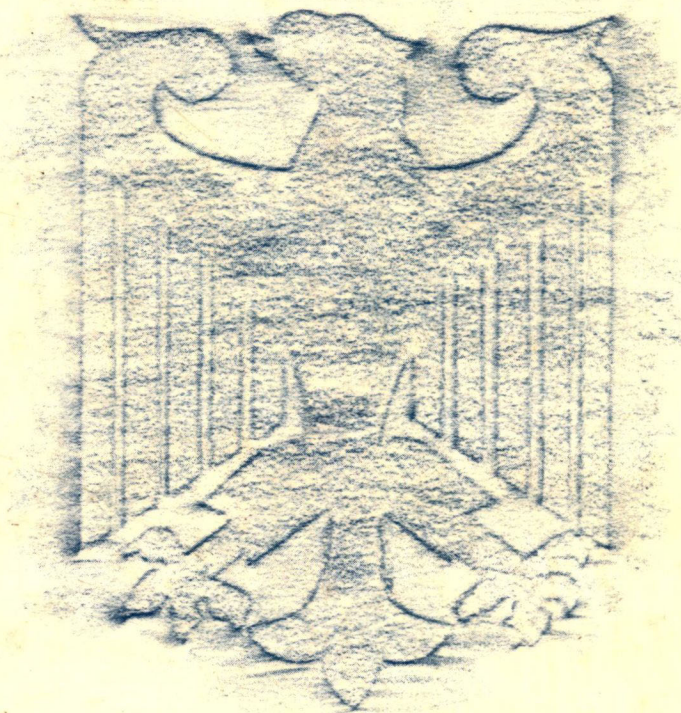


# **STATE AND GOVERNMENT IN THE FEDERAL REPUBLIC OF GERMANY**

**The Executive at Work**

2nd Edition



**NEVIL JOHNSON**

**Pergamon Press**

*State and Government*  
*in the*  
*Federal Republic of Germany*

THE EXECUTIVE AT WORK

*Second Edition*

by

NEVIL JOHNSON



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## *Preface*

IN THE preface to the first edition of this book, published in 1973, I explained why I believe it to be important to study the political institutions of a society, and in particular those through which executive authority is exercised. It is through such institutions that continuities are established and maintained: they represent the state in its concrete form. I argued that in the case of the Federal Republic there is abundant evidence of the ways in which traditions and practices established long ago continue to shape the contemporary institutions of government, maintaining a view of the state which is distinctively German. And this remains so despite the upheavals of modern German history, the reduced dimensions of the Federal Republic, and the great changes which have taken place in political attitudes and the organisation of political parties since 1949.

Nothing has occurred during the past nine years in the development of the Federal Republic which leads me to modify substantially the views then expressed. Indeed, the Federal Republic has in this period experienced a continuing consolidation of its system of government, and under a party leadership different from that which had dominated political life for most of the period to which the first edition chiefly referred. But whilst I am satisfied that the analysis of German government and the characterisation of the Federal German state offered in the first edition remain in essentials valid, it has to be accepted that many changes in the details of organisation and procedure have subsequently occurred. In addition, there have been changes in personnel and to some extent in the agenda of problems and policy issues facing those responsible for government in the Federal Republic.

Consequently, it seemed to be a worthwhile undertaking to prepare a new edition which would set this account of executive government in Western Germany into a context running on to about the end of 1981. Yet, when I started the work of revision, it soon became apparent that to take proper account of the events of the past nine years or so required more extensive rewriting of the original text than had perhaps been envisaged at the outset. It is not the impact of major

changes in institutions and styles of behaviour which made this necessary, but rather the adjustment of perspectives which becomes necessary when one looks at an object of inquiry from a different point in time and from the vantage-point of different preoccupations.

The outcome is that the earlier text has been substantially rewritten and extended. Roughly a third of this second edition consists of new material or thorough-going revisions of passages in the previous text. All the tables have been brought up to date and the operation of German government has been illustrated by many new examples derived from the political experience of the seventies. The description of the party political context of German government in Chapter 2 has been extended and up-dated; the treatment of the federal structure and of local government in Chapter 5 and the role of the Federal Constitutional Court in Chapter 7 has been much expanded; the final chapter has also been extensively rewritten. Throughout, I have taken the opportunity to correct, amend or qualify judgements made in the first edition about which I now have reservations. The result is a volume which is, I hope, recognisably the lineal descendant of the first edition, presenting in essentials the same view of the West German state, but developing this in the light of the experience of the past decade in addition to that of the earlier years of the Federal Republic.

In recognition of an emphasis already present in the first edition and now after revision reinforced, there appeared to be a case for amending the earlier title, *Government in the Federal Republic of Germany: The Executive at Work*, to one which would indicate rather more exactly the scope and character of this study. It is essentially concerned with the structure and principles of the Rechtsstaat—a state founded on the rule of law—in Western Germany, together with what this implies for executive action. It is hoped that the new title adequately expresses my intentions in this regard.

As before, I am indebted to my many friends in the Federal Republic for advice and information. Several members of the public service have been generous in enabling me to profit from their knowledge and experience, and I wish in particular to thank Dr. Hans-Joachim v Oertzen of the Federal Ministry of the Interior for his comments on Chapter 4. I would like too to acknowledge the help I received from the Geschwister-Scholl Institute in the University of Munich where I spent the summer of 1980 as Visiting Professor. To my secretary Mrs. Lyn Yates I record a special debt of gratitude for her patience and skill in mastering all the intricacies and obscurities of a heavily revised text and, as always, presenting me with an impeccable final typescript.

Nuffield College, Oxford  
April 1982.

NEVIL JOHNSON

## *Postscript*

Since the preface above was written a change of Government has taken place in the Federal Republic with the replacement in October 1982 of a Social-Liberal coalition by a Christian Democrat-Liberal coalition. This change appeared to pose some threat to the future survival of the smallest of the three main parties, the Free Democrats. In addition, there were signs from election results in several Länder that the ecological movement—the “Greens” as it is generally known—might gain enough support to succeed at some stage in breaching the long-standing monopoly of Bundestag seats held by the established parties. Apart from a few minor amendments to the text inserted at proof stage, no account is taken of these developments. It is on the experience of the new state down to the end of 1981 that this analysis of government in the Federal Republic is based.

*November 1982*

NEVIL JOHNSON

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## CHAPTER 1

### *The Inheritance of the State*

MORE than thirty years have now passed since the Federal Republic was founded in 1949. The achievements of these years are in broad terms familiar. They are characterised on the one hand by remarkable success in the reconstruction and development of the economy, a necessary precondition for the provision of a high level of publicly financed social welfare services, and on the other by the establishment and consolidation of a democratic political system which must now be regarded as one of the most stable in Western Europe. These achievements, combined with the emergence of a relatively open and mobile society, convey at first sight the impression that the Federal Republic represents a radically new departure when set against earlier phases of modern German history. Clearly there is much in the development of the Federal Republic which is new and which thus underlines the historical discontinuity imposed by the Nazi era and the effects of the Second World War with which all Germans, both in the Federal Republic and in the German Democratic Republic, still have to live. Nevertheless, the recognition of this radical break in German development should not be allowed to obscure the fact that there are continuities and perhaps a growing contemporary need to recognise them more openly as such.

One of the most interesting developments of the nineteen-seventies is the way in which the question of identity as a society and a state has re-emerged in the Federal Republic. The very success of the post-1949 political development has gradually had the effect of compelling people in the Federal Republic to try to answer questions about their own identity, a need reinforced during the past decade by recognition of the fact that the division of Germany into two states is likely to endure. The Federal Republic can no longer be regarded as a provisional state: it is here to stay, it has developed its own political life and has acquired a significant role in the world. Nearly half the present population was born after the founding of the new state and there are fewer and fewer for whom the earlier nation state provided a formative experience. Inevitably under such conditions an effort has

to be made to shape a new sense of national identity related to the society which now exists with its own specific political characteristics and interests.

It would be premature to suggest that this problem has been solved and the challenge overcome. The idea of a Federal German national identity is still elusive and in some respects artificial. Moreover, there are powerful influences at work in West German political and social life, as well as considerations of policy stemming from the Federal Republic's international role, which work against any self-conscious attempt to cultivate feelings of national identity. Nevertheless, there are now signs of a keener appreciation on the part of many people in the Federal Republic of the need to redefine their identity in terms which adequately express the political achievements of the past thirty years.<sup>1</sup> But if such a sense of identity is to emerge it is very unlikely that it can rest only on the experiences and successes of the post-war epoch. It is also necessary to reforge connections with earlier German history and to re-establish continuities which have often been denied or forgotten in the post-war years. It is precisely in this respect that a critical appreciation of the character and principles of the system of government and politics in the Federal Republic has a bearing on the problem of identity. For behind or below the obvious features of innovation and change there are in fact many subtle links with the past in which there existed and evolved specifically German structures of law and government, different from but by no means totally contrasting with those of other European societies. There is, therefore, an explanatory justification for beginning with some reflections on the past. It will help to identify some of the threads which may have to be taken up more boldly as people in the Federal Republic seek to re-establish a sense of their own traditions.<sup>2</sup>

When we look back on the German historical heritage in respect of the theory and practice of government two features are particularly striking. One is the importance within the German political and legal tradition of theorising about the state, of explicating its nature and actual characteristics in both philosophical and legal terms. The other, operating more directly at a practical level, is the fact that Germany has had but limited experience of national unity, and practically

<sup>1</sup> Some discussion of the need for a sense of identity adequate to the political achievements of the past thirty years is to be found in K. Sontheimer, *Der unbehagliche Bürger*, Interfrom, Zurich, 1980, especially Chap. V.

<sup>2</sup> A renewed interest in the past and the attempt to rediscover history is not confined to the Federal Republic: the German Democratic Republic has recently shown a surprising concern both with Luther and the Reformation and with some of the achievements of Prussia, e.g. in the time of Frederick the Great.

none of a unitary state. Instead German political development was marked by division and a scattering of political authority amongst states, principalities and provinces. In other words, there has been a powerful federal or confederal tradition.

Both these factors have had an important influence on the development of German methods of government and on the manner in which the problems of government are conceptualised. To consider this matter in more detail requires some historical discussion. Institutional structures and procedures evolve slowly, gradually giving firm shape to particular ideas about law, politics and government. Because the modes of government in a particular society embody beliefs about how government should be structured and the conditions under which it should operate, they often have a capacity for survival and even revival, which is greater than the ability of a specific constellation of political forces to recast them—or to do without them. This argument seems to be borne out by the West German experience where, despite all that has happened in the recent past, the inheritance of ideas about constitutional principles and the structure of governmental institutions derived from the experience of the nineteenth century has proved to be very enduring. In the language and behaviour of present-day government and politics we can still discern the influence and persuasive appeal of some of the major ideas and experiences of the past, and many aspects of the institutions and activity of government in the Federal Republic can be satisfactorily explained only if account is taken of this legacy.

### **The Absence of a Unitary State**

The first point to be discussed is the retention of a federal structure of government. *Prima facie* this is an unexpected state of affairs. The Federal Republic is no larger than Britain and more or less as densely populated. Socially the country is more homogeneous than at any time in the past. The economy is highly integrated on a nation-wide basis, and communications are very well developed. Culturally there are provincial variations, but these are probably less marked than in a number of other European countries of comparable size. Moreover, Western Germany has had no serious problem posed by the claims to special attention of ethnic, linguistic or religious minorities.<sup>3</sup> Yet

<sup>3</sup> The remark requires now to be qualified somewhat by reference to the number of foreigners living in the Federal Republic. In December 1981 this had reached 4,659,482. Many of these were foreign “guest-workers” (*Gastarbeiter*). Their numbers have grown as follows:

government is organised on a decentralised pattern which finds expression in the official title of the state, and which justifies the political scientist in describing it as a federal system.<sup>4</sup> How is this to be explained and how significant is it?

German national unity came late. Until a century ago Germany was a geographical, linguistic and cultural expression. For the purposes of political life and government it was still a collection of separate and independent states. Though the Napoleonic conquest had achieved a major simplification of the political map of Germany, there was in 1815 no basis for a national state. A shadowy confederation was established, the thirty-nine members of which ranged from the two major powers of Prussia and Austria through the middle layer of states like Bavaria and Saxony to minor principalities like Schaumburg-Lippe and Waldeck. Militarily and in other respects all the German states were weak in comparison with Austria and Prussia. But their continued existence was guaranteed by the competition for influence in Germany between these two major powers, and by the commitment of the governments of both of them to the maintenance of dynastic interests throughout Germany. Thus political unification could be achieved in only two ways. One would have been by a revolutionary process sweeping away the existing structure of political authority in all the states. Then the way would have been open to the construction of a new and probably unitary German state. This course was never followed: the memories of 1789 in France and of all that followed weighed too heavily on the German Liberals of the mid-nineteenth century for them to dare embark on a revolutionary adventure. Instead they indulged in constructing a liberal political order in the abstract, until swept away by the only effective powers in Germany, the governments of the major states. After 1848 it was

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1965: 932,932

1970: 1,372,059

1972: 2,316,980

1977: 1,888,585 (Source: Federal Ministry of the Interior.)

The principal countries of origin have been Italy, Spain, Portugal, Yugoslavia and Turkey. Whilst many "guest-workers" do in fact return to their home countries after a few years, a significant proportion has remained (with families) and they constitute in many large cities noticeable ethnic minorities. A very recent phenomenon is the growth in the number of "political refugees" who are really "economic refugees" seeking to take advantage of the West German constitutional guarantee of the right of political asylum. In the course of 1980 efforts had to be made to restrict this kind of inflow.

<sup>4</sup> Some writers on federalism have questioned this, e.g. K.C. Wheare in his *Federal Government* (4th ed., OUP, 1963). But Wheare discusses federalism entirely in Anglo-American terms, paying relatively little attention to Western European federal experience.

more or less certain that only the other course offered hope of unification, that is to say extension of the authority of Prussia at the expense of Austria.

This, of course, is what happened. By 1866 the Prussian Government under Bismarck brought about the expulsion of Austria from internal German affairs. In 1867 a North German Confederation was established, and three years later the way was opened by the Franco-Prussian War for the entry of the four South German states of Bavaria, Baden, Württemberg and Hesse-Darmstadt into this confederation which, from 1871, constituted the revived German Reich or Empire.

But there was something essentially limited about the Bismarckian solution to the problem of political unification. Obviously it did not mean the establishment of a single national state for all Germans: the continuance of the Habsburg Empire was proof enough of that. Nor did it mean a radical reconstruction of the various structures of government which were brought together in the new federal system: there was no sign of a Prussian desire to establish a unitary state in the Empire. Both these facts are explained by the pragmatic and limited purposes pursued by Bismarck. His primary objective was to exclude Austria from the area covered by the old confederation of 1815. Only if this were done could Prussia establish a political order in Germany which would be extensive enough to satisfy *most* national aspirations and at the same time limited enough to avoid disrupting the Habsburg Empire with consequent dangers for the European state system. Moreover, unification on a somewhat restricted basis conveniently assisted in the preservation of Prussian hegemony.

Almost equally important, Bismarck wanted a "conservative" political order to emerge at the end of the unification struggle. Although prepared occasionally and, when it was convenient, to use radical weapons such as universal suffrage, Bismarck never once deviated from his determination to uphold something like the structure of monarchical authority with which he had grown up. True, the political systems of most of the German states had been modified between 1815 and 1871 in the direction of constitutional government with limited representative institutions.<sup>5</sup> Absolute monarchy of the *ancien régime* type was no longer tenable. But the progress towards representative and responsible government was modest, especially in Prussia, and the forces upholding the monarchical forms of government were nearly everywhere strong. Thus Bismarck's conviction

<sup>5</sup> The *ancien régime* survived almost unchanged in a few, e.g. the two Mecklenburgs.

that an authoritarian form of government tempered by constitutionalism could and should be maintained was not at the time entirely unrealistic.

It is this political attitude which really explains why the Empire appeared in the guise of a federal state. To have destroyed or supplanted the existing patchwork of states would have been, even for Bismarck and still more for most of his contemporaries in the Prussian Government, a revolutionary act, subversive of the political order in Prussia itself. Thus, once Austria was out for good, the problem was simply to induce the other states to accept a constitutional structure which would formalise and confirm the predominance of Prussia in, and only in, those functions of government which are inseparable from the notion of a sovereign state, i.e. the control of foreign and defence affairs, the general framework of law and order, and certain areas of taxation. A federal structure was therefore maintained not only for the sake of political stability and in the interests of monarchical rule, but also because the Prussian Government had no interest in assuming more burdens than it needed to in order to ensure the survival of the new state.

The absorption into the Empire of the confederal traditions peculiar to the political coexistence of the German states had important consequences. Most obviously it facilitated the survival of particularism in both government and politics. The retention by the states of administrative autonomy which meant in some fields exclusive powers to legislate (e.g. in education), and in others the right to administer services on behalf of the central government, became the hallmark of German federalism. This control of administration (and a major influence over the allocation of revenue) was the element of "statehood" which the German states insisted on retaining. And, as we shall see later, it is roughly this conception of federalism which is embodied in the constitution of the Federal Republic.

It is difficult to assess exactly what influence the federal structure of the Empire exerted on the development of political parties, if only because so many other factors helped to shape them. Undoubtedly the style of Bismarck's leadership as Chancellor of the Reich and the absence of any serious prospect of parliamentary government at the Reich level had a more decisive effect on the parties than had the specifically federal characteristics of the political structure. Nevertheless, it is reasonable to hold that the retention of federalism assisted in the transfer to the parties of many of the particularist attitudes and interests of the states. In this way there was additional encouragement to the process of division and inter-party conflict

which led to a multi-party system which was later to prove itself singularly unfitted to operate parliamentary government.

German federalism was, therefore, essentially a device which perpetuated into the era of a single national state the particularist habits and traditions of the dynasties and estates which were dominant in the separate states of Germany. It is surprising indeed that it should have shown so much capacity for survival. Originally the Imperial Reich Government had only limited powers and a very sketchy organisation.<sup>6</sup> Gradually it assumed a dominant role in social and economic legislation, and its administrative services expanded. After 1919 under the Weimar Republic these tendencies were more openly encouraged: the constitution limited considerably both the autonomy of the states or *Länder* (reduced in number to seventeen) and their ability to influence or reject legislative proposals put to the Reichstag by the central government. Moreover, the recurrent political and economic crises which beset the Weimar Republic underlined the need for a strong central authority to control the situation. The forces of particularism were to some extent strengthened by the sudden transition from a political system with many authoritarian characteristics to one based on a conscientious translation of all the principles of liberalism into constitutional law. In the short life of the Weimar Republic the central government had to face strong and sometimes violent opposition from political groups of the Left in Saxony and Thuringia, from those of the Right in Bavaria, and from quasi-secessionists in the Rhineland. For the whole period Prussia had a Social Democrat majority in its Landtag, and this led to constant friction between the Reich and the Prussian governments, leading finally to the suspension of the latter by Chancellor v. Papen in 1932. Indeed the imbalance resulting from the preponderance of Prussia (roughly equivalent to two-thirds of the Reich in area and resources) was one of the basic weaknesses of the federal structure.<sup>7</sup> Often it was in the *Länder* that parties built up positions of power which had the effect of increasing the disunity and rate of disintegration in a party system which already,

<sup>6</sup> The Imperial Government developed by an extension of the Imperial Chancellor's Office, from which functional offices were gradually split off, headed by state secretaries. A collegial ministry was never achieved. The position was enormously complicated by the fact that the Chancellor was nearly always Minister President of Prussia, so that eventually the Prussian Government constituted a kind of parallel government, assuming many of the functions of policy-making which properly belonged to the Imperial executive.

<sup>7</sup> An interesting account of the problems of the federal structure before the fall of the Weimar Republic can be found in Arnold Brecht, *Federalism and Regionalism in Germany*, OUP, 1945.