

The Renaissance of Federalism?

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After a century of centralization, there are many indications that we are now experiencing a worldwide renaissance of federalism and decentralization. Of approximately 160 amendments to Switzerland's old constitution, most saw the transfer of responsibilities from the cantons to the Confederation. A similar centralization of state functions could also be observed in almost all federations, not always through constitutional amendments, but often through Supreme Court decisions or simply the normative power of fact. Recently, a broad countermovement has been set in motion that has led to the reinforcement, to a certain extent, of individual constituent members (*Länder*, provinces and cantons) or the foundation of new federations. In well-established federal states such as the Federal Republic of Germany and Switzerland, important federalism reforms have just been passed or are still in the works. In the United States of America, the oldest federal state in the world, the Supreme Court has contributed to the safeguarding of the »dignity of the states« in several of its decisions. In Canada and Austria, major reform projects have, for the moment, failed on a constitutional level, but more practical attempts are being made to strengthen the constituent members on a legislative level. In Mexico, outgoing President Vicente Fox has strived for a strengthening of the country's 31 member states and of intergovernmental relationships.

Until now, unitary states such as Belgium, Spain, and South Africa have chosen explicit or *de facto* federalist organizational forms. In many regions of conflict around the world, such as Iraq, Sudan and Sri Lanka, a federal constitution appears to be the most promising method of guaranteeing liberty, while preserving national unity and avoiding secession.

Even in classical centralized unitary states such as France and Britain, discussion has focused recently on »regionalization« and »devolution« without actually going so far as to discuss federalist forms of government. Finally, the stalled European Constitution was and continues to be – if not an explicit, then a *de facto* – attempt to strengthen federalist elements within the EU.

Today, only 25 of the 190 member states of the United Nations are federal states, in the sense that they stipulate in their constitutions the division of state responsibilities between the central state and its constituent mem

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bers, the direct applicability of both legal order to citizens, and the right of constituent members to participate in the decision-making of the central state.

Yet more than 40 per cent of the world's population lives in these explicit, or *de facto*, federal states, which include such heavily populated countries as India, Brazil, Nigeria, and the United States. The importance of federalism in today's world cannot be overestimated.

Where does federalism's new attractiveness come from? No doubt, there are a number of reasons, from providing a response to economic globalization and conflict avoidance in multi-ethnic states, to greater control of state power and the demand for populist policy. Multicultural countries, such as Switzerland, are inherently federalist. As Napoleon Bonaparte explained to the Swiss delegates in Paris, »The more I thought about the nature of your country, the more I came to realize that the diversity of your members makes it impossible to subject it to uniformity. Everything leads you to federalism: Either Switzerland is federative or it is not.« One could say the

same thing today about the European Union. Recently, a man from India explained to me that diversity and federalism are part of the DNA of every Indian. He simply not imagine his huge country any other way. Federalism has also succeeded out of historical and political reasons in such culturally homogeneous states as Germany or the U.S.A.

In older, established federal states such as Germany and Switzerland, federalism reforms that have recently been passed or are still being debated regularly target the devolution of responsibilities from the Federation to the *Länder* or Confederation to the Cantons, greater transparency in intergovernmental affairs, and a strengthening of the constituent states. In those countries, where the combination of duties and responsibilities has sustained heavy damage over time, federalism is being renewed from the ground up. Herein lies the greatest known difference in the federalism practised by Germany and Switzerland: so-called financial federalism, in which Switzerland leaves the cantons with their own sufficient sources of revenue but also experiences the familiar fiscal competition that exists between them. Financial federalism was also the starting point and central theme of the latest federalism reform in Switzerland, though Germany must still face this politically difficult part of reform.

In Switzerland in November 2004, a two-thirds majority of the people and the Cantons (with only one opposing), voted to adopt the Reform of the Financial Equalization and Sharing of Responsibilities between the federation and the cantons (*Neugestaltung des Finanzausgleichs und der Aufgabenteilung zwischen Bund und Kantone*). Parliament is currently debating the necessary legislation to implement this reform. The entire reform package should come into effect in January 2008. Though the Reform of the New Distribution of Responsibilities and related financial equalization must

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still stand the test of time, it can already be seen today that through this, after a century of centralization and the weakening of the cantons, federalism got a very good chance at renewal in Switzerland.

In Federalism Reform I, agreed to in the coalition contract between the CDU, the CSU and the SPD, was adopted this past summer by Germany's *Bundestag* and *Bundesrat*, taking effect September 1. However, it did not include any financial federalism reforms and still has to prove itself in practical terms. This is also the case in Switzerland. When the long and sometimes arduous genesis of both federalism reforms is considered, there is good reason to speak of an actual renaissance of federalism in both countries. The new attractiveness of federalism is especially evident in multi-ethnic states such as India, Nigeria, Belgium, Spain, South Africa, Sri Lanka and Iraq. The federalist state offers various ethnic groups the chance to experience cultural diversity in a unified state, making it possible through the enormous autonomy given to constituent members in such areas as education, culture and language, for them to fully realize their different regional identities. In 1993, Belgium, which had until then been centrally governed, decided in favour of a dual federal system made up of linguistic communities and territorial regions. Spain recently opted for a kind of so-called asymmetrical federalism by granting far-reaching autonomous status to individual provinces, beginning with Catalonia. This is similar to Canada's relationship with the francophone province of Quebec. The latest example of the attractiveness of federalism for multi-ethnic states is Iraq's new constitution. Remarkably, several federal states have seen informal reinforcement mechanisms form outside the constitutional framework, to the benefit of their constituent states. In Switzerland, the primary example is the founding 12 years ago of the Conference of the Cantonal Governments (*Konferenz der Kantonsregierungen*). As long as it successfully conveyed the opinion

of the cantonal governments on such important national issues as the reform of the federal constitution, the new financial equalization, bilateral negotiations with the EU and within the framework of the WTO, and the Confederation's 2003 Budgetary Relief Program (*Entlastungsprogramm*), the position of the cantons within the Confederation was greatly strengthened.

With its successful attack of the cantonal referendum on the federal fiscal package, the cantons for the first time demonstrated their referendum skills.

From a comparative legal view point the need for better horizontal voting on the opinions of the constituent states to increase their weight within the Confederation has also led to the creation outside the constitution of similarly informal consultative bodies in other federal states. This is the case within the Council of the Federation that brings together the Canadian pro

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vincial premiers, or the Conference of Provincial Leaders (*Landeshauptmannkonferenz*) in Austria.

Naturally, the widespread renaissance of federalism is not a one-way street. There are also counter-currents. First, there is the burdensome expression »federal/federalist.« Although the term refers to a strengthening of the constituent states in Germany, Austria and Switzerland, in Anglo-Saxon countries (following the famous *Federalist Papers* in the United States) it means exactly the opposite: namely, the strengthening of the federal government.

Consequently, in some countries, especially Britain, the word »federal« has become taboo, needlessly hampering discussions surrounding the new European constitution. Then again, the constitutions of former centrally-governed countries such as Spain or South Africa deliberately avoid using the word »federal« so as not to unnecessarily unsettle adherents of the unitary state, although they are certainly *de facto* federations.

In former centrally governed unitary states, the governments often see the move to federalism (for example, by granting autonomy to minority groups) as the first step toward separation and secession. Federalism in multi-ethnic states is not always the most suitable solution for resolving domestic conflicts, but is often the only possible democratic one.

On the positive side are federalism's famous qualities of flexibility and adaptability. Particularly impressive is the case of the U.S. Its federal constitution, originally drafted for 13 founding states with a population of four million, continues to prove its worth today for the country's 50 constituent states, with a combined population of about 300 million.

There is no known universally valid model for a federal state, only variously organized federal states with their particular historical, political and institutional characteristics. The opinion that federal states are too different to learn from one another is a fallacy. The fundamental problems of federal states, such as the allocation of state responsibilities and finances between the central and constituent states, financial equalization, the right of constituent members within the federation to participate and, more recently, in foreign policy, the role of municipalities within the federal state, are the same everywhere. Obviously, different solutions to these fundamental questions of federalism are possible, but they are not all immediately successful. Each federal state can, for all intents and purposes, learn from the successes and failures of other federations and benefit from their experiences.

Since the time of Thomas Jefferson, Americans have loved to say that federalism makes people happier. This is a big concept (perhaps too big) that certainly has something to do with the »pursuit of happiness« being one of the goals of the U.S. state since its famous Declaration of Independence. Yet it is enough if federalism makes it possible, through a vertical separation of powers, to better control power, to find, whenever possible, populist

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solutions to political problems, and to peacefully integrate heterogeneous societies within the state. Or, as in the case of my own country, to make Switzerland “a nation of will” (*Willensnation*) stable and viable.