

## MECHANISMS OF INTERGOVERNMENTAL RELATIONS (IGR) AND THEIR MANAGEMENT CENTRES IN THE GERMAN FEDERAL SYSTEM<sup>1</sup>

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Above all, German federalism represents a structure of intergovernmentalism in-as-much as it is built on *inter-executive relations and processes of decision-making* predominantly between the governments on both levels vertically and horizontally. Thus the Legislatures of the States (the Länder) come into play only indirectly: They also elect the members of the *Second Chamber* but only insofar as they decide on the composition of the governments (cabinets) of the Länder whose members in that capacity constitute this Chamber, the Bundesrat (or Federal Council), while representatives of the oppositions in the Länder Legislatures therefore have no seats or votes there. Nor are, therefore, the members of that Chamber directly and popularly elected as are the members of the Brazilian Federal Senate<sup>2</sup>.

### **The Three Pillars of the German Intergovernmental Structure**

Moreover, the characteristics of all branches of the intergovernmental structure in Germany besides the Bundesrat are also mainly marked by interexecutive features. This already indicates that there are other such mechanisms beyond the constitutionally defined ones of the Bundesrat. In fact, the German intergovernmental system consists of three pillars, of which only one, the "Federal State", in its legally defined shape with the Bundesrat in its centre is based in the Constitution (called the Basic Law) itself<sup>3</sup>, while most of the other institutions are not even mentioned in statutory law. The second such pillar known as the "Whole State" comprises a number of bodies, which are chaired by representatives of the Federation, who discuss political initiatives on equal footing with their counterparts in the Länder without, however, making decisions by voting. The third pillar, even formally called the "Third Level", consists of institutions serving functions of horizontal coordination between the Länder, to which federal representatives are invited in most though not in all cases and in which, too, decision-making in the sense of agreeing on the recommendations takes place either by unanimity or by restriction to the principle of "agreeing to disagree".

### **The Constitutionally Organized Pillar of the "Federal State"**

In institutional terms, the pillar of the „Federal State“ is dominated by the Bundesrat. As a part of the federal constitutional structure its agendas are

<sup>1</sup> For details and further information see my chapter on *The Institutional Structures of German Federalism* in: Charlie Jeffery (ed.), *Recasting German Federalism*, London (Pinter) 1999 pp. 3-22

<sup>2</sup> Art. 46 of the Constitution of the Federative Republic of Brazil, following the American pattern (Art. XVII of the Amendments to the US Constitution); on the effects of such a composition as a pitfall for the functions of a federal second chamber in IGR see Uwe Leonardy, *Constitutional Provisions on Devolution and Federalism* in: Bertus de Villiers (ed.), *Birth of a Constitution*, Cape Town (Juta) 1994 pp. 144-171 (147-150)

<sup>3</sup> Arts. 50-53 of the Basic Law

strictly confined to matters of federal legislative competence and as such they are subject to decision making by voting. However, as the Länder are the main administrators not only of their own, but also of most federal and even of European legislation, the Bundesrat's agendas consequently also include numerous items of delegated federal legislation as well as administrative rules of the Federation and draft European secondary legislation, on which either the Second Chamber's comment or even its consent is constitutionally required. The way, in which voting in the Bundesrat is to be organised, strongly influences its entire political and working procedures: In very rough proportion to their numbers of inhabitants (from 0.7 to 18 million) the altogether sixteen German Länder have each either three, four, five or six votes. However, these individual numbers of votes must under constitutional rules always be cast en bloc and thus they cannot be split into parts in favour and parts against. Moreover, every decision of the Bundesrat always requires the absolute majority of presently altogether 69, i.e. as a minimum 35 votes. This results in the consequence that abstentions in practical terms have the effect of a no-vote. Politically that can, and often does, lead coalition-governments in any of the Länder into troubled waters, if the two or more coalition-parties cannot agree on a positive or a negative vote and if according to the usual pattern of a coalition-agreement they would then have to abstain under their internal rules. Situations like this tend to ring the alarm-bells in the party-machineries of intergovernmental mechanisms, which will have to be dealt with briefly at a later stage here. At this point, it needs to be emphasised that Bundesrat business is characterised by the fact that decisions are made by majority voting. That applies both to the plenary and to the committees where, however, for the convenience of an efficient procedure each Land has one vote and both working and voting functions are mostly delegated from the political to the civil service level under ministerial instructions.

The *management centre* of the Bundesrat is its highly efficient Secretariat, consisting mainly of the staff of its departmentally organised committees, who have permanent and very close working relations with the corresponding ministries of both the Länder and the Federation. The efficient performance of the Bundesrat's numerous functions would hardly be possible, however, if that federal body were not surrounded by a circle of Länder institutions, which are very typical of the German structure: All of the Länder have Missions (*Vertretungen*) to the Federation in Berlin serving liaison functions between the Länder Governments on the one side and the parliamentary and governmental organs of the Federation on the other. In doing so they mainly focus on the Bundesrat.

### **The Pillar of the “Whole State”**

The leading institution in the pillar of the “*Whole State*” is the Conference of the Heads of Governments of the Federation and the Länder, which is regularly (every three or four months) convened and chaired by the Federal Chancellor after preparatory conferences of the Heads of the Cabinet Offices on both levels. Unlike business in the Bundesrat structure, the agendas here

are not restricted to matters under federal jurisdiction only, which means that the Conference can discuss any matter of political relevance throughout the entire federal system, thus also including items of outstanding general relevance under Länder jurisdiction. Mainly for this reason, but also for the Conference's predominant function as a forum for non-public debate and co-ordination, decisions here are all made as recommendations and thus they are arrived at not by voting but by compromise or by agreeing to disagree. Due to the high ranks of the role-players involved they do, nonetheless, naturally imply and carry a strong political and factual authority in their effects.

Preparatory and other *management functions* for the Conference are performed by the Federal Chancellor's Office. Particularly in this field it works in close contact with the Cabinet Offices (or State Chancelleries – *Staatskanzleien*) of the Länder.

Next in influence and importance particularly in controversial situations are the co-ordinating mechanisms of the two large parties, the Social Democrats (SPD) and the Christian Democrats (the CDU plus its regional sister-party in Bavaria, the CSU). At their tops there are the party-presidiums, meeting normally once a week under the chairperson of the respective party and always comprising the political leaders not only on the federal but on Länder level, too<sup>4</sup>. These bodies, thus also belonging to the "Whole State" pillar, regularly come into the game, whenever party-political issues are at stake which might in particular foreshadow conflicts between the First and the Second Chamber, the Bundestag (equivalent to the Chamber of Deputies) and the Bundesrat (comparable to the Federal Senate in Brazil). Such conflicts are finally dealt with by the permanent Mediation Committee of Bundestag and Bundesrat, which works under special rules for the purposes of achieving compromise between the two Chambers (managed in organisational terms by the Secretariat of the Bundesrat's Legal Committee).

### The Pillar of the "Third Level"

At the top of the horizontally co-ordinating "Third Level" the Conference of the Minister-Presidents, the Länder Heads of Governments, is convened every two or three months and not rarely even more frequently. In it the chair is rotating among the Länder on an annual basis, and its scope of business as well as its working-methods are similar to those of the Conference under the Federal Chancellor referred to above (unlimited choice of items on the agendas plus co-ordination and compromise rather than voting). The same applies to the Departmental Conferences of Länder Ministers located one step below this roof-structure and covering all fields of legislative and/or administrative competences within the jurisdiction of the Länder, thus ranging from education, finance and health to justice, home affairs and the

<sup>4</sup> In more detail see Uwe Leonhardy, *Federalism and Parties in Germany: Hinges Between Constitutional and Political Structures* in: Rudolf Hrbek (ed.), *Political Parties and Federalism. An International Comparison*, Vol. 22 of the Publications of the Europäisches Zentrum für Föderalismus-Forschung Tübingen, Baden-Baden (Nomos) 2003 (forthcoming)

environment plus numerous other such functionally defined areas. In most of their meetings the respective Federal Minister normally participates as a guest, but he or she would never convene or chair any of these bodies him- or herself. If a meeting is needed for federal reasons, it would be convened on federal request by the chairing Land Minister in charge.

*Management of IGR on the “Third Level”* is predominantly connected with the principle of rotation governing the attribution of the chair functions in its various institutions. This means that e.g. in the case of the Minister-Presidents’ Conference the agendas, meetings and resolutions are organised and administered by that Land’s Cabinet Office, whose Head of Government holds the chair in the respective year until these functions are taken over by the next Land in turn. The same applies *mutatis mutandis* to the Departmental Conferences of Länder Ministers in most fields, while in some of them management has been permanently delegated to the respective Bundesrat committee secretariats (as e.g. in the areas of finance and home affairs). In no case, though, are managerial functions on the “Third Level” ever a matter for any federal governmental institution.

## **Summary on the Three Pillars and Leading Constitutional Principles**

In summing-up the *main functions of the three pillars* of intergovernmental mechanisms in Germany are, therefore, the following ones:

- co-ordination and preparation of voting, and finally voting itself about federal and European legislation in the pillar of the “Federal State”
- mutual consultation and co-operation in all fields and in particular in overlapping areas of competence in the pillar of the “Whole State”, and
- co-ordination in the preparation of both Länder and federal legislation as also (and sometimes primarily) on matters of administration on the “Third Level”.

Within that structure the plenary of the Bundesrat, meeting in public in all but exceptional circumstances, serves the important function of being a “*window into intergovernmental relations*”<sup>5</sup>, which always develop the democratically dangerous tendency of becoming intransparent for public control because of the innate needs of negotiating behind closed doors. Thus, although the Bundesrat committees, too, are bound to abide by this closed rule dictated by practice, at least the results of their work and debate on them in the plenary are open for public scrutiny and discussion.

The entire intergovernmental structure in Germany - no matter whether based

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<sup>5</sup> I used this term first in a public hearing of the Scottish Affairs Committee of the British House of Commons on the Scotland Bill; cf. *Memorandum submitted to the Scottish Affairs Committee, House of Commons, Session 1997-98, Second Report on “The Operation of Multi-Layer Democracy, Vol. II, London (The Stationery Office), HC II pp. 26-38*

in the Constitution directly or developed under its roof - is governed by the overarching principle of *federal comity or loyalty* (*Bundestreue*), which permeates all institutional and behavioural emanations of federal practice. It focusses on the demand that both the Federation and the Länder have to take care of "mutual considerateness" in the exercise of their respective powers and that all of their actions and intentions must be "friendly to the idea of federation". Although not in the written text of the Basic Law but carved out by the Federal Constitutional Court, this principle has a strong and legally very effective influence on the day-to-day functioning of federalism in Germany<sup>6</sup>.

## IGR and Foreign Affairs

Before some comparative observations would seem to be in place, one *particular institution in the field of foreign affairs* needs to be mentioned briefly, because it appears to be relevant not only in Germany or Brazil but also in some other federal systems: In order to prevent federal break-ins into the legislative competences of the Länder via the transformation of foreign treaties into domestic law, a Permanent Treaty Commission of the Länder was founded in 1957, to which the Federal Government must communicate all steps in the negotiations with a foreign power on a treaty touching upon exclusive Länder competences. There is a gentlemen's agreement (not formally established in legal terms) between the Federation and the Länder that the former will not internationally deposit the document of ratification, if and as long as the latter have not signalled their consent on the advice of the Treaty Commission. The main effect of that Commission is therefore that the Federal Government is practically bound to accept proposals of the Länder for alterations of all treaty clauses concerned in their fields during the course of international negotiations. In exchange for that concession the Länder have agreed not to take the underlying and still disputed question of the transformation power (a federal or a Länder competence?) to the Constitutional Court. These arrangements have been working smoothly and successfully ever since the agreement referred to above was concluded<sup>7</sup>.

The Secretariat of the Permanent Treaty Commission is by tradition linked to the Bavarian Mission to the Federation, which performs all managerial functions also on behalf of the other Länder. The chair of the Commission is,

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<sup>6</sup> For an excellent and also comparative analysis of that principle in English see *Bertus de Villiers, Bundestreue: The Soul of an Intergovernmental Partnership; Konrad-Adenauer-Foundation (eds.), Occasional Papers, Johannesburg, March 1995*. The actual effects of the analysis, suggested by the author of that publication, are to be found in Chapter 3 (Arts. 40 and 41) of the South African Constitution.

<sup>7</sup> For further and comparative studies see my essays on *Federation and Länder in German Foreign Relations: Power-Sharing in Treaty-Making and European Affairs* in: Charlie Jeffery/Roland Sturm (eds.), *Federalism, Unification and European Integration, London and Portland* (Frank Cass) 1993 pp. 119-135 and in : Bruno Coppiepers, David Darchiashvili and Natella Akaba (eds.), *Federal Practice: Exploring Alternatives for Georgia and Abkhazia*, Brussels (VUB University Press) 2000 pp. 151-166

however, always held by a civil servant of one of the other Länder's Missions, who normally holds office for several years.

## **Comparative Observations on Institutional IGR**

In comparative terms the following observations would appear to emanate from this (necessarily strongly summarised) analysis of intergovernmental mechanisms in the German federal system:

- The significance of a powerful Second Chamber with genuinely federal functions can hardly be overestimated.
- The liaison-channels between such a Chamber and the constitutional organs of the federation's constituent parts, particularly their executives, need to be efficient because federalism is intergovernmentalism by its very nature.
- As federalism is thus also "government by conferences"<sup>8</sup>, sufficient care must be taken to allow for "windows into the intergovernmental structures" in order to prevent intransparency from clouding democratic responsibility.
- Intergovernmental institutions need to be permanent in order to develop their own commonly accepted style "friendly to the idea of federation"<sup>9</sup>, and this is best secured by permanently submitting political performance to the constantly self-renewing agendas of practical problems occurring in every kind of multi-level government.
- Intergovernmental processes need to be related to each other in order to achieve their main goal, which is efficient co-ordination.
- The number of intergovernmental bodies should not be too large in order to avoid duplication, stalemate and undefendable costs.
- Above all, however, even the most optimally organised intergovernmental mechanisms will fail unless operated under the "values of tolerance, fairness, justice and transparent honesty"<sup>10</sup>.

## **Financial IGR**

Beyond these general observations about the requirements for both efficient and democratic mechanisms of IGR there is apparently some special interest in the financial field of such federal arrangements within the present Brazilian constitutional debate. While some framework information can be given here on the institutional

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<sup>8</sup> As Prof. K.H. Cheluva of Gulbarga University termed it in the Forum of Federation's Bangalore Roundtable on *Mechanism of IGR in India* of 25 April 2002

<sup>9</sup> See above on the principle of federal comity

<sup>10</sup> J. Isawa Elaigwu, *Current Issues in Nigerian Federalism*, Paper presented at the Annual Conference of the International Association of Centres for Federal Studies, Nice, 8-12 November 2000, p.16

side of that area, it would be a hazardous attempt to try and describe the highly complicated structures and methods of fiscal equalisation in an adequate manner within the very limited scope of this paper<sup>11</sup>. Moreover, treating this subject beyond its organisational aspects would certainly also transgress the time-potentials of the conference, so that this would rather require a second and more specialised workshop.

The leading institutions in the field of financial co-ordination are

- in the pillar of the “Federal State”: the Finance Committee of the Bundesrat, this body being the only one of its committees in which the Ministers of the Länder regularly participate in person (while in the others business is mostly delegated to civil servants; see above)
- in the pillar of the “Whole State”: the Financial Planning Commission, consisting of the Federal Ministers of Finance and of Economic Affairs, the Finance Ministers of the Länder plus four representatives of the local government bodies (the municipalities and the counties) and
- on the “Third Level” the Finance Ministers’ Conference of the Länder.

The *management centres* of these bodies are

- the Secretariat of the Bundesrat Finance Committee, which also runs the business of the Finance Ministers’ Conference of the Länder (see above) and
- the Federal Ministry of Finance for the Financial Planning Commission, which has the task to define the centres of gravity for the performance of public functions corresponding to the needs of economic development.

## **IGR – Relevance of Electoral Law**

For the mechanisms of IGR in every federal country the comparability of the electoral systems in the federation and its component parts is certainly strongly, even though indirectly relevant, because it establishes the bases of democratic legitimacy for the various co-ordinating and co-operating units of the entire structure. That, however, does not necessarily mean that those systems of electoral law need to be identical. At least in Germany they are in fact not, because both the Federation and the Länder are each in their own spheres autonomous in giving shape to their own constitutional structures, of which, of course, electoral law is an essential part. Nonetheless, their electoral systems are basically similar in-as-much as they all contain a mix of proportional representation with elements of the first-past-the-post system. The dimensions of this mix are different, and they range from a 50-to-50 relation (in the case of the Federation and some of the Länder) to other proportions in the rest of the Länder. As the electoral system apparently constitutes another issue of direct

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<sup>11</sup> For some more detail see *Uwe Leonhardy, op.cit.* (note 1) pp. 15-17 and for recent constitutional development cf. the leading judgment of the Federal Constitutional Court of 17 November 1999, *NJW 2000 pp. 1097-1104*; for an international comparative overview see *Teresa Ter-Minassian (ed.), Fiscal Federalism in Theory and Practice, International Monetary Fund; Washington, D.C. 1997*

interest for the debate in Brazil today, it would, therefore, be necessary for comparison with Germany to include not only the federal but also the Länder's systems. Again, however, this cannot be done here in any appropriate dimension, and maybe it should thus be reserved for special discussion at a later stage and opportunity.

## **Co-operative versus Competitive Federalism in IGR: The German Reform Debate**

No description of any mechanisms of IGR, let alone the German one, should create the impression that all solutions and devices in these mechanisms are felt to be optimal or ideal. In fact, German federalism has been in a constant debate on reform ever since its re-establishment by the Basic Law in 1949, and several expert and political commissions have been producing reports and recommendations on improvements more or less successfully since then.<sup>12</sup>

Presently the reform or modernisation of the federal system is a high-ranking political issue again. In these weeks Bundestag and Bundesrat are in the process of establishing yet another commission, which is expected to report by the end of 2004. It will centrally focus on the question, whether or not and how there should and could be more competitive versus, maybe, too much co-operative federalism. In that context, of course, the streamlining of present IGR mechanisms will also be on the agenda<sup>13</sup>. However, such streamlining combined with stronger elements of competitive federalism will in the end only be possible, if the crucial and highly power-related topic of territorial reform can be successfully addressed in the not too distant future. This has also been hinted at already by the Federal Minister of Justice, whom Chancellor Gerhard Schröder has appointed to be in charge of these reform efforts on the side of the Federal Government.<sup>14</sup> That requirement means that there needs to be substantially more comparability in the sizes and the economic plus administrative capacities of the present Länder, of which there are presently no less than sixteen with very different such potentials. Thus it would not seem to be an inadequate prognosis to say that unless a better equilibrium in the territorial bases of the system can be established efficient reforms also in the streamlining of IGR mechanisms will again be bound to fail. The plain reason for this is to be found in the obvious fact that you can hardly have more competitive and thus less interventionary mechanisms without first creating partners in the system, which are at least comparable competitors with adequate and sufficient political, administrative, economic and financial potentials of their own. Within these necessities, even enhanced in their effects by challenges from the constitutionalising level of the

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<sup>12</sup> On the state of affairs since the last reform commission see Uwe Leonardi, *To be Continued: The Constitutional Reform Commissions from a Länder Perspective* in: Klaus H. Goetz and Peter J. Cullen, (eds.), *Constitutional Policy in Unified Germany*, London (Frank Cass) 1995 pp.75-98 – identical with *German Politics*, London, 1994, Special Issue

<sup>13</sup> For a both profound and concentrated overview of the problems to be solved see Rainer-Olaf Schultze, *German Federalism at the Crossroads* in *Forum of Federations* (eds.), *Federations*, Vol. 3 No.3 (August 2003) pp.13-16

<sup>14</sup> A strong warning to this effect had already been articulated some years ago in Uwe Leonardi, *German Federalism Towards 2000* in Charlie Jeffery (ed.), *Recasting German Federalism*, London (Pinter) 1999 pp. 285-311 (286-292)

European Union, German federalism and its IGR mechanisms are, indeed, in a highly important phase of their development today.