

# A Reform That Misses Its Mark

*Early in the present decade, political actors at the national and regional levels finally seemed to agree: if government at both levels was to remain effective, Germany's system of federalism needed to be reformed. Their objective was to reduce the number of federal laws requiring approval by the upper house of the federal parliament, and to increase the range of issues to be decided autonomously by state parliaments. But by the end of the first reform stage, not much had been achieved. And according to the viewpoint of **FRITZ W. SCHARPF**, Emeritus Director at the **MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES**, nor will the second stage, which involves restructuring the financial affairs of the Bund (the federation) and the Länder (the states), deliver the desired "disentanglement." Here, he analyzes the faulty approach that defeated the objectives of the first stage of reforms.*

**T**he Federal Reform Commission – on which all of the prime ministers of the federal states and an equal number of high-ranking representatives of the political parties in the Bundestag, or lower house of the federal parliament, had both seats and votes – met from October 2003 until December 2004, when it failed to reach ultimate agreement. However, after the change in the national government, the results of their near-agreement were – with some important amendments – rescued by the new Grand Coalition and adopted by both houses of the federal parliament.

The declared aim of the reform process was to free German politics from the "joint decision trap" – in other words, from a situation in which national policies may be blocked by a veto of the Länder in the Bundesrat, or

upper house of the federal parliament, while the Länder individually have little or no legislative or tax-raising powers of their own. Measured against this objective, the present result is not impressive. The Bundesrat's veto over issues of political importance has been increased rather than reduced, and the extent to which powers of the Länder have been widened lags far behind what was both necessary and possible.

Why is this so? There are, in principle, three possible explanations: First, the need for joint decisions arises from the fundamental architecture of German federalism, where the Bund and the Länder are not assigned specific policy areas, but specific functions of government. Second, the approach adopted by the Commission of clearly segregating the responsibilities of the Bund

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and the Länder ignored both the multi-level nature of policy areas and existing differences in the capabilities of individual Länder. And third, deliberations in the Commission were constrained by the dominance of exactly those veto players whose vote was ultimately required to achieve two-thirds majorities in the Bundesrat and Bundestag.

Both the first and third of these potential explanations effectively ruled out the desired reduction in the Bundesrat's veto. From an objective point of view, functional interdependence in German federalism justifies the participation of the Bundesrat in federal legislation. Given that almost all federal laws must be executed by the Länder in their own right and at their own expense, and that the tax revenues accruing to the Länder are almost entirely dependent on federal laws, Länder governments simply could not abandon their influence over national legislation.

The Commission therefore did not even bother to discuss the veto in the field of public finances. In phase two of the reform now commencing, this is unlikely to change since no one has any plans to abolish the tax-sharing regime, which divides the revenues from major taxes between the Bund and Länder. The discussion in phase one instead concentrated on Article 84, para. 1 of the Constitution, to which the bulk of the cases requiring Bundesrat approval may be attributed. This reads: "Where the Länder execute federal laws in their own right, they shall regulate the establishment of the authorities and their administrative procedures unless federal laws enacted with the consent of the Bundesrat provide otherwise."

### The Bundesrat veto

Thus, if the Bund intends to intervene in the administrative authority of the Länder, the Bundesrat must be asked to agree. This reasonable rule, however, became a serious structural problem for the German Constitution after the Constitutional Court had announced the so-called "unitary theory" in 1958. It postulated that the need for agreement of the Bundesrat was not restricted to the organizational or procedural provisions of a law, but pertained to the statute as a unit of legislation.

The harmful consequences of this judgment became apparent in the 1970s when, for the first time, a social-liberal majority in government found itself facing an opposition majority in the Bundesrat. The need for Bundesrat agreement, intended to protect the administrative authority of the Länder, could now be used as a party political weapon to veto unwelcome legislation.

Under these institutional conditions, first analyzed by Gerhard Lehbruch in 1976, German federal politics developed a characteristic dynamic: in difficult times, when governments are forced to push through unpopular measures, and when elections to the Länder parliaments can be stage-managed as plebiscites on federal policies, the opposition can quickly gain a majority in the Bundesrat. Prime ministers on the opposition side then have three choices: they can limit themselves to representing the institutional self-interests of their Land; they can try to assert the policy interests of the opposition; or they can promote the positional interests of the opposition parties by obstructing the government.

The probable outcome in the first case is a pragmatic agreement among professionals. In the second, one may expect compromises that, as a combination of incompatible policy preferences, are defended by neither side. In the third case, however, one may expect blockades intended primarily to make the incumbent government appear incompetent and helpless in the eyes of the electorate. In the 1970s, Franz-Josef Strauß played these cards with brilliant cynicism, as did Oskar Lafontaine in the 1990s, followed by prime ministers on the Union side after the turn of the century. The malaise afflicting German politics in which no side is able to realize and take responsibility for a reform concept of its own is essentially rooted in the facility to mount party political blockades in the Bundesrat.

The Commission received proposals by legal experts that would have once again restricted the Bundesrat veto to organizational and procedural matters. But having once gained the opportunity to engage in party political blockading, prime ministers of the Länder were unwilling to give it up again. Their veto over the process of constitutional reform ensured that the unitary theory could not be challenged.

Instead, discussion switched to solutions under which, in principle, the Bund would avoid regulations of administrative procedures or organization – in which case, of course, agreement of the Bundesrat would not be required. But since that would still not rule out financially burdensome legislation, the Länder demanded – and ultimately obtained – a new veto over federal laws that imposed costs on them. The solutions finally adopted are complex and in part contradictory, and, as Philip Manow and Simone Burkhardt of the Max Planck Institute for the Study of Societies have shown in a working paper, they will ultimately increase, rather than reduce, the number of cases requiring Bundesrat consent.

In the past, the governments of the Länder were willing participants in a development that extended the leg-

islative powers of the Bund at the expense of the Länder parliaments, while at the same time also broadening the rights of the Bundesrat. The reform of the federal system was intended to reverse this trend. There were economic reasons for this: with the completion of the single European market, it was reasonable to assume that the uniform regulations required in the interests of the economy would no longer be formulated at a national, but instead at a European level, while in the competition between European regions, regulations with a regional bias might now be more advantageous than standardized federal laws.

More important, however, were the political interests of the powerful southern and western Länder, which, after German reunification, increasingly found themselves opposed by a structural majority of economically weaker Länder in the Bundesrat. Their prime ministers could still make political capital out of their roles in the Bundesrat, but there were few advantages to be gained for their own regions.

Under these conditions, their interest grew in the idea of *Wettbewerbsföderalismus* (competitive federalism) – the liberal opposite of the previously accepted self-description of "cooperative federalism". But since the concept was attacked as a repudiation of the solidarity among the Länder, it was replaced in the Commission's deliberations by *Gestaltungsföderalismus* (creative federalism) – a formula that could be presented as being in the common interest of all the Länder.

In May 2004, the prime ministers agreed on a common position paper in which they called for comprehensive legislative powers covering all aspects of regional life, from public welfare, active labor market policy and environmental law to regional economic policy. They also wanted the Bund to withdraw entirely from education policy "from child care centers to post-doctoral degrees." However, behind this common front lay some grave conflicts of interest between the Länder. For instance, the original demand that the Länder should obtain legislative powers over their own tax revenues had to be deleted from the statement.

As was to be expected, the red-green government had little sympathy for the demands raised in the position paper. And since the Länder were not willing to reduce their Bundesrat veto in return, it would have been reasonable to conclude from an analysis of the positions of the two sides in late summer 2004 that the reform program was destined for failure. Nevertheless, in the re-



maining months, a serious last-ditch attempt almost succeeded to reach agreement on a compromise package – which, however, was due less to the bargaining skills of the negotiators than to intervention by the Federal Constitutional Court. The judgment handed down by the Court on July 27, 2004 on the subject of junior professorships had

undermined the constitutional basis for much of the legislative competence of the Bund and thereby radically weakened the latter's negotiating position.

Even though the Bund subsequently offered to transfer competence to the Länder on more than 20 issues, the latter initially allowed the reform of the federal system to collapse in December 2004, since the offer did not include competence over all aspects of education. However, once the incoming Grand Coalition government, under the powerful influence of the prime ministers of the Länder, was willing to make this concession as well, a negotiated settlement was reached in the summer of 2006.

It was clear that, under these circumstances, the Bund stood to gain little from the reform. But why should the outcome also be regarded as unsatisfactory from the Länder point of view? The latter had originally demanded comprehensive responsibility for the regional aspects of economic, social and environmental policy. Instead, they received a number of narrowly circumscribed individual competencies, such as the right to regulate store opening hours, restaurants and amusement arcades, local noise levels and nursing and retirement homes.

### Legislative powers of the Länder

For Bavaria, Baden-Württemberg, Hesse and North Rhine-Westphalia, these were trivialities that did not amount to their objectives of "creative federalism." "That's not what we were there for," concluded an interviewee at the Ministry of State in Stuttgart. The fact that the Bund was ultimately compelled to withdraw from education does little to change this estimation, given that, within a matter of months, this proved more of a Pyrrhic victory for the state chancelleries than a triumph for educational policy in the individual Länder.

But why couldn't the Länder achieve more? The decisive reason seems to me to be contained in the second explanation cited above: the prime ministers had framed their objectives in a way that paid too little heed to the realities of German federalism. ▶



By defining their goal as a clear separation of responsibilities and demanding exclusive competence over large policy areas, the Länder had ignored the objective multi-level nature of most fields. There are surely many aspects of education policy that are best regulated at regional or even local levels or in individual schools and universities. Other aspects, however, require uniform regulation at the national level, whereas still others now depend on Europe-wide coordination. The same may be said of environmental, economic, employment or social policies.

Moreover, the principle postulated by the Länder also ignored the unitary character of German political culture. Politically salient public debates are conducted in the national media. When scandals claim public interest – from meat unfit for consumption to child murders – it is federal ministers who are asked to respond. And politically important demands are self-evidently aired at the level of federal politics.

In contrast to Switzerland or the US, regional differences that are not merely of folkloristic interest are regarded in Germany, not as an authentic expression of regional democracy, but as obstacles to mobility and a denial of the constitutional entitlement to equal or at least equivalent living conditions. Not least because of this entitlement to equal living conditions, the wholesale decentralization of governmental responsibilities contrasts starkly with the differences in the economic, financial and administrative capabilities of the Länder, which have been even more pronounced since the reunification of Germany.

In their position paper of May 2004, the prime ministers themselves had rejected the transfer of taxing powers with the argument that “fair competition” required that they should “start from conditions of economic equality.” But the same argument could also be applied to the transfer of other legislative competences, which could just as easily arouse the fears of the economically weaker Länder that they might be about to embark on a program of ruinously competitive deregulation, tax cutting and increasing inequality.

### *Why didn't the Länder gain more legislative autonomy?*

Moreover, the discussion had to be conducted in an anticipatory framework. If constitutional reform were to involve the complete and final transfer of competences, then it was the duty of responsible constitution makers to

assess the risks associated with potential uses of such powers by future Länder governments and parliaments. And given the uncertainty of anticipatory judgments, it was easier to raise concerns than to rule them out.

In short, by adopting the principle of separation as the solution to the joint-decision trap, the reformers established a frame of reference within

which only closely circumscribed competences could be delegated. Such competences should not make excessive demands on the administrative or financial capacities of, say, Saarland or Bremen; they should not create incentives for beggar-my-neighbor policies; nor should they endanger the equality of living conditions, or impede the mobility of businesses or families. Measured against these criteria, the competences gained by the Länder represent the maximum that Bavaria, Baden-Württemberg, Hesse or North Rhine-Westphalia could have hoped to achieve in application of the principle of separation.

Moreover, it has since become apparent that the Länder have little idea of what to do with what they've got. Even on the issue of store opening hours, they found it self-evident to negotiate uniform national regulations. On the issue of a smoking ban, the Bavarian minister even insisted that the hard-won right to regulate restaurants and taverns should lead to a situation where rules in a Bavarian border town might differ from those in its Baden-Württembergian neighbor. And in the present discussion over the need for more day-care and preschool education, Länder ministers are demanding exactly the kind of federal subsidies that their prime ministers had ruled out in the reform package.

Greater political scope at the level of the Länder could only have been achieved if, instead of the strict separation of competences, the Länder had aspired to a more flexible division of responsibilities. Such proposals were raised in the Reform Commission, but they were not taken up by the Länder. None of this is going to change in the second phase of reform. The focus this time is on the initially postponed issues of public finance. Once again, however, in view of the massive conflicts of interest between the Länder, it is scarcely to be expected that the highly desirable enlargement of their financial autonomy will actually be achieved. ●

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