The Long-Term Development of Federalism in Germany: An Essay[1]

Wolfgang Renzsch

For years, German citizens have been frustrated by having to navigate a federal maze to get government services. During the budget debate in the German *Bundestag* on September 7, 2016, Chancellor Angela Merkel put it succinctly:

"German citizens are not interested in which level is currently responsible (for a government service) but want access for themselves."

Except for knowing which government is responsible for education policy, most citizens do not know which order of government oversees what. Even in the case of schools, federalism is usually seen as a disadvantage because schooling policies vary from state to state. Moving from one state to another often results in school problems for the children. There are still many complaints about "petty state policies."

Why has federalism remained a fundamental constitutional principle in Germany – despite two horrendous historical catastrophes in the twentieth century? It's simply the result of history.

In contrast to Canada, Australia, Switzerland or the USA, there is little in Germany that could be called a "federal spirit." The reasons for this can be found in history. In the 19th century, after the Napoleonic Wars, most Germans wanted to have a single German nation state, but the federal arrangement set up by the Unification of Germany in 1871 was subject to several burdens.

From a Prussian perspective, the Constitution of 1871 was in most part an emergency solution, because otherwise the southern German states could not be won over to join the North German Confederation—now called the German *Reich* (Empire). From a South German perspective, the federal order needed to offer protection against Prussian centralism. Democrats, Social Democrats, and some Liberals, especially from southern Germany, took a critical view of the 1871 Constitution because the *Reich* was a federation of princes intended to secure the "monarchical principle." It was indeed an instrument for preventing democracy.

But it was also about religious contrasts in the new *Reich*: the essentially Protestant North of Germany was opposed to the more Catholic South. Bismarck tended to regard the Catholic *ultramontans*—the Black Internationalists— as well as the Social Democrats— the Red Internationalists— as enemies of the *Reich*. Nobody was really happy with the new imperial federal state: for some it was a part only of what they wanted because the desired central state was not possible. For others it was a barrier against Prussia. For a third group, it was a barrier against democratization. The people in the south of this new empire felt more connected with their neighbours in Austria or Switzerland than with those in northern Germany. This can still be observed today: for southern Germans, northern Italy and the Mediterranean are not only geographically closer than the North Sea and the Baltic, but also culturally.

[1] I wish to thank Carl Stieren for his support during the editing process of this article.

The special type of federal structure of the Imperial Constitution of 1871 had three unique pillars:

- Governmental powers were divided up among the member states according to functions.
- Joint decisions at the federal level were made only by the consent of the governments of the member states in the Federal Council.
- Execution of the federal laws was carried out by the member states.

These three pillars made up a new federal type, which differed markedly from that of Canada or the United States. These are based on a division of tasks according to policy fields, in which the functions of initiating, executing, and financing a task coincide in the powers of one authority. The most striking expression of the cooperative structure of the German federal state was the long-standing personal union of Reich Chancellor and Prussian Prime Minister. If one follows Daniel Elazar's definition that federalism is “self-rule plus shared rule,” then the German federal state can be described as a model in which “shared rule” is strong, but “self-rule” is weak. This basic principle of the German federal state would determine the development of federalism in Germany: it has survived all the catastrophes of German history since 1871.

The constitution of 1871 was deliberately designed to prevent its further development towards a democratic federal state. Due to the strong position of the *Bundesrat* – the German upper house - Prussia and the monarchically constituted states of the Reich were able to thwart any modernization of the *Reich* Constitution. The area regulated by non-constitutional law, which was often very modern for its time, looked somewhat different. The law of the *Reich* regulated trade law, civil law, the beginnings of the welfare state and other policy areas. The *Reich* did not regulate taxes, which was provided for in Art. 70 of the Constitution of 1871, because of the resistance of the member states. Independently of this, contemporaries already complained about the increasing legislative dominance of the *Reich*, even though in many cases new areas of regulation were involved, rather than areas which had previously been the responsibility of the member states.

With this structure—regulation at *Reich* level, implementation by the member states—the *Reich* as a political arena became the focus of interest. The tendencies towards a unitary government were reinforced by the political competition for representation in the *Reichstag*, which, unlike the parliaments of the member states, was elected based on universal male suffrage. The mass parties, especially the Social Democratic Party and the Centre Party, therefore concentrated on the *Reichstag* because the member states were less important. The "unitary federal state," which Konrad Hesse described in the 1960s, was in essence already laid out in Bismarck’s Constitution of 1871.

The Weimar Constitution—*Weimarer Reichsverfassung*—reversed the relationship between the *Reich* and the *Länder* (as the member states of the Reich were now called). The *Reich* was no longer dependent on the member states: the *Länder* were dependent on the *Reich*. This was also evident in the role of the upper house of the *Reich* of 1871—the *Reichrat*—in comparison to that of the *Bundesrat* in 1871: The *Reichrat* had only the right of objection, and approval of *Reich* laws was no longer required. Majorities against *Reich* laws could never be assembled. Such a majority was politically impossible, because majorities against the parties at the centre of the political spectrum—the Social Democratic Party and the Centre Party—could not be formed.

The Federal Republic

The post-war period did not bring a fundamental new beginning; on the contrary, the existing *Reich* laws remained in force as federal laws, unless they were conspicuously Nazi laws. The Parliamentary Council sought a balance between the 1871 *Reich* Constitution and the Weimar *Reich* Constitution regarding the relationship between the federal government and the *Länder*. Instead of dependencies, a balance was to be struck between the federal government and the *Länder*. This became clear in the division of the federal laws into laws which required the approval by the upper house necessarily (so-called consent laws as in 1871)—and laws against which the upper house could object (objection laws)—but which the lower house could overturn by a majority vote (as in 1919). However, the principle that the *Länder* implement federal laws was retained, now laid down in Article 83 of the Basic Law (German Constitution of the Federal Republic, 1949). A federal law became subject to approval of the upper house if it contained general administrative provisions for the *Länder*. This form of functional division of tasks, which is not an invention of the Basic Law but can be traced back to the Constitution of the *Reich* of 1871, was based on cooperation, the political integration between the levels of the federal state. Since the existing legislation continued to be essentially regarded as federal law, the newly founded Federal Republic of Germany had already exhausted the concurrent legislation to the greatest possible extent when it was founded, leaving the *Länder* little room for their own design in this area. A unitary tendency also emerged early on in competition among political parties. The SPD (*Sozialdemokratische Partei Deutschlands*) had resurrected from "above" at a "*Reich* Conference" in Wennigsen near Hanover in 1945, adopting old centralist structures for their party with a clear anti-federal orientation. Even though the CDU (Christian Democratic Union) was not founded as a federal party until 1950 and previously "only" consisted of state associations, Konrad Adenauer clearly oriented his policy towards the federal level, at least since the Parliamentary Council 1948/49. Party competition had now—as before— strong unifying effects.

From the beginning of the Federal Republic, the federal government used its superior financial power to control the policies of the *Länder*. In the 1950s and 1960s, the federal government launched support programmes outside its constitutional powers: social housing construction, the "Green Plan" for agriculture, the promotion of sport. There were "Federal Youth Games" and numerous other activities of the federal government promoted unitarization: there was little resistance to "financing from a foreign budget." On the contrary, the states were more inclined to accept the "golden reins." In addition, the federal government was given new legislative powers with approval, partly at the insistence of the federal states. Only to a small extent were there real transfers of competence from the *Länder* to the federal government, mostly in new areas such as the regulation of air traffic, nuclear power, or environmental protection, which made nationwide and uniform rules appear sensible.

The financial constitutional reform of 1969, which was essentially in force until the end of 2019, is less characterised by fundamental innovations than by a new constitutional basis for the federal-state cooperation structures that had pragmatically developed in a constitutional grey area in previous years. The new Articles 91a and 91b of the Basic Law (joint tasks) and Article 104a (3) and (4) of the Basic Law (cash benefit laws and investment aid) intensified federal-state cooperation and thus also policy integration. Financial equalization was also placed on a new footing. With the extension of formula-driven tax sharing between the federal government and the *Länder* (now income taxes and -new- VAT) —Art. 106 Para. 3 Basic Law—and a further development of the fiscal equalization system

of the *Länder*—107 Basic Law—the principle of "uniformity of living conditions" (in other words, raising the standard of living to the same level in all *Länder,* no matter which legislation was used to do so) was to be increasingly taken into account. The 1969 financial reform was probably one of the great achievements of German politics. It eliminated considerable deficits, for example in education, and created a high degree of interregional balance within the Federal Republic. The German federal state was not justified by diversity and difference, but by comparable public services in all regions of the country.

In 1969, the Social Democrats and the Free Democrats formed a new federal government. With this change of government, the question of the party-political composition of the *Bundesrat* became more virulent. As early as the 1950s, Chancellor Adenauer ensured that there was no party-politically opposing majority in the *Bundesrat*; he even insisted that coalitions be formed in the *Länder* according to the "Bonn model". But the conservative "citizens bloc governments" proved to be unstable. The government in Lower Saxony under Heinrich Hellwege, (German-(Hanoverian) Party leader who coalesced with the Free Democrats, and Christian Democrats), lasted only from 1955 to 1957. The government in Hamburg under Kurt Sieveking (Christian Democrat leader who coalesced with the Free Democrats and the German Party from 1953 to 1957) also fell after two years. Now, after 1969, the Christian Democrats and their Bavarian sister party, the Christian Social Union (CDU/CSU) attempted to use its majority to bring the federal government to its knees. This in turn led to the state coalitions increasingly following the new Bonn model. As a result, state parliamentary elections also became *Bundesrat* elections, even though no member of the *Bundesrat* ever appears on the ballot anywhere—the *Bundesrat* is made up of delegates selected by the government party or coalition in power in each respective state. The parties placed the effects on the *Bundesrat* in the spotlight of their ads for the next election.

However, it also turned out that the party-political instrumentalization of the *Bundesrat* had its limits. *Ministerpräsident* Ernst Albrecht (Lower Saxony), who ruled in a coalition with the liberal FDP, did not vote in accordance with the party line when ratifying accompanying laws to the treaties with Eastern Europe, for example. Not only during the reign of the Christian Democrat-Free Democrat coalition, but also during Helmut Kohl's chancellorship, the limits of the *Bundesrat's* party-politicization became apparent. The heads of government of the *Länder* —the *Ministerpräsidents*—would sometimes resist. For the 1989 tax reform, the four North German *Ministerpräsidents*—Ernst Albrecht and Gerhard Stoltenberg (CDU, Lower Saxony, and Schleswig-Holstein) as well as the mayors of Bremen and Hamburg—Klaus Wedemeier and Henning Voscherau (SPD) demanded compensation from the federal government for the expected tax losses. The Structural Aid Act, which came into force on January 1, 1989, and was intended to promote investment in the northern German *Länder*, was adopted. After German reunification, the situation became more complex because it was difficult to reconcile the different interests of the *Länder* and their governing parties. In 1992, the state of Brandenburg, which was governed by a Social Democrat "traffic light" coalition—Social Democratic red, Free Democratic yellow and Green Party green— voted against the SPD line in the *Bundesrat* and agreed to raise the Value Added Tax (VAT) by one percent—from 14% to 15%—because the federal government had promised to let the additional earnings benefit the East German *Länder*.

Challenge 1: EU internal market

With the adoption of the Single European Act of 1986 and the Maastricht Treaty of 1992, the European Union embarked on the road to the completion of the internal market of the European Union (EU). This was accompanied by very extensive legislative harmonization, particularly in the economic sphere, but also in social legislation. The President of the European Commission, Jacques Delors (1985 - 1995), said that 80% of economic and social legislation would be Europeanised in the foreseeable future. The perspective for the *Länder* was that the progressing European integration process would result in further losses of competence without having to accept a compensation through the right to a say at EU level. This trend in the process led to an intensive debate on the compatibility of German federalism and European integration, which legally led to the "Maastricht ruling" of the Federal Constitutional Court of March 31, 1998. The political answer was a debate about a "Europe of the Regions", in which the EU and the subnational level of each nation state, and no longer the nation states, would become the decisive players.

To become "fit" for the internal market, the large and economically strong *Länder* —often in conjunction with other European regions—demanded more competences. "Competition federalism" was one of the buzzwords of political and scientific discussions, in which the *Länder* threatened first to let the Single European Act and then the Maastricht Treaty fail in the *Bundesrat*. But the result of the political disputes was more participation rights for the *Länder* in decisions of federal policy or subnational authorities in Brussels. Thus, the Committee of the Regions was set up, without veto rights, but as a further advisory body. Furthermore, the Maastricht Treaty made it possible for subnational authorities to participate in the Council when issues of regional importance were being negotiated. The possibility of a so-called subsidiarity complaint (a plea of the member states against centralist EU-ruling at the expense of the member states or their regions) was also created. However, these new possibilities did not involve strengthening the autonomy of the *Länder*, but "only" an improvement in participation rights. Since the structure of the EU's political system with Council, Parliament and enforcement by the member states resembles that of the German federal state, giving more participation rights was also the system-adequate response to the demands of the *Länder*.

Challenge 2: German Unity

Neither the "old" Federal Republic nor the opposition in the German Democratic Republic (GDR) were prepared for German unity. It was just over one year from when East Germans took part in the Pan-European Picnic on the border of Hungary and Austria on August 19, 1989, to the date when the unification treaty was ratified between the Federal Republic of Germany and the German Democratic Republic, on August 31, 1990. Various models were discussed for a federalization of East Germany, ranging from a *Land* called "East Germany" to a variant with sixteen *Länder*. In the end, the division of *Länder* was returned to the way it had been before 1952.

The first institutional step towards unity was the Economic, Monetary and Social Union of July 1, 1990. Since this was primarily a matter for the federation, the *Länder* did not play a major role in the negotiations. The situation was different with the Treaty on the Unification of Germany. But even in the negotiations on this subject, the federal government began by assuming it was the only responsible body. On the other hand, however, the resistance of the *Länder* soon emerged, successfully pushing for participation. In the Unification Treaty, the *Länder* enforced a clause according to which the legislative bodies of the united Germany were to deal with questions of the relationship between the

federal government and the *Länder* within two years of the establishment of unity. A Joint Constitutional Commission of the *Bundestag* and *Bundesrat*, which was to fulfil this mandate, was established in November 1991 and submitted its report in November 1993.

The outcome of the Commission disappointed those who hoped for something like a federal reconstitution of the Federal Republic ("*Bund deutscher Länder*"). Nevertheless, it would be wrong to describe the results of the Basic Law reform of October 1994 as marginal or even ineffective. The additions to Article 3 of the Basic Law—actual equality of women and men—and the new Article 20a of the Basic Law - protection of the natural foundations of life - should be emphasised. In Article 72 of the Basic Law, the old convenience clause for federal legislation in the area of competing legislation was replaced by a "necessity clause." The semantic difference between "convenience" and "necessity" may be small in German, but the jurisdiction of the Federal Constitutional Court - *e.g. Kampfhundegesetz (Pit bull law), Juniorprofessur (law concerning Junior Professors)*— has sharpened the new clause. Only the new Article 118a of the Basic Law, which was intended to simplify the way for a merger of the states of Berlin and Brandenburg, had a direct bearing on German unity. But, as is well known, the merger was not accepted by a public referendum. The other changes were marginal and mainly concerned procedural matters. It is remarkable that the commission and the constitutional legislator saw no reason to legitimize the *Basic Law* by a referendum according to article 146 of the *Basic Law*. The *Basic Law* was also considered to have been sufficiently legitimised in this way. That is certainly true, but such an essentially symbolic act of integration would have been important for the new Federal-German citizens in eastern Germany. All in all, this reform remained relatively unaffected by German unity.

Parallel to the Constitutional Commission, a working group of the Finance Committee of the *Bundesrat* met—far less spectacular, but probably no less important—to discuss the inclusion of the new *Länder* in the system of financial equalization for the whole of Germany. The Unification Treaty only provided for a provisional arrangement until the end of 1994. In the Treaty on Economic, Monetary and Social Union, which expected longer transitional periods, it had been agreed for the period up to the end of 1994 that the foreseeable deficit of the GDR would be borne by the Federal Republic of Germany, by the West German *Länder* and by the GDR itself, one third each, through borrowing. The unexpectedly short time until unification did not permit the development of a financially and nationally appropriate solution for the newly emerging East German states, especially since the ideas of the federal government and the states differed widely. So basically, there was hardly anything left but to transfer the agreement for economic, monetary, and social union to the new *Länder*—which proved to be completely inadequate in the first weeks and months after unification.

The federal government and the majority of the *Länder* pursued different concepts in the question of the future structure of fiscal equalization. The federal government, based on its unwritten competence for national affairs, wanted the states to cede to it VAT shares so that it could centrally satisfy the financial requirements of unity. This proposal found support above all in the CDU-governed East German states, not in Brandenburg. A majority of the states then agreed on a proposal from Bavaria, supported by North Rhine-Westphalia and Hesse, which—conversely— provided for a transfer of VAT shares from the federal government to the states, which were then to flow into the eastern German states via the advance VAT pursuant to Article 107 (1), sentence 4, 2nd half-sentence of the Basic Law.

In the end, the *Länder* prevailed with their federal solution against the centralist model of the federal government. Their proposal had the charm of moving within the logic of the financial constitution of the Basic Law. The flagrant tax weakness of the eastern German states justified an adjustment of the distribution of turnover tax between the federal government and the *Länder* in favour of the latter; the advance of the turnover tax, designed for the very needy *Länder* which had been introduced in 1969 to support particularly financially weak states, was the right instrument to raise the eastern German *Länder* to a level that did not overburden the fiscal equalization of the *Länder*. A constitutional amendment was not necessary. This once again showed what a great success the 1969 Financial Constitution had been. The result was the first solidarity pact which, in addition to adjusting the financial equalization, provided for other measures such as structural aid and federal supplementary allocations in favour of the new *Länder*.

Challenge 3: The (Failed) European Constitutional Treaty

The modernization of the federal order, especially with regard to the EU, determined the scientific and political debate on federalism over the next few years. With the planned entry into force of the European Constitutional Treaty in 2004, the German federal system should also be modernized. At least a temporal hurdle proved to be the applications to the Federal Constitutional Court by the states of Baden-Württemberg, Bavaria, and Hesse to review the norms against the Financial Equalization Act, which led to the ruling of November 11, 1999. As long as it was not clear how Karlsruhe would decide, the German discussion stagnated.

After the ruling, time was pressing because of the European agenda. The court demanded a law concretizing the standards of the Basic Law and amendments to the Financial Equalization Act. In the legislative process, this was also linked to the extension of the solidarity pact, because it had become apparent that the adjustment goals after unity had by no means been achieved. From a legal point of view, the demand for a constitutionally concrete law was controversial. Critics accused the Federal Constitutional Court of having introduced a third legal form between constitutional law and ordinary law, which was not provided for in the Basic Law. The reading of both laws - the Scale Act (*Maßstäbegesetz*) and the Financial Equalization Act - also shows that, apart from the concrete figures on a general level, both laws are almost identical. It is impossible to see what benefit had been gained by this new law. The passages of the judgement which demanded that the actors should negotiate under the “veil of ignorance” also caused irritation. To interpret John Rawl’s “theory of justice” as meaning that negotiations should disregard financial outcomes did not seem compatible with many people’s idea of political responsibility.

With the adoption of the Scale Law and the Solidarity Pact Continuation Law in autumn 2001, both of which did not interfere with the structures of the German federal state, the way was clear for a modernization of the federal order, which had long been called for to respond to the development of the EU. In December 2001, the heads of state governments and the federal government agreed to set up a commission to review the relationship between the federal government and the *Länder*. The negotiations were to begin quickly and be completed by the end of 2003, so that a reform could be implemented by the end of 2004—when the EU Constitutional Treaty would also be adopted.

But it didn't go that fast. Several working groups met. The *Ministerpräsidents* of the *Länder* agreed on guidelines, the Presidents of the *Landtag* (legislatures of each *Land*) adopted a declaration, and finally the federal government as well. It was not until October 2003 that the *Bundestag* and *Bundesrat* decided to set up the planned commission. The size of the commission indicated that a fundamental reform had been undertaken in the sense of unbundling and strengthening the powers of the two levels of government. The Constitutional Commission consisted of 16 members and 16 deputy members of the *Bundesrat* and *Bundestag*. In addition, there were four representatives and four deputies of the federal government, six deputies from the state legislatures, three representatives and three deputies of the local umbrella organizations, and twelve experts (without votes) from the scientific community.

In contrast to the committees of the *Bundestag* and *Bundesr*at, the Constitutional Commission usually met in public. The eleventh and last meeting of the commission took place on December 17, 2004. In the meeting, which lasted only 26 minutes, only the failure of the efforts could be ascertained. The reason for this was that the federal government and the governments of some southern German *Länder* were unable to reach agreement on education planning issues in accordance with Article 91b of the Basic Law primarily because of differing ideas about the Higher Education Framework Act. However, nobody wanted to let the project fail completely in view of the efforts invested. During the coalition negotiations after the 2005 *Bundestag* elections, the CDU/CSU and SPD agreed to resume negotiations and bring them to a conclusion. The negotiations were concluded in 2006, and the first federalism reform came into force on September 1, 2006.

Looking at the results, the expectations of those who had hoped for or feared a paradigm shift from cooperative to competitive federalism were not fulfilled. On the contrary, the reform was not a fundamental overthrow, but rather a moderate adjustment. In the sense of unbundling, the framework legislation of the federal government was abolished, legislative matters were transferred entirely to the federal government, others to the *Länder*, and at the same time the *Länder* were granted rights of derogation to exempt individual, precisely defined matters. In the interest of reducing the *Bundesrat*'s obligation to give its consent, the new version of Article 84 of the Basic Law was adopted. The *Länder* were granted the right to lay down regulations deviating from federal regulations regarding administrative procedures for the implementation of federal laws. This was associated with the abolition of the approval requirement in the Federal Council.

A compromise was reached on Article 91b of the Basic Law, after the Federalism Commission's first attempt to pass it failed. This compromise now allows the federal government to support "institutions and projects" of non-university research, but only “projects” at universities. It is also allowed to fund “research buildings” and large-scale equipment at universities. The right of the federal government to grant financial aid to the *Länder* for significant investments was restricted. Financial assistance was limited to areas in which the federal government has legislative powers. This clause led to problematic cases where the federal government wanted to promote the expansion of day-care centres for children under the age of six. The *Länder* were also given the right to determine the rates of land transfer tax themselves. Because the unbundling and dismantling of financial aid led to a loss of revenue for the *Länder*, the federal government granted unbundling funds for traffic conditions in the municipalities, university construction and social housing construction.

The first federal state reform was thus saved, but it had also excluded the difficult complex of federal-state financial relations. As a result, the *Bundestag* and *Bundesrat* decided in December 2006 to set up a second Federalism Commission, this time with the task of reorganising federal-state financial relations. The composition of the commission resembled that of the first, but with the difference that no external experts from the scientific community took part. It worked from 2007 to 2009. In 2009, the proposals were also translated into a corresponding Basic Law reform and accompanying legislation. The core of this second reform was the introduction of instruments to limit public debt, such as the so-called debt brake, into the Basic Law. As a result of the global financial crisis since 2007, Germany's national debt had also risen exorbitantly. At the EU and German level, efforts were made to tighten the limits of debt beyond those provided for in the Maastricht Treaty. The revised Article 109 of the Basic Law obliged the federal government and the *Länder* to comply with the provisions of Article 104 of the EC Treaty. In addition, it stipulated that the budgets of the federal government and the *Länder* must in principle be balanced without income from loans. In the event of exceptions due to the economic situation or catastrophes, debt must be reduced. The federal government was granted regular net borrowing amounting to 0.35% of the nominal gross domestic product, but not to the *Länder* which did not agree on the same liberties because they could not agree on which base – population, former debts – the Länder share should be distributed among themselves.

It soon became clear that the rigid restrictions on cooperation between the federal government and the *Länder* in the field of research and science were not optimal. In 2014, the federal government and the *Länder* agreed to repeal the rule from 2006. Article 91b of the Basic Law was considerably streamlined. Instead of distinguishing between research outside and within universities, between institutions and projects and between different types of university buildings, the new version now allows the federal government and the *Länder* to work together to promote science and research— and this is new— including teaching in universities. The only restriction lies in the requirement that agreements that focus on universities require the approval of all *Länder*.

Challenge 4: Federal-*Länder* Financial Relations

The core area of federal financial relations, taxes, and their distribution, was once again omitted. This was not only due to the difficulties associated with the matter, but also to the fact that the solidarity pact regulations found in 2001 were in force only to the end of 2019. After the federal elections in 2013, the federal government announced that it would again appoint a commission to draw up proposals. However, this did not happen. Instead, the finance ministers of the *Länder* set up working groups, the Federal Finance Minister, Wolfgang Schäuble (CDU), and the First Mayor of Hamburg, Olaf Scholz (SPD), presented a paper, but for a long time no progress was discernible, also because most of the negotiations took place behind closed doors. The situation was further complicated by a lawsuit filed by Bavaria and Hesse, both of which saw themselves overburdened by the financial equalization obligations. Politically, North Rhine-Westphalia's demand to see the first step of the equalization – the redistribution of up to a quarter of the VAT revenues of the *Länder* to the very poor *Länder* (VAT advance) – abolished. According to the figures at the time, this would have made the North Rhine-Westphalia a donor state again. However, this demand was not compatible with Bavaria's demands for a reduction in its horizontal state fiscal equalization payments. These two steps of the system had a relation of communicating pipes: a reduction of one would increase the other. Therefore, one solution would have ruled out the other. The surprising agreement among the *Ministerpräsidents* of

the *Länder* then provided for the abolition of the previous compensation between the *Länder*. Instead, it was agreed that the below-average financial strength of the states would be replenished within the framework of the vertical distribution of VAT between the federal government and the *Länder*. This solution was made possible by the fact that the federal government paid for it—as the states wanted. From 2020, almost ten billion Euros of federal funds will flow to the *Länder* within the framework of the distribution of value-added tax and federal supplementary allocations. It is difficult to assess whether this new regulation will prove to be better than the old one. It has now been operational for several years, but the financial demand for fighting COVID 19 overshadowed all “normal” budgeting. On the one hand, tried and tested federal elements of equalization between the *Länder* have been abolished; on the other hand, other federal states only have vertically organised equalization systems without their federal substance having suffered seriously. It may cause scepticism that the new Fiscal Equalization Act contains several ancillary provisions for individual groups of *Länder*. Here it becomes clear that the compensation had to be “improved” already when it was passed.

In what was apparently a return for the financial improvements in favour of the *Länder*, they granted the federal government concessions in matters of competence. These amendments of the Basic Law gave the federal government sole responsibility for the construction and maintenance of the federal motorways. It is now permitted to set up an infrastructure company organised by the private sector for this purpose. Unlike the federal government, such a company can take out unlimited loans. It is subject to the debt brake of the constitution. Part of the federalism reform was reversed in 2006 with the federal government being able to provide financial support for school renovation in financially weak municipalities.

After the 2017 federal elections, it became clear that some parts of the reform were not without problems. At first it was about schools. It had already been settled in the coalition agreement that the restriction of federal aid to schools in financially weak municipalities would be open to all. This was to make possible the Digital Pact, through which the federal government would provide the *Länder* with five billion euros for equipping schools with computers and accessories. Adoption was not easy, because all the *Länder*, albeit for various reasons, rejected the federal government's concept: the financially strong southern Germans rejected the right of co-determination and controls demanded by the federal government, while the other *Länder* did not agree with the *Bundestag's* demand that they should provide funds to the same extent as the federal government. In the mediation committee, the federal government made a great effort to accommodate the *Länder* and thus prevented a blockade.

The German Federal State 2021: The Long Lines

Germany is a diverse country. Its landscape ranges from the beaches of the Baltic and North Sea to the North German lowlands, the low mountain ranges in the middle of the country to the towering Alps. Apart from the Danish and Sorbian minorities, German is the common language everywhere, albeit with different colours and dialects, from the North German *Platt* to the Saxon to the Swabian and Bavarian, from the North German "*moin*" (which has nothing to do with “tomorrow” or “good morning”) to the Bavarian "*Grüß Gott*”. The historical developments were different until the 19th century. Nevertheless, federalism, the federal state in Germany, is not really rooted in the culture of the regions. Regionality and region-specific peculiarities exist, but they have not developed any social federalism: the Frisians or the Franks, who certainly cultivate their special characteristics, do not form

regional authorities. Unlike in Switzerland or Canada, where different languages are the basis of a federalism supported by society, there is no such thing in Germany. Therefore, federalism is not a social issue, but first and foremost an issue for the organization of government and public administration. The former Federal Chancellor, Angela Merkel, was right to say that it is advantageous for citizens to have a single point of contact irrespective of federal competence, and this was and is the local town hall. The local government is often closer to it, at least in practice, than the state.

If one looks at the long lines of development of the federal order in Germany, the enormous continuity is striking. Despite all the breaks in German history in the 20th century, despite two dictatorships, little has changed in the basic structures of Bismarck's construction. The fundamental reason for this is not primarily the division of tasks according to policy fields, not institutional congruence, but instead, it has been the division of tasks according to functions. The *Reich* level, later the federal level, was responsible for political control with the participation of the member states, whose task was and is the implementation of Reich law, later federal law. In this respect "shared rule" dominated, not "self-rule."

Of course, there have been changes. The opinion occasionally voiced, especially in economic literature, that the Basic Law in its 1949 version had sharply separated the levels, but the country embarked on the wrong path, and that the federal state was "screwed up," does not stand up to scrutiny. In 1945 and 1949, respectively, the existing legislation of the *Reich* remained in force and, all laws, except those of National Socialist content, continued to apply as federal law. The concurrent federal legislation was thus largely exhausted, and the cooperative structures were adopted. The further development was shaped by the logic of Bismarck's model. The federal government ensured interregional balance in the Federal Republic, at times in a constitutional grey area. German reunification, which brought the Federal Republic previously unknown disparities, also was accomplished successfully by applying the existing logic of German federalism.

It appears to be a paradox that the rationality of the German state is not the preservation of regional diversity and difference, but rather the creation of equal living conditions. In fact, the Federal Republic shows a high degree of homogeneity in comparison even with unitary states when it comes to public services of general interest: despite all economic differences, even in peripheral regions there are proper schools, adequate health care and, in many cases, acceptable funding and support for culture. In historical retrospect this is not self-evident, not even in the situation today. Two circumstances are at the root of the interregional balance. On the one hand, there is nationwide party competition under conditions of proportional representation. No party can afford to neglect regions under these conditions—an exception is the Bavarian CSU, which, unlike other parties that already have to balance internally, can put its specific state interests first. On the other hand, the head of each *Land - the Ministerpräsident - is* closely involved in federal politics. In the capital of Germany, the *Ministepräsidents* are the first lobbyists for their states and take the federal government to account. They are not interested in federal competition, but in optimising state policy through cooperation with the federal government.

In particular, the legislative competence of the *Reich* and later the Federal Republic has increased throughout history. The complaints about this are old. They already existed in the 19th century. In fact, the increase in competences of the federal government is primarily due to the assumption of new tasks. The mothers and fathers of the Basic Law could not yet think of regulating the use of nuclear

energy, regulating international air traffic, environmental protection, and climate change, or digitalization. The nature of the issues meant that federal rather than state legislation was more appropriate. This does not mean that there were also transfers of existing legislative powers. The assumption that the *Länder* have been “taken away” something that they must now reclaim is hardly true. On the contrary, the author of this text recalls a conversation in the chancellery of a head of government of a *Land* in which he wanted to explain to senior civil servants which competences they could regain within the framework of the federal state reform. After sceptical looks, it was explained that they did not want that at all. The necessary legislative apparatus would then require more personnel, costing money that they would rather use differently. They added that they would be completely satisfied with the *status quo* if the federal government would take care of it and that each state could bring its own interest into discussions and debates over future federal legislation. The perspective of real state politics was different from that of academic discussion.

The difficulties of the reassignment became apparent in the discussions of the first Federalism Commission. There were reasons for transfers to the federal government. Accordingly, the reassignments, such as the Shop Closing Act or the ban on smoking in restaurants, remained positive individual cases. On the other hand, experts, including those in the state administrations, consider the regulation of the penal system under state law to be problematic. It remains to be seen whether the transfer of the right of assessment for land transfer tax to the *Länder* is compatible with a sensible housing policy. Obviously not. The 2021 newly elected federal government declared to introduce the possibility of tax allowances for private house buyers.

The federal state reforms of 2006 and 2009, whose paradigm was more federal competition, have created some meaningful unbundling, but in some cases, they have also proved problematic and have been corrected. The so-called 2006 “ban on cooperation” in education and science was usefully lifted in 2015. The federal government's withdrawal from municipal transport financing and social housing, on the other hand, has not proven to be successful. Whether the *Länder* are overburdened with these tasks without the help of the federal government or whether the performance of these tasks fell victim to the debt brake is yet to be seen.

The rather limited success of the 2006/2009 reforms has several causes. The functional division of tasks in the Basic Law provides the federal government with the incentive to pass federal laws in its interest, which the *Länder* then implement and pay for. The *Bundesrat*, through which the *Länder* could control and, if necessary, prevent this, proves to be a toothless tiger when it comes to popular federal "benefits" at the expense of the *Länder*. When, as in coalition negotiations at the federal level in 2017 and 2021, the prime ministers of the governing parties are also involved in federal policy decisions, resistance to this form of external control of state policy becomes even more difficult.

There is another problem: in *Land* politics, the implementation of federal laws has priority over the implementation of *Land* policy. A *Land* government is constitutionally obliged to implement federal laws and to bear their costs regardless of its own financial situation. There is no room for manoeuvre in this respect; this only exists in the case of *Land* policy-defined expenditures and expenses. If a *Land* government is under pressure from tight finances, which is rather the rule than the exception, savings cannot be made in tasks defined by federal law, but only in those defined by *Land* policy, such as schools, universities, internal security, municipal expenditures, and large parts of the public

infrastructure. Federal financial aid has a similar effect. It regularly requires co-financing by the *Länder*, otherwise they do not apply. This, in turn, is an incentive for the departmental ministers on *Land* level to acquire federal financial aid as far as possible, because the expenditure required for co-financing has priority over others. These circumstances also explain why autonomous *Länder* (and local) tasks are often under the risk to be neglected.

The evident financial imbalance between the Federation and the *Länder* is also due to the fact that the tax sharing provided for in the Basic Law - the Federation and the *Länder* are "equally entitled to cover their necessary expenditure" - has not functioned properly for years, if not decades, and has largely been replaced by freehand negotiation. But perhaps more importantly, the budget structures of the federal government and the *Länder* are very different. *Land* budgets are highly inflexible due to legal and factual obligations. The burdens resulting from the execution of federal laws, the costs of personnel - police and schools - and the debt service of a state can only be shaped in very long terms. More than 90% of a *Land's* revenues, certainly with differences, are fixed, so that the *Land* parliaments can only decide on relatively limited amounts. In contrast, the federal budget is tied up to a much lesser extent and is more flexible, especially because personnel expenditure is rather low, which allows the federal government to react much better to new challenges and to set political accents.

These structural conditions of the German federal state have become more difficult in recent years due to the financial crisis of 2008. Without it, the debt brake would hardly have been introduced into the Basic Law in 2009. The combination of the enormous increase in public debt during the financial crisis with the subsequent consolidation constraints, the "black zero" policy, and the generation of budget surpluses resulted in the neglect of essential tasks, particularly in the areas of the *Land* policies. The often-lamented dilapidated public infrastructure, serious teacher shortages and lesson cancellations at schools, underfunded universities, problems in the field of public safety and health care are an expression of the failure of the unbundling strategies. The *Länder* have not lived up to the responsibility that was transferred to them with the federal state reforms of 2006 and 2009.

As a reaction to the rapid increase in public debt during the 2008 financial crisis, it made perfect sense to limit public debt. However, budget surpluses, such as those recorded by the federal and state governments in the last few years before the outbreak of the Corona pandemic, are not prescribed by the Basic Law. They are rather an expression of too high taxes, neglect of public tasks or both. It is obvious that the debt brake has become a brake on public investment and tax cuts. The Corona crisis in particular has dramatically shown the deficits in the school system, in health care and in digitalisation. Only now, as a consequence of the crisis, is the former federal government beginning to think about unifying its IT systems. In this field Article 91c of the Basic Law provides already the basis for a cooperative approach by the federal and state governments. It is remarkable that the two articles—91a and 91b Basic Law of 1969 (joint tasks)—have now become five. The crisis has also shown that the debt brake is not optimally constructed. The former head of the Federal Chancellery, Helge Braun (CDU), pointed this out - and got himself into trouble. Professor Bert Rürup, economist and adviser of the government, suggested tying the debt to the interest-tax ratio. This might be a more flexible model.

Looking at recent developments in the federal state, a paradigm shift has probably begun. The measures that were introduced in 2006 and 2009 in particular in the sense of competitive federalism

have to a large degree been cancelled again. Instead, we are once again seeing increased federal-*Länder* cooperation, for example in science and research, in social housing, and even in the school system. For the digitalisation of public administration, a new common task was created under Article 91c of the Basic Law. Cooperation also dominated the Corona crisis. The 2019 report "Our Plan for Germany - Equal Living Conditions Everywhere" by Federal Ministers Horst Seehofer (CSU), Julia Klöckner (CDU) and Franziska Giffey (SPD) virtually invokes more forms of cooperative policymaking. Apparently, unbundling and more federal competition have not produced the desired results, so more cooperation is taking place again. Also, the new federal government of Chancellor Olaf Scholz (SPD), in office since December 2021, will strengthen this shift of paradigm. The coalition agreement of December 7, 2021 stipulates more cross-level cooperation. The most used phrase is “together with the *Länder* we want ….” Federal autonomy has not been mentioned. The German federal state remains on the path which has been developed during the last 150 years.

Bibliography

Baus, R. T., Fischer, T. und H. Rudolf, ed., 2007. *Föderalismusreform II: Weichenstellung für eine Neuordnung der Finanzbeziehungen im deutschen Bundesstaat: Ergebnisse einer gemeinsamen Konferenz der Konrad-Adenauer-Stiftung, der Bertelsmann-Stiftung und des Europäischen Zentrums für Föderalismus-Forschung Tübingen*. Baden-Baden: Nomos.

Baus, R. T., Eppler, A. und O. Wintermann, ed., 2008. *Zur Reform der föderalen Finanzverfassung in Deutschland*. Baden-Baden: Nomos.

Baus, R. T., Scheller, H. und R. Hrbek, ed.,. 2009. *Der deutsche Föderalismus 2020. Die bundesstaatliche Kompetenz- und Finanzverteilung im Spiegel der Föderalismusreform I und II*. Baden-Baden: Nomos.

Benz, Arthur, und Felix Knüpling, ed., 2012. *Changing federal constitutions: Lessons from international comparison*. Opladen, Berlin, Toronto: Barbara Budrich.

Bundesministerium des Innern, für Bau und Heimat. 2019. Unser Plan für Deutschland – Gleichwertige Lebensverhältnisse überall – Schlussfolgerungen von Bundesminister Horst Seehofer als Vorsitzendem sowie Bundesministerin Julia Klöckner und Bundesministerin Dr. Franziska Giffey als Co-Vorsitzenden zur Arbeit der Kommission „Gleichwertige Lebensverhältnisse“. www.bmi.bund.de/SharedDocs/topthemen/DE/topthema-kommission-gleichwertige-lebensverhaeltnisse/kom-gl-artikel.html?nn=9388812. Zugegriffen: 05. Februar 2020.

Bräuer, Christian 2005. Finanzausgleich und Finanzbeziehungen im wiedervereinten Deutschland, Wiesbaden: Springer VS.

Elazar, Daniel J., 1987. Exploring Federalism. Tuscaloosa: University of Alabama Press.

Finanzbericht 1970ff., annually edited by the Bundesministerium der Finanzen, Bundesanzeiger Verlagsgesellschaft Köln, since 2014 also online:

https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Wirtschafts_und_Finanzdaten/Finanzberichte/finanzberichte.html

Geißler, R., Knüpling F., Kropp, S., und J. Wieland, ed., 2015. *Das Teilen beherrschen: Analysen zur Reform des Finanzausgleichs 2019*. Baden-Baden: Nomos.

Gunlicks, Arthur B. 2003. The *Länder* and German federalism, Manchester: University Press

Hesse, Konrad, 1962: Der unitarische Bundessstaat. Karlsruhe: C.F. Müller.

Jeffrey, Charlie, 2007. Towards a New Understanding of Multi-Level Governance in Germany? The Federalism Reform Debate and European Integration, in: *Politische Vierteljahresschrift*, Vol. 48, pp. 17-27.

Junkernheinrich, Martin, Stefan Korioth, Thomas Lenk, Henrik Scheller, Matthias Woisin, ed., 2016. *Verhandlungen zum Finanzausgleich: Jahrbuch für öffentliche Finanzen 1-2016*. Berlin: BWV Verlag.

Junkernheinrich, Martin, Stefan Korioth, Thomas Lenk, Henrik Scheller, Matthias Woisin, ed., 2018. *Jahrbuch für öffentliche Finanzen 2-2018: Staatsanpassung – Die neue Finanzverfassung als politische und rechtliche Gestaltungsaufgabe im Bundesstaat*. Berlin: BWV Verlag.

Knüpling, Felix, Mario Kölling, Sabine Kropp, Henrick Scheller, ed., 2020. Reformbaustelle Bundesstaat, Wiesbaden: Springer VS

Korioth, Stefan, 1997. *Finanzausgleich zwischen Bund und Ländern*. Tübingen: Mohr Siebeck.

Korioth, Stefan, 2019. Autonomie, Kooperation, Solidarität – Konzepte und Interessen im deutschen Finanzföderalismus seit 1949. *Juristen Zeitung 74 (19)*: 910-916.

Langewische, Dieter, 2020. Vom vielstaatlichen Reich zum föderativen Bundesstaat. Eine andere deutsche Geschichte, Stuttgart: Alfred Kröner

Oeter, Stefan. 1998. *Integration und Subsidiarität im deutschen Bundesstaatsrecht: Untersuchungen zu Bundesstaatstheorie unter dem Grundgesetz*. Tübingen: Mohr Siebeck.

Renzsch, Wolfgang. 1991. *Finanzverfassung und Finanzausgleich. Die Auseinandersetzungen um ihre politische Gestaltung in der Bundesrepublik Deutschland zwischen Währungsreform und deutscher Vereinigung (1948 bis 1990)*. Bonn: Dietz.

Renzsch, Wolfgang, 1994. Föderative Problembewältigung: Zur Einbeziehung der neuen Länder in einen gesamtdeutschen Finanzausgleich ab 1995, in: *Zeitschrift für Parlamentsfragen 25 (1),* 1994: 116-138.

Renzsch, W. 1997. Budgetäre Anpassung statt institutionellen Wandels. Zur finanziellen Bewältigung der Lasten des Beitritts der DDR zur Bundesrepublik. In: *Transformation der politisch-administrativen*

Strukturen in Ostdeutschland, Hrsg. H. Wollmann, H.-U- Derlien, K. König, W. Renzsch und W. Seibel, 49-118. Wiesbaden: Springer VS.

Renzsch, W. 2018. Vom „brüderlichen“ zum „väterlichen“ Föderalismus: Zur Neuordnung der Bund-Länder-Finanzbeziehungen ab 2020. *ZParl Zeitschrift für Parlamentsfragen 48 (4)*: 764-772.

Renzsch, Wolfgang. 2019. *Bending the Constitution: The New Regulation of Intergovernmental Fiscal Relations in Germany*. Occasional Paper Series Number 43. Ottawa, Ontario: Forum of Federations.

Renzsch, Wolfgang, 2021: Die langen Linien des Föderalismus in Deutschland, in: Scheller, Henrik, Martin Junkernheinrich, Stefan Korioth., Thomas Lenk, ed., Finanzgeschichtsschreibung und finanzföderaler Diskurs in der Bundesrepublik Deutschland, Berlin: BWV

Scheller, Henrik 2005: Politische Maßstäbe für eine Reform des bundesstaatlichen Finanzausgleichs: Politikwissenschaftliche Analyse der Bund-Länder-Verhandlungen 1995, Lüdenscheid: Analytica Verlag.

Schneider, H.-P., Hrsg. 2001. Das Grundgesetz in interdisziplinärer Betrachtung. Buchreihe *Hannoversches Forum der Rechtswissenschaften*, Bd. 18. Baden-Baden: Nomos.