

OBJECTIVES AND RESULTS OF GERMANY'S TWO FEDERALISM REFORMS, 2006 AND 2009

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1. THE SOCIAL AND POLITICAL “ENVIRONMENT” OF GERMANY'S FEDERALISM REFORMS

Before I come to the objectives and results of Germany's federalism reforms some information on the background of these reforms – especially the type of federalism we have in Germany and the attitude of Germans towards federalism is necessary. Let's first look at what I call Germany's federalism without federalists. In Germany in the absence of politicised regional minorities or regions which see themselves as nations, federalism is not a tool to hold the country together. The only justification for federalism in Germany is power-sharing, or a check on federal power to strengthen German democracy. This is what the Allied powers had in mind when they would only allow a German constitution which was based on a vertical separation of powers in addition to the traditional horizontal separation of powers. The German Constitution gives federalism a privileged place. No majority in Parliament can ever transform Germany from a federal into a unitary state under this constitution. So, in theory democracy and federalism should reinforce each other. In day-to-day political practice they are, however, divorced.

For German citizens federalism has two faces: one is the regional government and a relatively powerless regional parliament and the other is public administration which is almost exclusively the responsibility of the Länder. Public policies which have to be coordinated between the Länder and the federal government and which may in the case of an exclusive Länder competence even differ from Land to Land are seen by a majority of Germans as badly organized. Federalism in its essence is perceived, as opinion polls tell us, by a majority of Germans as a complicated way to govern Germany with dubious results. Germans feel emotionally attached to their regions, they are

proud of their dialects and regional history, but this does not transform into politics. No Land politician could win an election with an agenda favouring more competences for his or her Land.

Germany is characterized by a federalism paradox. When asked in opinion polls, Germans want strong Länder. In the same polls a majority of respondents says “no”, when asked whether the Länder should be responsible for education policies, social policies or any other policy. They believe these responsibilities should be exercised on the federal level, irrespective of the current distribution of responsibilities between the federal level and the Länder. Otherwise, so the argument goes, living conditions in Germany would be unequal. And this is seen as unfair. What Germans seem to want is federalism without diversity, or uniformity of policy outcomes and at the same time they want to keep their Länder. The welfare state and its demands for equality of outcomes have since the end of the Second World War overwhelmed the principles of federalism. Civil society believes in centralism with regard to policy-making and federalism has become, similar to the European Union, a project of the political elites. Reforms of German federalism are therefore not driven by the discontent of the voters. Much more important is political expediency. Reforms were driven by the political necessity to remove some of the obstacles for a smooth working of political institutions in Germany. As two-thirds majority in Parliament and the Bundesrat, where the Länder executives sit, were necessary for a change of the constitution, political compromise was unavoidable. The Länder executives were involved in the bargaining process. So they could secure some gains for the Länder, which were intended to make federalism more meaningful again. The Länder are, however, no homogenous group. There are the rich and the poor ones, the ones in the East and the ones in the West. The richer Länder are more self-reliant, the poorer Länder believe that they need the federal government to survive. These different views strongly influences their inclination to fight for Länder autonomy.

Another background factor, mentioned already, which puts federalism reforms in Germany in perspective is the functional nature of Germany’s federalism. This means that the federal level is responsible for the lion’s share of legislation whereas the administration of laws is almost exclusively the domain of the

Länder administrations. So federalism reform has two logical starting points, one is the organisation of public administration and the financial responsibilities for political programmes and the other is the role of the Bundesrat in federal legislation and the fact that much of this legislation has created joint responsibilities of the federal government and the Länder. In addition, these days the European Union with its tendency to take powers away from the Länder is an issue in federalism discourses. An honest evaluation of the future of Germany's federalism should admit that the threat to Länder autonomy by the process of European integration is much less under Länder control than the negative effects consequences of what the Länder see as national political centralization.

A last factor which is of great importance for federalism reforms in Germany should also be mentioned: The rulings of the German Federal Constitutional Court. Only when this Court struck down federal legislation, because it infringed on Länder competences, German federal lawmakers saw the need for constitutional clarification. Much more than by the arguments of social scientists or economists, who had for a decade produced ideas for federalism reform, German politicians were and are impressed by the opinions of the Federal Constitutional Court, when they have to decide whether or not to start a process of political reform.

In part due to the nature of these reforms, the discourse of federalism reform¹ was dominated by the law profession. Federalism reform² was based on the views of economists. When it came to the justification for the need for reforms, long-forgotten themes of democracy and federalism were rediscovered and served as the story behind the reforms. The prime minister of Bavaria, Edmund Stoiber, christened federalism reform I, "the mother of all reforms". In the real world of political bargaining this rhetoric disappeared almost immediately after it had been presented to a wider public in Parliament where it provided an explanation for the need for reform.

2. FEDERALISM REFORM I, 2006

Federalism Reform¹ had six aims, which I will discuss now in greater detail:

1. The separation and reallocation of a considerable number of joint competences of the federal level and the Länder level.
2. More transparency of political decision-making and of constitutional rules in order to increase the legitimacy of federalism and to make its institutions more popular.
3. The Land Parliaments should become more autonomous.
4. The centralized tax system should to some degree be reformed to give the Länder greater responsibilities for raising taxes. The provisions for joint financial responsibilities of the federal level and the Länder should be reduced.
5. A political majority for opposition parties in the Bundesrat should in the future have fewer opportunities to stop federal legislation.
6. German federalism should be made fit for European integration.

2.1 SEPARATION OF COMPETENCES

A first step to separate federal and Land competences was to eliminate a special type of legislation from the constitution – the so-called framework legislation. This worked like a EU directive. The federal level agreed on a policy framework, and it was up to the Länder to find Land solutions in the context of this predefined set of rules. The problem with framework legislation, was, however, that the federal level tended to define the set of rules for the Länder so narrowly that for them no policy options were left. For example, a federal law was passed which made student fees illegal. Obviously this left no alternative options for the Länder parliaments. The Federal Constitutional Court, by the way, ruled that this federal law was for this very reason unconstitutional. The competences which used to be subject to framework legislation were not given exclusively to the federal or the Land level, which would have been in the spirit of a separation of competences, but ended also up in another category of joint federal-Land legislation.

This type of legislation is based on the assumption that if the constitution does not explicitly list a certain competence as belonging exclusively to the federal level, this competence is a Land competence. There is a list of competences in the German constitution for which this is the case, but with a very important restriction. Whenever the federal level in order to secure social, legal and economic unity of the state wants to use a competence on the list, the federal government is entitled to do so. The intervention of the federal government is, however, not the exception, but has become the rule. In other words all the competences listed in the constitution to which the federal government has access with the argument that this serves the common good have by now become federal competences.

Before federalism reform¹ this meant, however, that a majority of the Bundesrat, where the Länder executives sit, was needed to pass this legislation. After federalism reform¹ some competences were exempted from Bundesrat approval, others remained under this rule, and also a third category of legislation was created in this context, a kind of opt-out legislation. What does this mean? It means that with regard to six competences concerning legislation on environmental issue and some issues connected with education at universities the federal level may claim its competence and pass a new law. Each Land has then, however, the right to pass legislation which differs from the federal law. Those Länder which decide to opt-out then have their own rules, for the others the federal law is binding. The federal level is entitled to pass again a new law. If a Land wants to opt-out again it has to pass also a new law. Always the last law passed is binding for a Land, be it the federal or the Land law (lex posterior rule).

This is on the one hand quite a spectacular innovation for legislative decision-making in Germany. For the first time in the history of the Federal Republic Land legislation takes precedence over federal legislation, contrary to what the constitution stipulates. On the other hand, this change of principles has in practical terms not much impact on German policy-making. It effects only six policy fields, as mentioned, which are mostly of minor importance (as law-making on hunting) or are not exclusively under national control, because of EU competences (as environmental policies). The new opportunities for the Länder

have so far led only to some adjustments with regard to Land laws on hunting. This policy field is of marginal importance for the German public which did not even notice the opt-outs.

More important with regard to the separation of competences of the federal level and the Länder are the new rules for Germany's functional federalism. The Bundesrat often had a veto on federal legislation (though it rarely used it), because of the responsibility of the Länder for public administration. The Bundesrat worked on the assumption that whenever the Länder were involved in the administration of a law, their consent to federal legislation was needed. This was even assumed when the part on administration in a revised bill introduced in Parliament did not change and changes were only made in the policy part of the bill which affected an exclusive competence of the federal level.

Federalism reform¹ intended to separate federal and Land responsibilities with regard to the administration of laws more clearly. Now, only in exceptional cases the federal level when making laws also makes rules on the organisation of the execution of this law. This reduces the role of the Länder in federal legislation. The Länder are now more autonomous in the organisation of their public administration. The price they pay is: they have less influence on federal legislation. Should the federal level still decide to make laws which infringe on the autonomy of the Länder when executing federal law, the Länder are entitled to opt out and make their own rules. This is a device which works in parallel to the opt-out legislation which I have just described: lex posterior rule etc.

A last element of federalism reform¹ concerning the idea of a better separation of competences of the federal and the Land level focuses on the political use of financial instruments by the federal level. It is now forbidden that the federal government co-finances policies which are in the exclusive competence of the Länder (no cooperation rule). Why? In the past the federal level had used financial incentives even in policy fields where it had no competences to steer Länder politics. As we will see this is a mixed blessing for the Länder, they gain autonomy, but because of their budgetary problems, which they cannot solve on

the income side, because of a lack of tax powers, they lose much needed federal funds.

2.2. MORE TRANSPARENCY

If one tries to understand the reform measures I just explained and if one takes into account others which I will present later, it is obvious and will become even more so that the average German citizen is neither interested in these, in his view, technical details which are called reforms, nor will he be able to make sense of them. No German politician tried to connect the reforms with the idea of bringing democracy via the Länder closer to the people. Though there was this rhetoric of the “mother of all reforms” federalism reform¹ is a typical political compromise with package deals which look ugly from the outside, but are seen as political works of art by insiders. How serious the German political elite took their major reform project as a step to more democracy was best illustrated by the fact that the reform went through Parliament when the whole of Germany enjoyed the soccer world cup 2006 in Germany – a good time to bury news not to spread them.

In addition to a lack of transparency of federalism reform¹ there was a great amount of distrust between all parties involved in the reform process, especially with regard to the financial consequences of the reform. The result was that even agreements on one-time payments when federal-Land co-financing was to be phased out – I come to this point later – were given constitutional status. They were written into the constitution so that no government with a majority in Parliament and Bundesrat could alter it. Changes of the constitution need a two-thirds majority in both institutions, which guarantees in this case the status quo. The victim of this strategy is the constitution. Its article 143c now looks like a shopping list.

2.3. MORE AUTONOMY FOR THE LAND PARLIAMENTS

As mentioned above, some of the competences which used to be listed under framework legislation in the German constitution, but also some others which were part of the legislation which the federal could take over from the Länder as described above, were given to the Länder as a consequence of federalism reform¹. The idea was, to strengthen the role of the Länder in the political process and to give the Land parliaments a broader scope of legislation. In the past this had been reduced to not much more but the media, education, culture, police and public administration.

The new Länder competences as a result of federalism reform¹ are of minor political importance, but in some cases for citizens highly visible: They are: closing hours of shops, administration of prisons, legislation concerning meetings in public, homes for old age pensioners and other social groups, restaurants (including no smoking rules), gambling halls, fairs, exhibitions (also of persons), markets, some aspects of housing policies, purchase of agricultural land and land lease, “social” noise of children, sports events etc., salaries of Land civil servants and their career patterns, laws on universities and the building of universities, and laws concerning journalism.

We had hot public debates in Germany on no-smoking rules and shop closing hours. For budgetary reasons the autonomy the Länder now have with regard to the salaries and pensions of their civil servants is for them of major importance. Unsurprisingly in a federal country without federalists, the first reaction of the governments of the Länder and Land parliaments was, when they got their new competences, should we not co-ordinate our legislation with that of the other Länder to avoid differences between the Länder. Though we now have different no-smoking rules in the Länder, most Germans believe that this is a bad thing and that there should be uniform rules for the whole of Germany. One could even hear the argument that visitors to Germany should not be confused by too much diversity. There was a public outcry when the Land of Hesse offered better salaries than the neighbouring Länder to attract teachers which whose supply was short everywhere. Regional diversity in German politics is still the

exception and affects only issues of minor importance, the new federal law opt-outs are, as mentioned, also only rarely used by the Länder.

2.4. FINANCIAL AUTONOMY FOR THE LÄNDER?

Before I come to the marginal reforms in the financial relations between the federal level and the Länder as a result of federalism reform¹, a brief remark on the situation before the reform is necessary. In Germany tax laws are almost exclusively made on the federal level. In addition, about 75 per cent of all tax income is created by taxes jointly administered by the federal and the Land level (income tax, corporate tax and VAT). This tax income is then shared out according to certain formulas to the federal government and the Länder. The systems as such as well as details of this system are virtually unknown to ordinary citizens. Neither the federal government, nor the Länder have tax autonomy. The Länder have no control over levels of taxation, with the exception of local taxes.

In this situation radical solutions in the context of federalism reform¹ seemed impossible, for example tax autonomy with regard to certain taxes for the Länder, although this is the only way to create a meaningful correspondence between income and expenditures on the Land level. The poorer Länder have no incentive to shoulder responsibility for their income. After federalism reform 1 with a long adjustment period until 2019 the federal level will now stop the co-financing of the building of universities and university hospitals, of local streets and of incentives for the building of council houses. A general fiscal reform was postponed. Federalism reform² was to deal with this matter.

Federalism reform¹ clarified, however, the problem of unfunded mandates, i.e. the phenomenon that the federal level legislates and then local government has to cover the cost of legislation. The federal level is now no longer allowed to create mandates for local government with financial consequences.

2.5. REFORM OF THE BUNDESRAT

An important incentive for federalism reform¹ was to reduce the veto power of the Bundesrat. This was in the interest of the federal government. Governments want to govern with their parliamentary majority, and do not want to be held up by an opposition majority of Länder executives in the Bundesrat. I have already mentioned one important device used to come closer to this goal, namely the separation of powers in the field of public administration. In this way the Länder should in a smaller number of cases be in a position to claim that their competences were affected by federal legislation which then automatically entitles them, if they wish so in their majority, to a veto in the Bundesrat. Whether this reform reached its quantitative goal to reduce the number of bills for which the Bundesrat has a veto from about 60% to about 30% is – from the numbers we have after reform – not exactly clear.

But even if this was the case, does it matter? The answer is no, because quantitative reduction of bills which need the consent of the Bundesrat is of secondary importance. Bills includes many policies or changes of law which are of minor importance or uncontroversial. What really matters is that because of interconnected policy-making in Germany very important policy fields with a high political profile, such as health policies or tax policies still need the consent of the Bundesrat. In addition, federalism reform¹ has also widened the field for a Bundesrat veto, because now the Bundesrat has to agree to federal legislation when federal legislation implies the transfer of money or money equivalents, including services, to a third party. And many laws have such financial consequences.

2.6. FEDERALISM FIT FOR EUROPE?

Nothing much happened in this respect. The German Länder are still not part of the permanent representation of Germany in Brussels. They have their own offices, which they regard as quasi-embassies and which the federal government sees more as information offices. And the Länder compete with one another and the federal government for the attention of EU institutions. German federalism remains unco-ordinated in Brussels, and the Länder have not found a way to stop the transfer of powers to Brussels. Whether subsidiarity

control and/or legal proceedings at the European Court, as guaranteed by the Lisbon Treaty, will bring some relieve here, we will have to see. In many cases, for example with regard to the media competence of the Länder, the Lisbon Treaty comes much too late.

Federalism reform¹ was, however, concrete on the consequences of Germany's EU-membership for the Länder. They now have to share the financial burden, if Germany is punished by the EU for violating the Maastricht criteria or if the European Court fines Germany for non-compliance with a directive or an order.

Federalism reform¹ was also concrete regarding the right of the Länder to speak for Germany in the Council of Ministers. This used to be the case whenever Länder competences are affected. The new paragraph in the German constitution is now more precise and allows a representation of Germany by the Länder when the following policy fields are on the agenda of the Council of Ministers: education in schools, culture, media.

No fresh ideas regarding EU-policy co-ordination at home or in Brussels found its way into the constitution. Informally and as a result of a ruling of the Federal Court concerning the Lisbon treaty there is some change here, especially with regard to the flow of information to the Länder, which is faster now, and the Bundesrat is involved in any legislation that changes EU procedures, but at the time of decision-making on federalism reform¹ no-one seemed to have been willing to put more energy into the question EU matters.

2.7. FEDERALISM REFORM¹- WHAT KIND OF REFORM?

Federalism Reform¹ was certainly not a very bold step to transform Germany's federalism. It adjusted some minor rules of federal-Land co-operation and had the new idea of a very restricted policy opt-out for the Länder, but changed very little with regard to the unitary nature of German federalism. At the background of the reform process there was always the question, why should politicians invest political capital in a reform the population was not interested in and which wins them no election? Federalism reform¹ was a top-down reform of political

executives, although officially the Parliament and the Länder executives negotiated. In the end, two civil servants, as ghost writers of the leading politicians of the two major parties, which were about to form a grand coalition, wrote down the reforms.

2.8. FEDERALISM REFORM1 CREATES NEW PROBLEMS

The idea that a separation of powers would be good for federalism, that it would increase democratic responsiveness and would give the Länder parliaments new powers, soon ran into the most important obstacle of all, the lack of financial resources on the Land level. There are several examples for this problem. I will talk only about one here.

Let me illustrate my case with regard to the guarantee of access to nursery schools for all children in Germany. Nursery schools are the responsibility of local governments. As unfunded mandates are no longer allowed, in theory the federal level could not make such a law which forces local government to provide funds for the execution of a federal law. In addition, the federal level could also not make such a law for another reason, it infringes on Länder competences.

But all political parties wanted such a guarantee of general access to nursery schools for German children. Both the Länder and local governments were, however, unable to cover the costs this was to cause. The federal level was willing to pay, but federalism reform1 did no longer allow federal intervention.

The result was not another constitutional change, or a revision of federalism reform1, but a procedure to circumvent the constitution. How was it done? Step 1: the federal government creates a special budget for public investments. The Länder can apply for subsidies to invest in buildings. When the Länder receive this money they pass it on to their local governments which have now the resources to build nursery schools. Step 2: School buildings without staff are nonsense. One has to find a way to pay staff salaries. So the federal level transfers VAT income to the fiscal equalisation fund which transfers resources to the Länder. In theory and from a legal point-of-view, the Länder are free to do

whatever they want to do with more money from the federal level as part of fiscal equalisation. To avoid that the Länder use this freedom, an administrative agreement between the federal government and the Länder was signed which forces the latter to use the new money for salaries of the staff of nursery schools. This agreement is, of course, in a legal sense void, but as all parties accepted it, it will not be challenged in Court. After all, everybody involved knew that the only purpose of this whole procedure was to break constitutional law.

3. FEDERALISM REFORM2, 2009

As mentioned, the great hope with regard to federalism reform2 was that it would add a separation of financial powers to the separation of competences aimed at by federalism reform1. It was also to deal with financial equalisation between the Länder and between the federal level and the Länder, which at the moment creates no positive incentives for fiscal prudence of a single Land. Those Länder which are successful have to transfer the lion's share of their above average income to the poorer ones, and if the poorer Länder make no efforts to improve their lot, the other Länder and the federal government guarantee that in the end they have just as many resources and in some cases more than the economically more successful Länder. Plans were also made for a new system with regard to the beneficiary (Länder or the federal level) of tax receipts.

As there was a general fear in each Land (and especially the poorer ones) that it could be one of the losers if the topics just mentioned came on the conference table, in 2009 no reform of the organisation of financial relations in German federalism was possible. Instead - inspired by pressures from Brussels - the idea of a mechanism to avoid annual budget deficits moved into the focus of the attention of reformers. This is, at least at first sight, of course, no federalism issue. The only federal aspect deficit controls have is that in Germany the public deficit in the Eurostat definition is made up of the federal deficit, the Länder and local government deficits and the deficits of all types of social insurance.

With federalism reform² in 2009 German politicians invented a device which should help them to overcome their own inability to balance the annual budget without new debt. I will not go into detail regarding the Keynesian assumptions this reform implies or its over reliance on mathematical models of economists. From the perspective of German federalism six aspects are important:

1. The imbalance regarding the right to go into debt when the federal level and the Länder are compared
2. The aid to Länder in need
3. More joint policy-making
4. A lack of enforcement of the deficit rules
5. The budgetary competences of the Land parliaments were ignored
6. The threat to federalism in Germany.

1. What is a balanced budget?

According to federalism reform² for every political level a budget is balanced when it is balanced over the economic cycle. In addition, the federal government is, however, allowed a deficit of 0.35% of GDP, and the federal budget is still classified as balanced. The reform argues the federal level needs to be able to start new political initiatives and for this reason it is allowed to declare an imbalanced budget as balanced. The Länder are not seen in the same category. For them, apart from the influence of the economic cycle mentioned, a zero deficit is prescribed. The federal government has to balance its budget in 2016, the Länder in 2020, if no catastrophic circumstances arise which force an exception to this rule.

2. Aid to poor Länder

Four Länder: Saarland, Berlin, Sachsen-Anhalt and Schleswig-Holstein, will receive 800 Million Euros annually from the other Länder and the federal government to enable them to balance their budgets by 2020. This aid will be monitored annually by the Stability Council, an institution to which I come in a minute. The Council can sanction any of these Länder if they do not use their resources according to the rules. Sanctions include the repayment of money

received. Whatever these four Länder do, they still have to stick to the 2020 balanced budget aim.

3. More joint policy-making

Federalism reform¹ had as one of its aims the separation of powers. The membership of the Stability Council has just the opposite effect. The Council consists of the Federal Finance Minister, the Länder Finance Ministers and the Federal Economics Minister. It is jointly chaired by the Federal Finance Minister and the current chairperson of the assembly of Länder Finance Ministers. Instead of a separation of political responsibilities we are back in the mainstream of German joint policy-making. What raises questions of efficiency, is, of course, the problem, how can this Council fulfil its tasks? After all, it is made up of the same group of politicians it has to control.

4. Lack of enforcement

After 2016 or 2020 the Stability Council may criticise the Länder or even the federal government when they produce budget deficits, but it has less power of enforcement than the European Stability and Growth Act after which it was modelled. It can ask for reports and multiyear budget plans, it can decide that a Land is breaking the rules, but in the end it can only ask the Land to do better in the future. In other words it can raise its voice, but nothing spectacular happens if no-one listens.

5. Budgetary sovereignty of the Länder

As the Länder have their own constitutions, and their own parliaments which decide on the annual Land budgets, how can one justify that the federal constitution after federalism reform² forces the Land parliaments to produce balanced budgets? Would it not be necessary, as this was the case with subnational units in other federal countries, such as Canada, Switzerland or the United States, that balanced budget rules for the Land are first decided upon on the Land level. Only in unitary states can the central governments command its units. In Germany's unitary federalism the same will happen. Whether this is unconstitutional is still an open question.

6. The end of federalism?

The federal constitution upholds that the Länder and the federal government enjoy budgetary autonomy. I mentioned already that for the Länder this autonomy with regard to the income side of the budget is non-existent. The zero-deficit rule of federalism reform² also reduces considerably the room-for-manoevre of the Länder on the expenditure side. What remains then of the ability of the Länder to act according to the wishes of their population. Federalism reform² puts the Länder in chains. The question is: Are these long enough that a meaningful federalism, which is more than the execution of federal priorities, can survive?