Introduction: German Federalism in Transition?

CAROLYN MOORE, WADE JACOBY
and ARTHUR B. GUNLICKS

Federalism, according to Daniel Elazar, one of the leading scholars on the subject, ‘is rather like wanting to have one’s cake and eat it too’. By this, Elazar highlights the tension between the need to unite for common purpose and to maintain and sustain distinctiveness. Nowhere in recent times has this proven more true than in the protracted negotiations to modernise the German state’s federal order. Both the federal government and the 16 Länder are locked in a continual struggle to extend their autonomous sphere of competence as far as possible within the framework of the federal system. Whilst political pressure to reform the federal constitution has been a consistently recurring theme throughout the history of the Federal Republic, widespread political malaise and pessimism in the 2000s had increasingly been reflected in weariness with the existing federal system, which was regarded as not being up to the cumulative challenges of German unification, globalisation, Europeanisation and demographic change. Put simply, whilst German federalism had clearly contributed to the political stability and economic success of West Germany for a large part of its history, German federalism itself was now popularly regarded as the root cause of Germany’s broader social and economic discontent. As a result of years of frustrated efforts to rationalise the decision-making system and improve the legislative process, ‘federalism’ had in Germany come to be widely regarded as synonymous with Reformstau (reform blockage) and Stillstand (inertia).

Of course, federal constitutions are not static, but are living documents and evolve in line with the societies which they manage. Germany is no exception. Thus, to continue to provide an effective system by which to regulate social relationships, German federalism needs reform that reflects the changing nature of society. But the complexity of the German system of Politikverflechtung (political/policy interconnection and coordination) that had emerged over years of marginal changes seemed both incapable of providing the kind of policy solutions demanded by modern society, and, at the same time, incapable of reforming itself due to the self-interested behaviour of those actors with the capacity to deliver effective system change.

Dissatisfaction with the federal status quo is nothing new, but by 2002 the idea of producing sweeping constitutional reforms had garnered enough cross-party support to force the establishment of a reform task force (‘Reform I’). Dissatisfaction with the state of the federal system leads to a number of dilemmas for reformers. Criticism includes the argument that the Länder have too few and the federation too many law-making powers; however, the Länder themselves share responsibility for much of the growth in federal power, and if the Länder are to gain more powers, they will also need more autonomous revenue sources. But then politicians in the poorer Länder in particular fear that a transfer of powers to the Länder together with more
fiscal autonomy would put them at a disadvantage. They would therefore prefer to concentrate on participation in the legislative process and administration of laws with a system of shared taxes and fiscal transfers to the poorer Länder. But through their many avenues of participation in the legislative process, the Länder governments are said to have an excessive influence over federal policy-making, much of which is partisan in nature. In recent years this has led the media, politicians, the attentive public, and even some scholars to speak increasingly of “blockade politics” in the Bundesrat and the difficulty of passing major legislation and reforms, particularly when the Bundesrat has come under the control of the opposition, an increasingly common occurrence.

Against this backdrop of political jams and blockages, a Federalism Reform Commission (Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung – KOMBO) set out in 2003 to identify a set of measures for breaking the impasse and delivering the kind of robust institutional framework that would allow Germany to meet the political and policy challenges of the twenty-first century. The aim was to reduce the degree of joint decision-making, thereby strengthening both the federal government’s decision-making capacity and the autonomous room for manoeuvre of the Länder. Yet, as we sketch below, the Reform Commission broke down and subsequent reforms were introduced quietly, with much less fanfare, after a short review under the leadership of the grand coalition in 2006. The reforms were criticised from all sides, as not going far enough, lacking the necessary long term vision and for shelving the more difficult issue of the financial constitution until a later stage.

THE EVOLUTION OF GERMANY’S FEDERAL SYSTEM

Despite the lack of a ‘constitution’ in the strictest sense, Germany’s ‘Basic Law’ (Grundgesetz) represents the country’s federal constitutional underpinning. This document ultimately reflects the contract between federal and Länder level authorities in the regulation of social, economic and political relationships that effectively steer Germany’s political system. Perhaps most notably, German federalism has never demonstrated clear boundaries between distinct federal and ‘state’ (Land) realms. Indeed, prior to the 2006 reforms, Germany had no strict overall delineation of federal and state competencies familiar from most other federal systems. Though Article 73 did lay out some areas of exclusive federal competence, Article 75 laid out the scope for ‘framework’ legislation, and Article 74 specified the conditions for ‘concurrent legislation’. Thus, a number of federal and Land prerogatives can only be worked out in close consultation with the other level of government. This dense articulation extends to fiscal realms as well, where German Länder enjoy very substantial authority over both expenditure and borrowing decisions but, lacking tax autonomy, are deeply engaged with the federal level for a wide range of fiscal deliberations.

In this complex division of labour, many observers have argued that the power of the Länder is waning. Article 30 provides for state tasks to be undertaken by the Länder, unless the Basic Law specifically provides otherwise while Article 70 Paragraph 1 allocates legislative powers to the Länder unless the Basic Law specifically states otherwise. Despite their apparent legislative strength, however, the ‘residual powers’ of the Länder are constrained by an extensive list of exclusive responsibilities of the federal government, an increasing number of concurrent areas of responsibility, federal framework laws (where the federal government creates general framework legislation, leaving implementation to the Länder) and joint tasks (where the federal government lays down authoritative policy guidelines). This ultimately restricts the capacity of the Länder parliaments (Landtag) to pass legislation. But where Länder power has gradually been eroded at the Landtag level, it has been enhanced through additional participation in the federal legislative process through an increased role for the Bundesrat, a process of ‘compensation through participation’. Estimates suggested that by 2002, five to six of every ten new bills and, in practice, most legislation on major domestic issues, have since the late 1950s been subject to an affirmative vote (Zustimmungsgesetzgebung) of the Bundesrat, giving the Länder opportunities to block national legislation in the majority of cases.

Clearly, the degree of interdependence between Germany’s 17 governments (one federal, 16 Länder), restricts the possibilities for majoritarian decision-making and provides powerful incentives for consensus-seeking. This in itself raises the probability of maintenance of the status quo, a solution most attractive to the poorer Länder, since the status quo entails massive redistribution from the federation to the poorer Länder. Given the urgency of finding effective policy solutions to current challenges, calls for a drastic overhaul of the federal system became louder from the 1990s onwards, with even the major business interest group, the Bund der Deutschen Industrie (BDI) calling for a reduction in Länder powers through constitutional reform.

But whilst pressure for reform became overwhelming in the early 2000s, reform of Germany’s federal system has been a recurrent theme throughout the history of the
Federal Republic. Before the 2003 Reform Commission was established, there had in fact been previous reforms of the Basic Law, but either these had not led to widely accepted and satisfactory changes, as in the case of the finance reform of 1969; or they were confined to fiscal matters that needed attention after unification, e.g., Solidarity Pacts I and II; or they amounted to only modest changes in the Basic Law, as in the case of some reforms in 1994.

The finance reform of 1969 which introduced `cooperative federalism' led to significant changes in German federalism, but it only exacerbated developments that Konrad Hesse described in the early 1960s as a system of `unitary' federalism. Later Fritz Scharpf would introduce the concept of `Politikverflechtung' to describe the entanglements between federal and Land politicians and civil servants in the Bundesrat, numerous commissions and committees between the federal and Land (including local) levels and among Land officials, mixed financing and political-administrative responsibility for higher education and various forms of economic development, and the complex system of fiscal federalism. Furthermore, the system of cooperative federalism required cooperative decision-making, so that the decision-making process lacked transparency, making it difficult to assign responsibility to any one level. These and other criticisms led Heidrun Abromeit to argue by the early 1990s that Germany could be characterised not as a federal system but as a `hidden unitary state'.

Unification in 1990 offered Germans the opportunity to make a number of changes in the Basic Law. Solidarity Pact I, which incorporated the new Länder into the financing system of the western Länder and provided for large fiscal transfers to the East, lasted until 2005. It was followed by a Solidarity Pact II, which extended the first agreement to 2019. Neither pact offered any real `reform' of the financing of the federal system. Some real but rather modest changes were made in 1994, when several amendments to the Basic Law proposed in 1993 went into effect. At least one of these amendments proved to be important, namely the change in Article 72 that had granted concurrent powers to the federation on the basis of a `need' to establish `uniformity of living conditions'. After October 1994 the federation could claim a federal pre-emption only if it were `essential' to the general interest to preserve `equivalent' living conditions. Federal Constitutional Court decisions in 2002, 2004 and 2005 made clear that the Court interpreted `essential' in a way that made it difficult for the federation to base certain legislation on its concurrent powers or even its framework powers under Article 75.

THE PROCESS OF REFORM

After decades of intensifying criticism of German federalism, a Federalism Reform Commission was formed in 2003 to consider a comprehensive set of amendments to the Basic Law concerning the federal system. It consisted of 32 voting members, 16 each from the Bundestag and 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 Bund (federation) had no voting members, but it was represented by the head of the federal chancellery, the minister of justice, the minister of finance, and the minister of agriculture. Other non-voting members included two Land parliament presidents, four party group leaders from Land parliaments, and three representatives of local government associations. Twelve professors, all experts on federalism, also participated. Altogether there were 102 persons involved in the commission's proceedings.

Intensive discussions over several months led to numerous proposals; however, in December 2004 the co-chairs of the commission, SPD party leader Franz Müntefering, and CSU prime minister Edmund Stoiber, announced that the commission could not present a common reform package, because of disagreements over certain issues, especially education. This announcement was greeted with considerable disappointment and complaints that it was another example of Reformstau, the apparent inability of the German political system to deliver needed reforms and an additional reason to fear a growing Politikverdrossenheit, a sense of dissatisfaction and even disgust with the political system.

In the wake of the Reform Commission's breakdown, the major catalyst for change occurred when the federal elections in September 2005 led to the formation of a grand coalition between the CDU/CSU and the SPD. The coalition agreement of 11 November 2005 contained a section on reforming the federal constitution and an appendix of 226 pages, including 56 pages that presented the results of coalition discussions in the form of numerous proposals for constitutional changes in the federal system. Federal reform, which had seemed critically wounded if not dead, was thus suddenly revived by the grand coalition. The coalition wanted to demonstrate early that it was capable of passing important reforms that would start with federalism but would also include a series of other matters.

Reform proposals were discussed in a number of specialist committees by members of the government, the prime ministers of the Länder, and the Bundestag and Bundesrat. Before numerous amendments to the Basic Law passed the Bundestag and Bundesrat in midsummer and went into effect on 1 September 2006. As far-reaching as the reform was, it did not include two very important subjects that were also excluded by the Federalism Commission in its deliberations: the system of public finances (Reform II), especially the transfer payments from the richer to the poorer Länder under the complex and controversial fiscal equalisation procedures; and territorial or boundary reform (part three or Reform III) that would include the consolidation of some of the 16 Länder. It was agreed during the debates on the grand coalition's proposed amendments that finance reform would be taken up and changes proposed before the end of the government's term in 2009, and discussions in the Bundesrat did begin in December 2006; however, as the contributions in this volume by Jochimsen, Benz and Zohlnhöfer forcefully show, it is doubtful that these discussions will be successful, given the deep divisions between rich and poor Länder over this issue. It is even more doubtful that territorial reform will be seriously considered in the near future.

THE REFORM OUTPUTS

At their meeting on 14 December 2005, Chancellor Angela Merkel and the Länder prime ministers agreed that reforms of German federalism should emphasise the following general goals:
1. Strengthening the legislation of the federation and Länder through a clarification of their legislative powers and eliminating framework legislation;
2. Reducing the mutual blockades by the Bundestag and Bundesrat through a reduction in the amount of federal legislation requiring the consent of the Bundesrat;
3. Reducing joint financing and revising the conditions for receiving federal aid while confirming previous promises made to the new Länder;
4. Strengthening the ability of the Basic Law to deal with European integration through a revision of negotiating roles and responsibilities, alongside regulations on a 'national solidarity pact' as well as accepting responsibility for compliance with supranational law.  

This section details each of these four broad goals in turn as they became the primary basis for some important as well as minor changes in 25 Articles of the Basic Law.

1. Clarifying Legislative Competencies

The reforms have seen a number of key changes to the law-making powers of the federal government. As noted, the Länder enjoy relatively few competences in legislation outside of local government, police functions, and general culture, which includes education. The federation, on the other hand, traditionally gained legislative authority via three routes: exclusive legislative powers; concurrent legislative powers; and framework legislative powers. The reforms amended all three domains as follows:

a. A number of powers were added to the list of exclusive federal legislative competences in Article 73: protection of German cultural artefacts from transfers abroad; defence by federal police against terrorism (requires Bundesrat approval); weapons and explosives; the care of those injured or affected by war; and the manufacture and use of nuclear energy for peaceful purposes and protection against dangers from nuclear accidents.

b. Other federal prerogatives were trimmed, especially in the area of concurrent legislation. Article 72, Paragraph 1 was amended in 2006 to remove the right of the federation to pass legislation under its general concurrent powers, rather it retains the power to pass ‘essential’ legislation in ten specified areas only. In 16 areas, it has concurrent powers without having to meet the ‘essential’ (erforderlich) condition. An innovative change is found in Article 72, Paragraph 3, according to which the Länder now have the right to deviate (abweichen) from federal laws in six other areas of concurrent powers that are listed under Article 74, Paragraph 1, as items 28–33.

c. Framework legislation was eliminated. Complaints had increased that the federal government was providing details and not merely frameworks for the Land parliaments, and it was interpreting too broadly the provisions of Article 72, Paragraph 2, that the federation could pass framework laws under Article 75 if it were ‘essential’ to promote equivalent living conditions or protect legal or economic unity in the general interest. Indeed, the Federal Constitutional Court decided in 2004 (Junior Professor Decision) and 2005 (Student Fees Decision) that the federal government was interpreting ‘essential’ too broadly in the area of education. The 2006 federal reform moved from Article 75 to the exclusive powers of the federation (Article 73) the protection of German artefacts from transfers abroad, while most of the other areas covered by Article 75 are now included in the concurrent powers of the federation under Article 74. Importantly, the federation no longer has a role in higher education except for admission and graduation requirements.

2. Reducing the Mutual Blockades of the Bundestag and Bundesrat

One of the major complaints about German federalism was that the model of 'cooperative federalism' or Politikverfechtung made efficient and accountable policy-making difficult if not impossible. As long as the governing parties had a majority in both the Bundestag and Bundesrat, there was usually little or no difficulty in getting bills through the legislative process in both chambers. Problems arose, however, when one or both parties in newly formed coalitions lost votes in subsequent Land elections, sometimes resulting in different majorities in the Bundestag and Bundesrat. This 'divided government' led to a politics of blockade or gridlock or to compromises that were sometimes difficult for the government and Bundestag majority to swallow.

Reducing the percentage of legislation subject to a Bundesrat veto was complex, in part because the more the Bundesrat was involved in federal legislation, the more powerful the prime ministers of the Länder were. Some kind of compensation was required to secure their support. An innovative solution was to give the Länder the right to 'deviate' (abweichen) from federal rules under certain circumstances. Following the 2006 reform, the Basic Law now provides for a federal competence only in those cases where the federal government believes there is a special need for uniform federal regulation of procedures; however, this requires the approval of the Bundesrat. Local governments were also successful in efforts to eliminate federal mandates. New provisions were added to Articles 84 and 85 that state clearly that federal laws may not transfer tasks to local governments, which means that future transfers of tasks will have to come from the Länder, which retain the constitutional responsibility for their localities.

3. Revising Financial Arrangements

The aim of reducing joint financing was addressed through major reforms to Articles 91a and b of the Basic law, while a series of other financial reforms served as flanking measures to some of the legal changes already noted:

a. Article 91a. After the finance reform of 1969, there was much criticism of ‘mixed financing’, in which the federation would provide up to 50 per cent of the funds for certain Land responsibilities when these were ‘important for society as a whole’ and ‘federal participation is necessary for the improvement of living conditions (joint tasks)’. These joint tasks included ‘improvement and new construction of institutions of higher learning, including university clinics’, ‘improvement of regional economic structures’, and ‘improvement of the agrarian structure and of coastal preservation’. Projects required the consent of the Land affected. Critics argued that this was a kind take-it-or-leave-it bribe that poorer Länder often
could not afford and that it was another example of federal intrusion in Land affairs. The 2006 reform deleted Paragraph 1, Section 1, regarding the improvement and new construction of institutions of higher education and university clinics.29

b. Article 91b. The old version of Article 91b provided for joint federal—Land educational planning and promotion of facilities and projects of more than regional importance. Joint educational planning never really occurred, because of ideological and other differences between the governing parties in the federal government and the Länder, but federal participation in research facilities and projects was common.30 The 2006 reform ended educational planning, and Paragraph 1 now states that the federation and Länder can participate jointly in promoting and financing facilities and projects of science and research at universities. Federal participation in scientific research and projects in the universities must be approved by all of the Länder, which means that any Land prime minister can exercise a veto.

c. As noted, the general system of public finance was not included in the 2006 reform. Nevertheless, some changes introduced in 2006 did concern finances. In Section X, Article 104a now requires Bundesrat approval of federal laws that involve Land administration as well as Land funds. A Paragraph 6 was also added that concerns the responsibilities of the federation and the Länder for violating supranational provisions of EU law, e.g., illegal Land subsidies for industrial development or failure to implement EU regulations. Paragraph 6 also provides a formula for sharing EU fines between the federation and Länder for such violations. The old Paragraph 4 was revised and now forms the basis of a new Article 104b. It provides for federal grants-in-aid for especially important investments of the Länder and local governments to avert a disturbance of the overall economic equilibrium, to equalise differing economic capacities within the federal territory, or to promote economic growth. Finally, a new Article 143c provides formulas for compensation of the Länder until 2019 for the elimination of federal aid for the construction or expansion of facilities for higher education, improvements for traffic conditions of local authorities, and public housing. The year 2019 is also the last year of the post-unification Solidarity Pact II that establishes the fiscal equalisation regime between the federation and the Länder.31 But it is subject to revision by Paragraph 3, which calls for a determination of federal aid that is considered appropriate and essential for carrying out Länder tasks. Paragraph 3 states explicitly that the provisions of Solidarity Pact II are not to be changed.

4. Coping with European Integration

New regulations were developed to take account of Länder participation in EU policy-making and sharing EU sanctions for national budget deficits:

a. There was considerable controversy over the role of the Länder in EU policy-making under Article 23, and the Länder tried to increase even further their influence in the 2006 federal reform proposals. The Länder finally won their argument in the coalition agreement to clarify in the provisions of paragraph 6 areas of their exclusive legislative competence concerning schools, culture and electronic media. The Länder will be represented in the EU Council of Ministers by someone appointed by the Bundesrat. Yet as the contribution by Moore and Epler in this volume shows, the unintended consequences of this new formulation in the Basic Law may in future restrict the autonomous sphere of competence for the Länder on Europe.

b. In terms of sanctions, the EU Stability and Growth Pact may bring sanctions on member states that have a budget deficit of more than 3 per cent of GDP, a provision that Germany violated between 2001 and 2005.32 The federal government was concerned about the distribution of the German responsibility for failure in the future to abide by the Stability and Growth Pact. A new paragraph 5 of Article 109 now provides that in the case of sanctions the federation and Länder will share the costs according to a 65:35 ratio. EU requirements are directed at member states, not their subnational units, but Länder that have deficits in any amount will now be required to contribute to the 35 per cent designated as their responsibility based on their population. Only Länder with a balanced budget will be exempted from such contributions.33

One final key reform proposal addressed the issue of Berlin’s special status and financial responsibility as the capital of the Federal Republic. The Reform Commission had proposed a simple clause, designating Berlin as the capital of the Federal Republic. This proposal was not satisfactory to Berlin, which argued that some federal financial responsibility for the capital should be mentioned in the Basic Law. The amendment passed in 2006 did take account of the concerns of Berlin in Article 22 of the Basic Law, though not in specific terms: ‘Details shall be regulated by federal law’. These ‘details’ will be and are already controversial, given Berlin’s huge financial debts.

THE ‘TOO HARD’ BOXES: REFORMS II (THE FINANCIAL CONSTITUTION) AND III (TERRITORIAL REFORM)

The collapse of the first Federal Reform Commission at the end of 2004 certainly did not spell the end of the reform drive; as the above analysis shows, the election of a grand coalition leadership in 2005 did provide a new set of conditions under which federal reforms could be enacted relatively painlessly in 2006. The new administration made good its commitment to an assessment of those issues excluded from the first reform process by launching a second reform commission in March 2007. This aimed specifically to address underlying fiscal relationships that affect multiple dimensions of the federal—Länder relationship; however, as the contributions in this volume by Auel, Benz and Jochimsen clearly illustrate, there has been a gradual marginalisation of the more difficult issues regarded as most in need of reform. As a result, most commentators remain sceptical about the likely advances this second reform step will bring about.

Whilst the financial constitution forms the core substance of Reform II, the articles collected in this Special Issue recognise that every federal system needs a fiscal architecture to make meaningful its rules and division of competencies. Germany has no long-settled pattern of taxation powers, but in the main the pattern of German tax
financing since 1949 is one of the federal level attempting to divide and conquer the Länder, which cannot set their own tax rates but which have important constitutional obligations to their citizens. A key opening for the federal level in increasing its leverage is the system of tax equalisation, called the Länderfinanzausgleich (LFA). The LFA makes an important difference in the revenues that each state has to spend, and it emerged from the fact that the Länder are obliged by the constitution to perform a variety of different functions and to equalise living conditions in all parts of the country. For the poorest Länder, however, the money available was not enough to meet these obligations. Without the LFA, these states would have almost no discretionary spending power. Prior to the LFA, poor states were more or less obliged to call for federal help to meet their obligations. The richer states then feared that the federal government would usurp poor states’ competencies in exchange for its financial support. Indeed, the federal state used weak states to carve out more influence throughout the 1950s and 1960s. Ultimately, the bargain of national versus state responsibilities included a set of side payments that allowed poorer states to fulfil their obligations but not at the cost of national involvement in their policy-making domains.

Whilst any review of the LFA is ‘off limits’ until the expiry date of Solidarpakt II, as Jochimsen and Jacoby argue in their contributions to this volume, any assessment of German federalism and attempts to reform the federal order cannot be divorced from assessment of the LFA. This system provides not only the lynchpin to intergovernmental relations in Germany, but also helps to explain relative sources of power that have been strategically utilised to promote individual reform agendas. As a number of critics have pointed out, the responses of the Länder to the new opportunities for increased legislative and administrative activity depend also on the resources they have available. A resolution of this issue that is satisfactory to the federation and to both rich and poor Länder will be difficult to find, and the fact that fiscal relations were postponed to the second stage of the reform process means assessment of the full implications of the Reform I outputs will necessarily be limited.

Yet another potential area for future reforms of German federalism involves territorial rearrangements of existing states (Neugliederung). The discussion – now referred to as Reform III – usually revolves around the merger of two current states, though there also have been electronically-driven deliberations about dividing Bavaria and/or Baden-Württemberg. The only historical example of this type of federal reform resulted in the creation of Baden-Württemberg from three smaller states in 1952. In 1996 Brandenburg voters rejected a proposed merger with heavily indebted Berlin. Auel explains how the issue of territorial boundary reform was postponed to a later stage of the federal reform deliberations due to demands made by the smaller and financially weaker Länder. Nonetheless, redrawing the boundaries of Germany’s Länder is an issue which strong public support. As Petersen et al. demonstrate in this volume, a majority of citizens in eight of the 16 Länder could imagine fusing with a neighbouring Land. They illustrate how, despite elite protestations as to the sanctity of the current system, public preferences for a greater degree of economy parity between the Länder suggest that the territorial reform issue needs to be addressed. Current deliberations often invoke proposals for the grand coalition to use its large supermajority to revise Article 29, Paragraph 1 and eliminate or diminish the constitutional requirement for a referendum in the affected states.

**INTRODUCTION**

**EXPLORE THE NEW FEDERAL FRAMEWORK: IMPACTS AND ASSESSMENT**

The contributions that follow provide an English language review and assessment of key provisions of the federal reform of 2006. They represent an important first step in informing the non-German-speaking world of recent developments in one of the best-known and most influential federal systems in the world. To be sure, it is too early to provide a full assessment of the results of the federal reform of 2006. One reason that it is too early to reach firm conclusions is that the experience with the reform since September 2006 has been under a grand coalition government, which makes it difficult to assess the reform consequences under more ‘normal’ conditions. This is perhaps especially true with respect to the proportion of laws that will require Bundesrat approval, since the incentive of a large opposition party and its allies to block legislative action by the government is lacking. On the other hand, there has been a flood of articles and books in German about the background, process, probable consequences, and some praise but mostly criticism of the results. We think these debates deserve a wider audience, and the authors in this collection mix these updates with original research findings on a wide range of issues related to German federalism.

The articles in this issue are grouped into three categories. The first group offers initial assessments of the reforms in round 1, concluded in 2006. The second group addresses issues of fiscal federalism, including the on-going deliberations of round 2 of reforms to Germany’s federal constitution intended specifically to propose changes in the economic framework of federalism. The third group steps back and takes a wider view of German federal reforms by looking at the European level, as well as offering some broader recommendations and conclusions.

Assessment of the extent to which the first set of reforms have alleviated the underlying systemic problems inherent in the German federal order underpins a number of contributions. Each of the contributions in section 1 assesses whether the first set of reforms have achieved a rationalisation within the decision-making process by reducing the need for Bundesrat consensus in the passage of federal legislation. Burkhart et al. and Höreth both focus on a ‘counterfactual’ before and after analysis of federal decision-making, challenging figures published by the federal government that paint a very different picture of the output of Reform I. Rather than providing the streamlining that had been demanded by the reformers, the revised constitutional provisions simply shift the framework of constraints on governing actors, and allow opposition parties to call on other, non-reformed aspects of the Basic Law in pursuit of a Bundesrat veto. To that end, Höreth also challenges interpretations of the initial set of reforms which suggest that an acceleration of the reform process has indeed been achieved. In particular, he suggests that reforms intended to limit the prior scope of Article 84 have, in many cases, merely opened the way for functionally similar mechanisms that are still quite capable of halting federal government initiatives. Indeed, in some cases, these alternative mechanisms (especially Section 104) may actually be a more potent check on the federal level than was the old Article 84. Burkhart et al. add a case study of higher education as an illustration of the difficulties of designing clean and exclusive lines of competence—a theme that reappears in several other papers (e.g. Moore and Eppler, Scharpf).
Also in section 1, Auel outlines in detail the contours of Germany’s federal reform debate. Auel delivers a mixed picture that underscores not only a timidity of approach on the part of the reformers but also an incapacity amongst both the political elites and the academic experts invited to engage in KOMBO debates to produce innovations in terms of new institutional reconfigurations that might have focused on long term policy goals rather than short term political gains. She develops hypotheses regarding the conditions under which reform drivers will actually lead to reform outcomes. She finds that the problem-solving approach that the reformers wanted to facilitate was undermined and replaced with normal intergovernmental bargaining due to a lack of a shared orientation towards common interests, values or norms amongst the empowered actors. Benz’s article concludes this section by offering a critical assessment of the reform trajectory and explanation of the failings of Reform I. Invoking ‘norms of distributive justice’, Benz’s analysis underscores the ‘drift’ within German constitutional politics and the growing tendency for constitutional reform to be played out as ‘politics by the same means’. As a result, real reform of the constitutional order increasingly tends to be driven by the Federal Constitutional Court. It is primarily through this shift out of the everyday political realm that changes can be enacted.

Another dimension of the ‘rationalisation’ agenda that contributions consider here include the drive for a clearer separation of competencies within German federalism and an extension of the realms of autonomous Länder activity. The contributions by Auel, Höret, and Benz each suggest that despite attempts to achieve ‘disentanglement’ or political Enflechtung, the reforms implemented have unintended consequences which encourage further cooperation rather than autonomy. The drive to increase transparency of decision-making and thereby improve accountability within Germany’s federal institutions has also fallen short of the mark, and our contributors conclude that Germany’s infamous ‘joint’ decision trap remains firmly shut – for the time being.

Section 2 takes up fiscal reforms since fiscal relationships are key to understanding power in any federal system. Jochimsen’s article summarises a range of perceived problems of the current German fiscal federalism before sketching a number of proposed solutions. She argues that Germany lacks (and badly needs) ‘institutional symmetry’ in which the taxpayer, decision-maker and beneficiary are the same polity. She argues that Germany would be well-served by Swiss-style ‘debt brakes’ or even, more ambitiously, the legal possibility of Länder insolvency, in addition to several smaller innovations that may emerge from round 2. Zollnhöfer then provides a counterfactual analysis focused on economic policy-making under the Red–Green governments of 1998–2005. Unlike other authors, he argues that the joint decision trap plays a smaller role than party competition in perpetuating sub-optimal outcomes. Wintermann et al. then provide an empirical foundation for understanding another difficulty of introducing a more ‘competitive federalism’, namely the reluctance of German public opinion to countenance substantial differences in living conditions across Germany. Finally, Jacoby’s ‘apples and oranges’ comparison of German fiscal federalism with the (much weaker) redistributive mechanisms at the EU level aims to explain why Germany treated its ‘poor cousins’ generously after reunification while the EU was notably stingy with its poor cousins from Central and Eastern Europe.

INTRODUCTION

As in section 1 pessimistic reform scenarios dominate. Whilst Jacoby suggests that the objective of system optimisation within Germany is obscured by the complex demands of ‘equalisation’ which allow for side payments to secure support for other political agendas, Jochimsen argues that system optimisation cannot be secured without tight rules on fiscal discipline. Her pungent critique of the non-reform of Germany’s “disastrous” mixture of fiscal relationships is not softened by a forward look to the economic reform proposals put forward by the Reform II Commission. Zollnhöfer takes this exploration of attempts to reform Germany’s fiscal federalism further, by adding party political competition to the framework of incentives that structure reform options. From this vantage point, the obstacles facing reformers of fiscal relations in Germany appear formidable.

Normative issues at the heart of the system of governance have underpinned Germany’s development since the end of the Second World War. A re-ordering of that system therefore challenges a number of fundamental assumptions about German federalism, as Jacoby’s assessment of the LFA shows. The suggestion that German federalism should introduce greater aspects of competition became a core normative area considered during the first Reform Commission, and the contributions by Jochimsen and Moore and Eppler assess the merits of ‘competitive federalism’ for Germany. As noted, Petersen et al. present a general overview of public perceptions of federalism in Germany and outline a range of normative preferences that are on occasion strikingly at odds with the broad assumptions underpinning party political approaches to the reform agenda. Together, these contributions serve to illustrate the extent to which the reforms have failed to construct any sense of a new federal ethos in Germany.

The third section considers the reforms undertaken in both rounds 1 and 2 from broader vantage points. Moore and Eppler explore path dependency in the federal reform agenda as it affects Bund–Länder wrestling over prerogatives at the European level. Because reform of the EU decision-making framework is locked into the normal decision-making framework of intergovernmental bargaining, the unique pressures for change from exogenous bargaining arenas (like the EU Council of Ministers) are excluded from key domestic decision-making on reform. Therefore, reform of policy-making towards the EU simply mimics reform of the broader constitution. Scharpf sees a secular trend towards rising territorial interdependence pushing inexorably towards the centralisation of power. Yet problem-solving also demands a certain amount of localism. The result is a reform trajectory that swings rather wildly back and forth between centralisation and decentralisation. A key implication is that the aspiration to finally assign individual policy sectors to one level of governance is usually an illusion: we are stuck, for better and worse, with multi-level governance. But if politics is thus indeterminate about which level should address which question, law also is too weak to sustain a fixed and coherent division of labour. As a solution, Scharpf proposes ‘politically conditioned opt outs’, which lend flexibility to state-level experiments, but only on the condition that these (limited) experiments can win the confidence of a minimum number of other states.

By way of a conclusion, this special issue considers the broader question of whether federalism, and indeed, reform of German federalism, actually makes any difference. Charlie Jeffery picks up on this theme, which runs across a number of
German Politics contributions in this Special Issue: Auel and Wintermann et al. both consider the reformed German federal system's continued capacity to deliver nationwide uniform standards of public service; Moore and Eppler explore how the federal reforms will impact on Germany's EU-level interactions; whilst Burkhart et al. challenge the view that entirely autonomous spheres of policy competence will ever be possible under Germany's federal system, given the federal government's view of the requirement for overarching standards. Jeffery's analysis provides a pithy assessment of the new landscape of German federalism and the contours of future reform trajectories.

NOTES
7. The Bundesrat has a suspensive veto over the remaining 40–45 per cent (Einspruchsgegenbaur), but this can be overridden by a majority of the Bundestag.
13. See Jacoby in this volume.
15. Not 'equal' living conditions, and certainly not equal or equivalent living standards.
21. Much of the discussion that follows is based on Gunlicks, 'German Federalism Reform: Part One'.
23. BVerfGE 111, 226.
24. BVerfGE 112, 226.
25. In fact, actual vectors of legislation by the Bundesrat have been relatively rare, although important legislation is usually involved when they do occur.
26. A compromise package forced by the majority members of the Bundesrat on the government in the mediation committee is more common than a veto.
27. BR Drucksache 178/06, Artikel 1, 9 (1) and 10. For a discussion of the background of federal and EU mandates that have undermined local autonomy, see Karl-Peter Sommerrmann, "Kommunen und Föderalismusreform", in Bitburger Gespräche, Jahrbuch 2005, No.1 (München, 2006), pp.59–76.
28. The contributions by Zohnhöfer, Burkhart and Jochimsen in this volume explore these initial reforms to the financial constitution in greater detail.
29. This change complements the deletion of Article 75, which had provided for framework legislation regarding higher education; however, the two sections concerning regional economic structures and agrarian structures and coastal preservation were not changed.
31. Gunlicks, 'A Major Operation or an Aspirin for a Serious Illness? The Recent Agreement between the Federation and the Länder'.
32. Due to increased tax revenues, today Germany has close to a balanced budget.
33. Note that Article 104a, Paragraph 6, that was mentioned above in the section on finance, concerns the sharing of fines for violating EU regulations dealing with matters other than budget deficits, such as illegal subsidies for industrial development.
36. As does Zohnhöfer in the second section.
37. And later by Zohnhöfer, Moore and Eppler, and Scharpf.