
5 Towards benchmarking in Germany

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A constitutional amendment effective 1 August 2009 gave constitutional status to comparative studies between different levels of public administration in Germany. The present article discusses this constitutional amendment and its implementation in the Federal and *Länder* administrations in Germany, where, to-date, only a handful of benchmarking experiments have occurred above the local level.

5.1 The basic structure of German federalism

The federal state

The fundamental principles of Germany's state structure are enshrined in the constitution of 1949. Among other things, the constitution states that the Federal Republic is a federal state (Article 20). Under Article 79(3) this principle cannot be changed even by a constitutional amendment.

The Federal Republic of Germany is a two-tier federated state. State authority is divided between the Federation and its constituent units, the 16 *Länder*. It should be noted that the *Länder* are neither provinces nor *départements* but States with their own executive authority, constitutions, parliaments and administrative structures. Thus the individual *Länder* act independently. The Federation has no authority to tell them how to carry out their tasks; it may exert direct influence only if it delegated the task to the *Länder*.

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The *Länder* form the basis of authority in the political system. When responsibilities are to be divided between the Federation and the *Länder*, the Constitution assumes that the *Länder* are responsible unless otherwise specified. The Federation has responsibility for legislation, administration and jurisdiction only if expressly mentioned or implied in the constitution (Article 30). However, the *Länder* must abide by federal legislation, on which they have input via the *Bundesrat* (Federal Council), where their delegates sit as the second chamber of the federal parliament (see Fenna, this volume).

Legislative powers

Regarding the division of responsibility for legislation, the constitution provides for three types of legislative powers:

- exclusive legislative power at Federal level
- concurrent federal and *Länder* legislation
- exclusive legislative power at *Länder* level.

Exclusive legislative power at the federal level covers all tasks explicitly assigned to the federal level by Article 73 (together with Article 71) of the constitution or where implicit responsibility derives from the type of task or in connection with a directly assigned federal responsibility. These tasks include, for example, foreign affairs, defence, citizenship, currency, customs, foreign trade and payments, border protection, railways, aviation, postal and telecommunications services, copyright, counter-terrorism and nuclear energy.

Concurrent legislation includes the areas listed in Article 74 (together with Article 72) of the Constitution. They include civil law, criminal law, public welfare, economic law, labour law, food law and cartel law, social insurance, medicines, transport, environmental protection, university admission and degrees, and regional planning. If no federal law has been passed in these areas, the *Länder* are responsible. It should be noted that in certain areas, federal law is permitted only when necessary to establish equivalent living standards throughout Germany, or to maintain legal or economic unity in the national interest.

The exclusive legislative power of the *Länder*, finally, includes all areas not exclusively assigned to the federal level or subject to concurrent legislative power. This mainly affects schools and higher education, press and broadcasting law, and law on local authorities, police and regional planning.

Over the years, the Federation has adopted laws not only in areas where it has exclusive legislative power but also in most areas of concurrent legislative power.

The *Länder* are no longer authorised to make laws in these areas. However, this does not affect their other constitutionally guaranteed responsibilities. And via the *Bundesrat*, the *Länder* have a key role in the making of federal laws.

In addition to separate responsibilities for certain areas, there are tasks which can be carried out by the federal and *Länder* levels together —Article 91(a) and 91(b) of the Constitution). These shared tasks include the improvement of regional economic structures, agrarian structures and coastal preservation, and the promotion of research. The federation bears between 50 per cent and 90 per cent of the costs.

Administrative responsibility

Implementing the law also depends on the constitutional division of powers. If the *Länder* act in their own right, they are responsible for implementation. The *Länder* are also responsible for implementation when they are tasked with executing federal law (Article 84 of the Constitution) or on federal commission (Article 85). However, in these areas the federation may adopt laws (in some cases not binding) governing the authorities' organisation or administrative procedure, or adopt general administrative regulations, with *Bundesrat* consent, which are binding for the *Länder*. For example, general administrative regulations were adopted for authorisation procedures under environmental law; for issues related to enforcing the German Road Traffic Regulations; for guidelines on criminal proceedings and proceedings for the collection of fines; and for detailed provisions on the implementation of tax law.

Although all powers not specifically assigned to the Federation are reserved to the *Länder*, most legislation is passed at the Federal level. Laws are then usually implemented by the *Länder*. To important extent, then, German federalism embodies a different approach to dividing responsibilities from the American model (see Fenna, this volume).

In terms of state structure, municipalities (including 12 200 cities and communities, and 301 rural districts) are part of the *Länder* and not a 'third level' within the federal system. Nevertheless, they have their own responsibilities and a certain degree of independence. The Constitution stipulates in Article 28(2) that they must be given the opportunity 'to regulate all local affairs on their own responsibility, within the limits prescribed by the laws'.

Cooperative federalism

To ensure sufficient cooperation between the Federal and *Länder* levels on legislation as well as in other areas, various agreements have been concluded between the responsible divisions of the Federal and *Länder* ministries. Moreover, there are regular meetings of the *Länder* heads of government and with the Federal Chancellor, the Standing Conference of the Interior Ministers of the *Länder*, the Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder*, the Economic Policy Council, the Financial Planning Council, the Science Council, the Joint Science Conference and many other joint working groups. These regular meetings facilitate cooperation among the *Länder* and with the Federal government. For certain topics working groups are set up, for instance, at the Interior Ministers Conference, where experts of the various ministries work together. Decisions are made unanimously.

On the basis of these structures, a form of cooperative federalism has developed in Germany, as the administrative and political science literature largely agrees (Münch and Meerwald 2002; Scharpf 1976; Schubert and Klein 2006). The term ‘cooperative federalism’ refers to the fact that decisions are made by various decision-making levels working together. Cooperative federalism is associated with the aim of keeping differences between the member states as minimal as possible and striving for equivalent living conditions. In Germany, this aim is supported by constitutional law. Article 106 of the Constitution deals with the issue of maintaining equivalent living conditions throughout the Republic. This aim has led to a complicated system of revenue-sharing among the *Länder* and the Federation which is intended to reduce regional differences in living standards.

Various forms of cooperation between different state actors have given rise to overlapping jurisdictions and patterns of coordination, as well as formal and informal rights to be involved in decision-making. In this way, the many different levels of organisation and decision-making in the federal system are intertwined, both horizontally and vertically. As a result, it is often difficult to enact reforms in Germany, and in many cases it is hard to tell who is responsible for what decisions.

In recent years, some have proposed competitive federalism as an alternative to cooperative federalism. This model calls for the regions to have more autonomous decision-making authority in order to increase competition between regions. It is hardly surprising that this model is especially popular with those actors who do not profit from revenue-sharing among the *Länder*.

In fact, the *Länder* have lost influence in the field of law-making relative to the federal and European levels. In the large majority of policy fields, the federal or the

European level has the power to pass legislation. In consultations between the Federation and the *Länder*, the resulting reduction in *Länder* legislative power often leads to an unusual situation separate from the attempt to balance different interests. The *Länder* stress their sovereignty and constitutional status. Federal proposals are sometimes rejected as interference in the domestic affairs of the *Länder*. This is why the federal government often finds it necessary to seek allies among the *Länder* at an early stage in order to pursue common initiatives and interests.

5.2 Reforming federalism and anchoring comparative studies in the Constitution

The constitutional basis for benchmarking studies between Federal and *Land* administrations — Article 91(d) — is one element of the constitutional reforms achieved by the coalition of the two major parties, the CDU–CSU and the SPD, between 2005 and 2009 to modernise the federal system (phases 1 and 2 of the federalism reform).

These reforms were prepared, right down to complete drafts of proposed legislation, by high-ranking commissions of the *Bundestag* and *Bundesrat* in 2003–04 (First German Commission on Federal Reform) and 2007–09 (Second German Commission on Federal Reform).

The first phase was primarily concerned with untangling some of the highly intertwined decisions at federal and state level and with increasing the powers of the *Länder*. The second phase involved negotiating new constitutional and sub-constitutional financial legislation, in particular to limit government debt and budgetary emergencies. In addition to the finance reforms, the second phase also dealt with reforms in the area of administration. Here, two new articles were added to the Constitution: First, Article 91(c) of the Constitution governs IT cooperation between the federal and *Länder* levels. Secondly, the constitutional reform effective 1 August 2009 gave comparative studies constitutional status. The *Bundestag* and *Bundesrat* approved the new Article 91(d) of the Constitution worded as follows:

To determine and promote the productivity of their public administration, the Federation and *Länder* may conduct comparative studies and publish the results.

In analysing the debates over ‘benchmarking’, it is noticeable that in the commission’s meetings this issue found broad acceptance at the political level. The central argument was that comparative studies between administrative levels are especially suited to a federal system. Comparative studies are an appropriate instrument for federalism. A major advantage of federal systems over centralised state systems is competition for the best solutions. This advantage of federalism

only comes into play, however, when competition is organised, as it can be through comparative studies (see Fenna, this volume).

This position was partly based on the experience of often-significant differences in the way the different *Länder* carry out federal law — for example, with regard to agency organisation; administrative procedures; and the use of information technology. The result has been major differences in quality and costs — for example in the tax administration. This points to reserves of efficiency and effectiveness. Through administrative cooperation on comparative studies, individual reserves can be identified and necessary changes made. Comparative studies can also provide interesting insights for internal administrative services.

However, it was unclear what would provide the legal basis for comparative studies and what organisational form they would take. There was discussion as to whether legal provisions were even needed, or whether an intergovernmental agreement or a constitutional amendment would be the proper avenue. In terms of organisation, establishing a joint benchmarking agency was discussed.

Ultimately, the Commission on the Modernisation of Federation–*Länder* Financial Relations recommended to the *Bundestag* and *Bundesrat* that comparative studies be included in the Constitution. In its decision, the commission stated:

The commission agrees with the chairs that comparative studies of the public administration have proved to be a useful instrument. Comparative studies increase the transparency of state action and make it possible to recognise the best solutions and thereby optimize the public administration.

The *Bundestag* and *Bundesrat* also agreed with this position and adopted Article 91(d) of the Constitution. This article sends an extraordinary signal for administrative policy and is likely to have a binding effect on the Federal and *Länder* governments. It calls on the Federal and *Länder* administrations to conduct comparative studies.

5.3 A digression: experience with comparative studies

Even before the constitutional amendment, public administration in Germany had had experience with comparative studies, albeit, largely at the local level. There is much less experience at *Länder* level.

The local authorities network IKO of the local government association KGSt, where comparative studies groups at local level are coordinated, has the most experience.³

³ For more information, see: www.kgst.de.

The KGSt has overseen these projects, more than 240 of them since 1996, in areas such as facilities management, personnel management, youth welfare, public service offices and many more. More than 2600 municipalities and institutions have taken part.

At federal level, from 2000 to 2006 comparative studies were conducted with regard to grant procedures; IT and human resources processes; and in the area of sickness allowances for civil servants (Federal Ministry of the Interior 2005, p. 12). Also worth mentioning is the management of training conducted by the Federal Academy of Public Administration (BAkōV) a central federal training facility (Federal Academy of Public Administration 2008), and comparison of services centres introduced as a pilot (Federal Ministry of the Interior 2009, p. 14). Additional comparative studies were carried out as part of the introduction of cost-results accounting (Federal Ministry of Finance 2007, p. 12).

Some comparative studies have also been carried out between *Länder*. In particular, the following should be mentioned:

- Benchmarking by the city-states of Berlin, Hamburg and Bremen on budgetary data based on finance policy statistics (Berlin Senate Department of Finance, Hamburg Department of Finance and Bremen Senator for Finance 2008).
- The international comparative studies Program for International Student Assessment (PISA), *Internationale Grundschul-Lese-Untersuchung* (IGLU) and ‘Trends in Mathematics and Science Study’ (TIMSS) have led to further *Länder* comparative studies at national level. It should be noted that the PISA-E studies represent a national supplement to the international PISA studies and are aimed at analysing the possible influence of external factors (for example, the school systems in the various *Länder*, class structure, level of parents’ education and provision of material goods at home) on pupils’ levels of achievement. In 2009, the PISA-E studies were replaced by studies comparing educational standards in the different *Länder* in order to determine whether pupils are attaining the standards set by the Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder*.
 - In addition, further comparative studies on specific issues are conducted, such as language acquisition (Köller, Knigge and Tesch 2010).
 - The PISA Consortium of Germany was founded for the PISA studies, which are conducted every three years (PISA-Konsortium Deutschland 2007). In order to ensure cooperation between the Federation and the *Länder* on comparative studies in the field of education, the following text was inserted into Article 91(b)(2):

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- ... The Federation and the *Länder* may mutually agree to cooperate for the assessment of the performance of educational systems in international comparison and in drafting relevant reports and recommendations.
- Benchmarking for public procurement was launched under the title ‘REPROC-Excellence’. In the initial project phase, public contracting authorities such as the Federal Ministry of Economics and Technology are working with the German Association of Materials Management, Purchasing and Logistics and the Research Centre for Law and Management of Public Procurement at the University of Munich to develop performance-specific criteria for measuring public procurement.⁴
 - In 2009 and 2010, various *Länder* administrations initiated the projects ‘Housing Benefit Made Easy’ (Federal Chancellery / National Regulatory Control Council 2009a); ‘Parental Benefit Made Easy’ (Federal Chancellery / National Regulatory Control Council 2009b); and ‘Federal Higher Education Grants Made Easy’ (Federal Chancellery / National Regulatory Control Council 2010) and conducted them together with the Federal Government and the National Regulatory Control Council (NRCC). The NRCC is an advisory body instituted in 2006 that helps the Federal government reduce the administrative costs associated with legislation.
 - In 1998, Saxony and Bavaria initiated a comparative study of tax offices, in which seven of the 16 *Länder* are now participating.⁵

The examples of comparative studies in the finance administration and the project ‘Federal Higher Education Grants Made Easy’ will be used to explain briefly and in greatly simplified form how comparative studies can be carried out.

The studies initiated by Saxony and Bavaria in 1998 began by defining and comparing indicators for the following areas: task completion; client and staff satisfaction; and cost-effectiveness. Based on these indicators, reports on the performance of the tax offices were produced. In addition, more in-depth analyses, such as business process analyses, were carried out to explain differences between the tax offices. These reports and analyses provided the basis for adopting management targets and measures to optimise the respective administrations. The *Länder* administrations managed the comparative studies and modernisation process on a collegial and equal footing. In particular, contracts between the responsible actors and ongoing reporting requirements were used. Overall, the sharing of information served the ongoing improvement of participating tax offices. According

⁴ See: <http://www.bme.de/REPROC-Excellence.reproc-excellence.0.html>.

⁵ See: <http://www.leistungsvergleich.de/index.html>.

to those involved, these comparative studies have helped bring about significant improvements in quality as well as client and staff satisfaction in the tax offices.

In addition to the Federal government, the administrations of eight *Länder* are taking part in the project to simplify grants for students in higher education. This project was initiated by the *Länder*, and a process was chosen which is coordinated with all stakeholders. The aim was to identify administrative burdens and differences in implementation with regard to the making and processing of applications for educational grants and to simplify measures and/or develop services to reduce the burden on students and grant offices. First, the burden for applicants and the responsible administrations was identified, including the analysis of sub-processes. Based on these indicators, which vary by organisation, more in-depth analyses were conducted (for example, surveys, analyses of business processes). In this way, it was possible to identify differences specific to certain *Länder* and offices and to recommend improvements. Recommendations covered the design of application forms, methods for checking plausibility and errors, and the possibility of online application, to mention just a few.

In addition to these projects in which the various governments were directly involved, non-governmental organisations also carried out benchmarking projects. One example is the consumer protection index first commissioned by the Federation of German Consumer Organisations in 2004 and updated every two years since then. The index presents a comparative analysis of the consumer policy profile of the *Länder* (Bridges 2010). According to the Federation of German Consumer Organisations, this comparison has led to major efforts and improvements in the consumer protection policy of the *Länder*.

5.4 Activities to implement Article 91(d) of the Constitution

The constitutional amendment sends an important administrative policy signal. In this way, the *Bundestag* and *Bundesrat* have given modernisation of public administration constitutional status. This prominent position should be understood in the context of government deficits, changing expectations of business and individuals and international competition of entire regions. Performance of public administration and the quality of public services have long been important factors for investors and entrepreneurs when choosing where to do business.

The parties of the governing coalition (CDU/CSU and FDP) have recognised the need for better performance by public administration and included in its coalition agreement for the 17th legislative term a call to conduct comparative studies. Comparative studies

must become an instrument of administrative development. Areas in which comparative studies are to be conducted are to be defined in an annual work program.

The government program ‘Transparent and Network-Based Administration’ adopted by the Federal Government on 18 August 2010 includes the statements that ‘subjects for comparative studies should be designated in an annual work program’ and ‘that every ministry should take part in at least one comparison group by 2013, if possible’ (The Federal Government 2010, p. 52). Pilots on health management and balancing family and career are currently in planning. It is not yet clear how these activities can be expanded to the desired extent.

Situation at the federal level

Working Group VI of the Standing Conference of Interior Ministers, whose responsibilities include administrative organisation, drafted a plan for conducting comparative studies in public administration. This plan discusses the aims of comparative studies, how to go about them, how to handle their results, and the role of the Standing Conference. However, it does not say anything about the organisational structures in which comparative studies should be carried out.

The plan was approved by the Standing Conference of Interior Ministers on 18-19 November 2010. The Standing Conference also agreed that, as an initial step, each of its working groups should designate a specific subject and participants for a comparative study ahead of their spring 2011 session. With these decisions, the Standing Conference has decided to begin implementing Article 91(d) of the Constitution. It remains to be seen which specific subjects for comparative study will be designated, who will participate in the projects and how the comparative studies will be carried out.

As early as 2004, the heads of the *Länder* governments spoke out in favour of more comparative studies. In the context of Article 91(d) of the Constitution, for their session on 15 December 2010 they asked for reports on the ongoing efforts of all the conferences of specialised ministers regarding comparative studies. This comprehensive overview will provide further information about the implementation of the constitutional amendment.

In its 2010 annual report, the National Regulatory Control Council recommends applying the lessons learnt from the projects ‘Housing Benefit Made Easy’, ‘Parental Benefit Made Easy’, and ‘Federal Higher Education Grants Made Easy’ for comparative studies in accordance with Article 91(d) and offers its assistance (National Regulatory Control Council 2010, p. 40).

With these activities in mind, it can be expected that further comparative studies in various policy fields of the federal system will be launched soon and that in the medium term comparative studies will be organisationally anchored for the purpose of policy and administrative coordination.

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