



# Federal Reform in Germany—another failed attempt

*Federal government and Länder fail to reach agreement*

BY RAINER-OLAF SCHULTZE

**After** 13 months of deliberation, the joint *Bundestag* and *Bundesrat* Committee on Modernization of the Federal System has failed in its attempt to overhaul and modernize the highly integrated German system of intrastate federalism. The committee proposal was supposed to be delivered by December 17, but the 32 full voting members of the commission (see Box 1) have not been able to come to an agreement.

The commission's agenda was demanding, even though not comprehensive. It aimed primarily at:

- enhancing the ability of the federal and *Länder* governments to make decisions more independently of each other;
- clarifying the distribution of jurisdictions between the federal and the *Länder* governments and assigning political responsibilities more clearly; and
- increasing governmental and administrative efficiency and effectiveness.

Not included, however, were crucial features of German federalism such as the redrawing of territorial boundaries or core elements of fiscal federalism, particularly joint taxes (income tax and VAT) as well as the "Solidarpakt", which determines the size of federal and *Länder* transfers in favour of the five East German new *Länder* until 2019. The system of horizontal equalization was not touched either.

## What the federal government wanted

The federal government's primary aim was to reduce the number of federal bills which must be approved by the second chamber, the *Bundesrat* (controlled by the state or *Länder* governments). The number and range of those bills increased continuously since the 1950s. Today they make up more than 60 per cent of all federal bills. In the case of opposing majorities in the two chambers, the *Bundestag* and the *Bundesrat*, there has to be something approaching an all-party compromise on federal reform proposals. In the wake of growing partisan conflict, the opposition parties have been using the *Bundesrat* as a tool for blocking the federal government's initiatives.

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## 1. Who was on the committee?

Members	Rights
<b>Full Members</b>	
* Bund/Federation: 16 members allocated according to party strength in the <i>Bundestag</i>	the right to debate, to table motions, and to vote
* <i>Länder</i> : The premiers of the 16 <i>Länder</i>	
<b>Adjunct Members</b>	
* 4 members representing the federal government	the right to debate and to table motions; no voting rights
* 6 members representing the <i>Länder</i> parliaments	
* 3 members representing the local government umbrella organizations	
Experts: 12 academic experts (8 constitutional lawyers, 2 political scientists and 2 economists)	the right to debate; no right to table motions and no voting rights
<b>Organization &amp; voting procedure</b>	
2 working groups on:	
* "division of the legislative powers and the right of participation";	
* "financial relations"	
divided into 7 thematic working sub-groups	
Quorum	two-thirds majority of the full members
Chairperson: Franz Müntefering, head of the SPD-Bundestag-caucus; Edmund Stoiber, premier of Bavaria	

Partly in order to reduce the number of initiatives subject to *Bundesrat* veto, the federal government sought to change three articles of the constitution (which the Germans call the Basic Law). They are: the article on federal bills that specify how the *Länder* will organize and administer their tasks; bills that entail fiscal obligations for the *Länder*; and the provisions that deal with joint tasks in areas such as agricultural policy, regional development and construction of university buildings.

Of particular concern to the federal government is the matter of concurrent legislation (see Box 2). The need for reform grew out of the fact that the federal government – in line with its constitutional responsibility to guarantee equality throughout the country – went into various policy areas which had originally been assigned to the *Länder*.

The federal government also wanted to act more independently from *Länder* governments on the supranational level by abolishing the section of the Basic

Law that gives the *Länder* a role in international affairs. As it stands now, the *Länder* participate directly in negotiations on the European level whenever their exclusive jurisdictions are affected. In many other areas, the federal government is constrained by its obligation to define a common position with *Länder* governments before entering negotiations with the European Union.

In addition, the federal government was strongly committed to disentangling shared responsibilities in the area of environmental policy (especially with respect to nuclear energy) and to transferring them to the exclusive federal domain.

### **The *Länder* had their own ideas**

*Länder* governments aimed at regaining authority over various policy areas, currently under concurrent legislation, in exchange for concessions with respect to the reduction of their veto power in the Bundesrat. In particular, they asked for:

- jurisdiction over their public services, covering rights, obligations and pay of civil servants (including teachers, university professors and police);
- exclusive jurisdiction over regional policies, including labour market policies, housing, economic policies, environmental policy, and social assistance;
- exclusive jurisdiction over education, with the exception of scientific research policies; and
- the abolition of federal “framework” legislation.

In addition, the East German new *Länder* argued in favour of entrenching a constitutional provision regarding the *Solidarpakt* into the Basic Law.

### **The Compromise**

Politicians agreed on the importance of disentanglement, but their approaches differed significantly, especially with respect to the appropriate method and instruments.

For example, experts such as Fritz Scharpf, a member of the committee who has written extensively about the “joint-decision trap” in German federalism, argued strongly in favour of opting out provisions in certain areas of concurrent legislation. He also called for more *Länder* autonomy in fiscal matters by providing them with jurisdiction over tax rates and brackets in certain fields of taxation.

The politicians and their senior civil servants chose a different path. They were primarily committed to redefining jurisdictions. And they have not been favourable to the idea of *Länder* opting out of federal legislation provisions (with the exception of environmental policy). As well, several issues caused friction among rich and large, small and poor, Eastern and Western *Länder* governments. This revealed multiple cleavages within German federalism.

The two chairpersons, Edmund Stoiber and Franz Müntefering, made several serious attempts to reconcile and they came up with a compromise proposal.

Their compromise proposed that the Bundesrat would continue to participate in federal legislation through a suspensive veto on all bills and an absolute veto on tax



*The Bundesrat building in Berlin.*

matters and bills that impose financial obligations on the *Länder*. But the *Länder* would give up the absolute veto they now have on those federal initiatives where the *content* of the bill is federally defined, though *Länder* have the role of *administration and implementation*. The compromise did provide that *Länder* governments would have the right to opt out in such cases.

On taxation, the changes included giving the *Länder* jurisdiction over property and insurance taxes while the federal government would take over the automobile tax. Both orders of government would be obliged to adhere to the 3 per cent of GDP deficit limit that is part of the Maastricht agreement.

As for legislative powers, the proposed changes included adding the production and use of nuclear power, foreign cultural policies and environmental policy to the exclusive federal list, with the proviso that there be opting-out provisions for the *Länder* on the environment.

At the same time a number of matters would be moved from the concurrent list to exclusive *Länder* jurisdiction. These include: the public service (structure, rights, obligations and pay of civil servants and other public employees); the penal system; certain aspects of commercial law (office and shopping hours, for instance); and public housing. As well, matters related to the press, media and film would be transferred to exclusive *Länder* jurisdiction.

### **Why did it fail?**

The compromise would have undoubtedly changed federal-*Länder* relations. The reform would have reduced the number of federal bills subject to the veto power of the Bundesrat from approximately 60 per cent down to 40 per cent. That was the main goal of the federal government.

Some minor responsibilities would have been transferred to the *Länder*. The most important areas of public policy making, however, would still have remained within the framework of intrastate federalism. Even in the area of education the federal government would have retained some powers by means of framework legislation and joint tasks. The federal government would have been able to maintain its capacity to influence the *Länder* by, for

example, launching conditional grant-programs and by setting of standards applying to all *Länder*.

On December 17, *Länder* governments finally rejected the reform proposal. Much of the opposition came from the Christian Democratic *Länder* governments, who strongly resisted the efforts of the federal government to retain some influence in matters of education. But their resistance also indicated the divisions that exist among *Länder*

## 2. How the German federal system is structured

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German federalism is a highly integrated and centralized system of government. It is the model of intrastate federalism and is best captured by a term coined by Fritz W. Scharpf: *Politikverflechtung* or interlocking government based on joint decision-making.

*Politikverflechtung* refers to a political system in which all major political decisions are made jointly by the federal and *Länder* levels of government on the basis of solutions negotiated among the participants. It means that most governmental activities have to be implemented jointly by the federal and *Länder* governments: horizontally through inter-*Länder* cooperation and vertically through federal-*Länder* cooperation and multi-level governance. This process involves levels of government from EU institutions down to the municipalities. Institutionally, interlocking government is caused by the following:

- **constitutional clauses** that give precedence to federal over state law; clauses that enable the federal government to act and intervene if the *Länder* have not yet legislated in a particular field of shared responsibilities, or if the national interest or the interests of third-party members of the federation are affected by the legislation of a *Land*, or in order to protect the legal and economic union of the federation.
- **functionally differentiated distribution of responsibilities** where legislation is predominantly a federal responsibility (except for the areas of culture, education and the judicial system, which are under the jurisdiction of the *Länder*) while the *Länder* and municipalities carry out most administrative tasks
- ***Länder* participation in federal legislation** via the *Bundesrat*. *Länder* representation in the Second Chamber is based on the so-called *Bundesrat* principle - it is neither equal nor consistent with the representation-by-population rule; representation is asymmetrical and weighted. Members are not elected, but are delegates of the *Länder* governments. They have to vote as a block and according to the decisions taken by the cabinets of their respective *Länder*.

The *Bundesrat* has a hand in all federal legislation. There are two kinds of bills: those for which the Second Chamber has a suspensive veto only (*Einspruchsgesetze* in German), and those for which it has an absolute veto (*Zustimmungsgesetze* in German). In case of opposing majorities in the two chambers, the pending legislation is referred to the mediation committee with 16 members each from the *Bundestag* and the *Bundesrat*. The latter group of "absolute veto laws" includes not only more than 60 percent of all federal laws but also all major legislation - economic and social policy, as well as tax laws and acts concerning fiscal federalism.

governments with respect to changing the rules of the game more fundamentally. In a sense the question of education was only the nail in the coffin for the compromise. It became a particularly contentious nail when, just few days before the committee's proposal was supposed to be approved, federal Minister of Education Edelgard Buhlman reasserted the necessity to fundamentally change Germany's three-tier system of primary and secondary education by adapting it to nationally-set common standards.

There were many other reasons for the failure. For example, east German *Länder* were strongly opposed to any efforts to touch the area of fiscal federalism and horizontal equalization. Since 1998 richer *Länder* in the west have been pushing reforms in this area, consistently resisted by the east.

The overarching argument of the Christian Democratic *Länder* was that, while the reforms would allow the federal government to act more independently, efforts to decentralize fell well short of their expectations. And so they prefer the status quo to unacceptable reforms. That status quo still enables them to play a powerful role in the federal arena, influencing major legislation via the *Bundesrat* without being exposed to electoral resentment for unpopular measures.

A number of observers have commented that perhaps the greatest flaw of the reforms was that they were not far-reaching enough. A more adequate reform package would seek to address Germany's increasing cultural diversity and social disparities. One way of doing that might be by entrenching the opting-out mechanisms. That would create a more asymmetric federal system – something all sides seemed to shy away from. But when the deadline arrived in December, the *Länder* governments, in particular, were reluctant to trade their veto power in the *Bundesrat* in exchange for more jurisdiction over taxation and major legislative responsibilities.

The German reform process is another case that underlines the notion that "mega-constitutional politics" tend to fail, even when there is agreement that constitutional change is necessary. In order to accomplish profound structural reforms in federations, it might be more helpful to design committees or constitutional conventions that are made up not only of politicians who are directly affected by the reform output, but also of non-partisan experts as well as ordinary citizens.

Considering the major challenges that are shaping the political agenda in Germany, it is, however, likely that both tiers of government will soon revive negotiations and somehow come up with an agreement. And German experts predict that a new reform agreement will likely be similar to the one proposed by the two chairpersons! Leading politicians from all parties along with Horst Köhler, the President of the Federal Republic, all say that it is necessary to come to an agreement soon, although it is unlikely that the committee itself will be re-established.

The window of opportunity, as both sides including the co-chairman Edmund Stoiber have stated, will close this summer. From then on political parties will be preoccupied with preparations for the next federal election campaign in the summer of 2006. ☺