



IT challenges federalism

Recent constitutional law amendments in Germany

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1 Introduction (1/2)

German Federal Diet decision in mid-2009 dealing with “**improving trust, security and data protection** in E-Government and E-Business”

main relevant initiatives during the **16th Diet** (2005 – 2009):

- Federal E-Government program 2.0
- electronic personal identification document
- De-Mail project
- institutionalisation of cooperation between Federation (“Bund”) and States (“Länder”) in information technology area realized by inserting a new art. 91c into Basic Law (“Grundgesetz”)

first success → introduction of a single telephone number (115) for all German administrations

- but how to link that project with the transformation of the “services directive” (2006/123/EC) into national law?
- State of Schleswig-Holstein a first mover on the road to “good (E-)governance”?

1 Introduction (2/2)

E-Government strategy based on **three pillars**:

- technical and procedural standardisation
- innovation by cooperation (between different administrative levels and bodies)
- Federal/State (or “public”) responsibility for infrastructures

enacting specific E-Government laws aimed at simplifying processes for electronic procedures in and between administrations (“**back office**”) as well as creating stable legal and organisational framework for enterprises in order to enable them to develop more efficient IT solutions also for “**front office**” applications

in the long run, further progress from “web 2.0” to “government 2.0” ?

2 E-Government in current German law and politics (1/3)

E-Government – i.e. better government and administration by using IT effectively and efficiently → destined to create advantages for all persons concerned:

- **public sector** to save costs (for the taxpayers)
 - **citizens** and **enterprises** to get swifter access to administration and their applications to be dealt with faster
- = “win–win“ situation

offering electronic (public) services in the public interest to be extended step by step:

- **starting** with more (official) “**information**” for citizens or a greater public
- **next level** being enabling “**communication**” in both ways, i.e. from administration towards citizens (customers) as well as in opposite direction
- **third level** if administration at the end of reciprocal communication process takes and electronically delivers final decisions to persons concerned (“**transaction**”)
- **fourth and last**, each interested citizen actively taking part in the whole (governmental) decision-making process (**e-participation**)

2 E-Government in current German law and politics (2/3)

recent examples of improving and “modernizing” politics by using IT:

- in summer 2009, government of **Saxony** publishing strategy for E-Government focussing upon more demand driven structures and better education in respect of main E-Government issues and intended to shape a policy framework for next ten years
- **Saar country** in early 2009 intending to introduce an electronic publication of legal rules on e-platform being the only official medium of publication each interested person getting access free of charge
- **Federal** coalition government program for next four years (2009 – 2013) = continuous and extended improvement of E-Government:

based on two earlier projects – **BundOnline** (2000 – 2005) and **E-Government 2.0** (2006 – 2009) – legal rules to be adapted to changing realities as far and as soon as necessary, e.g. by enacting a **Federal E-Government law** focussing upon appropriate basis for secure (electronic) communications between citizens and enterprises and public administrations

2 E-Government in current German law and politics (3/3)

peculiarities of German federalism:

many isolated “island” solutions for E-Government, nearly every major sector of public administrative bodies having its own processes, systems and data

uncertain fate of priority projects, e.g.

- plan to introduce an **electronic health card**
- **ELENA** (referring to “electronic certification of workers’ income”) project based upon a “procedural” law enacted in early 2009

3 Amendment of Basic Law 2009 (1/2)

urgent need for a constitutional amendment in the IT area, also driven by obligation to set up POSCs according to art. 6 of EU Services directive

at last, “legislative” solution consisting of Basic Law modification since German Federal constitution is based upon strict separation of (legislative as well as administrative) competences between two levels of government (central/Federal and regional/State)

inserting into chap. VIIIa of the Basic Law (“common tasks, administrative cooperation”) a **new provision (art. 91c)** containing four sections:

- **first**, Federation and States empowered to **cooperate** in respect of planning, establishing and operating information technology systems necessary for the implementation of their relevant tasks
- **second**, power to conclude (State) **treaties** between Federation and (all) States which should lay down some basic rules as well as more details about standards and security requirements needed for efficient communication between their IT systems

3 Amendment of Basic Law 2009 (2/2)

- **third**, transferring additional **powers** to **States** authorizing these entities to conclude inter-State treaties in respect of common operation of IT systems as well as establishment of institutions intended to fulfil that task
- **fourth**, laying down legal obligation for **Federation** to put up a connecting **network** linking IT networks of the Federation and of the several States, also providing for a Federal (parliamentary) **law** spelling out the details of this network of (public) networks

= so called IT network act (“IT-Netz-Gesetz”) put into force only a few weeks after the constitutional amendment

(↔ shaping various treaties more time-consuming)

need to establish institutions for continuous and consistent cooperation in order to improve IT use in public sector also contributing to swifter, more efficient and less costly administration, i.e. **better governance**

4 Assessment of constitutional amendment: E-Governance in a federalist State (1/2)

art. 91c as solid basis for more intense and thus probably better cooperation between various governmental levels in German public sector

success surely depending upon work of new IT “planning council” starting in April 2010 the main issue being what kind of E-Government projects will be dealt with and if “planning council” chaired by Federal Chief Information Officer will have real powers of decision (or is restricted to expert advice and/or coordination).

second crucial question referring to types of data to be exchanged within new public networks and to restrictions relating to that aspect dealing with “content”

→ which effects upon data holders, i.e. citizens and (private) enterprises?

→ any (and what) advantages in the “front office” while adequately taking care of citizens’ political and civil rights?

4 Assessment of constitutional amendment: E-Governance in a federalist State (2/2)

lessons from landmark judgment of Federal constitutional court, Feb. 28, 2008
“creating” by supreme judicial authority a new particular “fundamental right to the guarantee of the confidentiality and integrity of information technology systems”:

basic rights contained in art. 10 (secrecy of telecommunication) and art. 13 of Basic Law (inviolability of the home), as well as manifestations of the general right of personality previously developed in case-law of German supreme court not adequately taking account of the need for protection arising as consequence of development of information technology?

firm belief of the court that need for protection of IT system user not restricted solely to data to be allotted to his or her privacy

→ thus need to develop another “loophole-filling function” of general right of personality

but – neither wording of the constitutional amendment or of “IT net act” nor official explanation of drafts do contain any references to basic rights issues arising from establishing and operating the new public IT network(s)

5 Conclusion (1/2)

better network connections between different governmental levels within a State as necessary, but no sufficient condition for better (or “good”) governance

public administrations as well as judicial bodies – and even parliaments as core law-making institutions – referring to modern IT in order to be better informed and thus able to make well-informed decisions in any relevant sphere (e.g. **e-justice**, **not** merely **e-judiciary**)

IT systems also apt to improve possibilities of participation of any potentially concerned persons at early stages of decision-making processes so that citizens and enterprises would be enabled to take preventive steps against imminent violations of their political or economic (basic) rights

enhancement of IT-based mechanisms relating to governmental activities not only to consolidate decisions (and judgments) so that these would be taken according to the rule of law (and taking due account of human rights) but also to foster democratic values and procedures fundamental for every modern human society guided by the concept of governance by the people, of the people, for the people

5 Conclusion (2/2)

only citizens informed of public affairs as early and as broad as possible and enabled to take part therein also ready to engage themselves for “their” political community, i.e. for well-being of other persons

→ thus, **form (IT) must follow function (democratic rule of law)**, since every technological innovation only creating new means thus always being mere instrument aimed at improving human welfare