Reforming Federalism in Germany: Incremental Changes instead of the Big Deal

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The unique characteristics of Germany's federalism have been long identified as one of the main obstacles to legitimate and efficient governance. In 2006, the grand coalition adopted a federal reform which aims to disentangle the intertwined levels of government by reducing the influence of the *Länder* governments in federal policy-making and strengthening the *Länder* by granting more legislative competences to the federal states. In this article, I summarize the reasons for the constitutional change, provide a short overview of the reform process, and evaluate its results. I argue that the achieved compromise will only lead to incremental changes in Germany's federalism and will not be sufficient to solve the perceived problems of Germany's federal structure.

Once Germany's constitution, the so-called "Basic Law," was celebrated for Germany's successful transformation from a dictatorship into an exemplary democracy. Beside substantial basic rights granted by the constitution, the Basic Law created the legal and political framework for the "German Model," which boosted economic development and social achievements after World War II. The decline of the German Model, so it seems, has raised a genuine unease about the "dusted constitution" (Darnstädt 2003). The functioning of the federal system, which worked rather successfully in the first post-war decades, has been identified as one of the main obstacles to dealing efficiently with the social and economic challenges of unification, globalization, and Europeanization.

After years of academic and political discussion about the necessity and the possibilities of reforming the federal structure, the first part of the reform was adopted under the auspices of the "grand coalition" of Christian and Social Democrats in summer 2006. The Merkel government praised the reform as a sweeping modernization of the aging federal system. However, in this article, I argue that the rewriting of the constitution will neither lead to a substantial shake-up of Germany's federal system; nor is it likely to solve the perceived problems

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associated with some of the unique features of the federal structure. I will begin by describing the main deficits in Germany's federalism that first led to widespread demand for constitutional change, then give a brief summary of the reform process, followed by an analysis of the results and an evaluation of the reform. At the end of the article, I will argue that the outcome of the federal reform is rather limited, and I will discuss the reasons why the reform was nevertheless adopted.

Germany in Need of Constitutional Reform

The criticism of German federalism can be traced to two well-known weaknesses of the German federal structure: the lack of efficiency and the lack of legitimacy. There is general agreement that both problems have their roots in some very specific features of the federal political institutions and structures.

The first unique characteristic of Germany's federalism relates to the political power and the composition of its second chamber, the *Bundesrat*. Before the reform, the *Bundesrat* enjoyed an absolute veto for most important federal legislation in all major policy fields. More than half of all federal bills needed the approval of the *Bundesrat* to become law (so-called consent laws). The *Bundesrat* as the representative body of the federal states (*Länder*) is not composed of directly elected members but of representatives from the sixteen *Länder* governments. Because of Germany's integrated party system and the high degree of party discipline, voting behavior in the second chamber is at least partly influenced by partisan considerations.

If the opposition party dominates the *Bundesrat*—which has been the rule rather than the exception in the last thirty years—party-political conflicts between the government and the opposition are often carried over into the second chamber (Lehmbruch 2000) with the consequence that the government loses the ability to implement its political agenda. The government is forced to restrain itself in the formulation of a policy to ensure the adoption of a bill (Manow and Burkhart 2007) and has to incorporate elements of the opposition's agenda, as happened, for example, in the social and labor market reforms of the second Schröder administration. Necessary compromises between the federal government, the opposition, and the *Länder* are often heavily criticized as inefficient and incoherent. In addition, policy decisions lack legitimacy and accountability because they are often made behind the closed doors of the conference committee—an institution that is known for acting without any legitimate foundation. Moreover, accountability for policy decisions suffers because the government is not solely responsible for the final policy outcome. The opposition in turn cannot truly fulfill its task of criticizing the government if, through its majority in the *Bundesrat*, it itself is involved in the law-making process. In such "divided government" situations, national elections are in danger of losing their meaning and purpose.

The second important feature of German federalism is the so-called "executive federalism" and the comparative meaninglessness of the state parliaments (*Landtag*). In contrast to the dual federalism practiced in the United States or Switzerland, Germany separates political and administrative responsibilities. While the political responsibility for many areas of lawmaking lies in the hands of the federal government, the implementation of federal laws are carried out by the *Länder*. Because of the strong centralization tendencies of its federal system, Germany was soon characterized as a "unitary federal state" (Hesse 1962). In the course of the last forty years, the federal predominance for adopting legislation has been gradually expanded.[1] Therefore, the bulk of legislation is adopted at federal level (with high co-decision rights accorded to the second chamber), whereas only few and largely unimportant lawmaking competences remain at the level of the *Land*. Because of the weak role of the *Landtag*, some experts on constitutional law even see the guaranteed continuance of the federal states as being at risk (Eicher 1988; Huber 2006).

The insignificance of the *Landtag* has had a number of negative consequences. Because citizens are rather oblivious to regional politics, regional elections (*Landtagswahlen*) tend not to be about specific regional issues but rather are about expressing voters' attitudes toward federal politics. In the past, especially in times of perceived social and economic crises, *Landtagswahlen* conveyed voters' dissatisfaction with the national governing parties, causing them to suffer considerable losses at regional level (Burkhart 2005). This resulted in the frequent "divided government" situations in which the opposition gained control over the second chamber. Moreover, an opposition-dominated *Bundesrat* is most likely at the very time when the country needs a government with the strength and the ability to enact coherent and potentially unpopular reforms. Because regional elections are perceived as a barometer for national elections, German incumbent and opposition parties are permanently involved in election campaigns, which further weakens the ability of the national government by obstructing well-coordinated policy.

The system of "joint decision-making" (*Politikverflechtung*) is another heavily criticized element of Germany's cooperative federalism. Originally it referred to an elaborate system of jointly planned and financed programs (*Gemeinschaftsaufgaben* and *Finanzhilfen*) in highly important policy areas such as higher education or regional economic policy (Scharpf, Reissert, and Schnabel 1976). These joint tasks were financed, planned, and executed by federal and regional authorities. While the jointly planned and financed programs lost their importance once the Keynesian ideas of managing the economy were undermined by the recession in the 1970s, the formerly established joint decision system has survived. It even proliferated and became an established feature of lawmaking in Germany in various policy areas. It is often defined as a system of innumerable committees in which *Land* and

federal ministers, bureaucrats, and officials collectively coordinate the drafting and administration of laws and regulations in order to solve common problems. Although not always institutionally essential, decisions in the planning committees are reached only with the consent of the federal government and all regional governments.

Political scientists make gloomy predictions about the quality of political and administrative output resulting from the system of joint decision-making. The high majority requirement in particular proves to be awkward. It causes an inherent tendency toward political blockade and stalemate. Even though the joint decision system has never resulted in ongoing deadlock, because dynamic institutional procedures have been found by politicians and bureaucrats in order to ensure governability (Benz 1989, 1999), the resulting policies often fail to address the problems identified (Scharpf 1988, 2005b; Scharpf, Reissert, and Schnabel 1976). In particular, policy problems of a redistributive character are heavily biased toward the status quo and/or generate negative externalities such as the growth of public debt. Needless to say, the complex and obscure system of joint decision-making lacks accountability and transparency for ordinary citizens.

The fourth distinct feature of German federalism is its complicated system of public finance (for a short overview in English, see Gunlicks 2000). The German *Länder* are not entitled to raise taxes on their own authority. Instead, major taxes like the individual income tax or the value added tax (VAT) are divided between the federal, *Land*, and, sometimes, local levels according to complex rules. Additionally, a comprehensive system of revenue transfers among the *Länder* and between the federation and the *Länder* exists, ensuring that the poor federal states have nearly the same financial capacity as the rich ones. At a minimum, every federal state can rely on 99.5 percent of average per capita revenues! This system of financial equalization is supposed to ensure the constitutional principle of equivalent living conditions, which aims to guarantee all regions the facility to provide public services and carry out public duties autonomously and to the same high standard (Articles 72 and 106 of the Basic Law).

Most economists argue, and a lot of politicians agree, that the existing financial system is widely inefficient and partly counterproductive. The system of financial equalization offers little incentive for the *Länder* to govern efficiently since they can rely on equalization payments anyway. For this reason, the waste of public funds seems predetermined. But even worse is that neither poor nor rich regions have any incentive to promote economic development if most of the additional taxes are instantly transferred elsewhere. Similar complaints apply to the efficiency of collecting taxes. *Länder* that want to enhance the efficiency of tax collection and therefore employ more civil servants have to pay their additional employees from their own budget, whereas the additional revenue is distributed among all federal states. The big and financially strong federal states in particular regularly protest

against a financial system that, in their view, is not only unfair but also leaves the regional governments no political room to maneuver and therefore weakens the federal system as a whole. In contrast, the poor *Länder* refer to their comparatively higher spending on social benefits, to which they are bound to contribute by federal law, and object to all allegations that trace their low financial capability back to inefficiency and bad economic policy.

The problems with German federalism and the need for change came to a head after German unification in 1990. The reasons for this are certainly complex and numerous, and I will mention only three. First, German unification compounded the social and economic diversity within Germany. The constitutional goal of equivalent living conditions launched huge transfer payments from West to East Germany, which not only put stress on the federal budget but also overstrained the system of public finance. Second, globalization and Europeanization implied an increasing role for regions as business locations. To meet the challenges of the single European market, regional rather than national solutions promised higher economic competitiveness and prosperity. This, however, necessitated regional solutions in policy fields (social policy, economic policy, labor market policy, and tax policy) which, under the existing system, were federal, not regional competences. Third, globalization, Europeanization, unification, and demographic challenges demanded social and economic reforms in Germany, as was the case for most European countries. Redistributive policies in particular, which are within a system of multiple veto points and joint decision-making traditionally prone to either nondecision or inefficient solutions, increasingly dominated the political agenda. As a consequence, the federal structure, especially the strong veto rights of the second chamber, was soon identified as the main obstacle to desperately needed social and economic reforms in the postunification decade.

It is no surprise that the federal structure was the prime suspect for the "German malaise" of the 1990s. Many argued that, within the existing federal structure, social and economic reforms were either not possible (for example, due to the far-reaching veto rights of an opposition-dominated second chamber) or not efficient (for example, due to the inefficient structures of cooperative federalism) or both. The lack of autonomy for federal states, according to another criticism, prevented adequate regional solutions being found for the challenges of unification and globalization. In addition, low transparency, the lack of clear accountability, and inefficient policies resulted in widespread dissatisfaction with politics. So, the reform of the federal structure was widely seen as a precondition for restoring effective and legitimate governance at national and regional level—a thought that was expressed in the famous and often quoted saying of Edmund Stoiber, the former Minister President of Bavaria, that the reform of federalism will become "the mother of all reforms."

The Long Road to Adoption

In Germany, constitutional hurdles to constitutional reform are rather high (see Article 79 of the Basic Law). Revisions of the Basic Law require a two-thirds majority in both chambers, the *Bundestag* and the *Bundesrat*. Any constitutional change, therefore, needs a broad consensus between the government and opposition in the *Bundestag*, the poor and rich *Länder*, the large and small *Länder*, and the East and West *Länder*. Amendments to the Basic Law that affects the division of Germany into *Länder*, their participation on principle in the legislative process, or the principles of the basic rights granted by the constitution are inadmissible (Article 79 Section 3 of the Basic Law).

In spite of the high consensus requirements for constitutional change, the interaction of the peculiarities of German federalism and the new challenges of unification, globalization, and Europeanization led to a widely perceived demand for constitutional reform. However, the reform of German federalism by itself, so it seemed, was more a pet theme of the elite than a broad-based public movement. Over decades, a bulk of reform proposals and ideas were put forward and discussed among the political and scientific community. One permanent issue, for example, was the debate about territory reform (Benz 1992; Leonardy 2003). The fundamental idea of such a reform is the consolidation of the present sixteen highly heterogeneous federal states into six or seven federal states with a more homogenous economic and financial capacity. Another academic reform proposal, which was later taken up by the liberal Free Democratic Party (FDP), suggested a radical change in the composition of the second chamber (Höreth 2004; Wagschal and Grasl 2004). Elected senators, instead of representatives of the regional governments, should represent the interests of federal states in the second chamber, which might reduce the danger of divided government and the influence of party politics.

After the turn of the millennium, the issue of reforming German federalism was increasingly discussed in the political sphere. In October 2003, the Commission for the Modernization of the Federal Constitution was launched by the *Bundestag* and the *Bundesrat*.[2] It consisted of thirty-two voting members including the minister-presidents and governing mayors[3] of all sixteen *Länder* and an equal number of *Bundestag* MPs proportionally delegated from all political factions of the parliament. The commission was chaired by two prominent politicians: Franz Müntefering, at this time leader of the Social Democratic Party (SPD), and Edmund Stoiber, the then minister-president of Bavaria and leader of the Christian Social Union (CSU). The federal government and the state parliaments were represented with only four and six advisory (and therefore nonvoting) members respectively. Three delegates from local government associations and twelve experts completed the commission. The official voting rules followed the requirements for

constitutional change: A two-thirds majority of the voting members was required to adopt reform proposals.

The *Bundestag* and the *Bundesrat* entrusted a far-reaching mandate to the commission. Its task was to submit a proposal that allowed for a fundamental modernization of the federal system. Among other things, the distribution of legislative competences, the co-decision rights of the *Bundesrat*, and some aspects of public finance[4] should be reviewed and, if necessary, modified. The central aim was to disentangle responsibilities and decision procedures within the joint decision system in order to enhance efficiency and increase the effectiveness of governmental decision-making at all levels of government. In addition, reformers hoped that untangling the federal system would clarify political responsibility and accountability.

In spite of the comprehensive political mandate of the commission, its room to maneuver was restricted from the start. The guidelines of the minister-presidents, adopted in March 2003, prevented discussions about territory reforms, fiscal equalization, and regional tax autonomy. Nonetheless, major reforms seemed possible: The *Länder* fought for more legislative competences in such sensitive areas as regional economic policy, labor market policy, and education, while the federation had an interest in reducing the amount of legislation over which the *Bundesrat* had a veto. For this reason, a basis for compromise seemed possible: The *Länder* surrendered veto rights in the second chamber and received legislative competences in exchange.

Despite all the efforts, the commission announced its failure after more than one year of deliberations in December 2004.[5] Although the commission was unable to present a consensual reform proposal, there was agreement on several aspects of the reform agenda, such as the reduction of the veto possibilities of the *Bundesrat* and the delegation of competences to the *Länder*, which served as a basis for the reform subsequently adopted and described in the next part of the article. By March 2005, the government composed of Social Democrats and the Greens (*Die Grünen*) together with the Christian Democratic opposition agreed upon new negotiations. However, early national elections were announced in May 2005, and the election campaigns postponed all attempts at federal reform. National elections took place in September 2005 and subsequently resulted in the grand coalition of Social and Christian Democrats. It was the coalition negotiations that brought the constitutional reform back on the political agenda. A coalition working group discussed the reform in great detail, with the result that the coalition agreement included not only a commitment to federal reform but also more than fifty pages of written constitutional amendments, which were to be adopted in a first round of constitutional change addressing mainly questions of legislative federal–regional relations. Furthermore, a second round of reform negotiations began in March 2007.

The *Länder* as well as the parties of the grand coalition formed a working group to discuss the reform proposal of the coalition agreement and to negotiate

a package of constitutional amendments at the beginning of March 2006. In an extraordinary meeting of the federal cabinet, the coalition factions, and all the minister-presidents and governing mayors, the agreement was announced to the public, and one day later, on March 7, 2006, the legislative proposal for constitutional amendments was presented to parliament. The *Bundestag* and *Bundesrat* adopted the slightly modified proposal with the required two-thirds majority four months later. The reform became effective in September 2006. It has been the biggest constitutional change to the Basic Law since its adoption in 1949.

Results of Federal Reform

The general goal of the federal reform was to enhance efficient and legislative governance at all levels of the federal state. Very soon, two means to achieve this goal crystallized from the political rhetoric and from the final package of reforms. First, the legislative competences ought to be strictly allocated as federal or regional competences and, at the same time, the *Länder* parliaments should be granted considerably more of their own legislative competences than in the past. This can be largely seen as an attempt to break up the ineffective and opaque system of joint decision-making and to strengthen the *Länder* parliaments vis-à-vis the federal parliament. Second, the veto power of the *Bundesrat* was to be reduced in order to extend the possible scope for action on the part of the federal government and its supporting parliamentary majority.[6]

New Arrangements of Legislative Competences

The distribution of competences between the federation and the *Länder* was substantially changed in framework legislation (*Rahmengesetzgebung*—Article 75 of the Basic Law before the reform) and in concurrent legislative power (*konkurrierende Gesetzgebung*—Articles 72 and 74 of the Basic Law before the reform).

Prior to reform, the federal legislator was able, under certain conditions, to pass so-called framework legislation. This type of legislation existed in six areas of policy, such as the regulations governing the higher education system. The intention of framework legislation was that the federal government should set only key aspects of legislation, leaving the details to be determined by the legislation of the individual *Länder*. Framework legislation was completely abolished by federal reform.[7] The appropriate legislative competences have now been delegated either to the federal level or to the *Länder* or transferred to the area of concurrent legislative power.

Matters of concurrent legislation were originally meant to be governed by the *Länder*; however, the authority for legislating always fell to the federation if the federal legislator expressed a ''need'' for a federally uniform ruling. This enabled the federation to take over substantial legislative competences for many

policy fields that are subject to concurrent legislative power, leaving fewer and fewer possibilities for the *Länder* to pass autonomous legislation. For this reason, a constitutional change in 1994 converted the ''need clause'' into a ''necessity clause.'' The necessity clause, which was later interpreted by the Federal Constitutional Court extremely restrictively, only guaranteed the federation the right to a federally uniform ruling if this seemed essential either for the creation of equivalent living conditions throughout Germany or for the guaranteeing of legal or economic authority.

The reform changed the catalog of the concurrent legislative powers (Article 74 of the Basic Law), and some legal matters are now assigned exclusively to either the *Land* or the federation. For matters remaining in the area of concurrent legislation, the necessity clause was limited in its range of application to only certain policies. Another important change is a newly created right of the *Länder* to deviate from a federal ruling (*Abweichungsrecht*). In six areas of policy, such as the rules pertaining to university admissions and university degrees, the federation is able to pass legislation in the area of concurrent legislation; however, the *Länder* have the possibility of enacting deviating laws. In practice, this means that the regional legislators are now also entitled to pass laws in these areas of policy.

The *Länder* are awarded considerably more authority: seventeen areas or sub-areas of the former concurrent and framework legislation have devolved to the *Länder*. This affects, for example, the management of the states' penal systems, the laws governing shop closing hours, restaurant laws, the remuneration and appointment of land civil servants, and large areas of university law. The *Länder* have also acquired the ability to pass laws that deviate from the federal level in six areas of policy.

Conversely, six matters were transferred to and/or newly created as exclusive legislate powers of the federation, including, for example, defense against dangers of international terrorism. In addition, the reform will allow the federation to access many areas of concurrent legislation without having to prove a necessity.

Veto Rights of the Bundesrat

The rearrangement of the veto rights of the second chamber was intended to strengthen the scope of action of the federal government. The reform aims to reduce substantially the number of laws that require the approval of the *Bundesrat* to become law (consent laws). Over the last 30 years, 53 percent of all federal bills have been adopted as consent laws [the percentage rates vary across legislation periods, with a minimum of 50 percent in the 9th legislative term (1980–83) and a maximum of 60 percent in the 10th term (1983–87)]. The key changes regarding the veto power of the *Bundesrat* are enacted through revisions of Article 84 and Article 104a of the Basic Law.

The earlier Article 84 Section 1 proved in the past to be the "gateway" for the expansion of the veto rights of the *Bundesrat* (Dästner 2001). Previously, half of the requirements for a *Bundesrat* approval were enacted exclusively on the basis of Article 84 Section 1. This article precipitated the necessity for *Bundesrat* consent whenever a federal law regulated the establishment of authorities or administrative proceedings during the implementation of laws. The implementation of Article 84 Section 1 ruling became politically charged because of an early ruling of the Constitutional Court which not only restricted the power of veto over the ruling of the administrative procedures that prompted a requirement of approval, but also applied it to the material, i.e. the policy content of a law. This interpretation allowed the opposition under constellations of divided government to torpedo the political agenda of the government.

The reformulation of Article 84 not only allows federal legislators to regulate the administrative procedures but also permits deviant rulings regarding the establishment of authorities or administrative proceedings for the *Länder*. If the government chooses this option, then the bill does not need the approval of the second chamber. The federal legislator still has the option to regulate the administrative procedures without the possibility of the *Länder* deviating here. In these cases the bill requires, as in the past, the consent of the *Bundesrat*. Thus, the real innovations consist of granting the *Länder* a deviation right in matters of procedure. All hopes for a significant reduction in the *Bundesrat* veto rights are based upon these new arrangements alone.

With the revised version of Article 104a Section 4, a new occasion that gives rise to a *Bundesrat* veto is created. The amendment prescribes the requirement for *Bundesrat* approval whenever federal laws justify "the duty of the Länder to provide payments, monetary payments in kind, or comparable services to third parties" and "if expenditure resulting from this is to be covered by the *Länder* (Article 104a Section 4 of the Basic Law after constitutional reform, own translation)." From the point of view of the *Länder*, this new state of affairs was necessary, as the *Länder* would not otherwise be able to apply a veto to federal laws whose implementation involves their own financial outlay.

Evaluation of the Reform Results

To evaluate of the reform, I will focus on whether the reform can help increase the effectiveness and the legitimacy of the legislation at the federal and regional levels. Specifically, I assess whether the political weight of the *Länder* will indeed be increased by more autonomous legislative competences being surrendered to the *Länder* parliaments and whether the reform will significantly cut the number of federal bills that require *Bundesrat* approval. If both prove to be the case, the hope for a more effective and legitimate legislation would be justified.

Extending the Länder Competences

Is it realistic to assume that the reform of federalism would strengthen the capacity of the *Länder*? This would be the case if the legislative competencies transferred to the *Länder* during the reform were to create substantial room for maneuver in terms of policy-making *and* if the state parliaments were willing and able to use the competencies autonomously. I will evaluate these aspects in the following paragraphs.

Particularly in the area of education, important legislative competences have been granted to the *Länder*. The federation has now almost completely withdrawn from this policy area. However, in the past too, this was practically the only regional competence visible and relevant to the broader population. Now, the *Länder* are able to largely autonomously regulate not only the schools sector but also the university sector, which previously fell under the area of framework legislation. The *Länder* have gained further substantial options for regulating the status, duties, and payment of their civil servants and for managing their penal system. However, the remaining areas of competence transferred to the *Länder*, are more likely to be closely defined, partial competences. In this context, Münch (2006, 2) even speaks of "residual competences," and Scharpf (2006b, 6) of "isolated competences for closely circumscribed special laws."[8] Possible examples in this context are the laws governing shop closing hours, the regulation of nursing homes and homes for the elderly and disabled (*Heimrecht*), the regulation of sports, leisure and social noise, and restaurant law.

Even if the *Länder* have been guaranteed some politically relevant room for maneuver through federal reform, it remains uncertain whether the Länder parliaments and governments will make full use of their powers. In Germany, sixteen different regulations are likely to be derided as unwanted factionalism (*Kleinstaaterei*). The reasons for this must be traced back to the comparatively late foundation of a German nation state, which was not established as the German Empire *(Deutsches Reich)* under Prussia hegemony until 1871.[9] Prior to this, the territory forming the German nation state was fractionalized into many states, each with its own public administration, army, taxation, weights, measures, and currency.[10] The experience of centuries of factionalism created in the German historical memory a widespread disapproval of different regional regulations and a desire for unity and uniform national standards in all spheres of the society, which was further reinforced in the aftermath of the Second World War and which has persisted into the present.

In such a "centralized society" (Katzentstein 1987, 319) attempts at coordination of regional policy are numerous. Educational policy serves as a good example. Because uniform educational standards across Germany seemed necessary the Conference of the *Länder* Ministers of Education and Cultural Affairs

(*Kultusministerkonferenz*, KMK) was founded as a voluntary association sixty years ago. Since then, the KMK has coordinated educational and cultural policy of the sixteen *Länder* in order to ensure, for example, comparability of school and university certificates, educational standards and cooperation in education and science throughout Germany. Countless regulations that, for example, implement uniform educational standards leave only little scope for autonomous regional policy-making. It is fatal that, with the voluntary self-coordination of the *Länder*, more than just the goal of a more autonomous regional policy is torpedoed. In addition, decision-making ability is made substantially more difficult because ''horizontal policy integration'' (Scharpf 1989) between the *Länder* requires the unanimous decisions of sixteen individual *Länder*.

The fact that coordination of the *Länder* in the area of education policy is nothing exceptional and that similar tendencies are apparent with the newly transferred legislative competences can be illustrated by the discussions concerning the ''protection of non-smokers'' legislation which took place in the fall of 2006, shortly after the passing of the federal reform. Since the laws governing restaurants had been transferred to the *Länder*, the *Länder* now had the authority to decide whether and to what extent to impose a legal ban on smoking in restaurants. But nobody in Germany could imagine a situation in which, for example, Lower Saxony decides that smoking should remain permitted in its restaurants, while Bavaria decides that smoking should be banned. For this reason, over several meetings chaired by the Federal Chancellor Angela Merkel, the ministers-presidents and the federal and state health ministers agreed to a ban on smoking in all restaurants across Germany, with only some of the *Länder* having a few specific exceptions.

To sum up, the expectations of more autonomous *Länder* politics must be viewed with skepticism. The legislative competences delegated at *Land* level are only marginal in character and are not likely to enhance the status of the regional legislators. In addition, at least some of the competences granted will not be used autonomously but instead will be coordinated between all sixteen federal states. A mere shift in legislative competences will not reverse the unitary tendencies of Germany's cooperative federalism over night. Because of this, great hopes of improved levels of transparency and effectiveness from constitutional reform seem exaggerated.

Reducing the Veto Power of the Bundesrat

From the federal perspective, the major means of achieving a more effective and legitimate governance at the national level has been a clear reduction in the proportion of consent laws. I examine whether or not this aim might have been achieved by the constitutional amendments, on the basis of an evaluation of the

available studies and the first empirical evidence after one year of federal law-making under the new constitutional rules.

The hope for a significant reduction in the veto power of the *Bundesrat* was specifically covered in an influential study by the Reference and Research Service of the Federal Parliament, which was published shortly before the federal reform was instigated (Georgii and Borhanian 2006). In their study, Georgii and Borhanian contrafactually examine the percentage by which the proportion of consent laws would have fallen in the 14th and 15th legislative periods (1998–2005) if the new regulations governing the consent requirement had already been in force after 1998. The central result of the study claims that, with the consent conditions suggested by the federal reform, the share of consent laws in the 14th and 15th legislative period would roughly have halved (from approximately 53 to 25 percent).

Such a sharp fall in the requirement for second chamber consent appears to be rather implausible, however, for two reasons (see also Burkhart, Manow, and Ziblatt 2008). First, the study is at risk of overestimating the reduction in matters requiring approval due to the new regulation of Article 84 Section 1. The fundamental, but at the same time problematic, assumption is that the federation would in the future give the *Länder* the right to deviate from procedural regulations for all laws which were previously required for approval according to Article 84 Section 1. This is an unrealistic assumption because, in principle, the federal legislator had already enjoyed the ability in the past to pass a law without implementing provisions or, if necessary, to divide the law into a substantive part not needing consent and a procedural part requiring consent.

If the federal legislator had previously made no or only very little use of these facilities, then one must assume that this was for a good reason—especially because incentives for such an approach would have been particularly strong during periods in which the opposition parties controlled the *Bundesrat*. It is, however, often the case that the substantive and the purely procedural regulations cannot be separated from each other in a single law. If such a separation is not possible, then in many cases the substantive regulation ''stands and falls'' with the procedural provisions that the federal legislator includes in the law. What a law means in terms of its content is also determined by its execution. It thus seems realistic to suppose that, in the past, federal legislators often had a substantial political interest in the regulation of procedural provisions and, for this reason, made no use of the options open to them to forego procedural rules. There is no reason why this should be any different in the future – as presumed by the study by the Reference and Research Service.

Moreover, the newly created *Bundesrat* consent requirement of Article 104a Section 4 of the Basic Law is systematically underestimated in the study by the Reference and Research Service. This article demands the agreement of the second

chamber to laws that are based on the obligation of the *Länder* to provide payments, monetary payments in kind, or comparable services to third parties if expenditure resulting from this is to be covered by the *Länder*. In the formulation of the law, there are a number of ambiguities over the interpretation and the domain of application of the legal text. In the study by the Reference and Research Service, a very restrictive interpretation of the new ruling was applied, and it is highly questionable as to whether, in case of doubt, the Federal Constitutional Court would also follow such a restrictive interpretation. Consequently, it is likely that considerably more laws will be affected by the new approval situation. This is problematical first and foremost because, in all probability, the affected laws will deal more than usual with politically controversial legislation.[11]

The initial empirical evidence supports a skeptical evaluation of the reduced veto power of the *Bundesrat*. In fall 2007, the FDP requested from the government in a major interpellation (*Große Anfrage*) information about the effect of the federal reform. In their answer, the government listed the consent requirements of all laws ($N = 147$) which were proclaimed between September 2006 and August 2007.[12] According to this, the share of laws that did not need the consent of the Bundesrat dropped to 44.2 percent (compared with roughly 53 percent in recent decades) and therewith failed to meet the targeted range of 35–40 percent. Höreth (2008) argues convincingly that the share of consent bills would have been only 10 percentage points higher (54.4 percent) if the reform had not been enacted, while the government talks of a 15 percent reduction.[13]

More important than a pure comparison of numbers, however, is a deeper examination of these laws that no longer need for *Bundesrat* approval with the reform. Only three of those twenty-two laws attracted higher media attention: a law to prevent the undersupply of physicians in rural areas and in East Germany, a law regulating the storage of biometrical data on passports, and a law amending parts of the existing anti-terror legislation. Apart from these controversial and high-profile laws, the remaining nineteen laws, which—after being referred to the federal government—lost the need for *Bundesrat* consent, were passed rather uncontroversially and largely unnoticed by the public. In thirteen cases, neither the FDP nor the Greens voted against the proposal, and thus there was not any dissent between the established parties in 50 percent of these laws. For seven laws, not even a parliamentary debate took place, and three of them were adopted unanimously (see also Zohlnhöfer 2008).

As a result of these considerations, we are left with the conclusion that neither the effectiveness nor the legitimacy of federal legislation is likely to be significantly improved. The federation continues to be dependent on the consent of the *Bundesrat* for large parts of its legislation, particularly in crucial policy fields like economic policy (Zohlnhöfer 2008). Theoretical assumption and initial empirical evidence make clear that the veto rights of the *Bundesrat* have only marginally been reduced.

As a consequence, decision-making, especially during times of divided government, will not carry the signature of the federal government alone. Along with the level of effectiveness, this means that the legitimacy of the federal legislation will continue to suffer.

Explaining the Adoption of the Reform

The finding that Germany's federal reform has led at best to incremental changes is not surprising. As Lehmbruch (2004, 91) points out, there is no historical example of a radical reorganization of a federal state that was not associated with extreme crisis, often occurring during or after military conflict.[14] But while a gradual and path-dependent constitutional reform might nevertheless be effective from a problem-solving perspective, Germany's reform is more accurately described as an inadequate attempt to restore efficient and legitimate governance (Benz 2008; Burkhart, Manow, and Ziblatt 2008; Reutter 2006b; Scharpf 2006a; Sturm 2007). In the next section, I try to explain why an apparently unsatisfactory reform was nevertheless adopted. In doing so, I refer to a stunning lack of vision about the future shape of Germany's federal structure among the political elite and the public at large, which proved awkward during the reform process and impeded more efficient or fundamental constitutional change. While the lack of ideas contributes to the explanations of the limited reform outcome, its final adoption can be seen as a result of external events surrounding the formation of the grand coalition in 2005.

Lack of Vision and Ideas

The failure of the Commission for the Modernization of the Federal Constitution, and the inadequacy of the final outcome that built on this commission, can be blamed on a lack of a vision of the future federal structure (or at least any open discussion about it) and can be demonstrated by the existence of three concepts guiding the reform of German federalism.

From the start, the deliberations of the commission favored a concept of strict separation regarding the allocation of legislative competences in which either the federal or regional governments should have sole responsibility of each competence (Benz 2005b; Scharpf 2006b). Such a concept ignored the multi-level character of most policy fields as well as the highly heterogeneous legislative capacities of the sixteen federal states. Some aspects of economic policies, for example, might be adequately solved on a European level, others on a federal level, and some on a regional or even local level. But even more important was the fact that big and economically strong *Länder* like Hesse or Bavaria would like and are able to decide more policy issues than small and financially weak *Länder*, such as most East German states or the Saarland.[15] Within a strict and inflexible concept of

competence allocation, any changes had to meet the concerns of small states. Consequently, under the concept of strict separation of legislative competences, only those competences that would not overstrain the small states' financial and administrative capacity could be delegated to the *Länder*. The size and the substance of these competences, however, do not meet the needs and capabilities of the big and financial strong states.

Also, with regard to reining in the *Bundesrat* veto, a central concept held sway. The amendment of Article 84 of the Basic Law seemed a simple and rather uncontroversial way to significantly reduce the number of consent bills, especially since most other veto rights were connected with fiscal and financial matters which were not subject of the commission's mandate. Although the debate about curtailing the *Bundesrat* veto was relatively time-consuming, the discussions concentrated exclusively on Article 84 (Risse 2007, 708). This seems even more surprising because skeptical views about the possibility of thereby reducing the veto in politically contentious issues had been expressed in the past (Dästner 2001, 308) and proposals for other reform options existed, such as limiting the application of a veto to the administrative issues of a bill, changes in the counting and casting of votes in the *Bundesrat*, or changes in its composition. However, the minister-presidents were afraid of losing their political influence in federal politics and used their strong position in the commission to successfully prevent the discussion of any other reform options.

Beside the fact that these principles of the commission represented quite inadequate ways to modernize the German federal system, they also had some harmful consequences for the commission's work. According to Elster (1998, 100), the primary task of the commission would have been to choose from different reform options. However, because dominating principles already existed, there was little space for a deliberative process examining other reform options. Furthermore, the focus on a third concept, namely the exchange of legislative competences for veto rights, intensified the mood of "bargaining" instead of "arguing" at an early stage of the process. The structure and the working method of the commission were not helpful for preventing these tendencies. A relatively open discourse only developed in public plenary sessions at the very beginning, in which extensive hearings of the experts took place. This atmosphere, however, was not carried over to the working groups and informal committees in which the actual constitution amendments were drafted. It was mostly experts who developed alternative ideas for modernization of the federal systems within the commission. These experts, however, were not included in the drafting process, much of which was dominated exclusively by the minister-presidents and the members of the *Bundestag* (Benz 2005a, 211). Within such a setting, no new visions about the federal structure could be developed which could have resulted in a more ambitious reform.

The (Missing) Role of the Public

From a normative perspective, there is no doubt about the importance of broad public involvement in constitutional reform processes. As holds true for other democratic decisions, a minimal condition is that the process of constitutional change is to a certain degree transparent and open to the public. Constitutional amendments drafted behind closed doors are likely to lack legitimacy and thereby intensify dissatisfaction with politics. Nonetheless, in established democracies with the tendency to constitutional conservatism, as is the case with Germany, the role of the public is critically important. The demand for constitutional change within the population must be high in order to initiate the reform process and to enable substantial changes to take place. During the process of hammering out constitutional amendments, a high degree of openness and public interest can give politicians the incentive to engage in a deliberative process and, later on, encourage decisive actors not to block reform efforts that might leave them worse off in the short term. Both these elements were largely missing in the German case and help to explain the inadequate reform outcome.

Without question, there was a general unease about the functioning of the constitution among large parts of the population. The need for reform was mostly associated with the high veto rights of the *Bundesrat*, which, in the public perception, resulted in delayed decisions or even in the complete failure of important bills. But while (inadequate) concepts in the commission dominated the reform process and led to gradual reform, there were no guiding ideas about the role and the shape of federalism among the population. The reason for this can be found in a strong centralized political culture: Germany was and still is a federal state with few federalists. This can be demonstrated by a recent study of the Bertelsmann Foundation, which presents data on attitudes towards federalism throughout Germany (Wintermann, Petersen, and Scheller 2008). According to this, most people identify themselves with the local, the national, or the European level, rather than with the regional level of the *Land*. Every fourth German even thinks that the *Länder* can be abolished altogether, and public support for high degrees of coordination between states and the federal government has not waned despite all the problems with the opaque joint decision system.

Given this attitude, it comes as no surprise that public engagement about the future shape of German federalism have been absent, especially because all the discussions have focused on specific and complicated issues, instead of offering a vision of the future federal system. Some attempts were undertaken in the past to promote a "competitive federalism." The advocates of this approach, mostly academic and economic elites along with the liberal party (FDP), demanded comprehensive legislative and fiscal competences for the *Länder* and the abolishment, or at least substantial reform, of the financial equalization scheme.

Such a reform would radically break with the unique unitary character of Germany's federalism. Such a drastic change, however, is often associated with the termination of solidarity and a neo-liberal style of policy that, as pointed out above, seem neither acceptable nor desirable to the majority of the population. However, without public pressure in favor of change, the reform of German federalism has lacked a crucial element that could have inspired or moved the process of constitutional change forward.

Even worse has been the apathy of the public toward the process of constitutional change. The establishment of the Commission for the Modernization of the Federal Constitution garnered little notice. Public opinion poll data show that the circumstances that triggered the reform process, the much-lamented blockade of substantial reform (*Reformstau*), were not of any particularly great interest. In the time before the commission began its consultations, this issue was referred to by only 5 percent of the population as the most or second most important problem.[16] Interestingly, this figure increased for a short time during the open planetary meetings of the commission up to 10 percent, but dropped to about 3–4 percent by the time the commission met behind closed doors, and did not even rise substantially when failure was announced in December 2004.[17] The lack of enthusiasm among the public proved awkward since the decisive actors, especially the minister-presidents, could only insist on minor changes to the institutional status quo without running the risk of being punished in following elections. Also, there were no particularly appealing incentives for high-ranking politicians to actively involve themselves in the process. The hope of a political entrepreneur pushing and promoting the issue of constitutional reform was unrealistic under such conditions.

The Final Adoption of the Reform: the Role of External Events

After the Federalism Commission announced its failure, honest disappointment was expressed throughout the German societal elites. At this time, there seemed to be three options for the further process of constitutional reform.

The first option was to cling to the status quo and to cope somehow with the existing situation. This possibility was not unlikely given the fact that most observers expected the governing coalition of Social Democrats and Greens to be voted out at the next federal election (then anticipated in September 2006). The alternative, a coalition of Christian Democrats and Free Democrats, however, could have enjoyed, at least for some time, a unified government situation, which might have enhanced the chances of substantial reforms being made in social, economic, and fiscal policy. Constitutional amendments to empower the federal government via the *Bundesrat* seemed under such (hypothetical) constellations less essential. What militated against such an option was the probability that all the deficits of the

German federal system, described in part two of this article, would persist in the long run. This would result in a weakening of the democratic system as a whole, leaving all political actors worse off.

A second option was more simple. Since there was basic agreement in the commission about many aspects, an easy route toward constitutional reform was to take these suggestions as a starting point and only search for a final compromise. Because many found the solutions offered to be an unsatisfactory way to enhance efficiency and legitimacy, many experts hoped for a third option. In this scenario, the unsuccessful end of the commission might trigger a complete restart of the reform process. A new assembly or a new commission, it was hoped, might find solutions that would represent a better response to the crisis in the German federal system. It turned out that the second option was chosen, the adoption of constitutional amendments similar to the near-found compromise of the commission, and the reason for this is rather straightforward.

In May 2005, North Rhine-Westphalia held elections that ended disastrously for the parties of the federal government, resulting in the voting out of the coalition of Social Democrats and Greens in North Rhine-Westphalia. Before the election, North Rhine-Westphalia was the last federal state to be governed solely by federal government parties after similar defeats in several regional elections during the incumbency of the Schröder government (1998–2005).[18] Chancellor Schröder, acknowledging the lack of support for his government, decided to call for early national elections, which took place in September 2005. To the surprise of many political observers, the Christian Democrats did not fare as well as expected and were unable to form a governing coalition with the Free Democrats, their partner of choice. Because of the success of the new leftist party (*die Linken*), which was not a possible coalition partner for any party due to ideological and personal reasons, the only true alternative of the election outcome was to form a grand coalition of Christian and Social Democrats.

It was expected that the grand coalition would tackle at least some of Germany's most important reform issues. However, for many important policy fields that demanded political action—for example, in health care, labor market policy, and taxation, to mention just a few—there are virtually insurmountable differences between the coalition partners. It was therefore even more essential for the government, especially in the early days of the grand coalition, to show its activism and capacity to act on the question of reform. The reform of the federal system does not involve much potential for party-political conflict—reforming German federalism is more about cleavages between the federal and regional levels and, in particular, about conflicts between federal states. Moreover, with the near-found compromise in the commission there already existed a basis for the reform of the federal structure. Hence, constitutional change was a rather easy way to prove that the new coalition could implement important legislation. That is why the political

circumstances surrounding the grand coalition did not leave much room for a substantial rethink about constitutional change and federal reform.

Conclusion

While the constitutional change will bring about some improvement in single issues, its overall aim does not seem to have been fulfilled. The main goal of federal reform was to strengthen the political autonomy at both the federal and the regional (*Länder*) levels of government in order to enhance legitimate and effective governance. However, none of the most criticized characteristics of Germany's federalism will be fundamentally changed by the reform.

The hope for a reduction in *Bundesrat* veto rights rests on unrealistic assumptions, and therefore the reform is only likely to lead at best to a marginal increase in legislative autonomy for the federal government. Also, the reform will not change the criticized features of the executive federalism and the relative unimportance of *Länder* parliaments. Although the *Länder* acquire some new legislative responsibilities, these competences are all-too narrow in substance to allow specific regional solutions to be found in politically relevant areas. The negative consequences of the joint decision system are partly diminished by a stricter allocation of competences between the federal and the regional level and by new regulations governing the jointly planned and financed programs. But even if the vertical joint decision-making (the joint planning and execution of tasks between the federal and regional authorities) might be reduced, the reform noticeably strengthens the slow and opaque horizontal joint decision-making (the cooperation of the *Länder* authorities: see also Benz 2008). Finally, an early agreement between the Länder has completely excluded any discussion about the much-needed modernization of the ineffective financial constitution from the first round of the reform. A parliamentary committee was implemented in March 2007 to tackle this issue in a second round of federal reform. In the light of the highly contested issues, a parliamentary committee without any innovative structure, and the even more apathetic role of the public, a major reform of Germany's financial constitution does not seem close.

The reasons for the gradual and rather unimpressive constitutional amendments are numerous. These include (but are not limited to) the composition, working method and management of the Commission for the Modernization of the Federal Constitution (Benz 2005a), the role of the Constitutional Court during the deliberations (Scharpf 2005b), and the lack of a comprehensive strategy and involvement on the part of the federal government (Scharpf 2005a, 101ff). In this article I have highlighted some important points as to why an apparently uninspired reform outcome was nevertheless adopted. It seems evident from my analysis of the reform process that the role of guiding ideas and concepts within the decisive

bodies narrowed the scope of the whole reform outcome. In addition, there was no real enthusiasm for the issue of institutional change, not to mention any alternative vision of the political substance of federalism within the German population, which made significant and experimental constitutional amendments highly unlikely. The sudden early national elections and their unexpected result prevented a completely new, and potentially more promising, reform process from starting from scratch. Bearing in mind the limited outcome of the reform and the existing inadequacies of federal structures, gradual and incremental changes to Germany's federalism are likely to continue. To reduce the striking mismatch between the ambitions of the reform and the actual outcome of the reform and to incorporate the public in the reform process will be an ongoing challenge.

Notes

1. The thesis of a transfer of power from the *Land* to the federal level and the assumption of the low influence of the *Landtag* has only recently been challenged by Reutter (2006a). Reutter argues that the *Land* level is more important than widely thought and might become even more relevant in the future. However, even if one accepts Reutter's argument, there can be no doubt about the *relatively* insignificance of the *Landtag* in legislative concerns compared with the national level. In addition, the public awareness of regional politics is only marginal at best.
2. The official name was "*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung.*"
3. Hamburg, Berlin, and Bremen are city states governed by governing mayors instead of minister-presidents.
4. In particular, joint tasks (Article 91a and 91b of the Basic Law), provisions for federal money grants (Article 104a, Section 3), and financial assistance of the federation (Article 104a, Section 4 of the Basic Law). All Articles refer to the Basic Law before constitutional change.
5. There is a wealth of literature about the federal reform commission; see, for example, Benz (2005a), Gunlicks (2005), Renzsch (2004), Scharpf (2005b), and Schubert (2005).
6. Two further means were also stated in the grounds of the legal text. One was the reform of the system of mixed finance and financial assistance from the federation. In addition, it was hoped that the reform would also lead to a strengthening of the suitability of the Basic Law vis-à-vis Europe. Although some changes were completed in the area of mixed financing, the reform of the financial constitution is not complete and is the subject of ongoing negotiations within the scope of the second part of federal reform. The European suitability of the Basic Law is without doubt very important, but it does not play a pre-eminent role in the functioning of Germany's federal structure. For a detailed report of all constitutional changes, see Gunlicks (2007).

7. Framework legislation adopted at the federal level had only been allowed to contain detailed and directly valid regulations in exceptional cases. It was quite often a bone of contention between the federal government and the *Länder* because frequent disputes broke out about the extent to which the federal rulings were able to go into detail. In addition to this, the necessity of having two successive pieces of legislation (one at the federal level and one at the regional level) proved ineffective and time consuming, particularly for the implementation of European laws.
8. Both quotations are translations by the author.
9. For a historical overview, see Renzsch (1989).
10. In 1834, efforts were made to improve the economic unity and to establish a common market within the German Confederation *(Deutscher Bund*), the predecessor of the German Empire. A customs union (*Zollverein)* was created which standardized weights, measures, and currencies and ended tariffs between most states of the confederation.
11. This assumption is supported by two considerations. First, the scope of application of Article 104a, Section 4 will apparently pertain mainly to sensitive areas of legislative material such as social policy. Second, from extensive analyses of the documentation of the Reference and Research Service, one can conclude that the newly created approval situation is likely to be particularly affected by controversial legislative issues.
12. Printing matters 16/6499 and 16/8688 of the Bundestag.
13. These differences follow from varying interpretations of the consent requirements of the old constitutional regulations. There is always some legal leeway to draft the same proposal as consent laws or as objection laws, prompting different predictions about the impact of the federal reform.
14. Sturm (2005), referring to the multiple stream approach (Zahariadis 1999), argues that a more fundamental reform—as demanded, for example, by the advocates of a more ''competitive'' federalism—was not necessarily impossible from the outset. However, although such concepts were rather widespread in the country's economic elite, the population showed no real enthusiasm or euphoria for such an idea, making all relevant efforts doomed to failure (Sturm 2005, 202).
15. At least if the constitutional principle of equivalent living conditions is not abandoned.
16. Data source: Forschungsgruppe Wahlen e.V.
17. The relative reluctance toward the work of the commission could be explained by the extensive use of (expert) commissions during the coalition of Social Democrats and the Green Party. In 2002, the year before the commission was set up, three important commissions had been convoked by the government: the Hartz Commission for Modernization of Public Services and the Labor Market, the Rürup Commission for Sustainable Financing of the Social Insurance Systems, and a commission for the reform of local finances.
18. Regional governments led by Social Democrats were also voted out in regional elections in Hesse, the Saarland, Hamburg, Saxony-Anhalt, Lower Saxony, and Schleswig-Holstein.

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