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Coping with Diversity Federalism and the Return of History

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Coping with Diversity Federalism and the Return of History

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400 years ago, the first important theorist of federalism, Johannes Althusius, wrote that in a composite commonwealth like the German Reich a majority could decide upon matters that concern all members alike, but not upon matters concerning them separately ([1614] 1995, VIII: 70). The problem of federalism ever since has been to determine what is common or universal, and what should be separate or particular.

For a while, it looked as if this problem of unity and diversity had gone away. In 1965, a famous American political scientist, Robert Lane, wrote an article with the title: "The Politics of Consensus in an Age of Affluence," in which he prognosticated that economic growth and welfare security would lead to a decline in class awareness, religious conflict, and racial tension (1965). 24 years later, another famous American political scientist, Francis Fukuyama, even proclaimed the end of history. With the collapse of Soviet communism, so he argued, the combination of liberal democracy and capitalism would triumph as the final form of a universal human existence (1989).

Implicitly at least, the conclusion would have to be that federalism, that political form expressly invented to accommodate difference and diversity, would no longer be needed. Indeed, only as little as nine years ago, a prominent member of the scholarly comparative federalism community suggested that in Germany, a federal state with a "non-federal society," as he put it, the only reason why federalism continued to exist was that it is so required by the Basic Law (Erk 2008, 59).

History has come back with a vengeance. We are living in an age of scarcity rather than affluence. Class, religious, and racial conflicts are not only determining factors in global politics, they are also imported into countries that had thought to be immune to them. In many parts of the world, from Iraq to Sri Lanka, Cyprus and Yemen, federalism has been touted as a cure-all for sociocultural conflict in recent years, alas, with little if any success to date. The question then arises: How robust are the established federations themselves in coping with rising levels of difference and diversity?

My suggestion is that because the issues and conflicts driving difference and diversity will most likely transcend conventional boundaries of divided jurisdiction, success or failure will primarily depend on how governments are able to deal with overlapping or concurrent policy matters, and this in turn will very much depend on the availability of adequate formal or informal mechanisms for intergovernmental cooperation and compromise.

Federal systems in general provide two mechanisms for such cooperation. One is bicameralism, which is based on the idea that the subnational entities of a federation should have some input into national legislation by means of a second legislative chamber because such national or federal legislation affects all citizens across subnational boundaries, and therefore also co-determines the policy framework within which subnational entities may govern autonomously.

Intergovernmental relations between the two orders of government in the form of executive federalism constitute the other mechanism of cooperation, formal or informal contacts among government leaders or ministers for the purpose of reaching agreement on joint policy making, of figuring out, in other words, the boundaries between universal and particular with regard to specific policy problems.

The mechanisms and practices of bicameralism and intergovernmentalism vary greatly from one federal system to the next. I will focus on three classical models: the American presidential model, the Canadian parliamentary model, and the German council model.

The American Model

When it comes to the question at hand: which federal systems may be more successful than others in coping with difference and diversity, the American model is not the first one that comes to mind. In order not to be misunderstood: this assessment has nothing to do with the process or outcome of the most recent American presidential election. It does, however, have to do with a system of checks and balances unable to cope with ideological polarization, with Congressional supremacy largely unchallenged by the courts, and with an almost complete lack of formal and informal mechanisms for intergovernmental dialogue and compromise.

The American senate has lost its function as a transmission belt for regional interests at least since indirect elections of senators by the state legislatures were replaced with direct popular elections in 1913. In fact, directly elected second chambers rarely function as regional chambers unless, as may be the case in India more recently, its composition reflects a rise in regional party formations (Dhavan and Saxena2006).

If bicameralism is ineffective in the American model, executive federalism is largely absent. The only time when American presidents directly interact with state governors may be when they are invited to give the dinner speech at the annual meetings of the National Governors Association. In turn the only kind of influence that the states qua states can exercise upon Congressional legislation is lobbying. Intergovernmental relations merely constitute a subset of special interest politics (Cigler 2012), and it is doubtful whether the state lobby carries as much weight as the National Rifle Association.

How then does American federalism deal with increased levels of difference and diversity? Uniformity to the extent that it is so desired by the Congress is enforced by a punitive system of coercive federalism based on conditional grants (Kincaid 2012). Diversity, increasingly along ideological partisan lines, primarily prevails in areas that the Congress has no interest, or finds itself unable, to legislate on. Without any significant degree of organized policy cooperation and agreement,

the ultimate decision about what is universal and what ought to remain particular is routinely left to litigation before the courts.

A lot of this dismal picture of American federalism has to do with the presidential system of government and its checks and balances between the legislative and executive branches of government. To put it bluntly: There is no point for American presidents and state governors to negotiate an agreement when both may be faced with hostile majorities in their respective legislatures.

The Canadian Model

Two fundamental differences of American and Canadian federalism come to mind immediately. First, Canada has a government-appointed senate that does not even pretend to be a functional regional or 'federal' chamber. Second, however, in Canada's parliamentary system of government, prime minister and provincial premiers are directly accountable to their respective legislatures. This greatly facilitates intergovernmental deal making because government leaders are able to deliver on intergovernmental agreements at least as long as they are in command of legislative majorities. And indeed, direct negotiations and agreements between the two orders of government, have become a hallmark of Canadian federalism.

Canada's intergovernmentalism is grounded in the political strength of the provinces, and it is indirectly supported by the refusal of the courts to grant the federal government legislative largesse similar to that handed to the American Congress by a compliant Supreme Court. The provinces are strong for two reasons. One has to do with the need to accommodate Quebec nationalism. The threat of separatism has required concessions to provincial autonomy from which other provinces have benefitted as well. The other reason has to do with a regionalized economy and provincial ownership of resources in a country the economic strength of which heavily relies on the extraction and the export of such resources, oil and gas in particular. Regional economic and cultural differences cannot be patched over by however weighted majority rule in a bicameral legislature. They can only be accommodated through negoti-

ated agreement on compromise. Much of Canada's welfare state was negotiated after the Second World War in this way as well (Banting 2005).

You may have heard the slogan "sunny ways" with which the current prime minister, Justin Trudeau, won the 2015 federal election. This slogan actually was a reference to one of the pivotal moments in the history of Canadian federalism, the Manitoba school crisis. Manitoba had become Canada's fifth province in 1870. At the time, the province was culturally divided between two groups of roughly equal size, the French-speaking Métis people of mixed Indigenous and European ancestry, and English-speaking immigrant settlers. The Manitoba Act therefore sought to protect the continuation of two separate school systems in the province, one English and Protestant, French and Catholic the other, by stipulating that if the province reneged on French education, the federal government could unilaterally intervene with so-called remedial legislation.

Twenty years later, in 1890, with the English having become the overwhelming majority, the province first abolished French as one of its two official languages, and then replaced the dual denominational school system with one system, public and English. The introduction of remedial legislation in order to restore Francophone education in the province bitterly divided the governing conservatives in Ottawa, and the 1896 federal election was fought over the issue. The opposition leader Wilfrid Laurier avoided taking an either/or position by suggesting that instead of the confrontational approach of coercing the province into submission by means of imposed remedial legislation, he would prefer the "sunny way" of reaching an agreement with Manitoba. Laurier won the election and then negotiated a compromise: Catholic education in the French language would be made available school by school where numbers warranted. In doing so, Laurier also first established a tradition of intergovernmental bargaining and compromise as an alternative to confrontation and litigation before the courts.

Similarly, in the 2015 election, Trudeau's liberal promise of "sunny ways" helped defeating the conservative government of Stephen Harper. Harper had rarely met with his provincial counterparts during his nine

years in office, instead preferring what came to be called "open federalism" (Banting et al. 2006), separate governmental action by each order of government unimpeded by cooperation and compromise. The "sunny ways" slogan was clearly meant to signal a return to intergovernmental cooperation. As Trudeau's governmental record since coming to office shows, however, the intergovernmental approach to dealing with difference and diversity is not without problems.

His effort at reaching an intergovernmental accord on carbon pricing remains elusive as well as overshadowed by a unilateral threat of imposing a national carbon price regime if a cooperative agreement is not forthcoming by 2018. Similarly, with regard to the renewal of the health accord that his predecessor simply let lapse in 2014, Trudeau did not exactly succeed in reaching a common intergovernmental agreement. Instead, his government resorted to bilateral agreements with the individual provinces and territories, with the province of Manitoba the last holdout until August 2017. Essentially confronted with a take-it-or-leave-it approach, the cash-strapped provinces did not perceive the process as particularly sunny.

In principle as in practice, however, intergovernmental cooperation does offer flexibility. Governments can work around the rigidities of constitutional power assignments, and in doing so, they can avoid confrontation and, ultimately, litigation. In particular, cooperation allows for the asymmetrical accommodation of difference, which can be negotiated directly into an agreement. In the case of the aforementioned bilateral agreements on health care funding, British Columbia and Alberta received additional funds for combatting an opioid drug crisis that is particularly virulent in these provinces. Quebec in turn, as has been longstanding tradition, received its funds unconditionally in their entirety whereas other provinces had to accept apportionments earmarked for mental health and home care.

Part of the flexibility is informality. As we have seen, cooperative success to a large extent depends on the sunny predispositions of prime ministers. With good reason, then, what stands out as a hallmark of Canadian federalism, First Ministers' Conferences or Meetings aiming

at joint policy making in areas of overlapping jurisdiction, can also be described as the "weakest link" in Canada's regime of intergovernmental relations (Papillon and Simeon 2004).

The German Model

Germany does not have a Quebec, although it has Bavaria. The Bavarians refused signing on to the West German constitution (the *Grundgesetz*, or Basic Law) in 1949 because they found it too centralist and not Christian enough. Yet Bavarian separatism has been suggested only once, as *Der Abfall* Bayerns, in a 1973 political satire program, which Bavarian radio refused to televise as incompatible with Bavarian values (*Der Spiegel* 1973).

Sunny informality also does not come to mind when thinking about German intergovernmental relations. Article 65 of the Basic Law requires the German Federal Chancellor to follow procedural rules laid down in the *Geschäftsordnung der Bundesregierung* (standing order of the federal government) first adopted in 1951. Section 31 of this order compels the Chancellor to hold regular meetings with the *Länder* prime ministers for the purpose of working toward a "uniformly shared understanding of politics."

At first glance, then, the intergovernmental dynamic of Canadian and German federalism appears to be rather different. Indeed, the difference between Canadian and German federalism has been characterized more generally as one between Canadian "negotiated constitutionalism" and German "regulatory constitutionalism" (Benz 2008, 31). Yet the difference may not be as profound as one might think. The German *Spitzengespräch* (summit meeting) leading to the Oktober 2016 *Finanzpakt* (agreement on fiscal equalization) does not strike one as fundamentally different from the recent Canadian First Ministers' Meetings on the environment and health care.

There is one big difference, though, and that is Germany's second or upper legislative chamber, the *Bundesrat* (Federal Council). According to conventional wisdom, federalism as a system of governance entails a combination of self-rule and shared rule. As already mentioned

earlier, and as pre-formulated by Althusius, the members of a federation should be able to decide for themselves on matters particular to them, and they should have some say on matters common to all and decided at the federal level. In this sense, Germany's second chamber is the only truly regional or 'federal' chamber in the world of established federations because it is the *Länder* governments themselves co-determining federal legislation (see Hueglin and Fenna 2015, 218-19). This has consequences.

A few years ago, in Berlin, I was part of a team of external experts advising the Constitutional Drafting Commission of the Republic of Yemen on a new federal constitution. Coming from a country that had for years been governed by a centralized cleptocracy, the delegates were extremely skeptical when we told them that given Yemen's lack of regional administrative capacity, all revenue should be collected centrally and then redistributed on the basis of a formula to be determined by the new bicameral legislature. Stern faces of disbelief among the delegates only turned to cautious smile during a visit to the palatial premises of the *Bayerische Landesvertretung* (Bavaria's permanent representative office at the federal level), when a senior official told them in no uncertain terms that in fiscal matters, "nothing goes without us" (*ohne uns geht gar nix*).

At first glance again, one might think that this German form of non-plus-ultra bicameral federalism would make redundant elaborate mechanisms of intergovernmental negotiation. But the opposite is the case (Oeter 2006, 156), and for mainly two reasons. One is Germany's system of administrative federalism whereby almost all policy implementation and administration is under the autonomous jurisdiction of the *Länder*. The federal government therefore has to rely on *Länder* expertise at the stage of policy formulation (Benz n.d.). The other is the one-step bicameral process of law making itself. The process has to work if the federal government wants to govern, and the *Länder* governments want to deliver the services on which their electoral success depends. Both orders of government derive their legitimacy from the same piece of federal legislation.

This is very different from the two-step kind of intergovernmentalism in Canada where, after an agreement has been reached, each order of government is on its own to implement it and adhere to its rules. If the process falters, as in the recent First Ministers' Meetings on health care and the environment, for instance, the informality of the process allows for a variety of options ranging from inaction to unilateralism, or asymmetrical bilateralism. In this way, it may well be true that Canadian-style intergovernmentalism can offer more flexible policy options than German-style bicameralism (Broschek 2012, 682). But a counter-argument can be made as well: The one-step process of German bicameral federalism provides a powerful focus on reaching agreement, moreover advanced by all participants' awareness of operating in the shadow of eventual majority rule.

Comparative Conclusions

I am turning to some general comparative conclusions. All federal systems are in practice animated by two complementary forces or dynamics: One is a dynamic of constitutional federalism with its insistence on the exercise of divided powers. The other is a dynamic of what I have called treaty federalism (Hueglin 2013), and what Gerhard Lehmbruch has more recently called *Verhandlungsföderalismus* (negotiating federalism; Lehmbruch 2015). As the Supreme Court of Canada has stated in a recent decision: "We may appropriately note the growing practice of resolving the complex governance problems that arise in federations, not by the bare logic of either/or, but by seeking cooperative solutions that meet the needs of the country as a whole as well as its constituent parts" (Supreme Court of Canada 2011).

If we construct a continuum from rigid constitutional to more flexible treaty federalism, American federalism would be clearly placed at the extreme end of constitutional rigidity, and Canadian federalism would have to be located a long way towards the other end. To fit German federalism onto this continuum is more difficult. On the one hand, cooperative flexibility is clearly built into the bicameral form. On the other hand, this form of institutionalized cooperation creates rigidities known to Germans as an unloved regime of *Politikverflechtung* (interlocking

politics; Scharpf 2009). But, as I would argue, coping with difference and diversity leaves no real alternative to intergovernmental cooperation and agreement. I want to end, therefore, with a brief reflection on why this is not necessarily such a bad thing.

If one were to distil a common denominator from all the books and articles ever written about federalism, it would likely turn out to be a generally perceived sense of imperfection. More than in the case of unitary democratic systems, it seems, "performance, effectiveness, and legitimacy" (Bakvis and Skogstad 2012) of federal systems are almost constantly probed and critically evaluated. There is a lingering suspicion that governing in federal systems cannot ever be more than second best, and that to the extent it requires cooperation or even joint decision making, efficiency in particular becomes the victim of federalism's most famous defect: the "joint-decision trap" (Scharpf 1988).

Other and unitary political systems get scrutinised and criticised as well, of course. But when it comes to federal systems, a generally negative predisposition seems to prevail even though not everyone might want to go as far as to see federalism as an outright "tragic compromise" (Feeley and Rubin 2008). I want to at least attempt giving an answer to where this negative predisposition might be coming from.

In the seventeenth century, when Thomas Hobbes looked at the civil war tearing apart England and famously concluded, in chapter 13 of the *Leviathan*, that in a state of nature, that is, before the establishment of a civil society governed by an undivided "common power," there will be "warre, as is of every man, against every man." Hobbes also identified three of man's natural passions for this deplorable state of affairs: "First, Competition; Secondly: Diffidence; Thirdly, Glory." While competition and glory speak for themselves, diffidence, a word no longer common, is usually understood as fear or mistrust of others. But earlier, in chapter 6, when Hobbes talks about human passions, he defines it as "Constant Despayre" ([1651] 1991).

Taking the cue from Hobbes, then, we might wonder whether the negative perception of federalism stems from diffidence in this sense, ge-

neral despair or discomfort with a form of political order that somehow does not appear quite civil yet because it is still in search of the one optimal solution to the problem of governance. To put it differently: federalism does not satisfy the modern yearning for rational certainty. And if federalism is inevitable, then at least it should be based on "well-established constitutional rules" and not depend on informal compromises and agreements working around these rules (Gagnon and Iacovino 2007, 157). René Descartes, whom Hobbes met in Paris, pre-formulated what would become the mantra for the modern rational age of certainty by declaring flat out that "there is only one truth concerning any matter" ([1637]1985, Part II). Practicing federalism, in other words, with its messy arrangements of shared powers, conflict and compromise, is somehow premodern, leaving everyone living under it in a state of uncertainty and, as a consequence, diffidence.

Or is it postmodern? Friedrich Nietzsche became a postmodern icon (Sim 1998, 325) because the modern obsession with certainty based on a rational logic of universal truths appeared to him as an illusion. It was this illusion that was the real cause of despair because it commanded to strive for something that could never be achieved. "The fanatics of logic are unbearable like wasps" (die Fanatiker der Logik sind unerträglich wie Wespen), Nietzsche noted in one of his first published works ([1871] 1999, 541; own translation). Nietzsche did not really offer an acceptable alternative to a world governed by universal truths. His deconstruction of all established forms inevitably ends up in eternal chaos. For postmodern thinkers like the late Iris Marion Young, however, the deconstruction of universality would spark a new kind of "eroticism" through the rediscovery of diversity and with it, new encounters with, and new respect for, the "other" as the "novel, strange, and surprising" (1990: 239).

Now I will most definitely not suggest that federalism is an erotic form of government. But it seems evident that its constitutionally guaranteed and intergovernmentally performed commitment to plurality can provide an opportunity structure for encounters with a diversity of different rationalities that invite to rethink how we can reorganize a world in which few still believe that there is a linear path to an enlighte-

ned future. So my final answer to the question of which federal systems will respond to growing levels of difference and diversity more successfully than others is that it will be those federal systems that accept their inevitability and develop the most effective mechanisms of negotiation and compromise for coping with them.

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