

The Reform of Federal-Local Relations in Germany

Hendrik Hagemann

1. Introduction

The German Federalism Reform Commission that sat from November 2003 to December 2004 dedicated numerous sessions to the relationship between the federal level and federal states (Länder), particularly in the context of how to interact with local government. In addition, Commission members and the Commission's expert advisors produced a great deal of further written studies. Despite, or perhaps because of, the extensive deliberations, the Commission failed to come to any agreement. Its co-chairs Edmund Stoiber, then governor of Bavaria, and Franz Müntefering, then speaker of the SPD faction in the federal parliament, singled out federal-Länder relationships in local matters as one of five areas where the Commission was unable to reach a consensus on reform in their valedictory statement.

Then, when the creation of the CDU/CSU-SPD grand coalition after the 2005 federal elections opened up the prospect of a second go at reform, changes in communal matters were agreed upon. There was a substantial change to Article 84(1) of the Basic Law: the overall result was a prohibition on collaboration between the local and the federal levels of government.

This first part of the paper will outline how the German federal system was organized prior to the work of the Federalism Reform Commission I (a subsequent one, focusing on the federal-Länder

financial relations, was initiated by the two German parliamentary chambers in December 2006 and started its work in March 2007). The second part describes the work of the of the German Federalism Reform Commission I and its outcomes, especially the prohibition on collaboration between the local and the federal levels, while the last part of the paper gives a short outline of how the changes have been implemented.

2. The German Federal System Prior to the Results of the German Federalism Reform Commission I

The federal elements of the German Constitution have historical roots reaching back beyond the existence of a democratic state in Germany. Without going into these historical details, one has to point out some key features of the recent federal system as it was laid down in Basic Law in 1949 and evolved from there. Today, there are 16 Länder, which are the regional units of the federal system, of which each has its own parliament and government. The Länder differ substantially with regard to size, number of inhabitants and economic performance. There are regional cultural differences in the Länder, despite them sharing a common language. On the federal level there are two main chambers: the Bundestag, whose members are elected in national elections every four years, and the Bundesrat. The Bundesrat, or second chamber, represents Länder interests and functions as a safeguard for inter-governmental coordination and cooperation between the federal government and the Länder governments. It consists of those cabinet members of the sixteen Länder who were delegated by the respective Länder governments. Each Land with less than two million inhabitants has three votes; those with between two and six million inhabitants have four; those with more than six million inhabitants have six votes. The votes of each Land must be cast uniformly. There is strong judicial safeguarding of the federal elements of the constitution, which is reflected in the fact that the Bundesrat cannot be dissolved by the federal government, having

the status of an “eternal” organ in the Basic Law. At the same time the federal government is not accountable to the Bundesrat; nevertheless the latter plays an important role in the drafting of legislation.

While the Bundesrat mainly embodies intergovernmentalism on the regional level, the practical operation of the federal system as a whole also requires that intergovernmental relations are conducted between all levels of government. There are many more intergovernmental organs in German political practice, in more or less constant communication with each other:

- (a) The level of the “whole state”, on which political institutions both of the federation and the Länder are represented on an equal basis. Its most important institution is the Conference of the Heads of Governments of the Federation and the Länder, which meets every four months and is based on accommodation and compromise. Furthermore, there are a number of coordinating institutions at the party level and interparliamentary coordination.
- (b) At the federal level, several institutions deal with matters within federal competence or subject to federal procedure (including the joint tasks or *Gemeinschaftsaufgaben*, originally exercised by the Länder, then based on specific administrative agreements and finally abolished by the Commission). The most important body is the Bundesrat. The Bundesrat’s permanent advisory council, consisting of all the Länder presidents, is the main force behind the institution’s political business. Furthermore, there are many more selected and issue-based committees who also support the President of the Bundesrat, who chairs the plenary session held every third Friday.
- (c) The “third level” represents the horizontal cooperation between the Länder themselves, preparing decisions that have to be taken by all of them. This consists mainly of the Conference of the Minister-Presidents, which meets monthly, before the meeting of the Conferences of the Länder Heads of Government with the Chancellor.

2.1 *The Länder as the Main Administrators*

The multi-faceted network of intergovernmental relations between the Federation and the Länder set out above reflects the fact that the Länder have always been the main administrators not just of their own laws, but also of most federal and directly applicable European legislation.

The administrative role of the Länder is defined in Article 83 of the Basic Law, which confers upon them both the right and the duty to “execute federal statutes as matters of their own concern in so far as this Basic Law does not otherwise provide or permit”. Articles 84 and 85 of the Basic Law differentiate in this field between administrative functions to be performed by the Länder “as matters of their own concern” (under general administrative rules requiring the Bundesrat’s consent and subject to federal supervision relating to legal standards only), and other matters in which “the Länder execute federal statutes as agents of the Federation” (subjecting them “to the instructions of the appropriate highest federal authorities” and to federal supervision dealing also with the “appropriateness of execution”). Nonetheless, in the entire field of administrative functions, the Länder are clearly the predominant bodies, while federal administrative powers, defined in Articles 87-90 of the Basic Law, are classed as exceptions to that rule. These powers only cover areas such as the foreign service, defence, the federal waterways and others which are conducted “as matters of direct federal administration with their own administrative sub-structures”. All of this explains the otherwise rather obscure provision in Article 50 of the Basic Law that “the Länder . . . participate through the Bundesrat in the . . . administration of the Federation”.

While the attribution of administrative functions may sound to be a more or less technical matter, its significance within the German system derives from the implications which flow from it for the position of the Bundesrat in the passing of federal legislation: all federal statutes providing “for the establishment of the requisite authorities and the regulation of administrative procedures” require the Bundesrat’s consent, even if such a provision is only contained in a single paragraph or section of the respective federal act. This

is the main reason that approximately 55 per cent of all federal legislation needed the consent of the Bundesrat – one of the primary targets for reform during the first commission. The same applied to delegated legislation of the federal government (ordinances) pursuant to such statutes and generally to all matters “that are executed by the Länder as agents of the Federation or as matters of their own concern” (Article 80 of the Basic Law). It also applied to federal legislation with administrative relevance based on European Directives (framework rules to be given effect through legislation in the Member States of the European Union). With European competence constantly expanding into fields of federal relevance in Germany, the European dimension has naturally had an increasing impact not only on the field of administration, but also on that of legislative powers (as discussed later). The important observation at this stage is that alongside its core function of representing regional interests in federal legislation, the most outstanding function of the Bundesrat is to apply the administrative experience of the Länder to the shaping of federal law.

2.2 Local Government Autonomy

While considering the field of administration, reference needs to be made to the role of local government autonomy in the German constitutional system. Since the beginning of the nineteenth century, that autonomy—on both the town and county levels – has always been of considerable importance for German structures of government as a whole. Its status can even be compared with that of the federal principle due to the fact the Basic Law accords an institutional guarantee to that autonomy in Article 28 (despite the fact that the organization and supervision of local government clearly and indisputably belongs to the legislative and organizational sphere of the Länder). Local government bodies, which carry out large parts of the administrative functions attributed to the Länder by federal legislation, thus enjoy the constitutionally protected status of an autonomous tier of government (which even entitles them to raise matters concerning that status before the

Federal Constitutional Court). The functional area linking the Länder and local government most closely together is that of regional and town and country planning, where they possess substantial autonomy vis-à-vis the federal tier, thus balancing much of the legislative losses which the Länder (and with them local government) have suffered.

3. Changes to the German Federal-Local Relations as a Result of the German Federalism Reform Commission I

During the autumn of 2004 the work of the German Federalism Reform Commission I got stuck due to numerous propositions urged by the Länder and members of the commissions on how to change the crucial Article 84 of the Basic Law and its implications for direct federal-local relations within the German federal system. The implications of the proposal for the local level were that the Länder would be granted a right of divergence (*Abweichungsrecht*) for laws and administrative procedures issued by the federal government and to be implemented by the Länder. Due to the problem of administrative interconnectivity for the local level discussed above, where, many laws and administrative procedures had to be implemented by the local authorities, Article 84 would have had to be amended to prevent direct assignment of duties and responsibilities by the federal level to the local level, and would have constituted a fundamental change in the traditional relationship between the federal and local administrative level. In the future, all dealings would have to be between the federal level and the Länder, who in turn would work with, equip and control the local level alone. However, the Commission failed to come to any agreement in its initial phase from 2003 until the end of 2004.

These reforms were only possible following the creation of the CDU/CSU-SPD grand coalition after the 2005 federal elections. Article 84(1) was amended, with the overall result being a prohibition on collaboration between the local and the federal levels.

4. Implications of the Changes to Article 84 of the Basic Law and the Prohibition on Cooperation (*Kooperationsverbot*)

During the year 2007—the second year of the grand coalition – Ursula van der Leyen, the Federal Minister for Family Affairs, Senior Citizens, Women, and Youth, stirred up a controversy about her political lobbying concerning the lack of nursery schools and kindergarten places in Germany, especially in the west of the country. For historical reasons, while 35 per cent of children up to the age of three were provided with a place in a state run nursery school in the eastern Germany, this percentage was only 7 per cent in the west. This discrepancy is widely believed to be one of the main drivers behind the low birth rate in Germany as a whole but among young professional women trying to combine work and child-raising in particular. Furthermore, due to the results of the Federal Commission mentioned above, the federal government is prohibited from intervening in the local matter of providing and financing nursery school places, including the provision of federal funds. Thus, only a year after the Federal Commission had amended the Basic Law to prevent financial interaction between the federal and local level, there was already political and public opinion pressure for change. The matter was compounded by the Länder, who either lacked funds to provide their local communities with sufficient funds, or, in the east, still wanted their “fair” share funds. As a result, the federal government was forced to find a way around the new rule in Article 81 in order to provide sufficient funds to the local level. The actual process for doing so—which is still ongoing—will establish an endowment fund outside the normal budget rules and without the proper control of Parliament, funded by VAT revenue belonging to the federal level.

In conclusion, while the issue appears to be a technical one, it illustrates the potential limits of constitutional reform in strengthening the federal system. Despite the work of the reform commission, it is clear that if political pressure rises sufficiently the govern-

ment will find ways around the strict wording of the constitution—even if they run counter to the underlying federal principle. In the future, then, such constitutional changes will be better served if they reflect political realities.