The recent reform of German federalism - towards more heterogeneity and competition between the Länder?

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O. *Introduction*

In this article at first (below 1) some definitions on variants of decentralization will be submitted.
Then (below 2) some structural data on Germany's federal system will be presented.
Subsequently (below 3) the four key dimensions of the "vertical division of powers" will be sketched which characterise the status of the Länder in Germany's federal system.
Finally, in the main chapters of the article, at first (below 4) the distribution of the legislative powers in the federal setting and then (below 5) the shifts which have been brought about by the federalism reform of 2006. At last (below 6) come conclusions will be formulated.

1. *Variants of decentralization*

First, some definitional clarification shall be attempted.

In the pertinent discussion the distinction is often made between decentralization and deconcentration (for an overview see Kuhlmann/Wollmann 2014).
Decentralization is an essentially *political* concept which means that the devolution of (legislative and/or administrative) functions addresses a (subnational) level which autonomously performs the assigned functions through democratically elected and politically accountable bodies. By contrast, *deconcentration* is an intrinsically *administrative* concept which signifies the transfer of administrative functions from one administrative to another administrative level.
Decentralization has different variants depending on the (constitutional, institutional etc.) "intensity" of the devolution.. The most pronounced variant is the "federalization" in which the (legislative, administrative etc.) functions are devolved to the "regional"/"meso" level whose (legislative, administrative etc.) powers are anchored in the country's constitution and whose interests are, thanks to a certain constitutional arrangement, represented and involved in national level decision-making. In the German case, the "decentralized" powers are laid down in the Federal Constitution (*Grundgesetz*, Basic Law) of 1949 while the Länder, that is the Länder governments, are involved in national level's legislation and decision making through the Federal Council (*Bundesrat*).

One speaks of "*quasi-federalization*" if the devolution of (legislative, administrative etc.) powers of the regional/meso level is fixed in the country's constitution while a constitutional arrangement for a collective representation of the regions does not exist. Spain (since 1978) and Italy (since 2001) can be qualified as "quasi-federal" States. The United Kingdom make for a particular case. While Scotland and Wales have, since 1997, a "quasi-federal" status, England (where almost 90 percent of the UK population live) continues to be run as a unitary (highly) centralized part of the U.K.; thus one speaks of an "asymmetrical quasi-federal" structure.

The devolution of functions may be termed (simple) "regionalization" if, while the regions are recognized as such in the country's constitution, their functions are regulated by ordinary legislation. This may take the form of a "weak" regionalization if the regions have not been assigned norm-setting competences of their own and have largely the function to implement national legislation and policies. This applies to France's regions which have, besides, been constitutionally classified as a "local governments" (*collectivités territoriales*), thus placing them legally on an equal footing with "*départements*" and "*communes*". Insofar as in such variant of "weak" regionalization the devolution of administrative functions prevail it comes close to "administrative deconcentration" rather than constituting decentralization

It has been sometimes proposed to see a variant of decentralization also in the *privatization* of public functions or public assets, that is, in their transfer to the private sector. In a "nominalist" understanding of definition one might, at first sight, accept such notion of "privatization" However, in a more reflected view, such definition would appear to run counter to the cognitive and epistemological purpose of what defining is meant to be, to wit, to help to analytically structure and decipher the complexities of the "real world" in a way that is conducive to meaningful analyses. Under this regard a definition which "fuses" decentralization and privatization appears to be "fuzzy" and misleading rather than clarifying. From a "sociology of knowledge" perspective it seems plausible that such a "blurred" definition has originated in the Anglo-Saxon context in which, following from the Common Law tradition, a legal distinction between public and private law is unknown and consequently the public and the private sectors seem hard to discern. While, hende, it may make sense the Anglo-Saxon context it seems not applicable in the Continental European environment where, rooted in the Roman Law tradition, the legal distinction between public and private law has since long been established and where it is conceptually, cognitively and epistemologically accepted to perceive the public sector as the realm of political power,

political decision-making and political accountability, while the private sector revolves around the rationale of market competition.

2. *Number, population and territorial size of the Länder*

Germany's federal system is made of two tiers, that is, the federal level ("federation", Bund) and of the federal/regional States (*Länder*). The two local government layers that consist of the counties, *Kreise*, and the municipalities, *Gemeinden, Städte*), according to constitutional law, constitute an integral part of the *Länder* (administration).l.

Following the defeat of Hitler Germany in May 1945 and the Occupation of Germany by the four War Allies, the reconstruction of democratic institutions took place "bottom up". Whereas the local authorities were the only institutional structure that survived the collapse of the Nazi State, the *Länder* have been re-established in the Occupational Zones of the three Western Allies, before, in 1949, finally the Federal Republic of Germany was founded. The borders of the newly established Länder largely followed the arbitrarily drawn territorial of three (Western) Occupational Zones rather than regional traditions – with the noticeable exception of the Land Bavaria which continued largely within its historical borders.
As a result, 11 new *Länder* came into existence, three of them as so called City States (Berlin, Hamburg and Bremen). After German Unification in 1990 another five East German *Länder* joined the "old" Federal Republic.
The *Länder* have an average population size of 5.2 million inhabitants, ranging from 18 million (in *Land* of Nordrhein-Westfalen) to 660.000 (in City State of Bremen) (see table 1)..

Table 1: Population of some of the 16 Länder (in 2009)

Federal Republic (in total)	81,8 million
Nordrhein-Westfalen	17,8 million (= 21,9% of entire population)
Bayern	12,5 million (= 15,3%)
Baden-Württemberg	10,7 million (= 13,1%)
Thüringen	2,5 million (= 2,7%)
Hamburg	1,7 million (= 2%)
Mecklenburg-Vorpommern	1,6 million (= 2,02%)
Saarland	1 million (= 1,25%)
Bremen	660.000 (= 0,81%)

Data from Fischer-Weltalmanach 2011

Over the years there have been repeated discussions about redrawing and rescaling the *Länder*, particularly the smaller ones. Yet, so far only once, in the early 1950 such rescaling was effected when the *Land* of Baden-Württemberg was created resulting from the merger of three post-war *Länder* in the South-West.. In 1995, following German Unification, another attempt was made to merge the City State of Berlin and the (East German) *Land* of Brandenburg. In the referendum that was held in in May 1996 a majority of the population of Berlin approved the merger but the people of the *Land* of Brandenburg rejected it by a broad majority.(see McKay 1996).

The debate about rescaling the *Länder* suggests that, although, after 1945, the borders of most *Länder* were artificially drawn, in neglect of regional tradition, and although, due to the influx of millions of refugees and expellees from former Eastern provinces, a significant percentage of the then regional population were no "natives" (in the case of the *Land* of Schleswig Holstein up to 40 percent!), the respective regional populations have, surprisingly fast, developed a sense of regional identity which, as the recent case of the *Land* of Brandenburg demonstrated, resents territorial rescaling and changes.

3. *The devolution of functions to the Länder – four dimensions of "vertical division of power"*

The distribution of functions in the relation of the federal level (Federation) and the *Lände*r reveals a "vertical division of power" of which particularly four "pillars" can be discerned.

3.1. *The "federal" status of the Länder*

In a constitutional tradition which dates back to the "Bismarckian" Reich that was founded in 1871 as a union of hitherto independent (sovereign) states (and statelets) the *Länder*, when newly established in the course of the late 1940s, have fallen in line with the traditional self-image of and claim to some "quasi-Statehood" (*Eigenstaatlichkeit*). Besides the "classical" (horizontal division of powers-type) triad of legislative, executive/administrative and judiciary institutions (*Land* parliament *Land* government, lower echelons of the court system) each of the *Länder* disposes of a *Land* constitutional court, *Land* court of audits, etc. as well as an "embassy"-type representation in the federal capital of Berlin and partly also with the

European Union in Brussels, in some cases even (symbolizing its *Eigenstaatlichkeit)* with a Land flag and Land anthem of its own.

3.2. *Pivotal role of the Federal Council (Bundesrat*)

According to article 50 of the Federal Constitution "the *Länder* shall participate through the *Bundesrat* (Federal Council) in the legislation and administration of the Federation and in matters concerning the European Union". The Federal Council in its status and function as the Second ("Upper") Chamber, besides the Federal Parliament (*Bundestag*), in federal decision making, particularly in federal legislation (see Benz 1999, Gunlicks 2003, Wollmann/Bouckaert 2006) constitutes a corner stone in the "vertical division of power"..

It is enigmatic of German federalism that the votes in the Federal Council are controlled by the *Länder* governments (and not by the *Länder* parliaments!). Organizationally reminiscent of the Reich Council (*Reichsrat)* of the (*"Bismarckian"*) (the *Reichsrat* being the assembly of the then still semi-sovereign monarchs and princes that had joined the *Reich)* the "Federal Council principle" (*Bundesratsprinzip*) that hinges on the representation of the *Land* governments contrasts starkly with the "Senate principle". The latter is characteristic of the US constitution where two senators from each State are directly elected by the respective regional population to form the Senate that, along with the House of Representatives, make up the US Congress. The Federal Council has 69 votes which range from 6 to 3 per *Land* according to population size, but disproportionately favouring the small *Länder* (in allotting, for instance, three votes to the City State of Bremen with only 330.000 inhabitants) over the demographically larger ones (in assigning, e.g.,.only 6 votes to the Land of Nordrhein-Westfalen, with 18 million people).

In the federal legislative procedure a crucial distinction is constitutioinally made between "objection bills" (*Einspruchsgesetze*) and "consent-requiring" bills (*Zustimmungsgesetze)*s (art 77 Basic Law).

If in the case of the former an "objection" (*Einspruch)* is adopted by the majority of the votes of the Federal Council it can be rejected and overruled by the Federal Parliament with the majority of its members. If the Federal Council passes its "objection" with a majority of at least two thirds of its votes, its rejection by the Federal Parliament requires a two thirds

majority of the votes , including at least a majority of its members. Thus, an "objection" of the Federal Council can be overruled by the Federal Parliament with a (differently qualified) majority.

By contrast, regarding the legislative bills which require the consent of the Federal Council (consent-requiring bills, *Zustimmungsgesetze*) the decision by the Federal to not approve a bill adopted by the Federal Parliament cannot be overruled by the latter. In this case the Federal Council possesses an (absolute) "veto power" in the federal legislative process.

As enumerated in the Basic Law particularly those legislative matters which affect the *Länder* interests, such as taxation and financial matters, require the consent of the Federal council. In addition, under the version of article 84 Basic Law (as in force until the constitutional reform of 2006), the consent of the Federal Council was also required for federal legislative bills that were meant to regulate the implementation of federal law by a Land authority and its related administrative procedure. In a decision which the Federal Constitutional Court handed down in 1958 it ruled that that, if the federal legislator intended to regulate both the substantive contents as well as the administrative procedure in a given legislative matter it was held to do this in one and the same legislative bill.Hence, as the Federation continue to be keen to also regulate the administrative procedure for implementing federal legislation, the share of federal legislative bills which required the consent of the Federal Council kept rising to some 70 percent. The veto power-clad involvement of the Federal Council expanded accordingly. (see Wollmann/Bouckaert 2006: 28 ff.).

The risk that in the consent-requiring legislative matters the Federal Parliament and the Federal Council would block each other has become acute especially in periods in which the majority of votes in the Federal Parliament and that in the Federal Council were commanded by different parties or different party coalitions, that is, by the "government majority" in the Federal Parliament, on the one hand, and by an "opposition majority" in the in the Federal Council, on the other. In such ("cohabitation"-type) constellation the two "chambers" of federal legislation tended to be turned into party political arenas and strife between the federal government majority and the political opposition parties.

3.3. *Distribution of the legislative powers in the federal setting*

In the distribution of the legislative powers the Basic Law of 1949 has, on the one hand, assigned the majority of legislation to the federal level (Federation). On the other hand, in another element of "vertical division of power", the *Länder* have allotted a set of exclusive legislative powers as well. This will be discussed in more detail later (under 4).

3.4. *Decentralization of the administrative functions*

It is another peculiarity of the German federal system and of its "vertical division of power" that, while the federal level (Federation) has been given the preponderance in the exercise of legislative powers, the *Länder* have been constitutionally assigned a "quasi-monopoly" in the implementation of the federal legislation and policies (and of Land legislation as well as, in the wake of the European Integration, of the norm-setting and programs of the European Union. Thus, in the German variant of federalism, the exercise of legislative and the administrative/executive functions are vertically separated and, at the same time, vertically interrelated in what has been called the (vertical) "interwoveness" (of policies and functions) ("*Politikverflechtung*", Scharpf et al. 1975). In the face of this the mutual vertical functional penetration (and overlap) Germany's German federal system has been figuratively likened to a "marble cake" format. This contrasts starkly, for instance, with the "layer cake" scheme of the US federal system where for a given policy the federal government level may enact federal legislation and at may, for implementing it, create federal administrative units ("field offices") of its own on the regional and/or local levels.

In organizational terms the devolution of the administrative functions to the *Länder* can be classified as "political" decentralization. For one, according to article 83 Basic Law, the *Länder* , as a rule, "execute federal law in their own right (insofar as this Basic Law not otherwise provides". Moreover, although the Basic Law recognizing the right of the federal level to exercise some "oversight to ensure that the Länder execute federal law in accordance with the law" (article 84 paragraph 3 Basic), the procedure which is constitutionally prescribed for wielding such "legal review" (*Rechtsaufsicht*), is fairly cumbersome[1]. Its procedural clumsiness reveals to which degree the realm of Land administration is all but "impenetrable" (*undurchdringlich*) for the Federation even when it comes to carrying ot such

[1] See article 84 para 3 Basic Law: "The Federal Government shall exercise oversight to ensure that the Länder execute federal laws in accordance with the law. For this the Federal Government may send commissioners to the highest Land authorities and, with their consent or, where such consent is refused, with the consent of the Bundesrat, also to subordinate authorities" .

"legal review". Needless to add that the federal level has no right to wield any supervision on the "merits" and "adequacy" of the implementation of federal legislation by Land authorities on which they have operational "discretion"..

Within the *Länder* the implementation of federal legislation (and policies) as well as of EU norms and programs has been, to a large extent, transferred to the local authorities, as a rule, by way of "delegating" these tasks to them. In the administrative practice of the *Länder* the institutional mode of "delegation" implies that, in carrying out the "delegated" functions, the local authorities are subject not only to the "legal review" (*Rechtsaufsicht*) by the Land authorities but also to their supervision on the "merits" and "adequacy" (*Fachaufsicht*) of their activities. It has been plausibly argued that, being exposed to such intensive "merits control", the local authorities are being "integrated" into *Land* (that is, "State") administration to the point to the point of appearing to be "state-lised" ("*verstaatlicht*")-. At any rate, such mode of transferring administrative tasks from the *Land* to the local level resembles (administrative) *deconcentration* rather than *decentralization* (see Wollmann 2008, Kuhlmann/Wollmann 2014)..

The profile of the vertical allocation of administrative functions is evidenced by the distribution of public sector personnel between the levels of government (see Kuhlmann/ Röber 2006, Wollmann/Bouckaert 2006: 18)

- Only 12 percent of the entire public sector workforce are federal personnel
- while almost 90 percent are employed by the sub-national levels,
- that is, 53 percent are employed by the *Länder* and
- 35 percent by the local authorities.

Besides the federal ministries and federal (central level) agencies (*Oberbehörden*) the federal level is allowed to have subnational field offices only in constitutionally enumerated areas such as national border police, customs offices and, as important exception, the Federal Labour Office (with regional and local offices).
The personnel employed by the *Länder* which amounts to about half of the public sector personnel is, to a considerable part, made up of the education sector (teachers etc.) and of the police.

Finally the personnel employed by the local government level (about one third of the entire public sector personnel) points at the wide scope of local tasks, be it within their local government responsibilities proper, be it "delegated" to them by the *Land*.

4. *Vertical distribution of the legislative powers*

Since its foundation in May 1949 the Federal Constitution (Basic Law) has been marked by the tension typically inherent in a federal system between a (centralist) "unitarian" and equality-committed mandate and logic, on the one hand, and a (decentralist) pluralist/regionalist and disparity/ inequality - prone one, on the other hand.
The commitment to equality and to social justice has been solemnly laid down in the introductory fundamental rights chapter of the Basic Law, particularly in article 3 which stipulates that **"a**ll persons shall be equal before the law" and in article 20 which proclaims that "the Federal Republic of Germany is a democratic and social federal State". Moreover, a such obligation can be also derived from article 72 which stipulates "the Federation shall have the right to legislate … if and to the extent that the establishment of the uniformity of living conditions (*Einheitlichkeit*) (since 1994: equivalent living conditions, *Gleichwertigkeit der Lebensverhältnisse*) throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest". Similarly it is said in article 106 par. 2 Basic Law that "the financial requirements of the Federation and of the *Länder* shall be coordinated in such a way as to establish a fair balance, avoid excessive burdens on taxpayers, and *ensure uniformity of living standards throughout the federal territory* (italics mine, H.W.). Thus, the Basic Law appears deeply imbued with the idea equality and socio-economic equity.

On other hand, insofar also typical of a federal State, the Basic Law, also opens the path for the emergence of regional disparities and inequalities by assigning to each *Land* exclusive legislative powers to adopt legal provisions of its own. In fact, in a early leading decision of February 25 1960 the Federal Constitutional Court recognized that "the legislator (of each Land) is not prevented by article 3 of the Basic Law (**"a**ll persons shall be equal before the law") from adopting (Land-) specific legislative provisions ("Sondergesetze") if specific conditions require or warrant this". In a later decision the Federal Constitutional Court, in confirming its earlier dictum jurisprudence, spelt out "that legal provisions that differ from

Land to Land are not only admissible, but are intended/ intentional (*beabsichtigt*). The promotion of plurality is an essential element of the principle of the federal State…The principle of equality is thus not applicable in the case of an inequality which follows from legal provisions that are passed by different legitimized authorities (*verschiedene Kompetenzträger*" (for further references see Mellinghof/Palm 2008: 73-76 and Wollmann 2013: 102).

In the following, at first (4.1.) the vertical distribution of legislation powers will be sketched that existed prior to the federalism reform of 2006. Subsequently (.4.2) the changes will be outlined that have been effected by the reform.

4.1. *Vertical distribution of legislative powers prior to 2006*

Four relevant types of legislative competences were discerned.

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- Exclusive legislative powers of the Federation,
- "Frame-setting" legislative power (*Rahmengesetzgebung*) of the Federation,
- Concurring ("*konkurrierende*") legislative powers,
- Exclusive legislative powers of each *Land*

4.1.1. *Exclusive legislative powers of the Federation*

Under article 73 Basic Law exclusive legislative powers of the Federation pertained particularly to: foreign affairs and defence, including protection of the civilian population; (national) citizenship; passports, immigration, emigration and extradition;. currency, money and coinage, weights and measures etc.,

4.1.2. *Frame-setting legislative powers (Rahmengesetzgebung) of the Federation*

Under the frame setting legislative scheme (article 75 Basic Law – old -) the federal legislator was given, in some constitutionally defined legislative matters, the power to define the "legislative frames" (*Rahmengesetzgebung)* while it left to each of the *Länder* to "fill in" details by way of Land legislation of its own.

Legislative matters that fell under the "frame-setting" scheme were:

- regulating the legal relations of the public personnel/ civil servants employed by the *Länder* and the local authorities,
- regulating the general principles of the "system of higher education" (*Hochschulwesen).*.

When inserting the "frame setting" legislative provision in the Basic Law of 1949 it was expected that the federal legislator would restrict itself to just setting the "legal frames", while leaving it to the individual *Länder* to legislate on the "details".
Over the years, however, in its legislative practice the federal legislator tended to make ample use of its "frame setting" legislative powers so that the space for the individual Land legislator to adopt Land-specific provisions, in fact, became mince.

4.1.3. *Concurrent (konkurrierend) legislative powers*

Under the "concurrent (*konkurrierend*) legislative scheme (article 72 Basic Law), in principle, both the Federation and each of the *Länder* have the legislative power to adopt legislation of their own, but as soon as the federal legislator decides to make us of its (concurrent) (federal) legislative power, federal legislation prevails and abrogates possibly already existing Land legislation. When this legislative scheme was introduced in the Basic Law of 1949 it was expected that that adoption of *federal* legislation by the federal legislator would be the exception rather than the rule. To this effect the afore-mentioned constitutional provision of article 72 paragraph 2 Basic Law ("The Federation shall have *the right* to legislate on these matters if and to the extent that … renders federal regulation necessary in the national interest", italics mine, H.W.)[2] was meant and designed as a restraint and restriction on the federal legislator. . However, in an early landmark decision of 1953 the Federal Constitutional Court ruled that it was left "reasonable discretion" (*pflichtgemäßes Ermessen*) of the federal legislator to decide as whether the constitutional requirement that a "federal regulation… was necessary in the national interest" was actually met. On the top of it, the Court laid down that the exercise of the "reasonable discretion" by the federal legislator was not "judiciable", that is, not being judicially reviewed by the Court. Thus, the Court took a noticeably "unitarian"-

[2] As already mentioned, the full text of article 72 Basic Law reads: " The Federation shall have the right to legislate on these matters if and to the extent that the establishment of uniform (*einheitliche*) (since 1994 equivalent, *gleichwertige* living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest")

centralist, Federation-friendly rather than pluralist-decentralist Länder-friendly stand. Subsequently, probably interpreting this Court decision as a kind of legislative carte blanche, the federal legislator has make extensive use of the "concurrent" legislative power which left hardly any space for the *Länder* for legislation of their own.

As over the years the constitutional catalogue of legislative matters that fall under the "concurrent" legislative power (article 72 Basic Law) clause kept being extended by numerous constitutional amendments federal legislation and hence country-wide uniform legal provisions have come to prevail in the country's "law of the land" in moving Germany's legal world to what has been labelled, with a critical connotation, "unitarian Federal State" (*unitarischer Bundesstaat*, Hesse 1962).

4.1.4. *Exclusive legislative powers of the Länder*

While federal legislation has come to prevail in Germany's "law of the land", it should not be overlooked that the Basic Law of 1949 has assigned to the *Länder* a significant set of exclusive legislative powers on the basis of which a significant body of Land-specific legislation has come into existence

Some of these areas of Land legislation shall be briefly highlighted in the following.

- Each of the *Länder* has the exclusive legislative power to enact local government constitutions/municipal charters of its own. It should be hightlighted that, save article 28 paragraph 2 Basic Law which stipulates an "institutional guarantee" of local self-government (*kommunale Selbstverwaltung*), there is not further federal regulation ins this regard..
- Education, including (primary and secondary) schools as well as higher education (universities) is traditionally an exclusive policy and legislative responsibility of the *Länder* and is seen by them as being part and parcel of their (politically cherished and jealously defended) "Sovereignty in Cultural Matters" (*Kulturhoheit*). Accordingly, all public schools and universities are run (and financed) by the *Länder*. Hence, on the basis of their pertinent exclusive legislative power each of the *Länder* has adopted legislation on schools (Land School Act) and on universities (Land University Act), the latter within the legal parameters set (until 2006) by the pertinent federal frame legislation.
- In line with their traditional responsibility for the police each of the *Länder* has a police law of its own..

- Within the responsibility which the *Länder* have for the maintenance and protection of "public order" (*öffentliche Ordnung*) each of them enacted legal provisions on related policy fields, such as, building regulations (including the issuance of building permits etc.), emission control, noise control, health hazard control.

In order to coordinate and possible "harmonize" among themselves the exercise of this legislative powers the *Länder* have, over the years, a great number of (be it permanent or adhoc) joint bodies in the pursuit of what has been called "cooperative federalism" (*kooperativer Föderalismus*).

Thus, for example,, a periodically convening conference of the sectorially responsible *Land* ministers has the task to "harmonise" the different "*Land* building regulations" by elaborating and agreeing on a "model building regulation" (*Musterbauordnung*).

In the field of education sundry such joint bodies and commissions have come into existence, for instance, the "permanent conference of Land ministers for cultural matters" (*Ständige Kultusministerkonferenz*) which as a permanent office and staff of its own or the "Conference of University Presidents" (*Rektorenkonferenz*).

5. *The federalism reform of 2006*

5.1. *Political background and context*

In recent years the federal legislative system and process has come to be increasingly criticized particularly for two reasons..

For one, as already mentioned (see above 3.2.), the federal legislative process was seen to be hampered and "fettered" particularly by the expanding share of consent-requiring legislative bills (*Zustimmungsgesetze*) which enhanced the veto power-clad involvement of the Federal Council in federal legislation and resulted, especially in "cohabitations-type" political constellations in the Federal Parliament and the Federal Council "blocking" each other. So, primarily the federal level was keen to reduce the percentage of consent-requiring legislative und thus to facilitate and "unfetter" the federal legislative process.

Secondly, the mounting preponderance of federal, somewhat "centralized" and "unitarian" legislation and the corresponding shrinkage of decentralized *Land* legislation came to be increasingly attacked for eroding the political weight of the *Länder* and particularly for dwarfing the *Land* parliaments.

Against this background the federal government and the *Länder* governments agreed in mid-October 2003 to set up a Reform Commission which composed 16 representatives from the Federal Parliament and the Federal Council each and was mandated to 'modernise the federal system" (see Gunlicks 2005, Wollmann/Bouckaert 2006: 29, Wollmann 2010). It took two rounds of conflictual discussions and give-and-take negotiations before a compromise was reached. The ensuing constitutional amendment went in force on September 1 , 2006 (for details see Gunlicks 2005, 2007, Wollmann 2010: 84 ff.).

5.2. *Changes in the involvement of the Federal Council in the federal legislative procedure*

It was replaced with the amended article 84 Basic Law according to which the Länder are given the power "to provide for the establishment of the requisite authorities and regulate their administrative procedures … where (they) execute federal legislation in their own right". Hence a major driver of consent-requiring legislation and of veto power-glad involvement of the Federal Council has been removed..

5.3. *Reform of the distribution of legislative powers in the intergovernmental setting*

5.3.1. *Abolition of the "frame setting" legislative power of the Federation*

The "frame setting" legislative power of the Federation has been abolished altogether.

The cancellation of the "frame setting" scheme on the "system of higher education" (*Hochschulwesen)* (art 75 Basic Law – old –) marked the all but complete retreat of the education sector. This was accompanied by quashing the Joint Task of "University Construction and Education Planning" (art 91b Basic Law – old -). It epitomized in what has been labelled called a "ban of cooperation" (*Kooperationsverbot*) between the Federation and

the *Länder*, including financial matters (article 91 b Basic Law – new - [3]). Hence, the far-reaching responsibility which the *Länder*, already in the past, over the education sector now seemed to be complete politically, legally as well as financially..

The abolition of the frame-setting scheme on the "legal relations of the public personnel/civil servants employed by the *Länder* and local authorities" had far-reaching repercussions as well since each of *Länder* can now pass its own pertinent legislation, including the sensitive regulation of salary schemes.

5.3 2 *"Concurrent" ("konkurrierende) legislative powers*

In order to counteract and scale back the expansion of federal legislation which had resulted from the "old" version of article 72 Basic Law, among others, a remarkable institutional innovation has been made by introducing the legislative mechanism of the "deviation from" or "variance with federal legislation" (*"Abweichung"*) (article 72 paragraph 3 Basic Law – new-). This new legislative provision pertains to a fairly broad gamut of legislative matters, such as, protection of nature and landscape management, land distribution, regional, management of water resources. It means that, if the federal legislator decides to make use of this "concurrent" legislative power by enacting pertinent federal law provision, each Land may decide adopt a piece of Land legislation in deviation from that federal law provision ("at variance with", in the wording of article 72 paragraph 3 Basic Law – new). The conspicuous legislative novelty is that such piece of Land legislation would have the effect of abrogating the respective federal law provision whereby the otherwise stringent constitutional principle that "federal law overrides Land law" (article 31 Basic Law).would be suspended and reversed[4]. Indeed the "deviation from/at variance with"- clause has the potential of opening the constitutional avenue for the emergence of diversified Land legislation which could possibly exist side by side, depending on the individual Land, with federal legislation. Up to date, however, on the basis of available information, hardly any noticeable use has been made of the "deviation" scheme.

[3] Article 91b Basic Law (new) "the Federation and the Länder may mutually agree to cooperate n cases of supranational importance in the promotion of research facilities and projects apart from institutions of higher education" (sic!).

[4] In such a case the federal legislator may, in turn, decide to adopt a new piece of federal legislation and thus abrogate the respective Land law – in what in the subsequent legal debates has been depicted as a possible "ping-pong" sequence of legislative activities.

5.3.3. *Exclusive legislative powers of the Länder*

The hitherto already existing scope exclusive legislative powers of the Länder (see above 4.1.4), has been noticeably enlarged by the constitutional reform of 2006, pertaining particularly to

- Regulating the penal system,
- law concerning assemblies and processions,
- law on restaurants
- shop closing hours.

5.3.4. Some observations on the impact of the federalism reform of 2006

In the meantime most *Länder*, in making use of their newly gained legislative power on public personnel have turned to individually regulate the employment conditions and the payment scheme of their personnel and that of the local authorities. As a result, the salary and pension schemes of civil servants have begun to vary considerably from one Land to the other. So particularly the (financially and economically) "potent" *Länder* (such as the *Land* of Baden-Württemberg) have been ready (and able) to offer better employment and salary conditions than their "financially needy" counterparts (for instance the City State of Berlin)[5]. The different employment conditions and payment level between the *Länder* has proven to attract or deter qualified personnel in their search for employment in one *Land* or the other. There have been examples that a *Land* has explicitly set on advertising its better employment and salary conditions in order to "lure" qualified personnel from other *Länder*.

Probably the politically and medially most noticeable and most controversially debated policy field where the traces and impacts of the earlier and recent political and legislative decentralization can be observed is the education sector.
As education is the policy field in which the *Länder*, since the establishment of the Federal Republic in 1949, have been assigned far-reaching political and legislative powers which are seen to are key in their highly valued "Sovereignty in Cultural Matters" (*Kulturhoheit*). Thus

[5] To illustrate the socio-economic disparities between the Länder: the GDP per gainfully employed person ranges (as of 2008) between 71.000 Euro in the (West German) Land of Hesse and 48.000 Euro in the (East German) Land Mecklenburg-Vorpommern; similarly the unemployment rate stands (as of 2010) at 4.2 percent in the (West German) Land of Bavaria and at 12.2 percent in the (East German) Land of Sachen-Anhalt.

the discussion about the pros and cons, about light and shadow of the decentralization of powers to the *Länder* has accompanied the development of this policy field from the outset.
By the advocates of such far-reaching decentralization a major asset has been seen in giving the *Länder* the power to tailor the regulation and operation of the institutions of schools as well as of universities to the regional givens, demands and interests. Furthermore the "competitive" and "experimenting" potential of such decentralization has been highlighted by its sympathizers. In fact, during the late 1960s and 1970s the Länder conducted large-scale "social experiments" in "testing" different systems of (primary and secondary) education (see Wollmann 2013b for references). The sundry rounds of "PISA evaluations" and the related "benchmarking" have further accentuated this "competitive" dimensions and its dynamics between the Länder.
The critics of the far-going decentralization of school and university policy have, from early own, highlighted not only the ensuing institutional fragmentation, but also the inequalities in the education opportunities for young people that result from such interregional "parochialism" ("Partikularismus", "Kleinstaaterei")"

The federalism reform of 2006 has been widely (practically from all political camps) criticized for not having remedied some shortcomings of the education system but for having aggravated them. There is all but general agreement that the federalism reform of 2006 has gone too far in vertically disentangling the legislative and political powers and responsibilities in the education sector. The epitome of this "failed" reform is seen in the (afore mentioned) "ban of cooperation" (*Kooperationsverbot*) (article 92b Basic Law – new) by which the cooperation, between the Federation and the *Länder* has been practically ruled out.

In the meantime almost everybody (including the new federal "grand coalition" government which is currently being formed) agrees that a "reform of the reform" is mandatory, including the "Kooperationsverbot". So the reform "pendulum" appears to swing back.

6. *Concluding remarks*

Since its foundation in 1949, Germany's (originally West Germany's) federal system has been marked (just as any federal, quasi-federal and perhaps even any strongly regionalized system) by the inherent tension that between can be captured in the conceptual pairs of

unitarian versus regional, (country-wide) "equality" versus inter-regional disparity and inequality-prone, homogeneity versus heterogeneity and solidarity versus competition.

On the one hand, since its origin in 1949, the country's federal system has been normatively and politically guided by the principles of (country-wide) (legal) equality and social equity as laid down in article 3 Basic Law ("all persons shall be equal before the law" and in the constitutional. Proclamation (in article 20 Basic Law) commitment to the Federal Republic being a "social federal State" as well as highlighted in the constitutional reference (in article 72 Basic Law). The commitment to (country-wide, "national") solidarity became rooted in the country's political values (even in its, as it were, "political DNA") by the unprecedented social and economic catastrophe that was caused and left by Hitler Germany's war and defeat, when millions of destitute and homeless Germans from Easter provinces poured into the "old Reich", calling for solidarity and collective action.

On the other hand, from its outset, the country's federal system has, due its political decentralization and "vertical division of power", not least through the assignment of legislative powers to each of the *Länder*), has been conducive to generate regional differentiation and legal as well as socio-economic disparities. It deserves being recalled that the Federal Constitutional Court has acknowledged that interregional inequality by way of Länd-specific legislation may be not only normatively acceptable, but may also be regarded as an constitutionally intended ("*beabsichtigt*") feature of the very fabric of federalism.

In the further development, not least, during the 1950s well into the 1960s, in order to cope with the unprecedented tasks of post-war physical, economic and social reconstruction, the legislative powers of the federal level ("Federation") kept being expanded, while those of the *Länder* correspondingly shrank, thus ushering in what has been (critically) labelled a "unitarian federal State" (Hesse 1962).

It was one of the main *leitmotifs* of the federalism reform of 2006 to halt and revert this "unitarian" trend by decentralizing another set of legislative powers to the *Länder* and their parliaments. As a result, the legislative powers of the Länder have been significantly extended.

For one, a merit and asset of such widened legislative powers of the *Lände*r can seen in the enlarged capacity of each of the *Länder* to "tailor" the legal provisions to the regional (socio-

economic etc.) givens and the needs and interests of the regional population. At the same time, however, the risk of the emergence of further (normatively problematic) legal and socio-economic disparities and inequalities has grown which is evidenced, as was hinted at earlier, by the difference in the salary schemes from Land to Land or by further disparities in the education sector. Yet, first the dictum of the Federal Constitutional Court should be called to mind that interregional inequalities are constitutionally acceptable as being part and parcel of what federalism is all about. Furthermore, the counterbalancing mechanisms and principles which have been characteristic of the German federal system, including the joint bodies of "cooperative federalism", the financial equalization between the *Länder* (as prescribed by article 107 Basic Law), the constitutional maxim of "federal loyalty" (*Bundestreue*) as well as a politico-culturally shared commitment to "solidarity".

Second, the constitutional reform of 2006 has, no doubt, also reinforced the "competitive element" in Germany's federal system. On the one hand, as past experience shows, such competition between the *Länder* has borne positive fruits. For one, the afore-mentioned school experiments conducted by the individual *Länder* in the 1960s are a case in point. Furthermore, the field of local government constitutions/municipal charters for which the *Länder* have the sole legislative responsibility is exemplary. Between the 1950s and the earliy 1990s a (all but bewildering) plurality of local government constitutions were in place in the individual *Länder* which proved a kind of "laboratory" for the operation and performance of different local government charters. In the early 1990s in a remarkable sequence of individual legislative acts all *Länder* finally adopted one model (that is, the directly elected mayor) (see Wollmann 2005, 2008: 86 ff.) in what can be interpreted as a process of "(intra-federal) mutual learning". By contrast, the afore mentioned example of Länder "luring" qualified personnel from each other by way of different payment schemes may point at negative fallouts of interregional competition signalling some "intra-federal Darwinism" of making the stronger even fitter. However, also at this point, the existing institutional and cultural mechanisms of the federal system, not least the imperatives of "federal loyalty" and politico-cultural "solidarity" can be called upon and expected to institutionally hem in and culturally discipline such ("excessive") processes.

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