Rainer Pitschas*

Self-Governing Health Care in Germany at the Frontiers of Parliamentary Law**

The Self-Governing German Health Care System and the Federal Joint Committee as an Independent Decision–Making Body of Joint Self Government

I Insurance in Germany

1 The Public and Private Health Care System according to the Law

Illness is one of the risks in our life which most people cannot finance themselves. In Germany, therefore, there exists a provision against illness through statutory health insurance on the one side and by private health insurance on the other side. Almost 86 % of inhabitants are members of the statutory health insurance to which they pay their contributions. They are secured by the compulsory public health insurance funds. The state provides a special allowance *(Beihilfe)* for public servants as a supplement to their income.[1]

According to the Constitution for the Federal Republic of Germany, everybody has the right to life and physical integrity. This does not only include the right not to be harmed by the state but also the right to support and protection; so the state is obliged to ensure a functioning health care system as well. The competencies for regulating health care matters in Germany are founded in Art. 74 § 1 No. 19 and 19a of the Constitution.[2] It contains all the issues of concurrent legislation, as an exception to the rule in federal states that the single state usually has legislative competence. The consequence is that if the federal government legislates on one of these matters, the states generally can no longer legislate on that matter (see Art. 72 of the Constitution). It is, however, for Germany, remarkable that there is no

* Prof. Dr. iur. habil. Dr. h.c. mult. Rainer Pitschas, German University of Administrative Sciences Speyer.

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1 See generally Raimund Waltermann, *Sozialrecht* (12th edn, C. F. Müller 2016, Heidelberg) para 8.

2 *Grundgesetz für die Bundesrepublik Deutschland* vom 23. Mai 1949, Bundesgesetzblatt 1.

global competency for the Federal Government in the area of health care except particularly expressed single competencies.[3]

Against this background, Germany's health care system is the oldest in Europe. It started with Otto von Bismarck's social legislation. This law included the Health Insurance Bill of 1883, the Accident Insurance Bill of 1884 and the Old-Age and Disability Bill of 1889. Initially, the insurance only covered low-income people and government workers, but step for step it would expand to cover the entire population. In contrast to that, the members of a private insurance scheme have earnings above a certain limit even today. Nearly all of the German population is eligible to join a private insurance scheme–. Generally, the private system gives good protection with affordable premiums for young people, allowing doctors to charge firefees and for wider services. However, private insurance charges each family member adult patient premiums and raises the premiums for older patients. Health policy in Germany is therefore currently debating the question of modernising the law and reality of the whole insurance system by introducing unique health insurance for all citizens, like for those in The Netherlands.[4]

2 Statutory Health Care as a Pillar within the Social Insurance System

All in all and from an institutional perspective, health insurance is part of a greater Social Insurance System, also embracing accident insurance, nursing care insurance and pension insurance for all. Part of social insurance is also unemployment insurance, even though the insurance belongs under the statutory labor promotion law.[5]

3 Social Insurance System as a Part of Social Provision in the Modern Social State

In its extent, the social insurance system itself is part of the *Social Prevention System*.[6] The state founded this system to become a modern social state in Europe. The system also includes *Social Welfare* and those social provisions by the state which people receive, for example, in the event of falling a victim of crime.

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[3] See Rainer Pitschas, 'Krankenhausstrukturen – Erschöpfter Föderalstaat?' (2016) 34 Vierteljahresschrift für Sozialrecht 343–354, 349 ff.

[4] See for example Friedrich Breyer, 'Pflege und Gesundheit' in Peter Masuch, Wolfgang Spellbrink, Ulrich Becker, Stephan Leibfried (eds), *Grundlagen und Herausforderungen des Sozialstaats – Denkschrift 60 Jahre Bundessozialgericht,* Band 1 – Eigenheiten und Zukunft von Sozialpolitik und Sozialrecht (Erich Schmidt 2014, Berlin) 729–749.

[5] Waltermann (n 1) 35–39, 190–192.

[6] See generally Rainer Pitschas, 'Soziale Sicherheit durch Vorsorge-Sicherheit als Verfassungsprinzip des Sozialstaats' und das Vorsorgeverhältnis als rechtliches Gehäuse ihrer Vorsorgestandards' in Ulrich Becker (ed), *Rechtsdogmatik und Rechtsvergleich im Sozialrecht I* (Nomos 2010, Baden-Baden) 63–106.

II Statutory Health Insurance as a Self-governing System

1 Regulation of the Health Care System by Parliamentary Public Law

Statutory Health Insurance is actually performed by more than thirty *health care funds.* The work of these funds is directed by the regulation of parliamentary public law at the federal level. The Ministry of Health regulates at the federal level, whereas the Ministries of Labour and Social Affairs regulate at the state level. The tasks of the Ministry of Health are to create bills, regulations and administrative provisions.

Another very important aspect is the maintenance of an *effective* statutory health insurance scheme, which includes economic aspects as well as strengthening the rights of patients. Furthermore, the Ministries of Health on both levels are responsible for prevention, health protection, disease control and bio-medicine. Apart from that, they set the framework for the production of pharmaceuticals and medical products.

In the first line it is the Federal Government which thus specifies the legal framework for the statutory health insurance system. The health care fund's benefits are provided according to that legal framework. More than that, all the health care funds, as well as all the other institutions within the circle of health care provision, are bounded, unlike private health insurance, to the principles of *solidarity* and social *equalisation.*

2 Self-Government within the Scope of Statutory Health Insurance by Health Funds

However, the insurance providers are independent and self-governing institutions. That means they have the power to bargain with hospital or medical associations and with physicians and dentists, because the providers of health care services and purchasers are completely separated.

'Self-Government' for them means within the scope of statuary health care insurance system to exercise their duties in an independent manor and without orders from Government. The insurance funds are thus a species of non-governmental organisations, working in their own responsibility and jurisdiction like autonomous entities. They have to consider the principles of solidarity and social equalization, as well as the rights of patients who are members of a sickness fund, but they do their business under the statutory *supervision* of the Federal Ministry of Health and/or the State Government.[7]

As already mentioned, more than thirty different self-governed public sickness funds exist in Germany. All of them compete with each other. The members of each fund have to pay a contribution of 14.6 % of their monthly income and – as an additional contribution –

[7] See, for example Rainer Pitschas, 'Abgrenzung der Aufsichtszuständigkeiten in der gesetzlichen Krankenversicherung gem. Art. 87 Abs. 2 S. 2 GG' (2016) 25 Neue Zeitschrift für Sozialrecht 321– 28, 322–323.

0.9 % on average as a supplement. There is a ceiling by law, but in some funds it is possible to have to pay some further contributions on top.

Through so-called 'social elections' the members of a sickness fund can elect their representatives, who will choose the executive board of the Fund. However, this form of representing the interests of patients is ineffective.

3 Autonomous 'Umbrella-Organisations' for a Self-governing German Health Care System

On the top of the health insurance funds, we also find furthermore autonomous organisations as public legal entities consisting of the health policy of funds in this sector. In addition to this construction, there are also the National Associations of Physicians and Dentists as well as the German Hospital Federation. They work together in the German *Central Federal Association of Health Insurance Funds.* Its main goal is to ensure, by distributing the premiums, the principal that every citizen receives the necessary health care services independent of his income. That is the consequence of the principle of solidarity and the welfare state.

Another important aspect is that health care services have to be carried out according to the human dignity and the free will of the patient. The Central Federal Association of Health Insurance Funds is in that way something like an 'Umbrella Organisation' for health care provision in Germany.

4 The Central Health Care Fund

Since January 1st 2009, this complimentary *Central Health Care Fund* which is collecting all the contributions from the sickness funds' members has continued to exist.[8] The contribution rates of the insured persons go directly to the Central Fund and the Federal Government grants up to 14 billion Euros each year to cover the remaining expenditures by the health care funds. The allocated rate, which is paid back to the insurance providers out of the fund for each insured person, depends on their age, sex, and possible health risks. In the event that the insurance providers cannot cover their costs using this allocated rate, they can charge an additional input from their members (2016: up to 0.9 % extra contribution per month).

5 Regulatory Decision-making by Settlement of Guidelines

The *Statutory Health Insurance Funds* and especially the *Central Federal Association of Health Insurance Funds* take part in the regulatory decision-making by self-governed settlement of guidelines in so-called *norm-replacing treaties:* At least two different

[8] Arndt Schmehl, 'Gesundheitsfonds, Finanz- und Risikoausgleiche' in Helge Sodan (ed), *Handbuch des Krankenversicherungsrechts* (CH Beck 2010, München) para 39 C.

associations enter in to an agreement on the details of health care and this contract has a regulatory effect; it works like a public law norm.[9]

III The Federal Joint Committee as an Independent Autonomous Body of Joint Self-Government within the Health Care System

1 The Federal Joint Committee: What It Is and What It Does

The *Federal Joint Committee* is a public legal entity comprising the leading umbrella organisations of the self-governing German health care system described earlier, The National Association of Statutory Health Insurance on the side of physicians and dentists, the German Hospital Federation and the Central Federal Association of Health Insurance Funds form the Committee.[10] In addition to these four pillar organisations, patient representatives also participate in all the sessions of the Committee. They are entitled to put topics on the agenda, but not to vote. Other participants in discussions of the Joint Committee are the federal counties, although they are not allowed by the law to do so[11], and private health care insurance provides, for example. However, they are also not entitled to put topics on the agenda.

The *Joint Committee* has an interesting history of development. It was established on 1st January 2004. As a result of the health care modernisation act, it took over the mandates of its predecessor organisations. As such, it is an outstanding example of the increasing centralization of self-government in the social sector and of loosening its own roots. However, following same path, the *Committee (Gemeinsamer Bundesausschuss / G-BA)* became the highest decision-making body of the joint self-government of physicians, dentists, hospitals and health insurance funds in Germany: The Committee issues directives for the benefit-catalogue of the statutory funds in Germany for more than 70 million insured persons and specifies which services in medical care have to be reimbursed by the funds *(Gesetzliche Krankenversicherung / GKV)* from the central health care fund.

In addition to that, the G-BA specifies measures (public law norms instead of parliamentary law and settlement of guidelines by contract) for quality assurance as well as in in-patient and out-patient areas of the health care system. So what is the G-BA really? And what it its function at the core of health governance?

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[9] See generally Peter Axer, *Normsetzung der Exekutive in der Sozialversicherung* (Mohr-Siebeck 2000, Tübingen) 52–95.

[10] See generally § 91 Abs. 1 Satz 1 German Social Code, Book 5 (SGB V) from 2017.

[11] See Winfried Kluth, *Der Gemeinsame Bundesausschuss (G-BA) nach § 91 SGB V aus der Perspektive des Verfassungsrechts: Aufgaben, Funktionen und Legitimation* (Duncker & Humblot 2015, Berlin) 96–98.

2 The Federal Joint Committee as an Unspecified Public Legal Entity

From the standpoint of modern administrative law, the *Federal Joint Committee* is a public legal entity comprising the four leading umbrella organisations of the self-governing health care system.[12] As mentioned the Committee was established on 1 January 2004 as a result of the health care modernisation act. It took over the mandates of the predecessor organisations and began its third term of office on 1 July 2008; the fourth term started on 1 July 2012.

The Committee is the highest decision-making body of the joint self-government of physicians, dentists, hospitals and health insurance funds in Germany. It issues directives for the benefit catalogue of the statutory health insurance funds and specifies which services and medical care have to be reimbursed by the Central Health Care Fund.

As with many organisations in the field of social insurance, the Committee works under the statutory supervision of the Federal Ministry of Health. It is a legal supervision. Resolutions and directives passed by the G-BA are audited by the Federal Ministry in accordance with the requirements set forth in the law and then published in the Federal Gazette, if no objections are found. However, the latest amendment of the social law code has brought intensified functional supervision concerning the financing data of the Committee and its budget – a new effort to control the decisions of the Committee by strengthening financial oversight.[13]

3 Structure, Members and Patient Involvement

a) In accordance with the requirements set forth in the German social code, book five (SGB V), the Resolutions Committees of the Federal Joint Committee (= Plenum) comprises 13 members:

– One impartial chair – at the same time Chairman of the Committee – and two impartial members (the impartials)
– Five members appointed by the Central Federal Association of Health Insurance Funds
– Two members appointed by the German Hospital Federation (GKG)
– Two members appointed by the National Association of Statutory Health Insurance Physicians (KBV)
– One member appointed by the National Association of Statutory Health Insurance Dentists (KZBV)

The term of office of each plenum member is six years. Myself, I am the Deputy of the Impartial Chair.

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[12] Reimund Schmidt, De Caluwe, 'Kommentierung zu § 91 SGB V' in Ulrich Becker, Thorsten Kingreen (eds), *SGB V – gesetzliche Krankenversicherung. Kommentar* (4th edn, CH Beck 2014, Berlin) para 91 n. 10.

[13] Rainer Pitschas, 'Auswirkungen des Selbstverwaltungsstärkungsgesetzes auf den Gemeinsamen Bundesausschuss (G-BA)' (2017) 69 (4) Kranken- und Pflegeversicherung (be published).

The members appointed by the pillar organisations to the G-BA, as well as the proxies, work in an honorary capacity.

The impartial chair represents the G-BA judicially and extra-judicially, shares supplementary sessions and works with the other impartial members to prepare the sessions. Along with the management board, the chair is also responsible for ensuring the budget and staffing plan of G-BA.

In addition to their responsibilities in the plenum, the three impartial chairs are directing the sub-committees of the G-BA. Based on proposals submitted by the impartials, the plenum appoints the chairs and proxies for each subcommittee. Each impartial has a primary and secondary deputy to fulfill his or her responsibilities and exercise his or her rights if the impartial is prevented from doing so.

b) In accordance with the regulations set forth in the German Social Code (Book 5, SGB V), leading nationwide advocacy groups that represent patient interests or facilitate self-help for people in Germany who are chronically ill or have disabilities are entitled to take part in discussions and submit petitions, but not to vote.

The following patient groups and self-help-organizations are currently entitled to appoint patient representatives:

– The German Council of People with disabilities
– The Federal Syndicate of Patient Interest Groups
– The German Syndicate of Self-Help Groups
– The Federation of German Consumer Organisations.

These groups and the people they represent reflect the diversity of patient interests and self-governed organisations in Germany. Upon request, the Federal Ministry of Health can recognise additional organizations that are not members of the federations mentioned above as leading nationwide advocacy groups.

c) The plenum of the G-BA appoints *Sub-Committees* to prepare decisions and resolutions. These Sub-Committees consist of one impartial chair, six representatives from the umbrella organisations of the statutory health insurance providers and a total of 6 representatives from the umbrella organisation of care-providers (the German Hospital Federation and the National Associations of Statutory Health Insurance Physicians and Dentists). The German Hospital Federation and the National Associations of Statutory Health Insurance, Physicians and Dentists appoint two Representatives each, unless the plenum determines a different structure based on the tasks of that Sub-Committee.

Patient Representatives are also present at Sub-Committee meeting and take part in the discussions. Representatives from other organisations and federations are involved as required and experts brought in as needed. Unlike the plenum, Sub-Committees meet only in closed sessions. They draft the results of their discussions as recommended resolutions for the plenum. But I suppose, the in-transparent way of decision-finding is not to justify.

IV Legal Mandate, Procedures

a) The *legal basis* for the work of the *Joint Committee* is, as mentioned, the German social code, Book 5 (SGB V).[14] Herein lawmakers have specified the mandates and responsibilities of the G-BA, the appointment of its members, patient involvement, the inclusion of third parties and the general framework of the structures and procedures of the Committee. In its bylaws and rules of procedures – both of which must be approved of the Federal Ministry of Health – the Committee defines the details of this statutory regulations.

Although the legislator provides the framework, it is the duty of the self-government to fill out this framework and to ensure that the legal instructions are practically implemented in every days work. The legal basis for this can be found although in the Social Code Book 5 (§ 92).

b) The directives in this way concluded by the Committee have the character of sublegal norms. In other words, they apply to the statutory health insurance funds and to persons insured by these funds. At the same time, patients, responsible physicians and other service-providers are also bound as parties. In that manner, non-legislative norms are binding upon all stakeholders in the statutory health insurance system. In accordance with the requirements in the SGB V, all resolutions and directives passed by the Federal Joint Committee are audited by the Federal Ministry of Health and then published in the Federal Gazette if no objections are found.

So what is the result? The Federal Joint Committee is of course not a subordinate agency of the Federal Ministry of Health; it is a discrete public legal entity. However, it creates its own health policy in Germany by the settlement of law – perhaps in contrast to the parliamentary order.[15]

V Autonomous Joint Self-Government: Asking after the Rule of Law and the Problem of Democratic Legitimation

Let me sum up. Co-Operatism and Self-Government are fundamental organisational principles for the construction and successful work of the Public Health Service in Germany. However, to navigate a compromise between several pressure groups on difficult questions about the distribution of financial and other resources of health care for everybody, as well as to guarantee its effectiveness and efficiency is a very complicated and extreme point of controversy. To resolve these questions is the main task of the joint self-government of physicians, dentists, hospitals and health insurance funds.

[14] Consider Kluth (n 11) 11–27, 39–60, 90–104.
[15] Compare Kluth (n 11) 90–104.

With regard to this problem, the actual construction of the Federal Joint Committee ensures, on the one side and without any doubt, 'social peace' in Germany by granting a minimum of financial resourcing for providing health care. However, on the other side there is a wide range of factors which cry for the situation to change. By reflecting the needs for the developing structures of self-government, we have to take particular notice of:

– increasing centralisation of decision-making bodies in statuary healthcare
– ongoing professional guidance by specialised institutes (in Germany: Institute for Quality and Efficiency in Health Care)
– increasing participation of counties in decision-making and the problem of outsiders
– the common good versus competitive health care
– settlement of norms in public law by the Federal Joint Committee and the influence of supervision in relation with the role of parliament and the rule of law.

These and other observations form a challenge to reflect the principles of 'corporatism' and 'self-government'.[16] That means, for example, discussing both boundaries and public law at its boundaries with regard to the function and role of professional corporations in joint self-government for providing health care. Among those questions, the boundary between law and politics, viewed from a public law perspective, and also the scope of settling public law norms by self-government seem to be of particular interest.

VI Summary

Health care in Germany by statutory health insurance funds within a self-governing health care system is far from perfect, as we learn from the example of the *Federal Joint Committee,* the highest self-governing and independent decision-making body of joint self-government. It is a real 'bureaucratic monster'. The construction of autonomous service provision as a self-governing system was once thought of as a step into flexibility of decision making during the day-today-business. Nevertheless, the settlement of exigent public law norms by self-governed entities and the way of decision-making by integrating 'outsiders' has driven the whole statutory health insurance constellation into a vicious circle of unstable contribution rates as a consequence of competition, into a movement away from the principle of solidarity and to changing ways of financing statutory health insurance. In my opinion we need a new construction for representing patients' interests in health care and to take responsibility for it – but not under an institution like the G-BA.

[16] For the discussion of these topics see Rainer Pitschas, 'Dezentrale Regulierung des deutschen Gesundheitswesens. Der "Gemeinsame Bundesausschuss (G-BA)" als rechtsetzende Regulierungsagentur' in Korea Public Land Law Association (ed), *Verwaltungsrechtssystem und Verwaltungswissenschaft. Essays in Honour of Prof. Dr. Hae-Ryoung Kim* (Hanyang University 2016, Korea/Seoul) 467–481.