

ARTICLES : SPECIAL ISSUE  
GERMAN FEDERALISM : THEORY AND DEVELOPMENTS

## German Federalism and Recent Reform Efforts

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### A. Introduction: What Kind of Federalism?

In both the United States and Germany constitutional lawyers, politicians, and the attentive public speak of “dual federalism.” In the United States this means that the federal government and the states have separate political and administrative responsibilities and their own sources of revenues. In Germany, in contrast, dual federalism means that the federal government, i.e., the executive and legislative branches, are responsible for most legislation, and that the *Länder* (states; singular, Land) generally administer the laws (in large part through their local governments) on their own responsibility. In both federal systems “dual federalism” has been undermined if not replaced by “cooperative federalism,” generally associated with the New Deal era in the United States and the Finance Reform of 1969 in Germany. In the meantime “intergovernmental relations” has more or less replaced the concept of “cooperative federalism” in the United States, while *Politikverflechtung* (political/policy interconnection and coordination) is perhaps the more commonly used term in Germany today. In both cases the new terms reflect an interrelationship among federal, regional, and local levels that goes beyond mere cooperation.

### B. Cooperative Federalism/*Politikverflechtung* in Germany

One very good example of interconnection in German federalism is the system of public finance. The *Länder* have no *Steuerfindungsrecht* (autonomous tax authority), and the local governments have very limited authority to raise revenues on their own. Instead, the most important taxes are shared. Thus the corporation tax is divided 50-50 between the federal and Land levels; the individual income tax is divided so that the federation and *Länder* receive 42.5 percent each and the

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municipalities 15 percent. The distribution of the value added tax (VAT) is more complicated: the federation receives 5.63 percent for old age pensions and municipalities receive 2.2 percent in compensation for the elimination of the capital business tax; the remaining 92.17 percent is divided between the federation, which receives 50.5 percent, and the *Länder*, which receive the remaining 49.5 percent. There is also a *Gewerbesteuer* (a local business tax) that is shared among the three levels. These taxes and their distribution are determined by the federal government (cabinet) and *Bundestag* (parliament), but only with the approval of the *Bundesrat*, the legislative chamber that represents the *Länder*.<sup>1</sup> They are not, therefore, “federal” taxes, which would include less important sources such as customs duties, the gasoline tax, the tobacco tax, and the solidarity tax surcharge for aid for East Germany (currently 5.5 percent).<sup>2</sup>

The personal income tax and corporation tax revenues are distributed according to the residency principle, whereas 75 percent of the Land share of the VAT is based on population. The remaining 25 percent is distributed to the poorer *Länder* to bring them up to 92 percent of the average *per capita* revenue of all *Länder*. Transfers from the richer to the poorer *Länder* are then made by complicated procedures until the poorer *Länder* have reached 95 percent of the average revenues for all *Länder*. Finally, federal supplementary grants are provided the poorer *Länder* in order to bring them up to 99.5 percent of the average.

From the perspective of those Germans who support this complex system of revenue sharing and revenue transfers, it is precisely the general fiscal equalization among the *Länder* that makes it possible for them to carry out all of their functions autonomously and to meet the constitutional requirement of providing equivalent or uniform living conditions (Article 72, para. 2, and Article 106, para. 3). Equivalent living conditions do not mean the elimination of all differences in living conditions throughout Germany, but the concept does suggest generally equivalent public services and standards that only an adequate funding of all government units throughout the country can provide. The goal of equivalent living conditions

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<sup>1</sup> The *Bundesrat* is not an “upper house,” although it is frequently referred to as such by the quality press and even by many Anglo-Saxon experts on Germany. It is, instead, a unique chamber that represents the Land governments (cabinets)—not the parliaments—roughly on the basis of population (each Land has from three to six votes, which must be cast *en bloc*). It is not, therefore, a popularly elected body, which German constitutional experts consider to be a prerequisite for a true “house” of parliament.

<sup>2</sup> ARTHUR B. GUNLICKS, *THE LÄNDER AND GERMAN FEDERALISM 173-190* (2003), and Arthur B. Gunlicks, *Financing the German Federal System: Problems and Prospects*, 23 (3) *GERMAN STUDIES REVIEW*, 533-555 (October 2000). See also Gisela Färber, *On the Misery of the German Financial Constitution*, in *GERMAN PUBLIC POLICY AND FEDERALISM CH. 2* (ARTHUR B. GUNLICKS ED., 2003).

(not living standards!) is anchored in the principle of the *sozialer* (social welfare) state, *Rechtsstaat* (the state of law), and the federal state (Article 20, para. 1).<sup>3</sup>

In addition to the example of the *Politikverflechtung* given above, one could look at the participation of the Land governments via the *Bundesrat* in the federal legislative process (the *Bundesrat* has veto rights over approximately 60 percent of federal legislation) or the coordination and cooperation that takes place among Land cabinet officers and high-level bureaucrats, e.g., via the conference of Land prime ministers or the conference of education and cultural ministers, as well as via conferences of Land and federal officials.

As a result of the participation of the Land governments in the legislative process via the *Bundesrat* and the numerous conferences involving federal and Land officials, references are frequently made to the German system of “participatory federalism” or “executive federalism.” “Administrative federalism” is often used to describe dual federalism in Germany. Germany is also often referred to as a “unitary federal state,” a term that goes back as far as the early 1960s.<sup>4</sup> The designation of Germany as a “unitary federal state” is the result of numerous centralizing features, such as the fiscal equalization procedures described above that have evolved largely due to the constitutional requirement of “equivalent” or “uniform” living conditions throughout the country and the cooperation and coordination between federal and Land officials. In more recent years one could add the centralizing trends that have emerged from EU legislation.

### C. Some Problems and Criticisms of German Federalism

A review of almost any book or article on German federalism written in the last fifteen-to-twenty years reveals that whatever the strengths and successes of the federal system, there are also numerous problems and criticisms.<sup>5</sup> These would include, but are not limited to, the complaint that the *Länder* have too little fiscal autonomy, and that the poorer *Länder* have little incentive to govern with more cost efficiency when they can count on equalization payments in any case. Or, from the perspective of the richer *Länder*, there may be less incentive to promote economic development if much of the additional tax revenue will have to be given to the

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<sup>3</sup> Fiscal transfers are not limited to those between the federation and the *Länder* and among the *Länder*. They also take place between richer and poorer towns and villages within the counties.

<sup>4</sup> KONRAD HESSE, *DER UNITARISCHE BUNDESSTAAT* (1962).

<sup>5</sup> Edzard Schmidt-Jortzig, *Reformbedürftigkeit des deutschen Föderalismus*, *AUS POLITIK UND ZEITGESCHICHTE (APuZ)*, 6-12 (2005).

poorer *Länder* (a majority). A continuing problem concerns local government finances: local governments always complain about revenue shortages, especially for implementing federal and Land mandates, a recent example of which is federal legislation concerning child care staff and facilities for *Kindergärten* (preschoolers). Local governments are also responsible for various payments to the unemployed, homeless, and foreigners, for whom costs have increased dramatically in recent years. Thus the principle of “who orders, pays” (*Wer bestellt, bezahlt*), known as *Konnexität*, does not really apply; instead, the principle of “who implements, pays” is closer to reality.

Part of the problem, according to many critics, is that the federation has taken on too much responsibility for legislation, in spite of Article 30, according to which “state [governmental] powers and the implementation of state tasks are the responsibility of the *Länder*” unless the Basic Law (constitution) provides otherwise (Article 70). In fact, of course, the federation has assumed responsibility for most areas of lawmaking via its concurrent powers (Article 72 and Article 74), framework legislation (Article 75), and joint tasks provisions (Articles 91a and 91b). The assumption of so much authority for legislation has meant increased involvement by the *Bundesrat*, the chamber representing *Länder* governments, and thus increased *Politikverflechtung* and less transparency. Some reforms were implemented in 1994 to strengthen the position of the *Länder*, but these were minor and subtle in their effect.<sup>6</sup> The solution to the assumption of so much legislative authority by the federation is, according to the critics, to return some powers to the *Länder* for autonomous action.

Related to this issue is the growing influence of the EU on the legislative authority of both the federation and the *Länder*. It is estimated today that from 50 to 70 percent of legislation is now based on EU regulations,<sup>7</sup> and there are a number of examples of EU regulations affecting the authority of the *Länder* in areas reserved to them such as education and vocational training. For this reason many Land prime ministers and others have expressed their concern about or even opposition to the reach of EU regulations and their impact on the autonomy of the *Länder*.

In summary, these and other complaints have led many to argue that the German federal system has become inefficient and ineffective in meeting the many political and economic challenges that face Germany today. The system is too complex due to so much *Politikverflechtung* and the lack of accountability and transparency, with

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<sup>6</sup> GUNLICKS (note 2), 56.

<sup>7</sup> Elisabeth Dette-Koch, *German Länder Participation in European Policy Through the Bundesrat* (note 2), 182.

the result that the federal system is contributing more than its share to the growing disillusionment and dissatisfaction with the political system. (*Politikverdrossenheit*).<sup>8</sup>

## D. Reforms after Unification

### I. Territorial reform

There have been numerous proposals for reform of the German federal system since its creation in 1949. One broad proposal that retains support among a handful of persistent advocates is *Neugliederung*, or the redrawing of boundaries of the *Länder*. An expert commission report in 1973 called for a reduction in the number of *Länder*, which, of course, entailed a consolidation, and redrawing of boundaries.<sup>9</sup> A massive scholarly literature has also appeared over the decades advocating territorial reform,<sup>10</sup> but opposition by other scholars and elected officials has prevented any action.<sup>11</sup> A referendum to consolidate Berlin and Brandenburg in May 1996 that was supposed to set the stage for other referenda failed, in large part because of opposition by voters in Brandenburg and the eastern part of Berlin.<sup>12</sup> Bernard Vogel, the former prime minister of the Rhineland-Palatinate, and the prime minister of Thuringia in the 1990s, warned in 1990 at the time of unification that “now is the time,” and if action to consolidate the *Länder* does not take place soon after unification, it will be far more difficult to act later.<sup>13</sup>

Some scholars note that there are significant differences among the American states and regional governments in other federations without serious calls for territorial changes that would bring about more equality in terms of population and tax

<sup>8</sup> SCHMIDT-JORTZIG (note 5), 7.

<sup>9</sup> Bundesministerium des Innern, *Bericht der Sachverständigenkommission für die Neugliederung des Bundesgebietes*, Bonn, 1973 (BERICHT DER ERNST KOMMISSION).

<sup>10</sup> Hartmut Klatt, *Länder Neugliederung: Eine staatspolitische Notwendigkeit*, 5 ZEITSCHRIFT FÜR BEAMTENRECHT 149 (1997). Adrian Ottndad and Edith Linnartz, *Föderaler Wettbewerb staat Verteilungsstreit*, CAMPUS VERLAG (1997). For a legal argument in English, see UWE LEONARDY, TERRITORIAL REFORM OF THE LÄNDER: A DEMAND OF THE BASIC LAW, (note 2) Chapter 3.

<sup>11</sup> Gisela Färber, *Finanzverfassung*, in: 50 JAHRE HERRENCHIEMSEER VERFASSUNGSKONVENT – ZUR STRUKTUR DES DEUTSCHEN FODERALISMUS 126 (*Bundesrat* ed., 1999).

<sup>12</sup> Joanna McKay, *Berlin-Brandenburg? Nein danke! The Referendum on the Proposed Länderfusion*, 5(3) GERMAN POLITICS, 3 485 (1996). A new attempt at a referendum was originally planned for 2006, but it has now been deferred to the year 2013. *Wir werden arm sein, aber glücklich*, 24 DAS PARLAMENT 9,(2005).

<sup>13</sup> Bernhard Vogel, *Mehr Länder, weniger Föderalismus*, 2 STAATSWISSENSCHAFT UND STAATSPRAXIS 129 (1990).

capacity; however, the argument the proponents of boundary reform in Germany make is that the German system of dual federalism requires strong *Länder* that have the administrative and fiscal capacity to implement legislation and pay for it from own source revenues. Too many *Länder* also make coordination among them and with the federation more complicated, small *Länder* can hardly meet the demands of dealing with various challenges posed by the EU, and efforts to achieve “equivalency” or “uniformity” of living conditions are too dependent on federal assistance.<sup>14</sup> But in spite of these and other arguments for boundary reforms, action has not been taken, and, as Prime Minister Vogel predicted, it is indeed far more difficult today to talk about consolidation.

## *II. Fiscal Equalization Reform: Solidarity Pact I and II*

After unification in October 1990, huge transfers of funds were made from West to East, estimated to be around DM150 billion per year. In principle, the East was to be integrated into the general financing system described above by 1994, but it soon became apparent that this was not realistic. As a result discussions were held in 1993, which led to the Solidarity Pact I that went into effect in 1995. It provided for annual transfers of DM 56 billion to the East for ten years and DM 40 billion for debt relief. A federation tax was imposed on all citizens, East as well as West, consisting of a surcharge of 7.5 percent on personal income taxes and corporation taxes. This was reduced to 5.5 percent in 1998 and still applies today. The five new *Länder* were included in the horizontal equalization scheme, and in compensation the *Länder* share of the VAT revenues was raised from 37 to 44 percent, then later to 49.5 percent. The federation thus gave up a large chunk of its VAT revenues and agreed to transfer large sums to the eastern *Länder* in order to raise their fiscal capacity to 99.5 percent of the average. The end result was to make the new *Länder* more fiscally capable but also more dependent on fiscal equalization procedures<sup>15</sup> than the poor *Länder* in western Germany ever were.<sup>16</sup>

Solidarity Pact I was to end by 2005, by which time it was assumed the eastern *Länder* would have adequate financial capacity. Largely in response to a complaint brought by several rich *Länder* in the West to the Federal Constitutional Court, which rendered a decision in November 1999 requiring changes regarding fiscal equalization procedures, discussions were held between the federal government

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<sup>14</sup> LEONARDY (note 7), 77.

<sup>15</sup> GUNLICKS, (note 2), 183.

<sup>16</sup> 101 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS (BVERFGE) 158 (1999)

and the *Länder* that led to an extension of the Pact from 2005 to 2019. During this time the *Länder* are to receive almost 157 billion euros, mostly in the form of grants from the federation. These grants will be reduced over the years until 2019, when they will stop altogether.<sup>17</sup>

### III. Amendments to the Basic Law

Several provisions of the Basic Law that affect the distribution of powers were amended in 1994, including Articles 72, 74, 75, and 93. Article 72 grants the federation concurrent powers, and paragraph 2 was amended so that such power can be claimed only if it is “essential” or “required” and not just the result of a perceived “need.” One of these “needs” was the establishment of “uniformity of living conditions.” As of October 1994 the federation can claim a federal preemption to be “essential” only in the general interest of preserving “equivalent”<sup>18</sup> living conditions” or to secure the legal and economic unity of the country. It was thought that the strong unitary pressures of “uniformity” of living conditions would be lessened somewhat by the term “equivalent,” which means conditions can vary from Land to Land. Furthermore, under a new provision added to Article 93, the Land governments, Land parliaments, and the *Bundesrat* can take any disagreements over what is “essential” to the Federal Constitutional Court, which they could not do before the 1994 changes. A third paragraph added to Article 72 would return power to the *Länder* if and when a “requirement” for a federal action no longer exists. So far there are no examples of a power that has been returned. The responsibilities of the *Länder*, as important as they may be—especially in the general area of culture, education, local government, and police, pale in significance to the concurrent powers of the federation.<sup>19</sup> It is not surprising, therefore, that considerable dissatisfaction has been expressed concerning the division of powers in German federalism.

Federal framework laws, provided by Article 75, are another important source of federal legislation. They differ from laws passed under the federation’s exclusive and concurrent powers in that they are directed at the Land legislators for further

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<sup>17</sup> Arthur B. Gunlicks, *A Major Operation or an Aspirin for a Serious Illness? The Recent Agreement Between the Federation and the Länder on Financing the Länder: An AICGS At Issue Report* (2001), available at: [www.aicgs.org/at\\_issue/ai\\_gunlicks.shtml](http://www.aicgs.org/at_issue/ai_gunlicks.shtml).

<sup>18</sup> Not “equal” living conditions as mistranslated in the official German English version of the Basic Law. See Basic Law for the Federal Republic of Germany, Article 72, para. 2, in Press and Information Office of the Federal Government, 1998.

<sup>19</sup> GUNLICKS, (note 2), 58.

legislative action by them. It is assumed that the legislative details to be completed by the Land legislators are of some significance and are arrived at freely. In part to prevent the repetition of some past federal intrusiveness, a new paragraph was inserted in Article 75 in 1994 which states specifically that framework legislation may go into detail only in exceptional cases.<sup>20</sup>

These constitutional changes have had a modest impact at best, and they have done little to satisfy those who believe far more dramatic reforms are necessary.<sup>21</sup>

#### IV. *The Länder and the EU*

One area where significant reform did take place was in the constitutional provisions regarding the *Länder* and the EU. A new Article 23 was inserted in 1992 which makes any future transfers of sovereignty subject to approval by the *Bundesrat*; provides for comprehensive information exchange between the federal government, the *Bundestag*, and *Bundesrat*; and it gives the *Bundesrat* an opportunity to state its opinion before the federal government participates in the EU legislative process. The *Bundesrat* also has the right to participate in the decision making process of the federal government. Thus if the federal government has exclusive power but the interests of the *Länder* are affected, the federal government must take into account the opinion of the *Bundesrat*. Where autonomous rights of the *Länder* are affected, the opinion of the *Bundesrat* shall prevail while keeping in mind the overall responsibility of the federal government. Where exclusive legislative authority of the *Länder* is involved, the Federal Republic shall be represented in the EU councils by a representative of the *Länder* sent by the *Bundesrat*. In this case the representation shall take place with the participation of the federation. Needless to say, some observers feel that Article 23 goes too far in allowing the *Länder* to participate in or interfere with what the *Länder* and federal government consider to be basically domestic or foreign matters, respectively.<sup>22</sup>

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<sup>20</sup> Article 75, para. 2, Basic Law.

<sup>21</sup> REINHARD C. MEIER-WALSER AND GERHARD HIRSCHER (Hg.), *KRISE UND REFORM DES FÖDERALISMUS*, OLZOG VERLAG (1999).

<sup>22</sup> GUNLICKS (note 2), 369. For more detail, see Udo Diedrichs, *The German System of EU Policymaking and the role of the Länder: Fragmentation and Partnership*, in GERMAN PUBLIC POLICY (note 2) chapter 8 and Koch, GERMAN PUBLIC POLICY, (note 2) chapter 9.



### E. The Federalism Reform Commission of 2003-2004

After years of criticism about various aspects of German federalism and general agreement that the reforms mentioned above were inadequate, a commission was formed in the fall of 2003 to propose new reforms. Its official name was *Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung* (KOMBO). It consisted of 32 voting members, 16 each from the *Bundestag* and *Bundesrat*, i.e., one member per Land from the *Bundesrat*. These members were the prime ministers of the *Länder*, and their deputies were the heads of the respective offices of the prime minister or ministers of justice. The federation had no voting members, but it was represented by the head of the federal chancellor, the minister of justice, the minister of finance, and the minister of agriculture. Non-voting members included two Land parliament presidents, four party group leaders from Land parliaments, and three representatives of local government associations. There were also twelve professors who are experts on federalism. Altogether there were 102 persons involved.

Two important issues—some would say issues crucial to any reform—were omitted from consideration: territorial reform and fiscal equalization. As noted above, these have been major bones of contention for decades; however, their inclusion in the deliberations would have brought bitter conflict into the deliberations and probably have doomed the enterprise from the beginning.

### F. Accomplishments and Failures

#### I. General

According to one analysis of the results of the deliberations, the general trend since 1949 toward more centralization (*unitarianism*) and *Politikverflechtung* (interconnection) was reversed, which was a major accomplishment.<sup>23</sup> The winners would have included the parliaments at the federal and Land levels. *Bundestag* decisions would have been somewhat less subject to *Bundesrat* vetoes, and Land parliaments would have gained somewhat in legislative responsibility; however, both institutions had little influence in the Commission. Losers would have been the prime ministers of the *Länder* due to the reduction in *Politikverflechtung*. The federal leader of the Opposition would have gained influence at the expense of the

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<sup>23</sup> Wolfgang Rensch, *Bundesstaatsreform – nach dem Scheitern der KOMBO?* in DIE UNVOLLLENDETE FÖDERALISMUS-REFORM: EINE ZWISCHENBILANZ NACH DEM SCHEITERN DER KOMMISSION ZUR MODERNISIERUNG DER BUNDESSTAATLICHEN ORDNUNG IM DEZEMBER 2004, 11 (Rudolf Hrbek / Annegret Eppler eds., 2005)

Land prime ministers of his party. Other losers would have been the “subject matter brotherhoods,” i.e., the federal and Land ministers who meet at the horizontal and vertical levels to work out policies that they then push through their cabinets.<sup>24</sup>

## II. Selected Examples

1. Education. There was considerable disagreement in the Commission regarding educational planning and universities.<sup>25</sup> The federation wanted to strengthen its role in educational planning, especially after studies indicated that German students were not doing particularly well by international comparison, while the *Länder* wanted to exclude the federal involvement that had been authorized by the joint task provisions of Article 91b of the Basic Law. The *Länder* also wanted to eliminate federal framework legislation, including legislation regarding universities such as the *Hochschulrahmengesetz*. Instead, the *Länder* wanted this legislation to fall under concurrent legislation with the right of exemptions for individual *Länder*. The federation was willing to shift framework legislation to concurrent legislation, but not to give up the right to fashion higher education law in order to meet international competition. It also rejected the right of the *Länder* to pass exemptions to federal law concerning education.<sup>26</sup>

On December 17, 2004, the co-chairs of the Commission, the national leader of the SPD, Franz Müntefering, and the CSU prime minister of Bavaria, Edmund Stoiber, announced that they could not present a common reform proposal, because of the failure of Commission members to reach agreement on the issues of education. Documents reveal that these disagreements occurred in areas of financing and regulation of university admission and graduation standards. The federation insisted on uniform tuition charges, an area the *Länder* have begun to tackle on their own in recent years, and on uniform periods of study. The *Länder* rejected federal involvement in these matters. There was also disagreement between the federation and the *Länder* over educational issues involving the EU and the provisions of Article 23 of the Basic Law.<sup>27</sup>

2. Finances. As noted above, fiscal equalization procedures were excluded from deliberations, but general finances were discussed. It has also been noted above

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<sup>24</sup> *Id.* at 13.

<sup>25</sup> Ingo Richter, *Das Bildungswesen im Föderalismusstreit* (note 22), 43.

<sup>26</sup> *Id.* at 44-45.

<sup>27</sup> *Id.* at 46-47.

that the principle of *Konnexität* has not in fact been followed.<sup>28</sup> If *Konnexität* were taken seriously and the responsibilities separated more clearly, the federation would lose influence over certain matters. But poor *Länder* in particular would have trouble financing some responsibilities, and the federation could still pass unfunded mandates—now without the participation of the Land governments in the *Bundesrat* because they would no longer be administering federal law.<sup>29</sup>

The reason the *Länder* have a veto right over about 60 percent of the laws passed by the *Bundestag* is because of their involvement in the administration or, in the case of the joint tasks, the co-financing, of federal laws. One remedy would be greater tax autonomy for the *Länder*. This, however, gives rise to fears of a race to the bottom, and the eastern *Länder*, the poorest of the poor, are especially wary of this proposal.

As a result only taxes that are inherently local were actually considered by the Commission, but these were of some significance. It was agreed, for example, that there could be a tax exchange, with the *Länder* giving up the car tax to the federation and the federation transferring its insurance tax to the *Länder*; it was also agreed that there would be some changes regarding the participation of the *Bundesrat* in the funding of mandates and the subsidies for selected housing construction and for streets, that the construction of higher education facilities would be turned over to the *Länder*, and that the municipalities would have the right to set tax rates for property acquisition. In the final analysis, though, the inability of the Commission to consider fiscal equalization procedures made it difficult for it to suggest concrete reform proposals.<sup>30</sup>

3. The EU and Article 23. The roles of the federation and *Länder* concerning policy making for the EU became a matter of major contention. The federation wanted in effect to eliminate Article 23 and the complicated decision making process described briefly above, on the grounds that this process hindered the federation in carrying out its responsibilities in the increasingly important EU. The trend toward majority decision making in the Council of Ministers will make the federation even more insistent on flexibility without Land interference in the future. The *Länder*, on the other hand, urged retention of Article 23 without changes, precisely because it

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<sup>28</sup> Iris Kemmler, *Arbeit und Ergebnisse der Föderalismuskommission im Bereich der Finanzbeziehungen zwischen Bund und Ländern*, (note 22), 60.

<sup>29</sup> *Id.* at 61.

<sup>30</sup> For a detailed discussion of finances in the Commission's deliberations, see *id.* at 61-77; for a generally critical analysis, see also Gisela Färber and Nils Otter, *Reform der Finanzverfassung – eine vertane Chance?* in: *supra* note 5, at 33-38.

provides for Land participation in law-making at the European *and* domestic levels and serves to protect Land autonomy.<sup>31</sup>

4. Reform of the *Bundesrat*. Given the complaints since the 1970s about the *Bundesrat's* politics of blockage, it is surprising that this *Länder* chamber did not become a major issue. The idea of a U.S. Senate model was not given serious attention, nor was a Swiss-type cantonalization which would incorporate all parties in each Land parliament rather than the government coalition parties only. Some procedural issues were discussed, e.g., voting in cases of coalition differences in Land governments. The only real discussion, however, concerned the reduction of legislative proposals over which the *Bundesrat* has a veto. It was agreed that the federation would still have the right to regulate the administrative procedures of federal law implementation by the *Länder*, but that the *Länder* would have some right to pass exemptions. As a result the veto rights of the *Bundesrat* would be eliminated in such cases. Under some circumstances the federation could regulate implementation of its laws without allowing exemptions, but then the *Bundesrat* would retain the right to veto the law. The *Bundesrat* would also retain its veto rights if a financial burden regarding third persons would ensue.<sup>32</sup>

5. Local governments. In 2003 efforts to reform the local finance system failed. The issues were brought up again in the Federalism Commission, and the three representatives of the town and village, county, and city associations, respectively, participated as non-voting members. They expressed regret that the Solidarity Pact II, fiscal equalization, and territorial reform were excluded from consideration. They complained of declining revenues, the disjunction between local tasks and financial resources, and growing regulatory tendencies of the federation and *Länder* and ever declining room for maneuver for local governments. Since local governments implement 75-85 percent of federal and Land laws, they could make a strong case for reducing unfunded mandates.<sup>33</sup>

In early 2004 it appeared that the local association leaders had made good progress in achieving some of their goals. For that reason there was considerable

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<sup>31</sup> Matthias Chardon, "Institutionalisiertes Misstrauen": Zur Reform der europapolitischen Beteiligung der *Länder* nach Art. 23 GG im Rahmen der Bundesstaatskommission, (note 22) 79-102, especially 101. Martin Grosse Hüttman, *Wie europafähig ist der deutsche Föderalismus?* (note 5), 27.

<sup>32</sup> Annegret Eppler, *Warum die Reform des Bundesrats nur ein Randthema der Bundesstaatskommission war: Überlegungen zum Reformbedarf der Länderkammer und ihrer Rechte*, (note 22), 117.

<sup>33</sup> Tim Gburreck and Ralf Kleinfeld, *Die kommunalen Spitzenverbände in der Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*, (note 22), 125.

disappointment in their ranks when the failure of the Commission was announced in December 2004.<sup>34</sup>

### G. Options after the Failure of Reform

When the co-chairs of the Commission announced on December 17, 2004, that the Commission had failed, disappointment was expressed from every conceivable corner of the political, academic, and financial establishment. Many argued that a new commission should be formed after the federal election on September 18, 2005. Some suggested that it start over and tackle problems not dealt with before,<sup>35</sup> others hoped for a commission that would focus on those reform proposals on which there seemed to be basic agreement in the old commission. While this seemed to be the most common suggestion, another option would be to continue to muddle through under the current system with incremental changes of varying significance brought about by legislation passed by the new government and *Bundestag* with the cooperation of the *Bundesrat*. Finally, there are those who are not that unhappy with the status quo, in part because they see the current system of cooperative federalism as one promoting compromise and consensual politics.<sup>36</sup> But this is the least desirable option from the perspective of many experts, who would predict that the German federal system would then take on even more unitary features and be subjected to even more *Politikverflechtung*. The risk of doing nothing would be not only the continued weakening of the federal system but also a growing *Politikverdrossenheit* (public disenchantment) with the lack of clear decision making responsibility and accountability that exists currently in the German political system.<sup>37</sup>

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<sup>34</sup> *Id.* at 135.

<sup>35</sup> Rainer-Olaf Schultze, *Die Föderalismusreform zwischen Anspruch und Wirklichkeit*, (note 5), 13.

<sup>36</sup> Udo Margedant, *Ein bürgerfernes Machtspiel ohne Gewinner*, (note 5), 22.

<sup>37</sup> See Hartmut Kühne, *Föderalismusreform – Laufen oder Stolpern?* (note 5), 4.