

Germany: Länder Implementing Federal Legislation

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Germany's federal system is characterized by the principle of "strict separation" of responsibilities between the federation and the *Länder* (i.e., the constituent states). Each order is accountable for its own decisions, even when a federal law delegates power to *Land* parliaments. To enforce this principle, the Federal Constitutional Court (FCC) has prohibited mixed administration and mixed financing. However, the German federation is not based on two completely distinct and separate columns of federal and *Land* powers with no connections. Instead there is a concentration of legislative functions in the federal government and of administrative powers in the *Länder*. The *Länder* actually implement a large part of federal legislation, as well as their own laws.

Germany's constitution, the Basic Law, makes a distinction between three types of federal powers: exclusive, concurrent, and framework jurisdictions. The exclusive powers of the Federation read very much like the list of congressional powers in the United States Constitution: foreign affairs, defence, citizenship, movement of goods and persons, communications, and federal taxes. The list of concurrent legislative powers is very extensive. It includes most of the authority over economic and social matters, including welfare, social insurance, labour law, economic regulation, agriculture, and the protection of environment. Finally, there are framework laws, which lay down basic principles and leave their elaboration to the *Länder*. The list of possible subjects of framework legislation is relatively brief, but it also includes much of what are attributed to the *Länder* expressly: higher education, the press and film industry, land reform, and regional planning. The fundamental requirement of framework legislation, the Federal Constitutional Court has specified, is that it leave significant leeway to the *Länder* implementing its provisions.

One of the most surprising aspects of the German administrative system is that most federal laws are carried out by the *Länder*. The basic principle is that the *Länder* shall implement federal legislation as matters of their own concern, as long as the Basic Law does not provide otherwise. The opposite is strictly forbidden; the federation is not allowed to carry out any state law. Therefore, direct federal executive powers are very limited and provided for only in areas in which unified administration is considered to be essential.

However the federal government still has the means to influence the *Länder* in their execution of federal laws. It may regulate *Land* agencies that administer federal laws. It may also confine *Land* administrative discretion by issuing administrative guidelines, and may issue by-laws that bind third parties as well. There may be federal supervision to ensure that the *Länder* carry out federal laws, and federal observers can be dispatched to state agencies for this purpose. Finally, there can be an intermediate form of administration in which the *Länder* enforce federal laws as "agents" of the federation, subject to binding federal instructions.

In fact, the political scope for a *Land* to take action has been considerably reduced in the past fifty years, and the high degree of intertwining of policy-making has reduced the transparency and public control of the decision-making process. These developments in recent decades have

actually led to a concentration of powers at both governmental levels, at the level of the federal government on the one hand, and among the entirety of the *Länder* on the other hand, with power and also finances approximately equally distributed. However, these power blocks – having a deleterious effect on political accountability – are so closely linked with each other that hardly anything can be moved politically. **The federal government and the *Länder* agree on the diagnosis of immobility, but do not agree on the proper therapy for it.**

This immobility can be traced to the 1980s and 1990s when the political decision-making process in Germany became increasingly cumbersome. In fact there was a growing social awareness of the need for fundamental reforms. This awareness met, however, with little response in political practice. The legislative process was blocked as a result of different majorities in the *Bundestag* and the *Bundesrat*, the lower and upper houses of the legislature. The legislative authority of the federal government has grown continually while, correspondingly, the *Länder* have less and less legislative authority and are now virtually only responsible for the administration and the implementation of legislation. In the meantime the framework conditions for this distribution of responsibilities have certainly been fundamentally altered by German unification and by the progress of the European integration process. Thus, in the long term the current arrangement threatens to weaken the political capacity for action.

The processes of European integration and economic globalization have also fundamentally altered the basic conditions for political management in federal countries. These processes point to the need to strengthen the legislative authority of the *Land* level of government. The integration of international markets demands ever-greater specialisation from businesses in countries with high production costs. As a consequence, sectoral and regional differentiation is becoming increasingly important in the competition between locations. In countries like Germany this is leading to a growing importance of the *Länder* as economic policy actors. These changing fundamental conditions for German federalism are already sufficient to make clear that a review of the German constitution has become a pressing political issue. At the core of the issue lies the question of the distribution and disentangling of federal and *Länder* responsibilities, as well as a reform of the financial constitution.

The “fossilised” federal structures of the constitution hardly allow for flexible reactions to modern societal changes. While market forces and their systems of distribution demand a more flexible capacity for reaction from the political system, the constitutional reality in Germany, as a result of joint tasks and joint taxes, the integrated system of tax revenue redistribution (“equalization scheme”), and the continual extension of legislation requiring *Bundesrat* consent, have left the political system even less flexible.