[8] The problem is not an undersupply in itself but an unequal distribution. Health insurance in Germany is a compulsory insurance and is conceived as a dual insurance system. Instead of statutory health insurance, citizens have the option – and for various occupational groups even the obligation – of choosing private health insurance. The dual health insurance system also favours the development because the different remuneration levels provide incentives to settle in affluent urban areas where many privately insured people live.[9] The Federal Statistical Office has calculated that almost 90 per cent of the population living in urban regions in Germany reach the nearest hospital with a basic supply

[5] In Bavaria the municipalities have according to Art 11 of the Bavarian Constitution (following up Art 28 BL) the right to organize and administer their own affairs. In addition, Art 83 of the Bavarian Constitution lists numerous individual tasks of the municipalities in a non-exhaustive list which includes amongst others 'local health care'.

[6] Unlike in the past, it is no longer always possible to draw a clear dividing line between outpatient and inpatient treatment. On the contrary, due to some relaxation it is now also possible to provide outpatient care within the framework of a hospital. The extent to which this can be softened in the future in order to guarantee nationwide care has to be observed, but cannot be further developed at this point.

[7] In Bavaria for example every third GP is over 60 years old and will therefore retire in the foreseeable future.

[8] See Thorsten Kingreen and Jürgen Kuehling, 'Municipalities as Responsible Body of Medical Care Centers - Social Security, Municipal and Commercial Law Requirements' (2018) 21 DÖV 890.

[9] Council of Experts for the Assessment of Developments in the Health Care Sector, 'Bedarfsgerechte Versorgung – Perspektiven für ländliche Regionen und ausgewählte Leistungsbereiche' (expert opinion, SVR Gesundheit 2014) <https://www.svr-gesundheit.de/fileadmin/Gutachten/Gutachten_2014/Langfassung2014.pdf> 349, Sec 441.

within 15 minutes while in rural regions only 64 per cent of the population are able to reach this.[10]

Description of the Practice

In oversupplied urban areas is only a limited number of approvals for panel doctors (*Kassenarzt*), whereby for private medical activities no approval restrictions are made. The reason for this is that it would constitute a constitutionally justifiable encroachment on the fundamental right to freedom of occupation (Article 12 BL), and such restrictions would overall not automatically lead to more settlement in underserved rural areas. Rather should options be taken into consideration which tie in earlier, e.g. to allocate a place to study only on the condition that the student will later be established as a practitioner in rural areas. However, this is a political and legislative question and not a responsibility of local governments. Due to demographic change, the greatest challenge local governments are facing is in the area of health care, especially in structurally weak rural regions. Various measures must therefore be taken to prevent the threat of a shortage of doctors and to ensure that care is provided close to where people live and in line with their needs in the future. The lack of doctors in rural areas can be divided into two manifestations. Regarding the inpatient sector hospitals in rural areas have shortage of skilled personnel, whereas in the outpatient sector a lack of general practitioners and specialists in the form of individual practices can be located. Potential solutions can be created by RLGs either as the responsible body of a hospital or of a medical care center[11] (paragraph 95 SGB V). The provision of services as an individual doctor by a local government is essentially excluded.[12]

The right of local governments to self-government in Article 28(2) BL guarantees the right to handle all affairs of the local community on their own responsibility. This is sufficient only insofar as the definition is fulfilled, what means that larger tasks have to be split up into subtasks. One example to illustrate such a situation is the area of health care: the financing of nationwide health insurance is not a local task, but the operation of a hospital is. It is recognized that the guarantee of self-government includes (also) the economic activity of the local government. In 2017, 37.1 per cent of the hospitals in Germany were privately owned, 34.1 per cent by non-profit organizations and 28.8 per cent by public authorities.[13] If one considers

[10] See therefore the press release from 29 April 2019: 'Wie lange brauche ich bis zum nächsten Krankenhaus'

<https://www.destatis.de/DE/Presse/Pressemitteilungen/2019/04/PD19_163_91.html;jsessionid=FB87075D2D825969E260232728B9AC04.internet721>.

[11] In German: *Medizinisches Versorgungszentrum* (MVZ).

[12] Illustrated by Martin Burgi, 'Distribution of Responsibilities between the Federal Government, the *Länder*, Local Governments and Social Administration Bodies in the Health Sector' in Hans-Günter Henneke (ed), *Local Responsibility for Health Care* (Boorberg 2012) 36-38.

[13] But it has to be taken into account: Because private institutions are usually equipped with fewer beds and are therefore smaller hospitals while public hospitals are usually three times as large, nearly every second bed (48.0%)

the distribution of hospital ownership between local governments and private individuals, a decline in public ownership and an increase in private hospitals can be noted. The assumption of the ownership of a hospital and its termination are not subject to free local government's policy decisions. The legal basis is rather the local government's obligatory responsibility to subsidiary guarantee a basic supply laid down in the respective *Länder* hospital laws. In contrast to the outpatient sector here is no lack of the legal basis of competence for local government's participation, but rather of the political will and financial strength of RLGs.[14] Regarding hospital ownership, municipalities or more likely counties and districts can be owner of the hospital, a public company can be set up to run the hospital or as a third option the task can be given away to a private company.[15] When setting up a public company local governments are subject to certain regulations which vary in each of the *Länder*. What most Local Codes[16] have in common is the need for a public purpose, an appropriate balance between performance and expected needs and a subsidiarity clause. Some of the *Länder* declare local government's economic activity admissible if the public purpose pursued can be fulfilled 'just as well and economically' by the local government as by private companies. In other – stricter – *Länder* it is required that the public purpose 'is not or cannot be fulfilled just as well and economically by another', i.e. that the local government must be able to fulfil the purpose concerned better and more economically.

Outpatient medical care is largely provided by private contract physicians. In the recent past it can be observed that young doctors no longer want to take on the economic risk of having their own practice, but rather strive for a separation between the medical profession and the entrepreneurial side. With regard to rural undersupply in the outpatient sector (individual GP practices), however, there is as already mentioned a competence problem. As one step to face the challenges, local governments have been allowed to set up Medical Care Centers (MCC) since 2015.[17] This makes it easier for local governments to operate an MCC, as they can now set up such an MCC in the form of a private company, a public-law administration, an institution under public law or in the form of a public company. They will thus be provided with an

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was in a public hospital, a third of the hospital beds (33.2%) were in a non-profit hospital and only a good sixth (18.7%) in a private hospital. See Statistisches Bundesamt, 'Gesundheit. Grunddaten der Krankenhäuser' (subject-matter series 12, Destatis 2018) <https://www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Gesundheit/Krankenhaeuser/Publikationen/Downloads-Krankenhaeuser/grunddaten-krankenhaeuser-2120611177004.pdf?__blob=publicationFile> 8.

[14] See for a clear description Martin Burgi, *Local Responsibility and Regionalization of Structural Elements in Health Care* (Nomos 2013) 72-74.

[15] Details of the various possibilities and forms of privatization of a hospital and its limits cannot be discussed at this point, but see for further information: Martin Burgi, *Kommunalrecht* (6th edn, CH Beck 2019) para 17 - Economic Activity and Privatization.

[16] i.e. Municipal Codes (*Gemeindeordnungen*), County Codes (*Kreisordnungen*) as well as District Codes (*Bezirksordnungen*).

[17] According to the earlier legal situation, an MCC owner could only be an actor who was himself a service provider, for example a hospital. Since the last amendment, local governments can now themselves be the owners of a MCC.

instrument for ensuring medical care, especially in rural areas, which is a novelty in the form of contract physician law that has hitherto been characterized by the provision of private law services.[18] The strengthening of local MCC ownership is to be welcomed, especially with regard to underserved areas, and will lead to an increase in public run MCCs in the future. This correlates well with the legislator's vision of mastering rural undersupply by involving local governments more closely.[19] But with new possibilities, also legal challenges have to be taken into account. Local governments are only allowed to operate economically to a certain extent, especially with regard to MCC the problem of how to deal with the profits generated from it. If RLGs decide to operate an MCC under their own management, they must of course also comply with EU state aid law.

Since many municipalities are not financially able to run a hospital or MCC on their own, the issue also affects other report sections like changing the present financial arrangements (report section 3 on local finances), establishing inter-municipal cooperation or even amalgamations (report section 4 on local government structure) or enabling more intergovernmental relations and support (report section 5 on intergovernmental relations). As the dissatisfaction of the rural population rises, they will want to play an increasingly important role in decision-making processes or even think about ways of forcing universal health care (report section 6 on people's participation).

Assessment of the Practice

The influence of local governments on policy decisions in the context of health care is not particularly great. Rather decisions to ensure nationwide coverage are made at federal level, as shown recently by the Federal Ministry of the Interior's 'Plan for Germany – Equivalent Living Conditions'.[20] As stated there, one of the goals for the future is to ensure the provision of good medical and nursing care and local elder care services for everyone.[21] This is a major challenge, in particular as a result of future demographic developments. At this point, some suggestions and recommendations for action can be made for the future: a cross-sectoral approach to health care, better coordination of emergency care, the promotion and expansion of telemedicine and the promotion of young doctors in the regions.[22] Another effort to respond to the shortage of skilled workers in German hospitals was the creation of a new health

[18] For the social insurance, municipal and economic law conditions for the MCC founded by municipalities see Kingreen and Kühling, *Municipalities as Responsible Body of Medical Care Centers*, above.

[19] This conclusion is drawn by Florian Plagemann and Ole Ziegler, 'Kommunale Trägerschaft von MVZ' (2016) 131 DVBl 1432, 1442.

[20] 'Unser Plan für Deutschland – gleichwertige Lebensverhältnisse überall' (Federal Ministry of the Interior 2019) <https://www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/heimat-integration/gleichwertige-lebensverhaeltnisse/unser-plan-fuer-deutschland-langversion-kom-gl.pdf;jsessionid=4FEE6DA8F5956740EEF8A5CDCFE87FD0.2_cid287?__blob=publicationFile&v=4>.

[21] See ibid 102-104.

[22] As outlined in the above-mentioned 'Plan for Germany – Equivalent Living Conditions' 103-104.

profession which enables doctors to delegate medical services. The 'physician assistant' starts at the interface between nurse and physician.[23] Health care in rural and underdeveloped areas will need to focus more on health care across sectors with regional development aspects such as mobility and accessibility, digital networking and empowerment in an overall context. This can and must be achieved above all through a more regional and flexible approach. The lack of general practitioners in rural areas is a symptom behind the challenge of more regionalized health care. The guiding idea is to open up scope for local and state-related design within the fields of prevention, curative medicine (with the sectors of medical care and hospital care), rehabilitation and care de lege lata and de lege ferenda. The allocation of specific responsibilities to the local level proves to be functional if the requirements for high-quality and economic health care can be better met there. Field-wide, the structural interlocking is described as a future task of coordinating character and it is proposed to entrust this task to the local governments.

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[23] The studies at the Baden-Wuerttemberg Cooperative State University in Karlsruhe take three years and alternate between lecture hall and hospital. See, for more information, <https://www.karlsruhe.dhbw.de/pa/studieninhalte-profil.html>.

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2.4. Fighting Covid-19 on the Local Level

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Relevance of the Practice

When the SARS-CoV-2 virus broke out in Wuhan, China, in December 2019/January 2020 and the entire Hubei province was sealed off with strict curfews on January 23, 2020, Europe still considered itself safe. On March 12, 2020, the World Health Organization declared the Covid-19 outbreak a pandemic.[24] Almost all countries are affected by the exponential increase of infections since February/March 2020. Lockdowns, curfews and travel bans have been implemented in most of them. German Chancellor Angela Merkel described Covid-19 as the most severe crisis Germany is facing since the Second World War.[25] Nonetheless, the German Basic Law (BL) does not contain constitutional instruments to deal with a health-related crisis. The announcement of a state of emergency is confined to attacks by foreign states (Article 115(a) BL).[26] The BL does however empower the federal legislature to enact laws to deal with infectious diseases.[27] On this basis, the legislature had (already in the year 2000) enacted a federal law called infection protection law (*Infektionsschutzgesetz*, hereinafter: IfSG) that plays a central role in the German way of handling Covid-19. As the implementation of federal laws is generally the task of the *Länder* (Article 83 BL), the IfSG empowers the *Länder* and municipalities to enact (precautionary) measures against infectious diseases to prevent infection and to protect the people's health and public health system.[28] Therefore, the municipal authorities play a crucial role in the combat against Covid-19. This entry will lay out in more detail the allocation of responsibilities by looking at measures enacted in reaction to Covid-19 in Bavaria.

[24] 'WHO announces Covid-19 outbreak a pandemic' (*WHO Regional Office for Europe*, 12 March 2020) <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/news/news/2020/3/who-announces-covid-19-outbreak-a-pandemic> accessed 2 April 2020.

[25] The Chancellor's speech with English subtitles can be found here: <https://www.youtube.com/watch?v=WLxrxyk_wYo> accessed 15 April 2020.

[26] Furthermore, there is Art 35 (especially para 3) BL, which however has very limited legal consequences, therefor see Pierre Thielbörger and Benedikt Behlert, 'Covid-19 und das Grundgesetz' (*Verfassungsblog*, 19 March 2020) <https://verfassungsblog.de/covid-19-und-das-grundgesetz/> accessed 9 April 2020.

[27] Art 74(1)(19) BL.

[28] The IfSG foresees three different groups of measures: monitoring measures (paras 6ff IfSG); preventative measures (paras 16ff IfSG) and measures combating infectious diseases (paras 24ff IfSG). For Covid-19, i.e. a disease already spreading, the last group of measures is the most relevant.

Description of the Practice

The general clause of paragraph 28(1) IfSG obliges the responsible authorities to implement the necessary measures, especially those mentioned in the following paragraphs. Paragraphs 29 to 31 IfSG regulate special measures like observation, quarantine and the prohibition of professional activity. The authorities enjoy discretion in the selection of the specific measures, given that the envisaged measures are suitable and necessary to prevent spreading of communicable diseases.[29] The current measures, in particular wide-ranging curfews, are not explicitly foreseen by the IfSG. Whether they are nonetheless covered by paragraph 28(1) IfSG (which has been invoked as a legal basis by the authorities) has triggered a heated academic debate.[30]

As is the case in various federal laws, the IfSG grants the *Länder* the authority to designate the competent authorities within the *Land* (paragraph 54 IfSG). In Bavaria, the allocation of competences foreseen in paragraph 54 IfSG is regulated in paragraphs 65ff. of the Bavarian regulation of competence (*Zuständigkeitsverordnungen,* hereinafter: ZustV). Thereunder, the counties' administration authorities (*Kreisverwaltungsbehörden*)[31] as second-tier local governments are responsible for the implementation and enforcement of measures. Hence, the enforcement occurs on the level of local governments, with rural local governments (RLGs) and urban local governments (ULGs) being subject to the same legal conditions[32]. Since each LG decides independently, this can however lead to very different regulations. The following example of the municipal Mitterteich in the County of Tirschenreuth shows this clearly.[33]

As Mitterteich is a small-town in Upper Palatinate, not an independent town or city, the decision about precautionary measures for Mitterteich remained with the county office of Tirschenreuth. The county office was the first in Germany to prescribe a curfew specifically for and limited to the municipal of Mitterteich, as this municipality showed a significantly higher

[29] Georg Erbs, Max Kohlhaas and Peter Häberle (eds), 'Strafrechtliche Nebengesetze' in *Beck'sche Kurz-Kommentare* (231 EL, July 2020) 228. EL Januar 2020, IfSG para 28 Rn. 1; BVerwGE 142, 205.

[30] See for a critical perspective e.g. Thorsten Kingreen, 'Vom Schutz der Gesundheit' (*Verfassungsblog*, 20 March 2020) <https://verfassungsblog.de/whatever-it-takes/> or Anika Klafki, 'Corona-Pandemie: Ausgangssperre bald auch in Deutschland?' (*Junge Wissenschaft im Öffentlichen Recht*, 18 March 2020) <https://www.juwiss.de/27-2020/>; advocating in favor of the possibility to enact these measures under para 28 IfSG: Johannes Bethge, 'Ausgangssperre' (*Verfassungsblog*, 24 March 2020) <https://verfassungsblog.de/ausgangssperre/> all accessed 15 March 2020.

[31] Counties' administrative authorities in Bavaria are the 71 county offices (*Landratsämter*) as lower state administrative authorities (RLG) and the 25 independent towns and cities (ULG), as far as they fulfil state tasks in the transferred sphere of activity, which are otherwise to be performed by the county office as the lower state administrative authority (see also General Introduction to the System of Local Government in Germany).

[32] As the measures are allocated to the second-tier LGs, small municipalities themselves do not play a role in this field (big municipalities like independent towns and cities may however issue measures as described in FN 8).

[33] Elisabeth Kargermeier, 'Erst die Ausgangssperre, dann die Schuldzuweisungen' (*Zeit Online*, 19 March 2020) <https://www.zeit.de/gesellschaft/zeitgeschehen/2020-03/mitterteich-ausgangssperre-coronavirus-quarantaene-ansteckungsgefahr-deutschland> accessed 2 April 2020.

number of Covid-19 cases in comparison with other municipals in the state. The curfew began March 18, 2020 and ended April 02, 2020. Local citizens have been informed by applications on smartphones, newspapers, notes in every mailbox and announcements by firefighters driving the streets. Police reports show acceptance of the measures and few offences.[34] While such a lockdown might be more acceptable to the population in RLGs, as less people live in (crammed) small flats, the enforcement in RLGs is made more difficult by the lack of enforcement officers and the more spread-out territorial structure of RLG areas.

In addition to these competences on municipal level, paragraph 65 of the Bavarian ZustV (in conjunction with the IfSG) also allows the Bavarian State Government to enforce precautionary measures for the whole state. When infection rates in Bavaria further increased, the Bavarian State Ministry of Health and Care decided to make use of this competence. Hence, state-wide (partial) curfews (*Ausgangsbeschränkungen*) and other precautionary measures have been prescribed by a decree (*Rechtsverordnung*) issued by the ministry (*Bayerische Infektionsschutzmaßnahmenverordnung*). The decree entered into force on 31 March and was at first due to expire on 19 April 2020. Since then, the precautionary measures have been prolonged or adapted to the ongoing development based on the government's assessment of the situation. Under the decree, (public) institutions and companies are obliged to ensure compliance with hygiene standards and physical distances on their premises. The possibility to immediately comply with (and effectively monitor) these rules of social distancing may vary from case to case, but cannot be generalized for urban or rural areas. The other *Länder* have not enforced similarly strict measures such as curfews, but have implemented (partial) shutdowns of severely affected regions[35] and general no-contact rules, also called mandatory social distancing rules (*Kontaktverbote*)[36]. Besides these general rules, the local health authorities (*Gesundheitsämter*) also issue quarantine orders to individuals tested positive for Covid-19, persons that have been in close contact with these individuals, and returning travelers.[37]

[34] Johann Osel, '"Mitterteich, wir halten zam"' (*Süddeutsche Zeitung*, 19 March 2020) <https://www.sueddeutsche.de/bayern/coronavirus-mitterteich-wunsiedel-ausgangssperre-1.4850942> accessed 2 April 2020.

[35] e.g. in the County of Heinsberg, 'Quarantäne im Kreis Heinsberg teils beendet' (*tagesschau.de*, 1 March 2020) <https://www.tagesschau.de/inland/coronavirus-heinsberg-101.html> accessed 16 April 2020.

[36] These rules have been agreed upon (therefore working as a kind of minimum standard) by the federal government and the *Länder*: 'Besprechung der Bundeskanzlerin mit den Regierungschefinnen und Regierungschefs der Länder' (*Die Bundesregierung*, 22 March 2020) <https://www.bundesregierung.de/breg-de/themen/coronavirus/besprechung-der-bundeskanzlerin-mit-den-regierungschefinnen-und-regierungschefs-der-laender-1733248> accessed 16 April 2020.

[37] Such orders are based on para 30 IfSG. The main issue the health authorities are facing in this regard is the enforcement of the quarantine orders, as they are not able to surveil every single quarantined individual. Enforcement is however made more effective by the possibility to work together with the police, under the so-called administrative assistance mechanism (*Amtshilfe*).

Assessment of the Practice

During the still lasting Covid-19 crisis, it is not possible to assess the practice fully. Measures in Germany vary to some extent as the measures are implemented and enforced independently by the *Länder* and on the LG level.[38] Nonetheless, the Federal Ministry of Health as well as the Chancellor work very closely with the state authorities to standardize precautionary measures throughout the whole territory of Germany by agreeing on certain common rules.[39] Calls for a reform of federalism are becoming louder, but should be postponed carefully until after the crisis.[40]

When assessing the Bavarian measures, one encounters a factual problem between ULGs and RLGs relating to the curfews: Even though walks, sports and excursions in the fresh air with people of the same household are not forbidden, RLGs and even the State Government of Bavaria ask citizens of urban regions not to leave the ULG-area to visit local recreation areas.[41] However, a closer look at the population figures shows that the mandatory distance of at least 1.5 m from others on streets and green spaces cannot be met in urban areas, especially the City of Munich, if many city residents go outside (especially to public parks) at the same time. The almost unlimited public green space available in the nearby rural areas could provide a solution thereto. The current RLG strategy of preventing visitors from further away[42] is however in line with the general isolationist character of most measures taken in the fight against Covid-19.

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[38] Gigi Deppe, 'Wie sich die Länder unterscheiden' (*tagesschau.de*, 24 March 2020) <https://www.tagesschau.de/inland/corona-bundeslaender-101.html> accessed 9 April 2020.

[39] Presse- und Informationsamt der Bunesregierung, 'Vereinbarung zwischen der Bundesregierung und den Regierungschefinnen und Regierungschefs der Bundesländer angesichts der Corona-Epidemie in Deutschland' (*Die Bundesregierung*, 16 March 2020) <https://www.bundesregierung.de/breg-de/themen/buerokratieabbau/vereinbarung-zwischen-der-bundesregierung-und-den-regierungschefinnen-und-regierungschefs-der-bundeslaender-angesichts-der-corona-epidemie-in-deutschland-1730934?fbclid=IwAR23kpzeWMfpgKHdpsJzNL-i2p9KVtB89TcvYf7ssvgXiPe6TWoZB1CNLEA> accessed 9 April 2020.

[40] Nonetheless, the federal legislature already acted upon the crisis and amended the IfSG to enable the federal government to announce a national epidemic emergency (*Epidemische Lage von nationaler Tragweite*), this would enable the federal government (especially the Federal Minister of Health) to enact and implement more measures on the federal level. See for comments thereto: Andrea Kießling, 'Rechtssicherheit und Rechtsklarheit bei Ausgangssperren & Co? Zur geplanten minimalinvasiven Änderung des § 28 I IfSG' (*Junge Wissenschaft im Öffentlichen Recht*, 24 March 2020) <https://www.juwiss.de/33-2020/> and Anika Klafki, 'Neue Rechts-grundlagen im Kampf gegen Covid-19' (*Verfassungsblog*, 25 March 2020) <https://verfassungsblog.de/neue-rechtsgrundlagen-im-kampf-gegen-covid-19/> both accessed 15 April 2020.

[41] 'Informationen zum Coronavirus' (*Bayerisches Staatsministerium des Innern, für Sport und Integration*) <https://www.corona-katastrophenschutz.bayern.de/faq/> accessed 2 April 2020.

[42] dpa, 'Bürgermeister am Tegernsee: Striktere Ausgangsbeschränkung' (*Süddeutsche Zeitung*, 23 March 2020) <https://www.sueddeutsche.de/gesundheit/gesundheit-tegernsee-buergermeister-am-tegernsee-striktere-ausgangsbeschraenkung-dpa.urn-newsml-dpa-com-20090101-200323-99-439863> accessed 2 April.

As an ending of the pandemic is not yet in sight, LGs will be challenged continuously. Both the on-going enforcement and the (constitutionally mandated[43]) continuous evaluation and adaption of the above-mentioned measures to the current local circumstances will take up significant resources.

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Rixen S, 'Gesundheitsschutz in der Coronavirus-Krise – Die (Neu-)Regelungen des Infektionsschutzgesetzes' (2020) Neue Juristische Wochenschrift 1097

[43] As has been emphasized by the Federal Constitutional Court, see BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 10. April 2020 - 1 BvQ 31/20 -, Rn. 16.

Local Financial Arrangements

3.1. Local Financial Arrangements in Germany: An Introduction

Nicole Lieb, *Ludwig Maximilian University of Munich*

The financial situation of local governments is critical in large parts of Germany. The budgets of many local governments are in the red and are leading to an increase in debt, which is why loans (*Kassenkredite*) are increasingly being used as a financing instrument for current expenditure. The reasons for this are manifold (financial crisis, economic decline, tax reforms, responsibility assignments by the federal and *Länder* governments, increase in investments in the social sector), but the consequence is clear: This development endangers the autonomous action and creative freedom of local governments.

The financial sovereignty is part of the guarantee of the right to local self-government under Article 28(2) of the Basic Law (BL). It guarantees the municipalities an independent income and expenditure management within the framework of an orderly budgetary system. At the core of this sovereignty are the principles of financial self-responsibility, which is made clear by sentence 3 of Article 28(2) BL: 'The guarantee of self-government shall include the basis of financial autonomy; it shall comprise the right of municipalities to a source of tax revenues that corresponds with the economic ability of the tax debtors [e.g. business tax – *Gewerbesteuer*], and the right to fix the rates at which these sources shall be taxed.' A central problem of the financial plight of the municipalities is the not cost-covering congestion of ever costlier tasks (*Aufgabenüberbürdung*) through the federal government. This is the opposite of the revocation of responsibilities (*Aufgabenentzug*). Within the framework of the Federalism Reform I, this problem could be stopped or mitigated by the prohibition on the assignment of responsibilities (*Aufgabenübertragungsverbot*) in Article 84(1)(7) BL.

Municipalities earn their revenue mainly through two main instruments: Levies and financial allocations. Levies can be taxes (*Steuern*), contributions (*Beiträge*) or fees (*Gebühren*) which are based on the Local Tax Law (*Kommunalabgabengesetz*) of the respective Land. Financial allocations are based on the Financial Equalization Act of the respective Land and the financial constitutional provisions of the respective *Land* constitution. Taxes account for the largest share of revenue (40 per cent), followed by allocations (20 per cent) and fees/contributions (10 per cent).

Tax revenue can be generated by local authorities in the form of local excise and expenditure taxes. In this respect, the Local Tax Laws grant them the right to find taxes, provided that these taxes are not 'similar to taxes regulated by federal law'. Important examples of this type of tax are the amusement tax, the dog tax, the overnight stay tax and the tax on second homes. Concerning a second group of taxes, only the revenue sovereignty and not also the tax finding right lies with the municipalities. However, they have the possibility to determine the tax

burden of their inhabitants in relation to their financial needs by setting so-called assessment rates to a limited extent. This applies to real taxes (land tax and business tax). Article 106 (7)(1) BL obliges the *Länder* to pass on a certain share of their total share of the so-called community taxes (income tax, corporation tax and turnover tax) to the municipalities (municipal financial equalization).

There are also short-term financing instruments such as loans, donations or sponsoring. In addition, municipalities generate income from economic activity, including interest from leases, rentals, capital investments and the concession fee for the provision of public roads for the laying of supply lines. The participation of municipalities in general legal transactions, in particular the acquisition and sale of assets, is subject to various conditions regulated in the respective Municipal Code (*Gemeindeordnung*). The initiation of insolvency proceedings against the assets of a municipality is excluded by law.[44]

The legal framework within which the municipalities exercise their revenue and expenditure sovereignty is formed by Budget System (*Haushaltswesen*). The legal basis for this can be found in the respective Municipal Code while the legal basis of the budget economy in the respective municipality is the budget by-law (*Haushaltssatzung*) which has to be adopted for each calendar year in the framework of the budget plan (*Haushaltsplan*). At the end of each year financial accounting (*Rechnungslegung*) has to be made, which is then subject to a so-called audit (*Rechnungsprüfung*).

The structure of the county finances follows the structure described for the municipalities in many areas, and there is also a precarious financial situation at this level. A county specific financing instrument of great economic and political importance is the county levy (*Kreisumlage*). It is levied by the counties on the municipalities belonging to the county which constitutes a fundamental, but constitutionally justified encroachment on the municipalities' guarantee of local self-government under Article 28(2) BL. There is often a dispute between the municipalities and counties about the legitimate amount of the county levy.

It is not possible to make a clear distinction between rural local governments (RLGs) and urban local governments (ULGs). ULGs usually have the advantage that they can cover a considerable portion of their financial needs with income from business tax because many companies settle in conurbations. Nevertheless, no general statement can be made about this as there are also ULGs with precarious financial situations. Dealing with financial issues is therefore an issue for both RLG and ULG.

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[44] Compare for example Art 77 Bavarian Municipal Code.

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3.2. Municipal Day-Care Facilities

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Relevance of the Practice

Since 1 August 2013 all children from the age of 1 to the age of 3 are entitled to early childhood support in a day-care facility.[45] In practice, many local governments – especially in conurbations – are unable to meet the demand for day-care places because they lack financial resources to provide facilities or to expand or modernize existing day-care facilities, as well as to recruit sufficient personnel. According to an analysis by the Institute of the German Economy 273,000 childcare places for children under the age of three are currently lacking throughout Germany. More than every tenth child at this age cannot be cared for and the parents therefore are incapable to resume employment which also impacts the economy. This means that one of the local government's core responsibilities, the safeguarding of services of general interest, is increasingly endangered. Ways must be sought of how local governments can fulfil their legal obligation to offer day-care places and the necessary expansion of the corresponding capacities without overburdening the local budget situation and their own personnel resources. Urban local governments (ULGs) in particular are struggling to find suitable properties and personnel.

Description of the Practice

The expansion, further development and improvement of the quality of day-care facilities has a high priority on the political agenda. Such intended objectives are established by the federal legislature, but their (costly) implementation in practice is incumbent on the *Länder* under the Basic Law (Article 83ff of the Basic Law [BL]). As a result of the prohibition on the assignment of responsibilities (*Aufgabenübertragungsverbot*) under Article 84(1)(7) BL, the problem has shifted to financial compensation between the *Länder* and the municipalities in accordance with the principle of connectivity of the respective *Länder* constitution.[46]

According to Social Security Code VIII (SGB VIII), the financing of day care facilities for children is regulated by the respective *Länder* law. Accordingly, the structures, responsibilities and level of financing for day-care in Germany vary greatly. There are different cost pillars within a day-

[45] The responsibility therefore lays (in most of the *Länder*) within the counties or county-free cities, see para 69(I) SGB VIII in accordance with the respective *Länder* law.
[46] See for more details on the principle of connectivity Martin Burgi, *Kommunalrecht* (6th edn, CH Beck 2019) para 18 marginal no 6.

care facility, for which there are different financing regulations (depending on the *Länder*). Each *Land* also uses a different personnel key for childcare (= for how many children one educator is responsible). In all East German *Länder* this key is traditionally much higher (i.e. less educators for the same amount of children) than in the west *Länder*. There is the need to cover operating costs (personnel and material costs) and investment costs, but also the possibility to receive further funding or demand parental contributions. In most cases, the financing consists of state subsidies (by Federal and *Länder* level), participation fees or charges, subsidies from the local public youth welfare institution, subsidies from the municipalities and personal contributions from the institution itself. That means municipalities, counties and *Länder* as well as sponsors, parents and the federal government share the financing which results in a network that is difficult to describe in every detail. Since this is not only regulated in the *Länder* day-care facility laws, but also in additional regulations and guidelines, an overview of the *Länder* is hardly possible. It becomes even more difficult when one considers that the regulations only give a coherent picture against the background of the general financial resources of the *Länder*, counties and municipalities as well as the municipal financial equalization (*Finanzausgleich*). Due to different financing structures the cost share remaining with the municipalities is not comparable across regions. The cost of a day-care facility to be borne by the parents also depends strongly on the place of residence, the institution, the age of the child, the care offered (i.e. personnel key) and the care periods and sometimes it is also influenced by social aspects such as income and the number of children in the family. The coalition agreement of 2018 presents as one of its objectives with regard to the topic 'focus on families and children' the expansion of the day care facilities and a reduction in parents' fees up to and including exemption from fees.[47] The federal government is supporting the *Länder* with the 'Gute KiTa' Law with a total of EUR 5.5 billion until 2022 in measures to further develop the quality of childcare and to reduce fees for parents.[48]

However, two overall forms of financing have emerged. If the facility is subsidized irrespective of the actual occupancy of the places, the project-executing agency has planning security. This financing of the offer is also referred to as 'object financing' (*Objektfinanzierung*). If in contrast to financing via the 'object', only the number of actually occupied places – i.e. the children cared for – plays a role in the institution, this is referred to as 'subject financing' (*Subjektfinanzierung*). Each *Land* has to decide what is the best approach for its municipalities. This depends primarily on financial capacity, which is why structurally weak and therefore financially weak RLGs have to fight harder than flourishing ULGs. But the ULGs have to face problems like real estate and staff shortage.[49] It must therefore be ensured at the federal government and *Länder* level that the financial resources actually reach where they are needed (linkage to report section 5 on intergovernmental relations). RLGs naturally also have to

[47] 'Coalition Agreement between CDU, SCU and SPD' (2018) <https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1> see marginal no 735ff.
[48] See for more information and the measures already taken <https://www.bmfsfj.de/gute-kita-gesetz>.
[49] The average salary of educators - and generally in social professions - is too low to afford the mostly expensive life in conurbations.

struggle with declining financial resources due to population decline, while ULGs have to meet a greatly increased demand for day care places in a short period of time due to an increased influx. Both the birth rate seems to be rising again and migrants with their families prefer to settle in urban areas as they hope for better job and integration opportunities there.

Assessment of the Practice

Over the past decade, many support packages have been passed in Germany to promote day-care facilities. However, these packages are always only temporary financial aid, which does not give the facilities much planning security. Just as little planning security is provided by subject financing. The institutions are dependent on the support of the federal government and the *Länder*. Despite the introduction of a legal right to a place in a day-care facility, the practice continues to lag behind. This applies equally to urban and to rural areas. The promises made at federal level often lead to excessive financial demands on the individual municipality. Support packages by the federal government set fixed subsidy sums instead of sharing the actual costs incurred. A long-term solution to cost sharing must therefore continue to be worked on and above all the federal government and the *Länder* must make financial resources available on a long-term basis. In the best case, this happens without making the system more complicated than it already is. The individual municipalities are not in a position to run their own day-care facilities without sufficient financial support from the government levels. On the other hand, the danger of an increasing political influence on the self-governing structure of local governments through the increasing provision of financial resources at federal and state level should be taken into consideration.

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3.3. Financing of Inter-Connected Transport Services or Linked Transportation Authorities

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Relevance of the Practice

In the 1970s, the regionalization of local public transport began. The transfer of responsibility for regional and local public transport to the *Länder* accompanied the privatization of the German Federal Railways.

Following the different laws on local public transport (ÖPNV-*Gesetze*, e.g. Article 8(1) Law on Local Public Transport in Bavaria (BayÖPNVG)) the planning, organization and provision of general local public transport is a voluntary task of the counties and independent municipalities within their own sphere of activity. 'At first glance, these organizations appear to be well-known regional associations of local governments, if not the *Land* government has kept responsibility. However, they have to co-operate with suppliers of transport, from which they have to buy services. Thus, regionalization led to complicated structures of public-private co-ordination and contracting, which correspond to the concept of regional governance.'[50]

In general, local public transport includes only transportation via buses, not via tracks. The accountable authorities differ according to type of transport: for transportation via buses the local governments, for transportation via tracks the *Land*-government is responsible. For this reason, the declining financial capacity of the municipalities and counties, especially in rural areas, also jeopardizes the provision of local public transport. Youths and elderly in rural areas in particular, who are especially dependent on local public transport, thus suffer from this lack of functioning infrastructure. However, even in the urban areas, the needs of growing cities for a high performing local public transport exceeds capability. Demographic change is thus leading to new – varied – challenges in both urban and rural areas with regard to public transport planning, coordination and notably financing.[51]

[50] Arthur Benz and Anna Meineck, 'Sub-National Government and Regional Governance in Germany' in Vincent Hoffmann-Martinot and Hellmut Wollmann (eds), *State and Local Government Reforms in France and Germany* (Springer 2016) 69f.

[51] Martin Burgi, *Kommunalrecht* (CH Beck 2018) para 6 Rn 19; Jens Kersten, 'Demographie als Verwaltungsaufgabe' (2007) 38 Die Verwaltung 309.

Description of the Practice

The statutory commissioning authorities (*gesetzliche Aufgabenträger*) for local transport are competent to merge with other such authorities.[52] Thus, local transport companies are often run or owned not only by one single authority, but mostly in close collaboration of neighboring municipalities, counties and the *Land.* Sometimes they even exist across the borders of different *Länder* (e.g. Berlin-Brandenburg Transport Association).[53] Therefore, these authorities usually hold a joint venture.[54] Many municipalities – especially in metropolitan regions – have a high interest in cross-border traffic[55]: Firstly cross border in its geographic meaning, to cross the municipalities' borders. Secondly in a personnel meaning, as municipalities guarantee the use of local transportation not only for inhabitants of the own municipality but for everyone. This organizational form of local public transport is called inter-connected transport service or transport association (*Verkehrsverbund*). In the respect of financing an inter-connected transport service, the population figures of the respective municipalities, the use of the offer by the respective municipalities' inhabitants, the financial capacity of the respective municipality and many more factors are of decisive importance. Even though the urban local governments (ULGs) usually have a larger budget, and thus a better negotiating position, they depend on the rural local governments (RLGs). Due to urban employment but limited urban space for housing[56], ULGs are dependent on cooperation with the RLGs for the provision of housing and for infrastructural connection to the city. It results in a fruitful collaboration of RGLs and UGLs in these linked transport associations, a combination of all means of transportation in one provider and a shared distribution of the cost burden among all authorities involved. Nevertheless, the transport associations are under great financial pressure.

The primary financing of the local inter-connected transport service is provided by ring-fenced financial allocations (*zweckgebundene Finanzzuweisung*) from the *Länder*.[57] These kind of allocations must be used for the purpose for which they are provided by the state. The financial allocations are generally based on the fiscal equalization law (e.g., *Bayerisches Finanzausgleichsgesetz,* BayFAG) of the respective *Land* and the fiscal constitutional provisions

[52] Antitrust problems may occur due to the merger of various companies, see Christian Jung and Sascha Michaels, 'Fusionskontrolle in einem sich wandelnden ÖPNV-Markt' (2005) 3 IR 55.

[53] See: Burgi, *Kommunalrecht*, above, para17 Rn 24ff for more detailed descriptions of the establishment of municipal undertakings and the prohibition of their economic viability and public service obligations. For more details on the Berlin-Brandenburg Transport Association, see Diana Runge and Jan Werner, 'Der "Berliner Verkehrsvertrag": Verkehrsvertrag zwischen dem Land Berlin und den Berliner Verkehrsbetrieben (BVG) AöR' (2009) IR 268.

[54] With regard to the establishment of municipal undertakings and the prohibition of economic efficiency or their obligation to serve the public good, see: Burgi, *Kommunalrecht*, above, 17 Rn 24ff.

[55] Janbernd Oebbecke, 'Der öffentliche Dienstleistungsauftrag nach der VO (EG) 1370/2007' (2019) Neue Zeitschrift für Verwaltungsrecht 1724.

[56] See therefor also report section 2.2. on Municipal Housing Companies.

[57] Burgi, *Kommunalrecht*, above, para 18 Rn 17.

of the respective *Länder*-constitutions. First sentence of Article 106(7) of the Basic Law (BL) obliges the *Länder* to pass on a certain proportion of their total share of community taxes to the municipalities. In addition, the *Land*-legislature determines whether and to what extent the revenue from *Land*-taxes accrues to the municipalities (Article 106(7) BL, second sentence). The ring-fenced allocations, like in the case of public transport, must be distinguished from the general financial allocations. Since the general financial allocations are not earmarked, they are freely at the disposal of the municipality.

Additionally and obviously a user charge is levied, which is therefore also a source of income, but usually not sufficient to cover costs. The source of revenue varies therefore with individual and specific organization of the linked transport association. It depends on collaboration of different authorities. Thus, this part of the financing is based on individual agreements between the authorities involved and therefore varies considerably. In this respect, however, the following should be added: In particular, mere profit-making intentions never constitute a public purpose, which municipal undertakings ultimately pursue. Nevertheless, a municipal enterprise must operate economically, i.e. also with the intention of making a profit.[58]

The financially stronger a municipality is, the more it can also invest out of its own general budget on top in its own local public transport. This may of course raise questions and problems under State aid law, and thus, questions concerning EU law. This type of financing is however possible in principle. According to the case law of the European Court of Justice (ECJ), the criterion of State aid is not met if specific parameters are fulfilled, e.g. the recipient undertaking has actually been entrusted with clearly defined public service obligations.[59]

Assessment of the Practice

The linked transport associations around a large city are only partially prepared for current challenges, notably due to lack of budget. There are in particular financial issues and tough negotiations between the authorities involved. The need for punctual, cheap, safe, flexible and fast local transport is growing rapidly, especially in cities and metropolitan regions. The frequency must be increased and services must be further adapted to the needs of the users. In this way, the rural areas surrounding large cities can also be integrated into the metropolitan area. The authorities and LGs must invest more and more money. To do this, the municipalities are dependent on the help of the *Länder*. On the other hand, there is a great danger that local transport in rural areas, which are not close to a large city, will almost come to a standstill.

[58] Regarding this point, see Hans Jarass, 'Aktivitäten kommunaler Unternehmen außerhalb des Gemeindegebiets, insbesondere im öffentlichen Personennahverkehr' (2006) Deutsches Verwaltungsblatt 1, 4ff.

[59] ECLI:EU:C:2003:415 (Altmark Trans). For all parameters, see Burgi, *Kommunalrecht*, above, para 17 Rn 29ff; Christian Jung, and Jan Deuster, 'Europäische Kommission genehmigt ÖPNV-Finanzierungssystem des Verkehrsverbunds Rhein-Ruhr' (2011) IR 148; Oebbecke, 'Der öffentliche Dienstleistungsauftrag nach der VO (EG) 1370/2007', above.

Concepts for individualized transport are being developed for this purpose. Key considerations in this regard will be transport on demand, involving artificial intelligence and autonomous driving. However, this entails comparatively equally high costs. The RLGs will therefore be required to continue into the future by connecting and coordinating (transport) more deeply among each other. However, the RLGs are far from being able to achieve it – especially financially – by themselves. Hence, here too, major investments will have to be made, particularly by the *Länder*.

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3.4. Public-Private Partnerships (PPP)

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Relevance of the Practice

When looking for means to implement cost- and knowledge-intensive projects (mostly infrastructure), governments of all levels in Germany have for quite a while resorted to Public-Private Partnerships (in the following: PPP) as a mode of financing and/or operating ongoing or one-time projects within their sphere of influence.[60] PPPs in the field of education infrastructure rank first by number, whereas the highest investment volume in recent years occurred in the area of road construction.[61] In terms of government entity involved, the biggest group is made up of PPPs commenced by local governments (LGs).[62] Examples from the state of Bavaria include the development of schools, public swimming pools and sports facilities.[63] In other German *Länder*, LGs also realize projects such as the handling of sewage[64] or waste facilities under a PPP model.

Description of the Practice

The term PPP describes a wide variety of different ways and approaches to conduct projects involving both a public authority and (a) private actor(s) that are based on a contract between the LG and the private company. While there are many different ways for an LG to fulfill the tasks assigned to it,[65] the PPP model was 'born' out of the desire to minimize public debt by

[60] See for a list of examples of (mostly *Länder*) PPP: Presidents of the Courts of Auditors of the Federation and the Länder (eds), 'Gemeinsamer Erfahrungsbericht zur Wirtschaftlichkeit von ÖPP-Projekten' (14 September 2011) 50ff (hereinafter cited as: Report); see also the project database of *Partnerschaft Deutschland*, accessible via <https://www.ppp-projektdatenbank.de/index.php?id=9> accessed 25 June 2020.

[61] 'Chancen und Risiken Öffentlich-Privater Partnerschaften' (expert opinion by the Advisory Board to the Federal Ministry of Finance, September 2016) 11ff (hereafter cited as: Opinion); see also 'ÖPP-Projekte mit Vertragsabschluss im Hoch- und Straßenbau nach Investitionsvolumen getrennt' (Partnerschaft Deutschland 2019) <https://www.ppp-projektdatenbank.de/fileadmin/user_upload/191231_Projekte_Hochbau_Tiefbau.pdf> accessed 25 June 2020.

[62] Opinion, 11, 21.

[63] See the examples listed in the first part of the PPP guidelines published by the Ministry of the Interior (hereinafter cited as: PPP Guidelines), 'Public Private Partnership zur Realisierung öffentlicher Baumaßnahmen in Bayern' (Gesprächsrunde PPP 2016) <https://www.stmb.bayern.de/assets/stmi/buw/bauthemen/iia4_ppp_leitfaden_teil1.pdf> accessed 22 April 2020 21ff.

[64] See for this practice in general report section 4.3. on Central Water Management.

[65] See Martin Burgi, *Kommunalrecht* (6th edn, CH Beck 2018) para 17 marginal no 69.

running public projects more (cost-) efficient. However, a PPP goes beyond a (debt) financing of projects in that it constitutes an alternative means of organization and procurement of public projects. It is however different from a 'normal' procurement process, as the LG and one or several private companies actually conduct a project together, thereby covering both financing and construction and maintenance. It is important to note that LGs may only decide to pursue a PPP if the project could not be realized in a more efficient way under a 'normal' procurement process.[66] However, the (partially) private financing in itself is not the reason for the model's popularity.[67] The potential of a PPP lies in the idea and its structure (especially the allocation of risks), setting certain incentives for both parties that can make the project indeed more (cost-)efficient overall.[68]

As mentioned, there are many different ways to structure a PPP. The models differ in terms of risk allocation and in terms of the ownership of the developed property, but also in terms of the administration of the project once the construction phase is completed.

Before going into these differences in more detail, a summary of the stages common to all PPPs will be outlined.[69] At first, the LG has to evaluate whether it is at all feasible to conduct the envisaged project as a PPP. Secondly, the authorities should clarify the responsibilities within their own organization, focusing on the question which tasks they can/want to fulfil themselves and which tasks they want to delegate to external parties (i.e. the private partner or other private entities). Based upon these findings, the LG (thirdly) has to compare the potential PPP with a 'normally' procured project to see whether resorting to a PPP is in fact economically beneficial. Only then the procurement proceedings (as a fourth step) might be commenced. After the procurement process, the selected private partner and the LG conclude an agreement (PPP contract) that outlines each party's rights and obligations, especially describing who is responsible for which parts of the project. It is within this contract that the risk allocation and property situation are regulated. Afterwards, the project enters the development stage and – upon completion – is implemented and (jointly) run for the duration of the contract (normally between 10 and 30 years). For most PPPs, the private actor conducts the development and maintenance himself or by employing subcontractors, while the government is tasked with controlling the progress and reacting to potentially necessary adaptations or changes to the contractual framework.

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[66] This is part of the general obligation to manage the public budget in an economic and efficient way under Art 61(2) of the Bavarian Municipal Code. The same paragraph also encourages LGs to engage in public partnerships or other alternative means of financing where this is feasible. The Bundesrechnungshof (Federal Audit Agency) has ia criticized the federal government for pursuing a PPP model for a highway where a classical realisation would have been more economical. See Steven Geyer, 'Rechnungshof rügt Scheuers Autobahn-Plan' *Hannoversche Allgemeine* (13 October 2018) <https://www.haz.de/Nachrichten/Politik/Deutschland-Welt/Bundesrechnungshof-ruegt-Andreas-Scheuers-OePP-Plan-fuer-Autobahn-A49> accessed 24 June 20.

[67] To the contrary, public actors usually get more beneficial rates for financing models like loans. Opinion, 8, 26ff.

[68] See ibid 15ff, 23.

[69] See for these steps the PPP Guidelines, 12ff.

Having outlined the timespan and stages of a PPP, the following part of the entry will deal with the different models of PPPs employed by taking up the above-mentioned examples from Bavaria involving both rural local governments (RLGs) and urban local governments (ULGs).

Firstly, there are several ways to allocate the economic risks, mostly pertaining to a sufficient usage/turnout. In that regard, the project can be structured in two main ways.[70] One way is to allocate these risks to the government, meaning the private company just constructs and runs the project without bearing any subsequent risk (*Verfügbarkeitsmodelle ohne Marktrisiko*). The other way allocates the risk of sufficient usage and other risks concerning e.g. pricing to the private company (*Marktrisikomodelle mit Preis- und/oder Auslastungsrisiko*). The idea behind this approach is to generate an incentive for the private company to conduct the project as efficient as possible, maximizing the gains for both partners.

In Bavaria, most municipal PPPs follow the former model.[71] This is due to the fact that they deal with the provision of services for which citizens cannot be charged (e.g. schools, roads), as the later model only works for projects that are offered on a fee-basis (e.g. public pools, waste management), as the collection of the fee enables the private company to get its costs reimbursed and create profit.

The second decisive point is the question of ownership. As the PPPs deal mostly with the construction of tangible objects such as buildings or roads, the parties have to agree in the contract who is vested with the ownership of the constructed property.

There are many different models in this regard[72], the parties can ia agree to give the ownership to one of the parties or decide to realize the project through a jointly-owned corporation, but can e.g. also agree that the private actor owns the property for the duration of the contract and then transfers it to the government. As a description of all models available would go beyond the scope of this entry, the following paragraph will only address the most common model employed in Bavaria, the so-called ownership model[73]. Under this model, the LG becomes the owner of the property upon construction.[74] In exchange, the LG pays a fixed sum to the private partner that covers the construction, maintenance and further services provided

[70] These are described in the PPP Guidelines, 10.
[71] c.f. ibid 21ff.
[72] See, for an overview of the variety of models, ibid 10ff; see also the short summary by the Partnerschaft Deutschland, accessible via <https://www.ppp-projektdatenbank.de/fileadmin/user_upload/Downloads/OEPP-Vertragsmodelle.pdf> accessed 18 June 2020.
[73] Another common model being based upon a leasehold (*Erbbaurecht*) granted within the PPP contract. This model is usually employed in cases where the private company also runs the constructed facilities, e.g. for the public pools in Ingolstadt or Sonthofen, see PPP Guidelines published by the Ministry of the Interior, 28ff.
[74] If the project concerns the renovation/remodelling of existing property, the government remains the owner of the property throughout the project period.

for by the private partner. This model is mostly employed if the project is limited to construction, renovation or maintenance of a building.[75]

Both ULGs (Nuremberg) and RLGs (Poing, Kirchseeon, Weiden) have relied on PPPs to build new school buildings. There are also examples of both ULGs (Ingolstadt) and RLGs (Sonthofen) constructing public baths/spas under a PPP.[76]

There have also been attempts to comprise projects from several LGs in one PPP to realize these projects more efficiently, e.g. in Offenbach county in the state of Hesse. However, the project costs increased massively over time contrary to the prognosis in the initial assessment of the project.[77] An additional independent assessment conducted after the increase criticized the complexity of the contractual relationships and a lack of control on the governmental side.[78] This shows that cooperation (e.g. between several RLGs) in the form of a joint PPP should be considered carefully as it might make the implementation of each single project more efficient at first sight, but will also increase complexity.

Assessment of the Practice

The practice of PPPs gives LGs the potential to realize projects in a more economical way[79] while at the same time making use of the experience and skills of the private partners. The continuous involvement of one company distinguishes PPPs from other projects that are divided into different stages with different private actors involved on each stage, leading to a potential lack of efficiency.[80] Both these aspects can make PPPs extremely helpful for smaller LGs when it comes to a one-time, large-scale project for which the LG itself lacks the necessary experience. Another potential advantage compared to the 'classical' procurement lies in the different timing and maturity relating to the LG's financial obligations. Normally, LGs will have to pay all costs as soon as the construction project is finished. In a PPP, the construction costs are normally borne by the private partner (and/or banks) in the first place, with the LG reimbursing the private partner subsequently by paying periodical fees or a lump sum when the contract expires.

[75] c.f. the PPP Guidelines, 21ff.
[76] See ibid for a detailed list of examples including the ones mentioned in this entry.
[77] Opinion, 21.
[78] ibid.
[79] E.g. one project concerned the replacement of several public baths that used to create massive losses by one public bath/spa that was constructed and operated by a private actor, with the government paying a subsidy equalling 1/3 of the losses previously incurred, see PPP Guidelines, 29.
[80] 'Öffentlich Private Partnerschaften unter Berücksichtigung des IT-Sektors' (WD 5-3000-053/09, Research Services of the German Bundestag 2009) 10.

Nonetheless, LGs have to keep in mind that PPPs are not a means of (debt) financing to ease their financial commitments, [81] as the costs are still incurred by both parties (i.e. also by them) depending on the contractual set-up. Specifically, LGs may not resort to a PPP to bypass budgetary restrictions that would otherwise prohibit the project.[82] Additionally, the PPP model is not feasible for all projects. To the contrary, there can be various reasons that speak in favor of the 'classical' implementation in terms of efficiency, e.g. the high transaction costs caused by the complex contractual relationships between the partners.[83] A proper pre-assessment is indispensable to get a clear picture before the project is commenced.

Criticism relating to PPPs focuses on the fact that private actors might make use of the necessity for PPPs on the government side by allocating risks to the government that would otherwise be incurred by them. However, the government should be able to mitigate this by conducting a thorough preparation and early examination of the project to identify its demands and its position towards potential private partners.

These and other points of criticism could also explain why LGs recently also resort to public-public-partnerships (i.e. cooperation between governmental agencies in a similar manner)[84] for the realization of complex projects.[85]

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[81] This is also emphasised in Opinion, 28.
[82] Report 3ff, 43.
[83] See, e.g., the recommendation against PPP for smaller infrastructure projects in Opinion, 21, 35ff.
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[85] See for a study about public-public partnerships and a summary of the most relevant findings, Sascha Knauf, Frederike Milde and Christoph Stumpf, 'Studie Öffentlich-Öffentliche Partnerschaften 2018' (CURACON 2018) <https://www.curacon.de/impulse/studien/studie/278-studie-oeffentlich-oeffentliche-partnerschaften-2018> accessed 25 June 2020.

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Structure of Local Government

4.1. The Structure of Local Government in Germany: An Introduction

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Local governments in Germany are territorial entities and their existence is therefore based on the territory allocated to them. Territorial reforms like amalgamations are therefore an encroachment on their territorial sovereignty and therefore need to be justified under the right to local self-government (Article 28(2) of the Basic Law [BL]). Detailed regulations on the admissibility of territorial changes can be found in the Local Codes. A distinction must be made between voluntary territorial changes, which can be brought about by public law contracts, and compulsory territorial changes, which require a law. The intensity of the intervention also varies depending on whether it involves the dissolution of local governments (*Auflösung*), the merger of two (or more) local governments into a new local government (*Verschmelzung*), the incorporation of one local government into the territory of the other local government (*Eingemeindung*) or the separation of individual parts of a local government (*Ausgliederung*). Counties are associations of municipalities (*Gemeindeverbände*) in the constitutional sense which is why they also have the right of self-government according to Article 28 (2)(2) BL and changes of territory must be justified beforehand. Territorial reforms at the municipal level take place periodically (in the old *Länder* last until the mid-1970s) or due to historical upheavals (as in the new *Länder*). The political objectives are to improve performance in the interests of the inhabitants and the tasks to be performed. At present, in several *Länder* (Brandenburg, Lower Saxony, Thuringia) the county level in particular is covered by territorial reforms, although some reforms have recently been announced at the municipal level (Mecklenburg-Western Pomerania, Rhineland-Palatinate). Rural local governments (RLGs) rather face mergers or even dissolutions (very rare) while urban local governments' (ULGs') territory can either be expanded through incorporations or on the contrary get separated because the territory (and responsibilities) gets too unmanageable.

Inter-municipal cooperation refers to the coordinated execution of individual administrative responsibilities by the participating local bodies. Cooperation may take the form of setting up another institution (e.g. *Zweckverband*) or it may be carried out by one local government taking over the tasks for one or more other local governments. This is of course more likely to happen between RLGs, while ULGs join (not always balanced) forces with nearby RLGs to improve the urban-rural linkage. The basis for this is the respective *Länder* law. These offer various types of cooperation under public law, regulate the circle of responsibilities that are generally related to cooperation and finally lay down the basic principles of the organization. The right of each local government to cooperate with other local bodies is part of the right to self-government guaranteed by Article 28(2) BL in the form of the sovereignty to cooperate. In view of the

demographic development and the growing budget problems, voluntary and compulsory[86] inter-municipal cooperation is likely to increase in the coming years, particularly in rural areas. Even though inter-municipal cooperation represents a shift in responsibility for the performance of responsibilities, German public procurement law has provided an exception for it since 2016 (paragraph 108(6) GWB) that was already confirmed by the European Court of Justice (ECJ) earlier. In the field of public-law forms of inter-municipal cooperation a distinction must be made between the joint inter-municipal corporation (*Zweckverband*) and the public-law agreement (*öffentlich-rechtliche Vereinbarung*). The joint inter-municipal corporation is created by a public law contract between municipalities and/or counties, is institutionalized and thus itself a public territorial entity. This means that it can carry out externally effective actions in place of the otherwise competent member local governments; but it is not included in the warranty area of Article 28(2) BL. On the contrary, a public-law agreement is also concluded through a public-law contract but it arises no new institution. It has the content that one of the participants only assumes individual tasks of the other participants (delegating agreement) or undertakes to perform such tasks for the other participants (mandating agreement).

In particular, to deal especially with urban-rural problems or in conurbations, institutionalized administrative units like *Verband Region Stuttgart* and *Regionalverband Frankfurt/RheinMain* are being set up, but they may also lack the constitutional quality of Article 28(2) BL. They are typically responsible for tasks relating to transport and spatial planning, economic development and landscape design.

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[86] This is an intervention in the guarantee to local self-government that needs to be justified.

4.2. Broadband Infrastructures

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Relevance of the Practice

Broadband supply is key in a way as it offers the opportunity to mitigate other supply shortages. Fast and stable internet connections are one of the most elementary living, working and production conditions. The development and maintenance of road and rail, but also digital and educational infrastructures is essential for a sustainable development. Some may even go so far as to raise access to broadband networks as a human rights issue, because many other social rights (like education, information, employment or health care) are linked to the access to a reliable, high-quality and affordable broadband connection.[87] One focus of the 'Plan for Germany – Equivalent Living Conditions'[88] is clearly the expansion of broadband infrastructure. Especially in the provision of broadband internet connections, there are serious differences between urban and rural areas in Germany which at the same time has fatal effects on the participation in the digitization process of the economy and society. Broadband expansion is of particular importance because rural areas would lose access to conurbations without it and this would have serious disadvantages as a competitor location. The 'constant dead spot' costs Germany a top place in the latest location ranking of the World Economic Forum (WEF). Because the Federal Republic of Germany is ranked 72nd of all nations worldwide in terms of internet connections and fiber optic cables, Germany is falling from third to seventh place in the Global Competitiveness Report.[89]

Description of the Practice

In the field of telecommunications as part of services of general interest, the state withdrew from the provision of services and limited itself to a mere warranty function which was even elevated to the status of a constitutional norm with Article 87(f) BL. The model of Article 87(f) BL relies on the provision of services by the private sector under state guarantee responsibility for a minimum offer. Although this transfer of responsibility to the private market has led to a

[87] See Andreas Kiefer, '2050: Europe grows through migration: Are we prepared?' in ÖCV und ÖAHB (eds), *Academia Nr. 2/2018: Where we live tomorrow. Save education and broadband the rural area?* <https://academia.or.at/s/Ac_WT_18-2_v3_komprimiert.pdf> 6.

[88] See report section 2.3. on Public Health Care.

[89] 'Global Competitiveness Report 2019: How to End a Lost Decade of Productivity Growth' (World Economic Forum 2019) <https://www.weforum.org/reports/global-competitiveness-report-2019-searching-for-the-win-win-policy-space>, where Hong Kong, the Netherlands, Switzerland and Japan passed by.

more efficient and faster provision of services, this has not been achieved across the board. One legislative instrument to make private sector involvement more attractive is to establish more and more investment incentives under regulatory law. Investment incentives are to be created – in simplified terms – to the extent that companies willing to invest as a reward can obtain facilitations and exemptions with regard to regulatory measures, in particular with regard to access and tariff regulation.

But the main focus in the future to fill the current supply gaps in rural areas will lay on taking action by local authorities themselves. This requires the provision and deployment of considerable financial resources which must ultimately reach local authorities in need of support.[90] Broadband expansion in rural areas is primarily being driven by counties as they have a better overview of current coverage than individual municipalities. Individual municipalities hardly take on this task on their own (it would be possible for ULGs like county-free cities, but they mostly don't lack broadband infrastructure), but work together with other municipalities under the umbrella of inter-municipal cooperation. If even individual counties are too small for this task, amalgamations may come into consideration. However, these are part of general, long-term territorial reforms and not tailored to individual areas of responsibility. On the contrary (or in the short term) counties are as well able to cooperate with each other inter-municipally.

As far as broadband expansion is concerned, three different stages must be distinguished: At first, the passive infrastructure has to be installed (typically empty pipes, 70 – 80 per cent of the total costs, but no revenue yet). The second stage is the network operation (active infrastructure) and the third stage is the provision of the actual telecommunications service. With regard to the organizational structure the local authorities can choose from various options. In the so-called 'profitability gap model' (*Wirtschaftlichkeitslückenmodell*) a network is built and operated by a private provider (stage 1 + 2). The instrument used hereby are state subsidies where this process is financially supported by the local authority which forwards subsidies from state funding programs. The federal and *Länder* governments provide considerable amounts of financial support while the EU has also set up a broadband infrastructure fund.[91] This must of course be done in accordance with European state aid law. With the so-called 'operator model' (*Betreibermodell*) a local authority builds the network (up to the financially weaker parts of the region) and remains the owner, but transfers the network operation to a private actor. The local authority can also decide not only to set up the broadband infrastructure on its own, but also to provide active technology and telecommunications services within the so-called 'full-service provider model' (*Komplettanbietermodell*). In this case the local authority often makes use of the local utilities by extending their offer to include telecommunications services. Of course it has to observe

[90] A clear distinction cannot be made between urban and rural areas, but rather between structurally weak and structurally strong municipalities. Of course, there are mainly structurally weak municipalities in rural areas, although there may still be exceptions.

[91] Connecting Europe Broadband Fund (CEBF).

the limits of municipal commercial law, in particular the subsidiarity of local authorities' economic activity anchored in numerous *Länder* as well as public procurement law. Local authorities have two options when choosing the right legal form: it can organize the broadband expansion as part of its general administrative activities or it can outsource it to an independent organization. In turn, it has both public law (e.g. inter-municipal cooperation) and private law legal forms (esp. GmbH) at its disposal. Within the existing models outlined above municipal enterprises are already subsidy recipients or operators if they have been successful in the respective award procedures. This could involve cooperation between several local authorities but also with private companies within the framework of a public-private partnership. Nevertheless, the state itself must become active and in general the trend must go from pure warranty back to (partial) fulfillment.

In summary, there are three different instruments to advance broadband expansion: Regulation, funding and self-economic action by local authorities.[92] As it is not only a task which can be solved within the local community of one individual municipality, umbrella entities like counties (or even districts) or inter-municipal cooperation must take action.

Assessment of the Practice

A nationwide expansion in rural areas cannot be achieved through private sector involvement alone because the expensive investment is not worthwhile with only a low customer density. Therefore, sovereign support is necessary and the federal state, the *Länder* and the local governments as counties and municipalities must take action.

In order to give a preliminary evaluation of the above-mentioned instruments: Within the profitability gap model the local government has hardly any scope of action and once the network has been set up, the money is lost because the network belongs to the private actor. The operator model offers more scope of action and more financial advantages for the local government. However, disadvantages can also arise here because network operators can only be found for economically interesting parts of the area. As a solution to this dilemma, a more recent consideration is to license the construction and also the network operation in the form of a potential network formed according to objective criteria across several municipal areas within the framework of a concession model (*Konzessionsmodell*).[93] This model needs to be further developed and the current rules on rights-of-way in the telecommunications sector

[92] See Matthias Cornils, 'Sicherstellung der technischen Infrastruktur durch Markt und Staat' in Hans-Günter Henneke (ed), *Gleichwertige Lebensverhältnisse bei veränderter Statik des Bundesstaates?* (Boorberg 2019) 181ff.
[93] This proposal comes from Martin Burgi, 'Wirtschaftsverwaltungsrechtliche Instrumente zur Sicherstellung der Versorgung in ländlichen Räumen?' in Hans-Günter Henneke (ed), *Rechtliche Herausforderungen bei der Entwicklung ländlicher Räume* (Boorberg 2017) 217, where he also gives initial consideration to compatibility with European and constitutional law.

amended. Nevertheless, it offers an opportunity to change the role of local governments and at the same time avoid the disadvantages of existing models.

Broadband expansion raises many different and complex legal issues in the areas of regulation, public procurement and state aid. Although the local governments need considerable financial support, they are also confronted with important issues regarding technical, organizational and legal options. It is a complex field that requires constant development and adaptation in every respect.

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4.3. Central Water Management – Water Supply and Effluent Disposal

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Relevance of the Practice

Water management refers to the qualitative[94] and quantitative management of water resources, i.e. water supply and effluent disposal. Water is a public good and must therefore be managed permanently and in a way that is in the best public interest. Due to various demographic changes, new challenges are emerging in water management. The change in population structures in rural and urban areas is hereby a significant factor. Demand in urban areas is increasing, while rural areas must try to keep quality standards high for a decreasing number of users. This leads in particular to prognostic uncertainties regarding future demand. In addition, the topic is currently being given special attention, as there are numerous demands for a 'human right to water and sanitation'[95]. The public water supply serves the public good.[96] The provision of drinking water as well as the disposal of sewerage is, in accordance with the division of competences laid down in the Basic Law (BL), the responsibility of the municipalities and other public bodies according to the respective *Länder*-law (see also paras 50(1), 56(1) WHG). This is a self-government task (*Selbstverwaltungsaufgabe*, i.e., a services of general interest) and thus, ultimate responsibility lies within the municipality (first sentence of Article 28(2) BL).[97]

Description of the Practice

First of all, it should be noted that Germany has in general a very high drinking water quality, as tap water is drinkable (almost) everywhere. This may vary only in some regions, because of topographical reasons. The central water management including water supply and effluent disposal is carried out as public service by the municipalities. This service includes five tasks: (i) water extraction and possibly treatment of the raw water; (ii) distribution of drinking water to

[94] This task includes the protection of water resources against pollution and deterioration (particularly with regard to water quality there are strict regulations under European law), see Wolfgang Köck, 'Zur Entwicklung des Rechts der Wasserversorgung und der Abwasserbeseitigung' (2015) ZUR 3, 5ff.

[95] 'The Human Right to Water and Sanitation' (*United Nations*, 29 May 2014) <https://www.un.org/waterforlifedecade/human_right_to_water.shtml> accessed 21 February 2020.

[96] Michael Reinhardt, 'Demografischer Wandel im Wasserrecht – Rechtsrahmen für Daseinsvorsage und Gewässerschutz' (2018) LKV 289, 291.

[97] Köck, 'Zur Entwicklung des Rechts der Wasserversorgung und der Abwasserbeseitigung', above, 8.

final consumers (households, trade and industry, public institutions), provision of the domestic water meter; (iii) collection and discharge of waste water and rainwater; (iv) treatment of waste water and rainwater; and (v) treatment and disposal of sewage sludge.[98] As not every municipality has resources to carry out all tasks independently, different kinds of consolidations occur. The municipalities have the sovereignty to form cooperations (Article 28(2) BL), which makes it possible for different municipalities to operate jointly.

For example, in Bavaria are 2,056 municipalities and 2,350 utilities. Nevertheless, it should be noted that there is currently a tendency towards centralization, at least in terms of organizational law. Municipal mergers (permitted under the general Federal Water Association Act [*Gesetz über Wasser- und Bodenverbände, WVG*] or the respective *Länder*-laws on municipal cooperation) or cooperation in municipal supra-local companies under private law are being established (inter-municipal cooperation [*interkommunale Zusammenarbeit*], see above). Joint inter-municipal corporations (*Zweckverbände*) are set up for this purpose, which in turn transfer the organization to municipal public enterprises (government enterprises; own enterprises) or to private enterprises under private law in the hands of the municipalities (own companies).[99] The public service tasks (see above) in water management can only be transferred to private third parties under strict conditions (Section 56(1)(3) WHG).[100] Even in case of such a transfer, the responsibility of the municipality, in the sense of the material municipal guarantee responsibility, as well as the associated obligation to effectively perform the service, remains intact.[101] In practice, this means that even in the event of a transfer of tasks, the municipality is responsible for monitoring. Principally, this form of performance can therefore also take place across municipal boundaries.

Moreover, public procurement law does not apply to the transfer of concessions in the domestic sphere, i.e. ultimately to the transfer of tasks to another public authority, e.g. in the context of inter-municipal cooperation.[102] Interventions in the competences of other associations can only be possible as extensions of competences through inter-area economic activity by virtue of law and in compliance with the jurisdiction of the Federal Constitutional Court (*Bundesverfassungsgericht*). Moreover, some municipal laws contain opening clauses in favor of inter-territorial economic activities, which, however, always require that the interests of the foreign municipalities are safeguarded.

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[98] Karin Rommel and Regina Burr, 'Wasserwirtschaftliche Daten für Stadt und Land' (2018) 9 Statistisches Monatsheft Baden-Württemberg 37 <https://www.statistik-bw.de/Service/Veroeff/Monatshefte/PDF/Beitrag18_09_08.pdf> accessed 10 March 2020>.

[99] Köck, 'Zur Entwicklung des Rechts der Wasserversorgung und der Abwasserbeseitigung', above, 8.

[100] For more details, see Köck, 'Zur Entwicklung des Rechts der Wasserversorgung und der Abwasserbeseitigung', above, 3.

[101] Reinhardt, 'Demografischer Wandel im Wasserrecht', above, 292.

[102] Nicole Weiß, 'Kommunale Wasserversorgung – Ungewissheit über zukünftige [ordnungspolitische] Strukturen' in Ulrich Hösch (ed), *Zeit und Ungewissheit im Recht* (Boorberg 2011) 478ff. For in-house criteria, see, among others, EuGH Rs. C-107/98 v. 18.11.1999 – Teckal; BGH, Az.: I ZR 145/05 (*Kommunalversicherer*) v. 3.7.2008.

Summarizing, municipalities have to guarantee water supply and sewage disposal as state task. There is a constitutionally warranty of equal living conditions throughout the federal territory (*Bundesgebiet*) and thus, a nationwide supply and disposal must be ensured. Municipalities can issue statutory regulations requiring residents to be connected to the water system and, in individual cases, allow for equally decentralized solutions.[103] As rural areas are experiencing a significant and worsening population decline, this – among other things – is also leading to more a difficult water management, especially regarding financial aspects. The scope of warranty of water supply and effluent disposal is only valid for those places, which already have a basic suitability for taking up residence. There is no claim to the creation of these conditions. In individual cases, turning away from a comprehensive water supply and effluent disposal system may prove to be permissible – i.e. proportionate due to economic unreasonableness for the municipality. The citizens left behind in rural areas have a high subjective interest in maintaining existing service standards.[104] A complete devaluation of the constitutionally protected property must of course be countervailed with compensatory measures, etc., in accordance with the requirements of the Federal Constitutional Court (*Bundesverfassungsgericht*). Decentralized, new solutions are also possible, especially in the field of effluent disposal law.[105] In doing so, individual planning of demand and, as a result, security of supply must be ensured due to the changing number and structure of customers. For this purpose, a smaller-scale local sewerage disposal system can be agreed upon, including decentralized effluent disposal treatment plants.

However, it remains open how this legal obligation to ensure water supply and effluent disposal will develop in consequence of the ongoing changes. The legislatures and the current legal situation therefore seem willing and able to maintain the supply of drinking water and the disposal of wastewater in rural areas. This is the only way to maintain flexibility of supply in the future.[106] In particular, the cooperation of many small rural local governments (RLGs) in joint inter-municipal corporations is a decisive factor in keeping the burden to be distributed in-between and as little as possible for each.

Assessment of the Practice

Proposals to strengthen competition and the possibility of privatizing water management (water supply and effluent disposal) are regularly brought up in political and legal discussions. Various demands to reform the water management law, especially for liberalization and

[103] 'However, central supply and disposal facilities clearly dominate: 99% of households in Germany are connected to the public water supply and 95% of households to sewerage and wastewater treatment facilities.', Köck, 'Zur Entwicklung des Rechts der Wasserversorgung und der Abwasserbeseitigung', above, 7f; further BMU/UBA (eds), *Wasserwirtschaft in Deutschland. Teil 1: Grundlagen* (Umweltbundesamt 2010) 86.
[104] Reinhardt, 'Demografischer Wandel im Wasserrecht', above, 293.
[105] ibid 294.
[106] ibid 291.

privatization, arise.[107] Evaluation of these proposals differs widely. In Berlin, the privatization of the utilities in 1999 resulted in such an increase in costs for the end consumer that the privatization was reversed in 2013. In general, the German model of water management is to be assessed positively: from the point of view of quality, environmental factors, and even with regard to the price-performance ratio and general cost aspects. In any case, new concepts for rural areas and their problems, especially in the technical and financial management of effluent disposal, should nevertheless be made politically and legally possible. The municipalities will not be able to implement these concepts on their own, but the existing organizational structure in joint inter-municipal corporations is beneficial. In addition to coping with demographic change and corresponding decentralization, another challenge will be dealing with climate change (increasing temperature, groundwater level, quality of water in pipes, removal of rainwater runoff). Moreover, many infrastructures are outdated and therefore in great need of renewal.

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[107] Martin Burgi, 'Privatisierung der Wasserversorgung und Abwasserbeseitigung' in Reinhard Hendler and others (eds), *Umweltschutz, Wirtschaft und kommunale Selbstverwaltung. 16. Trierer Kolloquium zum Umwelt- und Technikrecht* (Erich Schmidt Verlag 2000, 2001) 101ff; Weiß, 'Kommunale Wasserversorgung', above, 475ff.

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4.4. Cooperation in the Field of Tourism

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Relevance of the Practice

Tourism is a substantial source of income for local governments (LGs), especially for some more rural regions in Germany. At the same time, also big cities like Berlin or Munich gain profit from visitors, spending money within the city.[108] Therefore, furthering tourism is an aim pursued by both urban local governments (ULGs) and rural local governments (RLGs), although the cooperation aspect might be more important for neighboring RLGs due to potential necessity of pooling resources. This follows the general trend that inter-communal cooperation plays a bigger role in rural and peripheral areas, as lack of resources might otherwise limit the scope of measures each LG is able to take. A cooperative approach might also increase the chance of funding by the *Land* or the federal Government. On the other side, also an ULG and neighboring RLGs might gain substantial benefit and profit from cooperation.

Description of the Practice

As outlined in the introduction to the structure of local government in Germany, local municipalities have several possibilities of cooperating with each other. In the field of tourism, cooperation mostly occurs between neighboring communities that want to pool resources to achieve a more significant impact for their advertising and marketing projects.[109] Cooperation between several communities occurs especially in the area of nature-related tourism within the area of those municipalities which tend to be RLGs. The fact that the nature (e.g. a forest or lake) stretches beyond the territory of one municipality makes cooperation the natural way of enabling and furthering tourism.

Such a cooperation could be limited to joint marketing, but might extend to other areas and even encompass the joint operation of public facilities. It can occur in the form of a public corporation (*Kommunalunternehmen*) or under the framework of a private company. For a

[108] See the data on revenue created by tourism in 2019 <https://www.muenchen.de/rathaus/wirtschaft/branchen/tourismus.html> accessed 6 June 2020.

[109] Cooperation in the area of tourism also takes place within metropolitan regions (*Metropolregionen*). For a general explanation of such regions under the concept of *Ballungsräume*, see the General Introduction to the System of Local Government in Germany, 4. Political and Social Context in Germany. Metropolitan regions are also discussed in report section 5.3. on the Creation of a Further Third-Tier Administrative Unit.

closer cooperation in the fulfilment of public tasks, the municipalities can establish a joint inter-municipal corporation (*Zweckverband*).[110]

One prominent example of a region with a high amount of tourism is the region of Lake Tegernsee. The municipalities adjacent to the lake established a cooperation in the form of a private company (limited liability company), the Tegernseer Tal Tourismus GmbH.[111] The City of Tegernsee and four smaller municipalities are the sole shareholders of the company.[112] All of the participating communities belong to the same county (*Miesbach*). However, the county comprises many other municipalities and is therefore responsible for a wide range of tasks going beyond tourism in the Tegernsee region. This might explain the municipalities' interest in establishing another form of cooperation that is in a way 'located' between the municipality and the county level. The company's main task is to engage in marketing and advertising activities, both for leisure tourism but also for corporate activities such as seminars or conferences. Additionally, the company supports local projects and runs a free Wi-Fi in certain areas around the lake.

Another, more complex example of cooperation in the area of tourism is taking place in the area of Berchtesgaden, close to the Austro-German border. The Government of Bavaria established a national park (*Nationalpark Berchtesgaden*) there in the 1970s.[113] Whereas the overall responsibility for running the park is not vested with the municipalities, but in accordance with the establishing regulation with the Land and county authorities (a potential overlap with report section 5 on intergovernmental relations), the municipalities in the region still engage in a multi-pillar system of cooperation. The municipalities in the County of Berchtesgaden established three associations mirroring the three historical regions of the county, namely two registered associations (*eingetragener Verein*)[114] and one joint inter-municipal corporation[115], each bringing together different municipalities of the county. The corporation and the Erlebnisregion Berchtesgadener Land – Rupertiwinkel – e.V are in turn shareholders of a joint county-wide marketing agency established as a limited liability company.[116] As the City of Bad Reichenhall is the third shareholder,[117] all regions are

[110] See for this model of cooperation the General Introduction to the System of Local Government in Germany, 2. Legal Status of Local Governments.
[111] For further information, see <http://www.tegernseer-tal-tourismus.de/> accessed 3 June 2020.
[112] 'Gesellschafter' (*Der Tegernsee*) <http://www.tegernseer-tal-tourismus.de/unternehmen/gesellschafter-organe/> accessed 3 June 2020.
[113] See for the history 'Aufgaben des Nationalparks Berchtesgaden' (Nationalparkverwaltung Berchtesgaden, 2020) <https://www.nationalpark-berchtesgaden.bayern.de/nationalpark/aufgaben/index.htm> accessed 20 March 2020.
[114] The Kur & Verkehrsverein Bad Reichenhall / Bayerisch Gmain e.V., see <http://www.kvv-badreichenhall.de>, and the Erlebnisregion Berchtesgadener Land – Rupertiwinkel – e.V (no individual website).
[115] The Zweckverband Tourismusregion Berchtesgaden – Königssee, <https://www.zv-berchtesgaden.de> both accessed 3 June 2020.
[116] The Berchtesgadener Land Tourismus GmbH, see <https://www.berchtesgaden.de/kontakt-team> accessed 30 April 2020.
[117] ibid.

represented among the company's shareholders. Similarly to the one in the Lake Tegernsee region, the company is in charge of marketing the region, whereas the associations established by the municipalities make up another layer of cooperation, distinguishing the Berchtesgaden model from the one employed for the Tegernsee region. Most importantly, the associations are not merely meant to facilitate the activities of the LGs as shareholders, but have their own set of tasks, e.g. the collection of a tourist tax (*Kurtaxe*)[118] or the management of facilities.[119]

Assessment of the Practice

The area of tourism shows that cooperation between LGs can be an effective and efficient tool to lower costs while maximizing effort. Of course, tourism might be especially prone to cooperation, especially when the sights or spots attracting tourists stretch beyond the boundaries of one RLG, making cooperation the logical consequence. Besides the natural circumstances speaking in favor of cooperation, one could make the argument that cooperation is a 'must' for the RLGs while it is a choice for ULGs, as the financial rewards are much more likely to be substantially felt (and needed) by RLGs. Joint investments also have the potential to make the area more attractive for tourism. When speaking of rewards, one must also keep in mind the aspect of burden-sharing. If LGs jointly operate e.g. a public spa, each individual municipality will feel a lack of visitors less. Thereby, such cooperation can especially serve to support smaller and financially less powerful municipalities. All these aspects might make the area interesting for field research, as there is a lot of history of cooperation and different models of cooperation that maybe do not exist in other areas of governmental cooperation. However, especially a multi-layer system like the one in the Berchtesgaden region can also lead to controversies or an alleged lack of effective representation.[120]

In general, cooperation in the field of tourism is more prevalent among RLGs. This is exemplified also by looking at metropolitan cooperation. In this field, cooperation relating to tourism is not always the main priority. In some metropolitan regions, e.g. Munich, there seems to be no (explicit) cooperation in the area of tourism. To the contrary, advertising for activities

[118] The statute (*Satzung*) enabling the joint inter-municipal corporation to collect this tax is accessible at <https://www.zv-berchtesgaden.de/component/phocadownload/category/1-meldewesen.html?download=1:satzung-fuer-die-erhebung-des-kurbeitrages-stand-juli-2018> accessed 3 June 2020.

[119] See for further tasks e.g. <https://www.zv-berchtesgaden.de/service-infos/ansprechpartner.html> accessed 3 June 2020.

[51] e.g. one municipality left the above-mentioned Erlebnisregion Berchtesgadener Land – Rupertiwinkel – e.V, c.f. 'Diskussionen um "Erlebnisregion BGL"' (*PnP.de*, 10 March 2017) <https://www.pnp.de/lokales/berchtesgadener-land/Diskussionen-um-Erlebnisregion-BGL-2430082.html>. There are also general complaints about the association: 'Landkreis tritt nicht aus Erlebnisregion aus' (*BGland24.de*, 31 October 2018) <https://www.bgland24.de/bgland/region-bad-reichenhall/landkreis-berchtesgadener-land-ort77362/berchtesgadener-land-kreistag-lehnt-austritt-verein-erlebnisregion-berchtesgadener-land-ev-bgl24-10412835.html> both accessed 3 June 2020.

in the region is done independently both by the city[121] and the respective RLGs.[122] Local cooperation is encouraged by the legal framework itself by setting out different means of cooperation like the joint inter-municipal corporation. These enable municipalities to fulfill tasks more effectively and at lower personnel expenditure, but do not alter the allocation of the respective competences (as it is usually in the interest of municipalities to retain their competences).[123]

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[121] 'Impressum' (*einfach München*) <https://www.muenchen.travel/wichtige-links/impressum> accessed 3 June 2020.
[122] e.g. Tegernsee <https://www.tegernsee.com/> accessed 3 June 2020.
[123] See, therefor, Meinhard Schröder, '§ 3 Bayerisches Kommunalrecht' in Peter M Huber and Ferdinand Wollenschläger (eds), *Bayerisches Landesrecht* (Nomos 2019) marginal no 241ff.

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Intergovernmental Relations of Local Governments

5.1. Intergovernmental Relations of Local Governments in Germany: An Introduction

Nicole Lieb, *Ludwig Maximilian University of Munich*

System of Local Tasks and State Supervision

The structural distinction between the two poles of self-government tasks (tasks of a local government's own sphere of influence; *Selbstverwaltungsaufgaben*) and state tasks (tasks in the assigned sphere of influence or external tasks; *staatliche Auftragsangelegenheiten*) is elementary for the understanding of intergovernmental relations of local government in Germany. Due to the existence of different task categories[124] in horizontal and vertical respects, voluntary or compulsory, but also thematically and structurally, as well as the fragmentation of *Länder* law, it is not easy to filter out a general system of intergovernmental relations. In the course of development, a distinction has been made in Germany between *Länder* with a dualistic task model (e.g. Bavaria) and *Länder* with a monastic (uniform) task model (e.g. Brandenburg).[125] In the relationship between the county and the respective *Land*, the tasks are carried out in the same structures as in the relationship between the municipality and the *Land*, i.e. separately depending on whether the dualistic or the monistic system is the basis. As a result, the same types of tasks are to be distinguished at the county level as at the municipal level. The debate on the various task categories and the resulting legal consequences must take place according to the affiliation to one of the two models. In *Ländern* with the dualistic system, local governments can be assigned state tasks as external tasks, which are generally outside the scope of Article 28(2) of the Basic Law (BL). Their imposition is an intervention that needs to be justified and often leads to intergovernmental disputes, particularly because of the financial implications of resolving them. That is why local governments are increasingly defending themselves against the excessive burden of tasks (*Aufgabenüberbürdung*). This applies mostly to RLGs which are already struggling with their financial capacity and don't get enough support from the higher local levels.

Intergovernmental relations are also relevant when a municipality wants to defend itself against a measure of state supervision. In the event of a dispute, it is usually a question of the

[124] Around the two poles there are further categories such as 'compulsory task according to instructions' (*Pflichtaufgabe nach Weisung*), 'compulsory task without instructions' (*Pflichtaufgabe ohne Weisung*), 'lending of organs' (*Organleihe*), 'actions being taken as lower state administrative authorities' (*Tätigwerden als untere staatliche Verwaltungsbehörde*), etc. In all cases there is an interlocking with the state administrative organization through the so-called state supervision of the local governments.

[125] A further detailed explanation of the two systems can be found at Martin Burgi, *Kommunalrecht* (6th edn, CH Beck 2019) para 8.

competence of the state authority and the scope of its supervisory powers.[126] The result depends – as already mentioned above – on whether the municipality is involved in the execution of a self-government task or a state task. State supervision can be divided into two dimensions: on the one hand, it serves the municipalities as a defensive right, while at the same time it can also be used as a controlling tool. It is governed by the *Länder* constitutions and, depending on its scope, is intended to ensure legality (legal supervision; *Rechtsaufsicht*) or coordination within the state as a whole (subject-specific supervision; *Fachaufsicht*). Legal supervision aims to ensure compliance with formal and substantive European law, federal and *Länder* law. It is open to the execution of voluntary and compulsory tasks without instructions. In the case of state tasks or compulsory tasks in accordance with instructions, the standard of expediency is added to the standard of legality. In principle, authority to issue directives (*Weisungsbefugnisse*) only exists for the last-mentioned tasks. The instruments are to be differentiated according to preventive or repressive supervision. The following supervisory instruments are provided for in all *Länder*: right to information (*Informationsrecht*), right of objection or cancellation (*Beanstandungs- bzw. Aufhebungsrecht*), right to order or instruction (*Anordnungs- bzw. Anweisungsrecht*) and substitute performance (*Ersatzvornahme*). The selection within the supervisory instruments should be based on the prohibition of excessive use, i.e. graduated according to the intensity of the intervention. State supervision gains the greatest relevance in the course of monitoring the budgetary system of the municipalities. The respective Municipal Code contains the principle of balanced budgets. If this rule is violated by the municipality, the state supervisory authority is obliged to ensure that the municipality restores the budget balance. In the relationship between the county and the respective *Land*, the tasks are carried out in the same structures as in the relationship between the municipality and the *Land*, i.e. separately according to whether the dualistic or monastic system is the basis. As with the municipalities, but to a much greater extent, there is also an interlocking with the administrative organization of the *Land* at the lower level. The scope of tasks of the counties is, of course, to be delimited not only with respect to the *Land* but also with respect to the municipalities belonging to the county. There are no significant differences between urban and rural areas with regard to intergovernmental relations, only with regard to which authority is specifically responsible for supervision.

The legal protection against a supervisory action is available to a local government and takes place before the Administrative Court (*Verwaltungsgericht*). Its decision depends on whether it is involved in the handling of a self-government task or a state task. In most cases, it is a question of the delimitation of the competence of a state authority and the scope of its supervisory powers. As mentioned earlier, the right of local self-government in Article 28(2) BL gives local governments a strong position to defend themselves.

[126] For legal protection in the relationship between the state and the municipality, see Burgi, *Kommunalrecht*, above, para 9.

Local Authority Associations

Not municipalities, but representatives of municipal interests organized under private law are the Local Authority Associations (*Kommunale Spitzenverbände*), which are very powerful in political life: The German Association of Cities and Municipalities (*Deutscher Städte- und Gemeindebund*), in which mainly small and medium-sized municipalities and cities (approx. 13,000) are grouped together, the German Association of Cities (*Deutscher Städtetag*), an association of larger towns and cities (approx. 3,600), and the German Association of Counties (*Deutscher Landkreistag*; approx. 295), each with state associations. They are voluntary associations on a private law basis so they don't underlie state supervision. These umbrella organizations represent the interests of the counties, cities and municipalities vis-à-vis other political actors and exert a decisive influence on the *Länder* and federal governments. An indication of the increased importance of European law in this area as well is the existence of the so-called European Office of German Local Self-Government in Brussels.

The coordination of their work lies within the Federal Association of Local Authority Associations (founded on 19 May 1953). The Local Authority Associations are organized at both federal and state level while they are financed primarily by membership fees or by levies and are thus independent and autonomous in relation to state directives. This enables them to represent the interests of their members decisively. Despite numerous advances, the Local Authority Associations have so far not succeeded in establishing a qualified right to be heard or even a right of legislative co-determination by supplementing Article 28 of the Basic Law. However, individual *Länder* (such as Bavaria, Baden-Württemberg, Hesse, Saxony, Thuringia and Brandenburg) guarantee constitutionally that they can participate in legislative procedures. Other external functions include an advisory and consultation function for planning projects and decisions of the federal government and the *Länder* relevant to local authorities, and the representation of the interests of the members of the associations vis-à-vis the federal government and the *Länder*. Another major field of activity of the Local Authority Associations is their internal functions, e.g. the organization of the exchange of experience and opinion-forming process between the members, as well as their technical and legal advice.

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5.2. Migration and Integration

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Relevance of the Practice

The integration of refugees has in the recent years become an urgent task in Germany due to the immigration of over 1 million people since the late summer of 2015. Due to the character of the integration task as primarily person – and location-related, the focus of the task completion – at least after recognition as an asylum seeker – lies with the local governments.[127] This is where the urgently needed integration of the various tasks (education and training, social affairs, employment promotion, housing provision but also social participation) can most likely succeed (or fail). In the emerging 'integration administrative law' the local governments play a central role. At its core is the question of which level in the federal state can most effectively solve which task in the area of asylum and integration administration (first reception/asylum application processing/integration). An answer to this is always found in the tension between fundamental considerations with regard to the distribution of competences in the federal state and the existing administrative structures. The fact that only from January 2015 to June 2018 a total of 876,000 persons received a positive BAMF (Federal Office for Migration and Refugees) decision (in addition to persons whose deportations are suspended) demonstrates the need for action. This is also why the integration of new immigrants is the more protracted and fundamental task that requires more attention. Particularly with regard to various factors (security, peace and quiet, cleanliness, support from volunteers, mobility, job opportunities, housing) there are major differences between but also pros and cons of integration in the urban and the rural area.[128] Overall, it should be a high priority to create the same organizational conditions both for urban local governments (ULGs) and rural local governments (RLGs). If this is not so easy to accomplish for RLGs (with regard to their financial situation) on their own, intergovernmental relations can (or should) often give them a better starting position.

[127] On the fact that the accommodation of asylum seekers is not a local task, see BVerwG NVwZ 1990, 1173; NVwZ 1994, 694.

[128] An interesting insight into the perspective of refugees with regard to integration in rural areas (in Bavaria) with practical comments can be found here: 'Sicht der Geflüchteten auf ländliche Räume' in Peter Mehl (ed), *Aufnahme und Integration von Geflüchteten in ländliche Räume: Spezifika und (Forschungs-)herausforderungen* (Thünen Institut 2017) <https://www.thuenen.de/media/ti-themenfelder/Laendliche_Lebensverhaeltnisse/Thuenen-Arbeitsgruppe__Integration_von_Fluechtlingen_/Integration_als_Forschungs-_Herausforderung/5_TR53_Teil_II.pdf>.

Description of the Practice

The BAMF is a central higher federal authority (*Bundesoberbehörde*) and was founded to ensure uniform application of the law, i.e. equal treatment of all asylum seekers. The task portfolio can be fundamentally divided into the two pillars 'migration' and 'integration'. The migration-related tasks result mainly from the implementation of the asylum procedure (acceptance of applications, examination in the Dublin procedure, personal interview, decision on the application). In the field of integration, the BAMF has constantly expanded its range of tasks since the Immigration Act (*Zuwanderungsgesetz*) came into force in 2005. This includes in particular the nationwide responsibility for the two central language courses and the integration courses. The increasing expansion of competences is leading to concerns on the part of local governments that the BAMF could develop in the direction of a 'Federal Integration Agency' (*Bundesintegrationsagentur*). A coordination of language courses at local level can be seen as a better way of linking integration courses with measures for labor market integration that are also at local level. At federal level can also be found the Central Register of Foreigners (*Ausländerzentralregister*) which is a database where personal data records of foreigners are stored. Data are stored on foreigners in Germany who have or have had a residence permit, as well as on those who have applied for asylum, had applied for asylum or are recognized asylum seekers. The register is maintained by the BAMF. The Central Register of Foreigners is one of the most comprehensive automated registers of public administration in Germany. 6,500 partner authorities have access to this large database, including all immigration authorities, the BAMF, the federal government Commissioner for Migration, Refugees and Integration and the German police and customs services. The majority of the integration-related administrative tasks lie with the local governments as 'Immigration Authority' (*Ausländerbehörde*). Local integration includes all measures for the integration of refugees who either have a 'good prospect of staying' or are already recognized by the BAMF with regard to one of the forms of protection. Immigration Authorities are the municipalities themselves in urban regions and the counties with their county offices (*Landratsämter*) in rural areas.

Asylum procedures need to be completed as quickly as possible in order to obtain early clarity on the residence status of protection seekers. Anchor centers (AnkER) are certain reception centers for asylum seekers in Germany. The designation stands for 'Centre for Arrival, Decision, Return'. Refugees are to be accommodated in an anchor center until they are distributed in communities or deported to their country of origin. In an anchor center, various authorities should work together, such as a youth welfare office or the BAMF. In principle, there is an 'obligation to stay'. People with positive prospects of an asylum status are to be quickly distributed among the municipalities, the rest remaining in the anchor center until deportation or voluntary return. The responsibilities of establishing and operating the anchor centers lie in the administrative competence of the *Länder*.

In recent years, integration policy in the *Länder* has been significantly upgraded. In the meantime, one ministry in each *Land* is in charge of integration, and the *Länder* have created the office of a Commissioner for Foreigners and Integration almost nationwide. In addition, a large number of the *Länder* have so-called state advisory councils, which advise governments on integration policy issues. In addition, four *Länder* have enacted their own integration laws. An essential task of the *Länder* is the promotion of municipal integration tasks. Looking at the support measures of the *Länder* in detail, it becomes clear that the variety of support measures is hardly manageable and that the associated problem is that there is hardly any transparency about these various support options ('support jungle'). There is a clear need for action with regard to the design of funding measures at *Länder* and federal level. The aim should be to dovetail and focus measures and to evaluate their effectiveness, as well as to enable a better overview (e.g. through a comprehensive funding portal). Many local governments have already had positive experiences with an integrated administrative unit for migration and integration. In essence, it is a question of bringing together the three areas of migration, integration and service and accommodation in one organizational unit. Integration is a 'cross-cutting task', which leads to the visibility of many different fields of law and to the competence of different administrative bodies and authorities. It is precisely for this reason that coordination between the federal government, the *Länder* and the local governments is indispensable (as a tri-level mechanism). Integration is primarily a personal task. Both with regard to the (individual) person to be integrated and with regard to the integration environment, i.e. the persons or the collective into which the integration takes place. Within the *Länder*, it is the municipalities to which all the integration tasks of the Immigration Authority are assigned, but above all the tasks of child day care, school sponsorship, social assistance or basic security (there and in vocational training projects in cooperation with the Federal Employment Agency), child and youth welfare, urban planning and housing, as well as cultural work and adult education center sponsorship.

Assessment of the Practice

The opinions, in which area – urban or rural – refugees are better integrated, divide. On the one hand, the urban areas offer more jobs and, in general, a better variety of activities. On the other hand, there are better housing options in the rural area (housing bottlenecks in large cities) and a more communal atmosphere than the anonymity-driven metropolitan areas. The manageable size of rural local governments (RLGs) and the proximity and intensity of living together can also have a positive effect on integration, in that old-established residents and immigrants meet and cooperate with each other in everyday life much more frequently than is the case in urban local governments (ULGs). In local kindergartens and schools, there is a good mix of children from the different groups of origin. In small RLGs, civil society actors and institutions - volunteers, associations, churches and other religious communities - play a key

role in the integration of immigrants. Here too, geographical proximity creates far more opportunities for cooperation than in sprawling structures of a large ULG.

In summary, it is a fact that integration takes place on site. Therefore, the role of the local governments as central actors in the integration process and as bearers of important integration offers must be further strengthened, but also be adapted to local (urban or rural) needs. The BAMF must be limited to its existing competencies and must not develop into a 'Federal Integration Agency' because that would not have a positive impact on the efficiency of implementation. This is particularly true with regard to the integration courses. In order to enable such courses to start quickly and to coordinate them with other integration programs, the local governments must be given the opportunity to assign participants to a suitable course instead of the BAMF.[129] The integration administration represents a local task in the main focus. Another note can be added with regard to report section 6 of this report and the participation of citizens: In all *Länder*, even if only partially on an explicit legal basis, there are advisory committees or advisory boards in which foreigners living in the community can bundle and articulate their concerns. These foreigners' advisory councils (*Ausländerbeiräte*) or, more recently, some 'integration councils' (*Integrationsräte*) are elected by the foreigners living in the community.

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[129] Detailed recommendations for future action at Jörg Bogumil and others, *Bessere Verwaltung in der Migrations- und Integrationspolitik – Handlungsempfehlungen für Verwaltungen und Gesetzgebung im föderalen System* (Nomos 2018) 289ff.

5.3. Creation of a Further Third-Tier Administrative Unit – Munich as an Independent District

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Relevance of the Practice

In some of the German *Länder*, there are even third-tier (first-tier: municipality, second-tier: counties) local governments, e.g. districts (*Bezirke*). This is for example the case in Bavaria.[130] These units vary depending on in which *Land* and thus under which laws they have been created and they have only few things in common. They 'are created as public corporations formed by their member cities to fulfil local public tasks; (…) and they are nowadays mostly charged with responsibilities of a social and cultural nature, such as youth and disabled welfare or museum maintenance'.[131] Hereinafter the focus lies within the Bavarian districts.

These districts are an amalgamation of several counties and independent municipalities (*kreisfreie Städte*) and thus self-governing bodies. The District Code (*Bezirksordnung für den Freistaat Bayern*) regulates further details. They assume special tasks on the part of the local level, which the individual administrative units could independently or on their own not perform. These tasks extend beyond the competence and capacity of the independent towns and administrative districts. Therefore, the district provides comprehensive and joint task management for rural local government (RLG) and urban local government (ULG) and thus improves the cooperation between the different entities. The tasks include in particular the creation of social, economic and cultural institutions (e.g. the districts are responsible for psychiatric and neurological hospitals, special clinics, specialist and special schools and open-air museums). They are also supra-local providers of social assistance. There is a district council, which organically steers the district and is elected by the people.

Districts (*Bezirke*) are not to be confused with administrative districts (*Regierungsbezirke*) – although both are geographically identical and constitutionally linked. The Bavarian State Government, responsible for the entire *Freistaat* of Bavaria, sets up a government in the seven sub-areas (i.e., administrative district) in order to be able to better implement policies of the *Land* (state central authorities).

[130] Further examples of this third-tier structure in Germany: Rhineland-Palatinate (*Bezirksverband Pfalz*) or the 'Region Stuttgart' in Baden-Württemberg, in a broader sense (*Höherer Kommunalverband,* i.e., higher level associations of municipalities) also in Lower Saxony and in North Rhine-Westphalia as well as in Hesse and Saxony.
[131] Martin Burgi, 'Federal Republic of Germany' in Nico Steytler (ed), *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen's University Press 2009) 140-142.

Description of the Practice

There are currently seven districts and seven administrative districts in Bavaria. On the part of the Bavarian State Government, there are efforts to create another, eighth administrative district: Munich. Firstly, many jobs can be transferred from the Munich conurbation to rural areas (the cost of living there is much lower for civil servants and the rapidly growing city is relieved in terms of housing demand and infrastructure).[132] Secondly, it could lead to improved cooperation between the *Land* government and urban local government (ULG). Thirdly, the metropolitan character is to be strengthened so that competencies are enhanced and Munich is upgraded.[133] With this structural policy of reconstitution and relocation of authorities, the Bavarian Government is trying to counteract unequal developments in the federal state. In this way, urban regions could be relieved and rural ones promoted.

The creation of a new administrative district would probably also have to lead to the establishment of a new district according to Article 10 of the Bavarian Constitution. Especially here, factual and legal questions arise: Should the district comprise the City of Munich or the County of Munich (*Landkreis München*) or even further counties? Here, special attention has to be paid to how the relationship between the ULGs of the City of Munich or rural local governments (RLGs) of the counties and a possibly separate new District of Munich should function. It arises the question whether a close collaboration of municipalities (different local governments (LGs)) in a metropolitan region is aspired or a very strong ULG.

The advantage of considering only the City of Munich to form the new district would be that the corresponding administrative structures already exist – the city council could, theoretically, also take over the tasks of the district council. Thus, no new administrative structures would have to be created. This is however not mandated, so there is also the possibility that a parallel structure could be established, although this would duplicate administrative units and institutions. The City of Munich currently pays EUR 500 million as a district levy – it is not yet certain how financing issues will then be resolved.[134]

Legal issues[135] that can be assessed very differently may emerge due to the Bavarian Constitution: Firstly, the question arises, if the Bavarian Constitution (BC) would have to be

[132] Wolfgang Wittl, 'Söder will München zum achten Regierungsbezirk in Bayern machen' *(Süddeutsche Zeitung*, 15 January 2020) <https://www.sueddeutsche.de/bayern/bayern-behoerderverlagerung-soeder-regierungsbezirke-1.4757610> accessed 5 March 2020.

[133] ibid.

[134] Kassian Stroh, 'Was an Söders Reformidee schwierig ist' (*Süddeutsche Zeitung*, 23 January 2020) <https://www.sueddeutsche.de/bayern/bayern-muenchen-regierungsbezirk-probleme-1.4767073> accessed 5 March 2020.

[135] See also Martin Burgi in 'Viele Fragezeichen zur Trennung von München und Oberbayern' (*BR24*, 16 January 2020) <https://www.br.de/nachrichten/bayern/viele-fragezeichen-zur-trennung-von-muenchen-und-oberbayern,RnlDXRp?UTM_Name=Web-Share&UTM_Source=E-Mail&UTM_Medium=Link> accessed 15 April 2020.

amended. Because of Article 185 BC, that says the administrative districts have the same division as before 1933, it is disputed, whether Munich can be a separate administrative district or will have to stay part of Upper Bavaria. Such constitutional change in the *Freistaat* would only work through a referendum of all citizens, second sentence of Article 75(2) BC. Secondly, according to the third sentence of Article 8(2) District Code, the citizens of Munich may also have to be asked whether they would like to change their district affiliation. Thirdly, there is the question of whether the city council can simply become a district council as well; otherwise a separate district council would have to exist alongside the city council.

Assessment of the Practice

The main criticism of these projects is that they would not improve the current problems with which the City of Munich as an ULG is struggling. The order of competences remains unchanged and the reasons why traffic, mobility and housing are among the greatest challenges of ULGs, and the reasons why projects take a long time and cost issues are difficult, would remain the same. Especially when concentrating the district on the city area, an exclusion of the neighboring municipalities may occur – even though city and neighboring municipalities share the same problems in infrastructural and housing topics. Thus, a high political interest is, to strengthen the cooperation between ULGs and neighboring RLGs in financial regards of these projects, which will not be improved by creating the district of the City of Munich. Political reservations against such institutions originate from those institutions that may lose influence – it is a classic form of 'interorganizational jealousies'.[136] A further problem is that 'the concern has been raised that the establishment of such "mixed administration" leads to problems of legitimacy, transparency, and above all, accountability. Another point made is the danger of weakening the power of the local authorities, as well as local civil-society projects. However, the competences of these regional entities are still few, and their legal status remains mostly unclear. Legally, as well as politically, large cities and counties, therefore, continue to play the predominant role within those regional areas'.[137]

Other regions of Germany have made very different and individual decisions in similar cases, and thus put new concepts to the test. It lays within the competence of the *Länder,* hence, quite diverse and heterogeneous forms occur. In Rhineland-Palatinate, the regional administrations (*Regierungspräsidien*) have been reformed 'where new service centres organised according to functions have replaced the traditional administration organised on a territorial basis. Similar structural changes can be observed in Saxony-Anhalt (…)'.[138] However, specific metropolitan policy reforms have also taken place. For example in Baden-

[136] Burgi, 'Federal Republic of Germany' 140-142.
[137] ibid.
[138] Arthur Benz and Anna Meineck, 'Sub-National Government and Regional Governance in Germany' in Vincent Hoffmann-Martinot and Hellmut Wollmann (eds), *State and Local Government Reforms in France and Germany* (Springer VS 2006) 65.

Württemberg, the state capital Stuttgart and neighboring counties have merged to the so called 'Region Stuttgart', obviously without relinquishment of sovereignty. The *Landtag* of Baden-Württemberg passed the legislation for this merging in 1994. It is an association with a wide catalogue of tasks and has therefore an own local parliament.[139] This parliament aims to increasing decision-making between the City of Stuttgart and the neighboring counties.[140] Another comparable example is the Region Hanover.[141] The regions of Stuttgart and Hanover have in common, that 'new administrative entities have been established to cope more effectively with specific problems arising from the relationship between large cities and their surrounding areas'.[142] A third example is the Regionalverband Ruhr,[143] which is the largest conurbation of Germany including Duisburg, Essen, Bochum, and Dortmund. It is part of the even greater metropolitan Rhine-Rhur region (additionally including Dusseldorf, Cologne, and Bonn).[144]

All these new concepts could 'represent an "institutional nucleus" for an unconventional model of regional administration for a metropolitan region. (…) [And thus] represent a model of how to create a strong shared public governmental institution and might give impetus to the further creation of such shared public service agencies with possibly broader competences'.[145] The political decision if Munich will be an independent district and how is still pending. By choosing the city region as a district region, local intergovernmental relations to neighboring municipalities are being ignored. The comparisons made here suggest that the concepts of 'Regions' seem more sustainable at least for the cooperation of ULG and RLG.

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[139] ibid 69.

[140] See more, '179 Kommunen, ein starker Standort' (*Region Stuttgart*) <https://www.region-stuttgart.de/die-region-stuttgart.html> accessed 28 February 2020.

[141] See more, 'Die Region Hannover stellt sich vor' (*HANNOVER.DE*) < https://www.hannover.de/Leben-in-der-Region-Hannover/Verwaltungen-Kommunen/Die-Verwaltung-der-Region-Hannover/Stellt-sich-vor> accessed 28 February 2020.

[142] Burgi, 'Federal Republic of Germany', above, 140-142.

[143] See more, 'Verbandsleitung und Organisation' (*Regionalverband Ruhr*) <https://www.rvr.ruhr/politik-regionalverband/ueber-uns/start-organisation/> accessed 28 February 2020.

[144] Burgi, 'Federal Republic of Germany', above, 160, endnote 18.

[145] ibid 140-142.

Stroh K, 'Was an Söders Reformidee schwierig ist' (*Süddeutsche Zeitung*, 23 January 2020) <https://www.sueddeutsche.de/bayern/bayern-muenchen-regierungsbezirk-probleme-1.4767073>

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5.4. Digitalization of the Administration in Bavaria

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Relevance of the Practice

Digitalization is the aim of many current projects, both in the private and the public sector. This has been further intensified by the enactment of a federal law (OZG)[146] that obliges all governmental agencies to offer their services online until end of 2022.[147] While the law on *Länder* level (the Law on E-Government in Bavaria)[148] does not contain a similar obligation,[149] the local governments (LGs) are also bound by the OZG. To support this mandatory digitalization on the municipal level, the *Land* government engages in several projects and initiatives to nudge and support LGs in their digitalization efforts. Hence, the field of digitalization is a very current example for intergovernmental cooperation, while many projects are of course still in their early stages. As the digitalization of public administration requires a sufficient network infrastructure, the obligation to digitalize described below may have beneficial side effects for rural areas that so far lack sufficient infrastructure and a stable network connection. Digitalization can also enable municipalities to respond to problematic realities which is the focus of one of the projects described in this entry.

[146] *Onlinezugangsgesetz* (OZG) enacted (jointly with other laws) on 14 August 2017 (BGBl. I S. 3122).

[147] Sec 1(1) OZG. The implementation of this obligation takes place in close cooperation between the federal and the *Länder* governments, as the law requires the creation of a joint online portal (*Portalverbund*) in Sec 1(2). The federal and the *Länder* governments established an organisation to oversee this cooperation, the federal IT-cooperation (FITKO), for further information see 'Das Onlinezugangsgesetz (OZG)' (*FITKO*) <https://www.fitko.de/Start#StartFIM> accessed 25 June 2020. A detailed overview on the cooperative projects is given here: 'Digitalisierungsprogramme' (*Federal Ministry of the Interior, Building and Community*) <https://www.onlinezugangsgesetz.de/Webs/OZG/DE/umsetzung/digitalisierungsprogramme/digitalisierungsprogramme-node.html> accessed 25 June 2020.

[148] *Gesetz über die elektronische Verwaltung in Bayern* [Law on the Electronic Administration in Bavaria] (*Bayerisches E-Government-Gesetz* – BayEGovG), enacted 22 December 2015. Most other states as well as the federal legislature have enacted similar laws, see, for a list of the state laws from mid-2019, 'Sachstand – E-Government in Deutschland Aktueller Stand auf Bundes- und Landesebene' (File no WD 3 - 3000 - 134/19, Research Services of the German Bundestag 2019) 9f (hereinafter: WD Report) <https://www.bundestag.de/resource/blob/655082/32a17c3834d5c5c5d6f5a7232f0491c0/WD-3-134-19-pdf-data.pdf>.

[149] It obliges LGs to offer citizens a way to communicate with them electronically (Art 3), but only encourages the actual provision of electronic/online services (Art 4).

Description of the Practice

Digitalization of course presupposes the existence of (broadband) infrastructure. While this aspect is described in the first entry to report section 2 on local responsibilities, this entry will focus on the implementation of digital tools/technology in the municipal sector and how this is an example for intergovernmental cooperation. The intergovernmental cooperation in the field of digitalization of municipal services follows a common approach regarding the division of competences, with the *Land* government providing financial and technical support while the LGs are tasked with the implementation itself.

The Bavarian Government is implementing several means to incentivize LGs to engage in digitalization. One project is a website named 'BayernPortal' that provides information to citizens and also LGs on (digital) governmental services.[150] Furthermore, the state set up a system enabling each Bavarian citizen to create its own account to access governmental services online, the so-called 'BayernID'. This system is supposed to be taken up by all LGs that implement digital provision of services.[151] Another aspect is the inter-governmental financing of digitalization. Here, two state-administered funding programs are worth mentioning.

The first one is named Digital Town Hall (*Digitales Rathaus*) and is focused on subsidizing the digital transformation of LGs' administration. It grants funding (from *Länder* level) to specific LGs upon application in accordance with a Bavarian funding directive enacted in 2019.[152] The directive pursues a holistic approach, as only concepts containing more than 20 online services in total are eligible for financing.[153] This shows that the directive wants an overarching digitalization instead of only special sectors of governmental services. However, the directive only applies to totally new online services and explicitly excludes the modernization/updating of preexisting services.[154] This is meant to increase the number of digital services offered by municipalities and to implement the requirements of the federal law (OZG) mentioned above.[155] A broadening of existing services could however be eligible for funding.[156] While urban local governments (ULGs) are not in general excluded from financing under the initiative, financing has so far been granted mostly to rural local governments (RLGs) (from North Bavaria,

[150] Accessible via the website <http://www.freistaat.bayern/>, also available in English (accessed 25 June 2020).
[151] See, e.g., Sec 4(1)(1) of the funding directive for the project Digital town hall (see infra for further detail) that makes funding conditional upon the compatibility of digital projects with the BayernID-system.
[152] *Richtlinie zur Förderung der Bereitstellung von Online-Diensten im kommunalen Bereich* [Regulation on the Promotion of the Provision of Online-Services in the Municipal Field] (*Förderrichtlinie digitales Rathaus* – FöRdR), BayMbl. 2019 no 290, 7 August 2019.
[153] Sec 4(1)(4).
[154] Secs 2; 4(1)(4); 4(2).
[155] Sec 1.
[156] Sec 4(1)(4).

as the funding allocation for South Bavarian LGs has not yet been announced).[157] This might be explained by the fact that most ULGs already have digital systems in place, which makes them ineligible for funding.

The second project is called Digital Village Bavaria (*Digitales Dorf Bayern*)[158] and picks specific pilot projects in RLGs that are meant to deal with upcoming challenges by employing the benefits of digitalization. In a first step, several regions (comprising several municipal LGs[159]) where selected in a state-wide competition, the selection being based on concepts that were submitted by regions. The regional LGs were asked to identify challenges they are facing due to demographic change (e.g. public transport services becoming unprofitable, lack of qualified workforce, discontinuation of healthcare services, etc.[160]) and to come up with digital concepts that are meant to help them tackle these challenges. Currently, there are five so-called pilot regions working in the project framework, each of them lying in a peripheral area of Bavaria.[161] These regions receive (mostly financial) support in the development and implementation of their concept. Furthermore, each region will be marketed as an innovative region by the project and on its website.[162]

Assessment of the Practice

While the Bavarian initiatives and accompanying statements by politicians and LGs show that the *Länder* government is focused on achieving e-government, there are some points that warrant attention. Most of the current programs focus mainly on RLGs. While ULGs might have more budgetary leeway to fund digitalization efforts by themselves, this could also be an indicator for a lagging implementation in RLGs (in comparison with ULGs). Especially the Digital Town Hall program is tailored towards these issues, as it only covers first-time digitalization. In this regard, the efforts seem to be driven mainly by the requirements of the federal legislation described above. Another factor for primarily funding RLGs is the need to tackle demographic changes, as a well-implemented digitalization could make rural areas more attractive for

[157] See for a list of the beneficiaries: 'Füracker und Gerlach: E-Government im Kommunalbereich ausbauen' (*Digitales Rathaus Bayern*) <https://www.digitales-rathaus.bayern/aktuelles/news/artikel9.html> accessed 25 June 2020.

[158] See <https://digitales-dorf.bayern>. A similar project called digital villages (*Digitale Dörfer*) was set up in Rhineland Palatine and now caters to RLGs all over Germany. For further information and a list of the participating LGs see <https://www.digitale-doerfer.de/> both accessed 25 June 2020.

[159] The smallest region selected is made up of two municipalities, the biggest of 16.

[160] For a list of identified challenges, see 'Herausforderungen' (*Digitales Dorf. Bayern Digital.*) <https://digitales-dorf.bayern/index.php/dd-herausforderungen/> accessed 25 June 2020.

[161] See for a list of regions and the respective projects pursued: 'Übersicht der Pilotregionen' (*Digitales Dorf. Bayern Digital.*) <https://digitales-dorf.bayern/index.php/die-modelldoerfer/> accessed 25 June 2020.

[162] The benefits enjoyed by the pilot regions are listed here: 'Leistungsumfang' (*Digitales Dorf. Bayern Digital.*) <https://digitales-dorf.bayern/index.php/dd-herausforderungen/leistungsumfang/> accessed 25 June 2020.

companies and/or younger inhabitants.[163] This is explicitly addressed within the Digital Village project.

One could argue that these considerations exclude 'experienced' ULGs that would be able to test innovative projects more efficiently. While this does indeed not seem to be the main priority of the existing funding programs examined in this entry, it also becomes clear that the different circumstances in ULGs and RLGs render a 'one fits all'-approach not feasible. To the contrary, funding programs that are able to take into account the individual circumstances will produce more fitting results. Changing circumstances in different regions as well as the rapid technological development in the field of digitalization also show that a continuous evaluation and adaption of existing programs is necessary.

Looking at the programs from the perspective of inter-governmental cooperation, the biggest disadvantage lies in the lack of a deeper cooperation between the different layers of government. Instead of setting up one or several centralized project(s) to engage in the (technical) development itself, it seems that the government (through centralized projects) merely funds initiatives on the LG level. While this enables the LGs to actually tailor the specific projects to their needs, it might lead to plenty of parallel research and development on similar projects. A centralized agency[164] that engages in development itself or provides general tools/services for LGs could be more efficient and should be broadened in scope beyond the 'framework software' described above. The lack of central development is also one of the aspects criticized by governmental authorities when surveyed on the implementation of e-government.[165] At the same time, it should not be overlooked that the Bavarian digital villages project is supposed to develop and test programs that could be feasible for other LGs too, using the pilot regions as a kind of testing labs.[166] Additionally, the federal and the *Länder* governments created the federal information management system (FIM)[167] to establish a platform where developed digital solutions can be made accessible to other governments/agencies.

[163] This idea is also ushered by the following report on a digital village in Rhineland-Palatine: 'Leben auf dem Land. Ein Dorf wird digital' (*Die Bundesregierung*, 9 August 2019) <https://www.bundesregierung.de/breg-de/themen/digitalisierung/digitales-dorf-1604066> accessed 25 June 2020.

[164] Such as the Government Technology Agency in Singapore, for further information see <https://www.tech.gov.sg/> accessed 25 June 2020.

[165] WD Report 14.97% of the agencies obliged to implement e-government services stated they are facing challenges in their implementation. Besides the lack of centrally developed IT solutions, the other substantial difficulties in the implementation referred to by governmental agencies/bodies are: lack of funding; data protection rules; lack of acceptance by users and lack of relevant competences within the agencies.

[166] A similar project (*Smarte Landregionen*) focusing on rural regions is also pursued by the federal government. The application phase for regions began in December 2019. For further information see 'Smarte Landregionen' (*BMEL.de*) https://www.bmel.de/DE/Laendliche-Raeume/Digitales/SmarteLandregionen/_texte/MuD_Smarte_LandRegionen.html accessed 25 June 2020.

[167] Further explanation on this process is provided on <https://fimportal.de/> accessed 25 June 2020.

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People's Participation in Local Decision-Making

6.1. People's Participation in Local Decision-Making in Germany: An Introduction

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The most important form of participation in political decision-making at local level is the active and passive voting right, especially the election of the local council (municipal or county council) or the election of the mayor or county administrator. While individuals naturally run for office in mayoral/county administrator elections, lists of the local divisions of the political parties active nationwide dominate in local council elections. Elections at the local level are regulated in the respective Local Code (Municipal or County Code) and in the respective Local Election Law (*Kommunalwahlgesetz*). The constitutional basis therefore is Article 28(1)(2) of the Basic Law (BL), according to which 'the people' are also to be found in the 'counties and municipalities (...) must have a representation which has resulted from general, direct, free, equal and secret elections' (electoral principles). There are great differences in the individual countries in the definition and design of the respective electoral system. Complicated mixing systems have arisen here within the scope defined by Article 28(1)(2) BL. The principle of the proportional representation system, in which the seats are distributed in proportion to the votes cast for the nominations, is consistently practiced. In numerous *Länder*, however, this has been supplemented by personnel elements (e.g. Baden-Württemberg with a so-called 'favorites list' / 'diversion'). The system of majority voting, in which applicants run directly against each other and the one with the highest number of votes wins the seat, is only envisaged under strict conditions, especially if one or no list has been submitted. In the various countries, either the d'Hondtsche method or the Hare / Niemeyer method or the 'divisor method with standard rounding' according to Sainte-Laguë / Schepers are used in the calculation.[168] In various *Länder*, attempts have been made to introduce a blocking clause in order to avoid splitting the municipal councils into many small groups and to ensure their functionality. However, under the current framework conditions, the Federal Constitutional Court considered this (especially the 5 per cent clause) to be a violation of the principle of equal election.

The citizens of the respective local government are entitled to vote and are therefore holders of an active right to vote. Citizens are all residents of a local government who are entitled to vote in local elections in accordance with the provisions of the respective Local Election Law. Accordingly, citizens are all Germans (Article 116 BL) or EU foreigners, provided that they are residents (main residence) in the local government (municipality/county) concerned for between 16 days and six months (depending on *Länder* law) and have reached the age of 16 or 18 (also depending on *Länder* law). The provisions on the right to stand as a candidate

[168] Comparative Bernd Grzeszick and Jochen Rauber, 'Reformoptionen für die Sitzzuteilung in kommunalen Vertretungskörperschaften' (2018) 149 BayVBl 577.

(eligibility for election, also passive right to vote) are linked to this, but in some cases provide for a longer period of residence in the local government's territory and/or a higher age. After the conclusion of the Maastricht Treaty in 1992 and the introduction of citizenship of the Union, the constitution was supplemented by Article 28(1)(3) BL. It states that 'persons who are nationals of a Member State of the European Community' are 'entitled to vote and to be elected in elections in counties and municipalities' in accordance with the law of that state.

But it is becoming increasingly difficult for parties to recruit committed political personnel for local political mandates and offices. Particularly in rural small local governments, where local politics is based purely on volunteer work (with at least an expense allowance),[169] the parties often fail to fill the election lists with suitable candidates. The reasons for this are the burden of bureaucracy and the very high expenditure of time involved. At the same time, local politicians see themselves exposed to incitement and hostility in the increasingly coarse interactions in the society which can have both psychological and physical effects. Especially the honorary mayor's office represents a great challenge with regard to the compatibility of work and family.

While no plebiscitary elements are provided for in the Basic Law at the level of federal policy, they play a major role at the local level. Extensive regulations have been created in the local regulations of all *Länder*, some of them only in the recent past. Both the names and the requirements vary depending on the *Land*, but are comparable across the board. In addition to the voting right(s), the citizens of a local government are entitled to plebiscitary possibilities such as the citizens' proposal (*Bürgerantrag*), the citizens' assembly (*Bürgerversammlung*) and the citizens' petition (*Bürgerbegehren*) aimed at the implementation of a referendum (*Bürgerentscheid*). With the citizens' proposal, citizens can request that the local council deals with a specific matter while leaving its decision-making powers untouched. The citizens' assembly cannot make a decision, it can only make proposals and give suggestions. Through the citizens' petition, the citizens of a local government can request that they decide on a matter of the local community themselves instead of the local council. This gives them additional room for participation in terms of political organization. Nevertheless, the local council remains the guiding body of the representative democracy at the local level, which is why various requirements are placed on the admissibility of a citizens' petition and large areas of local policy are excluded from the citizens' petition (or referendum). If the local council declares the citizens' petition admissible, the content of the question must be engaged with. In a local council meeting it is therefore necessary to decide whether the content of the citizens' petition should be complied with. If the local council makes this decision, a referendum will not take place and the further legal situation results from the relevant local

[169] Three out of four mayors in cities and towns with a size of 2,000 or more exercise their office full-time. 25% are honorary mayors. However, due to the widely differing regulations and exceptions to differentiate between full-time and – if at all provided – voluntary work in the individual *Länder*, in-depth analyzes are not possible and that's why there are no reliable numbers existing.

council decision. If the council does not comply with the admissible citizens' petition, a referendum must be made within a certain period.

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Meyer H, 'Kommunalwahlrecht' in Thomas Mann and Günter Püttner (eds), *Handbuch der kommunalen Wissenschaft und Praxis, Band 1: Grundlagen und Kommunalverfassung* (3rd edn, Springer 2007)

Thum C, '20 Jahre Bürgerbegehren und Bürgerentscheid in Bayern' (2015) 146 Bayerische Verwaltungsblätter 653

6.2. Citizens' Petitions for Referendum Against Essential Large-Scale Infrastructure Projects in Urban Areas

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Relevance of the Practice

The crown of plebiscitary possibilities at the local level is the citizens' petition. Citizens' petitions and referendums have been used in spectacular cases that have caused a sensation nationwide. This applies, for example, to the referendum in Dresden on the construction of the *Waldschlösschenbrücke*.[170] On the other hand, citizens' petitions to withdraw from the 'Stuttgart 21' project have remained unsuccessful.[171] Stuttgart 21 (Baden-Wuerttemberg) is a traffic and urban development project for the reorganization of the railway junction Stuttgart. The core of the project is the conversion of Stuttgart's main railway station into an underground through-station. As it is more common regarding large-scale infrastructure projects and those happen to occur in urban areas, rural local governments don't see themselves confronted with citizens' petitions for referendum that often (or at all). Only the residents of the respective local government may participate in such a local decision, regardless of whether the project has effects beyond the territorial boundaries - which is often the case with large-scale infrastructure projects. Even though German administrative law has so far not offered too great a lack of opportunities for public participation in infrastructure projects, there is discussion about further strengthening public participation in large-scale projects. In principle, public participation is required by law at all levels of planning (demand planning, regional planning procedures, planning approval procedures) of an infrastructure project. Nevertheless, in the past, many citizens have felt that they were not sufficiently and, above all, not involved early enough in the expansion of transport routes. In practice, the people were often not reached, so that new forms of citizen participation were required to accompany the planning process. For this reason, the Federal Ministry of Transport and Digital Infrastructure published the 'Handbook for good citizen participation in the planning of major projects in the transport sector'[172] in November 2012 with suggestions for improving citizen participation under administrative law. In addition to that or maybe because the participation under administrative law isn't sufficient, it was recently proposed to develop a 'right of participation' as an independent legal category. In a certain contrast to the public participation in large-scale projects, citizens' petitions and referendums are governed by local law. The

[170] BVerfG, decision of 29.05.2007 – 2 BvR 695/07.
[171] VG Stuttgart (Administrative Court), judgement of 17.07.2009 – 7 K 3229/08.
[172] An English version can be downloaded here: <https://www.bmvi.de/SharedDocs/EN/publications/manual-for-good-public-participation.html>.

regulations standardized in the Local Codes grant citizens 'real' rights of initiative and decision-making at the local level.[173]

Description of the Practice

Only an admissible citizens' petition can be successful, which is why the prerequisites for this shall be examined in more detail here. The various Local Codes impose structurally different but largely comparable requirements on matters that are eligible for a citizens' petition. In most cases there are negative catalogues with matters that cannot be the subject of a citizens' petition. In any case, the local government must have the respective decision-making authority – the decision has to be a local responsibility – and the local council must be responsible in accordance with the local government's internal rules of competence. It is also indispensable that the petition follows a legitimate goal. Often excluded are matters with financial implications (or the budget statutes or the levying of levies), complex planning decisions and planning approval decisions. Such decisions can simply not be made by a simple yes or no question (as is the case with the subsequent referendum). As a second condition, the citizen's petition must be signed by a certain number of citizens (quorum), while the quorums are usually graded according to the size of the local government. There are great differences in the individual *Länder*.[174] The petition must be submitted in writing and the question to be decided, which must be answered with yes / no (ambiguous question leads to inadmissibility) together with a justification. It is also necessary to designate some persons (usually three) who are entitled to represent the undersigned. The first period requirement is that only those matters are eligible for a citizens' petition that have not recently been the subject of a petition or referendum within a certain period of time (1 to 3 years). Incidentally, a differentiation based on its effect must be made: Cashing citizens' petitions (*kassierende Bürgerbegehren*) which are directed against a local council decision are only admissible within a certain period of time from the challenged local council decision. Initiating citizens' petitions (*initiierende Bürgerbegehren*) that do not turn against a specific local council decision but raise an object themselves are not time-limited.

If a citizens' petition has been submitted, the further procedure depends on the decision of the local council. If the council declares the petition admissible, it must deal with the content of the formulated question. In a local council meeting, it must be decided whether the content of the petition should be complied with. If the local council makes this decision, then there will be no referendum. If the local council does not comply with the permissible petition, a referendum is to be held within a certain period of time. The question put to the citizens by

[173] See for an overview Friedrich Schoch, 'Rechtsprechungsentwicklung – Bürgerbegehren und Bürgerentscheid im Spiegel der Rechtsprechung' (2014) NVwZ 1473, 1473ff.

[174] While in North Rhine-Westphalia, depending on the size of the local government, a quorum of 3 - 10% of the population suffices, in Saxony a quorum of 10% of the citizens is required.

this is decided in the sense in which it was answered by the majority of the valid votes. This majority must again correspond to a certain proportion of citizens. If the local council decides that the petition is inadmissible, no referendum can be held. In this case, the representatives of the petition can seek legal protection. This is done by filing an action at the Administrative Court, which is directed against the local council's finding that the petition is inadmissible. After filing an admissible action, the Administrative Court will decide whether the petition submitted was admissible.

Concerning Stuttgart 21, the project opponents collected signatures for a citizens' petition concerning the exit of the City of Stuttgart by not signing any further contracts and by concluding a termination agreement with the project partners. On 14 November 2007, 67,000 signatures against the project were handed over in the town hall. 61,193 proved to be valid; 20,000 were necessary. On 20 December 2007, the Stuttgart local council rejected the application for approval of a referendum on the 'withdrawal of the state capital from the Stuttgart 21 project' by 45 to 15 votes, on the grounds that it was legally inadmissible. The referendum was directed against fundamental decisions of the local council from 1995 (framework agreement) and 2001 (supplementary agreement) and was limited in time in accordance with the Local Code for Baden-Wuerttemberg, which provides for an application period of six weeks after publication of the local council decisions. In addition, the aim of the annulment was inadmissible because it concerned a financial principle decision reserved to the local council. This decision has been confirmed by the court. The three other citizens' petitions against the large-scale infrastructure project Stuttgart 21 also failed (for similar reasons).

Assessment of the Practice

At local level, there are instruments such as citizens' petitions and referendums that serve the direct democracy. However, their practical benefits are often hampered by restrictive state legislation – e.g. a comprehensive negative catalogue, strict conditions of legality – and sometimes less citizen-friendly case law. But it can recently be seen that by and large the scope of citizens' petitions is extended and the hurdles for their implementation are lowered. In some *Länder* (e.g. Hesse, Lower Saxony, Rhineland-Palatinate), the hurdles have recently been reduced by changing fixed quora in terms of the number of supporters' signatures to staggered (and thus more flexible) quorums. In Lower Saxony there is a peculiarity that the citizens' petition has a blocking effect until the time of the referendum, so that no conflicting decision in this regard may be made until then.[175] Forms of direct democracy seem to be in high demand. It can be observed that citizens' petitions are often used against large-scale infrastructure projects and thus more in urban regions, but with moderate success. It is still a great tool of people's participation in local decision-making and should be further developed

[175] See, for further details, Christopher Schmidt, 'Die Entwicklung von Bürgerbegehren und Bürgerentscheid seit 2016' (2018) KommJur 165.

in a citizen-friendly way. However, it is problematic that these instruments for participation do not contribute to an interplay between urban and rural. A local decision is only brought about by residents of the affected community, although the project can also have an impact on the surrounding rural area and vice versa. A good example of this is the long-standing discussion about the 3rd runway at Munich Airport. Munich Airport is not located in the territory of Munich City (ULG), but on the territory of a surrounding (much smaller) RLG. For this reason, only these (numerically 'few') rural residents decide on a citizens' petition for the 3rd runway, while the approximately 1.5 million inhabitants of the City of Munich who would mainly benefit from it (also in respect of the major economy located in the city) have no right to participate. Because of the regional (and not only municipal) relevance of large infrastructure projects there is a need for more flexible perimeters and methodologies for participation. One idea for a region like Munich is to create a further third-tier administrative unit, that means Munich as an independent district,[176] in order to unite rural and urban interests on one level and to balance unilateral burdens as best as possible.

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[176] See, therefore, report section 5.3. on the Creation of a Further Third-Tier Administrative Unit.

6.3. Local and Interest-Driven Parties or Independent Groups of Voters

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Relevance of the Practice

Citizen-oriented local politics is characterized in particular by focusing on the main political issues of a single municipality, which is why independent groups of voters (i.e. Townhall Parties, Independent Voters' Association, Voters' Community, Voters' Association, Voting Block, Political Union, Political Association, Citizens' Association, Citizens' List, Non-party members) frequently appear alongside traditional parties at the local level. These are mergers of individual citizens of the municipality to pursue certain municipal political concerns. In certain – mainly rural – regions (e.g. Baden-Württemberg and Bavaria), they sometimes account for up to 44 per cent of all local councils (*Gemeinderat*) and 24 per cent of all county councils (*Kreisrat*) of elected representatives in local governments and even provide mayors. They are to be distinguished from 'Other Political Associations' (*Sonstige Politische Vereinigung, SPV*), which are – according to paragraph 8(1) EuWG (European Election Law) – enabled to run for the European Parliament and are therefore not a typical appearance in local governments.

Description of the Practice

Voter groups are not parties within the meaning of paragraph 2(1) PartG. Despite the fact that the Federal Republic of Germany is formed as a parties' state, the voter groups are authorized to take part in all elections to local governments, especially because of Article 28(2) of the Basic Law (BL).[177] The principles of universality and equality of election laid down in Article 38(1) BL maintain the right to nominate candidates in general; prima facie it is not limited to parties. Thus, in conjunction with the local self-government guarantee (*Selbstverwaltungsgarantie*) in Article 28(2) BL it is maintained that also 'local voter groups pursuing only local interests [i.e. issues of a single municipality] [have] the right to nominate candidates and their candidates must be guaranteed equal opportunities to participate in local elections'.[178] In particular, they

[177] BVerfGE 11, 266, recital 24. Also, see above in section A. 2. of the General Introduction to the System of Local Government in Germany.
[178] Guidelines BVerfGE 11, 266; furthermore, with regard to groups of voters with regard to the generality and equality of the election BVerfGE 121, 108; 78, 350 (358); 99, 69 (78).

are to be treated equal to the parties with regard to their financing and tax advantages.[179] In general, the prerequisites for a voters' group candidacy are a legal foundation, a proper statute and proof of the democratic appointment of the executive committee. Frequently, voter groups organize themselves in the legal form of a registered association (*eingetragener Verein e.V.*).

Local self-government has a long legal and actual tradition in Germany. Already during the Weimar Republic numerous local voter groups existed, which were then purely factual restricted to local interests.[180] This continues up to this day. It is in the nature of local self-government to depend on the support of fellow citizens and to require adaptation to the specific local needs of the community. Voter groups exist in both rural and urban areas, although their influence and significance in rural local government (RLG) is usually stronger than in urban local government (ULG). That is because well-known citizens, who are particularly familiar with their local circumstances, become more important in local politics as municipalities get smaller. Also, this increased influence in rural areas is particularly evident in the many communities where voters' associations provide the mayor or in some cases even make up a dominant part of the local government. In large cities, on the other hand, groups of voters initially had less weight. However, current developments such as ongoing gentrification, the issue of migration as well as concerns due to climate change seem to indicate a change in ULG as well (see below).

Voters' groups often arise from citizens' initiatives, i.e. associations with specific topics.[181] The positions of voter groups vary widely and are both local and issue-specific. However, they do have a high degree of commonality in their advocacy of strengthening plebiscitary elements. In some cases, voter groups are a kind of melting pot of non-party, but politically interested and committed citizens who do not want to join a party but want to combine – usually – forces of moderate conservative (i.e. middle-class) opinions. Since local election law is a *Länder* competence, there are considerable differences in the legal bases for the participation of a voters' group in a local election. The more personal the voting process is designed (i.e., strong elements of the personality vote), the more likely non-party candidates are to have a chance of success.[182] This is the case in almost all *Länder*-local election laws: They allow splitting and cumulating votes, thus highly developed elements of the personality vote are to be found.

[179] Hans H von Arnim, 'Werden kommunale Wählergemeinschaften im politischen Wettbewerb diskriminiert?' (1999) 114 DVBl 417, 421ff; Martin Morlok and Heike Merten, 'Partei genannt Wählergemeinschaft – Probleme im Verhältnis von Parteien und Wählergemeinschaften' (2011) 64 DÖV 125, 128ff.
[180] BVerfGE 11, 266, recital 35.
[181] See report section 6.2. on Citizens' Petitions for Referendum Against Essential Large-Scale Infrastructure Projects in Urban Areas.
[182] Martin Burgi, *Kommunalrecht* (6th edn CH Beck 2019) para 11 Rn16.

Assessment of the Practice

Though municipal election turnout is declining,[183] most recent developments show an increased politicization focused on specific topics, which can often be attributed to emotional and short-term issues. Citizens' petitions for referendum (see above) and citizens' initiatives occur more often, proving the increase of participation in local decision-making in general. This may lead to an increased appearance of local voter groups or at least a higher involvement in such already existing groups. In addition, there is widespread dissatisfaction with the traditional political parties, which thus struggle in fulfilling their constitutional duties (Article 21 BL) such as the recruitment of upcoming mandate holders and focusing on long-term issues. As voters' associations gain relevance, voices become louder that demand the imposition of the duties of parties on the voters' associations as well.[184] Actually, this is a purely local political phenomenon, but in the course of time, parties have already emerged from such voter groups, as only parties can participate in elections to the *Bundestag* or a *Landtag* (most prominent examples: Freie Wähler, Bündnis 90/Die Grünen). Thus, independent groups of voters can become highly relevant also for other sorts of participation.

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[183] Angelika Vetter, 'Kommunale Wahlbeteiligung im Bundesländervergleich – Politische Institutionen und ihre Folgen' (2008) 61 DÖV 885: the voter turnout in local elections is roughly at 45% (comparison: in federal elections around 80%).

[184] Morlok and Merten, 'Partei genannt Wählergemeinschaft', above, 133f.

Parteilosen und von neu gegründeten Parteien‘ in Martin Morlok, Thomas Poguntke and Jens Walther (eds), *Politik an den Parteien vorbei: Frei Wähler und kommunale Wählergemeinschaften als Alternative* (Nomos 2012)

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6.4. Citizens' Participation in Urban Planning

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Relevance of the Practice

When looking at participatory possibilities at the local level, one cannot leave untouched the possibility of citizens to participate in the process of urban planning. Planning processes are prevalent both in urban and rural areas with both urban local governments (ULGs) and rural local governments (RLGs) facing the same legal requirements for the participatory processes. As communities willing to enable land development have to resort to planning most of the times, [185] and citizens' participation is required by law for every process, the practical relevance of this practice is quite high from a quantitative point of view. Participation seems at first sight to be most relevant for large-scale infrastructure projects.[186] However, depending on the scope and content of the planned projects, even minor projects might substantially affect citizens, making planning in general very important and participation thereto even more desirable.

Description of the Practice

Before going into the different possibilities of civil participation in the planning process, it is important to first briefly introduce the urban planning process as a whole. Urban planning is assigned to LGs within/in accordance with Article 28(2) of the Basic Law (BL)[187] that ia enshrines the municipalities' planning authority.[188] The planning process itself is foreseen and regulated in much detail in the Federal Building Code (*Baugesetzbuch, BauGB*).[189] The most important aim of the process is the just balancing of public and private interests.[190] According to the regulatory framework, urban planning is conducted as a two-step process: first, the LG has to pass a so-called preparatory land use plan (*Flächennutzungsplan*) that contains the

[185] See below for the possibility to issue building permits without a previous planning process.
[186] See report section 6.2. on Citizens' Petitions for Referendum Against Essential Large-Scale Infrastructure Projects in Urban Areas.
[187] Art 28(2) BL (see General Introduction to the System of Local Government in Germany) grants the right to urban planning on each community's territory.
[188] See for the core authorities enjoyed by municipalities Horst Dreier, 'Art. 28' in Horst Dreier (ed), *GG* (3rd edn, Mohr Siebeck 2015, marginal nos 120ff.
[189] Federal Building Code, first chapter, section one (Arts 1-13(b)).
[190] This is stipulated in Art 1(7) of the Federal Building Code. Para 6 of this article contains a (non-exhaustive) list of interests that (potentially) are to be considered.

broad-brush planning for a municipality's entire territory. Afterwards,[191] the LG may proceed with one or several so-called mandatory/legally-binding land use plans regulating the use of specific areas within its territory (*Bebauungsplan*), thereby adding details to the policies outlined in the preparatory land use plan. Within these plans, the LG can determine in great detail what types of development should be permitted (e.g. housing, industrial use) and set out highly specific requirements for buildings.[192] Once the legally-binding plan has become effective, building permits (*Baugenehmigungen*) may be issued.[193] This process is covered by state laws (e.g. the Bavarian Building Ordinance, *Bayerische Bauordnung*) and handled by the second-tier LGs (e.g. county authorities or independent towns/cities[194]). While this shows that the law makes planning a general precondition for the issuing of building permits, permits can under certain prerequisites also be issued for development in (already developed) areas that are not covered by a legally-binding land use plan (*Bebauungsplan*).

For citizens,[195] there are two main ways[196] in which they can participate in the process of urban planning. First, citizens may by way of petition initiate a planning process. Second, Article 3 of the Federal Building Code gives citizens the right to participate in the process itself (statutory participation). Concerning the first possibility, the framework for a successful citizens' petition has already been described in the first report entry. There is however one addition that poses a limit to the effectiveness of a petition concerning urban planning: As a successful petition has to be implemented by the municipal authorities, a petition demanding a specific plan would prejudge the outcome of the balancing the planning process is meant to safeguard. Therefore, only petitions that concern the initiation of a planning process and leave substantial room for the balancing process are permitted.[197] Concerning statutory participation, there are two

[191] There is also the possibility to merge the two processes and move forward with both plans at the same time.
[192] The potential regulations that can be included in the mandatory planning are included in Art 9 of the Federal Building Code.
[193] The law makes planning a general precondition for the issuing of building permits, although building permits can under certain prerequisites also be issued for development in (already developed) areas that are not covered by a legally-binding land use plan (*Bebauungsplan*).
[194] See also General Introduction to the System of Local Government in Germany for a more detailed explanation of the several layers of local government.
[195] While the rules on petitions differ among the different *Länder*, only the residents of the respective local government may participate in such a local decision. In most *Länder*, the participation is limited towards citizens that are able to vote (see, e.g., Art 18(a) and 15 of the Bavarian Municipal Code). See for further information report section 6.2. on Citizens' Petitions for Referendum Against Essential Large-Scale Infrastructure Projects in Urban Areas.
[196] Please note that there also exists a right to participation for third parties in the process of permitting specific projects, especially for owners of adjacent/neighboring land (e.g. Art 66 of the Bavarian Building Ordinance). This however rather relates to their possibility to take legal action against planning permits and does not give them a right to participate further in the decision by the planning authorities. Additionally, citizens can of course always resort to informal participation by holding assemblies or establishing associations advocating for certain planning decisions.
[197] The municipal council decides on the admissibility of a petition, see, e.g., Art 18(a)(8) of the Bavarian Municipal Code. This decision can however be challenged in court. See only this recent decision by the Higher Administrative Court of Bavaria, Decision of 18 January 2019, case no 4 CE 18.2578, especially marginal nos 19ff.

stages of participation taking place one after the other. The purpose of this participatory regime is both to inform the public about the planned mechanism, giving them the opportunity to submit information or concerns, and to enable the planning authority to identify all relevant interests and to evaluate the importance of each aspect.[198] As a first step, the authority has to conduct a so-called early public participation (*frühzeitige Öffentlichkeitsbeteiligung*)[199]. It aims mainly at informing the citizens about the general concept of the proposed plan.[200] Therefore, the authority is required to begin with the participatory process as early as possible, so that citizens' statements bringing up concerns or specific issues might be included in the further process.

Once the authority has come up with final draft(s), the process enters the second stage of public participation, the so-called formal public participation (*förmliche Öffentlichkeitsbeteiligung*)[201]. In this stage, the final draft(s) have to be made public[202] for at least a month, together with several additional reports pertaining inter alia to the environmental consequences of the suggested planning. After a recent amendment, the government is also required to make the documents available online. During the month-long period, citizens can again participate by submitting statements. All statements duly submitted have to be considered before the final decision is taken, while statements submitted too late might be disregarded. The government has to notify the citizens of the result of such consideration. If the plan is changed in reaction to one or several statements, it is necessary to repeat the formal public participation part at least for the changed part. It is important to note that, for both stages, the group of citizens granted the right to participate is not limited to people living in the area covered by the respective plan or living in the area of the acting LG.[203] Additionally, associations and NGOs are also given the right to participate.

There is one special mode of planning where adjacent municipalities can draw up a joint preparatory land-use plan (*Gemeinsamer Flächennutzungsplan*).[204] This model is exceptional

[198] c.f. Alexander Schink, '§ 3 Beteiligung der Öffentlichkeit' *BeckOK BauGB* (48th edn, 2019) marginal no 3.
[199] Art 3(1) of the Federal Building Code.
[200] Thomas Lüttgau, 'Das Mandat im Bauplanungsrecht (para 7)' in Heribert Johlen and Michael Oerder (eds), *MAH Verwaltungsrecht* (4th edn, CH Beck 2017) marginal no 42.
[201] Art 3(2) of the Federal Building Code.
[202] This is usually done by displaying the plan and additional documents in a publicly accessible government facility. As this was rendered impossible by the Covid-19 pandemic, the federal government enacted a law to enable municipalities to fulfill the legal requirements of participation by uploading the documents online (*Planungssicherstellungsgesetz*), see BT-Drs. 19/18965 and BGBl. 2020 I, p 1041. The law only foresees this mechanism temporarily, but it can also be seen as a pilot project for further digitalization of the participatory process. See Jan Thiele and Maximilian Dombert, 'Öffentlichkeitsbeteiligung in Zukunft übers Internet?' (*LTO*, 8 May 2020) <https://www.lto.de/recht/hintergruende/h/bauprojekte-oeffentlichkeitsbeteiligung-online-planungssicherstellungsgesetz-oeffentliche-auslegung-digitalisierung/> accessed 3 June 2020.
[203] Schink, '§ 3 Beteiligung der Öffentlichkeit', above, marginal nos 17ff.
[204] See Art 204(1) of the Federal Building Code. This should be done under this article if the land development is determined by common factors and requirements or if the involvement of several communities enables a just balancing of the different interests involved. See for further remarks and examples of such planning practices

for its deviation from the municipality's constitutionally enshrined planning authority. However, each participating municipality is responsible to conduct the participatory process described above for 'its' part of the joint plan, i.e. relating to the parts of the plan covering its territory.[205] The outcomes are then discussed by the participating communities to include them in the joint plan.[206]

Failures occurring in the participation process might however be compensated by the possibility to challenge plans before the higher administrative court in order to have the court rule on the plan's (in)validity. However, the possibility to invoke the invalidity of a plan requires standing (i.e. an alleged interference with a protected right), which is only accepted for people directly affected by the plan.[207] Consequently, there is a discrepancy between the group of potential plaintiffs and the people able to participate in the planning process.

Assessment of the Practice

The possibility for citizens to participate in the planning process improves the legitimacy of the plan as well as the quality of the outcome by enabling the citizens to voice any concerns they might have.[208] An interesting aspect is that the participatory rights during a planning process are not limited to people living in the area covered by the plan, but are also granted to the public in general, including NGOs. This is different for the right of petition which is limited to residents of the respective municipality. As people living in adjacent municipalities are thereby able to make remarks and identify issues that would otherwise remain unaddressed in the planning process, this can contribute to an interplay between adjacent communities. Because planning can have impacts that reach (far) beyond the area that is covered by the plan,[209] it is commendable that all affected people are given the right to participate as this can increase the acceptance of far-reaching planning decisions. One could however ask the question whether totally unaffected persons should have a right to participate in such planning processes. However, it might sometimes be too difficult and impractical to draw a clear line between affected and unaffected people. Additionally, any perceived 'overparticipation' is mitigated by the fact that the right to challenge planning decisions in court is limited to people actually

Gerhard Hornmann, '§ 204 Gemeinsamer Flächennutzungsplan, Bauleitplanung bei Bildung von Planungsverbänden und bei Gebiets- und Bestandsänderung' *BeckOK BauGB* (48th edn, 2020) marginal nos 4ff. However, there seems to be hardly any practical application of joined planning which is apparently due to the fact that it limits the planning authority of each municipality.

[205] ibid marginal nos 16ff.

[206] ibid.

[207] See for this requirement in general Reinhardt Giesberts, '§ 47 Sachliche Zuständigkeit des Oberverwaltungsgerichts bei der Normenkontrolle' *BeckOK VwGO* (52th edn, 2020) marginal nos 34-42.

[208] Schink, '§ 3 Beteiligung der Öffentlichkeit', above, marginal no 3.

[209] Consider, e.g., a shopping mall project. While the mall itself (i.e. the area covered by it) would be the subject of the plan, the fact that a mall will be built can have economic impact on other businesses in several adjacent municipalities.

affected by the plans. Furthermore, the participatory means have a positive impact on the transparency and responsiveness of the LG's decision-making, as plans have to be publicly displayed and the government is obliged to reply to citizens' statement made within the timeframe.

However, there are several aspects warranting further attention. A potential problem especially for smaller RLGs lacking legal and administrative expertise might lie in the rather complex legal requirements of the planning process and the potentially high amount of citizens' statements. While this is not the focus for report section 6 on people's participation, a potential solution thereto could be the improvement of inter-governmental cooperation in this regard, which could in turn improve both the ability to conduct the participatory process and also the (inclusive) quality of planning itself. Focusing on a participation-based perspective, there are certain limits in terms of the quality of the participation, as potential remedies against (alleged) violations of participatory rights might be less effective as it seems due to the issue of standing and due to the fact that only certain violations of participatory rights lead to the invalidation of the plan itself.[210] Nevertheless, the possibility for citizens to initiate and influence the urban planning process is a valuable tool enabling all (!) citizens to participate in local decision-making without a high threshold barring participation, especially since the plans have to be put online as well. This has a potential to positively impact inclusive participation. It should also be noted that the (formal) means of participation described above might be less meaningful for citizens in ULGs. As described above, LGs may grant building permits without prior planning when the area concerned is already sufficiently developed and the permitted project fits into the area. As - by definition - ULGs are comprised of already developed areas, this possibility is regularly made use of in such urban areas which means no comparable participatory process is/has to be conducted. Nonetheless, citizens in urban areas can still voice their opinions and concerns by engaging in means of informal participation (e.g. public gatherings, district council meetings).

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[210] Arts 214, 215 of the Federal Building Code.

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