

Federalism In Germany: The View From Below

Abstract

There is hardly something that could be called “federal spirit” in Germany. Mostly, the German citizens have little knowledge about which jurisdiction is in charge of what. If things do not work well – like schooling in most of the Länder currently – politicians suggest, and citizens ask for centralized solutions. The roots of this apathy towards the federal order can be found in the formation of the German Empire of 1871: The agreement was that the German states (since 1919: Länder) wanted common federal regulations with their consent but the implementation was to remain in their hands. This concept is valid until today. The Basic Law stipulates: “The Länder shall execute federal laws in their own right ...” Still today we have a cleavage between the “Prussian” Protest North and East and the Catholic South. This cleavage is underpinned today by an economic cleavage, the South is more prosperous and richer than the North and in particular the East. Therefore, the North and the East has a stronger leaning towards the federal government while the South argues for more independence and not autonomy for the Länder.

Introduction

The Chancellor of the Federal Republic of Germany, Ms Angela Merkel, told the German parliament, the *Deutscher Bundestag*, on 7 September 2016, “the citizen in Germany is not interested in issues of government jurisdiction, he simply wants a *one-stop-access* to public administration”^[1] Her observation is probably completely correct: German citizens mostly do not care which level of government is in charge of what – as long as it works. If however the public administration does not work as efficiently as the citizens expect, mostly a centralization of the task is recommended. Parents are often annoyed about rather slightly different schooling systems in the *Länder*. Therefore, politicians of both levels have asked for centralized school examinations. Or, to take a more recent example: The *Länder* neglected to prepare their students for the digital age. Because of this rising concern, the Federal Government wanted to support the *Länder* financially for the innovation of the digital infrastructure of schools. It was accepted that the constitution had to be amended because education and schooling is one field for *Länder* legislation. The whole endeavor was close to a failure because all 16 *Länder* rejected the plans of the Federal Government. The more affluent *Länder* rejected the federal proposal because they feared it would allow federal influence on schooling, the poorer *Länder* rejected it because the Federal Government requested a 50 percent co-financing of the *Länder*. They declared that such a burden would be impossible to carry. In the end a compromise was achieved because the *Länder* were of unanimous opinion not to sacrifice the 5.5 billion Euros offered by the Federal Government.



No 'federal spirit' in Germany?

Daniel Elazar defined federalism as "self-rule plus shared rule."^[2] Placed on a continuum between shared rule and self-rule Germany would be quite close to the very end of shared rule. The grounds for that can be found already in *Bismarck's* constitution of the German Empire of 1871. The ratio of this first federal German state was to agree on imperial policies with the consent of Länder but to leave the implementation to the latter, or more precisely: their administrations. This is a completely different type of federal system compared with the North-American Anglo-Saxon types (or Switzerland) which are based on the idea of "watertight compartments". The German (Austrian as well as EU) type does not follow the idea of institutional congruence (or fiscal equivalence) but constitutes a separation of responsibilities: legislation at the federal level, execution of federal law by the sub-national units.

The German Empire developed a number of policies like a common currency, an integrated national market, a civil code, a common business and criminal law, the most progressive social security systems of its time, etc., all within processes of the joint decision making of the imperial parliament and the (then still feudal) state governments in the *Bundesrat* (federal council). Implementation remained the task of the administration of the states. The dependence of the Empire on the states was highlighted by the fact that the Prussian Prime Minister served for many years simultaneously as the chancellor of the Empire.

This construction – joint decision making on federal level and implementation by the Länder governments (the states were called Länder since 1919) – survived all catastrophes of German history. The Basic Law (*Grundgesetz*) of 1949, Article 83, stipulated:

The Länder shall execute federal laws in their own right insofar as this Basic Law does not otherwise provide or permit.

The participation of the Länder in federal legislation is based on two sources: firstly, many articles of the Basic Law which entitle the federal government to legislate provide the formula:

Federal laws relating to ... shall require the consent of the Bundesrat.

Secondly, the general clause of art. 84 para 2 Basic Law:

The Federal Government, with the consent of the Bundesrat, may issue general administrative rules.

Since there is hardly any federal law without general administrative rules practically all federal laws which are implemented by the Länder require the consent of the Länder in the Bundesrat. In the end these are about 60 percent of all federal laws.

The *Bundesrat* is globally a unique legislative chamber. Not elected, since 1871 it has been the organ in which the Land governments come together. It is a political arena for the premiers of the Länder at federal level. They have become key political players in the federal decision-making process. A few of them even participated in the negotiations of federal coalition building. Their role in the federal political process is grounded in the fact that they are in charge of implementing federal law. They do that "in their own right", which also implies that they have to carry the financial burden connected with the execution of federal law. It is not the level of governance which causes a law but the level which implements it which pays for the execution.

The federation not only dominates the legislation, also the Länder have coordinated what has remained as legislative powers of the Länder: education, police, local government and culture. Concerning education, the Länder have as early as 1948 – before the Federal Republic was created – founded the permanent Conference of the Ministers of Education and Cultural Affairs (KMK) which serves to achieve common standards and coordinated policies. In the field of domestic security, the federation has acquired certain competences, for instance in cases of terrorism, organized crime etc. Nevertheless, police remains overwhelmingly in the hands of the Länder governments. But the 16 Land laws on police are practically all the same, harmonized by the conference of the police directors of the Länder. More differences can be found in the regulation of local government. Some Länder exercise a stronger control over their local governments, others give them more leeway. Local finance is a bit different, but that is more due to different degrees of agglomeration. Cultural policies are concerned more with local events: exhibitions, music festivals, theatres etc. There is little regulated by law, cultural policies are administrative and legitimized by the budget.

The issues that preoccupy and are investigated by scholars and students of federalism is of little relevance for ordinary citizens. When they have to deal with the public administration they have to go to the local administration – the Rathaus – where practically everything (except taxes) can be regulated, independent of the source of the law applied. When the citizen is affected, positively or negatively, it is *the* government. If one would ask the citizen which level of government is responsible, the answer would be in most cases: ‘don’t know’.

Therefore, most citizens are not aware that federalism, a decentralized public order, is advantageous for them. Hence, federalism is not cherished, not considered as valuable, mostly seen as a system which is expensive and slow in decision making: there is no federal spirit.

The Perspectives of the *Länder*

It is not possible to talk about “the” perspective of the *Länder*. On the contrary, the perspectives are different, depending on the financial situation, history, religious background or geographical position of the *Länder*. Broadly speaking, today the south German *Länder* Bavaria, Baden-Württemberg and Hesse, sometimes joint by Saxony and Northrhine-Westphalia, tend to insist on their rights (“States-rights”) while the North German *Länder* which are mostly comparatively small (except Lower Saxony) are more often ready to allow the federal government more influence on *Land* policies in exchange for better burden sharing (more federal money for *Land* policies). This division among the *Länder* can be attributed to (at least) four circumstances:

When the German Empire as the first German federal state was founded in 1871 the objective was not primarily to create a federal order among equals. On the contrary, Prussia would have preferred a centralized nation-state like France or the United Kingdom. The north German states were either conquered by Prussia (Hanover, Hesse) or had “voluntarily” accepted dependence (Brunswick, Oldenburg) and became mock autonomous states. Such a solution was not acceptable for the South German states. For the Prussian supporter of a German nation state federalism was the unwanted price to be paid in kind of prerogatives to get South German states in. For the South German states, the federal order was considered to be the brake against Prussian dominance. Thus, right from the beginning both sides had different conceptions of federalism. Both were more or less negative, in both perspectives it was an instrument to achieve or avoid something else.

This North-South cleavage was underpinned by different religious affiliations. Prussia and the North were predominantly protestant, the South mainly catholic. From the South German perspective, federalism was to ensure religious autonomy which was put in question in the days of Bismarck’s fight against the “Ultramontanians” or “Black International”, those from “the other side of the mountains”, the Catholic Church. This rift also was virulent in the 1815 acquiring of the new Prussian provinces of the Rhineland and Westphalia, which are both primarily catholic. Thus, religion became an issue in the federal debate.

This cleavage had implications for the political orientation of the new German Empire: In the Northern provinces Prussian protestant conservatism dominated which was, however, challenged by the rising labour movement and the Social democrats. They became the strongest political party and continue to hold strongholds, albeit with shrinking support, in North Germany. In the South, catholic conservatism dominated except the South West, where liberal and bourgeois-democratic forces were strong. Since 2011, Baden-Württemberg has been governed by a Prime Minister who is a member of Greens. Somehow, this reflects the liberal and democratic legacy of the 19th century in South-West Germany. Despite domestic migration, in particular after the Second World War and again after German unification the political colourings until today show their historical roots.

Finally, the economy. The South features partly traditionally a strong economy (Baden-Württemberg and Hesse), and partly has become strong in the last decades (Bavaria). On the other hand, the North partly suffered a considerable economic decline (Northrhine-Westphalia, Bremen), and partly remained comparatively weak (Lower Saxony, Schleswig-Holstein), only the city-state Hamburg remained traditionally strong. In the beginning of the 1990’s the deindustrialized East was an

economic burden for the whole republic. This cleavage has caused a lot of resentments, in particular in the South which argues that they have to pay too much money for the poor East. On the other hand, the East feels badly treated and hardly accepted by the South.

This underlying historical structure of German federalism could also be observed during the proceedings which led to the two federal reforms of 2006 and 2009. The South German Länder wanted to reduce cooperation between the federation and the Länder and strengthen the legislative powers of the Länder while the North German Länder insisted on securing cooperation across the levels of government. The first reform commission was close to failure when no agreement about the role of the federal government in research and science policies could be found. In the end, compromise was found based on verbal ambiguities which somehow helped both sides to save face. Quite remarkable was a position explained to the author in a private discussion in the premier's office in one of the smaller North-German Länder: "We do not have any interest in expanding our legislative powers. We do not have nor can afford more personnel for the work involved in our legislation. We are much better off when the federal government legislates, and we have the opportunity to bring in our specific interests in the due legislative procedures."

The Achilles' heel of German federalism is – despite an elaborate system of fiscal equalization – the inequality of the financial resources of the Länder. While the rich (and bigger) ones are able to fulfil their tasks, the poorer (and mostly smaller) are often overburdened. The poor ones ask for federal assistance, even when the federal government gets more influence on policy matters which constitutionally is "off limits" for it. Therefore, with side payments the federal government is able to pursue a policy of "divide et impera" against the Länder. In the end, the federal substance of the Federal Republic is at stake.

Broadly speaking, Germany, as a federal state without much federal spirit, is seen at home quite often not as a federation of sixteen Länder but as a country of two parts: sometimes the North against the South, sometimes the East against the West. There are indeed a number of shades of federalism.

[1] Deutscher Bundestag, Plenarprotokoll, 18. WP., 186. Sitzung, 07.09.2016, S. 18417 (D): „denn der Bürger in Deutschland interessiert sich nicht dafür, welche Ebene gerade zuständig ist, sondern er will *einen* Zugang für sich haben.“

[2] Daniel J. Elazar, *Exploring Federalism*, The University of Alabama Press 1987, p. 12.

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Further Reading

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