

Administrative Federalism - executive policy-making between autonomy and cooperation



TECHNISCHE
UNIVERSITÄT
DARMSTADT

Prof. Dr. Nathalie Behnke

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Introduction

„Denn Herrschaft ist im Alltag primär: Verwaltung.“
(Max Weber 1922: *Wirtschaft und Gesellschaft*, p. 126)

⇒ *German federalism* is in its everyday work primarily:
administration



Main theses

1. The power distribution in German federalism has historically been marked by **strong administrative autonomy** of the Länder (while allocating the majority of legislative powers at federal level) **without**, however, resulting in **policy fragmentation**.
2. This logic of distribution has been exacerbated over the years by the **traditional exchange in the Bundesrat of legislative powers for the federal level vs. influence** in federal legislation for the Länder (resulting in more money and administrative autonomy).
3. The **new exchange** mode in the Bundesrat is **federal control on administrative policy-making vs. money** ⇒ a "head-on attack to the federal order" (Winfried Kretschmann).

Structure of the presentation

1. Administrative federalism in 70 years of Basic Law
 1. The original constitutional setting
 2. The Bundesrat model
 3. Legislative unitarization
2. Voluntary cooperation instead of policy fragmentation
 1. Horizontal cooperation: intergovernmental councils
 2. Vertical cooperation: Persisting entanglement even after federalism reform
3. Towards a 'new deal' - administrative control vs. money?
 1. Empirical example: the digitalization pact
4. Conclusion

1.1 Administrative Federalism in the original constitutional setting

- 1949 Basic Law: strong Länder, high autonomy, check on federal level
 - Historical precedent in Bundesrat of 1871
 - Art. 30, 70-74, 83-85, 104a-107: far reaching autonomy (and financial responsibility) in fulfillment of tasks; limited autonomous legislative powers
 - Bundesrat: co-legislation of federal governments
 - "division of powers, negotiation, contracting and cooperation" (Benz 1999: 58)

1.2 The Bundesrat model

- Federal co-legislation by Länder governments
- Strong influence in approval laws; arbitration committee
- But: Länder must form united front towards federal level to gain from the institutional setting
- The Bundesrat 'deal'
 - Länder abdicate legislative autonomy, but in turn influence federal legislation to gain financial advantage and administrative autonomy

1.3 A history of legislative harmonization and administrative empowerment

- Extensive interpretation of Art. 72 BL by the federal level
 - Increasing attraction of concurrent legislative powers
 - Loss of influence of Länder parliaments(?)
 - But: Länder autonomy in implementation
- Attempted cut-back in 2003-2006
 - Adjudication of constitutional court backs legislative powers of the Länder
 - Federalism reform I (2006) inserts opt-out clauses for concurrent legislation (Art. 72 section 3 BL)
- Federalism reform II (2009) and beyond
 - Länder call for federal money (abandoning the non-cooperation clause implied in Art. 104a BL)
- Little use of opt-out clauses

2 Voluntary cooperation instead of policy fragmentation

- Administrative autonomy bears risk of policy fragmentation
 - Negative consequences for citizens and economy
- Some degree of variation in policy-making exists
 - E.g. social policy ⇒ Länder can ascertain who provides social services to the citizen and how it is provided
 - E.g. 'Abitur' (final high school exam) standards are a recurrent discussion
 - E.g. civil servants remuneration (since 2006)
- But overall high degree of homogeneity ⇒ far more than in other federal countries, e.g. Switzerland, USA, Canada

2.1 Voluntary horizontal cooperation

- Is operated mainly through 'ministerial conferences'
 - By way of mutual information, position taking, influence and learning, negotiation, cooperation, coalition-building
 - Advantage: economies of scale, best practice, reduction of complexity
 - Cooperative federalism as opposed to joint decision-making according to Kropp (2010)
- Even after 'opt-out clause' of 2006 no increase in fragmentation, but rather increased cooperation (e.g. establishment of joint register for most recent regional changes to opt-out laws)

2.2 Vertical cooperation

- Mutually beneficial
 - Federal level gains influence, early feedback on items on the political agenda
 - Länder use federal level as information source, arbiter or money-giver
- Strong, yet welcome federal influence even after federal reform I
 - Federal money in day nursery enlargement
 - Federal money in refugee accommodation and social housing
 - Federal money in university research ('excellence initiative')

3. Towards a 'new Bundesrat deal'?

- Three trends
 - a habit of emphasizing the need for vertical cooperation while paying only lip service to Länder autonomy
 - increasing vertical and horizontal fiscal gap
 - increasing diversity of party systems across the territory

⇒ greater difficulties in forming a united Länder front in the Bundesrat
- Effect: Federal encroachment
 - no longer a deal of federal legislative power vs. Länder administrative autonomy
 - but deal of federal control of policy-making vs. money

3.1 The digitalization pact

- Coalition negotiations 2017: federal parties decide to invest in digital modernization of schools
- Länder agree to this plan, wait for the money
- 2019: legislative proposal to change the Basic Law would allow the federal level to give money not only to needy local authorities, but to all
 - But: request co-financing by the Länder of 50%
 - And: annual reports on how the money was spent, based on an administrative agreement
- Bundesrat arbitration committee: co-financing requirement is capped to usual 10%, but reporting requirements are retained

3.1 The digitalization pact (cont'd)

- Dividing line among Länder
 - BY, BW strongly object the proposal,
 - but poorer Länder are willing to accept because they need the money
- Acceptance of conditionality for payments and reporting requirements substantively weaken Länder position in German federalism
 - similar debate two years earlier on federal highway administration

Conclusion

1. The German model of federalism traditionally gives Länder administrations high autonomy in policy-making, while Länder legislative powers are rather restricted.
2. The trend to unitary federalism over the past 70 years by way of the federal level attracting concurrent legislative powers and the Länder agreeing in a deal power vs. influence and money exacerbated the elevated role of administrations in German federalism.
3. We may like those observations or not, but the new tendency of federal encroaching in Länder administrative autonomy in exchange for money seriously threatens the federal power distribution.

Conclusion (cont'd)

1. Increasing vertical and horizontal fiscal imbalance as well as increasing variation in regional party systems promote this new trend.
 1. While it may be hard to influence or reverse party political fragmentation,
 2. in order to strengthen unity among the Länder, horizontal fiscal imbalance should actively be countererd. From January 2020 on, the Länder debt brake and the new fiscal equalization scheme enter into force. It is, however, unlikely that those provisions will alleviate the strong fiscal imbalance among the Länder; rather the contrary might be the case.