Multi-Layer Democracy in Germany: Insights for Scottish Devolution

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July 1998

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The Constitutional Framework for German Federalism

The German federal system was established in the then West Germany in 1949. It forms a fundamental part (one of those which can never be overturned by constitutional legislation) of a constitutional order designed to deconcentrate political power after the experience of the Third Reich. Of the 141 articles of the German constitution (the Basic Law), over a third relate to the operation of the federal system. Many of these require supplementary legislation which fleshes out constitutional stipulations in, at times, rigorous and lengthy detail.

Constitutional provisions and supplementary legislation thus set out a hghly structured set of relationships between the federation (the various institutions of central, or federal government) and the sixteen states, or Lander. All the Lander have equal constitutional status under the Basic Law. In addition, they each have their own detailed constitutions which formally structure government within their territories.

The Constitutional Division of Powers in German Federalism

a) The Division of Legislative Com~etences

The Basic Law states that residual power lies with the Lander, i.e. unless otherwise specified, governmental powers and functions are exercised by the Lander (Art. 30). Areas 'otherwise specified' are the exclusive legislative powers of the federation (Art. 73), areas of concurrent legislation (Art. 74), areas of federal framework legislation (Art. 75) and joint responsibilities (Arts. 91a-b). All else falls under the exclusive legislative power of the Lander.

However, 'all else' does not amount to much. The exclusive powers of the federation include foreign affairs, defence, citizenship, migration, currency, transport and communications and aspects of policing. Concurrent and framework legislation covers 37 separate legislative fields. Although the presumption of residual power of the Lander applies here, the federation has made extensive use of the possibility given

The Scottish Parliament and the other units of devolved government in the UK under preparation or consideration will be established by normal statute. The UK constitutional

in Art. 72 of the Basic Law to claim the power to legislate in those fields. Art. 72 sets out a 'national interest' test, which justifies federal legislation wherever it is deemed necessary to maintain 'equivalent living conditions' throughout the federation. The equivalence clause has been described as the 'mission statement' of German federalism and has been invoked so extensively that there remains little scope for the Lander to legislate in the fields covered by concurrent or framework legislation.

The concern to maintain equivalence also underlay the joint responsibilities of Arts.
9 la-b (introduced in 1969-70), which allow federal participation in the joint planning
and financing of a range of high expenditure policy fields originally the preserve of
the Lander, but where the Lander were considered insufficiently able to guarantee the
delivery of equivalent standards of public services across the federation.

The net effect is that the residual power of the Lander in legislation now has a The different configuration of the residual power in UK-
marginal scope, with exclusive legislative competences remaining only in aspects of Scottish relationships means that the legislative autonomy of
policing, education, media regulation, regional economic policy, and local the Scottish Parliament will be far more extensive than that of
government structure. the German Lander.

b) Administrative Competence

The residual power also extends, though, to administration. Unless otherwise The Scottish Executive will be responsible for administering specified in the Basic Law, the Lander implement federal legislation with legislation in some fields of Westminster's resewed powers considerable discretion (Art. 83). Federal administrative authorities exist only in areas

C) Lander Participation via the Bundesrat in the Federal Legislative Process

This relationship has further implications concerning the role of the Bundesrat. The Bundesrat comprises representatives of the governments of the Lander (which have between

After a protracted campaign, the Lander secured a number of constitutional amendments in 1992 which addressed these problems. Essentially they extended the rights and role of the Lander and in domestic politics to European policy matters (Arts. 23 and 50). The most significant aspects of these rights, which are formally exercised through the Bundesrat, are: a) that the Bundesrat can bind the federation to represent its views in the EU in matters which impinge internally on their exclusive legislative competences or their administrative powers; and b) that a Bundesrat-
nominated Lander representative leads the German delegation in the Council in
discussion of matters 'essentially' affecting exclusive legislative competences of the
Lander.

Excursus: The Role of the Lander Parliaments

As these forms of division of power have evolved over the postwar period, they have
had a major impact on the institutional relationship between parliament 2t the Td (Landehe)]TJ 0.0117.576.245 0 Put (on)Tj 0 T663.397 0 s the Landeed pd (Parliamen of sely,ents Lande4c nmendment428hav4g tey whic48a tey

e) Adjudicating Disputes over the Division of Powers
In any system of decentralised governmentD9m0 Tc 2.0iSs9ef4011 Tc -128790 Td (owill)Tj 0 011 Tc -179930 Td (obe)Tj 0 Tc 1.026 0 Td (sdsputes)]j -0.011 Tc -3.60

The Intergovernmental Politics of German Federalism

A crucial feature of German federalism emerges from the above: the high level of interdependence which exists between federation and LanderIBundesrat in the process of making and implementing law. Only in the few areas of exclusive competence at either level of government do federation and Lander act separately from one another. In the vast majority of policy fields, their activities are intertwined through the functional division of competence between federal legislation and Lander administration and the scope of the Bundesrat's powers in federal legislation and EU matters. In order to make policy in Germany, elaborate mechanisms facilitating the cooperation and coordination of the two levels of government are therefore required. For this reason, German federalism is often described as 'cooperative' federalism.

These, characteristically, are highly structured, require intensive bureaucratic interaction, and are open to a number of criticisms: the need for coordination slows down the policy process, limits flexibility, and can lead to imrnobilism; the coordinative operation is expensive, requiring immense input of civil service time; and it is carried out largely outside the public view, raising additional questions of democratic accountability.

a) Intergovernmental Relations between Federation and Lander

If the Lander wish to maximise their influence in the policy process, they must as far as possible act collectively. The Bundesrat's veto powers can only be effective if enough Lander agree to deploy them. Intensive coordination between the Lander is therefore a necessary launching point for federal-Lander intergovernmental action. It is carried in a number of ways: in conferences bringing together representatives of the Lander ministries responsible for the same policy areas in their respective Lander; in formal and informal coordination between the 'missions' each Land maintains in the federal capital; in Bundesrat committees (which broadly cover the policy areas of federal government departments); and ultimately in the Bundesrat plenary. Equivalent forms of coordination also take place between the Lander and the federation, up to

The separation of legislative powers in devolved and resewed
matters will require a less close and formalised form of intergovernmental coordination between the Scotland and the
UK authorities than in Germany. However, the role of the
Scottish Executive in administering aspects of UK reserved
powers and in of tog Tdd (of)Tj ET /Suspect6-0. 111 40.0343936 0.9162

very limited autonomy to raise, or vary the rates of, taxes (although the and which has varied since according to a formula relating
revenues, or shares of revenues, of certain taxes are constitutionally guaranteed changes in government expenditure in Scotland to changes
to them in Art. 106 of the Basic Law). made to government expenditure in England. In addition,
there is an income tax-varying power of +3%.
The net allocation of resources between federation and Lander ('vertical'
equalisation) is periodically adjusted according to a formula designed to balance
tax revenues and expenditure obligations at the two levels of government.
'Horizontal' equalisation of resources among the Lander is, by contrast, primarily
revenue-driven. The aim is to equalise tax income per head of population and is realised by a series of allocation mechanisms designed to ensure that each Land has at least 99.5% of the average income per head of all the Lander taken together. It involves a range of financial transfers from economically stronger to weaker Lander, plus a number of 'top-ups' by the federation.

Horizontal equalisation is a much criticised system for a number of reasons. First, it has an extraordinary complexity which obscures financial accountability; it is scarcely possible to identify whose tax payments pay for which (or more precisely, which Land's) public services. Second, the levelling effect of 99.5% income equalisation is felt by the economically stronger Lander to penalise them for their economic success and (what they perceive as) their sound financial management, while failing to offer the weaker Lander real incentives for managing their economy and/or finances better. Third, the system is guided by income criteria, and takes differential expenditure needs among the Lander into account only marginally or in an ad hoc and inconsistent manner. Lander with weaker economies and therefore higher expenditure needs (e.g. on social security or economic restructuring) feel the system

behalf a collective policy line in the Council. An initial tendency to issue over-rigid mandates unsuitable for the consensual political style of the Council has been rectified, and the system is generally deemed to work satisfactorily. Second, the Bundesrat representative in no sense legally represents the Lander in the Council, but the German member state, and merely takes the (temporary) lead for a delegation also and always comprising representatives of the federal government. In these circumstances, the Bundesrat's positions for the Council are invariably subject to prior coordination with the federal government.

Two further features of Lander engagement in the European policy process are worth noting. First, though the main force behind the establishment of the Committee of the Regions in the Maastricht Treaty, the Lander have been disappointed by the operation of the Committee in practice. This is less a reflection of the Committee's as yet weak, consultative powers and more of its composition as a body of regions and local authorities (including, alongside at least one representative for each Land, three representatives from the German local authorities' associations). The Lander have found it difficult and of limited utility to pursue common cause with constitutionally weaker local government units which have different perspectives and interests in EU policy-making.

Second, all of the Lander maintain liaison offices in Brussels, some of them with more staff and splendour than some national embassies. Although some of the Lander style these (without legal foundation) as quasi-diplomatic 'representations', their function is rather more prosaic. They do not serve primarily as autonomous lines of influence into the Commission or Parliament (much less the Council), but rather as information channels whose main function is to supply early and thorough intelligence which the EU policy operation 'at home' then feeds into the intergovernmental coordination process.

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Current Issues: From Cooperative to Competitive Federalism?

To recap: the German federal system has evolved over the postwar era into a The UK devolution process is asymmetrical and for
'cooperative federalism' which is based mainly on a functional division of power Scotland consists primarily of the separation of legislative
and which seeks through intense intergovernmental interaction to ensure powers between Edinburgh and Westminster. It will
common standards of public policy and services - 'equivalence' of living require a lesser degree of intergovernmental coordination
conditions - across the federal territory. than in Germany.

However, cooperative federalism had become entrenched as a method and ethos
of government by the late 1960s. This was an era when, relatively speaking,
'living conditions' did not significantly diverge from one part of the federal
territory to another. In those circumstances, ensuring common standards was
both an uncontroversial and a feasible goal.

These conditions are no longer met. In the 1980s a north-south divide emerged in West Germany between northern 'smokestack' Lander facing structural economic decline in traditional industries and a group of southern Lander riding a wave of economic success in high-tech manufacturing and/or the expanding service sector. Since German unification in 1990 and the integration of the eastern Lander into the federal system, economic divergence has, of course, become much starker. As a result the question of whether the pursuit of common standards is desirable or feasible is increasingly being answered in the negative.

Economic divergence leads the Lander to pursue increasingly differentiated and at times conflicting policy interests which are less amenable to coordination in the intergovernmental relations of German federalism. In addition, economic divergence brings with it a greater volume of financial transfers in horizontal equalisation from the economically strong to the economically weak. As a result, the sense of solidarity between the Lander has become increasingly strained, raising doubts about whether cooperative federalism remains appropriate as a method and ethos of government.

Bavaria has been most vocal among the Lander in criticising the existing In this sense, Scottish devolution equates broadly to
institutional configuration of the federal system, arguing in the words of its Stoiber's reconzmendation of a rmade-to-measurer suit: the
Minister-President, Edmund Stoiber, for the replacement of the 'uniform corset' Scottish Parliament and Executive will be able to pursue
within which all Lander have to operate with 'made-to-measure suits' whereby separate Scottish priorities and will have suflicient
each Land would pursue its own regional priorities on the basis of its own resources (through block and tax-varying power) to do so.
resources. The aim is to establish a competitive, rather than a cooperative
federalism.

Bavaria has not as yet secured regular support for its aims elsewhere among the
Lander. Indications are, though, that other economically stronger Lander in
western Germany are beginning to endorse the Bavarian agenda. It seems likely,
therefore, that the ethos of cooperation which has been central to postwar Germany federalism will contue to dissipate in the coming years.