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**German federalism, the subsidiarity principle, and the European Union**

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The organizers of this conference have asked me to focus on what distinguishes the German model of federalism from that of the United States. Such a comparative perspective is also in the center of a reform debate actually taking place in Germany. German federalism is currently the object of much criticism, and its most recent manifestation was a decision of the Constitutional Court demanding an overhaul of revenue-sharing.

How relevant may German federalism, with its complex and often cumbersome structures, be for other federal countries? One point which I want to demonstrate is that it is often difficult to maximize at the same time the goals of equality of citizens, on the one hand, of autonomy and efficiency, on the other. There is often a trade-off between different goals. However, even a much-criticized system such as the German may demonstrate its effectiveness in times of crisis.

**German “executive federalism”, its origins and its logic**

The first important distinction is that, basically, the American system is characterized by the systematic duality of federal and state institutions. To be sure, this dual federalism has been modified by trends toward a more cooperative relationship. But in a comparative perspective dualism remains a basic feature. Recently, the fate of little Eilan Gonzalez from Cuba was a good illustration: As this was a matter of federal immigration law, the case was in the jurisdiction of federal courts, and it were federal marshals who took Eilan from he house of his uncle to bring him to his father. In Germany too, federal law would apply in a similar case, but the case would first be tried before state courts, and the state police would have to intervene, if necessary, to implement the federal law. To be sure, the same would be true in Switzerland (which otherwise is much closer to the U.S. model), but Swiss cantons have much more discretion in implementing federal law whereas in Germany also the details of administrative procedure are normally tightly regulated by federal rules.

This in turn has to do with a second, and much more fundamental difference. In the American system, the states participate in federal rule-making by elected representatives of their people, the members of the U.S. Senate, whereas in Germany it is the state executive branch that participates in federal rule-making: The Federal Council (Bundesrat) is composed by members of the state governments who vote on instructions decided in

their respective cabinet meetings. And in the specialized legislative committees of the Bundesrat the state governments are represented by civil servants from the corresponding state ministries. Hence the bureaucracies of the states are closely involved in federal legislation and can control the ordinances that regulate the details of implementation.

The genesis of this German system of “executive federalism” is due to the peculiar development of the modern German state. Whereas in France and in England the emergence of the modern state with its monopoly on the exercise of legitimate power was tantamount to the gradual development of a nation state, in Germany the formation of the “modern state” preceded the formation of a German nation-state. In early modern times, beginning with the 16<sup>th</sup> century, the modern bureaucratic state emerged first in the larger territories, such as Austria, Brandenburg-Prussia, or Saxony. The old German Empire, for its part, remained an archaic structure with only weak central powers until it was finally destroyed by the Napoleonic conquest. And in the political reforms of that age, at the beginning of the 19<sup>th</sup> century, the major German states – not only Prussia but also Bavaria, Baden and Württemberg – succeeded in strongly modernizing their administrations who became remarkably efficient instruments for the mobilization of civil society. And that process was followed by the emergence of efficient local government at least in the larger cities. This strength of the states is one of the reasons that explain the failure, in 1848, of the liberal attempt to establish a German nation-state within a federal framework essentially patterned after the U.S. model. So when in 1871 Bismarck succeeded as the architect of the German nation-state he did no longer rely on the U.S. model. On the other hand (at the difference from Camillo Cavour, at that same time the architect of Italian unity) he did also not copy the French model of the centralized nation-state. Instead, he created a federal hybrid predicated on a sort of basic deal with the states: The state bureaucracies would retain their organizational domain by implementing the federal legislation and by being involved in its making. To achieve this, to the model of the U.S. Senate Bismarck substituted the Bundesrat (Federal Council), a modernized version of an older German confederal institution, the Permanent Diet (a congress of the ambassadors of the states that was from 1666 to 1806 the supreme legislative authority of the Empire).[\[1\]](#) German federalism was thus from its very beginnings cooperative in nature and involved close linkages of federal and state administrations.

I am, by the way, convinced that this specific path of development of German federalism can be translated into a general hypothesis about the genesis of federal systems: When political units merge into an overarching federal system the structure of the federation will depend on the structural properties of the constituent parts at the time of their merger. More precisely, even when the constituent parts are full-blown “modern states” with a complex administrative structure run by professional bureaucrats they will tend to federate into a system of “executive federalism” in which close linkages between the executive authorities of the constituent units and the federation. This is what happened in the German case in 1871, and this is what we are now observing in the case of the European Union. The EU, with the Council of Ministers as key institution, bears close resemblance to the German federal system with its Federal Council.[\[2\]](#) On the other hand, when the North American colonies formed the USA, or when in 1848 the Swiss cantons transformed the ancient confederation into the modern Swiss federal system, these

constituent units had not yet constituted bureaucratic states with a complex professional administration.<sup>[3]</sup> So the founders drew up a different constitutional model where, in particular, the member states (in the case Switzerland the cantons) are represented by elected senators (in Switzerland, state councilors or Ständeräte).<sup>[4]</sup>

### **Shared responsibilities in rule-making**

The basic deal which the German states struck at the times of Bismarck has been maintained up to the present and has developed its peculiar logic: Länder (state) governments as a rule, have voluntarily and progressively abandoned much of their autonomous sphere of legislation and surrendered it to the federal legislator in exchange for shared responsibilities in rule-making which further guarantees them a close control and monitoring of implementation (Beteiligungsföderalismus<sup>[5]</sup>). Technically, this is done by making legislation subject to the absolute veto of the Bundesrat (Federal Council). The constitution distinguishes two different varieties of legislative procedure, Einspruchsgesetze and zustimmungspflichtige Gesetze, which may be roughly distinguished as bills subject to a suspensive or to an absolute veto of the Bundesrat . Einspruchsgesetze are bills to which the Federal Council may object; but if they then are voted again by parliament (the Bundestag) with an absolute majority of its members they become law also against the objections of the Bundesrat.<sup>[6]</sup> It is different in the case of the bills subject to an absolute veto (Zustimmungsgesetze): They can only become law if, after having passed parliament, they are also voted by an absolute majority of the Bundesrat. Originally, the constitution-makers intended to reserve the absolute veto to a limited proportion of exceptional bills that might infringe upon states rights. However, as a consequence of a very broad interpretation by the Constitutional Court, what was meant as an exception was then extended to all legislation which regulated the implementation by the states. And this category has gradually been so much extended that today about 60 percent of bills are subject to the absolute veto of the Bundesrat. For both categories, those who have lost in the first round can then try to open a second round by appealing to the “mediation committee” (Vermittlungsausschuss) composed by one representative from each Land (state) and an equal number of representatives from the Bundestag.<sup>[7]</sup>

This key position of Länder governments represented in the Federal Council thus has important consequences for the process of policy-formation: They are closely involved in the legislative process. This was the rule since the founding of the German Empire by Bismarck, but now the veto position of the Länder is so strong that legislation can be generally considered as the output of complex bargaining processes between the federal and state administrations. A further consequence is of course the strengthening of the position of the top-level bureaucracies in the legislative process because it is them who do most of the negotiation work. A key position in these negotiations is held by the “state representations” (Landesvertretungen) at the seat of the federal government. This is very visible to anybody who visits the new government district in the center of Berlin: Most of the Länder have erected big buildings for their Landesvertretungen, and not only are these colloquially designated as “embassies” of the states – many are also located in the embassies district near the Tiergarten, rivaling with the embassies of countries such as Italy or Japan in location as well as in size.<sup>[8]</sup> They symbolize quite well the peculiar character of Germany as a Verhandlungsdemokratie (negotiative democracy).

A further salient example of this federalism with sharing of functions and with high thresholds of consensus-building which can only be surmounted by negotiation and compromise is the German fiscal system. To this example I will come back immediately.

### **Germany as “unitary federal state”**

The basic power-sharing deal of German executive federalism in turn explains the third important difference between the German and the U.S. model of federalism: German federalism since its early beginning shuns regional differences and fosters nation-wide uniformity. Already in the first three decades of the Empire (1871-1900), the federal legislator (with the Federal Council) voted not only uniform codes of Civil Law and Penal Law, but also laws standardizing judicial procedure and organization of courts and covering both the federal and state judiciary by integrating them into a hierarchical system. Thus Germany achieved rather soon a legal uniformity still today not found in the United States (and not even in Switzerland). This trend has continued, and in more recent times a prominent legal scholar has (somewhat paradoxically) characterized German federalism as a “unitary federal state” [Hesse, 1962 #259]. Today, the legislative domain of the Länder is largely restricted to education, to the administration of police, and local government. But even here, considerable uniformity was obtained by interstate compacts and – in the case of local government - by model statutes that were drafted by a semi-private agency set up by local governments as an advisory body for “administrative simplification”.

I am convinced that this strong trend toward unitarization is due to the powerful model of the big neighboring West European national states, most notably France (but also Britain) that are distinguished by a high degree of national uniformity in legislation and in administrative practice. In the 19<sup>th</sup> century, the national liberal bourgeoisie considered the fragmentation of Germany into a multitude of small independent states as a strong liability in the struggle for national power on an equal footing with the neighboring powers, and so unitarization was considered as a precondition for achieving a commensurate position within Europe. But whereas in France or in Britain such uniformity is due to highly centralized procedures of decision-making, in Germany it is achieved by complex and often very cumbersome bargaining processes.

### **Basic principles of fiscal federalism**

So it is not surprising that the Länder have also few fiscal autonomy. That does by no means imply that they have no important fiscal revenue. To be sure, they have practically lost their autonomous taxing power, and most taxes are exclusively subject to federal legislation. However, the proceeds from the most important taxes – the incomes tax, the corporation tax, and the (value-added) sales tax – are divided between federal and states governments according to rules laid down either in the constitution or in laws that cannot be changed without the assent of the Federal Council, i.e., of the state governments. (Also, a portion of the income tax is reserved for local governments). Revenue-sharing is thus a pervasive feature of Germany’s fiscal federalism.

This system of revenue-sharing involves also complex mechanisms for redistribution between the richer and poorer states. One of its basic principles, according to Art. 106 al. 3

of the constitution, is that revenue-sharing has to guarantee the “uniformity of living conditions in the federal territory”. This involves equal access of all citizens to the technical and social infrastructure, from roads and dykes against floods to schools and all sort of public amenities. Obviously, the reality of the German fiscal system is far away from the model world of the economic theory of fiscal federalism.

The Länder have practically no autonomous taxing power left. In the past they have found it more convenient to cede their taxing powers to the federal legislator in exchange for a share in other taxes that formerly were exclusively federal taxes. In consequence, the most important taxes (income tax and value-added tax) are now “common taxes” (Gemeinschaftssteuern or Verbundsteuern) the proceeds of which are divided between the federal and state levels according to fixed quotas, and they are voted by the federal legislator. An important consequence is that fiscal competition between the states is completely excluded.

There is an economic rationale underlying these arrangements which is derived from traditional German beliefs about what constitutes a competitive market. According to this belief, undistorted competition presupposes equality of those conditions that – like taxes – can be manipulated by governments. Hence it is a logical conclusion to avoid tax competition between states. (There is some limited fiscal competition between local governments which is limited to local business taxes and some minor sources of revenue, such as a tax on dogs...).

This aversion to fiscal competition is in turn related to another basic belief which distinguished Germany from the model world of fiscal federalism. North American specialists of public finance often tend to believe that “voting with the feet” is an important corrective mechanism in fiscal federalism: If you feel that your local or state governments spends too much on welfare or not enough on schools, if taxes are too high or roads are too bad, you may move to another jurisdiction that suits your tastes better. But when such issues are discussed in Germany, the prevailing beliefs are very different: “Heimat”, the home country, is a highly valued good, and you must not oblige people to abandon it. One might say that the right to stay in one’s home country is an unwritten but important right. Hence our fiscal system is biased against encouraging internal migrations, and implicitly governments are expected to make sure that people can stay in their home town or region if they so wish.

All this explains why such an enormous effort was made after German unification to discourage East-West migration. Historical experience seemed to indicate that inequality of living conditions, with certain regions lagging behind the better-to-do, might foster political radicalism and endanger political stability. The massive financial transfers to East Germany in the past decade were very much motivated by such concerns.

Now it is of course undeniable that this fiscal system has considerable shortcomings. Modern fiscal federalists quite convincingly argue that such a system of massive revenue-sharing, where states are no longer autonomous in raising their own revenue and in deciding how to spend it creates perverse incentives and fosters economic inefficiency. German federalism thus has a mixed record. It has been very successful in creating the conditions for stable democracy, in particular individual equality of living conditions

across the territory of the Federal Republic. But it is not very efficient in economic terms, and it discourages growth.

### **Federalism and party politics**

As I have shown, federal and state governments are closely linked in the policy-making process. Their relationship is one of mutual dependency where they have to cooperate to get things done and, in particular, to legislate. Otherwise the high thresholds for the formation of consensus built into the system could not be overcome.

This creates particular problems when the opposition party in parliament obtains a majority of seats in the Bundesrat. This is not an exceptional situation. Of the fifty-one years since the present constitution was voted, for more than twenty years the Federal Government had no majority in the Federal Council. With such a constellation, the opposition is in measure to veto important laws (and., in particular, most tax legislation). We thus have an in-built tension between party competition, on the one hand, and the need for cooperation in the federal system, on the other. And this in-built tension may eventually degenerate into an institutional gridlock.

### **Subsidiarity as a solution?**

Because of these experiences the view has become popular in public opinion that federal and state politics should be disentangled. It is in this context that much attention has been focused on the “principle of subsidiarity”. As you may be aware, this principle is now enshrined in the law of the European Union. Article 3b of the Maastricht treaty of 1991 stipulates that

“in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community,  
Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty”..

It was largely due to German demands that this article has been inserted. Given that there exist remarkable institutional similarities between German federalism and the federal structure of the EU, German insistence on the subsidiarity principle might suggest that this principle too has been patterned after the German federal model. However, nothing could be less true: Subsidiarity has only recently been discovered as an eventual constituent principle of federalism, and the reality of German federalism is far away from it as I hope to have made clear at least implicitly.

The origin of that idea is not the federalist tradition but the social doctrine of German Catholics, and in this doctrine it originally referred to the relationship between the society and the state. It was first formulated by two German Jesuits (Gustav Gundlach and Oskar von Nell-Breunung) who were advisers of Pope Pius XI. and who played a key role in drafting the encyclical *Quadragesimo Anno* published in 1931. A key sentence in para. 79 of this encyclical reads: “Just as it is gravely wrong to take from individuals what they can

accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them". And para. 80 continues: "The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. ... Those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of "subsidiary function," the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State."

German Catholics have since that time cherished the subsidiarity principle, not least because the minority position which they occupied in Germany between 1971 and 1945 made them receptive for the idea that the state (in their case, a state dominated by protestant elites) should not become too powerful and should not infringe upon the autonomous rights of lower (e.g. Catholic) associations. Only in the last two decades was it discovered that the subsidiarity principle might also apply to federal organization. Among those who discovered it outside the Catholic camp we have to mention, in the first place, German neo-liberal theorists of fiscal federalism. In their view, it complements the "principle of fiscal equivalence" (discovered by Mancur Olson) to which it seemingly bears a strong conceptual affinity.

However, subsidiarity as originally conceived in *Quadragesimo Anno* is a highly abstract principle, not always easy to translate into practical conclusions. In particular, in a complex modern society it is not always self-evident what the "lesser and subordinate organizations" are. The Maastricht treaty only mentions the member states as eventual claimants. To be sure, at the Amsterdam conference the federally organized EU countries (Germany, Austria and Belgium) proclaimed that they wanted to extend the subsidiarity principle to the lower levels of government so that the EU would have to respect the domain of, e.g., the German or Austrian *Länder* (states). But it is by no means sure that this demand has the whole-hearted agreement of other EU member states with a centralist tradition.

For the German states, moreover, the danger is twofold. On the one hand, the EU may be tempted to pre-empt matters that traditionally belonged to their exclusive jurisdiction, such as education. Such attempts they may indeed resist by invoking the principle of subsidiarity. But much more problematic is that – as I have pointed out above – the *Länder* have abandoned much of their original domain in exchange for participation in the federal law-making process. If such matters are pre-empted by the EU, it would become rather difficult for the states to maintain their veto power and preserve their political influence.. One can, after all, not expect the partners of an already enlarged Union to include, in their intergovernmental negotiations, not only the Federal Government but also sixteen state governments. To be sure, on the insistent demand of the *Länder*, an amendment to the German constitution was recently passed guaranteeing to the states that they would be consulted by the Federal Government in those EU matters where their interests are in jeopardy. But it is rather doubtful that this obligation will decisively contribute to check the erosion of the autonomous power of the states. In my view they would be much better

advised to change their traditional strategy based upon an exchange of influence and to reassert the demand for an autonomous domain. The subsidiarity principle would legitimate such a demand, provided it is interpreted in a broader sense than in the Maastricht treaty.

## **Conclusion**

German federalism, as I have shown, is a complex and cumbersome structure. However, this is a price which Germans have been willing to pay after the traumatic experiences of the Nazi dictatorship. It was so far a unique case the institutional framework of which was due to specific paths of historical development. Although now the European Union appears to move in a quite similar direction, this type of federalism will probably – as an institutional pattern – serve as a model which other countries should copy. However, I am convinced that important lessons can be drawn from the German federalist experience. One of them, I submit, is that federalism can serve to balance the goals of equality and social solidarity, on the one hand, of autonomy, efficiency and innovation, on the other.

[1] From 1971 to 1919 the name of this body was Bundesrat. Under the Weimar constitution it was called Reichsrat, and since 1949 it is again called Bundesrat.

[2] The German Bundesrat is a remarkable parallel to the EU Council of Ministers, although formally the Bundesrat as a body is competent for all federal rule-making whereas the EU Council of Ministers in reality is differentiated into specialized Councils for the different policy domains (e.g. Council of the Ministers of Finance, or of the Ministers of Agriculture). However, on closer look, even here German federalism looks remarkably similar: The specialized committees of the Bundesrat largely overlap with the specialized sectoral Councils of Länder ministers (again: of Finance, of agriculture, etc.). In one case as in the other, executive federalism is characterized by strong tendencies toward sectoral segmentation. And, as a further consequence, in both cases there is a tendency to look for the Conferences of heads of governments (national governments in the UE, Länder governments in Germany) to settle cross-sectoral conflicts and to achieve coordination.

[3] The same can be said, as far as I know, of the Canadian provinces at the time of the formation of the Union. Still, Canada with its “federal-provincial diplomacy” is somewhat closer to the German model. Generally speaking, the borderline cannot be too neatly drawn between the two ideal types outlined in the text. Swiss federalism, for example, resembles the German case insofar as federal laws are to a large degree implemented by the cantons, but that also means that the cantons have more discretion in organizing the implementation process than the German Länder (states).

[4] Hence the US Senate and the Swiss Ständerat are chambers of parliament conforming to the principles of representative parliamentary rule, such as the independent mandate. The German Bundesrat, on the other hand, is not, strictly speaking, a parliamentary chamber. It is a legislative body sui generis.

[5] In Beteiligungsföderalismus, the verb (sich) beteiligen means “to share”; so the term



may be translated as “federalism with sharing of functions”, as distinguished from functional differentiation.

[6] In the (rather exceptional) cases when the Federal Council objects to a bill with a majority of two thirds of its members it can only be overruled by a two thirds majority of the members of the Bundestag.

[7] The mediation committee was patterned after the model of the US “conference committees”. However, there is only one permanent committee elected for the whole legislative period, and it is responsible for all bills that may be deferred by the Federal Government, the Bundestag, or one of the state governments, to the mediation procedure. Its meetings are not public, and neither deputies nor state representatives are bound by instructions so as to facilitate the elaboration of compromises.

[8] This can also be interpreted as a reminiscence of their historical origins: At the time of Bismarck, the states of the newly formed Reich were originally represented by the heads of their former legations to the Prussian capital. (One should remember that the titles “embassy” and “ambassadors” were formerly the privilege of only a few big powers). Bavaria even maintained a legate at Berlin throughout the Weimar Republic, and he continued to rank among the members of the diplomatic corps.

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