## DEVELOPMENTS

# German Federalism Reform: Part One

*By Arthur Gunlicks*[*]

### A. Introduction

In October 2005 the *German Law Journal* published my article which reviewed the major characteristics of German federalism, some common criticisms, and efforts to reform the system in recent decades.[1] These efforts culminated in a Federalism Commission (*Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung [KOMBO*]) that was formed in the fall of 2003 and met until December 2004, when the co-chairs announced that the Commission was unable to reach agreement on several issues, in particular the respective roles of the federal and *Land* (state) governments in higher education policy.[2] The failure of federalism reform was lamented by most observers, and many regretted especially the fact that the Commission had agreed on far more issues than those on which it had disagreed.

That federalism reform was important to political elites as well as scholars and not to be ignored in spite of the failure of the reform commission became apparent when the leaders of government and opposition met from 17-22 May 2005 to revive the issue. Though considerable progress seems to have been made in the private discussions held during this brief period, thoughts of revisiting the reform were put on ice after the *Land* elections in North Rhine-Westphalia on 22 May 2005.[3] The Social Democrats (SPD) in that *Land*, who had governed alone or as the major coalition partner as a result of receiving a majority or plurality of votes for thirty years, lost badly to the Christian Democratic Union (CDU). The federal chancellor,

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[1] Arthur Gunlicks, *German Federalism and Recent Reform Efforts*, 6 GERMAN LAW JOURNAL 1283 (2005), at http://www.germanlawjournal.com/pdf/Vol06No10/PDF_Vol_06_No_10_1283-1296_SI_Articles_Gunlicks.pdf.

[2] Ingo Richter, *Das Bildungswesen im Föderalismusstreit*, *in* DIE UNVOLLENDETE FÖDERALISMUSREFORM 43 (Rudolf Hrbek and Annegret Eppler eds., 2005).

[3] Rudolf Hrbek, *Ein neuer Anlauf zur Föderalismus-Reform: Das Kompromisspaket der Großen Koalition*, *in* JAHRUCH DES FÖDERALISMUS 2006 145 (Europäisches Zentrum für Föderalismus-Forschung ed., 2006).

Gerhard Schröder, apparently to secure renewed majority support for his federal coalition government, decided to call for new national elections (which can be done only by manipulating constitutional procedures, which do not provide for a British-style dissolution of parliament) for September 2005.[4]

Early federal elections did, indeed, take place, and to the surprise of most experts, the SPD did somewhat better (34.2 percent) and the CDU and its sister party, the Bavarian Christian Social Union (CSU), did much worse than expected (35.2 percent). The CDU/CSU's small plurality of the vote was not enough to form a majority coalition with the preferred partner, the Free Democratic Party (FDP), which received a very respectable 9.8 percent of the vote. A CDU/CSU-FDP coalition which would include the Greens (8.1 percent) was not viable, due to the many differences in policy positions between it and the CDU/CSU and FDP, and a coalition with the new Left party (*die Linken*), which received 8.7 percent, was out of the question for policy and ideological reasons.[5] The SPD and its coalition partner from 1998 to September 2005, the Greens, lost their previous majority, and for them a coalition that would add the Left party, which was especially critical of the SPD for its alleged betrayal of workers' interests, was also out of the question. A coalition of SPD, Greens, and FDP was hardly viable, because of the differences on economic and other issues between the SPD and Greens *vis-à-vis* the FDP. There was, then, no alternative to a "grand coalition" of CDU/CSU and SPD, in spite of their numerous but apparently not insurmountable differences. After a delay brought about in part by former Chancellor Schröder's insistence that he should remain chancellor because the SPD had more votes and seats in the Bundestag than the CDU without the CSU (an argument that was not very persuasive), a coalition government consisting of the CDU/CSU and SPD was formed in November under the leadership of Chancellor Angela Merkel of the CDU. The coalition agreement, signed on 11 November 2005, contained a section on federalism reform and an appendix of 226 pages, including 56 pages that presented the results of coalition discussions in the form of numerous proposals for constitutional changes in the federal system.[6]

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[4] *See* Werner Reutter, *Yet another Coup d'État in Germany? Schröder's Vote of Confidence and Parliamentary Government in Germany*, 15 GERMAN POLITICS 302 (September 2006).

[5] The German electoral system, which combines single-member districts with proportional representation, is essentially proportional in its effects, which means that the percentage of votes translates roughly into the percentage of seats.

[6] "Gemeinsam für Deutschland: Mit Mut und Menschlichkeit." *Koalitionsvertrag von CDU, CSU, und SPD* (http://www.cducsu.de/upload/koavertrag0509.pdf)

Federalism reform, which Edmund Stoiber, the prime minister of Bavaria and a co-chair of the Federalism Commission, had called "the Mother of all Reforms," and which had seemed to be critically wounded if not dead, was thus suddenly revived by the CDU/CSU and SPD that wanted to demonstrate that their grand coalition was capable of passing important legislative reform bills that would start with federalism but later would also include health care, pensions, taxes, and other longstanding key issues. Federalism reform did, indeed, pass the Bundestag and Bundesrat in mid-summer and go into effect on 1 September 2006. On one hand, the grand coalition thus demonstrated—at least temporarily—that it was capable of breaking the reform gridlock (*Reformstau*) that had come to characterize German politics, and which, in no small measure, had been attributed to federalism issues in the first instance. On the other hand, the authors of the coalition agreement, like the members of the Federalism Commission of 2003-2004, did not tackle two very important subjects strongly related to federalism and considered by many to be necessary for a genuine reform: a reform of public finances, especially of transfer payments from the richer to the poorer *Länder*, and territorial or boundary reform that would include the consolidation of some of the sixteen *Länder*.[7] It was agreed during the debates of the reform proposals of the grand coalition that finance reform would be taken up in the fall (in fact, December 2006),[8] but it is doubtful that territorial reform will be considered in the near future. In any case only "part one" of a reform that many experts believe needs to consist of three parts has been completed.

**B. The Reform Proposal of the Grand Coalition**

During negotiations leading to the formation of the grand coalition, a working group of experts completed a document that became that part of the appendix of the coalition agreement that deals with federalism reform. Section V. of the coalition agreement states that "[t]he grand coalition has agreed to a modernization of the federal order on the basis of the previous work on federalism reform by the Bundestag and Bundesrat, as contained in the appendix." It notes that the Bundestag and the *Länder* would be consulted regarding the proposed constitutional amendments and accompanying legislation, and that the results will be passed quickly. It also promises to clarify the financial relationships of the federal and *Land* governments in order to amend the Basic Law (constitution) so

[7] For the discussion in the Federalism Commission for and against dealing with territorial reform, *see Dokumentation der Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*, Deutscher Bundestag, Bundesrat Öffentlichkeitsarbeit (Hrsg.), Berlin. Zur Sache 1/2005, pp. 988-996. (Available as CD-Rom).

[8] The Bundestag and Bundesrat established a committee on December 15 to recommend changes in the system of public finances before the end of the current parliamentary session in 2009. 56 DAS PARLAMENT 51/52 (18/27 December 2006), at 1.

that the autonomy of the territorial units and finances adequate to their responsibilities are strengthened.

The section of the appendix concerning federalism reform contains the numerous proposals for amendments to the Basic Law, and it was approved by a conference of prime ministers of the *Länder* on 14 December 2005. They agreed to form a working group led by four *Länder* that would prepare and coordinate among the *Länder* the changes in statutory legislation that would be required. The three parties that formed the coalition government also set up a special working group to work on details of the reform proposal. The two working groups accepted a package of changes, and a special conference of *Land* prime ministers agreed on 6 March 2006 to introduce the various legislative changes in the Bundestag.[9]

The measures were introduced on the same day, March 10, 2006, in both the Bundesrat and Bundestag.[10] Because the prime ministers of the *Länder* had been involved in the process almost from the beginning of the grand coalition, the debate in the Bundesrat was characterized by the compromises already reached. It was somewhat different in the Bundestag, because members of that body had not been involved at any stage and saw themselves confronted with a reform package that allegedly could not bear any tinkering. The Bundestag debate that followed showed some differences in the understanding of federalism, including support by CDU/CSU parliamentarians for "competitive federalism," which the reforms would presumably promote; preference by some for more uniform, that is, national, solutions to certain problems; and opposition by the new Left Party that warned of weakening the Federal Republic by creating numerous small states going their own separate ways (*Kleinstaaterei*). The FDP, whose support by the grand coalition parties was solicited to ensure the required two-thirds majority, made its support contingent on the agreement by the parties of the grand coalition to take up the question of public finances as part two of the federalism reform.[11]

In the Bundesrat the prime minister of Mecklenburg-Vorpommern, the poorest of the poor *Länder*, expressed opposition to the reform proposals on the grounds that, to the extent that they promoted "competitive federalism," they weakened constitutional provisions calling for maintaining "equivalent living conditions" (Art. 72, para. 2 and Art. 106, para. 3—which still uses the term "uniformity of living conditions"). These guaranteed an essential degree of financial support to poor areas of Germany that were unable to compete with rich areas in any

[9] Hrbek, *supra* note 3, at 149.

[10] Helmut Herles, *Noch längst nicht im Kasten*, 56 DAS PARLAMENT 3 (March 13, 2006).

[11] Berndette Schweda, *Zündstoff auf der Zielgeraden*, 56 DAS PARLAMENT 1 (March 13, 2006).

meaningful sense. But the prime ministers of the other *Länder* expressed support for the compromise package in spite of criticisms of individual provisions. It was noted that passage of the reform package would demonstrate that the Federal Republic was capable of implementing reforms, and reference was made to the second part of the reform that would deal with public finance. In this context one prime minister remarked that a debate would be needed to clarify just how much difference in the fiscal capacities of the different *Länder* the German federal system could tolerate.[12]

For the first time in the history of the Federal Republic, joint Bundestag-Bundesrat hearings on the reform were held in the Bundestag chambers in May and early June, and the constitutional amendments and revisions in numerous laws made necessary by these amendments were discussed and debated not only between but also within the party groups.[13] Some last minute changes were made, but some strong opposition within each of the coalition parties remained. Nevertheless, the most comprehensive reform of the Basic Law (constitution) since its inception in 1949 and the accompanying legislation passed on 30 June 2006 with 428 votes in favor (410 were required for a two-thirds majority), 162 opposed and 3 abstentions. The opposition Greens voted against the package, because, in their view, it offered no solutions to serious problems, especially in the area of education; the FDP expressed regret that a reform of public finances was not included; and the Left Party rejected the reform as a return to *Kleinstaaterei*, for example, in education policy, and complained that the authors of the reform had never made clear whether they wanted a system of cooperative or competitive federalism.[14]

The Bundesrat took up the reform package a week later and passed it by a vote of 62 for and 7 against (the *Länder* have from 3-6 votes each in the Bundesrat). The prime minister of Bavaria, Edmund Stoiber, emphasized the transfer of responsibilities to the *Länder* and their partial redistribution between the federation and *Länder* and rejected the argument that the reform would lead to *Kleinstaaterei*. The *Länder* had demonstrated their competence in education and environmental policy and would continue to show solidarity with the poorer *Länder.* SPD party leader and prime minister of the Rhineland-Palatinate, Kurt Beck, noted the clearer division of responsibility between the federation and the *Länder* and the

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[12] Hrbek, *supra* note 3, at 153-156.

[13] Johannes Leithäuser, *Berliner Reformviertelfinale*, FRANKFURTER ALLGEMEINE ZEITUNG, July 1, 2006, at 8; *Blokadebrecher*, FRANKFURTER ALLGEMEINE ZEITUNG, July 1, 2006), at 1.

[14] *Bundestag billigt Staatsreform*, FRANKFURTER ALLGEMEINE ZEITUNG, June 30, 2006, at 1; *Föderalismus in neuem Gewand*, 56 DAS PARLAMENT 1 (July 3, 2006). For excepts from the Bundestag debate, *see* 56 DAS PARLAMENT 15 (July 10/17, 2006).

opportunities the reform offers for a revival of federalism that would lead to a competition of ideas rather than the "competitive federalism" feared by the poorer *Länder* and the Left Party. While other prime ministers also praised the reform, Schleswig-Holstein (CDU) with 4 votes and Mecklenburg-Vorpommern (SPD) with 3 votes rejected the reform package.[15]

## C. The Reform Amendments

### *I. The Proposals of the Reform Commission, the Coalition Agreement, Legislation Introduced and Legislation Passed*

As noted in my article in the *German Law Journal* of 1 October 2005, the co-chairs of the *Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung* (*KOMBO*) reported on 17 December 2004 that they could not present a common reform document, because of disagreements in the Commission regarding a number of issues, especially education. On the other hand, the Commission report did contain numerous proposals for constitutional changes on which agreement had been achieved and which later served as the foundation for the proposals on federalism reform in the coalition agreement and the actual legislation that followed. Reading the proposals of the Commission report of December 2004 and the coalition agreement almost a year later, one finds they were the same or very similar in most cases, but a sizeable number of proposals were revised rather significantly and a number were added, in particular proposals concerning issues on which no agreement was reached in the Commission in 2004. The working groups assembled after the formation of the grand coalition that were noted under section B. above made some additional revisions in the wording of the proposed amendments and prepared the legislative changes that were to accompany the constitutional amendments.[16] Indeed, according to my own analysis, there were changes—from significant to minor editorial changes—in 20 proposed amendments, and 4 proposed amendments were not contained in the coalition agreement; there were no changes in 14 other proposed amendments.[17] These proposed changes were introduced in the Bundestag and Bundesrat on March 10.

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[15] 56 DAS PARLAMENT 6 (July 10/17, 2006).

[16] For the changes to legislation accompanying the revised constitutional amendments, *see* Bundesrat, *Entwurf eines Föderalismusreform – Begleitgesetzes*, BRDrukcs 179/06 (March 7, 2006); and *Entschließung des Bundesrates zum Entwurf eines Gesetzes zur Änderung des Grundgesetzes*, BRDrucks 180/06 (March 7, 2006).

[17] *See* Coalition Agreement, *supra* note 6; Bundesrat, *Entwurf eines Gesetzes zur Änderung des Grundgesetzes*, BRDrucks 178/06 (March 7, 2006).

During the hearings in the Bundestag and before the reform package was passed on June 30, a relatively small number of additional changes were made.[18]

*II. General Goals*

In their meeting on 14 December 2005, Chancellor Angela Merkel and the prime ministers of the *Länder* agreed that the proposals for federalism reform should include the following general goals:

- Strengthening the legislation of the federation and *Länder* through a clearer distinction of their legislative powers and eliminating framework legislation;
- Reducing mutual blockades by the Bundestag and Bundesrat through a re-designation of federal legislation requiring the consent of the Bundesrat;
- Reducing joint financing and revising the conditions for receiving federal aid while confirming previous promises made to the new *Länder*;
- Strengthening the ability of the Basic Law to deal with European integration through a revision of representation abroad and regulations concerning a national solidarity pact as well as accepting responsibility for compliance with supranational law. [19]

These broad goals and a number of other provisions became the basis for some important as well as minor changes in 25 Articles of the Basic Law. The more important changes are discussed in the section below.

*III. The New Amendments and Changes*

*1. Section VIII: The Implementation of Federal Laws and Federal Administration*

One of the major complaints about the functioning of the German federal system, especially after the finance reforms of 1969 that led to a strong system of "cooperative federalism"—characterized increasingly by a kind of intergovernmental relations called "political interconnections" or even "political entanglements" (*Politikverflechtung*) that has made efficient and especially accountable policy making difficult if not impossible—was that about 55-60 percent of all federal legislation required the consent of the Bundesrat. The Bundesrat can also object to the remaining 40-45 percent, but this is a suspensive veto that a majority of the Bundestag can override.

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[18] *See* Bundesrat, *Gesetz zur Änderung des Grundgesetzes*, BRDrucks 462/06 (June 30, 2006).

[19] BRDrucks 178/06, "Begründung," p. 15.

So long as the governing parties have a majority in both the Bundestag and Bundesrat, there is usually little or no difficulty in getting bills through the legislative process in both chambers. The problem, it is argued, is that in recent decades one or both parties in newly formed federal coalition governments[20] have usually lost votes in subsequent *Land* elections, because voters tend to see these elections as an opportunity to vote against parties in the federal government or not to vote as a protest. The parties that have formed the federal government (cabinet) as a result of their majority in the Bundestag either have not retained, or, more likely, soon lost, their majority in the Bundesrat to the opposition parties that benefited from the decline of support for the federal government parties. These opposition parties then became governing parties in the *Länder* that sent delegations with 3-6 votes to the Bundesrat. If and when the parties in the federal government lost their majority in the Bundesrat, there was a tendency for the Bundesrat to block[21] or to force modifications[22] in legislative proposals supported by the federal government. The resulting "blockade politics," somewhat similar to conditions in the United States when the Senate and House of Representatives have different party majorities and/or when there is "divided government" as a result of different party control of Congress and the White House, has been strongly criticized in Germany because of its lack of transparency and accountability, inefficiency, and hindrance of "responsible" party government that should be found in a parliamentary "party state" like Germany.[23] "Blockade politics" has been blamed in part for the apparent inability of German politicians to deal with the challenges that face them and to introduce needed reforms, and it is seen as one of the causes of popular discontent with the parties and politicians in Germany.[24]

As noted in my previous article in the *German Law Journal,* "dual federalism" in Germany means policy making at the federal level and policy implementation at the *Land* level, and Article 83 in Section VIII of the Basic Law that deals with the implementation of federal laws and the federal administration states accordingly

[20] Since 1949 all German governments have been coalition governments, which is common to most European parliamentary systems. The CDU/CSU gained an absolute majority of seats in the 1953 elections, but they formed a coalition government anyway.

[21] In fact actual vetoes of legislation by the Bundesrat have been rare, though they do occur.

[22] More common is a compromise package put together by members of the Bundestag and Bundesrat in the mediation committee.

[23] *See, e.g.*, Peter M. Huber, *Klare Verantwortungsteilung von Bund, Ländern un Kommunen?*, GUTACHTEN D ZUM 65. DEUTSCHEN JURISTENTAG 33 (2004).

[24] The fact that popular discontent with parties and politicians is found in varying degrees in virtually all Western democracies suggests that particular conditions in Germany are at best contributing factors.

that "the *Länder* implement federal laws on their own responsibility insofar as this Basic Law does not provide otherwise." The major reason for the requirement of Bundesrat consent for about 60 percent of federal legislation—at the time the Basic Law was written, it was thought Bunderat consent would be required for about 10 percent of all legislation—is found in Article 84 and the interpretation it has been given by various federal governments and the Federal Constitutional Court. Article 84, para. 1, states that when the *Länder* implement federal laws, they establish on their own responsibility the agencies and procedures for administration unless federal law with Bundesrat approval provides otherwise. Paragraph 2 states that the federal government can establish general administrative rules with the approval of the Bundesrat. A rather loose interpretation of these provisions became responsible for about half of the consent legislation.[25]

One of the major goals of the proponents of reform was, therefore, to find ways to reduce the percentage of legislation requiring Bundesrat consent. This was, however, not a simple task, in part because the more the Bundesrat had to give its consent, which meant the more the Bundesrat was involved in federal legislation, the more powerful the prime ministers of the *Länder* were. As a result it became clear that the "*Land* princes" would probably need some kind of compensation to secure their support for change.

The solution found was the right of a *Land* government to "deviate" (*abweichen*) from federal rules regarding the establishment of agencies and procedures, when provided, by passing its own regulations. If this occurs, the federal regulations do not go into effect for the other *Länder* for six months, in order to give those *Länder* the opportunity to consider passing their own regulations. In exceptional cases, where the federal government believes there is a special need for uniform federal regulation of *procedures*, the law providing for such uniformity requires approval by the Bundesrat.[26] While the *Länder* gained the right to deviate from some federal legislation, the local governments were also successful in their efforts to eliminate federal mandates. New provisions with the same wording were added to Articles 84 and 85 that state clearly that federal laws may not transfer tasks to local governments,[27] which means that future transfers of tasks will have to come from the *Länder* that retain constitutional responsibility for their localities.

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[25] Irene Kesper, *Reform des Föderalismus in der Bundesrepublik Deutschland*, 6 NIEDERSÄCHSISCHE VERWALTUNGSBLÄTTER 146 (June 1, 2006); Stefanie Schmahl, *Bundesverfassungsrechtliche Neujustierung des Bund-Länder-Verhältnisses im Bereich der Gesetzgebung*, in Jahruch des Föderalismus 2006 233 (Europäisches Zentrum für Föderalismus-Forschung ed., 2006).

[26] BRDrucks 178/06, Artikel 1, para. 9(1); BRDrucks 462/06, change (c); Kesper, *supra* note 24, at 147.

[27] BRDrucks 178/06, Artikel 1, 9(1) and 10. For a discussion of the background and development of federal and EU mandates that have had the effect of undermining local autonomy and the need to

*2. VII. The Lawmaking Powers of the Federation*

In addition to the complaints made about the need to gain the consent of the Bundesrat for 55-60 percent of federal legislation, a major problem in the German federal system was seen in the relative decline of the *Länder vis-à-vis* the federation in general lawmaking powers. In response, important, but not radical, changes were made in the restructuring and redistribution of law-making powers.

Article 70 under Section VII states that "[t]he *Länder* have the right to legislate, insofar as this Basic Law does not provide the federation legislative powers." This article is misleading in that it gives the impression that the *Länder* are *the* or at least *a* major source of legislation. In fact, however, constitutional and political developments since 1949 left the *Länder* with relatively few competences in legislation outside of local government, police functions, and general culture, which includes education. The federation, on the other hand, assumed major responsibility for legislation via three sources: exclusive legislative powers (Article 71); concurrent legislative powers (Article 72); and framework legislative powers (Article 75). One of the major goals of federalism reform was to redistribute these powers in such a way as to give the *Länder* additional responsibilities and therefore strengthen the role and status of the *Land* parliaments.

*a. Article 73 and Federal Powers*

Exclusive federal legislative powers are listed in Article 73 and include such obvious areas as foreign affairs and defense, federal citizenship, currency, customs and trade. The amendments passed on June 30 actually added several items to this list: protection of German cultural artifacts from transfers abroad; defense by federal police against international terrorism in cases where certain conditions are met (legislation in this area requires approval by the Bundesrat); weapons and explosives; the care of those injured or affected by war; and the manufacture and use of nuclear energy for peaceful purposes and protection against dangers from nuclear accidents.

*b. Articles 72 and 74 and Concurrent Powers*

Many of the powers assumed by the federation have come from Articles 72 and 74, which deal with concurrent legislation. Article 72, para. 1, states that the *Länder* have the right to legislate so long and insofar as the federation has not made use of

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provide protection to local governments in a reform of the federal system, *see* Karl-Peter Sommermann, *Kommunen und Föderalismusreform*, *in* Bitburger Gespräche Jahrbuch 2005/I 59 (2006).

its legislative authority by law; para. 2 gives the federation legislative powers that are essential (*erforderlich*) in promoting equivalent living conditions in the federation or in protecting the legal and economic unity in the general interest of the federation. This second paragraph has now been changed so that the federation no longer has the right to pass legislation under its general concurrent powers; rather, it retains the power to pass "essential legislation" in ten areas only (Article 74, para. 1, items 4, 7, 11, 13, 15, 19a, 20, 22, 25, and 26). In sixteen areas it has concurrent powers without having to meet the "essential" condition, which some see as having a centralizing effect.[28] A new paragraph 3 states that in six other areas (Article 74, para (1), items 28-33) the *Länder* have the right to deviate from federal laws and that these laws go into effect at the earliest six months after passage, unless the Bundesrat has agreed to a different timetable.

As noted above, Article 74 provides a long list of items that fall under concurrent legislation. The problem, from the perspective of the *Länder*, is that the federation did "make use of its legislative authority by law." Whenever it did so, whatever law the *Länder* had in that particular area became null and void and was replaced by federal law (thus "concurrent legislation" is somewhat of a misnomer).[29] The federation also decided that it should pass a good deal of legislation that promoted equivalent (before 1994, "uniform") living conditions (conditions that promote more equal opportunity, such as infrastructure, *not* equal living standards). The tendency of the federation to pass such legislation on the grounds that it was "necessary" and, after 1994, "essential," according to Article 72, para. 2 (see above), was dampened even before the federalism reform of 2006 was passed as the result of a decision by the Federal Constitutional Court that narrowed considerably the meaning of "essential."[30]

It was also noted above that Article 74 has now been amended in a number of ways. In the first item on the list of concurrent legislation which deals with a series of legal issues, punishment for crimes and the regulation of notary publics (more important in Germany than in the U.S.) were removed, *i.e.*, they were given to the *Länder*. In items that follow, the regulation of assembly, the regulation of nursing homes and homes for the elderly and disabled (*Heimrecht*), weapons and explosives and the care of those injured or affected by war were also removed from concurrent legislation (both of the last two areas were added to the exclusive powers of the federation as noted above). Items 18, 19, and 20 were revised, as were items 22, 24,

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[28] Kesper, *supra* note 24, at 148.

[29] *See, e.g.*, Schmahl, *supra* note 24, at 221.

[30] BVerfGE 106, 62; BVerfGE 106, 223-225.

and 26. Seven new items were added after item 26, so that there are now 33 areas listed under concurrent legislation.[31]

A particularly contentious issue was Article 74a, added to the Basic Law in 1971. It provided that the federation has concurrent powers over the salaries and benefits of all public employees. Its purpose was to stop the competition among the *Länder* for the recruitment of public employees, including professors, school teachers, and police as well as those engaged in administration at all levels. It was criticized for decades as an example of the *Länder* voluntarily giving up to the federation a major area of responsibility that had been an important part of *Land* powers. Article 74a was deleted in the 2006 federalism reform, and provisions concerning the status and duties of civil servants (*Beamten*) of the *Länder*, local governments, and other public corporations, including judges, were transferred to Article 74 as item 27 (see paragraph above). Salaries and benefits for all public employees in the *Länder* and local governments, however, are now the responsibility of the *Länder*.

In those cases where the *Länder* may deviate from federal legislation passed in accordance with federal concurrent powers, the federal law is not to go into effect for six months. This not only allows the *Länder* time to consider to what extent, if any, they wish to deviate from the federal legislation; it also prevents a kind of legislative "ping-pong" between federal and *Land* laws. On the other hand, a two-thirds majority of the Bundesrat can allow the federal law to go into effect immediately.[32]

*c. Article 75 and Framework Laws*

As noted above, the third source of federal powers was found in Article 75 that provided for federal framework legislation. The *Länder* retained the right to fill in the details of such legislation, but complaints multiplied in recent years that the details were being provided increasingly by the federation (in spite of Article 75, para. 2, that permitted details only in exceptional cases and Article 75, para. 1—that refers to Article 72, para. 3—when it was "essential") thus reducing further the legislative powers of the *Länder*. The Federal Constitutional Court decided two cases in 2004 (Junior Professor Decision)[33] and 2005 (Student-Fees Decision)[34] that placed significant limits on the federal government's broad interpretation of its

[31] BRDrucks 178/06, Artikel 1, para. 7( a) and (b); BRDrucks 462/06, (b).

[32] Kesper, *supra* note 24, at 150.

[33] BVerfGE 111, 226.

[34] BVerfGE 112, 226.

competence in the area of education in accordance with the provisions stated above. Areas covered by Article 75 included regulations concerning the legal regulation of the public servants in the *Länder*; the general principles concerning higher education; the general legal regulation of the press; hunting, nature conservation and landscape management; land distribution, land use planning and water resource management; matters relating to registration or residence or domicile and identity cards; and protection of German cultural artifacts from transfers abroad.

Article 75 was deleted from the Basic Law in the federalism reform of 2006, which was not surprising given the implications of the two Federal Constitutional Court cases mentioned above. The last item above concerning German cultural artifacts has now been added to Article 73 as an exclusive federal power, whereas the status and duties of *Land* and local civil servants, hunting, nature conservation and landscape management, land distribution, land use planning, water resource management; and admission and graduation requirements in higher education have been added to the federal concurrent powers (see above).

*3. The Disentanglement of Joint Tasks and Mixed Financing (Articles 91a and 91b).*

*a. Article 91a*

One of the persistent complaints about the relations between the federation and the *Länder* concerned "mixed financing" (*Mischfinanzierung*) pursuant to which the federation would provide up to 50 percent of the funds for certain *Land* responsibilities when these "are important for society as a whole" and "federal participation is necessary for the improvement of living conditions (joint tasks)." These "joint tasks" included "improvement and new construction of institutions of higher learning, including university clinics"; "improvement of regional economic structures"; and "improvement of the agrarian structure and of coastal preservation." Projects required the consent of the *Land* affected.

The problem, according to many critics, was that the *Länder* were in effect bribed to engage in a variety of activities at the risk of losing federal funds, and that some *Länder* could ill-afford these activities even with federal help. Another complaint was that joint financing of what, after all, were *Land* responsibilities increased the federal role at the expense of the *Länder* and reduced their autonomy.

The federalism reform of 2006 deleted paragraph 1, section 1, regarding the improvement and new construction of institutions of higher learning and university clinics. This change complements and is in conformity with the deletion of Article 75 which provided for framework legislation regarding higher education.

On the other hand, the two sections concerning regional economic structures and agrarian structures and coastal preservation were not changed.[35]

*b. Article 91b*

The old version of Article 91b provided for joint federal-*Land* educational planning and promotion of facilities and projects of more than regional importance. Joint educational planning never really occurred, because of ideological and other differences between the governing parties in the federal government and the *Länder*,[36] but federal participation in research facilities and projects was common. The federalism reform of 2006 made a number of changes: educational planning was deleted, and paragraph 1 now states that the federation and *Länder* can participate jointly in promoting and financing facilities and projects of scientific research external to universities; projects of science and research at universities; and research facilities at universities, including large scientific instruments. Perhaps as a reflection of the sensitivity of some *Länder* regarding the federal role in higher education, federal involvement in scientific projects and research in the universities must be approved by all of the *Länder, i.e.*, any one *Land* prime minister can exercise a veto.[37]

*4. Finance*

The two parties in the grand coalition formed in November 2005 agreed to exclude the general system of public finance (the so-called part two) in their federalism reform of 2006, but they did make some changes in selected parts of the reform that concern finances. In Section X, Article 104a was changed in a number of places: the last sentence of paragraph 3 was deleted, and a new paragraph 4 was added that replaced the old one. It requires Bundesrat approval of federal laws that involve *Land* administration as well as *Land* funds. A paragraph 6 was also added that concerns the responsibilities of the federation and the *Länder* for violating supranational or international obligations, such as when one or more *Länder* violate provisions of EU law. An example might be a fine for illegal subsidies for a particular industry that a *Land* is trying to attract or for failure to implement EU regulations. According to the new paragraph 6, the federation now bears 15 percent of the costs of such a fine, while 35 percent is borne by all of the *Länder*. The

[35] BRDrucks 178/06, Artikel 1, para. 12.

[36] Heinrich Mäding, *Federalism and Education Planning in the Federal Republic of Germany*, 19 PUBLIUS: THE JOURNAL OF FEDERALISM 115 (Fall 1989).

[37] BRDrucks 178/06, Artikel 1, 13; BRDrucks 462/06, (d).

offending *Länder*, on the other hand, are responsible for 50 percent of the costs (see also the new paragraph 5 of Article 109 below).[38]

The old paragraph 4 mentioned above was revised and now forms the basis of a new Article 104b. It provides for federal grants-in-aid for especially important investments of the *Länder* and local governments to avert a disturbance of the overall economic equilibrium, to equalize differing economic capacities within the federal territory, or to promote economic growth. This provision differs from the old in limiting somewhat the reach of federal grants-in-aid, in placing time limits on the grants and requiring periodic reviews, and in requiring that the aid granted be reduced in stages over time.[39]

The new Article 143c also deals with finances in that it provides formulas for compensation of the *Länder* until 2019 for the elimination of federal aid for the construction of expansion of facilities for higher education, improvements for streets in local governments, and public housing. The year 2019 is also the last year of the post-unification Solidarity Pact II that establishes the fiscal equalization regime between the federation and *Länder* and among the *Länder*.[40] But it is subject to revision by paragraph 3, which calls for a determination of federal aid that is considered appropriate and essential for carrying out *Länder* tasks. Paragraph 3, sentence 3, states explicitly that the provisions of Solidarity Pact II are not to be disturbed.[41]

*4. German Federalism and the EU*

*a. Sharing EU Sanctions for National Budget Deficits.*

The Growth and Stability Pact of the European Union places sanctions on member states that have a budget deficit of more than 3 percent of GDP, a provision that Germany—and a few other states, such as France and Italy—violated between 2001 and 2005. Due to increased tax revenues, Germany was able to keep its deficit below 3 percent in 2006; however, the federal government in particular was concerned about the distribution of the German responsibility for failure to meet this requirement in the future. A new paragraph 5 of Article 109 now provides that

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[38] BRDrucks 178/06, Artikel 1, 16; BRDrucks 462/06, (e); Kesper, *supra* note 24, at 155-156.

[39] BRDrucks 178/06, Artikel 1, 17; BRDrucks 462/06, (f).

[40] For a brief analysis of Solidarity Pact II, *see* Arthur B. Gunlicks, *A Major Operation or an Aspirin for a Serious Illness?*, American Institute of Contemporary German Studies, 28 June 2001 (http://www.aicgs.org/analysis/at-issue/ai-gunlicks.aspx).

[41] BRDrucks 178/06, Artikel 1, 23.

in the case of sanctions the federation and *Länder* will share the costs according to a 65:35 ratio. The EU requirements are directed at the member states, not their subnational units, but the *Länder* that have deficits of any amount, not just 3 percent, will now be required to contribute to the 35 percent designated as their responsibility on the basis of their population. Only *Länder* with balanced budgets will be exempt from such contributions.[42]

*b. Länder Participation in EU Policy-making*

One of the contentious issues in the Federalism Commission in 2004 was Article 23, which outlines in some detail the participation of the *Länder* in deliberations of the EU Council of Ministers. In cases where the federation has exclusive legislative powers but the interests of the *Länder* are nevertheless affected in some manner, the federal government is to give consideration to the views of the *Länder*. When, however, *Länder* interests are the focus of EU legislation, as in cases involving areas of *Land* legislative powers, organization or procedures of *Land* administrative agencies, the views of the *Länder* are decisive (*maßgeblich*) so long as they respect the national interest (the *Länder* tried unsuccessfully to change "decisive" to "binding"). Representatives of the SPD-Green federal government and some experts argued that *Länder* participation caused delays and inefficiencies that were harmful to German interests. *Länder* governments disagreed in general, suggesting that the federal representatives were exaggerating their concerns, and even tried to strengthen the role of the *Länder*.[43]

The *Länder* won the argument in the coalition agreement and later insofar as their role in paragraph (6) of Article 23 was clarified and strengthened somewhat. This paragraph now states that in the areas of their exclusive legislative competence concerning schools, culture, and electronic media, the *Länder* will be represented in the EU Council of Ministers by someone appointed by the Bundesrat.[44] In cases involving areas other than the three specified above, the *Länder* can appoint a representative only in consultation with the federal government.

*5. The Berlin Clause*

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[42] BRDrucks 178/06, Artikel 1, 20.

[43] Matthias Chardon, *"Institutionalisiertes Mißtrauen": Zur Reform der europapolitischen Beteiligung der Länder nach Art 23 GG im Rahmen der Bundesstaatskommission*, *in* DIE UNVOLLENDETE FÖDERALISMSU-REFORM 79 (2005); Kesper, *supra* note 24, at 156.

[44] BRDrucks 178/06, Artikel 1, 2.

There was general agreement among members of the Federalism Commission about the need for a clause designating Berlin as the national capital. The proposal of 13 December 2004 made by the chairmen of the federalism commission added a new section one to Article 22 that simply designated Berlin as the capital of the Federal Republic.[45] This proposal was not satisfactory from the perspective of Berlin, however, because it wanted provisions concerning a federal financial responsibility for certain activities associated with a capital city. The federal government of then Chancellor Schröder, on the other hand, was not in favor of such obligations.

The coalition agreement of November 2005 and the version of the amendment that passed the Bundestag and Bundesrat[46] took account of the concerns of Berlin, though not in specific terms. It reads: "The capital city of the Federal Republic of Germany is Berlin. The representation of the state as a whole in the capital city is the responsibility of the federation. Details shall be regulated by a federal law." The "details" will undoubtedly be controversial, especially given the huge financial debts that Berlin has.

**D. Assessment**

According to the coalition agreement of November 2005, the changes in Section VIII of the Basic Law that deal with the implementation of federal laws by the *Länder* and the rights of the *Länder* to participate in federal lawmaking should reduce the percentage of legislation requiring Bundesrat consent from about 60 percent to around 35-40 percent. This would, indeed, be an important step away from "political interconnections or entanglements," but it does not reduce the influence in a massive way.[47] It depends on the extent to which, in the future, the *Länder* perceive a need to exercise their new right to deviate from the federal regulations. It also depends on the political response to separate *Land* regulation when there is no consensus that *Land* regulation is more suitable.

Under Section VII of the Basic Law dealing with lawmaking competences of the federation, some of the amendments of Articles 72, 73 and 74 and the transfer of the provisions of Article 75 to Articles 73 and 74 have provoked considerable controversy. For example, Article 74, para 1, item 11, which gives the federation

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[45] Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung, Arbeitsunterlage 0104-neu, Vorentwurf vom 13. Dezember 2004, Vorschlag der Vorsitzenden, V. Hauptstadt.

[46] BRDrucks 178/06, Artikel 1, 1.

[47] Kesper, *supra* note 24, at 147.

concurrent powers over certain economic activities, no longer includes the right to regulate store closing hours, a power favored strongly by unions and churches (at least as far as Sundays are concerned) but a power seen by many others as a good example of overregulation, a considerable burden on retail establishments, and an inconvenience to German shoppers. By November 2006 some *Länder*, *e.g.*, Berlin, had already acted to liberalize dramatically store opening hours. Another example is the transfer from Article 74 (para.1, section 1) to the *Länder* the responsibility for the punishment for crimes, which some observers fear will lead to unacceptable differences in the treatment of those convicted for the same crime in different *Länder* (as in the U.S.).

A very controversial change concerns setting the salaries and benefits for public employees, a right returned to the *Länder* through the deletion of Article 74a. While this satisfied those who argued that this is a core responsibility of the constituent parts of any strong federal system, critics in the poorer *Länder* object that it will put unacceptable pressure on these *Länder* to keep up with the rich *Länder* or lose their more qualified civil servants.

Transferring responsibility to the *Länder* for most aspects of education by deleting federal framework legislation (Article 75) and, as a result, federal influence over education, was a necessary compromise for achieving success in the federalism reform package, but it remains problematic for many critics. They fear a fragmentation of the German educational system and a decline of standards in some *Länder,* while proponents insist that education is a core responsibility of the units that make up a strong federal system and an area where competitive federalism can make a positive contribution. (The federal government's retreat from education is, nevertheless, rather astonishing from a comparative perspective, given, for example, the massive federal role in the Bush Administration's "No Child Left Behind" legislation.[48]). The federation still has concurrent powers for regulating admissions and graduation requirements in higher education, but even these are subject to the right of the *Länder* to deviate from these laws.

Environmental legislative competence was one of the issues that divided the Federalism Commission in 2004. The transfer by the 2006 reform of nature conservation from federal framework legislative powers to the concurrent powers of the federation, combined with the right of the *Länder* to deviate from federal law in this area, has been criticized not only because of the fear of a fragmentation of law in the protection of the environment but also because of the need to conform to EU environmental legislation, under which up to 80 percent of environmental

[48] Ingo Richter's claim that there is no federal regulation of education in other federal systems is, therefore, not true. *See* Richter, *supra* note 2, at 51-52.

legislation in Germany falls. On the other hand, the *Länder*, just like the federation, are bound by EU regulations, and they do not have the right to deviate from concurrent legislation concerning "the general principles of the conservation of nature, [or] the law of species protection or of marine life." Just what this means, especially "general principles," is subject to debate.[49]

Both the federal government and the *Länder* gained and lost certain powers as a result of the federalism reform of 2006. The federation gained exclusive powers (Article 73) over the law relating to registration of residence and identity cards; protection of German cultural artifacts against transfer abroad; defense against international terrorism (subject to Bundesrat approval); laws relating to weapons and explosives; benefits for war victims; and the regulation of nuclear power. These changes aroused little controversy. But changes to Articles 72 and 74, as we saw above, have in some cases been criticized in varying degrees by those who fear that the newly gained *Land* powers will lead to a race to the bottom, make it difficult or impossible for the poorer *Länder* to compete with the richer *Länder*, or lead to the *Länder* going off in different directions and weakening the federation (*Kleinstaaterei*). Proponents of the reform, of course, reject these concerns. Some observers argue that in fact little will change, either because the German public will not accept significant differences in the quantity and quality of important services in different parts of the country or that differences that could emerge will be checked by a lack of funding. These debates reveal the dilemma faced by Germans who want more autonomy for the *Länder*, on the one hand, but recognize the need to maintain some uniformity in economic, social, and educational conditions and opportunities, on the other hand.[50]

The amendments to the Basic Law regarding finances were very modest in comparison with the task that any part two of federalism reform will face. Neither the Federalism Commission of 2003-2004, the grand coalition parties in their coalition agreement of November 2005, nor the members of the Bundesrat committee formed in the winter of 2006 or the coalition parties in the Bundestag deliberations in the spring and summer of 2006 were willing to tackle the issue of general finance reform.[51] Indeed, the last sentence of the new Article 143c,

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[49] BRDrucks 178/06, Artikel 1, 5 (b); BRDrucks 462/06, (a), (bb), (aaa). For a thorough discussion of federal-*Land* competences in environmental regulation, *see* Annegret Eppler, *Föderalismus-Reform in Deutschland: die geplannte Kompetenzverteilung in der Umweltpolitik*, *in* JAHRUCH DES FÖDERALISMUS 2006 200-219 (2006). *See also* Kesper, *supra* note 24, at 151.

[50] Kesper, *supra* note 24, at 151; Huber, *supra* note 22, at 49.

[51] A Bundestag-Bundesrat working group began discussions on finance reform in December 2006. For some of the reasons why it will be difficult to achieve a compromise on this part two of federalism

paragraph 3, states that the provisions of the Solidarity Pact II are not to be changed, and any general finance reform would have to have made significant changes. This omission and the unwillingness to attack the issue of territorial reform show clearly that the poor *Länder* (especially in the East) and the small *Länder*, particularly Bremen and the Saarland in the West, will resist and, if possible, block any finance reform that would threaten, respectively, the current level of fiscal equalization or their autonomous existence. Yet a general finance reform—and, many would add, a territorial reform[52]—are necessary to give teeth to the federalism reform amendments of 2006.

There will, of course, be a flood of articles and books in the near future concerning the positive and negative aspects of the federalism reform of 2006 and future developments derived from the reform measures.[53] Already one observer has reached a "sobering conclusion" by suggesting that the reform did not accomplish its main goals of strengthening the decision-making ability of the federation, strengthening *Länder* competences, making lawmaking less complicated, or making lawmaking more transparent and understandable for citizens. Indeed, the reform measures that did pass were brought about in large part by public expectations that were awakened by the attention the reform process received. In short, the author contends, the reform is a package of compromises that demonstrates the inability of the German political system to deliver meaningful reform.[54]

It should not be forgotten, however, that federalism reform, "the mother of all reforms," seemed mortally wounded if not dead on 17 December 2004, when the co-chairs of the Federalism Commission announced that agreement could not be reached by the Commission on a number of issues. It also should not be forgotten that discussion about and proposals for reform were major topics for many years before the Commission was formed in 2003, that beyond a general consensus in favor of reform there was little agreement on details, and that, after all, a two-thirds majority would be required in the Bundestag and Bundesrat for amendments to the Basic Law. That compromise would be necessary with so many ideological, political, regional, and even personal interests at stake in a political system that

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reform, see Wolfgang Renzsch, *Föderalismusreform II* and Manfred Schäfers, *Vor dem Finanzpoker*, FRANKFURTER ALLGEMEINE ZEITUNG, December 15, 2006, at 8 and 18.

[52] *See, e.g.*, Uwe Leonardy, *Territorial Reform of the Länder: A Demand of the Basic Law*, in GERMAN PUBLIC POLICY AND FEDERALISM 65 (Arthur B. Gunlicks ed., 2003); Huber, *supra* note 22, at 125-128.

[53] For a number of articles that appeared too late to be incorporated in this paper, see *Föderalismusreform*, AUS POLITIK UND ZEITGESCHICHTE 50 (11 December 2006).

[54] Kesper, *supra* note 24, at 158.

values consensus[55] should not be surprising; nor is it surprising that many observers with their own agendas are disappointed with the final results. Whether the negative assessment in the paragraph above is too harsh, whether the reform will show mixed results, or whether it will even be generally successful in achieving its goals will be a topic of great interest to constitutional scholars, politicians, journalists, and the attentive public in the coming years.

[55] Huber, *supra* note 22, at 51.