# THE REGIONALIZATION OF THE FORMATION OF PREFERENCES IN DECENTRALIZED FEDERAL STATES – THE GERMAN CASE: FROM UNITARY TO COMPETITIVE FEDERALISM

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## 1. THE FRAMEWORK

Since a long time, German federalism, in particular intergovernmental relations between the federation and the *Länder* have been on the academic as well as on the political agenda. The debates started already before German unification in 1990, they continued afterwards, with more intensity. Two issues have been addressed primarily: the efficiency or inefficiency of federal-*Länder* cooperation, and the fairness or unfairness of the intergovernmental fiscal relations, in particular the fiscal equalisation scheme. Hopes that German unification would open an opportunity to modernise the federal system, failed. Although some talked of a "lost chance", dealing with the challenge of German unification and modernising the federal system at the same time would probably have overburdened the problem-solving capacity of the political system. However, the Unification Treaty of 31 August 1990 stipulated in article 5 (BGBl. 1990 II, p. 889) that the legislature of the Federal Republic should revise the relations between the federal and *Länder* governments within the next two years. This provision reflected the fear of the West German *Länder* governments to lose political influence in a united Germany.

The reform of the federal system was originally divided into two steps. The *Bundestag* and the *Bundesrat* agreed to call a joint commission which was supposed to develop proposals for a reform mainly of the legislative powers of both levels of government (Batt, 1995; Klöpfer and Lang 1996; Renzsch, 1996). The not less difficult task of amending the system of intergovernmental fiscal relations determined to integrate the new *Länder* was delegated to the ministers of finance of the *Länder* who called the commission "*Finanzreform 1995*" (Razeen and Webber 1994; Renzsch 1994). A reform of the allocation of legislative powers was certainly desirable; an amendment of the system of intergovernmental fiscal relations, however, was necessary since the Unification Treaty provided for financial assistance for the new East German *Länder*

governments outside the constitutional framework until the end of the year 1994 (article 7 Unification Treaty; article 134 GG). Passing this task to the *Länder* ministers of finance indicated that the federal and the *Länder* governments supposed the *Länder* themselves to find a solution. Indeed, the result, later called Solidarity Pact I, reflected much more the common position of the *Länder* rather than that of the federal government.

## 2. TWO FEDERAL REFORM COMMISSIONS

Not long after the first Solidarity Pact had come into force a new debate on the federal order in general and on intergovernmental fiscal relations in particular started. In 1998 the *Länder* governments of Baden-Wuerttemberg, Bavaria and Hesse filed a suit at the Federal Constitutional Court requesting that the Court declared important parts of the fiscal equalisation law as unconstitutional and therefore void.[1] The "red-green"-government under chancellor *Schröder* elected in 1998 also placed the federal order on its agenda, when it announced its intention "to participate in the joint elaboration of an appropriate division of powers between the federation and *Länder*."[2]

However, the proceedings at the Federal Constitutional Court prevented any progress in political deliberations since none of the actors was willing to define a negotiation position as long as it might be overruled by the Court. After the Court had decided on 11 November 1999 the political debate concentrated on the implementation of its requests and – associated with this – a prolongation of the fiscal assistance for the East German *Länder*. Within a comparatively short period of time, the federal legislature agreed on a law defining the principles for fiscal equalisation (*Maßstäbegesetz* of 9 September 2001, BGBl. I p. 2302,) and on an amendment of the fiscal equalisation scheme by a law adjusting the Solidarity Pact (*Solidarpaktfortführungsgesetz* of 20 December 2001, BGBl. I, p 3955). These two laws are of relevance for the analysis that follows, as their rules should be terminated on 31 December 2019 (§ 15 *Maßstäbegesetz*; article 5 § 20 *Solidarpaktfortführungsgesetz*).

1 http://www.bverfg.de/entscheidungen/fs19991111_2bvf000298.html: BVerfG, 2 BvF 2/98 of 11 November 1999.

2 Chancellor Gerhard Schröder, 10 November 1998, Deutscher Bundestag, 143th legislative period, 3rd session, p. 67 (A) (my translation).



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On 16 October 2003 respectively on 17 October 2003, after more than two further years of preparations, the *Bundestag* and the *Bundesrat* decided to call a "Joint Commission for the Modernisation of the Federal Order". The resolution calling this commission also defined its tasks:

> *"The Commission shall develop proposals for a modernisation of the federal order of the Federal Republic of Germany in order to improve the ability of the federal and the Länder governments to act and to decide, to improve the allocation of powers and to increase the effectiveness and efficiency of public policies. It shall present these proposals the legislative bodies of the federation"* [3]

In particular, the commission was supposed to review

- the allocation of legislative powers to the federal and the *Länder* levels;
- the power and rights of co-determination of the *Länder* governments in federal legislation; and
- the intergovernmental fiscal relations (in particular the joint tasks and sharing of expenditure) between federal and *Länder* governments.

Also the consequences of European integration should be taken into account.
The commission held meetings from November 2003 until December 2004. To the surprise of most observers the commission finished its negotiations without a result, mainly due to a dispute on higher education which could not be settled. On 17 December 2004, in a meeting of only 26 minutes the two chairmen informed the Commission that they were not able to present a common proposal.[4]

This deadlock situation was hardly acceptable, in particular as many observers deemed short-sighted and purely political reasons as decisive for the failure. Indeed, shortly after the federal elections of 2005, the Christian Democrats and the Social Democrats settled the dispute in their negotiations on a grand coalition (Kluth, 2007: 54; cf. also Krings, 2007: 74 ff.).
The final compromise counted five pages in the federal Law Gazette.[5] The important changes were:

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3 Deutscher Bundestag/Bundesrat Öffentlichkeitsarbeit, 2005: 17 f. (my translation). Further information about the first federalism commission is based on this documentary.

4 Stenographic record, 11th session, 17 December 2004, pp. 279- 282, published ibid., attached CD Rom.

5 BGBl. I, 2006, Nr. 41, pp.2034-2038; see also Maiwald, 2006.



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- Article 23 para 6: In case the European Union acts in matters of primary and secondary education, culture or broadcasting falling under the exclusive legislative power of the *Länder*, the federal government must authorise a representative of the *Bundesrat* to represent the Federal Republic in the Council of Ministers.
- Article 72 para 2 restricted the formerly general "necessity"-clause in concurrent legislation of the federation of 1994[6] to ten matters.
- Article 72 para 3 – the flipside of the coin – allowed the *Länder* legislatures to deviate from federal legislation in six areas of concurrent legislation.
- Article 73 provided new exclusive legislative powers for the federation, in particular concerning the protection of German cultural heritage from being transferred to foreign countries, the fight against international terrorism, the regulation of weapons and explosives, the provision for the victims of war, and finally the use of nuclear power for peaceful purposes.
- Article 74 para 1 strengthened the legislative powers of the *Land* parliaments by transferring from the federation to the *Länder* the right to legislate the prison regime, to regulate public demonstrations, sheltered homes, shop closing hours, public housing, amusement halls, fairs and markets.
- Article 74a and article 75: framework legislation of the federation was abolished. Therefore the right to legislate the status and the obligations of civil servants (except career schemes, remuneration and old age pensions), hunting, protection of nature and landscapes etc. were transferred to article 74 para 1, i.e. to concurrent legislation of the federation.
- Article 84 para 1 changed the rights of the *Länder* in implementing federal laws and role of the *Bundesrat*. In cases the *Länder* administrations implement a federal law, their parliaments were entitled to deviate from federal administrative bye-laws unless the federal law rules otherwise. In those cases in which the *Länder* were allowed to deviate from federal regulation the federal law does not need the consent of the *Bundesrat*.
- In article 91a the construction of universities has been deleted from the list

6 The above mentioned amendment of article 72 para 2 GG of 1994 stipulated that the federation may only use its powers in the area of the concurrent legislation if it was "necessary" for equal living conditions, or the protection of the legal and economic unity. Before this amendment, the federation could apply its concurrent legislative powers when it considered the use as "appropriate". Whether or not the federation used its concurrent powers depended on the discretion of the federal government alone.


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of joint tasks. It was replaced by a complex regulation of article 91b which allows cooperation of the federal and *Länder* governments, firstly in the cases of institutionalisation (*Einrichtungen*) and projects (*Vorhaben*) outside universities, secondly in projects of science and research in universities, and thirdly in the construction of buildings for research including large devices at universities.

- Article 93 para 2 subjected the "necessity clause" of article 72 para 2 GG under the control of the Federal Constitutional Court.
- Article 104a para 3 introduced a new clause ruling that a federal law needs the consent of the *Bundesrat* if it obliges the *Länder* to provide financial assistance, benefits in kind or comparable services to third persons.
- Article 104a para 6 settles an old dispute about the question which level of governments has to pay fines resulting from the violation of international obligations, in of the European law, by a formula of cost sharing.
- Article 104b replaced the old 104a para 4, however introduced two amendments. Firstly, federal grants for investments of the *Länder* and local governments were restricted to areas the federal government has the power to legislate; secondly, these grants have to be designed with descending annual contributions.
- Article105 introduced the right of the *Länder* parliaments to set the rates for the tax on the purchase of real estate.
- Article 109 para 5 is strongly related to article 104a para 6 GG. It obliges both levels of government to respect the provision of article 104 Treaty Establishing the European Community (now article 126 Treaty on the Functioning of the European Union) concerning budgetary discipline.
- Article 125a, 125b, 125c, 143c regulate the transition from old to new law.

Taking into account the amount of changes of the Basic Law it is justified to speak of the most extensive reform of the constitution since 1969. However, a core issue of any federal order, the intergovernmental fiscal relations, remained untouched except a few marginal amendments. These issues were left-overs for the next reform.

Shortly after these constitutional amendments had been published in the Federal Law Gazette (28 August 2006), the *Bundestag* and the *Bundesrat* started second constitutional reform of federalism. On 15 December both houses voted for the creation of a new commission which was supposed to



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develop proposals for a modernisation of the system of intergovernmental fiscal relations. The proposals should improve the conditions for economic growth and the creation of new jobs. The fiscal accountability of the federal as well as the *Länder* governments was to be strengthened. This rather general definition of the task became more precise by an open list of issues. They included:

- prevention of budgetary crises, development of criteria to limit public debts,
- handling of existing budgetary crises,
- revision of public tasks and standards
- reduction of bureaucracy and enhanced efficiency of public administrations, introduction of common IT-standards,
- improvement of an adequate distribution of revenues and a review of the fiscal equalisation scheme,
- enhancement of the accountability of all territorial authorities,
- improved cooperation of *Länder* governments and better chances to reorganise territories of the *Länder* on a voluntary basis,
- bundling of policies and their effect on intergovernmental fiscal relations (Deutscher Bundestag/Bundesrat, 2010: 18ff.).

The commission finished its work after two years of negotiations on 5 March 2009. Within less than four months the amendments of the constitution were published in the federal Law Gazette.[7]
This second constitutional reform introduced

- article 91c allowing the federal and *Länder* governments to cooperate in matters of information technology as far as necessary,
- article 91d allowing evaluation of performance and “benchmarking” of public administrations,
- an amendment to the 2006 newly introduced article 104b allowing the federal government to provide financial assistance for the *Länder* also in cases of natural catastrophes and extraordinary emergency situations which cannot be controlled by a government,
- a revision of article 109 and a new article 109a which provided the core element of the 2009 reform, the “debt brake”, and
- article 143c which provided transitory regulations.

7 Gesetz zur Änderung des Grundgesetzes of 29 July 2009, BGBl. I, 2009, pp. 2248-2250.


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Again, key questions of the system of intergovernmental relations were not answered. In particular, the commission did address neither the issue of tax legislation by the *Länder* nor the distribution of revenues between the federation and the *Länder* or the problems of fiscal equalisation among the *Länder*. The latter issue was left for future negotiations which have to be finalised until the end of the year 2019.

## 3. WHAT HAS BEEN ACHIEVED BY TWO REFORMS?

These two parts of a still unfinished federal reform have not been completely implemented. Just about five, respectively two years after they have been adopted, an assessment of their effects turns out to be a rather challenging task. Certainly it is far too early to draw final conclusions. It took ten years until the constitutional reform of 1994 had significant effects on the political practice in Germany. Not before 2004, the Federal Constitutional Court enforced the new provisions of article 72 para. 2 Basic Law.[8] Such judicial action was necessary because federal legislation continued as if the delimitation of legislative powers had not been amended.

Therefore, the following paragraphs have to be limited to a few preliminary remarks on a few aspects of the reforms. They focus on how the *Länder* have used their new powers and how governments have anticipated the "debt brake".

In fifty years from now, historians might look at the developments between 2002 and 2020 or even between 1990 and 2020 as a long process of constitutional adaptation of the "old" West German Federal Republic to the challenges of German Unification and European Integration. This process has followed a logic determined by the Basic Law. Its general leitmotiv can be defined as strengthening the accountability of all levels of government. Even the "small" reform of 1994, in particular the new article 72 para 2 GG introduced a change of paradigm in German federalism going in this direction. The permanently increased precedence of federal legislation as well as joint decision-making were questioned and revised.

8 BVerfGE of March 16, 2004, 1 BvR 1778/01, and other decisions.



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The 2006 reform followed this change of paradigm and tried to disentangle joint federal-*Länder* decision-making in legislation and to separate the jurisdictions of the federation and the *Länder*. This separation of powers was pursued not only with respect to legislative matters, but also and primarily in the area of administration. Part of this was the rule that the Federal Republic shall be represented in the Council of Ministers of the EU by a member of the *Bundesrat*, i.e. by a member of a *Land* government, when issues of exclusive *Land* legislation will be on the European agenda.

After the reallocation of powers, the next step aimed at the budget. The 2009 reform amended the Keynesian budgetary principles introduced in 1969 (achievement of an overall economic balance) and introduced new criteria based on article 104 of the Treaty Establishing the European Union resp. article 126 of the Treaty on the Functioning of the European Union. In principle, the budgets of the federation and the *Länder* should be balanced without debts. Exceptions have been limited to deficit spending in recession, natural disasters and emergency situations beyond government control. Governments borrowing money have to provide a repayment scheme for the debts. This regulation did not abolish the Keynesian principles of budgeting but – much more – introduces the omitted part of Keynes: In periods of economic growth debts have to be paid back, what never happened until now.

## 4. WHAT EFFECTS CAN BE MEASURED TODAY?

### 4.1 Limiting joint decision-making of Bundestag and Bundesrat

Whether the attempt to disentangle joint decision-making by the two chambers of the federal legislature was successful or not has been a matter of dispute. *Marcus Höreth* did not find major progress. According to his study, the effects are small, as the amendments reduce the number of federal laws requiring the consent of the *Bundesrat* by only five percent of all federal laws, which he considers as close to negligible (Höreth, 2007; 2008). *Horst Risse*, former secretary of the reform commissions, argued quite differently: He pointed out that hitherto more than half of all federal laws needed the consent of the *Bundesrat*. Addressing the causes he distinguishes between the specific requirements for a veto right of the *Bundesrat* (e.g. amendment of the constitution – article 79 GG – or regulations concerning the distribution of



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revenues – article 105, 106, 107 GG) on the one hand and the general rule of article 84 para 1 GG on the other (Risse, 2007). Thus he implicitly, although not overtly, distinguished between wanted (by the constitution) consent requirements[9] and those not intended and resulting merely from the regulations concerning administrative procedures. This provision has caused veto power of the *Bundesrat* in about 60 percent of the laws its requiring consent; the other 40 percent were caused by the special regulations of the Basic Law.

During the first year after the 2006 reform came into force, the number of laws requiring *Bundesrat* consent because of article 84 para 1 GG dropped from 60 percent to about 25 percent. Of these 25 percent, about three quarters concern laws transforming international or European into German law. In these matters the federal legislature is not in the position to allow the *Länder* deviating administrative bye-laws. As a consequence it is next to impossible to relinquish the consent of the *Bundesrat*. However, these cases rarely cause political controversies.

It has been argued that the new clause of article 104a para 4 GG requiring consent if a federal law provides for grants and services at the expense of the *Länder* contradicts the intention of the amended article 84 para 1 GG. At a glance, that may be true. However, the *Länder* need a protection against financial burdens imposed on them by the federal government. *Risse* figured out that – during the period of time he looked at - about 10 percent of the consent requirements were caused by this clause (Risse, 2007: 710). According to his calculation, of the new article 84 para 1 GG the amount of consent demanding federal laws dropped to 43 percent during the first year after the reform from 57 percent in the previous legislative period. Therefore, Risse assesses the reform as effective, but not radical (709).

Any assessment of this part of the constitutional reform has to consider its purpose. It aimed at strengthening the accountability of all levels of government by limiting joint decision-making in order to allow a legitimate majority of the *Bundestag* to pursue its policies, and to protect the *Länder* against fiscal encroachments of the federation. Therefore the endeavours were concentrated

9 Risse explains that the reform commission did not address those specific consent requirements. They were not considered as a problem, (Risse, 2007: 708).



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on the clause of article 84 para 1 GG and left the special provision causing a Bundesrat veto aside, except for the amendment of article 104a para 4 GG. Among politicians, nobody had the intention to exclude the *Länder* from constitutional legislation, distribution of revenues or EU affairs.

The old article 84 para 1 GG intended to shield the *Länder* from federal encroachment on their administration. However this constitutional norm was hardly invoked for this purpose. Primarily it was used to protect the *Länder* from financial burdens imposed on them by federal legislation. Moreover, under conditions of a divided government, this rule allowed the opposition party at the federal level, commanding a majority in the *Bundesrat,* to compel a ruling majority of the *Bundestag* into bargaining on legislation. The new article 104a para 4 GG now improves the formerly imperfect protection.[10] In cases of a divided government the amendment will make it probably easier for a majority of the *Bundesrat* to circumvent an adversarial majority of the *Bundesrat*.

Since in future it will be more difficult to use (or misuse) the *Bundesrat* as an instrument of the political opposition, we can expect that party politics will play a smaller role in this second chamber. That, however, does not mean that polic-making will become easier for the federal government. On contrary, when party politics lose importance in the *Bundesrat*, the federal government also is confronted with the problem that appealing to the party loyalty of "their" *Länder* governments will no longer work as in the past.[11] Thus, the small amendment of article 84 para 1 GG, which gives the *Länder* a right to deviate from the federal procedural bye-laws, might in the long run have more implications than we can anticipate as yet.

### 4.2 Use of new legislative powers by the Länder

The new legislative powers of the *Länder* concern primarily the regulation of public houses (smoking/non-smoking regulation) and shop closing time, tax

10 The old provision of the former article 104a para 3 GG read that a federal law needed the consent of the *Bundesrat* if the *Länder* had to carry more than a quarter of the expenditure of federal law providing financial assistance to third parties; the new provision of article 104a para 4 GG requires the consent of the *Bundesrat* if a federal law constitutes *any* financial burden for the *Länder* because of financial assistance, benefits in kind or other services.

11 In summer 2011, it has been quite interesting to see that none of the prime minister of the CDU supported their party chairwoman and Chancellor Angela Merkel in debates on tax reductions.



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rates on the trade of real estate, salaries of civil servants, sheltered homes and the prison regime. How would the *Länder* use their expanded powers? Taking into account the current practice of the *Länder*, two different approaches can be distinguished: individual law-making by which each *Land* does it "my way" (e.g. local fiscal equalisation) and coordinated *Länder* laws, negotiated on the "third level" among the land administration (e.g. police laws of the *Länder*). Also we have to distinguish between policy areas where no federal law existed before decentralisation, and areas where *Land* legislation can be based on a former federal law.

The *Länder* governments have used their new legislative powers received by the 2006 Constitutional Reform in at least six cases for autonomous *Land* legislation. Concerning non-smokers protection in public houses, there was no former federal law which could have given an orientation. In this case all *Länder* have meanwhile adopted varying regulations. Passed by a successful referendum, the Bavarian law implies the strictest rules, generally prohibiting smoking in public houses, including festival halls or tents.[12] The other *Länder* provide more or less extensive exceptions from non-smoking rules: Hamburg, Lower Saxony and Saxony allow smoking in small pubs, however Hamburg and Lower Saxony only if no hot food is served.[13] Baden-Württemberg allows smoking in pavilions on fairs, festival halls or tents only.[14] Berlin allows "smokers' pubs" and smoking in separated rooms,[15] Brandenburg allows smokers' pubs too, but not in separated rooms,[16] while Bremen allows smoking in separated rooms.[17] Most *Länder* allow smoking in separated rooms, however under varying conditions. For instance Saxony Anhalt requests that guests must

12 *Gesetz zum Schutz der Gesundheit* (Gesundheitsschutzgesetz GSG); former law from 2007 (GVBl S. 919, BayRS 2126-3-UG) changed by a successful referendum August 1, 2010.
13 *Hamburgische Passivraucherschutzgesetz* (HmbGVBl. 2007,No. 28; p. 200); *Niedersächsisches Gesetz zum Schutz vor den Gefahren des Passivrauchens*, 12 Juli 2007 (Nds. GVBl. S. 337); *Sächsisches Nichtraucherschutz* (SächsNSG), 26 Oktober 26, 2007 (SäGVBl 13/2007).
14 *Landesnichtraucherschutzgesetz* (LNRSchG) vom 25. Juli 2007, GBl. 2007, S. 337).
15 *Gesetz zum Schutz vor den Gefahren des Passivrauchens in der Öffentlichkeit (Nichtraucherschutzgesetz* – NRSG), 16 November 2007(GVBl. S. 578).
16 *Gesetz zum Schutz vor den Gefahren des Passivrauchens in der Öffentlichkeit* (Brandenburgisches Nichtrauchendenschutzgesetz – Bbg NiRSchG), 18 December 2007 (GVBl.I/07, S.346).
17 *Bremischen Nichtraucherschutzgesetz* (BremNiSchG), (Brem.GBl. S. 413), 12 Dezember 2007 (Brem.GBl. S. 515).


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be able to have access without passing through the smokers' room or should not be molested when using the lavatory.[18]

Despite the fact that there had been a federal law before, the regulations of the shop closing time vary considerably among the *Länder*, too. Ten out of sixteen *Länder* allow shopping from Monday until Saturday all day and night long; four *Länder* restrict the opening hours on these days from 6 a.m. to 8 p.m. and 10 p.m. respectively Two *Länder* require different closing hours on Saturdays, namely 8 p.m. and 10 p.m respectively instead of midnight. Baden-Württemberg, which allows shopping on six days a week all day long, restricts the selling of alcohol to the time period from 5 a.m. to 10 p.m. Sunday regulations show slight differences only: eleven *Länder* apply the (old) federal regulation[19] permitting on four Sundays per year shops to be open. Other *Länder* are more liberal: Brandenburg allows six,[20] Berlin eight open Sundays.[21] In accordance with the old federal law, all *Länder* laws allow shopping at gas stations, airports and railway stations at any time. Officially, the shops are open for travel necessities. In reality, they have become more or less shopping malls for all kinds of goods. In particular airports provide large malls which are frequented by all kinds of customers not only travellers. Regulations for holiday resorts, and for places (and occasions) of special tourist interests have introduced further exceptions from constraints on Sundays.

Compared to the federal law on shop closing time of 2003[22], the Land legislations (or in Bavaria simply a bye-law[23]) have led to a liberalisation of the former regulation. In particular, the new *Land* laws pay respect to local particularities and interest. For instance, the mainly catholic *Länder* Bavaria[24] and Saarland[25] only allow Sunday shopping after "the main Sunday church services have taken place". Berlin was interested in long shopping hours, also

18 *Gesetz zur Wahrung des Nichtraucherschutzes im Land Sachsen Anhalt* (Nichtraucherschutzgesetz), 19 Dezember 2007 (GVBl. LSA 2007, S. 464).
19 *Gesetz über den Ladenschluss* (LadSchlG), 18 November 1956 (BGBl. I S. 875).
20 *Brandenburgisches Ladenöffnungsgesetz* (BbgLöG), 27. November 2006 (GVBl.I/06, [Nr. 15], S. 158)
21 Berliner Ladenöffnungsgesetz (BerlLadÖffG) vom 16. November 2006 (GVBL S. 1045).
22 Gesetz über den Ladenschluss vom 2. Juni 2003 (BGBl. I S. 744).
23 Ladenschlussverordnung (LSchlV) vom 21. Mai 2003 (GVBl S. 340, BayRS 8050-20-1-A)
24 § 2 Ladenschlussverordnung.
25 § 8 Abs. 1 Gesetz Nr. 1606 zur Regelung der Ladenöffnungszeiten (Ladenöffnungsgesetz - LÖG Saarland) vom 15. November 2006 (Amtsblatt 2006, S. 1974).


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on Sundays, because the city government hoped for tourists and shoppers from neighbouring regions. The Brandenburg government saw itself in a competitive situation and followed the path taken by Berlin. Between Schleswig-Holstein[26] and Mecklenburg Pomerania[27] similar effects occurred concerning special regulations for the seaside resorts at the Baltic coast. Unexpectedly, the Federal Constitutional Court intervened and stopped too liberal regulations. It held to be unconstitutional the rules on the Berlin Sunday shopping hours. With reference to article 139 of the Constitution of the Weimar Republic (which remained constitutional law according to article 140 GG), the court prevented the Land to allow shop opening on consecutive Sundays in order to protect the Sunday as a day of leisure and recreation.[28]

In contrast, the different tax rates on the trade of real estate introduced by the *Länder* are hardly more than a variation of the federal law. This law had set a tax rate of 3.5 percent of the price.[29] The *Länder* are now entitled to change this rate. The revenues achieved by the rates above (also below) the federal rate will not be taken into account in the fiscal equalisation scheme. Therefore, higher rates provide "real money" for the coffers of the *Länder*. So far, eight *Länder* have used their right to raise this tax. They apply rates of 4 percent (Lower Saxony), 4.5 percent (Berlin, Bremen, Hamburg, Saarland, Saxony-Anhalt) or 5 percent (Brandenburg, Schleswig-Holstein).[30] Other *Länder* will probably follow. With the exception of Hamburg, all those *Länder* which increased the taxes rank among the poor ones in Germany. This observation supports the assumption that tax competition drives the not-so-good-off *Länder* to raise their tax rates for stabilising their budgets.

26 § 9 Gesetz über die Ladenöffnungszeiten (Ladenöffnungszeitengesetz - LÖffZG) vom 29. November 2006 (GVOBL. 2006, S. 243).

27 §10 Gesetz über die Ladenöffnungszeiten für das Land Mecklenburg-Vorpommern (Ladenöffnungsgesetz - LöffG M-V) vom 18. Juni 2007 (GVOBl. M-V 2007, S. 226).

28 BVerfG; 1 BvR 636/02 vom 9. Juni 2004; 1 BvR 2857/07 und 1 BvR 2858/07 vom 1. Dezember 2009, Süddeutsche Zeitung, 2 December, 2009: „Bloßes Umsatzinteresse reicht nicht", and Heribert Prantl, Der Sonntag ist heilig.

29 Grunderwerbsteuergesetz (GrEStG) vom 17.12.1982 (zuletzt geändert durch Artikel 29 des Gesetzes vom 8. Dezember 2010 BGBl. I S. 1768).

30 See for example: *Gesetz über die Festsetzung der Hebesätze für die Realsteuern für 2007 bis 2011 und des Steuersatzes für die Grunderwerbsteuer* (Gesetz- und Verordnungsblatt Nr. 43/2006, 30 Decenber 2006, p. 1172 (Berlin); *Gesetz über die Festsetzung des Steuersatzes bei der Grunderwerbsteuer*, 16 Dezember 2008 (HmbGVBl. 2008, S. 433 (Hamburg); *Gesetz über die Festsetzung des Steuersatzes für die Grunderwerbsteuer des Landes Sachsen-Anhalt*, 17 Februar 2010 (GVBl. LSA 2010, S. 69).



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The federalism reform of 2006 also introduced "competitive elements" regarding the salaries for civil servants. Even though the salaries of *Land* civil servants were fixed before 2006 by federal law, [31] competition in this field had already existed to a certain extend. The structure of staff positions in public administration varied from *Land* to *Land*, and so did career prospects. On the other hand, in 2010, most of the *Länder* followed the decision of the federal government to increase payments, despite their new powers. The government of Baden-Württemberg, facing Land elections, and the government of Bavaria conceded higher increases for their civil servants.[32] Most of the poor *Länder* have reduced or cancelled the annual remuneration ("Christmas bonus") which, however, the *Länder* governments could determine even before the federal reforms were adopted.

The *Land* legislation on homes is still not finished as yet. It addresses the regulations of nursing homes for elderly and handicapped people who need constant care. Here again we observe a variety of approaches. Two *Länder*, Hessen and Thuringia, have not yet come up with their own legislation and thus continue to follow the regulations of the still existing federal law.[33] The other *Länder* all went their own way as even the titles of the laws (or the drafts) indicate: Home Law (Baden-Württemberg)[34], Habitation- and Participation Law (North Rhine-Westphalia)[35], Nursing- and Quality of Habitation Law (Bavaria)[36], Law concerning the Habitation-, Care- and Nursing Quality for the Elderly as well as for Persons in Need of Care and Handicapped Adults (Saarland)[37], Self-Determination Improvement Law (Schleswig-Holstein)[38], Law for the

31 *Bundesbesoldungsgesetz* (BBesG) of June 27, 1957 (BGBl. I S. 993).
32 *Landesbesoldungsgesetz Baden-Württemberg* (LBesGBW) vom 9. November 2010 (GBl. 2010, S. 793, 826); Bayerisches Besoldungsgesetz (BayBesG) vom 30. August 30, 2001 (GVBl S. 410, S. 764).
33 *Wohn- und Betreuungsvertragsgesetz* vom 29. Juli 2009 (BGBl. I S. 2319).
34 *Heimgesetz für Baden-Württemberg (Landesheimgesetz* - LHeimG) vom 10. Juni 2008 (GBl. 2008, S.169).
35 *Gesetz über das Wohnen mit Assistenz und Pflege in Einrichtungen (Wohn- und Teilhabegesetz)* vom 18. November 2008, GVBl. 2008, S. 738.
36 *Gesetz zur Regelung der Pflege-, Betreuungs- und Wohnqualität im Alter und bei Behinderung (Pflege- und Wohnqualitätsgesetz* – PfleWoqG) vom **8. Juli 2008 (**GVBl 2008, S. 346).
37 *Saarländisches Gesetz zur Sicherung der Wohn-, Betreuungs- und Pflegequalität für ältere Menschen sowie pflegebedürftige und behinderte Volljährige (Landesheimgesetz Saarland* - LHeimGS) vom 6. Mai 2009 (Amtsblatt 2009, S. 906).
38 *Gesetz zur Stärkung von Selbstbestimmung und Schutz von Menschen mit Pflegebedarf oder Behinderung (Selbstbestimmungsstärkungsgesetz* - SbStG) Pflegegesetzbuch Schleswig-Holstein - Zweites Buch vom 17. Juli 2009 (GVOBl. Schl.-H.


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Safeguarding of the Rights of Persons in Need for Care and Nursing in Supporting Dwelling Forms (Bremen)[39] and several others; – the smaller the Land, the longer the title of the law, and the more difficult to translate.

One of the most interesting cases is the *Land* legislation on prison regimes, in particular those for juvenile offenders. In 2006, the Federal Constitutional Court requested a law regulating the penal system for juveniles. The lack of a legal regulation in this field did not comply with the Basic Law since any encroachment on the basic rights of a citizen needs a firm legal foundation in a formal law.[40] After the 2006 federalism reform, this task had to be fulfilled by the *Länder*, not by the federal government. Therefore, similar to the laws concerning non-smokers' protection, the *Länder* had to pass their own laws without being able to more or less copy an existing federal law. However, this case is a good example for an unintended effect of separation of powers between the federal and the *Land* level. It reveals how decentralisation might cause new entanglements and joint decisions, although now "horizontally, among the Länder governments, instead of vertically, between levels (Benz, 2007).

The *Länder* pursued different way to solve this problem. Thirteen of them adopted laws for the detention of juvenile delinquents, three - Bavaria, Hamburg and Lower Saxony - did not create separate laws but integrated the special rules for adolescents in the general laws regulating the penal system. Ten out of the mentioned thirteen *Länder* agreed on a common regulation for adolescents. The Bavaria, Hamburg, Lower Saxony and Baden-Wurttemberg passed new penal laws regulating the imprisonment of juveniles and adults. The remaining Länder continued to apply the still existing federal law for adults (Dünkel, Geng and Morgenstern, 2010).

The difficulties for autonomous *Land* legislation arise from two circumstances which actually restrict discretion of the *Länder* parliaments. Firstly, the legal proceedings as well as the organisation of penal courts are still regulated by

S. 402).

39 Gesetz zur Sicherstellung der Rechte von Menschen mit Unterstützungs-, Pflege- und Betreuungsbedarf in unterstützenden Wohnformen (Bremisches Wohn- und Betreuungsgesetz - BremWoBeG) vom 5 Oktober 2010 (Brem. GBl. S. 509).

40 BVerfG, 2 BvR 1673/04 and 2 BvR 2402/04, Decision of 31 May, 2006.



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federal law limiting *Land* powers. Secondly, the detention of convicts can be a cross-border issue, especially for the smaller *Länder*. Here, three aspects have to be taken into account: Firstly, prison inmates should serve their sentence close to their home in order to promote social integration after their discharge from prison independent of where the crime had been committed or where the convict had been sentenced. Secondly, not all *Länder* provide all kinds of prisons, like, e.g., for women or high security delinquents. Thirdly, not all prisoners comply with the prison rules. When prisoners show deviant behaviour or get involved in forbidden activities – for instance drug trafficking – they have to be taken out of their "networks" and be transferred to other prisons for security reasons. These requirements provide problems for small *Länder* maintaining only one or two prisons on average.[41]

Furthermore, some *Länder* cooperate in implementation of the penal system. The government of Saxony-Anhalt, for instance, transfers female convicts to Saxony.[42] Berlin is constructing a new prison in Brandenburg, on the soil of an entirely different *Land*. Currently, Berlin transfers inmates to prisons in Brandenburg because the Berlin prisons are overcrowded while those in Brandenburg offer empty places (see Potsdamer Nachrichten, 22 January, 2010).

Therefore, the issue of regulating the prison system is not only a question of the political philosophy regarding whether a Land puts more emphasis on the deterrence of would-be-criminals or on social reintegration of the convicts after leaving jail. It is also a question of which law applies for which person. If somebody has been sentenced in one *Land* and has to serve his or her sentence involuntarily in another *Land*, it has to be decided which law would apply. In case the law of "*Land* x" provided more rights than that of "*Land* y" – for instance, allows for more visits or provides for better social support –, a prison inmate may request the rights he or she would have at their place of residence or at their place of conviction. According to experts, these questions

41 Information provided here is based to a large extend on oral communication with the civil servant in charge of prisons in the Ministry of Justice in Saxony-Anhalt.

42 For instance Saxony-Anhalt does not have a prison for female inmates. The Land government has made an arrangement with Saxony that female convicts serve their sentence in Saxony. Also the Land does not have provisions for high security inmates. They are confined at other places.


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remain completely open and nobody knows yet how the courts will decide. These uncertainties of cross-border issues due to diverging *Land* law (instead of a uniform federal law) particularly induce the smaller *Länder* to coordinate their legislation. Experts still disagree whether or not coordinated Land legislations provide better solutions compared to federal legislation.

To sum up, the legislative activities of the *Länder* in the areas of decentralised powers prove that they have used their new competences in a rather pragmatic way. The particular, mostly economic or financial interests of a Land play a more important role than ideologies or party interests. Concerning non-smokers protection, legislatures tried to balance concerns of smokers and non-smokers alike, independent on which parties have a majority. Concerning shop closing times, *Länder* with a predominating Catholic population have been more restrictive when Sundays were concerned. Besides that, the tourist industries and their interests have influenced the *Land* legislation on this matter. Variations in tax policies and remuneration of civil servants reflect the financial situation of the *Länder*. As a consequence, the new *Land* laws in general did not reveal radical changes or partisan politics but aim at incremental adaptations to local circumstances.

### 4.3 The debt brake

The debt brake introduced in 2009 will show its full effects for the federal level in 2016 and for the *Länder* level in 2020 (article 143d para 1 GG). However, already now governments of both level have to anticipate the rules. The federal government aims at a balanced budget in 2014, some *Länder* intend to get along without debts in 2012. A few of them had avoided new deficits even before the financial crisis of 2008/09 occurred, but could not compensate the decline of tax revenues during the crisis by regular budgetary measures. Also, three *Länder* – Rhineland-Palatinate, Schleswig-Holstein and Hesse - meanwhile introduced a debt brake in their *Land* constitutions. [43] In principle, these *Länder* have adopted the federal regulation. Others will follow.

The political objective to balance the budgets without credits has gained a hitherto unknown importance. On the one hand governments limit expenditure

43 Constitution of Rhineland-Palatinate, article 117; Constitution of Schleswig-Holstein, article 53, Constitution of Hesse, article 141.



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more than in former times. On the other hand, consolidating public budgets has become an issue of public political discourse. But it was the debt brake of the Basic Law and - probably even more - the global financial crisis of 2008/09 and the Euro crisis of 2010/11, that have changed the public attitudes.

These changed attitudes, presumably more than legal grounds, caused the Constitutional Court of North Rhine-Westphalia to apply a stricter interpretation of article 82 2nd sentence, Constitution of North Rhine-Westphalia, which allows credits up to the sum of public investments unless the economic balance is disturbed. For the first time in the history of the Federal Republic a court declared a budget unconstitutional. In its judgment of 15 March, 2011[44], the court argued that it did not recognise any economic imbalance but, on the contrary, rising revenues. Therefore, it rendered the budget as not complying with the constitutional provisions.

This decision of the Constitutional Court of North Rhine-Westphalia as well as the decisions of the Federal Constitutional on the Berlin shop closing hours, mentioned above, and those based von article 72 para 2 GG (1994) indicate that the courts tend to a more restrictive applications of constitutional provisions. The argument, that political interpretation of undetermined legal concepts has priority against legal consideration may not any longer be accepted as the courts did before. Whether that will become questionable "judicial activism" or a proper limitation of a rather too liberal handling of constitutional rules remains to be seen.

## 5. CONCLUSION

Certainly, it is not difficult to argue that the reforms of German federalism did not meet the ambitious aims and that a "better" solution could have been possible in one or another issues. However, that would immediately provoke a dispute about what is a better solution. In political practice, "second best" solution based on a broad consensus might be preferable. Moreover, if we consider the evolution of German federalism driven by a series of constitutional reform, it is fair to conclude that results achieved since German Unification are

44 VerfGH 20/10, www.vgh.nrw.de/presse/2011/p110315.htm.



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quite remarkable. The 1994 reform changed the paradigm of an ongoing process of centralising the regulation of public tasks and of increasing intergovernmental cooperation. Accountability of governments on both levels should be improved by a clearer delimitation of powers and a reduction of joint decision-making. This paradigm became the leitmotiv of the two reform commissions set up the first decade of 21st century. By an incremental disentangling of responsibilities, the *Länder* gained some of the political importance they had lost in former times. The second reform will – hopefully – force all government within the Federal Republic to reduce or abolish expenditures financed by new credits. The Euro crisis of 2010/11 has shown the risks of extensive public borrowing in a way hardly anyone expected.

However, the process of modernising the federal order has not come to an end. The reforms of 2006 and 2009 only mark first steps. The probably most difficult tasks, a review and reform of the intergovernmental fiscal relations are still on the agenda. The next steps not only have to revise the fiscal equalisation scheme, as some argue, but must include urgent problems such as the different cost effects of the implementation of federal laws by the *Länder* administrations, the inter-regional effects of migration within Germany and demographic effects causing different expenditures needs in regions, the horizontal effects of tax deductions by private investors, the regional distribution of tax revenues among the *Länder*, of tax legislation by the *Länder* governments, and several more. In July 2011, the prime ministers of Bavaria (CSU) and Baden-Württemberg (Green) have proposed a third federal reform commission, and the Federal Minister of Finance announced to give a speech about the federal view on fiscal federalism in September 2011. Probably, in 2020 the Federal Republic within the European Union (the impact of European integration on German federalism has to be excluded in this article) will in many respects be quite different compared to the old West German Federal Republic of 1969 or even of 1990.

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