Towards a New Understanding of Multi-Level Governance in Germany? The Federalism Reform Debate and European Integration

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1. Introduction

The Federalism Reform Commission that sat from November 2003 to December 2004 dedicated one and a half of its eleven sessions to the relationships of federal level and Länder in German EU policy-making. In addition, various Commission members and all of the Commission's expert advisors collectively contributed a further, hefty sheaf of documents on those relationships. Despite, or perhaps because of this surfeit of spoken and written word, the Commission failed to come to any agreement. Its Co-Chairs Edmund Stoiber and Franz Müntefering had to single out federal-Länder relationships in EU matters – as regulated in Article 23 of the Basic Law – in their valedictory statement on the work of the Commission as one of five areas where it was unable to reach a consensus on reform (Kombo, Arbeitsunterlage 104 neu, 2004: 1).

Then, when the creation of the CDU/CSU-SPD grand coalition after the 2005 federal elections opened up the prospect of a second go at reform, the changes agreed on in EU matters were minimal. There were just two changes, both to Article 23, paragraph six of the Basic Law:

1. The previous stipulation that a Bundesrat-nominated representative of the Länder shall exercise Germany's rights as a member state of the EU in any areas that fall under the exclusive competence of the Länder is now restricted to exclusive competences in just three areas: school education, culture and broadcasting. Other areas where the Bundesrat had been able to exercise those rights, like research policy and internal security, are no longer open to it.
2. The previous formulation that a Bundesrat-nominated representative of the Länder *shall ("soll")* exercise Germany's rights has been strengthened to *will ("wird")* exercise Germany's rights in the three fields now specified.

The overall result is, in other words, a narrowing of the range of fields in which the Länder, through the Bundesrat, can take the lead for Germany in EU negotiations, along with a strengthening of their claim to do so in the respective fields. Given – as is discussed further below – that the Bundesrat had hardly ever claimed use of these rights since they were established in 1993, this might seem a rather inconsequential outcome from such an intensive and long-winded debate.

There is though a sub-text. The debate about Article 23 in and around the Federalism Reform Commission revealed a number of more or less subtle shifts in understanding of how best to organise a federal state like Germany, with its constitutionally

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embedded internal division of competences between levels of government, in order to realise German interests as a member state of a European Union with a growing membership and its own solidifying constitutional framework.

The least subtle of these shifts in understanding was that set out by federal-level representatives and their advocates. One of the Federalism Reform Commission's expert advisors, Dieter Grimm, made the point in his call in May 2004 for the federal government to have the "right of sole legitimate representation" *("Alleinvertretungsrecht")* at the EU level in order to ensure "maximum capacity for carrying through" Germany's interests (Kombo, 6. Sitzung, 2004: 152). Though perhaps expressed in less cautious language than that of the federal government, Grimm's words conveyed a more general understanding on the federal side: the Länder had too much of a say in European matters, this was a disadvantage for Germany, and their role, as set out in Article 23, had to be rolled back.

This federal attack on Article 23 is set out and analysed in section 3 of this article. It was, at best, flawed and exaggerated. Yet the rather limited reform to Article 23 that was eventually agreed on moves at least some way to meeting this federal objective of rolling the Länder back. The restriction of the Bundesrat role from a general claim to exercising Germany's rights in the EU in all areas of exclusive Länder competence to being allowed to exert these rights in just three areas – school education, culture and broadcasting – has to be seen in the context of the wider federalism reform agreed about by the grand coalition. The effect is not simply to end any claim to exercising Germany's rights in other areas of exclusive Länder competence where the Bundesrat had played a role hitherto, like research and internal security. It is also to pre-empt any Bundesrat claim to exercising Germany's rights under areas which formerly fell under the category of federal framework legislation (the former Article 75 of the Basic Law) or on which the Länder now have additional legislative rights following amendments to the rules of access to, and categories of, concurrent legislation (the amended Articles 72 and 74 respectively).

In other words, the Länder have accepted a reform which restricts the range of fields in which their powers apply and pre-empts a claim to rights of participation in EU matters in areas where new Länder powers have been awarded, or made possible, in domestic constitutional law. Section 4 of this article accounts for this self-denying behaviour and calls attention to a more subtle shift on the part of the Länder in their understanding of how best to organise multi-level governance. That shift in understanding connects to parallel discussions about the EU constitutional debate. It also reflects a sense of disillusionment with the existing structures for Länder participation in EU decision-making, including Article 23, which were established in the domestic constitutional debate and in European treaty negotiations in the early 1990s. In order to place these shifting Länder perspectives, but also the federal ambition of rolling back the Länder in EU policy, into context, the next section provides a short review of the historical debate about federal-Länder relationships in EU decision-making.

2. Federal-Länder Relationships in EU Policy: Mistrust and Dissatisfaction

The federal government has always opposed greater Länder participation in EU decision-making. Its view – reiterated by Federal Justice Minister Brigitte Zypries in the Federalism Reform Commission (Kombo, 6. Sitzung, 2004: 132) – has always been that EU policy is foreign policy and that the federal government has an "exclusive right to represent" Germany in foreign policy matters. Any Länder rights of participation in EU decision-making erode that exclusivity by establishing a "parallel" foreign policy *("Nebenaußenpolitik")* which prevents Germany from presenting a single, coherent position to its external partners. The federal government has therefore always opposed the establishment and extension of the Länder role in EU decision-making, and has only accepted significant enhancements of that role when it was forced to by Länder threats not to ratify EU treaties, including the Maastricht Treaty, the Nice Treaty and, most recently, the Treaty Establishing a Constitution for Europe (Jeffery 1996: 258, 2004: 610; Chardon 2005: 147–148).

The concern of the federal government in the Federalism Reform Commission to roll back Länder involvement in the EU is, against this background, not that surprising. The federal government has never accepted the logic of Länder arguments for a role in EU decision-making. These arguments are based on the observation that once a domestic competence has been transferred to the EU level it is the federal government, as representative of the member state, that contributes to the exercise of that competence, even if it used to be a Länder competence domestically. Länder demands for access to EU decision-making are, in those circumstances, nothing more than demands for new forms of access to "their" old competences.

Those demands were expressed in a concerted campaign in the late 1980s and early 1990s which had two successes. The first was the establishment by the Maastricht Treaty of the Committee of the Regions, which suggested a new openness of the EU's emerging constitutional architecture to regional-level input. The second was focused on reformulating the domestic constitutional understanding of European integration not as foreign policy but as a special category of domestic policy which should be subject to all the usual processes of federal-Länder cooperation that conventional domestic policy is. This notion of a "European domestic policy" lay behind the introduction of the 1993 version of Article 23 of the Basic Law, which translated domestic practices of "cooperative" federalism to EU decision-making – and with it established a complex paraphernalia of federal-Länder coordination in defining and representing Germany's position in EU decision-making. Inter alia, this coordination process made it possible for the Bundesrat to require the federal government to represent its views in matters falling in key fields of Länder competence, and for the Bundesrat to nominate Länder representatives to speak for German delegations in the EU Council in areas of exclusive Länder competence.

For reasons developed more fully in section 4 both of these "successes" have proved, in part, to be empty. Neither has emerged as an especially satisfactory mechanism for realising effective Länder participation at the EU level. Twenty years on from the initial, concerted mobilisation of the Länder on EU issues the outcome is, in other words, an enduring sense of mistrust on the part of a federal government – wedded to

a view of EU policy as part of its foreign policy competence – and a growing sense of dissatisfaction on the part of the Länder still searching for a more effective way of exercising their competences in Europe.

3. The Federal Government Attack on Article 23

The evaluation of Article 23 that the federal government brought into the Federalism Reform Commission was – no doubt in part as negotiating tactic – unremittingly negative. Perhaps more surprisingly, the federal government view was more or less uniformly supported by the experts nominated to support the work of the Commission (Kombo, Arbeitsunterlage 5, 2004: 11–13). There were a number of concerns that contributed to these negative evaluations:

1. The requirement for the federal government to represent a Bundesrat viewpoint when dealing with key matters of Länder competence limited flexibility in negotiations and the federal government's ability to construct package deals which, in the round, were advantageous to Germany (Kombo, Drucksache 41, 2004: 4). This was especially the case given the Bundesrat's tendency, based in its domestic administrative practice, to issue long and detailed guidance (Große Hüttmann 2005: 30–32).
2. The need for sixteen Länder to coordinate a common position, then coordinate that with the federal government, was unwieldy and time-consuming (Bundestag Drucksache 15/1961, 2003: 4).
3. The representation of Germany in the EU Council by Länder representatives did not necessarily bring the best expertise to the table and undermined the continuity of the German position (Kombo, Drucksache 41, 2004: 3).
4. The concepts used in Article 23 to specify different scopes of Länder participation were legally imprecise. This concerned federal government representatives, who feared that there was scope for the Länder to make fuller use of Article 23 powers than they had yet done, with all the disadvantages suggested in points 1 to 3 above (Kombo, 6. Sitzung, 2004: 131–132, Drucksache 41, 2004: 1–4).
5. The risks in points 1 to 4 above were magnified by the expansion of the membership of the EU, alongside the move to more qualified majority voting over the last 20 years. In order best to position Germany in majority coalitions among a more diverse membership, the onus would be all the more on flexibility and fleet-footedness in negotiations and on continuity of expertise. The practices surrounding Article 23 were not consistent with this need (Kombo, Drucksache 41, 2004: 1, 6. Sitzung, 2004: 130).

These points were put with vigour by the federal government. They also gained currency from the general support given by the Commission's expert advisors, whose views were seized upon by the federal government to legitimate its position (Kombo, Drucksache 41, 2004: 32–34). The concerns raised by the federal government and paralleled by the academic experts were, though, on closer examination almost entirely unsupported by evidence. There may have been some reluctance on the part of the federal government to disclose privileged information about how Germany goes about its busi-

ness in EU negotiations, but it certainly weakened the federal government's case that concrete examples of issues where the role of the Länder under Article 23 brought identifiable disadvantage for Germany were conspicuous by their absence.

The federal government's case was weakened all the more by two other factors: a federal government response to a Bundestag written question tabled in October 2003, before the Commission first met, and a paper by the Rhineland-Palatinate Minister-President Kurt Beck, both of which provided evidence on the operation of Article 23. The federal government parliamentary response, which was prepared by the Foreign Office (Bundestag Drucksache 15/1961, 2003), set out data on the scale and pattern of federal-Länder coordination under Article 23, plus some explanatory commentary. It was evidently not well joined up with emerging thinking on Article 23 elsewhere in the government (Große Hüttmann 2005: 31). Only in part did the paper chime with the emergent federal government position in the Federalism Reform Commission, in particular in its diplomatically worded references to the timeliness of German coordination processes, noting that the EU Council's decision-making timetable moved ahead irrespective of Germany's internal coordination and that the slowness of those coordination processes "can" hinder the successful representation of German interests (Bundestag Drucksache 15/1961, 2003: 3–4). Otherwise, though, the Foreign Office paper did not make a case that Article 23 was a notable barrier to the development of effective and flexible policy. If anything, it pointed to a smoothly running system that rarely produced disagreement, noting (Bundestag Drucksache 15/1961, 2003: 3):

– that the Bundesrat issues many opinions on EU matters, over 1,500 between 1993 and 2003,
– that it rarely demands that the federal government follows the Bundesrat's viewpoint,
– that over half of the 28 such demands made in the period 1998–2002 were rejected, and
– that the Bundesrat accepted those rejections without further dispute.

These data are consistent with those collected in earlier academic analyses (Börzel 2002: 80–84; Maurer 2003: 135–136). They reveal, rather than the bleak picture painted in the Commission by federal government representatives and academic experts, an essentially pragmatic relationship between federal government and Bundesrat in EU decision-making. This was the point made by Kurt Beck in his submission to the Commission (Kombo Drucksache 34, 2004), which reiterated much of the Foreign Office data, noting that there had only *ever* been one case since 1993 on which the federal government and the Länder had been unable to reach agreement (and even then the federal government was able to assert its own position, as indeed Article 23 allows). He also provided data on the frequency of Bundesrat requests to lead the German delegation in the EU Council. Such requests had been made on only *eight* occasions since 1998, with three of the eight requests rejected by the federal government. The Bundesrat accepted those rejections not least because in those cases the substantive positions of the two parties were reconcilable. Similarly, the Foreign Office paper also noted that procedural disagreements about whose view should be the lead view had not led to real dispute because the substantive positions in the matters concerned were

"identical or to the greatest extent identical" (Bundestag Drucksache 15/1961, 2003: 2).

It is not entirely surprising that substantive positions rarely diverge significantly between the federal government and the Bundesrat. Given that the Bundesrat has to act collectively, as a federal-level body, on EU matters it is effectively responding to the same Germany-wide policy concerns as the federal government. Moreover, much of the business of EU legislation is "technical and largely depoliticised" and unlikely to provoke significant substantive dispute (Börzel 2002: 83). Finally, and perhaps most importantly, because the Bundesrat has to act collectively, it has to produce positions broadly acceptable across its membership. These are inevitably at a fairly low common denominator and in the great majority of cases are unobjectionable for the federal government (Börzel 2002: 84).

An evidence-led evaluation of Article 23 would suggest that it has not been a significant problem for German EU policy-making. Bundesrat positions may at times be over-detailed for a flexible negotiating situation, and the coordination process may be at times unhelpfully slow, but the absence of evidence that in particular cases this has caused real disadvantage is striking. So, more generally, is the fact that only on very few occasions does the Bundesrat request that its view be followed or that its representatives speak for Germany in the EU Council. There appear to be few risks to the flexibility or continuity of the German negotiation position here. Article 23, if anything, has been a non-event. The first three of the concerns listed above, which the federal government and the Commission's experts raised, appear as a result at best to be overstated and are certainly inadequately substantiated.

And the final two concerns – that the Länder could cause trouble if they used Article 23 more systematically, and that the new circumstances of more majority voting and more member states require the federal government to have a more decisive decision-making capacity – are simply not amenable to substantiation. They are little more than speculation. And again no evidence is brought forward to suggest why the Bundesrat would want, or be able, to approach Article 23 differently than hitherto and give those concerns substance. The federal government's case was, in sum, lamentably weak and easily refuted. If that was the case, it begs the question of why the Länder were prepared to accept even the limited amendments to Article 23 that were eventually applied – given that they reduced the previous scope for Länder participation in EU decision-making and pre-empted future claims arising from the wider package of federalism reforms agreed on in 2006.

4. The New Multi-Level Governance of the Länder

The answer to that question lies in the sense of dissatisfaction that had emerged about the possibilities for Länder input into EU decision-making processes that were established in the early 1990s. To adapt Ivo Duchacek's (1970: 356) terminology, these possibilities had been established in response to a Länder demand to "let us in" to Europe: to be "let in" directly at the EU level through the Committee of the Regions; and to

be "let in" to Germany's domestic EU decision-making process via the establishment of Article 23 as an adaptation of domestic cooperative federalism for Europe.

However, the Committee of the Regions has simply not worked as a body useful in any routine way as a means of pursuing Länder interests in the EU. Its membership is too diverse to come up with opinions that generally support Länder positions, its powers are too weak to make much of a difference anyway, and many of its members – including the German Länder – have more effective routes for making their concerns count than the Committee can offer (Jeffery 2003).

One of those more effective routes is Article 23. But – as suggested above – there are also growing question marks about the effectiveness of Article 23. Article 23 was conceived for pre-1989 *West* Germany. It was the culmination of *West* German Länder arguments about participation in EU decision-making which were rapidly developed around and after the ratification discussions on the Single European Act. Being West German arguments, they were attuned to a federation with fewer members, and with less sharp distinctions of territorial interest than united Germany. As such the conception of a collective expression of Länder rights of participation in EU matters through the Bundesrat made sense in much the same way that the cooperative federalism that Article 23 adapted for Europe was then a largely unchallenged approach to government in Germany.

It is not now. Cooperative federalism makes much less sense for a federation of sixteen Länder and much sharper territorial cleavages. The challenge of generating uniform policies acceptable to sixteen diverse units has become increasingly forlorn and the outcomes increasingly unsatisfactory, especially for the group of wealthy Länder in the south whose governments feel that they contribute disproportionately to resourcing uniform policies. Their solution has been to try to maximise their autonomy within the federation by arguing for less statewide uniformity, more regional legislative autonomy, and the relaxation of the fiscal equalisation demands which fund statewide uniformity. This "new territorialism" (Jeffery 2005) in the south has been accompanied by a different form of territorial politics in the east, underpinned by a clear sense of distinctive territorial interest across the eastern Länder (Jeffery 2007 forthcoming), and expressed in demands for asymmetrical treatment and funding by the federal government. In these different ways the notion of a cooperative federalism of uniform statewide standards has been eroded.

These new dynamics of territorialism – which elsewhere I termed a "Sinatra-doctrine", with each Land increasingly inclined to do it "my way" (Jeffery 1998) – naturally enough also have an impact on Länder EU policy. Territorially differentiated interests in domestic politics become externalised in equally differentiated territorial interests in EU politics. Bavaria does not share Saxony-Anhalt's interest in industrial regeneration, Rhineland-Palatinate is not moved by Brandenburg's concerns to find the best mechanisms for cross-border cooperation with the EU's new member states, the Common Agricultural Policy is irrelevant for Bremen and the other city-states but not for the rest, the Saarland does not share Bavaria's more heroic aspirations to rein in the regulatory instincts of the Commission, and so on.

Greater territorial diversity, and a greater willingness to give expression to it, have implications for Article 23, just as they have for domestic cooperative federalism.

Common denominators become lower, and therefore less satisfactory to all parties. This may be why the Bundesrat so rarely asserts a claim to a lead role in German EU policy. It is certainly one of the reasons why the Länder have increasingly moved away from a "let us in" approach to Europe towards what Duchacek (1970: 356) termed a "leave us alone" strategy – that is one of maximizing and protecting Länder autonomy, and the capacity to pursue distinctive territorial policies.

This form of "leave us alone" strategy has, since the mid-1990s, shaped the Länder contribution to the European constitutional debate. A range of issues over time has focused Länder concerns on the reach of EU-level competence, and the – they argue – undue restriction of policy autonomy in the Länder, including:

– a long-standing dissatisfaction with the basis of EU policy-making in open-ended "aims" as expressed in the treaties, rather than more tangible (and justiciable) "competences", such as in the Basic Law (Leonardy 2002: 276),
– a suspicion of new initiatives which opened up potential scope for Union action notwithstanding the content of the treaties, including the Open Method of Coordination based in voluntary cooperation between member states (Große Hüttmann 2004),
– particularly a strengthening perception that the European Commission has become too intrusive in its regulatory activity, and needs to exercise self-restraint or be restrained in order to give meaning to the principle of subsidiarity (above all the Commission's role in competition policy and policing state aids; Hrbek 1996; Hrbek/Nettesheim 2002), and
– the Commission's vision of a set of "networked governance" arrangements, cutting across tiers of government, public and private sectors, and civil society, which was developed in the discussions leading up to its Governance White Paper of 2001. These arrangements were viewed as a dangerous obscuring of conventional notions of accountability and the democratic process; the only antidote was a clear demarcation of competences which would limit the scope of what the Commission could do (Bocklet 2001).

The theme of competences, and with it the constitutional definition and separation of clear spheres of constitutional authority between Union and member states, became the defining theme in Länder contributions to the Amsterdam and Nice IGCs, and then the European Convention in 2002–3. The Länder had a significant impact on the debate in the Convention. The speech of the then Minister-President of North Rhine-Westphalia Wolfgang Clement at the Humboldt University of Berlin in February 2001 (Clement 2001) had an agenda-setting effect on the debate in the Convention on the need for a more explicit demarcation of member state competences from those of the EU (Jeffery 2004: 612–615). And some of the Länder were highly active in a lobby group of "legislative regions" which was instrumental in ensuring that new mechanisms of subsidiarity control envisaged by the Convention for member state national parliaments could be also opened out to the regional level (Kiefer 2005).

What is remarkable about these constitutional initiatives is their focus on the member state as a framework for achieving Länder aims. With their shift of emphasis from participation ("let us in") to autonomy ("leave us alone") their aim has become one of rebalancing the EU by strengthening the member states, in order that within the Ger-

man member state they could have maximum autonomy to shape policy on their territories. As the Bundesrat (Drucksache 1081/01 Beschluss, 2001: 8–9) put it in 2001: A better system of competences between the EU and the member states is also in the interests of regions, whose domestic policy-shaping capacities are protected in that way.

5. Analysis: The Länder, the Member State and the New Multi-Level Governance

The thinking behind that statement about the virtues of the member state for the Länder has also shaped the domestic debate on the relationship of German federalism to European integration. The domestic negotiations on the ratification of the Treaty on a Constitution for Europe (Chardon 2005: 147–149) were marked by the commitment and success of the Länder in giving force to the possibility of regional-level access to the new national parliamentary procedures for the policing of subsidiarity set out in the Treaty. Likewise, the Länder won a commitment that any German approval of the use of the "passerelle" clause in Article IV-444 of the Treaty, which allows a move from unanimity to qualified majority voting without treaty amendment, would be dependent on the approval of the Bundesrat. In both cases – and also in a commitment won from the then Chancellor, Gerhard Schröder, that the Bundesrat would be bound in more fully to German discussions on EU "soft law" like the Open Method of Coordination – the Länder strengthened their capacity, working with the federal government, to guard their sphere of competence against unwanted or unwarranted incursion by the EU.

These observations place the Länder attitude to the reform of Article 23 in the domestic federalism reform debate into perspective. What the new version of Article 23 brings them is a strengthened, guaranteed right to take the lead for Germany in the traditional heartland of Länder competence in education, culture and broadcasting. Together with a subtle change in Article 53, Paragraph 3a of the Basic Law, which makes it possible for the Bundesrat's European Chamber to take decisions by correspondence, and therefore more quickly, a new prospect has opened up of building a fuller, more continuous and fleet-footed capacity to build collective positions and contribute with more effectiveness to defining Germany's position on EU matters in these core fields. That capacity may in principle be limited by the need to coordinate sixteen units, though it has to be said that it is in precisely these fields of education, culture and broadcasting that the Länder have the strongest tradition and the most effective structures for building and maintaining unity of purpose.

The quid pro quo has been a renunciation of a claim to take the lead for Germany on other areas, including those newly or potentially opened up by parallel reforms to the categories of framework and concurrent powers. Given the difficulties noted above in making Article 23 and other channels of input to the EU work, and the related shift in emphasis from a participatory to an autonomy-maximising approach vis-à-vis the EU, this appears a logical step. It would have made little sense for the Länder to argue for a decentralization of competences and their disentanglement from federal-Länder coordination practices in the domestic arena in order for them to have been re-entangled in federal-Länder coordination under an unsatisfactory Article 23 process

(Eppler 2006: 22). But – assuming that the Treaty on a Constitution for Europe comes into force, or at least that future developments move in a similar direction – the Länder will have at their disposal a fuller battery of controls available through the member state to police and, where appropriate, challenge any EU-level regulation of new domestic competences.

This refocusing on a strategy of maximum autonomy within the member state sets out a new understanding of multi-level governance in the EU. It signals a perhaps decisive move away from the earlier strategy focused on recasting EU-level politics to open up space for a creative contribution by the Länder and other regions. Instead, the Länder are increasingly minded to tuck themselves in behind – and by implication do what they can to strengthen – the hard carapace of member statehood. This explains why the Länder could accept what is, on the face of it, a limitation of the scope of their powers in EU policy under the Basic Law; in most respects they simply do not want to have overlaps of competence with the EU and, assuming an adequate set of controls on subsidiarity, soft law and the passerelle clause, are happy to leave the bulk of EU policy engagement to the federal government. Perhaps this might, taking Duchacek's terminology a little further, be termed the new "Garbo-doctrine" of the Länder on Europe: they want to be left alone.

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