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Postwar Federalism at 60: Showing its Age

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What went wrong with German federalism?

What was accomplished with the 2006 federalism reforms?

How might financial subsidies and territorial reforms be addressed in the future?

Unlike its American counterpart, German federalism has never really been aimed toward providing a “laboratory of democracy” by letting people try very different things in different parts of the country. Instead, German federalism arguably brought other virtues. In the early days of the Federal Republic, it seemed to be a return to governing traditions less tainted by Nazism as well as another tool in the arsenal against any return of tyrannical power. Later, in the 1950s and 1960s, the continuity that the interlocking federalist rules helped to secure was often credited with helping Germany avoid the wild swings in economic policy evident in other European nations (unitary Great Britain comes to mind immediately). And for many others, federalism brought both policymaking and administration closer to the people and allowed the preservation of old and well-established political bodies at the Land (state) level. Certainly, Germans like federalism (though they are not as deeply devoted to their particular states as to their more local communities). Public opinion polls also show they prefer for federalism to be fairly uniform across the country rather than allowing large differences to emerge.

But whatever these virtues and preferences, something seems to have gone wrong with German federalism.¹ Exactly what went wrong is the subject of a lot of head scratching. For some, German federalism got caught in the trap of increasing centralization—leaving the states with little authority over their own fortunes and little ability to defend their traditional prerogatives. For others, the problem is the other way around: the center lost its ability to make policy as it was increasingly blocked by the states, where the party that had lost the last national election could use its power in the Bundesrat (which the states control) to take its revenge.

Yet where both of these explanations stress change in the wrong direction, it may be more accurate to locate the real problem in the inflexibility and sheer stubbornness of German federalism. In the past two decades, a host of new problems have come on the agenda—not least the triple whammy of German unification, European market integration, and the rise of global competition against German firms in sectors like autos, machine tools, and electronics. These challenges have made many states—especially the wealthier ones in the south of Germany—anxious to control enough policy tools to help their firms and citizens compete internationally, while they have also challenged the federal government to be more nimble and responsive. Almost every big effort to support either goal has come with some kind of call to reform federalism.

Recent years have seen yet another round of such calls. But the general pattern is that the things that make federalism work badly—especially the complex shared responsibilities between federal and state level—are the very things that make it so devilishly hard to reform. Any major actor can say “no” and stop the reform train. Reforms thus tend to be of the “lowest common denominator” in that they are so weak that there is little left to object to.

Yet it would be wrong to suggest that nothing ever changes. Most recently, federalism reform efforts, after first (barely) failing in 2004, did then (barely) succeed in 2006. At least, there was “success” insofar as the Bundestag and Bundesrat (which represents the states) passed a hefty package of constitutional changes. In 2003-04, the federation and the states had bargained to a stalemate, but a decision by the Constitutional Court in 2004 essentially

undercut the legal basis for many federal prerogatives, and this encouraged the government (in the guise of a CDU-SPD Grand Coalition after 2005) to go back to the bargaining table and, ultimately, to cut the deal just noted.

But what kind of deal? The essence of the bargain was built on a simply and widely-shared theory: the problem with federalism in Germany is that too many powers are shared between the federal and state levels. Accordingly, so went the theory, the solution was to “untangle” these powers, putting either Berlin or the states in charge of a long list of separate policies. The reform was, therefore, meant to give exclusive competence to either one level or the other. But if these things were too important to share, they were definitely too important to lose entirely—even if there were a side-payment for the loser somewhere else. The agenda to mark out areas of exclusive competence thus faced the dilemma that only powers too trivial to matter could really be given to either one side or the other. Thus, the new list of “exclusive” competencies turned out to be for things like the regulation of shop-closing hours.

Meanwhile, aside from the complexity of law making, German federalism also suffers from some severe financial problems. For one thing, it intentionally violates the common idea that the rule maker, the taxpayer, and the beneficiary ought to be the same community of people. For example, substantial tax receipts from economically healthier states are sent to poorer ones to top up their lower level of receipts. This is an old and relatively popular policy. As noted above, most Germans like equivalent living conditions and their constitution calls for it, even though it is hard to specify exactly what “equivalent living conditions” means in practical terms.

But does this equality ambition make economic and political sense? One major worry, of course, is that poorer states have less incentive to promote healthier economies since they get the same tax revenues to spend per capita as the richer states. The built-in tendency has been for deficit spending, and the ever-higher debts have seemed largely immune to efforts to rein them in. The administrative costs (and debts) also led to a recurrent conversation about whether some states might not be better merged with one of their neighbors.

Against this “sea of troubles,” the major federalism reform in 2006 aimed at four things while side-stepping two others. First, it tried to clarify legislative competencies between the *Bund* and the *Länder*. Some powers were granted exclusively to the *Bund*, while its ability to pass laws in other areas was tightened. For example, so-called “framework laws,” in which the *Bund* sets the broad framework with details to be filled in by the states, were eliminated.

Second, the reform sought to improve the “cooperative” aspect of federalism by reducing the number of areas in which the Bundesrat representing the states could block or veto a bill. The reformers also tried to eliminate federal administrative “mandates” to the states. Arguably, however, what was essentially a veto-for-prerogatives deal never really went very far, in part because the states were quite divided over which tasks they really wanted exclusive responsibility for. Poor states actually worried that they might be given more responsibility than they could afford.

Third, the reform tried to tweak the exceedingly tricky financial arrangements, generally making it harder for the *Bund* to stick its nose into things like higher education and hospital funding. Finally, the 2006 reform aimed to give the *Länder* a voice in certain meetings of the EU Council of Ministers, while also increasing Land exposure to EU fines if Germany entered a situation of excessive budget deficits and the states were complicit in the problem.

Which two key issues were side-stepped in the 2006 reform? First, aside from the relatively small exceptions just noted, the major actors decided not to tackle the financial arrangements that underpin German federalism. These essentially involve two kinds of subsidies: from the richer states to the poorer and from the *Bund* to both richer and poorer states. The current arrangements are set to run until 2019 (a legacy of post-unification negotiations), and were deemed too hot to handle in the 2006 round. Later, a second reform commission established in 2007 did agree to discuss a long list of financial issues, but as of the summer of 2009, its primary accomplishment seems to be a new (and, so far, entirely theoretical) limitation of federal deficits (starting in 2016) and a constitu-

tional prohibition on state deficits (beginning in 2020). The reform of the system of subsidies remains to be tackled.

Second, the 2006 reforms also dodged the issue of territorial reforms, whether of splitting current large states (Bavaria is sometimes mentioned) or, more often, merging small and economically weak states with larger neighbors. Either step is devilishly difficult, and only once in postwar history has a larger state been made from smaller ones (creating Baden-Württemberg in 1952). Financial and territorial reform were widely considered too difficult for the Grand Coalition to manage insofar as any individual state that felt itself disadvantaged by a reform could block the whole reform. Presumably, only an adverse decision by the Federal Constitutional Court might someday break these logjams; waiting for the parties to do so seems, for now, quite futile.

In between the areas of reform and the areas of non-reform lies the probability that some of the 2006 reforms may have unintended consequences. Sadly, few of them are likely to be for the better. For example, while the reforms have diminished the reach of one notorious tool that states often used to block the Bund, this may only lead states to use other rather easily available tools to do the same thing. At the same time, while there is an appearance of reform insofar as 25 of the Basic Law's 183 articles were reformed in some way, few observers think this will do much to restore a real sense of state prerogative. And even those who do see a real strengthening of state-level prerogatives in the 2006 reforms emphasize that the cost has been to over-codify federalism inside the Basic Law itself with a real cost in future flexibility that all federal systems need. And where state prerogatives toward the EU were nominally strengthened, there again remains a real chance that the old Bund-Länder mistrust will make it largely impossible to benefit much from these changes.

There are a few potential bright spots. For example, health care reform may be one place that decision-making is really less likely to be blocked. For a while, it also looked like all education—from day care to universities—would be the exclusive responsibility of the states. But more recently, the “excellence initiative” is now re-opening Bund influence over higher education just as the federalism reform was supposed to scale it back. So it's hard to see how the “untangling” approach can really work when the “re-tangling” starts happening again so quickly.

In part, this dilemma is completely understandable and even normal. Deciding which level of politics controls what policies is hard in any country. This is true whether we look at the permanent tug and pull of federation and states in the U.S., Canada, Switzerland, or Australia or at recent experiments with the decentralization of unitary states like Great Britain (“devolution” to Scotland and Wales) and France (“pseudo-federalism”). All of these polities are struggling with age-old questions of the “right level” at which to make certain decisions, often forgetting that much of politics is a permanent argument about what level would actually be right. To these old challenges, however, we must also add new issues that come with economic liberalization and, recently, economic crisis. So Germany is far from alone in its federalist discontents.

But Germany does have some special problems with federalism. Some of these are about entanglements of authority (as already discussed), but others are about the fiscal side. We've already mentioned the uniquely bold effort to share tax revenues virtually evenly across the states, and this is linked to many formal and informal methods of equalizing state spending across jurisdictions. It's hard to imagine German voters accepting that one state might spend \$15,981 per pupil per year while another spent only \$5,683. And yet according to the U.S. Census Bureau, this was the gap between New York and Utah's per pupil education spending in 2007.² Another important issue in comparative perspective is that German states cannot go bankrupt. Under current law, debts they could not pay must be assumed by the Bund. This effectively removes the threat of non-repayment and emboldens capital markets to make loans they might otherwise consider too risky. One active proposal is to allow an insolvency right for states, and, if passed, this might soften politicians' current incentive to spend money they don't have.

And, finally, what about trying different things in different places? In one sense, of course, German states are a laboratory of democracy: they allow party politicians to “try out” coalitions on a Land level to see if they might be satisfactory at the national level as well. With the German party sys-

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tem—traditionally a “two and a half party system”—now fragmented into at least five parties, the need for this function is arguably larger than ever. But in the U.S. sense of policy experimentation, the German states are much less valuable as incubators of new ideas. This need not remain the case. One little-noticed provision of the 2006 reforms allows states to “opt-out” of federal regulations, provided that they explain their reasons to the satisfaction of Berlin and the other states. If this provision works on a small scale, perhaps it can be expanded over time to allow a broader set of experiments that will show new ways forward, one innovative state at a time.

NOTES

¹ For more details on all of the issues discussed here, see Wade Jacoby and Carolyn Moore (eds), “German Federalism in Transition?” Special Issue of *German Politics*, 17(4), December 2008 and also Carolyn Moore and Wade Jacoby (eds), *German Federalism in Transition: Reforms in a Consensual State* (London: Routledge, 2009).

² These figures do not factor in the cost of living, which is 30 percent higher in New York. Still, a 3:1 gap in education spending is unthinkable in Germany, where COL differences can also be substantial.

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