How to participate in federations?

Managing inter-territorial conflicts on infrastructure projects of overall interest in the German federation

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Prof. Dr. Sabine Kropp
Freie Universität Berlin
Otto-Suhr-Institut für Politikwissenschaft
Chair of German Politics
Ihnestr. 22
14195 Berlin
Tel.: 49-030-838-57871
E-Mail: sabine.kropp@fu-berlin.de

Abstract

This paper investigates institutional tensions arising from citizen participation in federal democracies. Theoretically, it distinguishes voluntary federal cooperation and obligatory joint decision-making as two ideal-types of federal negotiations, assuming that they do not equally match different modes of participation. The analysis predominantly focuses on the German federation, which is shaped by both types of negotiations. By examining two case studies on infrastructure planning, it is shown that adding more participatory channels to ‘traditional’ representative institutions can, indeed, contribute to pacify, mediate, and resolve political conflicts, but also sustainably affects the functioning of federalism. Depending on which participatory channels are combined, problems of congruity, de-parliamentarization, accountability, equality, and party integration which are inherent in federalist systems may be reinforced. The study suggests that reforms aiming at extending citizen participation can trigger unintended dynamics and change in a federal setting, since the single institutional components are closely interlinked and synchronized.
Introduction: federalism and participation in infrastructure projects

In normative theories, federalism was often conceptualized as a subcomponent of democracy (Hamilton et al. 1989). Democracy, for its part, is seen as a basic prerequisite to safeguard the vitality of federations (Watts 2006). However, the close link between federalism and democracy is not as self-evident as often assumed. Federalism itself can affect democracy for various reasons.

Cooperation and coordination are necessary conditions for securing the functioning and the viability of any federation. Federal cooperation, however, impacts parliamentarism. Most evidently in ‘interlocked’ federations shaped by joint decision-making (Scharpf et al. 1976), federalism comes along with de-parliamentarization. Cooperation between territorial jurisdictions basically works in favor of executive powers undertaking intergovernmental negotiations. Negotiations between federal units are typically prepared by administrations and coordinated through and by the governments, whereas legislative powers—legislation, scrutiny, elective functions—cannot be jointly exercised. Parliaments as the ‘principals’ face serious difficulty in trying to scrutinize the governments as their ‘agents’, the more so as cabinets in parliamentary democracies emerge from the majority parties in parliament; majority parliamentary groups and cabinets naturally constitute a political unity. Even though inter-parliamentary cooperation is intensely debated as a suitable means to balance democratic deficits in multilevel systems, it can, at best partially compensate for the loss of legislative and of scrutiny powers (see Crum and Fossum 2013).

Moreover, votes are not equally weighted in federations due to the need of territorial representation (Stepan 1999). Disproportional representation, however, violates the principle of equality. It may generate dissatisfaction and lead to loss of trust, if citizens have the feeling that their will is not adequately represented in the decision-making process. Vertical limitations of powers also have a flipside. Mutual rights of checks and intervention imply that decisions not only affect the jurisdiction in which they are taken but also ‘neighboring’ federal units. External effects call for coordination ensuring that problems intersecting territorial borders are solved effectively. Coordination, however, may come into conflict with the principle of congruity between those jurisdictions taking a decision and those affected by a decision (Benz & Sonnicksen 2015). For the same reason, federalism may affect democracy because accountability for decisions becomes blurred. If responsibilities are separated or shared between territorial levels, governments can shift accountability for policy outcomes to other federal units (‘blame shifting’; Weaver 1986). Due to the complex distribution of responsibilities and the lack of transparency caused by federal settings, voters often do not react to decisions at the level where elections take place but address demands and protest to the authorities of other jurisdictions.
As modern democracies suffer from decreasing legitimacy, loud demands to extend existing and add new channels of participation are being put forward by interest groups, citizens’ initiatives, and single parties. Critics often mistrust any kind of representation and believe that representation in general is a distortion of the people’s will. People do not longer accept the idea that intergovernmental negotiations generate appropriate policy solutions and enhance output legitimacy. They rather insist that the citizens’ expertise has to be consulted, since it seems to be closer to the peoples’ will than the knowledge and expertise provided by specialists, bureaucrats, and politicians. In this view, administrations and governments seem to be more or less detached from the people’s will. Due to the lack of transparency resulting from intergovernmental negotiations and opaque responsibilities, federalism seems to additionally fuel mistrust in representative institutions, even though the access to participatory channels is multiplied in multilevel systems. As a general tendency, many citizens do “not [longer] accept the idea of democracy being reduced to indirect representation” (Simmons 2011, 357) through elected ministers and bureaucrats, but prefer direct democracy, citizens’ initiatives and deliberative or consultation procedures as modes of participation to traditional representation.

Protest and mistrust of citizens against incumbents often escalate when huge infrastructure projects of overall interest are put onto the political agenda. In federal democracies, managing such conflicts encounters serious obstacles. Depending on how responsibilities are distributed among federal jurisdictions, traffic route engineering, energy networks, or pipelines require territorial coordination. As a rule, infrastructure projects not only affect the jurisdiction in which they are taken but also ‘neighboring’ federal units. Often, they are of overall interest but locally and regionally contested. As decisions immediately affect the living environment of people, conflicts typically flare up at local or regional level. When it comes to planning and implementation, citizen participation often generates ‘negative’ distributional conflicts. Then, citizens and lobby groups play the “nimby” (not in my backyard) game by trying to externalize negative effects or even to prevent infrastructure projects. Due to the complex distribution of responsibilities and the lack of transparency caused by federal settings, voters often do not react to decisions at the level where elections take place but address demands and protest to the authorities of other jurisdictions. Representative institutions and incumbents have to cope with this challenge, but are often overstressed by managing contradictory demands. In Germany, numerous ‘forums’, ‘dialogues’, ‘mediation procedures’ as well as law amendments stipulating that citizens are to be involved at an early stage of decision-making were created, but recent cases reveal that conflicts often cannot be settled. In their own interest, many politicians demand more plebiscites in order to involve the public. Different from consultative procedures which require subsequent authoritative decisions to be made by parliaments and governments, politicians as ‘agents’ can
shift responsibility for contested issues back to their principal, i.e. the ‘people’, when it comes to a referendum.

Meanwhile, one can observe that infrastructure planning regularly raises problems of congruity and accountability in federations. Moreover, being confronted with contested projects, party elites and party branches at different territorial levels have to position themselves. Intra-party conflict on infrastructure projects is fueled when party elites at the territorial levels act responsively towards differing or even conflicting citizens’ demands. As a tendency, this weakens the vertical integration of federally organized parties (Riker 1964) and leads to polarized conflicts among various parties at different territorial levels.

This paper takes up these problems by proceeding as follows. In the next section, it is debated how different types of federalism mesh with various participatory channels. The argumentation starts from the assumption that inserting additional channels of participation into representative democracy does not automatically match federalism. Quite the contrary, it appears that the linkage of combined participatory channels to federalism can trigger and intensify distinct institutional tensions and cause unintended dynamics. To illustrate the argument, the analysis focuses on the German case, which is shaped by strong elements of cooperation and joint decision-making, but also resorts to the Swiss experience in order to contrast the German case. In the third section, two case studies investigating current conflicts on German infrastructure projects are presented. The concluding section summarizes the findings and discusses whether and how different modes of participation can suit to manage inter-territorial conflicts.

Federalism and citizen participation – a tense relation?

Today, creating a ‘proper’ mix of various participatory channels enabling citizens to express their demands in the course of the legislative period is often seen as a way out of the legitimation crisis. Some advisors recommend introducing instruments of direct democracy (Gabriel 2015), whereas others prefer to involve citizens’ initiatives and interest groups at an early stage of the policymaking process, thereby adding elements of ‘participatory’, ‘deliberative’ or ‘associative’ democracy (Cohen and Rogers 1995; Hirst and Bader 2005) to representative institutions. By opening federations for more participation, however, institutional designers face complex challenges. Simply adding more participatory channels to a federal system does not automatically make it more democratic but may even reinforce the problems sketched out above: de-parliamentarization, a lack of equality, accountability, transparency, and faulted congruity.
Do various models of federalism make a difference?

Recent studies on civic participation in multilevel democracies revealed that various models of federalism do not equally harmonize with specific participatory channels and their combinations (Kropp 2015a, 2015b). Meanwhile, a bulk of literature on the opportunities and constraints arising from different combinations of participatory channels and representative institutions can be accessed (Gabriel 2015). Up to now, however, research has not systematically investigated how different modes of participation interact and mesh with various models of federalism. Linking combinations of representative institutions and participatory channels to federal institutions probably generates dynamics and tensions between systemic components and triggers effects which are still under-researched. Taking up a basic notion of historical institutionalism, it may happen that inserting additional channels of participation causes ‘layering’ effects (Pierson 2004; Mahoney and Thelen 2009) which lead to an incremental change of path-dependent institutions shaping federations.

The following considerations focus on question how federalism and various modes of participation interact. In doing so, the analysis distinguishes two basic models of federal negotiations. Whereas negotiations in cooperative federalism are basically voluntary, joint decision-making is characterized by obligatory negotiations. The former occurs in interstate (‘dual’) as well as in intrastate federalism, whereas the latter exists mainly in intrastate federations. In dual federalism, relations between federal units are regulated more by the idea of competition and not so much by consensus. The most commonly cited examples of this are the US, Canada, and Switzerland. Competition, however, does not mean that there is no federal cooperation at all. But even if negotiations are more or less institutionalized or legally stipulated, cooperation among federal units remains predominantly voluntary. If governments and bureaucrats do not agree on common policies, parliaments and governments can nevertheless enact laws and regulations on their own. When jurisdictions are clearly separated, it is easier for parliaments to hold their governments accountable. Moreover, by establishing distinct responsibilities, federal units can step into a competition of ideas, aimed at realizing the best possible policy solution (Benz 2012). Solutions can be better tailored to regional needs if subnational incumbents are given leeway to legislate autonomously. By doing so, political elites can react more responsively to citizens’ demands brought forward within ‘new’ channels of participation. It is this flexibility that gives voluntary cooperation an important advantage over joint decision-making. One can rightly argue, however, that voluntary cooperation may have similar effects as joint decision-making, because political pressures often commit actors in a similar strength as legally fixed obligations do (Kropp 2010).

At this point of analysis, it has to be considered that most institutional solutions have a flipside. If subnational incumbents, who are legitimized in regional elections, mainly take up local and
regional interests, they are tempted to embark on populist strategies (Benz 2009: 219). Governments which do not immediately profit from balancing regional inequalities probably refrain from leading negotiations and spending ‘unnecessary’ transaction costs in cases when short-term benefits are barely discernible. Moreover, conflicts on external effects remain unsolved, if subnational governments refuse to compromise in intergovernmental agreements. This problem may come to a head in federal systems where territorial interests are not mediated within vertically organized parties and where the composition of party systems at state level significantly differs from that at federal level.

The second model, which is basically different from inter-state or dual federalism, is shaped by joint decision-making. Albeit commonly subsumed under the term of ‘cooperative federalism’, it differs from that because cooperation among federal units is obligatory (Kropp 2010). The basic idea underlying this model is to enable central planning but to avoid centralization as well as the deficiencies of pure decentralization by incorporating subnational governments into all stages of the federal policymaking process (Scharpf et al. 1976). Principally, joint decision-making systems prove to better suit overcoming congruity problems, as long as diverging policy or party positions are not antagonistic and can be reconciled. In order to prevent ‘solutions by chance’, obligatory negotiations are legally or even constitutionally stipulated. By playing ‘iterated games’, actors are expected to take the other federal units’ preferences and the various perspectives on a problem into consideration. Within systems of joint decision-making, there is a higher probability that political actors bear all-federal concerns in mind when trying to achieve ‘satisficing’ policy solutions for the particular federal unit. It is therefore expected that in such settings incumbents mostly refrain from pursuing hard populism.

As with voluntary negotiations, joint decision-making has some negative sides. Qualified majority requirements implicate that decisions can only be made if most federal units agree on a solution. A blocking minority or even a single federal entity can blackmail the others in such institutional settings. This also impacts the scope of policy-making: as a rule, abrupt policy changes or large-scale reforms are unlikely; instead, incremental step-by-step solutions are preferred (Scharpf et al. 1976: 58). Accountability becomes blurred because political elites can point to unavoidable concessions they have to make in intergovernmental negotiations. By emphasizing overall needs, they may find it easier to fend off demands brought forward by citizens and lobby groups. This constellation, however, strikingly contradicts the idea of responsiveness. Vice versa, if elites act responsive to such demands, overall solutions can be doomed to failure. If a compromise fails, federal entities willing to change the status quo are not empowered to realize their own policy agenda. This, again, impairs a basic idea underlying federalism, i.e. the competition for the best possible policy solutions (Benz 2012). Moreover, joint decision-making enhances de-parliamentarization, because parliaments
(which are dominated by the governing majority usually supporting its government) usually
do not question package deals negotiated by the government in the intergovernmental arena.

Table 1: Problems of voluntary and mandatory federal cooperation

<table>
<thead>
<tr>
<th>General problem</th>
<th>Definition</th>
<th>Voluntary cooperation</th>
<th>Joint decision-making</th>
</tr>
</thead>
<tbody>
<tr>
<td>De-parliamentarization</td>
<td>Negotiations are prepared by administrations and coordinated by and through the governments; parliaments face difficulty to scrutinize executive powers and co-govern</td>
<td>Governments can exit negotiations ⇒ parliaments have a say and can better control the government</td>
<td>Parliaments face difficulty to untie package deals; cannot decide on the issue after a decision has failed</td>
</tr>
<tr>
<td>Congruity</td>
<td>Jurisdictions taking a decision differ from that affected by a decision ⇒ external effects</td>
<td>Coordination ensuring that problems intersecting jurisdictions is basically voluntary ⇒ populism?</td>
<td>Can better solve such problems, at least as a tendency, because negotiations and cooperation are rehearsed</td>
</tr>
<tr>
<td>Transparency</td>
<td>Intergovernmental and inter-administrative negotiations often lack transparency</td>
<td>Responsibilities are more clearly separated</td>
<td>As jurisdictions are not clearly separated, responsibilities are blurred</td>
</tr>
<tr>
<td>Accountability</td>
<td>Voters have difficulty to address demands to authorities responsible for a decision</td>
<td>Jurisdictions are separated; clear responsibilities; voters can address demands to one jurisdiction ⇒ responsiveness, populism?</td>
<td>Joint decisions obscure responsibilities; blame shifting</td>
</tr>
<tr>
<td>Equality</td>
<td>Disproportional representation</td>
<td>No specific effect</td>
<td>No specific effect</td>
</tr>
</tbody>
</table>

Mixes of participation and their compatibility with German federalism

Table 1 reveals that both types of negotiations generate specific problems affecting the
democratic quality of a given federal system. But can more participation balance the outlined
deficits? This study argues that participatory channels and their specific mixes do not equally
match the different federal models. At this stage of analysis, a glance at the Swiss model
which has often served as a benchmark for other democracies helps to further develop the
argument. The Swiss experience is shaped by a unique mix of interrelated participatory
channels. It was not deliberately manufactured on the drawing board by institutional designers
but has developed over centuries, now providing a set of well synchronized institutional
components (Vatter 2014). The Swiss multilingual federation is shaped by dual, multilingual
federalism, close links of direct democracy, consociationalism, a markedly decentralized
party system, and strong elements of ‘associative democracy’ which are transferred by
consultation procedures (‘Vernehmlassung’; Sägesser 2004). Plebiscites are conducted within
the framework of dual federalism; there, congruity problems can be better avoided than in
interlocked systems. The Swiss model of direct democracy comes along with intergovernmental agreements that are based on voluntary negotiations between the territorial
units. This gives each canton the opportunity to ‘opt out’ and make decisions corresponding to the regional electorate’s will (Pállinger 2015). The cantons’ right to deviate from intergovernmental agreements closely corresponds with the primacy of direct democracy, since the people in the cantons—as the ultimate sovereign—must have the last say within their exclusive jurisdiction. If they decide not to agree, cooperative agreements (Konkordate) may cover just a certain number of cantons (Ambühl & Hardmeier 2009). Nonetheless, elements of joint decision-making were recently debated by the Swiss academia as a possible solution for coordination problems. However, they do not reconcile with the prerogatives of decentralization and participation and have consequently remained part of an all-academic debate.

As all participatory channels are closely interrelated, they form a coherent set of institutions. Historically, the widespread elements of direct democracy not only entailed the development of the ‘magic formula’, a rule which means that the most relevant parties are coopted into government in order to avoid people’s legislation initiated by the opposition (Pállinger 2015), but also promoted extensive consultation procedures which take place at an early stage of the decision-making process. By deliberating bills with lobby groups and associations which could be able to veto, governments try to take the wind out of the opposition’s sails and avoid citizens’ or interest groups resistance during implementation.

In general, direct democracy tends to thwart supra-national integration and better harmonizes with non-Europeanized dual federalism. Not coincidentally, Switzerland is not a member of the EU. If policy issues were decided in Brussels, they could no longer be a matter of people’s legislation but must be implemented through the national and regional administrations. Rightly, limited compatibility of joint decision-making with the Swiss ‘referendum democracy’ is emphasized as one (besides other) basic argument suggesting not joining the EU in the future.

Although the Swiss institutional setting is unique, it has often served as a yardstick suggesting how to improve the democratic quality of the German federation. Drawing on the Swiss case, several bills were introduced into the German Bundestag in order to add people’s legislation to the German ‘super-representative’ system, but have not yet gained a two-thirds majority.¹ Meanwhile, however, people’s legislation is broadly established at

¹ See draft law brought in on 21 March 2002 by the parliamentary party groups of the Green Party and the SPD (BT-Drs. 14/8503). The draft was not supported by a two-thirds majority, which is necessary to change the constitution (see BT-Drs. 14/14240, at 24032ff). See also another draft law brought in by the Left Party on 12 November 2010 (Drs. 17/1199). As a party in opposition, the Social Democrats drafted another bill in June 2013 which, however, did not become part of the coalition treaty concluded by the CDU/CSU and the SPD in December 2013, see BT-Drs. 17/13873; for further discussion in the SPD see SPD-Parteivorstand, Mehr Demokratie leben (21 March 2011) Berlin, available at http://www spd.de/21576/20111204_beschluss demokratie.html.Überlegungen.
the state and the local levels (Eder et al. 2009), offering additional veto points for organized interests and citizens’ initiatives. Comparing the strength of direct democracy in 36 western democracies (Walter-Rogg 2008), it soon becomes evident that Germany has meanwhile gained one of the top positions, even though referenda and people’s legislation are not yet implemented on the federal level.

Principally, plebiscites need to respect the congruity principle. Ideally, direct democracy refers to issues within the federal jurisdiction which is legally responsible for the issue under consideration. A basic argument of this paper is that the ‘fit’ between people’s legislation and federalism depends on which type of negotiations—voluntary or obligatory—is established in the (sub-)policy under consideration. Peoples’ legislation, which is broadly discussed in Germany as a means to improve input legitimacy, can collide with obligatory joint decision-making as is typical for German interlocked federalism, because it may become unclear who the responsible electorate actually is. People’s legislation at local or regional level therefore proves difficult in encroaching upon issues which are under joint jurisdiction of the federation and the German states (Länder). The Europeanisation of the German federal system further strengthened its territorial and administrative interlocking (Kropp 2010); as a result, decision-makers have to consider interwoven multilevel responsibilities in nearly every policy. This necessity often collides with the citizens’ expectations, because they often do not consider the complex multilevel architecture. Not coincidentally, advocates of direct democracy criticizing the ‘lack of democracy’ typical for representative institutions aim at further disentangling federalism, often without reflecting that this would lead to more diversity and less equal living conditions, an idea, however, which is widely supported and underpins the model of German unitary federalism. Undoubtedly, plebiscites can help to pacify existing conflicts among social groups and strengthen the overall belief in the political system’s legitimacy (Merkel 2010), but also evokes congruity and accountability problems in Germany’s Europeanized, intertwined federalism.

As a remedy, an extensive involvement of associations and citizens’ initiatives into policymaking has been debated. Governments and administrations pursue two interrelated goals by creating additional such arenas for citizens’ participation. On the one hand, citizens provide information on local problems, additional expertise, and legitimacy. On the other hand, by involving groups and individuals, decision-makers have better chances to avoid protests and administrative proceedings delaying implementation. In Germany, laws and regulations stipulate that citizens and interest groups are to be heard during the parliamentary process. This, however, implies that the agenda is already set when citizens come into play. Experts therefore suggested that citizens should be involved into infrastructure planning before the first draft is launched (Birk 2011; Schink 2011). They argue that the citizens’ engrained mistrust against politics and administration can be appeased only if the public
participates in planning already at a nascent stage of the policymaking process. The recent federal law on administrative procedures corresponds to these demands; the German Länder established corresponding state laws until the end of 2014. As a result, the federation and the states provide similar and far-reaching procedures taking the associations and the citizens’ initiatives’ requests into account. It was believed that legislators willing to revise or even to dismiss projects as a result of deliberations can considerably increase their credibility. Consultative and deliberative procedures, however, may trigger similar congruity problems as referenda and people’s legislation do; for example when citizens try to foreclose infrastructure projects at local or regional levels relevant for the whole federation. In general, parliaments (or citizens in plebiscites) should have the last say, as MPs are elected in general and free elections and thus possess a higher legitimacy than representatives of interest groups and initiatives. Considering that, consultative and deliberative procedures prove as additional participatory channels but cannot substitute representative democracy. However, they may even be of small value or even counterproductive if citizens have the feeling that their expertise and demands opinions are heard by governments, administrations, and parliaments, but remain unconsidered in the end.

Associative and deliberative modes of participation cannot only be exercised at all levels of a federation, but also matches both basic types of federal cooperation as sketched out above. Governments and parliaments can make use of the associations’ resources, such as legitimacy and expertise, in voluntary as well as in obligatory negotiations. Self-evidently, its real functioning depends on how institutions are shaped in detail as well as how the specific configuration of the civil society group system is structured (Immergut 1992: 482). A glance at the Swiss democracy, however, reveals that associative democracy seems to unfold its full potential when direct democracy is used as leverage. In this case, incumbents have to take into account that well organized lobby groups oppose a project when an obligatory referendum is fixed or when they can mobilize for people’s legislation.

Parties offer channels for citizens’ participation as well, even though the number of members dropped down considerably during the last years (Niedermayer 2014). How parties are organized is utmost important for the functioning of federal systems (Detterbeck 2012; Riker 1964). Different from interstate federations, such as Switzerland, the US, or Canada, which are shaped by regionalized party systems, Germany features a vertically integrated party system leading to federal negotiations running through the multilevel party channels. Parties link the territorial levels to each other and thus balance different regional positions and reduce party polarization. This integrative function becomes visible during the minister conferences,

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2 See the German federal law on administrative procedures, § 25, available at http://www.gesetze-im-internet.de/vwvfg/.
for instance, where the state ministers meet within their party camps in order to fix a common party position before all state ministers meet (Hegele & Behnke 2013). Often, it is possible to mediate federal conflicts within these channels. In German post-war history, vertical party integration has contributed to avoid blockades despite the strong veto rights state governments composed of parties in opposition at federal level can exert in the German Bundesrat. Since the 1990s, however, the emergence of new parties at state level promoted a multi-colored coalition landscape and thus loosened the meaning of vertical party ties. Moreover, due to the economic asymmetries which have not considerably diminished after reunification, minister presidents and their parties more strongly prefer regional over federal policy positions.

Principally, ‘new’ modes of participation can further reinforce vertical disintegration. Different from federally organized parties, groups and initiatives face difficulty to negotiate federal conflicts within their organization in order to avoid or balance inter-territorial conflicts, the more so if their purpose is to promote specific local and regional interests. Consequently, there is reason to assume that strengthening the participation of associations in inter-territorial infrastructure planning can strengthen the regionalization of German parties. Subnational party leaders acting as vote seekers are legitimated in regional elections and thus need to respond to local and territorial demands. However, which effect the regionalization of parties probably has in joint decision-making systems still has to be investigated in detail. On the one side, if majorities are not based on clear party majorities, negotiations become more erratic and need to take cross-cutting interests into account. On the other side, blockades between the party camps become less likely. It can be argued that interlocked federations have more institutionalized capacities to mediate conflicts than dual federations, because consensus-making and iterative negotiations are rehearsed.

**Empirical evidence: case studies on German infrastructure planning**

*“Stuttgart 21”*

The case ‘Stuttgart 21’ illustrates some of the basic conflicts outlined above. It is strongly characterized by elements of voluntary federal cooperation, which, though, are supplemented with some modes of joint decision-making and public-private treaties. During the decision-making which had presumably taken place in the parliamentary arena at the beginning, a referendum and a mediation procedure were conducted.

‘Stuttgart 21’ is part of a huge infrastructure project which is designed to develop the railway route between Stuttgart and Ulm as a segment of the European railway Paris – Bratislava for the high-speed railway traffic. The planning also aimed at improving the transport connection to the Stuttgart airport and the trade fair. One core element of the highly contested plan is the
reconstruction of the main station in Stuttgart, which was a terminus but is now laid underground as a through station in order to make more than 100 square hectares land ready for building in the city center. From the beginning, the project was of high local, state, federal, and European interest.

The project is financed by various semi-private and public investors and thus reflects the structures of German cooperative federalism which commonly implies patchwork financing. It is secured by financing treaties (from April 2, 2009) involving the state Baden-Württemberg (BW), the city of Stuttgart, the Stuttgart region, the airport, and the various companies incorporated into the German railway company (DB AG) which is privatized but still in the property of the federation. According to the original financing plans, the DB AG takes over costs of about 1.3 billion Euro, the airport of about 107.8 million, the federation of about 1 billion, and the state BW more than 1 billion Euro (with 780 million Euro as a subsidy to the DB AG which cannot be paid back). In order to secure reliability, the treaties exclude any regular cancellation.

Already before the protests flamed up, the project was broadly discussed in the media and the public. Undoubtedly, actors and institutions complied with all democratic rules and approval regulations. The state parliament of BW debated the project in numerous sessions and agreed to it with a broad majority of the CDU, FDP/DVP and SPD parliamentary groups, comprising 110 out of 132 votes on July 25, 2007. The city parliament of Stuttgart discussed the project in more than 170 sessions. It rejected a motion for a referendum which was supported by 61000 signers on December 20, 2007; the administrative court confirmed that the motion was an improper action because it was not congruent with local responsibilities. The Green party and their parliamentary groups at local, state, and federal level opposed the project from the beginning. A motion of their party group in the German Bundestag aiming at stopping the construction work was rejected by a broad majority.

After the start of construction, the protest against ‘Stuttgart 21’ gained additional momentum (see Rucht et al. 2010). Since autumn 2009, routine demonstrations have taken place. The conflicts escalated after a hard and utmost contested police operation had led to several injured persons. A study interviewing the protesters indicated that about 60 % had voted for the Green party in the recent elections to the state parliament; about 80 % wanted to vote for the Greens in 2010 (Rucht et al. 2010: 6). Even though the empirical sample was not representative, it revealed that the driving forces behind the protest were not ‘the people’ but mainly followers of the Green Party, which rejected the plan from the beginning. In order to settle the conflicts, the CDU/DVP-FDP state government, the DB AG, and the various groups

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3 LT.Drs. 14/1583; LT-Drs. 14/4438.
4 BT-Drs. 17/125 and 17/268.
and initiatives opposing the project finally agreed on a mediation managed by Heiner Geißler, the former general secretary of the CDU and member of the anti-globalization movement Attac. In order to enhance transparency, experts were heard and all negotiations were broadcasted live in TV during October and November, 2010. The mediation resulted in an ‘arbitral verdict’ which proposed some changes of the project and a simulation of the railway traffic in the planned through station. The state government had agreed on accepting the verdict before; polls showed that its recommendations were supported by the followers of SPD, CDU/CSU and the FDP, whereas those of the Green party remained ambiguous.\(^5\)

The project ‘Stuttgart 21’ combines elements of voluntary cooperation between federal units with single components of joint decision-making, joining them to a rather complex financial construction. Principally, the federal railroads are in the exclusive federal jurisdiction (art. 73,6, Basic Constitution).\(^6\) However, ‘Stuttgart 21’ is also a project of the DB AG pursuing its own economic interest. Different from the railroad Wendlingen – Ulm, ‘Stuttgart 21’ is not part of the federal planning (Bedarfsplan des Bundes). BW, for its part, pays its share in project voluntarily, even though its co-financing is secured by a public-law contract. Consequently, the state does not implement federal law in this specific case. This means that ‘Stuttgart 21’ is not primarily an issue of joint decision-making. The project is rather shaped by elements of voluntary cooperation, but its results are fixed in a contract which is legally binding. The state Baden-Württemberg gives voluntary subsidies to the financial contract\(^7\) with the German railway company. In addition, however, some instruments of joint decision-making are used for financing, i.e. the ‘law on financing local traffic’, which is a joint task of the federation and the German states.\(^8\) It was a legally controversial question if the state BW could exit the contract despite it forbids cancellation.

In order to gain back legitimacy for the project, the SPD parliamentary group which was still in opposition in the state parliament of BW tried to initiate a referendum which, however, required an intricate procedure. The constitution does not allow for people’s legislation. Consequently, the SPD party group requested the state government to introduce a bill on the

\(^7\) The contract which was concluded by different state and several quasi-private actors was object of conflicting legal interpretations. For an overview, see Kropp 2011.
\(^8\) The law will expire in 2019.
project which then had to be declined by the parliamentary majority (which usually supports the government) in order to come to a referendum. This regulation which is fixed in the state constitution of BW (art. 60,3) obviously refers to the idea of ‘old’ dualism between the government and parliament which, however, does not reflect that the governing majority and opposition typically build patterns of ‘new’ dualism in most parliamentary systems. By reinterpreting the constitution, a legal opinion commissioned by the SPD tried to create the preconditions for fixing a state-wide referendum on the project (see Kropp 2011). The SPD insisted that parliamentary-representative institutions could no longer generate the legitimacy necessary to conduct the construction of ‘Stuttgart 21’. With this argumentation, the party kept the doors open for a coalition with the Green party which was pursued for the new legislative period beginning in 2011. The incumbent CDU/FDP coalition, however, rejected a referendum at the moment in time. Moreover, it would have been difficult to give plausible reasons why the majority groups in parliament should decline a bill of their own government without being at odds with the project. Even the SPD which supported the idea of a referendum did not oppose ‘Stuttgart 21’. It finally remained unclear how the state constitution was to be interpreted (Kropp 2011).

The elections to the state parliament which took place on March 26, 2011, led to a change of government. Due to the nuclear disaster in Fukushima the Green party gained even more votes than the SPD and the first green-red coalition in Germany’s history was built. Neither the Green party nor the SPD opposed the idea of a referendum. Constitutional concerns against holding the referendum could be clarified, because the Green party further argued against the project, whereas the SPD supported ‘Stuttgart 21’. Now, real conflicts within the governing majority existed. Besides the chance to develop the city and the disadvantages of keeping a deficient railway infrastructure, the supporting parties pointed to the loss of about 1,4 billion Euro for the Land should BW abrogate the financial treaties. The opponents, for their part, emphasized the ecological and geological dangers as well as a deficient planning and consequently opted for alternative planning. The referendum which was held on November 27, 2011, brought an unexpectedly unanimous result. 58,8 % of the voters were against BW’s exit. With 48,3 %, the voter turnout was relatively high. Shortly after the result was announced, however, the same conflicts came to the fore, even though the majorities had become transparent. The hard adversaries were not willing to accept the majority vote, but continuously lost support. The Green party put into question whether BW should share in the cost increase which soon exceeded the financial framework of 4,5 billion Euro. Although a core of protesters keeps on demonstrating each Monday, the basic conflict about ‘Stuttgart 21’ could partly be eased after the referendum. The Green party which is in government and heads the ministry of traffic has to implement the decision.
Even though the infrastructure project involved just a few components of joint decision-making, it vividly demonstrates that plebiscites can generate *congruity* problems in federations. The referendum might have rendered the whole project which is of nationwide (and even European) importance impossible—not legally, but as a matter of *political* fact. Legally, it was held on state level and thus only aimed at revoking the ‘voluntary’ financial contribution to the project provided by Baden-Württemberg but could not annul the whole contract. Politically, it was common sense that the project would have failed if the state electorate had not accepted the vote. The German federal and state constitutions do not provide clear and reasonable rules and regulations clarifying how to establish *accountability* for decisions made by one jurisdiction but encroaching on other jurisdictions. This problem is especially inherent in systems of joint decision-making and will more often occur should the number of plebiscites increase in the future.

In addition, ‘Stuttgart 21’ reveals that false sequencing can enhance *de-parliamentarization*. This is not to say that plebiscites and representative democracy are generally incompatible. Research has unanimously refrained from this opinion. In terms of democracy, there are no convincing arguments justifying a clear hierarchy of parliaments over direct democracy. Moreover, the referendum made the majority opinion on this topic *transparent*. In the case under consideration, the referendum helped to partially pacify a conflict which could otherwise not have been settled. Critics, however, may argue that this single plebiscite at *state* level overturned numerous hearings and debates of the parliaments at *all* territorial levels and thus questioned legitimate decisions. Indeed, it would have raised basic questions and democratic concerns if the vote of the citizens in BW had been in conflict with parliamentary decisions that had created unanimous majorities. An additional problem is that the mediation was set off *after* parliaments at the local, state and federal levels had made their decisions. Advocates of the mediation regarded this as an adequate means to correct the decisions taken at *all* territorial levels, but they lack the legitimacy to do so. Mediation and consultations of associations and citizens’ initiatives need to be conducted *before* parliamentary decisions are made. In the scheme of associative democracy, representative institutions shape the background conditions for the functioning of group representation. Consequently, they are entitled to overturn policy solutions suggested by deliberative and associative bodies. This concern applies particularly to federal systems, because governments and administrations require leeway to cope with territorial spillovers and to agree upon package deals. To conclude, the case reveals that timing and sequencing were not properly conducted due to an *ad hoc* crisis management, but both factors are of utmost importance when various participatory channels are combined.
After the worst case scenario had become reality in Fukushima in March, 2011, the German federal government (CDU/CSU/FDP) which had reversed the former phase out and extended the run-time of the German nuclear plants in 2010, changed its mind and decided to enforce a gradual nuclear phase out until 2022. Still, it is mainly Bavaria and Baden-Württemberg which depend on nuclear energy (up to 60%) and are most affected by the exit. Nevertheless, under the impression of the nuclear disaster, both governments supported the plans for phasing out. The Bavarian minister-president, Horst Seehofer, was even one the first prominent incumbent of the CDU/CSU who demanded exiting nuclear power. The disaster in Fukushima also impacted the state elections in Baden-Württemberg in March 2011, where the first green-red coalition headed by a green minister-president, Winfried Kretschmann, in Germany’s history was formed. In order to manage the energy transition and to compensate the power demand, the federal government enforced its planning to construct 2800 kilometers power supply lines transporting energy from the North, where wind energy is produced, to the South of Germany, where energy is required. For construction, 70 meters high maximum voltage wires (‘power highways’) have to be built which will run through more or less populated areas. Since the plans have been published, they caused extensive protests, as property which is located near the supply lines depreciates, landscape is misshaped, and citizens fear health damages.

Different from ‘Stuttgart 21’, this case is presumably framed by elements of joint decision-making. In 2012, the German Länder transferred responsibilities for the planning of power highways to the federal level in order to enable inter-regional planning and avoid time delays caused by voluntary coordination. Faced with the deadline of 2022, the federal and state governments agreed that the process was to be speeded up. It was feared that the state governments and administrations would be too close to the municipalities’ and citizens’ concerns to resist populism and localism questioning the whole project. The German Länder had to agree to the bill in the Bundesrat. The federal government delegated the planning approval to the Federal Network Agency (Bundesnetzagentur), which stipulates the details and is responsible for planning and licensing of cross-regional power highways. The networks are owned by four big energy companies, i.e. RWE, EnBW, Vattenfall, and e.on. E.on, for its part, sold 10700 km of its network to Tennet in 2010, which is a Dutch holding, in order to avoid a suit of the EU commission which claimed that EU competition law had to be respected. Since then, Tennet has had difficulty to find partners for financing offshore-connections in the North Sea. Wires can principally be tracked underground, but companies

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9 As the process is not yet finished, the case study still provides preliminary results. It summarizes information taken from a media analysis.
try to avoid this solution, because it dramatically increases costs. In order to generate trust in the process and prevent protest, a corresponding law passed by the Bundestag, for instance, stipulates that underground cabling is necessary in cases the power highway is less than 400 meters away from residential areas. However, even such decisions did not prevent numerous protests since then. Meanwhile, the planning is no longer in time and scenarios predicting delays or even blackouts are already made.

From the beginning, the states which are immediately affected by the power highways organized citizens’ forums and ‘dialogues’ in order to involve citizens and groups at an early stage of the decision-making and to avoid administrative proceedings. As a reaction to ‘Stuttgart 21’, it seems to be common sense today that participation is necessary before the agenda is set. Since 2015, the federal ministry of economics and energy has promoted the initiative ‘citizens’ dialogue on power supply lines’ which organizes meetings in communities immediately affected by the planning. Thereby, the project focuses on the so-called ‘hotspots’, where offices are established for informing the public and taking up citizens’ ideas and concerns. Besides, for developing the network expansion planning, consultations organized by the companies and the Federal Network Agency are required. Comments, opinions and proposals for alternative routing can also be handed in electronically. The first conference held in May, 2015, revealed that ‘the citizens’ do rarely participate; it was the well established interest groups and initiatives which took part in the meeting. The consultations brought a basic discrepancy to the fore: whereas the federal government tries to increase acceptance for the project, initiatives aim at preventing the planning.

The Bavarian strategy seems to be especially instructive to outline the basic problems emerging when federations have to manage citizen participation in infrastructure projects of overall interest. Two major tracks running through Bavaria were planned in order to meet its energy demand. Even though Seehofer had voted for the federal network expansion plan in the German Bundesrat in 2013, he changed his position when feeling that the citizens’ protests against the power highways might diminish the voters’ support of the CSU in the upcoming local elections. In November 2014, the Bavarian government established an ‘energy dialogue’ with four working groups in which the usual pattern became visible: citizens and local initiatives want to prevent the power highways in their own backyards, whereas the industrial associations stressed the need to secure energy supplies. In order to take up the concerns, the Federal Network Agency had reassessed the project once again, but finally reconfirmed that the tracks are necessary. As a compromise, the Bavarian minister of economy, Ilse Aigner, announced that Bavaria would accept one instead of two tracks but demanded a gas-fired power plant instead, which was to be subsidized by the federal budget.

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10 Gesetz zum Ausbau von Energieleitungen (Energieleitungsausbaugesetz - EnLAG), BGBl. I S. 2870.
However, her plans were thwarted by Seehofer himself, who did not support her give-and-take but aimed at negotiating directly with chancellor Merkel (CDU) and the federal minister of economy and energy, Sigmar Gabriel (SPD), in order to avoid any track running predominantly through Bavaria. 14 out of 16 Länder clearly opposed these plans, pointing to the additional costs and existing law. They rejected any Bavarian privileges at the cost of the other states, as they all have to resolve the same conflicts with citizens’ protests and decreasing voters’ support. The black-green government of Hesse, which had backed off at the beginning, finally distanced itself from Seehofer after he had presented a draft which designed a track through Hesse that turns to Bavaria just in the last few kilometers. Even the CDU minister-president, Volker Bouffier, heavily criticized his party colleague for trying to externalize negative effects and at the same time internalize the benefits of the planning. This attempt vividly illustrates freeriding strategies which often occur in federations (Bednar 2005). Up to now, the conflict has remained unresolved.

Similar to ‘Stuttgart 21’, the case study reveals typical patterns of federal conflict. In the given case, the Bavarian government used consultative and deliberative channels of participation in order to pressurize the federal government and the entirety of the states. Citizen participation worked as a leverage to untie former package deals on which the Bavarian government had explicitly agreed. The minister-president did not stick to its former position but, as a typical vote-seeker, presented himself as behaving responsibly to the demands and concerns of the citizens. By doing so, he was consequently blamed for populism. This stance obviously generates congruity problems, because it affects the planning and implementation of a nationwide project and tries to externalize negative effects at the cost of other states. The case also highlights that even joint decision-making which had involved the Bavarian government from the beginning cannot avoid the mentioned problems, if actors do not comply with the decisions made by Bundestag and Bundesrat but change their ‘principal arena’ during the planning (Tsebelis 1992). In this case, serious problems of deparlamentarization have not occurred up to now, since the ‘forums’ and ‘dialogues’ were established before the final route of the power highways will be finally fixed. However, local forums show a strong tendency to play the ‘nimby’ game. Meanwhile, they tend to question the timely implementation of the federal law stipulating that the energy transition has to be finished until the end of the nuclear phase out in 2022.

The case also impacts the vertical integration of the CDU/CSU. CDU and CSU form a common party group within the German Bundestag. According to its standing orders, the CSU disposes of an absolute veto, since no party can overrule the other when it comes to
basic decisions. As a consequence, the principle of equality is questioned. Bavaria is not only represented in the Bundesrat through its government, but also enjoys privileged representation in the Bundestag, as long as the CSU is party in government. First and foremost, this is not an effect of the federal system, but rather illustrates that a regional party which is incorporated into an all-federal party, such as the Bavarian CSU, tends to claim overrepresentation and exclusive rights. It still has to be analyzed how the other regional branches of the CDU (and the other parties) which do enjoy similar privileges will position themselves in the ongoing process.

Table 2: Participation on infrastructure projects in the German federation

<table>
<thead>
<tr>
<th>'Stuttgart 21'</th>
<th>Power supply lines</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congruity</td>
<td>Congruity</td>
</tr>
<tr>
<td>Referendum at state level might have rendered a project of nationwide importance impossible.</td>
<td>Subnational government aims at externalizing costs and, at the same time, at internalizing benefits of a nationwide project; avoids compliance; consultation procedures as justification and means for pressurizing other federal jurisdictions.</td>
</tr>
<tr>
<td>Accountability</td>
<td>Accountability</td>
</tr>
<tr>
<td>Not significant in the given case, because there was no diverge in substance between referendum at state level and parliamentary decisions made at all territorial levels. Other results of the referendum, however, could have caused problems.</td>
<td>System of joint decision-making with joint responsibility of federal jurisdictions. Blame shifting; attempts to shift responsibility from the subnational to the federal level during the planning; populism and localism</td>
</tr>
<tr>
<td>De-parliamentarization</td>
<td>De-parliamentarization</td>
</tr>
<tr>
<td>If referendum at state level had come to a different decision, it would have overruled parliamentary decisions at all territorial levels. The mediation was set off after parliamentary decisions were made, but representatives of groups and initiatives have not gained similar legitimacy.</td>
<td>No effect</td>
</tr>
<tr>
<td>Equality</td>
<td>Equality</td>
</tr>
<tr>
<td>No effect</td>
<td>Disproportionate weight of Bavarian positions due to standing order of parliamentary group; special rights of regional party (CSU) within the federalized CDU</td>
</tr>
<tr>
<td>Vertical integration of party organization</td>
<td>Vertical disintegration of party organization</td>
</tr>
<tr>
<td>No effect</td>
<td>Conflicts between CSU and CDU may contribute to loosening the vertical integration of the party; affect federal consensus-building</td>
</tr>
</tbody>
</table>

**Conclusion**

The intent of this paper has been to illustrate basic institutional tensions arising from citizen participation in federal democracies. Infrastructure planning which typically creates inter-territorial conflicts can be consulted as an especially instructive example, because it uncovers

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11 Vereinbarung über die Fortführung der Fraktionsgemeinschaft zwischen CDU und CSU für die 18. Wahlperiode des Deutschen Bundestages.
specific problems inherent in federal settings. The analysis predominantly focused on the German case, which is strongly shaped by cooperative federalism and joint decision-making. Looking at two infrastructure projects featuring two ideal-types of federal negotiations, it was observed how different participatory channels were added to the prevailing representative institutions and how they affect federalism. Consultative and deliberative procedures were used in order to involve citizens’ initiatives and interest groups into policymaking in both cases; in addition, a referendum was conducted in the case of ‘Stuttgart 21’ in order to resolve a conflict on a huge infrastructure project which otherwise could not have been terminated.

Both case studies reveal that timing and sequencing are most relevant factors when additional participatory channels are added to the already existing representative institutions. It can be resumed that in order to avoid a loss of legitimacy, consultative procedures involving citizens and associations should be established at an early stage of decision-making, i.e. before parliaments make their decisions. The same applies when citizens vote for or against a specific policy option in a referendum. Considering the Swiss case, there is reason to argue that there is a tight relation between direct democracy and consultative procedures. Incumbents show strong interest to involve associations and citizens’ initiatives which can exert veto power in order to avoid defeats in the vote.

At the outset of this study, it was argued that referenda better suit voluntary cooperation, whereas deliberative and consultative procedures match voluntary negotiations as well as obligatory joint decision-making. However, the case studies reveal that some theoretical considerations are debatable and need contextualization and further elaboration. Principally, federal systems of joint decision-making can easily be opened for consultation and deliberative procedures. But when it comes to inter-jurisdictional infrastructure planning of overall interest, additional access for initiatives and associations to policy-making promotes localism at the cost of all-federal planning. Subnational and local politicians are tempted to take up such demands and, by addressing accountability to other jurisdictions (‘blame shifting’), pursue populist strategies at the cost of federal consensus. Meanwhile, some observes conclude that the German federation does no longer have a participation problem, but faces a serious implementation problem due to extensive participation.\(^{12}\)

Moreover, the case of power supply lines suggests that local and regional initiatives and associations which oppose infrastructure planning may loosen the vertical integration of federally organized parties. ‘New’ modes of participation tend to further regionalize the party system, because subnational party leaders who are legitimated in regional elections need to

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respond to local and territorial demands. In interlocked federations, this can result in conflict-laden negotiations, as the ongoing debate on energy networks reveals, but, basically, can also break up polarized conflicts between the party camps.

Voluntary cooperation enables federal units exiting negotiations, if authorities feel that compromises and package deals do not meet the expectations of their electorate. Consequently, it was argued that systems which are predominantly shaped by dual federalism and a clear separation of responsibilities better match a mix of referenda and consultative/deliberative procedures than arenas shaped by joint decision-making. In systems of voluntary federal cooperation, is easier for citizens to hold their governments and parliamentary responsible. However, infrastructure planning not only makes high demands on federal coordination but can also lead to congruity and accountability problems, as the case ‘Stuttgart 21’ reveals. If the majority of the electorate had refused the project in this referendum, it would have been impossible for the railway company, the federal government and other federal units to further conduct the planning for political reasons. A failure, however, would have affected a project of nationwide relevance. It had probably caused debates pointing to the problem of de-parliamentarization, because a referendum held at state level would have overridden unanimous parliamentary decisions taken at all territorial levels as a matter of fact.

To conclude, this paper suggests that institutional designers and researchers should not exclusively focus on the advantages and disadvantages of citizen participation and its contribution to improving input democracy, but also take its complex impact on the federal system into consideration. Picking just one institutional element and inserting it into a different setting can lead to unintended effects. Tensions arising from citizen participation can cause ‘layering’ effects (Mahoney and Thelen 2009; Pierson 2004), meaning that new institutional components trigger dynamics and lead to a change of the federal setting. Future results of comparative fieldwork will provide the opportunity to give thought to these theoretical and empirical implications.

References


