ARTICLES : SPECIAL ISSUE
FEDERALISM : THEORY AND DEVELOPMENTS

German Federalism – An Outdated Relict?

By Christian Hillgruber[*]

A. Introduction

Germany is currently in a deep structural crises which has been furthered by the combination of ongoing economic stagnation and a desolate situation of state finances. That these circumstances are due to—according to a widespread opinion—not just the failure of political leadership in the Federation and *Länder* during the last decades, but also, and especially, the German system of federalism in its current form, is anything but evident. It has become commonplace to hear that the German federal state is in the throes of a serious legitimacy crises and is in need of fundamental structural reform, if the current federation is to have any future. Advocates of reform claim the process needs to result in a widespread disentanglement of powers, so that responsibility can once again be clearly attributed to its proper bearers. Meanwhile, criticism continuously takes on an ever stronger tone: Germany is supposedly to have fallen into the "trap of federalism".[1] As Klaus von Dohnanyi stated: "If, as in our German *Bund-Länder*-consensus-system of the so-called 'cooperative federalism', one level can always interfere with the other level even into details—and that is now the case in almost every aspect—immobility and stagnation, irresponsibility and chaos appear. It would have been better, if we had chosen a centralistic organization. Centralism is better than half-hearted decentralism. A well-lead central state is better than an undecided federalism."[2]

The fundamental criticism aimed at the state of German federalism has in the meantime received "official certification" by the German President: Horst Köhler

[*] Professor for Public Law, Rheinische Wilhelms-Universität Bonn. Email: **LShillgruber@jura.uni-bonn.de**.

[1] P.M. HUBER, DEUTSCHLAND IN DER FÖDERALISMUSFALLE? (2003).

[2] *Ein gut geführter Zentralstaat ist besser als ein unentschiedener Föderalismus*, 4 NEUE GESELLSCHAFT/FRANKFURTER HEFTE (NG/FH) (2004).

https://doi.org/10.1017/S2071832200014310 Published online by Cambridge University Press

stated in his decision to dissolve the 15th German Bundestag that the existing federal order was outdated.[3] This devastating judgment is combined with the demand for the "Commission for the Modernization of the Federal Order" (Commission of Federalism) to restart its work. This commission had been instated by the German *Bundestag* and *Bundesrat*, but failed in its task in the end of 2004 due to unsolvable differences in opinion concerning the allocation of state powers in the areas of education and research. Currently the Commission of Federalism is being called on by some to lead the way out of the current crises by developing a clear-cut distribution of powers between The Federation, *Länder*, and communities by fundamentally reforming German federalism and to reduce the "reform tailback".

But should the current federal system indeed carry the blame for the existing crises, because it—as is claimed—raised insurmountable institutional barriers? This question demands a well thought-through answer for if the analysis is incorrect, the same holds true for the supposed therapy to the current crisis. If structural reform of German federalism is not the panacea[4] but a placebo prescribed by the political class to divert public attention from their leadership weaknesses, then an unnecessary constitutional crises might be added to the current economic and financial problems, all of which could lead to a loss of respect on the part of the public for politicians and political parties: once the federal order of the Basic Law has received a bad reputation and its reform cannot provide the so easily promised relief, the whole constitutional order itself suffers a loss of legitimacy.

B. The participatory rights of the *Bundesrat* – instruments for blockade and delay?

Current criticism focuses on the *Bundesrat* and its rights of participation as the incarnation of the disliked system of "*Verbundföderalismus*". Critics have largely focused on reducing the *Bundesrat's* supposedly excessive amount of participatory rights that are susceptible to abuse, namely using those rights to marshal blockade attempts.[5] This reduction is emphatically demanded for the numerous rights of

[3] Address on TV by the German President on 21 July 2005, available at: www.bundespraesident.de/Reden-und-Interviews.11057.625010/Fernsehansprache-von-Bundespra.htm.

[4] For a version of this skeptical position, see Franz-Xaver Kaufmann, *Wege aus der Reformblockade*, 4 NG/FH (2004).

[5] Additionally proposals have been made for the *Bundesrat* to be turned into a senate similar to the US and/or a change of procedures (see HUBER, FÖDERALISMUSFALLE?, *supra*, note 1, 21, 33). These suggestions are not convincing. The direct democratic legitimacy of this senate due to elections in the *Länder* would not make the simultaneously demanded repression of the participation of the *Länder* in the

approval (*Zustimmungsrechte*) that were often established as compensation for the loss of original powers of the *Länder*. This claim seems to be plausible at first glance, as the number of rules in the Basic Law that establish that laws need to be approved by the Bundesrat has increased from the original 13 in 1949 to the current 49 rules. But already in the first election period the amount of the passed laws needing approval was at 43%, the average amount during the first ten election periods was 51.5% and it is now slightly decreasing after a high point during the thirteenth election period (approximately 60%). Therefore a dramatic rise in the number of laws needing approval by the *Bundesrat* cannot be detected over that period. Instead it is to be noted that on average about half of the laws of the Federation were and are in need of approval by the *Bundesrat*. As a rule this phenomena is due to the same reasons: Article 84 § 1 Basic Law regarding rules of administrative procedure (about 70% of laws needing approval) and the reservations within the Basic Law for approval regarding tax law which have been part of the Basic Law since its beginning.

Additionally, it should be pointed out that the potential of blockade that is inherent in the required approval by the Bundesrat is one thing, and its actual realization, viz. the (final) refusal to approve a law, is something very different. It is rare to the point of neglect that the *Bundesrat* refuses to approve a draft therefore frustrating the democratic will of the majority as articulated by the *Bundestag*. Statistically the *Bundesrat* "uses its opportunities to blockade very rarely and moderately"[6], and out of principle surely not in a politically irresponsible manner. None of the major reform projects supported by the majority of Parliament failed because of a refusal to approve by the *Bundesrat*.[7] At least in the current constellation of a parliamentary

federal legislation possible because of the "further approximation of *Bundesrat* and *Bundestag*" (Rudolf Dolzer, *Das parlamentarische Regierungssystem und der Bundesrat – Entwicklungsstand und Reformbedarf*, 58 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 7, 31 assumption 26 (1999)). The (compelled) "participation" does not prohibit abstentions from voting by the representatives of one of the *Länder*. The need for absolute majority to take a decision likewise hampers objections and approvals by the *Bundesrat* and would – if abstention was prohibited – not play any role; for then the majority would always also be the absolute majority. If a different vote among representatives of one of the *Länder* was made possible, the objective attribution of a vote to this *Land* as responsible entity would be impossible.

[6] H.H. Klein, *Diskussionsbeitrag*, in DIE ERNEUERUNG DES VERFASSUNGSSTAATES. SYMPOSIUM AUS ANLASS DES 60. GEBURTSTAGS VON PAUL KIRCHHOF, 137 (Rudolf Mellinghoff/Gerd Morgenthaler/Thomas Puhl Eds., 2003)

[7] An exception can be found in the first cautious attempts at reform during the late period of the Kohl government which failed due to the resistance of the majority in the *Bundesrat* which was dominated by the Social Democratic Party and lead by the clandestine opposition leader Lafontaine. Even in this case though the term "blockade" – which suggests obstruction for obstruction's sake – cannot be used, because Lafontaine rejected the reform proposals out of inner convictions which, unlike his comrades-in-arms, he has not yet abandoned. Additionally the Kohl government did not fail in 1998 because of this

majority consisting of the German Social Democratic Party and the Green Party and a *Bundesrat* dominated by the Christian Democratic Party a "blockade" cannot seriously be suspected. Instead the leader of the opposition boasts—with very little exaggeration—in presiding over "the most constructive opposition" which ever existed. Furthermore, "blockade" is not a neutral legal term, but a partisan political term signaling serious confrontation that is thrown into the debate by that side which cannot (completely) enforce its political aims.

The criticism regarding the kind and the amount of participatory rights of the *Bundesrat* also draws on a second argument: European integration and globalization also lead to a competition among political systems; therefore speedy decision-making processes and a high level of organizational flexibility are needed to maintain the ability to compete with other jurisdictions. Veto rights owned by constitutional organs are "serious location deficiencies and increase the risk to lose in this competition of systems".[8] This criticism prompts the question: does the participation of the *Bundesrat* in the law-making at the level of the Federation prove itself to be too cumbersome and time-intensive and are we therefore unable to afford it any longer? This position is debatable. The time limits provided by Art. 76 § 2 and 3, Art. 77 § 2, 2a and 3 Basic Law adequately secure a speedy accomplishment of the legislative procedure; in particular the *Bundesrat* must adopt a resolution in view of the approval or disapproval of a law within an adequate time limit which starts with the expiry of the time limit for the reference to the mediation committee (*Vermittlungsausschuss*). The delay in the legislative procedure which goes hand in hand with the mediation procedure (Art. 77 § 2 Basic Law) should not be overestimated either. It is important to bear in mind that a certain minimum time of a legislative procedure is nothing more than a prerequisite for an appropriate handling and deliberation of legal initiatives and therefore demanded by the rule of law. If even this is seen as a deficiency for the above-mentioned competition, we have to accept it for constitutional reasons now and in the future.

Finally, the effect of the participation of the *Bundesrat* through rights of approval and rights of reclamation which might lead to a delay or even the circumvention of the democratic will of the majority in Parliament was accepted by the founders of

---

blockade, but because of their reform plans which were unpopular and depicted as unsocial and unnecessary by the opposition.

The general assumption of Huber: "it is generally the politically controversial and fundamental projects of the federal government which cannot muster the hurdle of the *Bundesrat*" (*Klarere Verantwortungteilung von Bund, Ländern und Kommunen?, Gutachten, erstattet für den 65*. DEUTSCHEN JURISTENTAG 35 (2004) [Huber, *Gutachten*] is not attested. Most likely it is neither attestable.

[8] See HUBER, FÖDERALISMUSFALLE?, *supra*, note 1, 14.

the constitution, even installed as an element of the horizontal separation of powers, as "checks and balances" on the level of the Federation.[9] "Participatory federalism" is therefore constitutionally envisioned. According to Art. 50, in its insofar unchanged version, the *Länder* participate in the legislative procedure and administration of the Federation (and since the constitutional reform in 1992 in matters of the European Union as well). The founders of the Basic Law deemed this participation in the legislative procedure of the Federation as a form of allied cooperation to be such an important structural decision molding the identity of the German federal state that they declared the basic principle of federalism to be immune to constitutional change (Art. 79 § 3 Basic Law).[10]

Evidently, this decision is open for criticism and one can work towards changing the constitution – within the boundaries of Art. 79 § 3 Basic Law—towards a reduction of participatory rights of the *Bundesrat*. But it cannot be argued against *de constitutione lata*. Particularly the democratic principle of the Basic Law cannot be used as a constitutional argument against the federal principle in the precise form which this principle received through the same constitution. The actual stumbling block, the participatory rights of the *Bundesrat* which have been part of the Basic Law since its coming into force are not "unconstitutional constitutional law" which can only exist in the form of an amendment to the constitution outside the boundaries of Art. 79 § 3 Basic Law.[11] On the contrary, these rights are constitutionally unassailable. Therefore the attempt to play off supposedly superior democratic legitimacy against federal (constitutional) legality must be rejected as inadmissible under the Basic Law.

C. Relocation of legislative powers to the *Länder* in turn for a reduction of participatory rights of the *Bundesrat*?

[9] See the statement of the member of Parliament A. Süsterhenn at the main board of the Parliamentary Assembly, JöR 1 n.F. (1951), p. 582: To the nature of a federal state also belongs "the participation of the *Länder* in the formation of the federal will".

[10] The fact that this means the basic participation of the *Länder* in the federal legislation and is therefore out of reach for the legislator amending the constitution, is attestable by the history of the provision (see FN 9) and they only explanation having semantic and teleological value. The *Länder* do not just participate in their own legislation; this legislation is their proper responsibility and is therefore respective to its use not a topic for the federal constitution. This is different for the distribution of legislative powers between the Federation and the *Länder*. See KARL-EBERHARD HAIN, DIE GRUNDSÄTZE DES GRUNDGESETZES 413-415 (1999) (with further references in footnote 103). For an alternative view, see J. Isensee, *Der Bundesstaat – Bestand und Entwicklung*, in FS 50 JAHRE BUNDESVERFASSUNGSGRIGHT (BVERFG), Bd. II, 2001, pp. 719-770, 743; Bruno-Otto Bryde, *Art. 79(5)* in: KOMMENTAR ZUM GRUNDGESETZ (GRUNDGESETZ) (Ingo v. Münch/Philip Kunig, eds., 2003), margin number 32.

[11] See CHRISTIAN HILLGRUBER/CHRISTOPH GOOS, VERFASSUNGSPROZESSRECHT 190 (2004), Rn. 504,

https://doi.org/10.1017/S2071832200014310 Published online by Cambridge University Press

None of what has been discussed thus far excludes a reform discussion about a limitation of the influence of the *Länder* on the Federation's legislation. Yet this discussion must take place on a level of constitutional *politics* and other, more convincing arguments than "blockade" and "loss of time" need to be brought forth. Efforts should center on a strengthening of the legislative powers of the *Länder* by relocating powers from the Federal level to the *Länder* which in turn give up certain of their participatory rights in the *Bundesrat*—instead of the current compensation strategy of "participatory rights of the *Bundesrat* in turn for legislative powers of the *Länder*".[12] Thus the goal of the constitutional reform of 1994 to strengthen the autonomy of the *Länder* in the German federal system which is threatened by the continuous erosion of powers of the *Länder* could be further pursued. The *Länder* parliaments would benefit from the recovery of legislative powers. This relocation would also counteract the growing and alarming tendency of decision processes losing parliamentary legitimacy.

Such a development is not opposed by Art. 79 § 3 Basic Law. This Article does not guarantee the original, and even less, the current amount of participatory rights of the *Bundesrat*.[13] But there exists a connection in the sense of "communicating tubes" in all transactions of powers between the constitutionally demanded minimum of (effective) participation of the *Länder* in the federal legislation process and their own endowment with legislative powers: the more proper powers remain or are transferred back to the *Länder* in addition to those which cannot be taken from them in the first place, the less participation in federal legislation is needed to protect interests of the *Länder*.

The problem here is not found in the basics, but in the details, not in the approach, but in its implementation: the continuous relocation to the "higher" federal level did not happen without objective reasons in each case and, therefore, can and should not be reversed solely for the purpose to be provided with "means" which can be given for the aimed at gain that the *Länder* give up certain participatory rights in the *Bundesrat*. "The question on which level the legislative power for a certain area is most appropriately situated requires an extensive examination of the characteristics of that area (problems to be solved, current legal situation, anticipated need for further legislation). Only after such a survey can a decision for

[12] Also Dolzer, *supra*, note 5, 32, 38 assumption 27; Markus Möstl, *Neuordnung der Gesetzgebungskompetenzen von Bund und Ländern*, 4 ZEITSCHRIFT FÜR GESTZGEBUNG (ZG) 297, 299 (2003). For a different perspective than the one offered by Möstl, see differing Henrich Wilms, *Überlegungen zur Reform des Föderalismus in Deutschland*, ZEITSCHRIFT FÜR RECHTSPOLITICK (ZRP) 86, 88 (2003)

[13] See also for the following part Hain, *supra*, note 10 , 415

the more appropriate level be made; abstract principles, e.g. the principle of subsidiarity can be of assistance, but they are not able to decide the matter completely or lead to doubtless results."[14] Therefore, it is hard to generalize on this matter. However, it should be mentioned that—contrary to a wide-spread opinion—constitutional ties or commitments resulting from fundamental rights to the execution of powers do not form an argument against transferring powers to the federal legislator. The legislative bodies in the *Länder* are as well bound by the unitarian fundamental rights which in this case execute harmonizing effects on the legislation in the sixteen *Länder*.[15]

The need for approval by the *Bundesrat* of federal laws which contain regulations for the establishment of public agencies or administrative procedures is surely reasonable. It not only guards the organizational authority of the *Länder*, but also guarantees that the legislative power for administrative procedures cannot be taken from them through federal law against the will of the majority in the *Bundesrat*.[16] A law in the sense of Art. 84 § 1 Basic Law interferes with the powers of the *Länder* according to Art. 83 Basic Law. The administrative power of the *Länder* for the enforcement of federal laws compensates for their more marginal legislative powers. Only the need for approval by the *Bundesrat* prevents the *Länder* from being stealthily deprived of legislative powers in areas where they own the original powers according to the constitution. Art. 84 § 1 Basic Law is actually designed to forestall such a gradual movement of constitutional powers.[17] Therefore, it would be more suitable that the Federation relinquishes its rights of intervention—which need the approval of the *Bundesrat*—than to discard the requirement of approval itself. The contestation that the Parliament could not be deprived of the possibility to "decree constitutional and self-executing laws"[18] is not convincing. As far as the protection of fundamental rights through organization and procedure is concerned, this obligation is directed at the body which is competent to regulate this procedure—the *Länder*, subject to a federal law according to Art. 84 § 1 Basic Law approved by the *Bundesrat*. The fundamental rights which similarly bind the Federation and the *Länder* while executing their proper powers do not determine the distribution of powers between the Federation and the *Länder*. Due to the principle of federal fidelity the constitutional power of the *Länder* to decree

[14] Möstl, *supra*, note 12 , 297, 311.

[15] See in view of the areas of media (press) and assembly Möstl, *supra*, note 12, 297, 312, 314; Huber, *Gutachten*, *supra*, note 7 66, 73.

[16] BVerfGE 105, 313, 339.

[17] BVerfGE 105, 313, 341.

[18] Huber, *Gutachten*, *supra*, note 7, 80.

regulations executing federal laws – which make the implementation of these laws consisting solely of substantial regulations possible –simultaneously constitutes an obligation which the Länder are obliged to carry out and do carry out. The fact that the *Länder* in doing so are able to choose their own ways is not a constitutional "risk"[19], but constitutionally intended and harmless if the task of the *Länder* to execute laws does not suffer.

D. Introduction of a new form of power?

Besides a debatable reform suggestion to completely reorder the catalogues of Art. 73 and 74 Basic Law, it has been suggested that a new form of power be introduced: the *Länder* shall receive the right to decree laws in certain areas which so far form part of the concurrent legislation or the federal framework legislation and are currently (and partly) regulated by federal law. These laws of the *Länder* supplement or substitute federal law and claim primary validity (so-called reversed concurrent legislation). In effect, federal law only has supportive functions in these areas.[20] This new form of legislative power would not only overturn the regulation in Art. 31 Basic Law which establishes part of the federal order, but would also break with the hitherto tendency of distributing powers which aim at legal unity and clarity. In addition it would break with the existing legislative practice (safe the area of federal framework legislation) to have an area regulated as exhaustively and completely as possible by *one* competent legislator--be it the Federation or the *Länder*.[21] This has been and remains reasonable as only a regulation "from one source" can guarantee a regulation "made in one casting". According to the envisioned "*Auffanggesetzgebung mit Zugriffsrecht*" first the Federation decrees legislation then the legislative power is successively and maybe only partly shifted to all or just one of the *Länder* through a simple act of access on their part without any procedural requirements. Contrary to the current system of powers this power therefore leads to a severe loss of clear distribution of powers and the associated responsibilities: previous regionally limited federal legislation which was still valid would exist alongside new legislation of the *Länder* which would in turn replace it, creating a bizarre set of legal circumstances.[22]

---

[19] Contrary Huber, *Gutachten*, *supra*, note 7, 79.

[20] Huber, *Gutachten*, *supra*, note 7, 58-60, 70-75,140 assumption 16 (proposal of a new Art. 72 a Basic Law) therefore calls this "*Auffanggesetzgebung mit Zugriffsrecht*" (of the *Länder*).

[21] Möstl, *supra*, note 12, 297, 303; still skeptical is HUBER, FÖDERALISMUSFALLE?, *supra*, note 1, 35

[22] See BVerfG, 1 BvR 636/02, – Ladenschluss (9.6.2004), § 105. The Constitutional Court expands that Art. 125 § 2 Basic Law leads to the reverse "that the *Länder* are prohibited from to change single regulations in

The need for this particular new category of power is not readily recognizable. If a federal uniform regulation seems dispensable even for the framework of those areas which so far form part of the federal power of framework legislation, then this area can and should be given over completely and with effect *pro futuro* to the *Länder*. This transfer of power is justified as the areas concerned are the affairs of the *Länder* and therefore a right of the Federation to retrieve them should not exist. Additionally the use of such a power by the *Länder* needs to completely replace federal law to avoid legal uncertainty as well as a mixture of particularistic federal law and laws of the *Länder* which might differ from one *Land* to the other.[23] Then a "*Auffanggesetzgebung mit Zugriffsrecht der Länder*" is unnecessary. Instead all that is needed is an interim arrangement (like Art. 125a § 1 Basic Law) to secure that the federal framework laws remain valid until they are replaced by legal rules of the *Länder*, resulting in legislation passed by the competent legislator. If the circumstances were different in so far as not all areas of the framework legislation could be satisfyingly transferred into either the concurrent or absolute legislative power of the Federation or the *Länder*—or where this does not appear reasonable as in the areas of higher education or civil servants—the category of federal framework legislation should be kept. For the category of federal framework legislation guarantees a minimum of identical legislation for all *Länder* which in turn own a margin of influence to shape legislation in these areas within the federal framework. Its (uncontestable) weaknesses are not corrected by the new suggested category that only shifts the unavoidable problems of separation between powers.

E. The "separation model"

Only a model of separation would be a consistent solution in view of a complete disentanglement of legislative powers of the Federation and the *Länder*. According to such a model there would only exist exclusive legislative powers, either of the Federation or of the *Länder*.[24] This model requires the abolishment of the concurrent legislation and the federal framework legislation which in turn presupposes that the relevant areas are either awarded exclusively to the federal level (by amending the catalogue of Art. 73 Basic Law) or exclusively to the *Länder* according to the presumption of Art. 70 § 1 Basic Law.

---

case of continuity of the federal law. *The otherwise occurring mixture of federal law and law of the Länder for one and the same matter in the same application area would be a debris in the current system*." (emphasis added)

[23] Huber, *Gutachten*, *supra*, note 7, 59.

[24] This was approved by the FDP in their paper *Motor für Wettbewerb und Subsidiarität*; see *„Föderalismus-Kommission legt erst im November Reformvorschläge vor"*, in: FAZ No. 129 (5 June 2004).

The problem in this approach is not its rigidity[25]. On the contrary, its rigidity is the strength of the separation model, because only then can power deferrals within a movable system be avoided and therefore the danger of power conflicts be minimized.[26] A change of perspective regarding the distribution of powers can be achieved through a constitutional change, as this shift will not suddenly appear due to the abolition or demand for uniform federal regulation, but will be the result of a fairly long-term process. Additionally, progressive European efforts of legal harmonization will often make federal regulations redundant or obsolete, such as those which aim to improve the standard of living within various regions in Germany or promoting legal and economic unity in the country. The main challenge to such reform is its feasibility. Attempting to satisfactorily allot all areas of the concurrent and federal framework legislation exclusively to the Federation or the *Länder*[27] would be a tall order, but it is definitely worth a serious attempt.

F. Abolition of joint tasks

The constitutionally instituted cooperation between the Federation and the *Länder* in the form of so-called joint tasks (Art. 91 a Basic Law) must appear to the advocates of a strict separation between both federal levels as the "fall of man" *par excellence*. Joint tasks combine the Federation and the *Länder* into one entity in order to design and be responsible for "tasks of the *Länder*" (!) (see the wording of Art. 91 a § 1 GG).[28] Federation and Länder found an "administrative condominium" in joint framework planning as well as joint financial responsibility of the Federation and the *Länder*, therefore a mixed administration and a mixed financing. Critics charge that because of joint tasks the respective responsibilities become obscured, the predominance of the executive over the parliaments is strengthened, and the budget autonomy of the *Länder* is endangered.[29] Supportors of the joint task arrangement counter that joint tasks are in principle justified by the fact that the individual *Länder* could not bare the organizational and financial burdens these

[25] Differing view: Huber, *Gutachten*, *supra*, note 7, 54.

[26] Conflicts cannot be completely avoided though. If different matters are concerned which fall partly under federal legislative powers and partly under those powers of the *Länder*, the competent powers will need to be determined by looking at the main focus of the planned regulation.

[27] See a doubtful Möstl, *supra*, note 12, 297, 310.

[28] See U. Volkmann, Art. 91a in: GRUNDGESETZ (Hermann von Mangoldt/Friedrich Klein/Christian Starck, eds.), , 4. Aufl., Rdnr. 1.

[29] See HUBER, FÖDERALISMUSFALLE?, *supra*, note 1, 9.

https://doi.org/10.1017/S2071832200014310 Published online by Cambridge University Press

tasks entail. The joint task of "enlargement and new development of higher education" originated from the participation of the Federation in the investments into higher education by the *Länder,* and that involvement was and remains undoubtedly necessary. The abolition of joint tasks—irrespective of the absurdity of framework planning—is therefore only an option if either the financial situation of the *Länder* is considerably improved (which is not to be expected) or the current financial contribution of the Federation can be performed in a alternative, yet constitutionally valid, way. The main danger associated with the joint tasks is that the *Länder* will be held by "golden reigns", because the Federation will only contribute financial means if it receives a decisive influence in the ensuing policy development process. Even though the *Länder* place great importance on their autonomy, they willingly hand it over to the Federation as they are allured by the "attractiveness of the higher budget" of the Federation. There is no effective constitutional insurance against this; the *Länder* cannot be protected against themselves and the necessary political will of self-assertion cannot be constitutionally prescribed. If this will is not mustered by the *Länder*, then there is no help possible for them—or for the federal order.

G. Rearrangement of the financial relations between the Federation and the *Länder*?

The deliberations on the joint tasks have already offered a glance at the financial relations between the Federation and the *Länder*. These financial arrangements are simultaneously the practical test of federal government structures as well as the most delicate aspect of the federal order. Not only friendship ceases due to money, but also federal solidarity.

The constitutional regulations concerning finances are "consequential constitution"[30], as they need to correspond to the distribution of powers between the Federation and the *Länder*. In view of the connectivity between legal responsibility for a certain area and the financial responsibility for this area (Art. 104 a § 1 Basic Law) equipping the relevant competent entity with adequate financial powers is the starting point for the constitutional arrangement of finances. This structure must enable the competent entity to take any necessary financial measure which is needed for the proper fulfillment of the tasks in that area.[31] The substantial prerequisites for the realization of governmental independence of the

[30] Ferdinand Kirchhof, *Grundsätze der Finanzverfassung des vereinten Deutschlands*, 52 VVDStRL 71, 80 (1993).

[31] See BVerfGE 55, 274, 300; 86, 148, 214 with further references.

Federation and the *Länder* can only be achieved once this structure is in place. The same holds true in view of the development of the *Länder's* political autonomy through self-reliance and personal responsibility for the performance of their tasks and implementing and administrating budget policies (Art. 109 § 1 Basic Law).[32] The federal state as well as the member states need to have at their disposal adequate shares in the tax revenue for their independent budgets and cannot be dependent on payments from the other part.

According to the distribution of legal powers—except the powers for excise taxes—the *Länder* can not arbitrarily create new proper tax revenues.[33] Therefore it seems self-evident to award the *Länder* a broader autonomous right to levy taxes as a new source of income.[34] But this would not do any favours for the *Länder* as *they* would be thrown into a competition with each other which—as things currently stand—can only end in disaster. Therefore it is necessary to adhere to approval by the *Bundesrat* according to Art. 105 § 3 Basic Law which is supposed to counteract an erosion of the profit autonomy (*Ertragshoheit*) of the *Länder* due to the superiority of the Federation in tax legislation. Additionally the *Bundesrat* is supposed to urge the Federation to take the financial needs of the *Länder* for the independent fulfillment of their tasks into account while using its power for tax legislation.[35]

Revenue equalization among the *Länder* (Art. 107 § 2 Basic Law) cannot be simply abolished—as sometimes is called for[36] -- if one does not one want to give up the idea of a federal community entirely. Financial disparities between the *Länder* are not all due to factors which are open to influence through the budget policies of the *Länder*. But to determine the "adequate equalization" envisioned by Art. 107 § 2 Basic Law the statehood and self-responsibility of each of the *Länder* need to be born in mind as well as the prohibition to level all differences between the *Länder* (*Nivellierungsverbot*) and the prohibition of excessive regulation (*Übermaßverbot*). Additionally the supplementary grants by the Federation (Art. 107 Abs. 2 S. 3 Basic Law) should be restricted to constellations in which "temporary aid to self-aid" should and needs to be rendered.

---

[32] BVerfGE 86, 148, 264; also BVerfGE 72, 330, 383.

[33] See Vogel/Wiebel, Art. 109 in: BONNER KOMMENTAR GRUNDGESETZ, (*Zweitbearbeitung*), margin number 37; J. Wieland, DVBl 1992, 1181, 1187.

[34] Wilms, *supra*, note 12, 86, 89. The FDP also approves of a "as far-reaching tax autonomy of the *Länder* as possible" (see FN 24).

[35] See M. Jachmann, *Art. 105* in: GRUNDGESETZ, *supra*, note 28 margin note 21, 46. See BVerfGE 86, 148, 265.

[36] See Wilms, *supra*, note 12, 86, 89.

H. Conclusion

Strong political will and basic reforms are needed to overcome the current structural, economic, and financial crisis and to ensure our social systems remain effective in the face of serious demographic change, regrettably, solutions for these problems were largely ignored and our social system has deteriorated. It will no doubt be a long-term political project that will bring prosperity and save the welfare state in its current form. The Basic Law—institutionally or on the contents— neither did nor does oppose the necessary, far-reaching radical reforms now facing Germany. Therefore the reform debate should not be held as a mock-debate on our constitutional order. Constitutional sham-solutions are not needed to solve the current crisis. Instead political resolution and assertiveness are needed and there is no substitute, particularly not by constitutional amendments. Politicians in the Federation and the *Länder* are neither allowed to nor need to dread the judgment of the democratic sovereign whom they subsequently have to face.

Irrespective of the current economical and financial situation of the federation for which it does not bear responsibility, the constitution must be put on the test to find out if it remains the adequate framework for what possibly appears to be fundamentally changed circumstances. Such an excursive inquiry only focusing on parts like the one undertaken here leads to the following conclusion: the Basic Law is neither outdated nor does it blockade the republic.[37]

[37] 20 DER SPIEGEL 34, 38 (2003).

https://doi.org/10.1017/S2071832200014310 Published online by Cambridge University Press