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Community, Diversity and Autonomy: The Challenges of Reforming German Federalism

FRITZ W. SCHARPF

In federal states with territorially based ethnic, linguistic or religious cleavages, the allocation of competences among the levels of government may be determined by highly salient normative convictions and conflicts. In their absence, the economic theory of federalism and the subsidiarity principle might offer some highly abstract guidelines. Of greater practical significance are country-specific points of departure, path-dependent institutional developments and concrete challenges that might provoke a change of direction.

Germany, for instance, is a polity with a unitary political culture but also with institutionally entrenched sub-national governments. Thus the post-war decades saw a continuous expansion of federal legislative competences combined with a continuous increase of practices of 'cooperative federalism' and 'joint decision-making'. As a result of high consensus requirements, both the federation and the Länder lost the capacity for autonomous political action. When, under the pressures of German unification, Europeanisation and economic globalisation, the demands for decisive policy changes were often frustrated, the blame was directed at federal institutions. Hence the reform of German federalism, the 'first phase' of which began in 2003 and was completed in 2006, sought to increase the capacity for autonomous political action by replacing joint decision-making with the allocation of exclusive competence to both the federation and the Länder. It can be seen already, however, that the reforms that were in fact adopted fall far short of the original goals. I will discuss the reasons for this relative failure and will outline a more promising approach to the management of concurrent competences that might also be useful elsewhere.

INTRODUCTION

In federal states, the allocation of governing competences and resources among the different levels of the constitutional architecture differs greatly from one country to another and from one time to another. In international comparison, there are polities like Switzerland or Belgium where the allocation of powers is largely determined by the need to accommodate territorially based and politically salient linguistic, ethnic or religious cleavages. Similar conflicts explain special constitutional arrangements for some regions in Canada, the United Kingdom, Spain or Italy. But even where such political cleavages do not seem to matter – as in the United States, Germany or Australia – the ways in which legislative authority, executive capacities and fiscal resources are either centralised, decentralised or shared among the levels of government differ greatly. In all countries, moreover, the allocation has been shifting

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over time – often in the direction of greater centralisation, but sometimes in the direction of decentralisation and a devolution of powers as well.

For an explanation of these differences and of the direction of changes, general theories are not much help. The economic theory of federalism formulates prescriptive norms that are too abstract and too simple-minded to provide much guidance for specific constitutional changes, and the same is true of the proto-theories associated with the 'principle of subsidiarity'.[1] In any case, both formulate prescriptive norms and, perhaps, standards for evaluation, but are not meant to explain empirical variance. At the same time, however, the number of dependent and independent variables that empirical studies of comparative federalism have to consider is so great, and the number of comparable cases so small, that any hope for general explanatory theories seems unrealistic. The best we can do, therefore, is to design comparative empirical studies in a historical-institutionalist framework. They need to identify the unique historical starting conditions of each federal state and the interests, cognitive and normative orientations, power positions, and strategies of the actors that have shaped the original institutional configuration and its path-dependent evolution. In a logically separate dimension, we may also analyse the consequences of the resulting institutional structure, for the problem-solving capacity and legitimacy of the polity as a whole.[2]

With this in mind, this article describes the conditions and problems to which the recent reforms of German federalism responded; it then examines the outcomes and potential alternatives in light of the manifest purposes of the reform efforts.

GERMANY: UNITARY FEDERALISM AND THE JOINT DECISION TRAP

The post-war German polity is a federal state with a unitary political culture. It is a federal state with parliamentary governments at the national level and in each of the 16 Länder of the Federal Republic – ranging in size from fewer than 700,000 inhabitants to more than 18 million. Unlike in Switzerland, Belgium, Canada, Spain or even the United Kingdom or Italy, however, there are no politically salient territorial cleavages defined by ethnic, linguistic or religious divisions, and no popular demands for regional autonomy.[3] Mass communication is dominated by nationwide media; political issues are defined and debated nationally; and public attention is focused on national parties even where they compete for office in the Länder. By contrast, the political salience of policy-making at the regional level is quite low, and the 16 Land elections have the character of 'second-order national elections' as parties tend to fight over national policy choices and about the performance of the national government.[4] As one should expect therefore, legislative competences – including practically all tax legislation – have become increasingly concentrated at the national level.

By contrast, the statehood of the Länder rests, on the one hand, on their near-monopoly on administrative capacity. On the other hand, Länder governments (rather than elected senators) constitute the membership of the second chamber of the national legislature, the Bundesrat, and an absolute majority of their votes is required for practically all important national laws. At the same time, revenues of the major taxes are shared between the federation and the Länder, and the large differences in the per-capita revenues of rich and poor Länder are neutralised by an elaborate system of vertical and horizontal fiscal equalisation. Moreover, among the remaining

responsibilities of the Länder important programmes are co-financed and thus influenced through federal grants. In other words, there are practically no domestic policy areas that cannot be shaped by the national governing majorities – and at the same time there are practically no domestic policy areas where the national majorities do not depend on the agreement of Länder governments. Instead of protecting the mutual independence and decision-making autonomy of the national and regional levels of government, German federalism maximises mutual interdependence and joint decision-making.

In the early decades of the Federal Republic, this 'cooperative federalism' worked reasonably well and was credited with the success of the post-war 'German Model'. It was thought to encourage policy consensus among the major political forces and thus to ensure consistency and continuity of public policy. Its economic effects seemed to compare favourably to those of polities that were prone to more hectic policy swings. But when, toward the end of the 1990s, Germany came to be considered the 'sick man of Europe', with lower economic growth, higher unemployment and higher budget deficits than most of its neighbours, co-operative federalism was again considered a major contributing factor – but now in self-flagellating accounts of the 'German Malaise'.[5] Even though exaggerated, such accounts did point to two real structural problems.

First, with the fall of the Iron Curtain, German unification, the completion of the European Monetary Union, the rapid rise of economic globalisation, and with the rapid ageing of the population, the external and internal environments of all European polities changed so fundamentally that radical departures from established policy patterns were thought necessary everywhere. Under these circumstances, the very stability of public policy, which had been ensured by cooperative federalism in Germany, became an economic liability.

Second, and even more importantly, as problems increased, voters could express their dissatisfaction with the national performance in 16 Länder elections spread out over a single term of the national parliament.[6] Since each change of a Land government influences the party political composition of the Bundesrat, opposition control of the second chamber is almost inevitable when difficult times are met with unpopular policy choices. This was true for Willy Brandt and Helmut Schmidt after 1972 and for Helmut Kohl after 1992. And when Kohl finally lost the national elections in the autumn of 1998, the red–green government of Gerhard Schröder could rely on a majority in the Bundesrat for no more than six months. Under these conditions of 'divided government', major reform initiatives were sometimes blocked entirely by ideological disagreement or electoral positioning. More typical, however, were awkward compromises in which neither the government nor the opposition could realise their own reform concepts. As a consequence, *Reformstau* – the logjam of reforms – became the label for all that went wrong in German politics at the turn of the century.

Schröder just managed to survive the elections of 2002 because of his refusal to join the Iraq war, but the opposition was confident to win next time. Given its own commitment to harsh reforms, however, it had reason to fear the same gridlock thereafter. At the same time, the red–green coalition had not yet relinquished all hopes. For the first time in the history of the Federal Republic, therefore, a window of political opportunity opened in which the government and the opposition agreed on the need

for constitutional reforms that would reduce the veto powers of the Bundesrat. But since that would require two-thirds majorities in both houses, it was clear that changes could only be had if the Länder received substantial compensation.

What form this compensation should take was clear for the large and economically prosperous West German Länder. North Rhine-Westphalia, Bavaria or Baden-Württemberg are larger and richer than most middle-sized member states of the European Union, and yet their legislative and fiscal powers are inferior not only to those of the American or Australian states, but also to those of even the smallest Swiss cantons.[7] For their prime ministers, moreover, the strong role in federal legislation had lost much of its former attraction. After German unification, they found themselves outvoted in the Bundesrat by a structural majority of small and economically weak Länder. In any case, moreover, a growing share of federal legislation was now determined by EU directives that left little room for national policy choices.

Of greater objective importance, however, was another consequence of increasing Europeanisation: with the creation of the Single European Market, the Länder were no longer protected by national boundaries but found themselves in direct competition with industrial regions abroad. At least in the medium-sized or smaller member states of the Union, however, these regions are under the authority of a single government that may make concerted use of all instruments of economic, labour market, education, R&D, infrastructure and tax policy to promote their comparative advantages. Given the economic heterogeneity of German regions, and the separation between federal legislation and Länder administration, however, national policy could not be sufficiently targeted to the needs of specific regions, whereas Länder competence was insufficient to achieve the concerted effects which smaller nation states could design for their more specialised economies. It made sense, therefore, for ambitious Land governments to seek broad legislative authority over the 'regional aspects' of all economically significant policy domains.

For the smaller and economically weaker West German Länder, and for most governments in East Germany, however, the prospect of greater legislative and financial autonomy appeared more threatening than promising. Their budgets depended on fiscal equalisation, their economies depended on federal subsidies, and they preferred to have the federal government politically responsible for rising difficulties in labour market and social policy. In their view, demands for the devolution of federal competences might well transform 'cooperative federalism' into its 'competitive' opposite. Here, they feared a weakening of the solidarity of fiscal equalisation and a tax and regulatory competition that could turn into a race to the bottom and undermine the political viability of some of the smallest and economically weakest Länder. Hence formal discussions about the reform of German federalism could only begin after the South German promoters had accepted a number of taboos: there could be no reform of the present regime of fiscal equalisation; there could be no discussion about autonomous taxing powers; and there could be no proposals to facilitate mergers among the Länder.

THE HALTING PROGRESS OF THE REFORM COMMISSION

With these constraints accepted, both houses of the national parliament established a 'Joint Commission on the Modernisation of the Federal State' in October 2003 with

the mandate to propose constitutional reforms to increase the capacity for autonomous political action of both levels of government. As described in the introduction to this special issue, the Commission included the prime ministers of all 16 Länder governments on the Bundesrat side while the Bundestag appointed 16 members from its parliamentary parties. The federal government was represented by four ministers who could speak but not vote. The functions of the Chair were jointly exercised by the Bavarian prime minister and by the leader of the social democratic parliamentary party. Even though the core membership was enlarged by some (non-voting) representatives of Länder parliaments and of communal associations, and by 12 'experts' in constitutional law, economics and political science, the reform process was thus basically shaped according to the model of an inter-parliamentary conciliation committee, rather than of a constitutional convention.[8]

The original intent had been to reach agreement on the principles of reform by the middle of the following year and to work out the details of constitutional amendments before the end of 2004.[9] But progress was slow as the Länder maintained a common front against federal demands, while the federal side saw little reason to offer unilateral concessions. During the summer recess in 2004, work was carried on behind closed doors in seven specialised project groups where representatives of federal ministries and Länder chancelleries searched for compromises – again with little success. At the end of the summer, the Länder had only agreed to very limited reductions of the Bundesrat veto while the federal ministries had the support of most organised interests and some Länder governments in arguing against the devolution of legislative competences. For all intents, therefore, the reform seemed to have failed when the project groups reported back to the plenary sessions in October 2004.

In November, however, at the start of the final weeks of top-level bargaining behind closed doors, the federal government came forward with a long list of legislative competences that it proposed to transfer to the Länder. The reason for this sudden change was a radical shift in the bargaining constellation caused by a judgment of the Constitutional Court in late July. It struck down a federal 'framework law' that would have introduced the position of junior professor in German universities (which are organised under the jurisdiction of the Länder). The supporting arguments, however, applied not only to framework legislation but also to the wide range of concurrent competences on which the major part of existing federal law is based. Under the 'necessity clause' of Article 72, Paragraph 2 of the Basic Law, the concurrent powers may only be used by federal legislation under some fairly general conditions suggesting a need for nationally uniform rules. For decades, the Constitutional Court had treated the existence of these conditions as a matter to be determined by legislative discretion. In 1994, however, a constitutional amendment had explicitly affirmed its jurisdiction, and the junior professorship case was the first occasion where it was used by the court to invalidate a federal statute. In doing so, however, the court defined the preconditions for federal legislation so restrictively that much or most of the existing body of federal law could now be challenged as being *ultra vires*.

Once these practical implications were understood, an issue that had never been on the agenda of German federal reform came to dominate the bargaining process. Now the federal government urgently needed the support of the Länder for a constitutional amendment that would protect the bulk of existing (and politically

uncontroversial) civil, criminal and administrative law from having its 'necessity' challenged by private parties in ordinary litigation. The Länder, having no interest in maximising the vulnerability of laws for whose application and enforcement they were responsible, were generally willing to cooperate – but for a price. Subsequently, the Chancellor's Office urged all federal ministries to re-examine their legislative portfolios with a view to maximising devolution. In the final round of top-level negotiations, therefore, the federal side proposed to transfer exclusive legislative powers to the Länder over a total of almost two dozen items. Nevertheless, the Länder rejected the package, ostensibly because the federal government had not also agreed to relinquish all legislative powers and financial influence in the field of education – from day care centres all the way to universities and academic careers. A year later, however, after the red–green government had lost the national elections, the new grand coalition – heavily influenced by the prominent role of some prime ministers in the coalition negotiations – was willing to make these concessions as well. In the spring of 2006, the reform package was submitted to parliamentary ratification and, with some modifications, finally adopted in the summer of 2006.

CHANGES – BUT HOW MUCH DIFFERENCE?

In purely quantitative terms, this was the most extensive constitutional revision in the history of the Federal Republic. In terms of the original goals, however, the achievements are limited. After the federal government had seen its bargaining position destroyed by the Constitutional Court, it had to pay a considerable price merely to protect much (but by no means all) of its legislative domain against the vagaries of judicial interpretation. There were also some changes in the rules under which the Bundesrat may veto federal legislation. They are likely to reduce the number of instances where agreement is required, but (as Höreth points out in this volume) the potentially more controversial policy choices will still depend on a majority of the Bundesrat. Under conditions of divided government, therefore, the need for compromises between the government majority and the opposition, and thus the possibility of party political blockades, remain pretty much unchanged.

The Länder, for their part, also received less than they had asked for. While the number of their constitutionally assigned legislative powers increased considerably, these tended to be narrowly circumscribed. Instead of the competence for 'regional economic law' which they had demanded, they now may regulate shop closing hours, restaurants and local fairs; control over regional issues of social policy turned into control over old-age homes; and regional environmental policy was reduced to the abatement of leisure activity noise, and so on. For governments of the big and economically strong Länder, these mini-competences here and there appeared trivial; they would not allow them to optimise the regulatory environment of their regional economies. It was only in the field of education that the gains seemed substantial. Here, the Länder had indeed obtained complete legislative powers in the coalition negotiations, and the agreement would have eliminated all federal subsidies to education as well. In the last rounds of parliamentary ratification, however, a tightly constrained opening for university finance was allowed.

Yet it soon became clear that the Länder found it difficult to make autonomous use of even the limited powers gained. The first issue, arising right after the reform, was the regulation of shop closing hours, followed soon by the regulation of smoking in restaurants. In both instances, Länder governments responded quasi-automatically by negotiating with each other, rather than with their own parliaments. Their goal was the adoption of nationally uniform standards, since – as the Bavarian minister in charge put it – voters would not understand why different smoking rules should apply across the border from one Land to the next. In the same spirit, the demand for a monopoly in education had always been accompanied by the promise that the Länder would of course coordinate their policies through the 'Conference of Cultural Affairs Ministers' – a long-standing institution whose unanimous decisions could only be changed through unanimous agreement. Regardless of the location of formal competences, in other words, regional diversity is not popular in German political culture, and Länder governments will not lightly challenge the unitary sentiments of their constituents.[10]

Worse yet, the political agendas in the Länder are often determined by national debates. Thus, when – in the first year after the reform – the federal minister for youth and family affairs started a public campaign focusing on the crucial importance of early education for the intellectual development and life chances of children, the West German Länder could not possibly ignore the need for a dramatic increase of their dismally deficient (in comparison to East Germany) provision of publicly financed child care places. Given their lack of fiscal autonomy, however, even the richest West German Länder were unable to finance the additional expenditures within their own budgets. As a consequence, they demanded what they had just ruled out through constitutional reform – massive federal subsidies for a nationwide programme of early education. And the federal government was happy to oblige – even though the grants could only be provided through methods which, if anybody had wanted to challenge them in court, would almost certainly be found unconstitutional.

THE LIMITING EFFECTS OF THE DOMINANT SOLUTION CONCEPT

In the end, therefore, the reform did introduce a large number of generally desirable or at least innocuous constitutional amendments, but it did not make much progress toward its primary goal – to increase the policy-making autonomy of both levels of government. The reasons for this – relative – failure are, in my view, largely conceptual, and they were exacerbated by the fact that the reform process was from beginning to end conducted in the bargaining mode among the ultimate decision-makers. It was thus not only (and inevitably) shaped by their pre-existing definitions of institutional self-interest but also by their preconceived problem perceptions and solution concepts. A quarter-century after political scientists had first identified the deficiencies of 'cooperative federalism' in Germany,[11] political actors had indeed understood that the present problems of German federalism followed from the interaction between party competition and the basic structure of a joint decision system in which neither the federal government nor individual Länder governments could act autonomously. Unfortunately, however, the solution concept which was derived from this insight, and which was shared by the federal government and the Länder, was extremely

simple and took little account of the real interdependencies that had motivated the creation of the joint decision system in the first place. If '*Politikverflechtung*' was the problem, then it seemed obvious that '*Entflechtung*' (disentanglement) through a strict separation of federal and Länder competences had to be the solution.[12]

However, as nothing would or could be done about the functional (administrative and fiscal) interdependence between the levels of government, not much could be done to reduce the participation of the Bundesrat in federal legislation.[13] By default, therefore, efforts concentrated on the separation of legislative competencies. Ideally, so it was thought, one should be able to eliminate not only the class of framework laws but also the category of concurrent legislative competences. The goal was to allocate all legislative powers in the form of exclusive competences either to the federation or to the Länder. Towards this ideal, some progress was in fact achieved. The catalogue of exclusive federal powers was somewhat enlarged, and the Länder obtained a considerably larger number of, albeit minor, exclusive competences. Nevertheless, the remaining list of concurrent competences is still the largest and it covers the most important policy areas, including all those which the South and West German governments had considered essential for their own purposes.

Given the conflicts of interest between big and small, rich and poor Länder; and the continuing effects of a unitary political culture, this was to be expected. Under these conditions, governments of the economically strong Länder could not accept a larger expansion of exclusive federal competences; the federal government could not accept exclusive Länder authority over matters that might have major nationwide repercussions; and where the federal government was willing to abdicate some its responsibilities (e.g. in the field of taxation), the weaker Länder prevented the devolution of functions that might strain their limited capacities or put them at a competitive disadvantage. Under these conditions, one must conclude, the reform went about as far as could be reasonably expected if the goal was to assign exclusive competences.[14] And where it did in fact go further, as was true in the field of education, corrections were either imposed in the last phase of parliamentary ratification or the new constraints on federal involvement simply had to be ignored in practice. If greater autonomy was considered desirable, it could not be had within the separation framework.

The question is whether, given the conditions described, this was the best that could have been achieved. In my view, other solutions could have been constructed that would indeed have increased the policy-making autonomy of the federation and the Länder at the same time. But these would have presupposed a change of the dominant solution concept.[15]

MANAGED INTERDEPENDENCE

Reformers would have had to realise that the search for a strict separation of competences would either produce very narrowly defined, and hence politically innocuous, mini-competences for the Länder or would impose too narrow constraints on federal powers, which would be politically unsustainable in the unitary political culture of German federalism. But the argument can also be put more generally and without reference to the specific cultural characteristics of German federalism: under

modern conditions of increasing economic integration, communication and mobility, territorial and functional interdependence have also increased enormously. This development must have consequences for the goodness-of-fit between a given hierarchy of territorially defined jurisdictions and the underlying activities and subject matters that are to be regulated. As interdependence increases, more and more matters must indeed be regulated at higher levels of government with more inclusive jurisdictions if they are to be regulated effectively at all.[16] This explains the seemingly secular and ubiquitous trend toward a centralisation of competences in all federal states or in the European Union. At the same time, however, as the territorial domain of regulations expands, the significance of local and regional differences of economic and social conditions, problems, opportunities and political preferences also will increase.[17] As a consequence, the problem-solving effectiveness of centralised (and almost inevitably uniform) solutions is likely to decline, and political dissatisfaction may produce a backlash of decentralising reforms – whose unresolved problems may then start another turn of the centralising–decentralising cycle that seems characteristic not only of federal polities but of many large organisations as well.

This dynamic instability is ultimately caused by the multilevel character of the problems requiring regulation. In any substantial policy area, one will find problems, or aspects, that are best regulated at the regional or even local level, whereas other aspects could only be regulated effectively at national, European or even global levels. That is as true for education as it is for economic, social or environmental policy. In the German reform, for instance, the Länder obtained exclusive competence over the abatement of 'leisure-activity noise' – which may in fact be best dealt with through local measures. But if these should aim at reducing the noise level of lawn mowers, the free trade rules of the Single European Market would require harmonisation through an EU directive. In other words, the attempt to allocate exclusive competences over any substantial field of legislation to a single level of government must inevitably lead either to over-centralisation (where important local concerns are ignored) or to under-centralisation (where important external effects and coordination needs are ignored). It does not make sense, therefore, to object in principle to the preponderance of concurrent competences. What is needed instead are better ways to manage their use by governments on both levels.

In the practice of federal states, there are two rules which favour the use of concurrent competences by the central state: (1) Central state law takes precedence over prior member state law, and (2) where central state legislation has 'occupied the field', there is no more room for member state legislation. In principle, to be sure, the centralising effect of these rules may be moderated through (legal or political) federal constraints on central state legislation. Unfortunately, however, these will not be able to deal satisfactorily with the multilevel characteristics of important policy areas.

Political constraints are generally institutionalised in the second chamber of a bicameral legislature. But if the second chamber is an elected Senate, party politics may dominate and either produce uncritical partisan support of central state policies or partisan blockades that have nothing to do with the federal balance. The same may occur also in the relations between the German government and a Bundesrat that is dominated by the opposition. In periods or on issues where party politics did not matter, by contrast, Länder governments had in the past willingly contributed to

increasing centralisation. They were generally more interested in participating in federal legislation rather than in defending the domain of their own legislatures. Political constraints, in other words, may enlarge or reduce the range of central state legislation with little concern for an a vertical allocation of competences that would optimise the problem-solving capacity of both levels.

Legal constraints, by contrast, depend on the judicial interpretation and enforcement of a constitutional text that enumerates central state powers and/or limits their exercise. Enumeration, however, provides no defence against the extensive interpretation of central state competences. This is particularly true for competences to regulate the economy – which, in modern capitalist societies, has come to penetrate all spheres of social and cultural life. Hence the expansionist interpretation of economic competences has been the most powerful force of centralisation in the constitutional history of the United States and Australia as well as in the European Union. Regardless of the interpretation of the underlying competence, however, there could still be effective legal constraints on the actual use of concurrent powers Such constraints are in fact attempted by the 'necessity clause' of article 72 II of the German Basic Law and by the 'subsidiarity clause' of article 5 of the EC Treaty. Historically, they had also been implied by the 'dual federalism' and 'economic due process' doctrines of the US Supreme Court before the constitutional revolution of 1937.[18] In the American decisions after 1937, in the German decisions before 1994 and in the case law of the European Court of Justice, these constraints were not effectively enforced by the judiciary. To have any effect at all, they would need to be interpreted restrictively and applied rigidly – which was true in the United States before 1937 and is currently true in Germany. In that case, however, these legal constraints will generally exclude certain matters from central legislation and, like an allocation of exclusive competence to the member state level, may give rise to problems of under-centralisation. In the United States, this was dramatically the case when the Supreme Court denied the constitutionality of the New Deal in the 1930s. The result was a constitutional crisis which was resolved when the Court abandoned its prior interpretation in 1937.

But even where they are effective, legal and political constraints on the use of concurrent competence could not provide a lasting protection for the legislative powers of member states. The reason is the second of the rules cited above which stipulates that a valid central state law will occupy a field that henceforth must be off-limits to member state legislative initiatives. Hence any piece of central legislation that was once adopted, in the presence or absence of political or legal constraints, will expand that field. In other words, the second rule creates a ratcheting mechanism which, in the absence of constitutional counter-movements, must progressively reduce the domain of member state legislation.

This ratcheting effect would be avoided if the second rule could be relaxed. In the German reform process, the Länder had in fact tried to remove it. Before they had become committed to the separation principle, they had proposed opt-outs (*Zugriffsrechte* or *Abweichungsrechte*) from standing federal law. If these were allowed, the federal constraints on national legislation would be removed. At the same time, each Land would be allowed (but not obliged!) to adopt laws that deviated from existing federal rules. Unfortunately, however, this innovative proposal was easily rejected

by the federal government. What the Länder had asked for were 'absolute' opt-outs – a unilateral and unconditional right to adopt statutes deviating from existing federal law which, once enacted, would also be immune to the effect of later federal legislation. From the federal perspective, therefore, such opt-outs amounted to exclusive Land competences in disguise – where the disguise merely served to avoid the conflicts of interest between big and rich versus small and poor Länder. In that case, it seemed far better, from the federal perspective, to insist on negotiating directly about the allocation of exclusive competences instead.

What the discussion had failed to explore, however, were long-standing proposals[19] for *politically conditioned opt-outs*. These would also remove federal constraints from national legislation, and they would also allow the Länder to initiate legislation deviating from existing federal law. But before these deviations would become effective, they would have to be submitted to examination by the federal parliament where they could be stopped by a joint veto of both houses. What would be gained by such a solution?

First, federal legislation could again deal with problems as they might arise without having to worry about the judicial interpretation of rigid constitutional constraints. This would remove the shadow that has been hanging over crucial federal competences since the Court announced its narrow criteria in 2004. Second, Länder governments and parliaments could now envisage policy responses to specific problems, opportunities or political preferences in their regions that might make use of the full range of concurrent competences without having to avoid the fields occupied by prior federal legislation. This could dramatically increase the potential problem-solving capacity of the Länder.

But would the federal veto not impose the same narrow limits on potential opt-outs as it had imposed on exclusive Länder competences? I think not. In cognitive terms, the situation would be very different. The assignment of an exclusive competence would be general and permanent. Hence constitutional reformers would not only have to worry about future needs for federal action, but they would also have to imagine the potential uses that individual Länder might make of their new power and the possible damage which these might do to national concerns or to interests of other Länder. These are conditions of maximal uncertainty, and they would justify proceeding with extreme caution. The acceptance of an opt-out, by contrast, would not depend on very broad and uncertain predictions. Federal actors would merely have to assess the possible damage which the specific measure of a single Land might cause in the near future. Politically, moreover, this would be a measure which a democratically accountable government had in fact considered necessary, even though its voters would generally prefer national unity over regional diversity. And finally, if unforeseen problems should arise at a later time, federal legislative powers would still be intact and could be used to correct the earlier judgment. Under these conditions, even the governing coalition would not lightly vote for a veto. In the Bundesrat, moreover, the applicant government would be judged by its peers. While these would object to measures with negative externalities and to beggar-thy-neighbour policies, they would also know that they might soon find themselves in the same spot. In short, there is reason to expect that opt-outs would be judged with a favourable presumption.

But if that is assumed, what would be the effect of the solution on the institutional architecture, the problem-solving effectiveness and the political legitimacy of the multilevel German polity? The institutional architecture would evolve in response to actual practice: If the unitary political culture continues to dominate politics in the Länder, there will be few opt-outs and not much will change. But ambitious political leaders may use the new options to respond creatively to specific challenges in their own region. If they succeed, and if others would then follow, the institutional architecture could indeed change. The outcome could be a very differentiated, fine-grained and flexible de-facto distribution of competences between the federation and the Länder. Moreover, the resulting pattern could be quite asymmetric, as individual governments would respond to specific problems and political preferences in their regions, while others might be quite satisfied with the status quo of existing federal law.

If this should happen, even German federalism might finally benefit from the potential for innovation and policy learning that is theoretically associated with federal institutions. Moreover, politics in the Länder might eventually become more politically salient, and might weaken the unitary character of German political discourses. In that case, Land elections might even be seen as opportunities for democratic self-determination at the regional level, rather than as second-order national elections.

NOTES

The text is the slightly edited version of a presentation at the International Conference on the Future of Federalism, hosted by the Law Council of Australia and the University of Queensland in Brisbane, 10–12 July 2008

1. See, e.g., Wallace E. Oates, 'An Essay on Fiscal Federalism', *Journal of Economic Literature* 37/3 (1999), pp.1120–49; Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', *Common Market Law Review* 43 (2006), pp.63–84.
2. For an elaboration of this approach, see Fritz W. Scharpf, *Games Real Actors Play. Actor-Centered Institutionalism in Policy Research* (Boulder: Westview, 1977).
3. In East Germany, cultural differences and continuing economic disadvantages have given rise to demands for more effective equalisation efforts, rather than for greater political autonomy.
4. This has been confirmed though careful statistical analyses by Simone Burkhart, 'Divided Government in Deutschland. Eine empirische Analyse 1976–2005', PhD Dissertation, University of Cologne, 2007. See also Oscar W. Gabriel and Everhard Holtmann, 'Ober sticht Unter? Zum Einfluss der Bundespolitik auf die Landtagswahlen: Kontext, theoretischer Rahmen und Analysemodell', *Zeitschrift für Parlamentsfragen* 38/3 (2007), pp.445–62.
5. See, e.g., Konrad Morath (Herausgeber), *Reform des Föderalismus. Beiträge zu einer gemeinsamen Tagung von Frankfurter Institut und Institut der deutschen Wirtschaft, Köln* (Bad-Homburg: Frakfurter Institut, 1999).
6. See R. Zohlnhöfer's, 'An End to the Reform Logjam? The Reform of German Federalism and Economic Policy-Making', *German Politics* 17/4 (2008), pp. 457–69.
7. See, e.g., Wolf Linder, 'Die deutsche Föderalismusreform – von aussen betrachtet. Ein Vergleich von Systemproblemen des deutschen und des schweizerischen Föderalismus', *Politische Vierteljahresschrift* 48/1 (2007), pp.3–16.
8. In addition to the materials in this special issue of *German Politics*, the mandate, membership, deliberations and materials of the Commission are fully documented in Deutscher Bundestag, Bundesrat (eds.), *Dokumentation der Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung* (Berlin: Zur Sache, 1/2005). Authors with a political role in the reform process have commented on the issues involved in Rainer Holtschneider and Walter Schön (eds.), *Die Reform des Bundesstaates: Beiträge zur Arbeit der Kommission zur Modernisierung der bundesstaatlichen Ordnung 2003/2004 und bis zum Abschluss des Gesetzgebungsverfahrens 2006* (Baden-Baden: Nomos, 2007). A full analysis of the legal aspects and implications of the reform has been provided by one of constitutional law experts participating in the Commission in Hans Meyer, *Die*

Föderalismusreform 2006. Konzeption, Kommentar, Kritik (Berlin: Duncker & Humblot, 2008). My own book-length analysis will be provided in Fritz W. Scharpf, *Kein Ausweg aus der Politikverflechtungsfalle?* (Frankfurt/M.: Campus, 2009 – forthcoming).

9. The tight deadline was determined by the anticipation of two critical Land elections in 2005 that would interfere with the search for bi-partisan consensus. Subsequently, the red–green coalition parties lost both of these elections, and Schröder then opted for the dissolution of the Bundestag and national elections – which he lost narrowly in September of 2005. The reforms were then adopted by the new grand coalition.
10. Additional evidence about public preferences for relatively homogenous cross-Land provisions are contained in T. Peterson, H. Scheller and O. Wintermann, 'Public Attitudes towards German Federalism: A Point of Departure between Public Opinion and the Political Debate', *German Politics* 17/4 (2008), pp.559–86.
11. See Gerhard Lehmbruch, *Parteienwettbewerb im Bundesstaat* (Opladen: Westdeutscher Verlag, 1976); Fritz W. Scharpf, Bernd Reissert and Fritz Schnabel, *Politikverflechtung: Theorie und Empirie des kooperativen Föderalismus in der Bundesrepublik* (Kronberg: Skriptor, 1976).
12. See Arthur Benz, *Föderalismusreform in der Entflechtungsfalle* (Theodor-Eschenburg Vorlesung an der Universität Tübingen, 10 Nov. 2006), MS Feruniversitätate Hagen.
13. What could have been done was to limit the reach of the Bundesrat veto so that it would apply only to those parts of a federal statute that directly affected the administrative or fiscal concerns of the Länder. This option was never even considered by the prime ministers.
14. See, Fritz W. Scharpf, *Verfassungsreform mit Vetospielern*, in Klaus Dieter Wolf (ed.), *Staat und Gesellschaft – fähig zur Reform?*, 23. Wissenschaftlicher Kongress der Deutschen Vereinigung für Politische Wissenschaft (Baden-Baden: Nomos, 2007), pp.47–57.
15. The case is interesting from a theoretical-methodological perspective. What I presented so far was essentially an explanation in the framework of historical institutionalism which, like its companions of rational choice and sociological institutionalism, take the 'framing' of actors' perceptions and preferences as a given part of the explanans that accounts for choices and outcomes (Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms', *Political Studies* 44 (1996), pp.936–57). What is excluded is the question of the 'appropriateness' of these frames and the possibility that a 'reframing' might have allowed agreement on solutions that could be more attractive for all parties concerned.
16. This is of course a big if. Neo-liberal and Hayekian theorists would deny the need for, and justification of large parts of the regulatory 'acquis' accumulated by national and subnational governments during the post-war decades. If increasing interdependence and mobility have rendered these regimes unviable, that would be no reason for reconstructing them at European or global levels (e.g., Manfred E. Streit and Werner Mussler, 'The Economic Constitution of the European Community. From Rome to Maastricht', *European Law Review* 1 (1995), pp.5–30). But even these authors see a need for some regulation at higher levels.
17. See, e.g., James M. Buchanan and Gordon Tullock, *The Calculus of Consent. Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962).
18. Horst Ehmke, *Wirtschaft und Verfassung. Die Verfassungsrechtsprechung des Supreme Court zur Wirtschaftsregulierung* (Karlsruhe: C.F. Müller, 1961).
19. The proposal was first formulated in the dissenting vote of Senator Ernst Heinsen in the 1976 report of the Enquetekommission Verfassungsreform (Bonn: Zur Sache 2/77, pp.76–7).