12

Conclusion: the German model of federalism

The German model

The most commonly cited characteristic of American federalism is “dual federalism.” This refers to constitutionally delegated powers for the federal government and reserve powers for the states, with each level of government responsible for making, financing, implementing, and administering its own policies. In case of conflict, federal law is supreme so long as the federal government is authorized to act by the constitution. German federalism is also sometimes described by German scholars as “dual federalism,” but sometimes this means the same as above (Trennysystem) and at other times something quite different. That is, it often means “dualism” in the sense that the federal level is responsible for passing most legislation and the Länder for implementing this legislation on their own responsibility, usually with only legal supervision by the federation. Some Germans also refer to their system as “functional federalism,” by which they mean that the legislative function is largely a national responsibility, the administrative function largely a matter for the Länder.

These terms are confusing in fact, not only because of the different interpretations of “dual federalism,” but also because American dual federalism was abandoned to a considerable, though not complete, extent with the emergence of President Franklin Roosevelt’s New Deal in the 1930s and policies of following Administrations that were faced with the challenges of the growing welfare state. These changes brought about what became known as “cooperative federalism,” which was characterized above all by the sharing of fiscal and administrative responsibility for a wide variety of activities. Indeed, by the 1970s there were few government programs that did not involve the federal government in some combination with the states and/or local governments. The federal government
claimed the authority to pass legislation in almost any area it chose by use of the implied powers and interstate commerce clauses of the constitution, and, after the 1930s and 1940s, the Supreme Court generally accepted this interpretation of broad federal powers. Cooperative federalism was championed most enthusiastically during Lyndon Johnson’s Great Society programs in the 1960s, and it continued to grow even under the more cautious Richard Nixon, whose “new federalism” tried to remove to some extent the federal bureaucracy from its heavy involvement in state and local governments through such innovations as revenue sharing. A reaction set in with Ronald Reagan, whose “new federalism” was more like the old dual federalism in that he sought to “sort out” the responsibilities of the different levels and, in the process, return a number of important functions to the states. Since this was to include the financing of these activities, the support of many governors and interest groups was not very strong, and in the end little actual “sorting out” occurred. But the enthusiasm for federal involvement in so many activities was dampened during the Reagan era, and with the appointment of a majority of conservative Supreme Court judges during the Reagan and Bush Administrations from 1980 to 1992, the Supreme Court has become much less supportive of and even hostile in some cases to federal actions that can be seen as interfering with state autonomy.

The German era of cooperative federalism also weakened, but certainly did not eliminate, the German dualism of federal legislation and Land administration. Cooperative federalism is usually identified with the finance reforms of 1969 which were passed by the grand coalition of CDU/CSU and SPD. These reforms provided for the sharing of the most important taxes for federal and Land levels, authorized federal grants for certain purposes, and even initiated a traditionally rejected “mixed administration” in several “joint tasks” in which the Länder were deemed to need financial assistance to meet the constitutional requirement of “uniform living conditions.” In the meantime the joint decision making and mixed administration called for by these reforms and other features of German cooperative federalism came under increasing attack for their inefficiency and lack of transparency.¹

“Functional federalism” is also problematic, because Germans use “functional” in contradictory ways. As already indicated, to some Germans “functional” refers to federal legislation and Land administration. But Frido Wagener, a leading legal scholar of public administration, distinguished between administration by function, as in the case of special districts that are especially characteristic of American public administration,
and the “territorial administration” typical of Germany, France, and many other European states in which there is a high degree of unity of command. The classical examples would be the fragmented administration of American local governments that have numerous special districts responsible for schools, public housing, airports, parks, sewerage, public transport, etc., and the French prefectures or German cities and counties in which virtually all public activities are the administrative responsibility of the local general purpose executives.

“Participatory federalism” is another term frequently applied to Germany. This refers to the participation by the Länder in federal legislation, that is, national policy making. This occurs informally through a variety of committees and conferences, such as the conference of Land prime ministers associated with the chancellor’s party, and more formally through the Länder chamber, the Bundesrat. Federal legislation that affects the Länder, which is about 60 percent of all federal legislation, is subject to the absolute veto of the majority in the Bundesrat, while other matters are subject to a suspensive veto. This regional level participation in national policy making has no counterpart in American federalism, where the governors may have some informal influence with the Administration and/or Congress but no formal access to decision making. Indeed, governors can be ignored in the policy making process, especially if they are not of the same party as that of the President. The federation in Germany has gained a variety of powers or competences since 1949 largely at the expense of the Länder through concurrent and framework legislation, but almost always with the approval of a majority of the Länder in the Bundesrat. In other words, the Länder relinquished certain powers over the years, mostly for financial reasons and because federal responsibility was deemed more rational or appropriate, or because federal action was seen as more likely to produce more uniformity (since 1994 “equivalency”) of living conditions. These voluntary acts of relinquishing powers were, however, always done in return for Länder participation in the federal policy making process. The powers relinquished usually belonged to the Land parliaments, while the increased rights of participation went to the Land governments, so that the exchange was at the expense of the Land parliaments.

“Executive federalism” is therefore a term which is related to “participatory federalism,” but it refers more to the increased role of Land executives in federal policy making in the Bundesrat and to the role of prime ministers, subject ministers, and civil servants in discussing, coordinating, and even drafting common policies and procedures in various committees and
groups (sometimes referred to as the “third level”). The Conference of Minister-Presidents (prime ministers), the conference of education ministers (Kultusministerkonferenz (KMK)), and the science council which deals with higher education are well-known examples, but there are also informal conferences of the chancellor and prime ministers of his party that are very influential in policy making.

The term “administrative federalism” is used to describe the administration of most federal laws by the Länder. The general rule is still that the Länder administer these laws on their own responsibility without interference or supervision by the federation except with regard to the legality of Land practices. This stands in sharp contrast to the mixed responsibilities found in the administration of many American grant programs, which is a part of the American concept of cooperative federalism or intergovernmental relations.

A term often heard in Germany that seems contradictory to American ears is “unitary federalism.” It seems contradictory, of course, because “unitary” suggests a unitary as opposed to a federal system, or at the very least a highly centralized federal system. There is more centralization of legislation and other matters in Germany than in the United States, but “unitary” refers more to various policies, ideas, formal and informal coordination, and constitutional provisions that lead to more uniformity of public policy making and implementation with or without action by the federal government and Bundesrat. The requirement of uniform or equivalent living conditions is not only a constitutional requirement, it is also a reflection of the value Germans hold for equality. It does not mean that everyone should have the same standard of living – which some foreign observers and even some Germans seem to believe. Rather, it refers to “living conditions” such as school facilities and salaries of teachers, public transportation, roads, athletic facilities (including outdoor and indoor swimming pools), public assistance, and general welfare. The conferences of ministers and other committees and groups are also concerned among other things with coordination and standardized practices throughout the country. The most obvious result of the constitutional requirement and ideology of equivalent living conditions is found in the fiscal equalization procedures which, in the final analysis, bring the poor Länder to 99.5 percent of the average total revenues of all of the Länder but at considerable cost to the richer Länder.

A relatively new concept in Germany is “competitive federalism.” Over the past several years, an increasing number of voices have been heard that argue that the practices of German federalism have discouraged
experimentation and autonomous actions of all kinds in the Länder. Bavaria, joined by Baden-Württemberg and Hesse, has complained that fiscal equalization in Germany rewards Länder that are perhaps less concerned with cost-saving practices or more autonomy, because they receive the average revenues of all the Länder regardless of their own policies. On the other hand, the richer Länder have little incentive to be more cost-effective, because as much as 80 percent of their above average revenues are taken from them for transfer to the poorer Länder. The focus on federal policy making regarding most issues with only Land executive participation in the Bundesrat also discourages the Länder from engaging in autonomous experimentation. They have also addressed the more fundamental issue of Land autonomy and have insisted on the return of significant powers to the Land parliaments. The question, of course, is whether the value of equality and the constitutional provision regarding equivalent living conditions do not preclude serious efforts at autonomous decision making in the Länder beyond relatively minor actions.

In summary, the German federal model is characterized by parliamentary institutions, a strong party system, and a national government which is responsible for policy making at the federal level in most areas outside of education, culture, local government, and police, and autonomous administration of these policies by the Land governments. However, the Länder governments (which also means opposition parties) participate in this policy making and can even exercise an absolute veto over most important bills in the Bundesrat, so that it is not accurate to think of federal law making as being highly centralized. Administration is generally carried out according to the principle of unity of command by the local governments to which most federal laws are transferred by the Länder for implementation. The most important tax revenues are shared by the federal, Land, and to some extent local governments, which reduces pressures for widespread resort to American-style federal grants. However, some federal grants are provided under certain conditions, and there is some joint financing of certain “joint tasks.” A key characteristic is also the requirement to promote equivalent living conditions in the country as a whole. The accretion of powers over the years by the federation; the perfectionist and highly complex fiscal equalization procedures; the numerous conferences of prime ministers, subject ministers, and civil servants regarding specific policy arenas; and the requirement of equivalent living standards which is a reflection of the value Germans place on equality together form complex pressures for policy conformity which is captured in the term, “unitary federalism.”
The characteristics of German federalism described above have major consequences for the general political system. Peter Katzenstein pointed to the inability of the Kohl government after 1982 to match the kinds of significant changes brought about by the Thatcher and Mitterrand governments or the Reagan Administration, in spite of the talk of a major shift in direction (Wende) when the Kohl government assumed office. Indeed, one could also argue that the SPD–Green coalition government of Gerhard Schröder that came into office in 1998, after sixteen years of Kohl and his CDU/CSU–FDP coalition government, has also proceeded cautiously and incrementally. This is because the Federal Republic, in spite of being in many ways a centralized society, is also a decentralized, “semisovereign state” with “coalition governments, cooperative federalism, a wide range of parapublic institutions, and . . . the state bureaucracy itself” which together create “domestic shackles that have tamed the power of the West German state.”

Challenges confronting the German model

Many Germans express considerable pride in and satisfaction with their system of federalism, and some are eager to point to the advantages and accomplishments they believe have resulted from the federal system since 1949. A long list would include opportunities for greater grassroots participation; the political experience gained by numerous political leaders at the regional level and in the interlocking arrangements between the regions and the center; the opportunities available to regional politicians to be recruited into national politics; the identity which many Germans have with their regions; the fact that the Länder, while not as autonomous as American states, do provide for generally effective and honest administration; the division of powers which finds expression especially in the Bundesrat (also seen by some as a disadvantage); and, in spite of unification in 1990, the high degree of uniform living conditions throughout the country.

On the other hand, one German scholar has written that “it is apparent that German federalism is seen as permanently in need of reform.” The evidence for this statement is strong. Of the fifty amendments to the Constitution since 1949, most have some connection with federalism. There have been several reforms of financial relationships between the federation and the Länder and among the latter, the last of which was in the summer of 2001. From the beginning the German Länder enjoyed
little autonomy. By the 1960s Germany was being described as a “unitary federal state,” which suggested not just a tendency toward centralization but also various practices and policies that brought about a high degree of coordination and participation in federal policy making. The finance reform of 1969 ushered in the era of cooperative federalism which soon became identified with Politikverflechtung, or a kind of intergovernmental, interlocking decision making process in the Bundesrat, in joint tasks, in conferences and expert committees, etc., all subject to the “joint-decision trap” according to which the requirement of unanimity or near-unanimity leads to inefficient, ineffective, and fiscally wasteful decision making based on the lowest common denominator. A study commission on Land boundary reform was formed in the early 1970s, and it recommended a consolidation of the then ten West German Länder to five or six Länder of roughly equal size. In spite of considerable discussion, no action was taken beyond some changes made in the Basic Law in 1976 concerning procedures for territorial revisions. Another study commission recommended in the mid-1970s some changes in the Basic Law regarding federalism, but again no action was taken. The SPD–FDP coalition government tried to expand federal authority even more in the 1970s, but it was thwarted to a large extent by the opposition in the Bundesrat and by growing economic problems. By the early 1990s, one scholar in an admittedly somewhat polemical book called Germany a “disguised unitary state” and argued that history, political structures, procedures, actions of political parties, public attitudes and other factors did not favor genuine federalism. Following unification in 1990, some changes were made in fiscal legislation, especially in order to accommodate the five new Länder, but no significant permanent changes in the existing system were made. There were also some relatively minor changes in the Basic Law in 1994 concerning federalism and other matters, but those who wanted a thorough revision were certainly disappointed. As noted above, considerable dissatisfaction arose during the 1990s over fiscal relations, and, following a decision of the Federal Constitutional Court in November 1999 requiring some rather major changes, the prime ministers and Chancellor Gerhard Schröder hammered out an agreement that will go into effect on January 2005 and last until the end of 2019.

Voices calling for some major changes in German federalism were hardly quieted by the financial agreement of 2001, because it did relatively little to satisfy those who now argue that Germany needs a system of “competitive federalism.” As indicated on pp. 192–194, the general
theme is the need for more fiscal and policy making autonomy for the Länder. This has been a long-standing demand of many Land politicians, but it seems not to have been taken very seriously in the past. In more recent years, especially since unification and the huge transfers of funds to the East, it has become a serious demand. This can be demonstrated by two examples. First, Bavaria, Baden-Württemberg, and Hesse went before the Federal Constitutional Court in 1998 and argued that the existing system of fiscal equalization was unconstitutional. In November 1999 the Court agreed in part and ruled that the Bundestag would have to revise the law by the end of 2002 so that a new system of financing the Länder could go into effect by 2005. As noted on p. 199, Chancellor Schröder and the prime ministers of the Länder met in June 2001, after the recommendations of a special expert commission had been rejected, and hammered out an agreement for the period 2005–19. This agreement was reached at the expense of the Federation, which agreed to increase its contributions so that the richer Länder could retain a larger portion of their above-average revenues. Another part of the agreement provides for a continued transfer of large amounts of money to the five new Länder in the East.

A second example is the announcement in August 2001 by Prime Minister Roland Koch of Hesse that he would seek authorization from the Bundesrat to engage in an experiment regarding the administration of public assistance (Sozialhilfe) based on the “Wisconsin model” introduced by Governor Tommy Thompson in the 1990s. This model, which focuses on consultation, child care for single parents, basic job training, and assistance in getting a job offer which must be accepted to avoid a reduction in monetary aid, immediately became a focus of discussion in the German media. Not surprisingly, many supported the idea, while others rejected it. It is interesting to note that some opponents said it would not work in Germany, while others claimed that the model was already being applied to a considerable extent. In any case it is doubtful that Hesse will receive permission by the Bundesrat majority to begin a process that could be seen as undermining the strong belief in Germany that welfare is a national responsibility and that all citizens must be treated equally.

The probable failure of Prime Minister Koch’s initiative is an example of why it will be difficult to give the Länder more autonomy. More Land autonomy means less attention paid to the constitutional requirement of equivalent living conditions. This can be seen clearly in the United States, where there are rather significant differences in social policy among the more autonomous states. These differences will probably grow in time under the Welfare Reform Act of 1996 which eliminated the old federal
program of Aid to Families with Dependent Children (AFDC) and turned the new program, Temporary Aid to Needy Families (TANF), over to the states with federal guidelines. Given the value that Germans place on equality, which, after all, is reflected in the provision for uniformity or equivalence of living conditions, it is difficult to see how the Länder can be granted more autonomy without a negative public reaction which would surely be even stronger in the five new Länder than in the West. The poorer Länder would find it difficult to maintain the generous welfare programs to which many Germans have become accustomed and which many would argue are necessary to keep current recipients from threatening political stability through protests or even violence.

It should be noted in this context that conventional wisdom in Germany holds that the Länder have little opportunity to be innovative, whether because of the dominant policy role of the Federation, the interlocking relationships between the federation and the Länder and among themselves, the lack of own source revenues, political culture and public expectations, or for other reasons. Yet one might hypothesize that this conventional wisdom is based in part the lack of studies on comparative public policy in the Länder. It is at least possible that there are greater differences than is generally recognized, and that the Länder do indeed engage in some innovations within the constraints in which they operate. This is one of the conclusions of Schmid and Blancke, whose careful and sophisticated comparative study of employment policy demonstrated that some differences exist in the initiatives taken by the Länder. These are based to some extent on party differences, but, as in the United States, more on social–economic pressures confronting the Land governments.9

Whether or not employment policies or welfare policies are exceptions to the ability of the Länder to act with some autonomy, one might argue that they could regain some greater initiative if they could achieve a lessening of the joint decision making processes which seem to hinder effective policy making and reform efforts.10 But this would probably require some sorting out of responsibilities, and as Americans learned under President Reagan’s “new federalism,” a sorting out of responsibilities in the modern state is not a simple matter. In determining what is a matter of federal concern as opposed to what is a matter for the Länder, it may well be decided that the responsibility should be shared. This means cooperative federalism, which is what those demanding more autonomy appear to reject.

A successful sorting out of responsibilities would also mean that more pressure would be placed on the smaller and poorer Länder to consolidate
with their neighbors in order to reduce political costs, for example, for separate cabinet ministers, parliamentary deputies, Land political parties, etc.; reduce potentially costly competition for economic investments; and to realize savings in scale. But besides the problem of the low likelihood and feasibility of territorial reform, it is not clear how the joining of two or perhaps even three small and poor Länder would improve significantly their fiscal potential.

Another interesting question raised by the demand for more autonomy is the extent to which the Land governments are willing to give up their participatory rights in the Bundesrat and elsewhere in making federal policy. Indeed, there is reason to believe that some Land politicians would not be willing to trade their rights to participate in “high politics” in return for more Länder autonomy. Another question is the extent to which the strong party system in Germany can be brought into conformity with more autonomous Länder, since they have also been agents of a more “unitary” federalism. (On the other hand, some scholars have suggested that the parties are acting more autonomously today than in the past.) And it must be asked, of course, to what degree the autonomy of the Länder has already been or will be in the future affected by the responsibilities assumed by the EU. The Länder have some influence via the Bundesrat on EU policy making that affects them directly, and they are represented in the EU’s CoR, but so far they do not seem to have been able to gain the voice in EU policy making in the Committee that they had hoped for when the TEU was negotiated in Maastricht in 1991.

Today German federalism is under discussion more perhaps than ever before, and some of the criticism, which has always existed, has become so extreme as to suggest that German federalism is a farce and should be abandoned. The addition of five poor new Länder as a result of unification has made the achievement of equivalent living conditions even more difficult than it was before, in spite of the massive transfers to the five new Länder. Old questions about the extent to which the Länder have lost most of their important legislative functions in return for the right of participation in federal policy making by Land executives are being raised again with a new vehemence, and a serious discussion of more autonomy for the Länder can be found today in the major newspapers, academic journals, and in numerous books. Apparently in part as a response to the EU’s 2002 Convention on the Future of Europe, the presidents of the German Land parliaments began their own “Convention of Land Parliaments” in the summer of 2002 in the Wartburg on devising means of gaining more autonomy and drawing a clearer separation of federal and
Land responsibilities. Their report is due by 2004, before the EU Convention has submitted its findings. How this body deals with the issue of equivalent living conditions will be a major question. There seems to be little doubt that the pressures for changes will have some impact on German federalism in the near future, and that these changes will not be limited to the rather modest revisions made in the Basic Law in 1994 or in the financing of the Länder in June 2001. Those interested in federalism, in Germany and elsewhere, will be eager to learn about the changes which finally emerge.

Notes

7 Abromeit, Der verkappte Einheitsstaat, pp. 7–12.
8 There is a rapidly growing literature on the subject of competitive federalism. One recent example is Heribert Schatz et al., Wettbewerbsföderalismus: Aufstieg und Fall eines politischen Streitbegriffs (Baden-Baden: Nomos Verlagsgesellschaft, 2000). Several chapters in Meier-Walser and Hirscher, Krise und Reform des Föderalismus, also deal with competitive federalism.
9 Josef Schmid and Susanne Blancke, Arbeitsmarktpolitik der Bundesländer (Berlin: Sigma, 2001).
11 Ibid., pp. 109–110.
