

Quantification times 16: When decentralization stands in the way of markets

Nathalie Iloga Balep and **Christian Huber** consider the effect of federal diversification in the German prison sector

In the German prison sector, quantification – the institutionalized production and consumption of numbers – has been widely practised over the past decades. However, the absence of comparison and benchmarking amongst the 16 federal Länder (states) precludes wider marketization and competition. This is in clear contrast to the UK, where since the 1980s private sector accounting instruments have transformed the prison from a ‘rules-based, bureaucratic institution to a calculating, economically minded organisation’ (Mennicken, 2013, p. 207). We trace here the role of quantified data in the German prison sector and explore how quantification, benchmarking and competition are linked therein. The context of the German federal system plays an ambiguous role. While the federal structure should be expected to encourage competition between the Länder’s penal systems, it actually precluded national comparisons across Germany.

The lack of increased competition is particularly surprising in view of the large-scale reform of federalism in 2006 in Germany that was expected to bring about increased benchmarking, comparisons, and, as an unintended consequence, a ‘competition of shabbiness’ (Dünkel and Schüler-Springorum, 2006), meaning a ‘race to the bottom’ (especially with regards to goals of rehabilitation) amongst the 16 federal Länder. The wider federalism reforms introduced a strict principle of subsidiarity into the prison sector, giving each of the Länder the right to pass their own laws regarding penal administration. The most debated issue in this context is how the 16 Länder interpret federal law in terms of balancing resocialization and security (Rowe and Turner, 2016) and how this influences the practices of penal administration. Similarly, regulations setting out the way in which different Länder approach open prisons and systems of parole display major differences in the treatment of prisoners depending on their Land of residence at the moment they committed the crime. Debates continue until the present day about the fairness and impact of legal diversity among different Länder. Granting full authority to the Länder raised the spectacle of prisons becoming hostages to fast-moving political agendas and interests. Instead of the anticipated (and feared) rise of comparison and competition, the collection of numbers has instead served two other main purposes: internal steering and statistics.

The first purpose of the use of quantified data in the prison sector lies in Länder- and the internal prison steering processes. Data is collected by the ministries to compare prison performance within their own Land. Lower Saxony, for ex-

ample, introduced one of the first and rather sophisticated budgeting tools for the entire public sector in 2006, including prisons. Lower Saxony’s Performance-Oriented Budgeting (Leistungsorientierte Haushaltswirtschaft Niedersachsen (LoHN)) is based on five pillars: (1) the Balanced Scorecard (BSC), (2) a target system, (3) a reporting system, (4) budgeting and, more recently, (5) benchmarking. Benchmarking is based on the results of cost and performance accounting as well as several law enforcement statistics. Lower Saxony even included benchmarking of all of its own prisons into the Land’s penal administration law. Further, prison directorates and their middle management use their own additional indicators to adapt steering within the facility to their individual needs and interests. The few prison system comparisons amongst Länder are mainly due to initiatives of individuals located in ministries, criminological research institutes and prison administrators. Lower Saxony, Hesse and Baden-Württemberg, for example, belong to the few Länder, which during a seven-year project used their different quantification instruments as joint benchmarking tools. They still partly continue these efforts currently. However, these efforts are hampered by different compositions of single indicators which establish a low degree of comparability. In addition, comparison is hindered by Land-specific redefinitions of priorities in view of changing governmental agendas regarding the prison sector.

Quantified data serves further descriptive statistical purposes since the 1960s when the Federal Statistical Office began issuing a countrywide yearly report on demographic and criminological characteristics of detainees. These statistics contain inter alia information on age, nationality, type of crime, duration of detention and possible readmission of the detainees. Overall, quantification in German prisons is not a new phenomenon. The puzzle remains, however, that even though the federal structures in Germany could, in theory, be conducive for comparisons between Länder, accounting and statistical information on the German prison sector is neither used for comparative performance measurement nor for systematic benchmarking amongst the Länder.

The major fear with regard to the reform of federalism was that the main over-arching political and public reference point would be cost, as cost is often mistakenly considered to be one of the most easily comparable indicators. To illustrate, amongst the 16 Länder, Bavaria reported the lowest cost per prisoner, whereas Hamburg the highest cost in 2011. Research,

however, suggests that even such a seemingly straightforward comparison has no legs to stand on. Numbers are calculated differently. Prisons in Hamburg are rather old and the maintenance costs are included in the expenditure ratio; Bavaria has mostly new detention facilities and the construction costs are not considered part of the expenditure ratio. There is also disagreement about what the numbers actually imply. While some see low expenditure as proof of an efficient and well functioning prison system, others regard high expenditure as a signal of high quality and better services. Another example concerns the prisoner transportation costs. While in most Länder prisoners are transported by the prisons themselves (for example, to court hearings), in Bavaria the police carries out this task. Again, this leads to lower transportation costs in Bavaria than in other Länder. In other words, without adequate background information cost data is misleading.

The fear that the reform of federalism would lead to a 'competition of shabbiness' in the sense that Länder would compete on cost-cutting and thus compromise quality of prison services has not materialized. Different reasons exist. One explanation is that the federal law of penal administration still serves as a binding framework, so that the autonomy of the Länder is constrained with regard to major legislative changes (Rowe and Turner, 2016). Another explanation is that 10 out of 16 Länder based their new penal laws on a common draft, so that they are, after all, quite similar. Third, even though they were not yet laid down in different legal frameworks, differences in practice amongst the Länder have been in existence previously (Feest, 2011). If Länder had wanted to 'race', then they could have done so earlier. Federalism reform therefore did not particularly encourage a 'race to the bottom'. Finally, competition necessitates comparison. Yet, there is no systematic benchmarking amongst the Länder in the way it is known in other (often centralized) penal systems, such as the Prison Service in England and Wales. Differences therefore are likely to remain unnoticed.

The lack of systematic benchmarking across the Länder is particularly surprising as it received considerable attention. First, in May 2006 the Federal Constitutional Court of Germany demanded benchmarking efforts and the integration of scientific insights into prison work in the area of juvenile detention to assure a high and consistent quality of these prison services across different institutions. Second, shortly thereafter, Paragraph 91d was added to the German constitution. This Paragraph enabled benchmarking studies amongst the Länder as well as the publication of results. Although the court judgement only addressed the area of juvenile detention and the constitutional addition 'allows' but does not 'mandate' benchmarking, both events suggest that benchmarking was desired at the federal political level. Nevertheless, no systematic benchmarking amongst all Länder is practised.

Overall, Germany's 2006 federalism reforms have facilitated discussions on legal differences and on different forms of performance measurement in the prison sector (Rowe and Turner, 2016). Experts feared that a federalist system could serve as a basis for a regulatory race to the bottom with negative consequences. However, in the German prison sector, differences in practice have not visibly increased with the reform: neither a 'competition of shabbiness' nor a more ambitious kind of competition on performance has taken place so far. This is not due to a lack of quantified data. The collection of numeric figures and performance management through indicators are an increasing trend throughout the Länder. Concrete numerical values and figures could be used to reveal differences. However, the federalism reform stands in the way of such competition and comparison by (so far) inhibiting the existence of an over-arching calculative infrastructure across Länder and a comparability of indicators in use. The constitutional sovereignty of the different Länder stands in the way of any attempt to harmonize relevant data, and the existence of a legal framework encouraging benchmarking and various individual initiatives cannot change that. The German prison sector can therefore be considered as a non-constructed market with multiple decentralized calculative practices, but without market structures, with all the positive and negative attributes this might bring about.

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