

COMENTARIO SOBRE EL ESTUDIO DEL MODELO ALEMÁN: FEDERALISMO EJECUTIVO Y EL ROL DEL BUNDESRAT

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First of all I would like to thank the organisers for inviting me to attend this conference.

As Secretary-General of the German Bundesrat I am supposed to comment on Professor Benz' paper from the perspective of practical experience. Unfortunately I have very few comments in that respect, as Professor Benz covered all the issues and I also concur in principle with his critical comments.

For that reason I would like to summarise how we put cooperation into practice in Germany and highlight a few characteristic aspects from the perspective of the Bundesrat.

1. INTRODUCTION

Let me begin with a comment on constitutional law and constitutional policy.

Our constitution – the Basic Law – stipulates that it is the German federal states, the *Länder*, which make up the Federation. Legislation, administrative tasks and the administration of justice – in other words, the three classical executive powers – thus in principle fall within the ambit of the federal states' powers and responsibilities. The Federation is only competent when the constitution explicitly ascribes a particular role to it. Whilst the overwhelming majority of legislative powers accrue to the Federation as stipulated in various provisions, it is important to note that these are powers that have been transferred – one might almost say, delegated – to the Federation. Carrying out the tasks incumbent on the state/Implementing legislation is however nearly on the whole the responsibility of the authorities in the federal states.

To put it in a nutshell:

The Federation needs the federal states in order to adopt bills for the state in its entirety and indeed to implement this legislation. However, the federal states also need the Federation, as the crucial income for the workings of the overall state comes from taxes known as taxes accruing to the Federation (joint taxes).

This intermeshing of the powers and responsibilities of the Federation and the federal states is made manifest in a series of provisions in the Basic Law

(for example, in Articles 30, 50, 70 and 83 on the powers and responsibilities of the federal states, and in particular Article 79 Sub-section 3 with what is called the eternity clause, prohibiting certain changes to constitutional provisions in respect of Germany's federal structure and the participation of the federal states in Federation legislation, as well as Articles 31, 32 with its provisions on the pre-eminence of the Federation on the one hand, as well as the powers and responsibilities explicitly allocated to the Federation under constitutional law).

This system with intimately related spheres of influence and mutual checks and balances means it is essential for there to be cooperation between the Federation and the federal states; indeed this is just as true for relations between the federal states as for relations between the federal states and the Federation.

Within this relationship the federal states must uphold the principle of “loyalty to the Federation”, while the Federation is obliged to adopt a “*Länder-friendly* approach”. The constitution thus holds the state together.

In terms of constitutional policy, both the federal states and the Federation are responsible for creating living conditions for all citizens that are as equal as possible. As a consequence, in addition to straightforward exchange of information on technical points, at the political level alliances are also forged between the federal states when they have shared interests, whilst in other cases their positions are diametrically opposed. As a result, federal states with a strong industrial base to their economy may find themselves joining forces alongside a grouping of federal states where agriculture is more important; similarly, city-states may have different concerns than the larger federal states in their immediate vicinity. The constitution allows competition between the federal states within reasonable bounds but also fosters solidarity between the *Länder*, for example in the context of the financial equalization scheme.

My first conclusion:

Despite all the differences between the federal states in terms of population structure or economic structure and clout, and irrespective of which political constellation is currently in government, there is also a need for cooperation between the federal states in the interest of the people living there. Unless the majority of the federal states reach an agreement and cooperate with each other, the federal states cannot have a decisive impact on federal policy and on legislation adopted for the whole country.

2. DIFFERENT FORMS OF COOPERATION

When considering how the federal states cooperate, shape their opinions and take joint decisions, a distinction should be drawn between institutional cooperation in the Bundesrat and cooperation which, although it is formalised, is not enshrined in the constitution, for example in working groups, or sector-specific conferences bringing together ministers from the federal states or the Minister-Presidents. In parallel, various bodies have been set up, often based on specific legislative provisions, with representatives from both the Federation and the federal states, particularly to deal with what are known as joint tasks, as well as fora established on the basis of agreements between the federal states (such as the Standing Conference of the Ministers of Education).

These forms of cooperation intertwine. Let me explain this with an example concerning the European Union.

Every federal state has its own representative office in Brussels, each with its own networks of contacts in the Commission and the Council. The federal states have concluded an agreement with each other, whereby they maintain a small secretariat in Brussels – known as the Federal States' Observer – whose director is entitled to attend meetings of COREPER and Council meetings as an observer and to inform the federal states about the progress of such meetings.

When the federal states have a particular interest in the matters being addressed by specific draft legislation, the Bundesrat appoints representatives known as plenipotentiaries, who follow the negotiations at the European level as representatives of the German delegation and inform the federal states about the details of these negotiations.

If fundamental questions concerning European Union policy arise from these deliberations, the ministers from the federal states with responsibility for European Union affairs discuss these issues in a separate conference, the Conference of *Land* Ministers for European Union Questions.

The federal states take action via the Bundesrat should they wish to adopt a joint position vis-à-vis the federal government or vis-à-vis the Commission – and indeed in certain cases such opinions are binding on the federal government.

That means that the administrations of the federal states exist alongside the joint *Länder* secretariat in Brussels, the political coordination body with the Conference of Ministers on European Union Questions, and the Bundesrat, which adopts positions in particular on matters of European Union legislation and may appoint plenipotentiaries, who can put an issue back on the agenda at any time.

(In addition I would just like to point out that the federal states may also attempt to influence European policy through the Committee of the Regions and that German participants endeavour to adopt a concerted approach in this context too).

The situation is comparable when it comes to participation in the context of national legislative procedures.

The federal states have their own representative offices in Berlin, representing the interests of the federal states during committee meetings in both the Bundesrat and the Bundestag.

If the federal government intends to launch a legislative initiative – and this is the normal state of affairs in legislative procedure – it is obliged, in keeping with its own rules of procedure, to involve technical experts from the federal states even before a decision by the cabinet on introducing the legislation in question into the legislative procedure. The standard procedure thus gives all federal states an opportunity to comment – each of the federal states presenting their own particular position – before the Bundesrat addresses the draft bill in an official capacity. At

this initial stage there are already contacts between officials in the specialist departments in the various federal states, at least in the case of major draft bills, and often a political opinion is also expressed via the relevant sector-specific Conference of Ministers.

If the federal government decides to introduce the draft bill into the legislative procedure, it is up to the Bundesrat to adopt a binding opinion for the federal states through discussions in the committees and in the plenary session.

There is an agreement between the federal states in this context, stipulating that draft bills will no longer be examined in the sector-specific Conferences of Ministers once deliberations are underway in the Bundesrat on this legislation, but will instead be addressed only in the Bundesrat.

The Bundesrat may also take the initiative by introducing legislation. This is likewise preceded by meetings with the relevant departments to address the technical issues, as well as political discussions in the sector-specific Conferences of Ministers, where efforts are made to “organise” the requisite majority needed in the Bundesrat later in the procedure.

My second conclusion:

Cooperation between the federal states via technical specialists in the Bundesrat, in the independent Conferences of Ministers, as well as in bodies provided for in legislation or agreements (as is the case for joint tasks) thus exist parallel to each other. Although there are occasional overlaps, these areas of cooperation are on the whole complementary.

3. THE SPECIFICITIES OF THE GERMAN SYSTEM

All the aforementioned modes of cooperation involve cooperation between the various executive authorities and indeed often include bodies in which only civil servants are represented. Ministers – in other words, the political level – only become involved towards the end of the process, for example in the sector-specific Conferences of Ministers or in the Bundesrat's plenary sessions. Germany has "executive federalism". The Members of the Bundesrat are also members of the government in their federal states and are appointed exclusively via a decision taken by the cabinet of their own federal state. That means that they are not directly elected parliamentarians.

This special form of federalism has been discussed on a number of occasions, and proposals have also been mooted to introduce a directly elected second chamber – comparable to the senates in other states. However, as the constitution stipulates that the Bundesrat is responsible for representing the interests of the federal states rather than the interests of individual parties in legislative procedure, the system whereby the federal states are represented by the executive in each federal state has persisted. The executive is also the only tier of the system with the resources and in-depth knowledge needed to represent the interests of the federal states over the long term vis-à-vis the Federation.

In addition in principle this form of federalism prevents the same party political debates being conducted in the Bundestag and in the Bundesrat. There is virtually no duplication of political discussions. As a general rule, debates in the Bundesrat are very matter-of-fact and focused on solving problems, with few heated discussions.

It is certainly the case that the political camps also meet and attempt to establish a consensus at every step of the decision-making process in the Bundesrat. Prof. Benz addressed the details of how this happens too. However, the importance of such meetings – although there may of course be exceptions in specific cases – is

often overestimated. Irrespective of which party forms the government, either alone or in coalition with other parties, if the cabinet in a federal state takes a decision on how to vote during the plenary session, then the head of a *Land* government cannot simply overturn the decision and steer a different course overnight even after a fireside chat with the Chancellor or the leader of the party at national level. As the votes for each federal state always have to be cast en bloc, a new decision always has to be taken by the cabinet in the federal state in question if a voting decision is to be changed in response to party political considerations. This applies in particular if the *Land* government in question is a coalition government.

Exceptions to the aforementioned matter-of-fact approach in the Bundesrat only really arise when the balance of power differs in the two chambers (Bundestag und Bundesrat) and elections to the German Bundestag are imminent. Then there is occasional political point-scoring in the Bundesrat too and broad political affiliations may take precedence over the specific interests of the individual federal states.

In these cases in particular disagreements often arise between the two chambers, resulting in an increased number of mediation proceedings (meetings of the Mediation Committee, a joint committee made up of an equal number of representatives from the Bundestag and the Bundesrat).

In this context the Bundesrat is often accused of engaging solely in opposition politics or even of pursuing a blocking policy. One aspect often overlooked here however is that significantly less than 1 % of the roughly 7,000 bills examined have failed due to the Bundesrat's behaviour during the 60 years of the Federal Republic of Germany's history. As a rule it usually proves possible to find a compromise acceptable to both sides in the mediation procedure.

Another aspect observers often forget is that the Bundesrat, precisely because it represents the interests of the federal states – and in particular their financial interests – frequently requests that the Mediation Committee be convened even when the same political constellation exists in both the Bundestag and the

Bundesrat: this scenario would almost never arise if party political interests were the sole concern.

Third conclusion:

In the first instance cooperation between the federal states is almost always between civil servants. They are however accountable to politicians in leadership positions and are therefore also influenced by them. Ultimately decisions are taken at the political level. Apart from certain exceptional cases, the specific interests of the federal states determine how they cast their votes.

4. THE BUNDESRAT – “STEPPING ON THE BRAKES”?

It is often said that this German system of mutual influence, and hence also mutual oversight, gives rise to complicated and lengthy procedures. Some claim that it encourages regionalising tendencies and forces politicians to reach compromises, indeed to end up with the “lowest common denominator”. Federalism is thus held to hinder rapid and clear decisions and is more or less analogous to a constant “grand coalition” in which both sides need to demonstrate consideration for each other.

Let me say a few words on these issues by way of conclusion:

Yes, the political positions of the parties in government in the federal states or in the federal government do of course play a decisive role in Germany, just as they do elsewhere.

Bills are "the tangible side of politics" and that means that legislative procedures also have a political aspect to them.

Every time a new federal government takes up office, it begins its work with a majority in both the Bundestag and the Bundesrat. The government certainly should take the interests of the federal states into account on substantive issues, but actually does have a “free hand”.

To date however every government has ultimately lost its majority in the Bundesrat through changes in the governments in power in the federal states over the course of time as a result of elections in the federal states. As the balance of power then shifts, the Bundestag must take the position of the Bundesrat – in other words, the position of the federal states too – into account, at the latest by seeking to attain a compromise in the Mediation Committee. The type of compromise thus attained, which respects the interests of the federal states, has made a great contribution to stability and social peace in Germany. Most of the electorate supports the solutions identified in this process.

The Germans want equilibrium, they want peace within the country and the overwhelming majority of Germans have no desire for political wrangling. They reject political extremes just as they vote to reject the notion of one party enjoying political supremacy for years on end. They are no longer prepared to hand over political pre-eminence to a single party in both chambers.

In addition the smaller parties have also become stronger recently. Whilst there were really only 3 political groupings in Germany up until the 1970s (Christian Democrats, Social Democrats, Liberals), we now more or less have a 5-party system (with the Green Party and The Left having joined the party constellation). This configuration is likely to give rise to a grand coalition for the Federation if one considers that each of the parties currently in opposition in the Bundestag (the Liberals, the Green Party and The Left) received between 10 and 15 % of the vote.

As a result of the varying shapes of coalitions in the federal states, the Grand Coalition making up the federal government, which also started its work in 2005 with a large majority in the Bundesrat too, no longer has a straightforward majority

in the Bundesrat. That means that when Bundesrat consent is required before federal legislation can enter into force, the Grand Coalition also requires agreement from 2 federal states in which the Green Party or The Left are involved in the government, or from a federal state in which the Liberals are a member of the coalition.

This of course does not facilitate cooperation between the federal states or in the Bundesrat, and calls once again for negotiations and compromises.

Ultimately however this need to compromise confirms my argument concerning the focus in Germany on obtaining a consensus.

MY CONCLUDING COMMENTS:

There are historical grounds for the specifically German form of federalism, in which the federal states play a significant role in exercising state power, and this is certainly not a model that would be suitable everywhere. It has made a major contribution to maintaining cultural diversity and regional identity. Federalism in Germany offers the federal states scope to develop in their own capacity without calling the unity of the state into question. It fosters and indeed demands solidarity between the federal states and guarantees stability and social peace in Germany and hence right at the heart of Europe.

This system is of course not free of party political concerns but does offer a counterweight to centralising tendencies in the federal government and Bundestag. It is – just like all forms of politics – also subject to constant change, but has so far withstood all the trials and tribulations it has faced. Federalism serves Germany well.

Thank you for your attention.

Saragossa 28th March 2009