

Intergovernmental Relations in German Federalism: Co-operative Federalism, Party Politics and Territorial Conflicts

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Abstract: Federalism in Germany is characterised by an emphasis on a symmetrical allocation of competencies, the intergovernmental sharing of responsibilities and resources and on vertical and horizontal joint policy-making, leading to a very dense and strictly symmetrical and multilateral system of intergovernmental relations. Since the late 1970s, but especially since Unification in 1990, this system has come under considerable stress. On the one hand, party competition is increasingly played out through the Bundesrat, the body representing the Länder governments at the federal level, making intergovernmental coordination more difficult and leading to accusations of ‘Reformstau’ (reform log jam). On the other hand, Unification not only added five new Länder to the system, but also led to economic disparities between the Länder at a hitherto unknown level, and deepened territorial conflicts over Länder competencies and the allocation of finances. Both developments have made led to demands for a reform of the federal structure aimed at disentangling joint policy-making structures to ensure greater autonomy for both the federal level and the Länder. But, as the paper will argue, the developments have resulted in a triangular constellation of interests between the federal level, the richer and the poorer Länder that makes reforming the system almost impossible.

1. Introduction

As outlined in the introduction to this special issue, the term ‘intergovernmental relations’ (IGR) captures “the working connections that tie central governments to those constituent units that enjoy measures of independent and inter-dependent political power, governmental control and decision-making” (Agranoff, 2004: 26), with ‘working connections’ referring both to the institutional and formalised structures of IGR and to the actual patterns or modes of interaction. Both are expected to differ according to a more federalised logic, where constitutional categories of multi-level government are considered as important factors shaping intergovernmental relations and a more multi-level governance logic, where the mode of IGR is driven by the specific interests and political capacities of the lower level governments rather than constitutional norms.

Under the comparative federalism scenario, as argued in the introduction, it is assumed that in federal states, where subnational governments have constitutional status and share sovereignty with the central level, this will also feed into the formal and informal structures and patterns of IGR leading to predominantly symmetrical multilateral rather than bilateral coordination structures. Secondly, that given that their rights and competencies are constitutionally guaranteed and can only be altered with their consent, it is expected constitutional reforms involving a (re)allocation of competencies will have to treat subnational units equally, thus creating or perpetuating symmetry of competence allocation over time. Finally, given the shared sovereignty between the levels and the lack of a constitutional hierarchy that would allow either level to define the competencies of the other, party political incongruence between the levels or between subnational authorities is expected to have a major - disruptive - impact on the patterns of IGR.

This comparative federalism scenario is contrasted in the introduction with a multi-level governance scenario. Here, constitutionally defined resources are expected to have less of an

impact on the patterns of IGR, long-term competence allocation of competencies or the impact of party incongruence than other important informational or political resources which subnational governments have at their disposal. The particular pattern of IGR is thus assumed to be driven by the specific interests and political capacities of the lower level governments. As a result, long-term constitutional developments, and the competence (re)allocation in particular, are also assumed to reflect less the constitutional position of subnational governments resources and more the shifts in the balance of power resources more generally. Finally, the relative impact of party incongruence on patterns of IGR coordination is expected to depend on the characteristics of individual lower level governments rather than the constitutional setting these governments are embedded in.

As will be shown in the following, dynamics in the German federal system mainly follows the federalism scenario developed in the introduction. Federalism in Germany is characterised by an emphasis on a symmetrical allocation of competencies, the intergovernmental sharing of responsibilities and resources and on vertical and horizontal joint policy-making to generate common nation-wide standards of public policy, resulting in its description as ‘co-operative’ and ‘unitary’ federalism. Constitutional norms of the German federal system had the major and most important impact on the development of a system of very dense, strictly symmetrical and multilateral IGR.

Since the 1970s, and especially since Unification in 1990, this system of symmetric and multilateral IGR has come increasingly under stress due to two main sources for conflict. On the one hand, since the system was basically in place before the bi-polar party system fully developed, party incongruence and growing polarisation between the two main parties had the expected negative impact on intergovernmental co-ordination. On the other hand, divergent economic developments of the Länder and regional disparities, especially since the accession of the five new Länder, have led to severe territorial conflicts over Länder competencies and

the allocation of finances. As a result, Germany has gradually changed towards a more ‘asymmetric’ federal system, which takes on some features of the multi-level scenario. Negotiations within the system of IGR have become at the same time more difficult and more open, fluid and unpredictable. Yet while this development increased the pressure for a reform of the federal structures, the symmetric allocation of competencies or the formal multilateral structures of IGR have remained remarkably stable.

The paper is structured as follows. The first section will give a short overview over the constitutional structures of German federalism including an outline over the development of German interlocked politics. This is followed by an overview over the structures of IGR. Section three and four analyse the impact of both, the German party system and the growing impact of party incongruence and polarisation as well as the increasing territorial conflicts on the formal structures and working patterns of IGR. Section 5 briefly discussed the latest federal reforms in 2006 and 2009. The final section discusses the results in light of the overarching questions of this special issue and concludes.

2. The Constitutional Framework of German Federalism

Germany is the classic example of co-operative and symmetric federalism. In contrast to other federal states, the distribution of competences between the federal level, the ‘Bund’, and the subnational units, the ‘Länder’, does not follow a material, but rather a functional logic: while the main legislative competences lie with the federal level, most administrative competences are assigned to the Länder. Article 70 GG does state that the ‘Länder shall have the right to legislate insofar as this Constitution does not confer legislative power on the Federation’, but the Basic Law (Grundgesetz, German Constitution) provides ample opportunities for federal legislation, in particular through the concurrent and (former) framework competencies, if and to the extent that there was a ‘need’ for the ‘creation of equivalent living conditions throughout the country’ or ‘the maintenance of legal and economic unity’ (Art. 72 para. 2

GG). As a result, the residual, exclusive competencies of the Länder are limited to a small number of legislative powers, mainly in the areas of local government, policing, education and cultural affairs including the media. This is, however, compensated in two ways: First, Article 83 GG assigns the Länder both the right and the duty to ‘execute federal Laws in their own right’ although the federal level maintains a right to regulate administrative procedures as well (Art. 84 GG). Second, the Länder participate in federal legislation through the Bundesrat. The Bundesrat differs from other second chambers in federal systems in that it consists of Länder government representatives, i.e. the Minister President and cabinet members. The Länder have between three and six votes (depending on their population size), which have to be cast en bloc and cannot be split. The Bundestag not only has the right to initiate federal legislation by submitting bills to the Bundestag (a right it makes use of relatively rarely), but also has to deliberate and pass all federal laws. The veto power of the Bundesrat depends on the impact a federal law has on the Länder. In the case of consent laws (Zustimmungsgesetze), where important financial or administrative interests of the Länder are concerned, the Bundesrat has an absolute veto. In all other cases (objection laws, Einspruchsgesetze), an objection (i.e. a suspensive veto) by the Bundesrat can be overruled by the Bundestag (Art. 77 GG) In addition, constitutional amendments require a two-thirds majority in both the Bundestag and the Bundesrat.

The development towards the system of functional division and strong co-decision rights of the Bundesrat was also supported by decisions of the Federal Constitutional Court. In the mid-1950s (supported by subsequent decisions), the Court had ruled that the evaluation of the ‘need’ for federal legislation was essentially a political question and thus not subject to the adjudication of the Court’ (BVerfGE 2, 213; Kisker 1989: 40). In turn, the Court also strengthened the Bundesrat, for example by adhering to the ‘Unity Principle’ (Einheitsprinzip), which means the consent of the Bundesrat is necessary for the whole legislative proposal – and not just the parts that directly impact the financial or administrative

interests of the Länder (BVerfG 8, 247; Kisker 1989: 41). As a result, a Bundesrat veto can be used to block the whole bill and for reasons unrelated to the implementation.

Although the basic structure of the German federal system was already enshrined in the 1949 Basic Law, it was the ‘Great Finance Reform’ of 1969 that gave the system its final format (Benz 1999: 63). Until then, the tension between the aim of providing ‘uniform living conditions’ and the fact that some Länder were burdened more heavily than others by the consequences of World War II meant that the federal level had to step in and provide the necessary financial means in the form of grants. And while the Bund was able to afford this due to the overall favourable economic development and high revenues during the 1950s, the downside was an uncontrolled growth of grants to the Länder and of mixed expenditures, which not only lacked a constitutional basis but also represented an encroachment on Länder competences. The finance reform of 1969 (for further information Renzsch 1991) introduced the Joint Tasks, which turned regional development policy, agriculture and fishery, university construction and education planning, originally competencies of the Länder, into matters of intergovernmental decision-making (Article 91 GG). In addition, the reform amended the fiscal constitution by expanding the system of revenue sharing originally established in 1955 and adapted the financial equalisation scheme. Thus, as Benz has argued, the reform did not so much introduce new provisions as create a constitutional basis for the existing cooperation: ‘Interlocking politics was thus consolidated’ (1999: 63). As a result, the symmetrical and cooperative elements of the federal system are also apparent in the financial constitution. The most important taxes (income tax, capital gains tax, VAT and corporation tax), which raise ca. two thirds of the overall revenue, are shared between the Bund and the Länder. With the exception of a few minor taxes, all taxes are regulated at the federal level – including those allocated to the Länder (Article 105 GG). Federal legislation on revenues needs the consent of the Bundesrat, which gives the Länder collective influence, but individually the Länder have little opportunity to set tax rates, which are the same across Germany. Finally, a mechanism

of fiscal equalization levels out regional financial disparities amongst the Länder, so that no Land falls below 99.5% of the average financial strength.

As the short overview demonstrates, the German federal system mainly tries to achieve symmetry and equality, which clearly confirms the dynamics expected for the ‘federalism scenario’. Although the Länder differ with regard to their size and economic power, they all have exactly the same rights and competencies. Even more, the German system is geared towards eliminating territorial differences not only by levelling out financial differences between the Länder, but also through a uniform provision of public services and nation-wide standards of public policy. Given that the fundamental rationale for the system is the aim of achieving and maintaining equivalent living conditions, rather than promoting territorial diversity, the two levels of government are therefore ‘bound together in a perpetual process of coordination designed to secure the consensus necessary for policy to be made and implemented’ (Jeffery 1999a: 133). The following will therefore investigate how the constitutional logic inherent in German federalism is reflected in the working structures of IGR.

3. Managing Interlocked Structures: Legal and Voluntary IGR

Apart from the participation rights of the Bundesrat, only a small number of intergovernmental coordination arrangements are actually mandated by the Constitution or by secondary legislation. Among these are the coordination bodies for the Joint Tasks as well as the Joint Planning Councils. Decisions on the Joint Task framework plans including the allocation of financial resources are made in the Bund-Länder Coordination Councils for Regional Development and for Agriculture and Coastal Protection. With the federal reform of 2006ⁱ, the former Joint Task of education planning was abolished (and the Joint Bund-Länder

Commission for Education and Science with it), but Bund and Länder can still cooperate in areas such as the promotion and funding of research institutions or university construction within the newly established “Joint Science Conference” (Gemeinsame Wissenschaftskonferenz). Finally, the federal reform of 2009 also introduced two new bodies, both set up in 2010: Bund-Länder cooperation in the area of information technology (Art. 91c) takes place in the “Council for IT Technology” (IT Planungsrat) while the task of the ‘Stability Council’ (Stabilitätsrat) is to monitor the budgetary management of the federal level and the Länder, thus acting as an early warning system to prevent future budget crises.

Another feature of the legal cooperation are advisory Joint Planning Councils that consist not only of Bund and Länder representatives, but also of members of local authorities and experts. The ‘Council for Economic Development’ (Konjunkturrat), based on the Stability and Growth Act in the context of the finance reform of 1969, aims at a comprehensive coordination of economic activity within the federal system. The former ‘Council for Financial Planning’ (Finanzplanungsrat), also based on the Stability and Growth Act, coordinated the medium term financial planning of Bund, Länder, municipalities and public agencies with the aim of developing an overarching and consistent economic policy. In the context of the 2009 reform, it was replaced by the Stability Council (see above). The German Council of Science and Humanities (Wissenschaftsrat), finally, draws up recommendations on the development of science, research and the university sector.

However, most IGR in the German federal system are based on voluntary coordination (freiwillige Koordination). The term voluntary relates to the fact that these forms of IGR are neither constitutionally demanded nor based on secondary legislation. In addition, decisions are politically, but not legally binding, and both single Länder and the Bund can resort to their autonomous competencies in cases where an agreement cannot be reached (Kropp 2010: 125). This should not imply, however, that voluntary IGR are informal, indeed they are often based

on executive agreements or even treaties between the Länder. The term voluntary is also somewhat misleading, as the formal structures of the federal system make cooperation an inherent necessity.

The German system of interlocked politics has been most famously captured with the term 'joint policy making' ('Politikverflechtung', Scharpf et al. 1976), and the development of IGR can be seen as a response. Not only does the federal level need the consent of (a majority of) the Länder governments in the Bundesrat in a broad range of policy areas, but the Länder also implement most of the federal level's legislation (they also employ the vast majority of Germany's civil servants), so their administrative expertise and knowledge of how policies work on the ground is vital both for the drafting of federal bills and to ensure smooth implementation. In turn, given that the Länder must implement almost all federal laws under their responsibility and at their own expense, and that their tax revenues are almost entirely dependent on federal legislation, intensive cooperation between the Länder is a necessary precondition for exerting effective influence through the Bundesrat and for safeguarding their interests. Given the emphasis on equal living conditions, a uniform provision of public services and the legal and economic unity, Länder also need to coordinate their policies on the areas of their own exclusive legislative competence to avoid external effects and to harmonise legal and administrative procedures. The federal construction of the Basic Law thus forces the federal level and the Länder to cooperate in the fulfilment of a large number of government tasks and responsibilities.

This voluntary cooperation and coordination takes place in a dense network of political and administrative conferences, committees, sub-committees, working groups and ad hoc meetings at all levels. To give an idea of the sheer numbers, a survey conducted in 1989 demonstrated that North-Rhine Westphalia participated in around 330 Bund-Länder commissions and another 120 to 140 Länder commissions (Große-Sender 1990). A survey in

Hesse produced even larger numbers with the government participating in 635, the sectoral administration in 290, and the other administrative agencies in 69 Bund-Länder or Länder forums (Hessischer Landtag, Drs. 9/6806). Since a full description of all institutions, bodies and forums of Bund-Länder coordination is neither feasible nor sensible, the following will outline the most important types of intergovernmental coordination.

The highest-ranking institution is the Conference of Minister Presidents (MPK), established in 1947 and one of the earliest forms of IGR. After the Republic was founded in 1949, the Länder initially saw no further use for the Conference as a coordination arena. It was re-established in 1954, however, as a means to safeguard against the federal level encroaching on exclusive Länder competencies. As the Bavarian Minister President put it at the time, the MPK was meant to discuss policies ‘the federal level might be tempted to centralise unless the Länder are able to deal with them among themselves in a sensible way’ (Hans Ehard, cited from Kropp 2010: 135, translation KA).

Today, the MPK meets four times a year, but can also convene for special meetings if necessary. The Chair alternates annually between the Länder, and the Conferences are prepared by meetings of the Heads of the Länder Cabinets Offices. Twice a year, MPK meetings are followed by meetings with the Federal Chancellor, usually preceded and prepared by meetings of the heads of the Chancellor's Office and the Cabinet Offices of the Länder. Until 2004, MPK decisions had to be taken by unanimity, but during the deliberations for the federal reform this was changed (with few but important exceptions) to a qualified majority of 13 out of the 16 Länder. In contrast to the procedure in the Bundesrat, where votes are weighed, voting in the Conference is based on the ‘one Land one vote’ principle. Since the pressure to find a compromise is great, the Minister Presidents also come together in so-called ‘fire-side chats’ to discuss politically important issues or conflictual questions confidentially and without their staff before the main Conference.

At the level below, Länder ministers also meet in regular Conferences. The most prominent is the Standing Conference of the Länder Ministers for Education and Cultural Affairs (Kultusministerkonferenz, KMK). As the MPK, its establishment precedes the founding of the German Republic. It first met in early 1948 and was set up as a permanent institution with its own secretariat later the same year. Until today, it is the only Länder Conference that has its own administration based on an executive agreement in 1959 with a staff of more than 200 (Krug and Herrmann 2010), but Conferences exist for almost all policy areas. The latest addition to the currently 18 Conferences was the Conference of Ministers for the Integration of Immigrants in 2008 (Zimmer 2010: 677, FN 3). Although the Conferences are mainly an instrument of coordination at the Länder level, representatives of the federal government usually participate, either as members or as guest. In addition, relevant policy experts (fachpolitische Sprecher) from the governing parties in the Bundestag are often invited to attend. The aim is not only to benefit from their expertise, but also to be informed of potential conflicts with (or within) the coalition and thus to generate a consensus with the Bundestag before entering into the formal Bundesrat procedures.

The Conferences meet between once and three times a year, and although none of them have as large an administration as the KMK, most have developed some embryonic form of bureaucratic structures. The Conference Chairs rotate on an annual or biannual basis between the Länder. For some Conferences, the Chair also serves as the secretariat; other Conferences have established a permanent secretariat within the Bundesrat. In addition, Conferences are prepared in committees or working groups at lower administrative levels. The annual meetings of the Conference of the Ministers for Home Affairs, for example, are prepared in 6 Standing Committees consisting of the heads of department (Kropp 2010: 137f.).

Since Unification, the dense network of ministerial conferences has become even more intricate. Given the specific interests of the new Länder, the East German Minister Presidents

decided as early as 1990 to set up their own Conference (MPK-East) to coordinate their positions for negotiations that are of particular concern for them. Similarly, whenever issues affecting especially the East German Länder are on the agenda of Conferences, the East German Ministers meet beforehand to agree on a common position.

Below the political level, finally, we find numerous committees, commissions and working groups at all levels of the administration both with and without the participation of federal representatives. Based on either written agreements or ad hoc convened meetings, they prepare the meetings at the next higher level, coordinate legislative proposals and executive regulations, deal with administrative questions, or simply exchange information and experience. In the past, efforts have been made to curb the uncontrolled growth of these working structures of IGR, albeit with mixed effect. In both 1998 and 2004, formal resolutions of the MPK called on the sectoral Ministers to reduce the number of working groups and committees and to organise their coordination in project-related and fixed-term rather than permanent bodies. In some areas, this has led to significant reforms, while others have changed very little (for an overview see Zimmer 2010).

The only bilateral element of this coordination machinery are the so-called Länder representations in Berlin, led by a high ranking Land politician, either a Cabinet Minister or a high civil servant in the rank of a parliamentary state secretary (*parlamentarischer Staatssekretär*). The general task of the representations is to keep the Land government informed of all developments within the governmental and administrative bodies at the federal level and to represent the interests of their Land vis-à-vis the Bund and the other Länder.

With this exception, the working structures of legal as well as ‘voluntary’ IGR are thus symmetric and strictly multi-lateral with regard to both, horizontal coordination between the Länder and vertical coordination between the Länder and the Bund. The dominant mode of

German IGR thus clearly supports the expectations developed for the federalism scenario. However, the development of a network of voluntary IGR that is denser and more extensive than in most federal systems (Watts, 2003) can mainly be explained with the specific constitutional set-up of German federalism, and the functional distribution of competencies between the federal and the Länder level as well as the role of the Bundesrat in particular. The constitutional aim of ‘creating or sustaining equal living conditions’ and ‘safeguarding the legal and economic unity’ acted as the main driver for centralised legislation at the federal level. In turn, the functional division of competencies and the provisions of the fiscal constitution made the participation of the Länder in federal legislation via the Bundesrat necessary. However, as the theory of joint policy-making (‘Politikverflechtung’ Scharpf et al. 1976) famously argued, a political system, where central government decisions are directly dependent upon the agreement of constituent governments, is prone to deadlocks due to the large number of actors and potentially conflicting interests that have to be involved. Since coercion is, due to constitutional and political reasons, not an option in the joint policy-making between the Länder and the federal level, agreements have to be negotiated. In this regard, the especially the intensive cooperation at lower levels of the administration helps to ‘de-politicise’ negotiations as it allows the development a ‘problem solving’ style of negotiations based on shared policy interests, values or norms which may facilitate agreement. In addition, voluntary intergovernmental cooperation allowed executives to isolate themselves more effectively from demands formulated by competing political parties and interest groups (Lehmbruch 2000: 111). Consensual decisions are, however, particularly difficult, if not impossible, in those cases where the involved actors have competitive or even antagonistic action orientations. The following sections will therefore investigate the impact of party politics and growing territorial cleavages as sources of conflict.

4. The Impact of the Party System – Incompatible Rules of the Game

The German party system has long been remarkably stable. From the beginning, the Christian Democratic Union (CDU) and the Social Democratic Party (SPD) dominated elections at the federal and the Länder level and structured party competition along the left-right cleavage. A plethora of smaller parties existed at both levels, but from the 1950s they either merged with the CDU or failed to jump the electoral thresholds necessary for parliamentary representation. By the early 1960s the German party system had settled in to a bipolar competition between the CDU (together with their Bavarian sister party, the Christian Social Union, CSU) and the SPD with the far smaller Free Democratic Party (FDP) playing the role of kingmaker. In addition, the party systems at the federal and Länder level became remarkably congruent (Detterbeck and Renzsch 2008: 44-45.). Competition was structured by similar class, confessional and issue cleavages at both levels, even if differences in confessional and socio-economic characteristics between the Northern and Southern Länder led to the relative strength of the SPD in the former, and of the CDU (or, in the case of Bavaria, the CSU) in the latter. From the 1980s onwards, the system changed when the Greens were able to enter the Bundestag as well as most of the Länder parliaments. Although for some time a coalition of the SPD with the Greens was not considered a viable alternative to the governing CDU-CSU/FDP coalition at the federal level (the first 'red-green' coalition was formed in Hesse in 1985, but only in 1998 at the federal level), party competition at both levels was gradually transformed into a two-block system consisting of four parties.

During the early years of the Republic, congruent majorities in Bundestag and Bundesrat, but also a general compatibility of party positions and the social and economic homogeneity of the Länder meant that conflicts between Bundestag and Bundesrat, but also within the MPK or Minister Conferences remained fairly rare. 'Länder government formation was governed by similar considerations to those at federal level, and Länder government

composition became, with few exceptions, essentially congruent with the pattern of government and opposition at federal level' (Jeffery 1999a: 135). In addition, all parties, and the two large parties CDU/CSU and SPD in particular, developed comprehensive networks of vertical co-operation. Among them are the institutionalised Conferences of Party Leaders in the Bundestag and the Länder legislatures, which are partly assisted by permanent staffs. The parties' Executive Committees meet on a regular basis with 'their' Minister Presidents and the leadership of their parliamentary party groups, and similar meetings take place between the party experts in particular policy fields across levels. Finally, in the two large parties, SPD and CDU, leading Land politicians (the Minister Presidents and Oppositions leaders who are usually also the Land Chairs of their party) are often integrated into the executive party structures at the national level, where party elites from the different levels make personnel, policy and strategic decisions for the whole party. As a result, intergovernmental conflicts between the levels, but also between Länder could be solved within the party structures (Detterbeck and Renzsch 2008: 51f.), while party conflicts were not the main factor impacting IGR.

The latter changed, however, when the first federal SPD-FDP coalition (1969–82) faced a hostile CDU majority in the Bundesrat. Cooperative decisions between the Bund and the Länder became much more difficult, not only because majorities were no longer congruent, but also because the two main parties adopted strongly opposing positions on a range of policy issues and conflicts became highly ideological (Benz 1999: 64). As a result, the reform processes of the 1950s and 1960s lost momentum and major reform plans, such as the territorial reorganisation of the Länder or a comprehensive constitutional reform, failed (ibid.). What had until then been a latent problem turned into a manifest and lasting one: as Lehmbruch famously argued (2000 [1976]), the German political system combines two basically incompatible sets of rules of the game. While the federal structure with its emphasis on vertical and horizontal joint policy-making makes cooperative orientations and the search

for compromises necessary, the bipolar party system is based on competition, and the two will clash violently in times of ‘divided government’ when the majority in the Bundestag does not control a majority in the Bundesrat, or even worse, is faced with a hostile majority. Coordination between the Bund and the Länder, and between Bundestag and the Bundesrat in particular, can then become subject to and severely hampered by the - often public - power play between the governing majority and the opposition parties.

Divided government and the growing polarisation of party competition not only had a negative impact on the Bund-Länder coordination, but also on the negotiations between the Länder. In the early 1970, the Länder therefore started to convene in two sets of informal meetings according to the coalition majority, in so-called ‘A-Länder’ (SPD-led) and ‘B-Länder’ (CDU- or CSU-led) groups, prior to formal meetings to coordinate the party line for the official negotiations. The practice was first developed for the meetings of the KMK, but was quickly adopted for other Conferences as well and has since become a permanent and institutionalised feature of the MPK and Minister Conferences as well as Bundesrat committee meetings and plenary sessions.

Chancellors have, especially in times of narrow Bundesrat majorities, also tried to break up the multilateral setting of IGR, for example by inviting only the Minister Presidents belonging to their own party to prepare Bundesrat decisions (Kropp 2010: 129). Such negotiations are more than questionable from a constitutional point of view, and the Constitutional Court repeatedly ruled them out with reference to the principle of ‘federal comity’ (‘Bundestreue’) (Kisker 1989: 40). The principle obliges both the Bund and the Länder to behave loyally towards the union, and the Court has treated this as a constitutional obligation ‘to act in a profederal manner [that] prohibits the federation from trying to “divide and conquer”’ (cited from Kommers 1994: 482).

Since Unification in 1990, the party system has again undergone changes, leading not only to the emergence of a new party, the Party of Democratic Socialism (PDS, successor to

the former GDR Unity Party SED), but also a regionalised and asymmetric party system. In the East German Länder, the PDS was able to consolidate its electoral base during the 1990s, even forming government coalitions with the SPD. Party competition is basically tri-polar between the CDU, SPD and the PDS/Left List, while the FDP and the Greens, although now also represented in most of the East German Länder Parliaments, have only rarely been included in government coalitions. In the West and at the national level, in contrast, the PDS remained marginalised until its merger with the newly formed West German WASGⁱⁱ. In the federal election in 2005, they immediately received over 8 per cent of the votes by presenting joint party lists with the WASG. Since the official merger in 2007, the Left List has also been able to gain seats in most of the Western Länder, but remains excluded from government coalitions.ⁱⁱⁱ Thus, while the system in the new Länder is essentially tri-polar, the party system in the old Länder and at the national level changed from the stable bi-polar to a more fluid five-party system, in which the Left List is not included in but often significantly affects coalition formation.

A second and related important change concerns the increased formation of so-called 'mixed' coalitions at the Länder level, i.e. coalitions cross-cutting the federal two-block coalition pattern. As a result, the neat division between 'A' and 'B' Länder no longer exists due to the large number of 'C' Länder with mixed coalitions. Meetings still take place in A- and B- groups with attendance depending on the party affiliation of the Minister President or the Minister independent of the type of coalition. However, it has become more difficult for them to represent their Land with a clear party political stance. Ministers from the smaller coalition partners usually attend the group of their larger coalition partner, but to complicate things even further, FDP and Green ministers now also meet in groups of 'F' and 'G' Länder, respectively (Leonardy 2002: 184ff.).^{iv} Thus, given that the East German Länder also meet beforehand to discuss issues of particular concern for them, some decisions now have to go

through at least three different rounds of party political, East-West and finally joint Länder negotiations.

The problem for such ‘mixed coalitions’ is that they have a relationship of *both loyalty and opposition* to the Government at the federal level. The problem for such mixed coalitions is that votes in the Bundesrat cannot be split but have to be cast en bloc. They therefore tend to agree in their coalition contracts to abstain in Bundesrat votes if an internal coalition consensus cannot be found. However, although *formally* admissible, of course, it is not really possible to adopt a ‘neutral stance’ in the Bundesrat. Given that according to Article 52 (3) GG, decisions in the Bundesrat may only be adopted with a majority of all 69 votes, and not of the votes cast, abstaining from a vote means basically the same as voting against a motion. As a result, Bundesrat decisions to object to a bill have become more difficult, while absolute vetoes (i.e. the non-adoption of a consent law) are more likely.^v

Divided government has thus been an almost constant feature of German politics since the 1970s, and since Unification the governing parties at the federal level have found it even harder to maintain a majority in the Bundesrat. Between 1992 and 2008, mixed coalitions controlled between 15 and 34 votes in the Bundesrat (Kropp 2010: 60), in late 2009 even 39 votes. Currently (March 2013), Angela Merkel’s CDU/CSU-FDP Government can rely on three Länder with a congruent coalition controlling 15 of the overall 69 votes in the Bundesrat, while the opposition controls 36 votes (8 Länder), and five Länder have mixed coalitions (18 votes). However, even under divided government the Bundesrat ultimately blocks federal legislation very rarely. There are some much-cited examples, such as the failed reforms in the 1970s mentioned above or, most prominently, the complete deadlock over major reforms proposed by the Kohl government and blocked by the SPD under Oscar Lafontaine in the late 1990s. Yet even during this famous legislative term (1994-1998), only 10 out of 338 and thus less than 3% of all consent bills were ultimately vetoed by the

Bundesrat (Auel 2010). On the one hand, while a majority of legislative (and administrative) questions do not trigger severe conflicts, those that do can often be moderated or even resolved within the preparatory meetings at the administrative level, where party political conflicts play a minor role (Detterbeck 2009: 104). On the other hand, if faced with an opposition majority in the Bundesrat, the federal government tries to find (often heavily watered down) compromises acceptable for the opposition long before bills go to the Bundesrat. The result of this ‘strategic anticipation of deadlock potential’ (Burkhart and Manow 2006: 26) becomes apparent in the fact that in times of divided government, the opposition within the Bundestag opposes only 12% of all consent laws in the final vote the Bundestag (Ibid.: 23).^{vi} And while agreement within the Bundestag does not automatically secure an agreement with the Bundesrat due to the latter’s specific territorial interests, the close cooperation between the two main parties prior to the introduction of a bill in the Bundesrat is one of the main factors explaining the low number of instances where the Bundesrat ultimately vetoes consent bills. Finally, one also has to take into account the policy position of the opposition in relation to the preferences of the government proposal: Where party positions are polarised, this will result in compromises on a low common denominator. Where, however, the positions of the two main parties differ not so much on the general direction, but rather on the *extent* of policy change, reforms may actually be facilitated. This was, for example, the case with the Agenda 2010 under Chancellor Schröder, where the opposition parties CDU/CSU and FDP pushed for more far-reaching reforms than the government had initially proposed (Auel 2010).

As the above shows, party incongruence and divided government did and continue to have a major, and generally disruptive, impact as expected under the federalism scenario. Given the absence of a constitutional hierarchy, party conflicts cannot be avoided by withdrawing competencies from the Länder level and can therefore be fully fed into the system of IGR. This has not, however, led to a massive legislative deadlock in German federalism. Rather,

the frequent occurrence of divided government means that the main parties are locked into an ‘informal Grand Coalition’ where the governing parties continuously have to negotiate compromises on their legislative program with the opposition. This has only changed slightly with the development the party system since 1990. Party competition has become more fluid due to the large number of mixed coalitions at the Länder level. This means that the Länder are not longer easily grouped into government supporting and opposition groups (or, A- and B-Länder). The resulting increase in the number of interest constellations has made the coordination within the system of IGR both more difficult and unpredictable.

5. Territorial Conflicts: The Thorny Issue of ‘Our Money’

What should not be overlooked, however, is that party incongruence is not the only factor that challenges smooth policy-making within the interlocked structures of German federalism. Until the 1970s the Länder were relatively homogenous with regard to their economic and fiscal powers. In addition, growing tax revenues provided the federal level with the necessary funds for distributive policies aimed at easing out regional disparities (Benz 1999: 63). Cracks in the system did, however, already appear in the 1970s. The growing polarisation of party competition outlined above was accompanied by increasing territorial disparities resulting from divergent economic developments in the northern Länder with their emphasis on declining heavy industries and the less industrialized southern Länder that emerged as new centres of technology-led growth. In addition, increasing budgetary constraints meant that regional policies turned into a more conflictual issue (Benz 2007: 423), especially with regard to the financial equalization scheme between the richer and the poorer Länder (Renzsch, 1991: 261–273; Jeffery 2005). Available revenues made the continuation of distributive policies possible, albeit at a reduced level, and in the 1980s conflicts over the subsidies to economically weak Länder and the fiscal equalisation scheme intensified.

However, while a complete deadlock did not occur, the system permitted only incremental change that dealt with symptoms rather than tackling underlying causes.

The apparent inadequacies of the system, especially the incapacity of the federal level to make redistributive decisions against the interest cartel of the Länder, have been famously analysed by Scharpf: Within the structures of 'Politikverflechtung' outlined above, the danger of deadlocks can only be met with strategies of conflict minimisation (Scharpf et al. 1976: 62-65; 1988: 260) that avoid discrimination between the interests of involved actors or redistributive decisions. At the same time, however, such decision-making systems are extremely difficult to reform, since involved actors will oppose any threat to their veto power over policy decisions even though the outcomes of policy-making processes are likely to be inefficient (Scharpf 2006: 849). The actors are thus caught in a 'joint decision trap' (Scharpf 1988; 1997: 211-212): in a structure which out of its own institutional logic, systematically produces inefficient and problem inadequate decisions, that at the same time, however, is unable to change the institutional conditions of its decision-making logic.

Unification in 1990 could thus have provided the necessary window of opportunity for an encompassing reform of the constitutional structures: After the fall of the Wall in 1989, the question arose whether German Unification would require a new constitution (since the German Basic Law was considered 'provisional' during the separation). However, the Kohl government was keen to avoid any delay to Unification caused by a potentially lengthy constitutional debate. As a compromise, the new Länder acceded under the existing Basic Law, but a Bundestag-Bundesrat Commission was set up with the task of drafting constitutional amendments. The question of whether to overhaul the system of fiscal equalisation or of how to incorporate the new Länder into the existing system was additionally delayed (at the demand of the old Länder) by the establishment of the, federally

funded, German Unification Fund that financed financial transfers to the East German Länder until 1995.

The result of these postponements was twofold: First, by the time decisions were made on the incorporation of the Länder into the fiscal equalisation scheme and on the constitutional changes in the early 1990s, the full extent of the economic problems of the new Länder had not only become apparent, their economic situation had become worse. Second, and even more importantly, by that time the new Länder were incorporated into the federal decision-making system and thus able to form a veto coalition together with other economically weaker Länder against any reform of the system that would threaten their financial subsidies. As a result, any major change to the existing fiscal equalisation scheme proved impossible and the window of opportunity for reform was basically closed. Consequently, the Solidarpakt I (adopted in 1993) simply incorporated the new Länder into the fiscal equalisation scheme. What is more, the Länder were able to ‘gang up’ on the federal level and force the latter to foot the largest part of the bill: To avoid massive redistributive conflicts, the large financial transfers to the Eastern Länder were financed by both, expanding the Länder share of the VAT revenue from 37 to 44 per cent and large contributions by the federal level, who compensated the expenditure partly through taxes (a solidarity surcharge on income tax). The Pact lasted until the end of 2004 and was followed by the Solidarpakt II (adopted in 2001), which basically extended the first agreement to 2019. For the constitutional reform in 1994, matters relating to the fiscal constitution had been excluded altogether. Unsurprisingly, the outcome was hardly ground-breaking either.^{vii}

Yet although the federal level shouldered the main burden of the financial support for the new Länder, the Solidarity Pacts were not able to prevent regional disparities from deepening further, and the German federal system became ‘bi-polarised between a pro-autonomy “rich south” and a pro-federal “poor east” (Jeffery 2008: 590). While party conflict and government

incongruence continue to have a great impact, the deepening of the territorial cleavage developed into an additional major disruptive factor regarding the ability of the IGR coordination machine to produce a consensus. The Länder not only have to be able to coordinate their own policies, they also have to be able to come to strong consensual, or at least majority, decisions to maximise their collective influence through the Bundesrat (or other coordination bodies). Such agreements can either be based on a party or a territorial logic. The intensification of territorial conflicts has made agreements along territorial interests increasingly difficult, but has also impacted intra-party coordination. Due to the deepening territorial cleavage, party organisations at the Länder level have to adopt territory specific policy positions, and Land politicians are increasingly prepared to advocate their Land interests even against their own national party. As a result, coordination also *within* the parties - both horizontally between the Länder and vertically between the Länder and the federal level – has become more difficult, and the ability of the parties to integrate interests and defuse conflicts throughout the system has weakened: ‘Vertically integrated parties find it difficult to articulate territorial conflicts; their strength lies precisely in overcoming them through the bonding cement – the common political program, joint electoral successes – within the party’ (Detterbeck and Renzsch 2008: 52, translation K.A.).

Another outcome of this ‘new territorialism’ is the development of informal forms of cooperation between smaller number of Länder and an increase in strategic bargaining between single Länder and the federal government. In addition to the five new Länder, the financially more successful Länder, mainly Baden-Württemberg, Bavaria and Hesse, have also started to cooperate, albeit more informally, to push their specific interests (see below). Moreover, especially the ‘C Länder’ have used their political power more strategically. In the case of the 2000 tax reform and the 2001 pension reform, for example, a number of mixed-coalition Länder negotiated bilateral side payments with Chancellor Schroeder’s government, for example in the form of additional funds for infrastructure programs, in return for their

votes in the Bundesrat (Kropp 2004: 83). The main winners of these negotiations were the Grand Coalitions in Berlin, Bremen and Brandenburg, the SPD/PDS-coalition in Mecklenburg-Western Pomerania and the SPD/FDP coalition in Rhineland-Palatinate.

5. Groundhog Day: After the Reform is Before the Reform

Given the developments outlined above, it is hardly surprising that the topic of a reform of the federal structures remained on the agenda from the mid-1990s onwards. Despite manifold pressures that had existed long before, but increased with Unification, Germany lagged behind other European countries in embracing structural reforms to its health care, pension and social security system or its highly regulated labour market. The interlocked federal structures were considered the main cause for the (in)famous '*Reformstau*' ('reform logjam'), hampering fundamental reforms due to the veto power of the Bundesrat and strangling the Länder in a tight corset of centralised legislation and the fiscal constitution.^{viii} Especially the richer Länder in the South (mainly Bavaria and Baden-Württemberg, but also Hesse) felt overly burdened by the fiscal equalisation scheme, but also unduly restricted in their autonomy. From the late 1990s onwards, they demanded greater legislative autonomy and, in particular, greater financial room for manoeuvre, a development that Jeffery captured with the term 'Sinatra doctrine' alluding to Frank Sinatra's popular song 'My Way' (Jeffery 1999b). In 1998, Baden-Württemberg, Bavaria and Hesse filed a claim with the Federal Constitutional Court against the fiscal equalisation scheme. Although the claim ultimately failed, they were in the end successful in putting the issue of a federal reform on the political agenda.

After years of debate, a lengthy reform process began in 2003. The joint decision trap, however, was as ready to snap shut as ever (Auel 2008). First, the reform of the fiscal constitution, and the equalisation scheme in particular, had to be excluded from the

negotiations and postponed to a second phase of the reform at the insistence of the poorer Länder. The aim of the first stage of the reform, that came into force on 1 September 2006^{ix}, had therefore mainly been to reduce the degree of joint decision-making through a reduction of the legislative areas subject to Bundesrat veto, for which the Länder were to be compensated with an expansion of their legislative competencies. However, only the richer Länder, in a structural minority in the Bundesrat since Unification, were willing to make such a trade. The less financially well-endowed Länder had little to gain from greater legislative autonomy, while Bundesrat veto rights had lost nothing of their charm for them. The outcome was a compromise, which not only left all parties involved disappointed, but also received widespread criticism from the public: the veto power of the Bundesrat was to a large degree defended successfully by the Länder, while the decentralisation of policies is very limited (providing the Länder with only a few new exclusive competencies, most importantly secondary education and the remuneration of civil servants). The reform did, however, introduce opt-outs, i.e. the right to deviate from federal legislation, as an innovative new instrument for the Länder. Art. 72 (3) new GG introduced this right for only six policy areas^x, but the federal level can also decide to give the Länder the right to deviate from federal regulations on the administrative implementation of federal legislation, which, in turn, is then no longer subject to a Bundesrat veto (new Art. 84 GG).

The second stage of the reform was completed in 2009 with similar results. The issue of the fiscal constitution was postponed again by the decision to leave the existing Solidarpakt II in place until 2019. Instead, the reform dealt mainly with the increasing levels of public debt at all tiers of government and established a so-called debt-brake (Schuldenbremse), which will come into force in 2016 for the federal and in 2020 for the Länder level. The ‘brake’ is accompanied by an early debt warning system to avoid excessive debts in the future by empowering the newly created Stability Council to monitor the fiscal policies of all tiers of government.

It seems, as Jeffery put it aptly, ‘Observers of German federalism appear doomed to wake up, like Bill Murray’s weatherman in the film *Groundhog Day*, at the start of each set of negotiations to find the same issues and critiques are being replayed again, with little discernible impact’ (Jeffery 2008: 587). And there may soon be an opportunity for the next *Groundhog Day*: in March 2013, the governments of Hesse and Bavaria filed another claim against the fiscal equalisation scheme before the Federal Constitutional Court.

6. Discussion and Conclusion: From Unitary Federalism Towards a More Asymmetric System of Multilevel Governance?

The formal evolution of the German federal system as well as the institutions and patterns of IGR clearly followed the expectations discussed under the comparative federalism scenario in the introduction to this special issue. The allocation of competences has been strictly symmetrical from the outset and, if anything, the early reforms, such as the Great Finance Reform of 1969, made the system even more symmetrical through the fiscal constitution and the introduction of the Joint Task, which replaced the multitude of bilateral funding programs that had developed since the 1950 with an institutionalised multilateral negotiation system on, inter alia, regional development policies. The grounds for the German system of voluntary IGR were laid even before the Republic was founded. Faced with the task of coordinating the efforts to deal with the devastating consequences of the Second World War (in particular housing, infrastructure and welfare provision), the Länder developed first forms of cooperation such as the MPK and the KMK as early as 1947. These were gradually expanded and institutionalised during the 1950s in reaction to the constitutionally interlocked structures, developing into a dense system of multilateral coordination and cooperation at all administrative levels. As a result, the basic structures of symmetric and cooperative

federalism in Germany had been established before the party system had fully developed into its bipolar (or 'two and a half') pattern of competition in the early 1960s. Indeed, the incompatibility of cooperative federalism and bipolar party competition developed its full impact only after the main structures of IGR had been in place. The growing confrontation between Christian and Social Democrats since the 1970s together with the emergence of divided government at the federal level created the expected serious problems for intergovernmental relations in terms of legislation and joint policy making, but it did not lead to a change of the structures of either the constitutional framework or the formal system of IGR, which remained strictly multilateral and symmetric. Rather, the parties adapted by developing parallel structures of IGR, both in terms of vertical coordination as well as horizontally between the Länder along party lines (A- and B-groups). And despite growing tensions due to a more divergent economic development of the Länder from the 1970s onwards, maintaining a symmetric system as well as uniform living conditions remained the fundamental guiding principle of federal politics. Indeed, one of the most discussed, but ultimately failed, reform attempts in the 1970s had been the territorial re-organisation to achieve a smaller number of Länder of similar size and economic power, and thus an even more symmetric system.

Since Unification, this system of symmetric co-operative federalism and multilateral IGR geared towards encompassing symmetry and equality has been under considerable stress. This is mainly due to the fact that the window of opportunity opened by Unification had not been used for a fundamental reform of the federal structures. Rather, the new Länder acceded under the existing Basic Law, which not only greatly exacerbated problems due to the weak economic development of the new Länder, but also made agreements even more difficult and thus basically cemented the existing structures. Both, regional disparities, in particular between East and West, but also between Western Länder, and the changes to party competition and coalition formation have challenged former patterns of Länder co-ordination

along territorial or party interests. This, in turn, had consequences the coordination with the federal level both within the Bundesrat and in the structures of IGR.

First, while the party logic had been the most important factor in – and hampering – vertical as well as horizontal IGR, the territorial logic has greatly gained in importance since Unification. Given the territorial disparities, but also the variety of coalition constellations, Länder party leaders have become more independent and more prepared to advocate their specific territorial interests. As a result, the parties have lost at least part of their ability to defuse conflicts between the Länder and between the Länder and the federal level.

Second, and as a result, the outcome of negotiations has become far more unpredictable and dependent on random factors (Benz 1999: 71), with negative, but also positive consequences. On the one hand, negotiations involve a greater number of interests, both party political and territorial, making deadlock and non-reforms generally more likely. On the other hand, the diversity of territorial interests combined with the fact that clear opposing camps have been replaced by greater variety in the party constellations of Länder coalition governments also opened up opportunities for more flexible negotiations with variable majorities.

Whether both developments will actually lead to IGR following more closely the multilevel scenario, rather than the comparative federalism scenario, remains to be seen. So far, the multilateral system of IGR has remained fairly unchanged, but we do observe groups of Länder engaging in *complementary*, formal and informal forms of IGR to coordinate and represent their specific interests. Examples are the development of specific forms of IGR among the East German Länder, such as the MPK-East and the less formalised meetings of Ministers from East German Länder prior to the Minister Conferences. Länder governments also no longer shy away from making bilateral deals with the federal level to push their interests. So far, this has mainly been the case for Länder with mixed coalition governments,

which traded Bundesrat votes for financial support or infrastructure investments financed by the federal level. However, such bilateral bargaining may become more frequent in the future, further undermining Länder solidarity and co-ordination. Finally, the Minister Presidents of the Southern Länder, at times under inclusion of North-Rhine Westphalia and Hamburg, developed their own form of informal ‘rich-Länder IGR’ to push their demands for greater autonomy and reform.

The developments especially since Unification also demonstrate the persistence of formal constitutional structures even in the face of changed circumstances. The federal system has become more asymmetric, yet, as the 2006 and 2009 federal reforms amply demonstrated, the functional and strictly symmetrical division of competencies as well as the fiscal constitution including the financial equalisation scheme proved remarkably resistant to change. German federalism seems a prime example of a system caught in the joint decision trap where changes to the federal set-up of the constitution are nearly impossible due to veto positions. And there are no indications that this will change anytime soon, as German federalism is faced with a fundamental dilemma: on the one hand, the growing demands for greater autonomy and fiscal responsibility by the richer Länder cannot be accommodated within the symmetric and cooperative federal system. The Länder right to deviate from federal legislation is an innovative new instrument in this regard, but it only applies to a small number of specific policy areas, and so far there are no studies on how often it has actually be used. On the other hand, any constitutional change towards greater Länder autonomy and competitive or asymmetric federalism would increase territorial disparities and thus reinforce the asymmetry in terms of economic development, in particular between East and West. And since the poorer Länder are in a majority in the Bundesrat, and constitutional reforms have to be adopted with a two-thirds majority in both Bundestag and Bundesrat, more far reaching reforms are fairly unlikely.

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ⁱ On the 2006 and 2009 federal reforms see below.

ⁱⁱ Electoral Alternative for Employment and Social Justice (Wahlalternative für Arbeit und soziale Gerechtigkeit)

ⁱⁱⁱ So far, the SPD has not embraced the Left List as a viable coalition partner due to the unease in the West regarding the historical baggage of the PDS, but also due to inter-party animosities since a number of Left List party members in the West are former SPD members including former Left List co-chairman Oscar Lafontaine.

^{iv} If the new and first Green Minister President, Winfried Kretschmann of Baden-Württemberg, does not remain a ‘one hit wonder’, MPK and Bundesrat may have to organise ‘G’ meetings as well.

^v Decisions in the Bundesrat are always based on ‘positive’ questions, i.e. ‘who votes for the bill’ for consent laws and ‘who objects to the bill?’ for all other laws.

^{vi} This number does not, of course, take into account consent bills that are never introduced because the government fears that they might be watered down too much or not pass the Bundesrat at all.

^{vii} The only really important amendments concerned the distribution of the Länder votes in the Bundesrat, the involvement of the Länder in EU policy-making and the amendment to Article 72 granting the Bund concurrent powers on the basis of a ‘necessity’ rather than a mere ‘need’ for the establishment of equivalent living conditions. In addition, the Court was given explicit jurisdiction in disputes over the new ‘clause of necessity’ (Art. 93 (1) GG), thus forcing it to abandon its ‘political question theory’.

^{viii} For a critical discussion of this view see Auel 2010.

^{ix} For the reform process as well as the outcome see Moore and Wade 2008.

^x Hunting, nature conservation and landscape management, land distribution, spatial planning, management of water resources and higher education (both admission and degrees).

