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What Can Federalism Teach Us About the European Union?

The German Experience

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A European Federation or a Federal Europe?

In an attempt to re-launch the discussion on the future shape of the European order, Germany's Foreign Minister, Joschka Fischer, described the European Union (EU) as a 'European Federation'.¹ His intervention provoked a heated political debate on how to organize the division and sharing of sovereignty rights among the different levels of government within the EU.² The debate gained further momentum with the Declaration of Nice, which called for a wide-ranging discussion on the future of the EU, resulting in the European Convention, which is expected to propose new structures for the EU.³ I argue that the concept of federalism is not only useful for reflecting about Europe's *finalité politique*, but that it also provides a good tool for understanding the current structure and functioning of the European system of multi-level governance (cf. Börzel and Hösli 2003; Börzel and Risse 2000).

The EU may be described as a system of multi-level governance, where sovereignty rights are shared and divided between supranational, national, and subnational institutions. While traditional theories of International Relations and European integration have difficulty capturing the multi-level nature of the emerging European polity,⁴ the constitutional language of federalism is more helpful in analyzing and discussing the ways in which the division of power is organized among the different levels of government in the EU.

Generally, federalism refers to a spatial or territorial division of power between two (or more) levels of government in a given political system.⁵ Both levels have to hold some autonomous decision-making powers which they can exercise independently of each other. Finally, the federal units are represented in central decision-making processes. In a nutshell, a federal system is characterized by sovereignty being shared and divided between different levels of government rather than being located at one level exclusively.

¹ Joschka Fischer: *From Confederacy to Federation: Thoughts on the Finality of European Integration*, speech at the Humboldt University, Berlin, 12 May, 2000, printed in Joerges, Mény and Weiler 2000.

² See, for example, Fischer's discussion with Jean-Pierre Chevènement in *Die Zeit*, 21 June, 2000, pp. 13-18, and his speech of 7 July, 2000 for the EP. On the latter, see 'Fischer fordert Entscheidungen über die Zukunft der EU', *Süddeutsche Zeitung*, 7 July, 2000 or 'Fischer Proposes Directly Elected European President,' *International Herald Tribune*, 7 July, 2000.

³ For the various contributions to the debate see the website of the EU on the 'Future of Europe Debate' www.europa.eu.int/futurum and the website of the European Convention <http://european-convention.eu.int>.

⁴ For a critique of more traditional theories see Marks, Hooghe, and Blank 1996.

⁵ In the framework of fiscal federalism, however, units may partially be overlapping, and not be strictly defined territorially (see above).

While discussions on European federalism often imply or even advocate the transformation of the EU into a federal state, federalism as a principle of organizing political authority and power is not necessarily wedded to statehood (Elazar 1987: 12). It is commonly agreed that the EU has developed into more than an international organization or confederation of states, without having become a federal entity, however. Few expect the EU to develop into a full-fledged federation in the sense of a federal state. But federalism examines a wide variety of federal arrangements between confederation and federation as the two opposite ends of the ‘federal continuum’ (cf. Burgess 1986). In this view, federalism provides a better way of understanding political relationships that are neither purely domestic nor purely international than most theories of International Relations or European integration do, precisely because federalism does not rely on a state-centric ontology (Koslowski 2001).

Certainly, the founders of the European Community did not envisage a truly federal structure. Originally, the European Community was set up and conceptualized primarily as a functionally circumscribed organization of economic integration (*Zweckverband funktionaler Integration*), based on neither fixed territorial boundaries nor a direct link between its citizens and its institutions (Ipsen 1972: 196). Nevertheless, European institutions have always entailed federal elements. For example, the High Authority of the Coal and Steel Community was not an intergovernmental executive body, but it held autonomous powers and was accountable to the ECSC’s Common Assembly. When it developed into the European Commission with the Treaties of Rome (1957), it continued to enjoy broad powers within the European Economic Community (EEC). While supranational competences remained under the control of the (intergovernmental) Council of Ministers, the Single European Act (1986) made qualified majority voting a standard decision-making practice in the Council and increased the powers of the European Parliament (EP). With subsequent treaty revisions, the EU acquired sovereignty rights in a wide variety of policy areas. They reach from exclusive jurisdiction regarding European economic and monetary union (EMU) for the participating EU states, to far-reaching regulatory competences in sectors such as industry, trade, transportation, energy, and environmental and consumer protection. In addition, EU regulations increasingly penetrate even the core of traditional state responsibilities – including internal security in the framework of the *Schengen* agreements and *Europol* and, albeit to a lesser extent, foreign and security policy (cf. Bogdandy 1999: 2-28). In most policy areas, Community Law not only has supremacy over national law, it also deploys ‘direct effect’,

giving citizens the option to litigate against their states for violating rights attributed to them by Community Law. With the Treaties of Maastricht (1993) and of Amsterdam (1998), the internal market and EMU became embedded into a political union with emerging external boundaries⁶ and a more clearly defined citizenship.⁷

Hence, the EU has developed into a political community with comprehensive regulatory powers and a proper mechanism of territorially defined exclusion and inclusion (Union citizenship). In fact, it now shares most features of what is usually defined as a federal system (see e.g. Wheare 1963; Bakvis and Chandler 1987). Let us outline some of these aspects:

- (1) The EU is a system of governance based on at least two orders of government, each existing under its own right and acting directly on its citizens.
- (2) The European Treaties allocate jurisdiction and resources to these two main orders of government (levels below the state are increasingly also gaining leverage and institutional representation, e.g. through the Committee of the Regions).
- (3) There are provisions for ‘shared government’ in areas where the jurisdictions of the EU and the member states overlap.
- (4) Community Law enjoys supremacy over national law.
- (5) European legislation is increasingly made on the basis of majority decisions, obliging individual states to accept decisions against their own priorities.
- (6) The composition and procedures of EU institutions are based not solely on principles of majoritarian representation, but allow for the representation of ‘minority’ views, as smaller EU states tend to be over-represented in both the EP and the Council of the EU (despite recent adaptations agreed upon in the framework of the Treaty of Nice).
- (7) The European Treaties are not unilaterally amendable by one order of government alone, but require the endorsement by national governments and either the national parliaments or the peoples by referenda.
- (8) The European Court of Justice (ECJ) serves as an umpire to adjudicate conflicts between the European institutions and EU member states, as well as between citizens and their domestic governments.

⁶ Article 11 of the Treaty on the European Union (TEU) refers to the protection of the *integrity* of the Union and of its *external boundaries*.

⁷ The material substance of Union citizenship is rather weak, but it may serve as an indicator for the self-perception of the EU as a political community of its own citizens (Bogdandy 1999; Wiener 1998).

(9) Since 1997, the EC (EU) has a directly elected Parliament, which has managed to significantly increase its leverage in the framework of the EU's inter-institutional procedures over the last decades.

In spite of this, however, the EU currently lacks two significant features of a federal polity. First, EU member states remain the 'masters' of the treaties, in terms of holding the exclusive power to amend or change the constitutive treaties of the EU on the basis of unanimity rule (and domestic ratification is mandatory). Second, the EU has no real 'tax and spending' capacity. In addition, rather importantly, it lacks an essential element of democratic control: the composition of the European Commission as the 'EU executive' is not determined by the European citizens, either directly, through the election of a president, or indirectly (e.g. by the EP).

If we accept that the European Union has been developing into a federal system where sovereignty is divided and shared, federalism offers different alternatives to organize the distribution of power vertically, i.e. between the European Union and the member states, and horizontally, between the executive and legislature. In principle, we can distinguish two federal models, which differ according to the distribution of competences between the two levels (shared versus divided), the representation of the states at the federal level (strong versus weak), and the fiscal system (joint versus separate).

On to a Federal Europe – But Which Way?

The literature on federalism usually distinguishes between two ideal type models, going back to different interpretations of Montesquieu's ideas about organizing political power as *séparation des pouvoirs* and *distribution des pouvoirs*.⁸

Séparation des pouvoirs, or 'dual federalism', to which the model of the United States most closely corresponds, emphasizes the institutional autonomy of different levels of government, aiming at a clear vertical separation of powers. Each government level has an autonomous sphere of responsibilities. Competences are allocated according to policy sectors rather than policy functions. For each sector, one level of government holds both legislative and executive powers. As a consequence, the entire government machinery tends to be duplicated, as each level manages its own affairs autonomously. The sectoral or dual allocation of policy

⁸ Loewenstein 1957, Elazar 1994, Watts 1999.

competences is complemented by a rather weak representation of the federal units at the central level of government. The second chamber of the federal legislature is organized according to the 'senate principle': the federal units are represented by an equal number of directly elected senators, irrespective of the size of the geographical unit they represent. As a result, and in contrast to the *Bundesrat* principle, the senate does not reflect the territorially defined interests as represented by the executives of the federal units, but the functional preferences of the electorate or the political parties within the federal units. The federal units articulate their interests through voluntary co-ordination and co-operation with the central government (the federal level), usually in the framework of intergovernmental conferences. Institutional autonomy of each government level, finally, presupposes a fiscal system granting federal units sufficient resources in order to exercise their competencies without financial interventions of the central level. They usually enjoy comprehensive fiscal autonomy allowing them to levy their own taxes and hence, to have independent sources of revenue.

Distribution des Pouvoirs or *cooperative federalism*, a concept for which Germany serves almost as a 'prototype', is based on a functional division of powers among different levels of government: while the central level makes the laws, the federal units are responsible for implementing them. In this system, the vast majority of competences are 'concurrent' or 'shared'. This functional division of labour requires a strong representation of the interests of the federal units at the central level, not only in order to ensure an efficient implementation of federal policies, but also in order to prevent federal units from being reduced to mere 'administrative agents' of the federal government. Their reduced capacity of self-determination is compensated, however, by strong participatory rights in the process of federal decision-making (mainly in the framework of the second chamber of the national legislature). Major policy initiatives usually require the consent of both the federation and a majority of the federal units. The chamber of territorial representation is organized according to what has become known as the *Bundesrat* (Federal Council) principle, where federal units are represented by their governments, and in relation to their population size, but smaller states usually enjoy over-representation. The sharing of policy competences is complemented by a joint tax system. The federal government and the federal units share the most important tax revenues, which allows for a redistribution of financial resources from federal units with higher spending power to those with weaker spending power (fiscal equalization). The functional and fiscal interdependence of the two main levels of government not only gives rise to 'interlocking politics' and 'joint decision-making', but also favours the emergence of a policy-making system in which policies

are formulated and implemented by the administrations on both levels of government ('executive federalism'). Unlike in dual federalism, functional (non-territorial) interests are only weakly represented in federal decision-making and rely on alternative forms of interest intermediation, such as the party system and/or sectoral associations.

The European system of multi-level governance appears to correspond more closely to the model of cooperative than to dual federalism: the EU does not have an autonomous sphere of competences in the sense of holding both legislative and executive responsibilities in selected policy sectors. Even in the areas of its 'exclusive competences', the EU cannot legislate without the consent of the member states (as represented in the Council of the EU). With the exception of monetary policy, there is no area in which the member states have completely ceded sovereignty to the EU, to the extent of excluding their direct participation in decision-making. This is even true for the domain of trade policy (cf. Nicolaidis and Meunier 1999) and for competition policy. This is especially true in the area of agriculture, where member states still hold significant leverage, mainly through the institution of the Council of Agricultural Ministers.

While the vast majority of legislative competencies in the EU are currently at least *de facto* shared or concurrent, responsibilities for policy execution mostly rest with the member states. The EU has an administrative machinery that is too small to implement and enforce EU policies. This functional division of competencies and the sharing of legislative powers grant member state governments a strong role in European institutions. Accordingly, the Council of the European Union (formerly Council of Ministers) resembles a *Bundesrat*-type second chamber of the European legislature: in the Council of the EU, member states are represented by their executives, and their voting power is weighed according to population size

Governing Together in Europe: Lessons from German Federalism

Fritz W. Scharpf pointed to the similarities between German federalism and the European system of multilevel governance over a decade ago (Scharpf 1988). Both present forms of cooperative federalism where competences are shared rather than divided up between the two levels of government. These similarities have major implications for the vertical and horizontal distribution of power in the European Union.

Centralization of Power

In order to enhance the effectiveness and legitimacy of the EU, the Declaration of the Nice Treaty on the Future of the European Union calls for a clear delimitation of competences between the different levels of government. The German *Länder*, in particular, demanded a catalogue of competences (*Kompetenzkatalog*) to curb and contain the regulatory powers of the EU. Yet, any attempt to ‘ring-fence’ or even re-transfer European competences to the member state level is likely to fall into the joint decision-trap. If the German *Länder* have not been able to agree on the disentanglement of shared competencies for more than 30 years, why should EU member state governments be able to do so? Whereas particularly the Eurosceptic member states, like the UK, Denmark or Sweden, may be supportive of a strict delimitation of competencies, the more pro-integration members as well as the ‘cohesion countries’ take a reluctant position. Not surprisingly, the European Convention swiftly buried the idea of a competence catalogue.

Instead, the Convention has discussed proposals for a new division of competencies according to which the EU should focus on its core competence for market integration while the member states would retain responsibilities that lie at the heart of traditional state functions, such as public health and social security, education, media, and culture. In these areas, the EU may at best complement or support member states’ activities. Such a division of labour, however, presupposes a somewhat artificial distinction between market-making and market-correcting regulations: neoliberal market policies are made at the European level, while welfare state policies are left to the member states. Yet, market integration produces negative externalities, such as “social dumping”, which the member states cannot effectively address. They require some EU-wide regulations on social security or health and safety issues, which also prevent the member states from using national regulations to impair the free movement of goods, services, capital or persons. Given the logic of market integration, EU-competences are likely to be strengthened rather than weakened. The curbing and containing of EU-legislative powers would contradict the logic of market integration and the growing interdependence between policy spheres, which have driven the Europeanization of national policy competencies in the first place. It is not necessarily desired by European citizens either (Commission 2000: 43).

Even if the member states agreed on some formal delimitation of competencies, it is unlikely to put a hold to the Europeanization of national policy competences. Any intervention of the *Bund* into *Länder* responsibilities must receive the explicit consent of the *Länder*. Likewise, many EU-policies, which national politicians now denounce as overstepping the limits of European integration, were adopted with the consent of their governments. The formal exclusion of EU-action in some policy areas by inserting exclusionary provisions into treaty articles (see e.g. Art. 149 (4) on education or Art. 152 (4) on public health) has not prevented the member states from adopting EU-policy measures. There are several cases in which the national governments evaded and transgressed the limits on EU-regulatory powers, which they themselves had put into the Treaties to protect their state jurisdictions (see, for instance, the famous tobacco advertising directive, which was revoked by the European Court of Justice).

Executive Dominance

As in other cooperative federal systems, interlocking of policy competences, the functional division of labour, and a *Bundesrat*-type second chamber all work in favor of a certain asymmetry in political representation, where territorial interests dominate over functional interests (cf. Watts 1988). The constrained financial autonomy of the EU vis-à-vis its member states underpins the dominance of territorial interests in European policy-making.

Certainly, the European Commission, the EP, and the ECJ represent functional rather than territorial interests in the EU (cf. Sbragia 1993b; Egeberg 2001). Yet, members of these institutions are appointed, or elected, on the basis of territorial representation. Most prominently, even the President of the Commission is nominated by member state governments – despite the EP’s increased leverage in the approval of Commissioners –while the Council President is determined by governments by definition (on the basis of the rotating principle among member states). Moreover, although the three major supranational EU institutions were able gradually to expand their powers, the Council of the EU is, in practice, still the EU’s most ‘weighty’ decision-making body. Its relationship with the Commission and the EP, in spite of the Treaties of Amsterdam and Nice, continues to be based on a somewhat asymmetrical balance of power.

The European Commission, as the ‘executive arm’ of the EU, has limited autonomy vis-à-vis the Council of the EU, notwithstanding its agenda-setting power, which is based on its right of

legal initiative. As mentioned above, it derives its authority neither from the EP nor from direct elections, as a result of which it suffers from weak political legitimacy. Moreover, the Commission strongly depends on the member states for financing and implementation of its policies. Hence, it enjoys little ‘strategic autonomy’ as regards designing and pursuing bargaining strategies against the Council (Scharpf 1988: 255). The EP as a ‘nascent first chamber’ of an EU legislature has managed to gradually increase its co-decision powers in European policy-making. But nonetheless, EU policies cannot be adopted without the consent of the Council. And even within the EP, territorial politics are important, because an effective system of European party alliances has not yet developed (e.g. Hix 1999: 180-184). Finally, the system of ‘comitology’ – the extensive network of committees linked to the Council and partially to the European Commission – enhances the extent of territorial interest representation in the EU: experts represented within these committees are usually selected by national governments and often serve in national administrations.

The dominance of territorially defined executive interests in the EU is even more pronounced than in established systems of cooperative federalism, where some countervailing remedies usually exist. In Germany, the *Länder* enjoy strong representation in central level decision-making through the *Bundesrat*, the second chamber of the federal legislation. However, the federation represented by the directly elected *Bundestag* (first chamber) and the federal government provide powerful counterweights to this, based not least on the political identity and legitimacy the federation generates, its dominance in the legislature, and its spending power. By comparison, neither the European Commission nor the EP are able to counterbalance the dominance of the Council. Moreover, political interest representation in Germany is based on a well-established system of vertical party integration in both chambers of the federal legislature. Finally, neo-corporatist forms of interest intermediation grant German economic interests privileged access to the policy process. The EU, by comparison, lacks an effective system of vertical party integration. There is no central arena of party competition – neither within the legislature nor within the executive. Nor do European top industrial associations and trade union federations, such as UNICE or ETUC, effectively aggregate and represent the interests of European employers and employees in the European policy process.

Consensus Politics

Executive dominance in EU policy-making has resulted in intense inter-administrative coordination and deliberation among national bureaucrats. While such inter-administrative

networks are highly exclusive and tend to blur political responsibilities, they facilitate the high level of consensus necessary for effective joint decision-making in multi-level systems of governance. Frequent personal contacts and similar professional perspectives allow for a depolitization in formulating and preparing decisions to be adopted by member state governments within the different constellations of the Council of the EU, for example. Restricted participation (generating problems of ‘input legitimacy’) and weak accountability have been largely justified by the achievement of efficient policy outcomes (‘output legitimacy’; cf. Scharpf 1999).

The efficiency of European policy-making is indeed quite extensive in some policy areas, given the diversity of interests among the member states (Héritier 1999). Yet, the problem-solving capacity of the EU is increasingly at stake since it does not have the power to perform important federal policy tasks such as macroeconomic stabilization and redistribution. At the same time, it increasingly inhibits member states from maintaining such functions (Scharpf 1996): EMU largely deprives member states of the capacity to ensure national macroeconomic stabilization, whereas the EU as a whole does not possess these instruments (yet). As a result, considerable legitimacy problems of the EU on the input side can no longer be compensated on the output side but, on the contrary, tend to be exacerbated by the decreasing problem-solving capacity of the EU (cf. Börzel and Hösli 2003).

Escaping the Double Legitimacy Trap

I have argued that the EU largely resembles a system of cooperative federalism in which competencies are mostly shared among different levels of government, where territorially defined executive interests dominate over functionally defined societal interests, and where political decisions require a high degree of consensus. Due to the heterogeneity of its states and peoples and in the absence of an effective system of functional interest representation, the EU has maneuvered itself into a ‘double legitimacy’ trap where lacking input legitimacy can no longer be compensated by effective policy outcomes.

The EU is likely to continue its gradual move towards cooperative federalism. The logic of market integration, paralleled by a strong preference for preserving the welfare state, favours increasing centralization of national policy competencies at the EU level. As a compensation for

their losses in sovereign decision-making powers, EU member states retain strong co-decision powers in European policy-making, as exercised by their governments. The transfer of stabilization and redistribution competencies to the EU level, complemented by a strengthening of the taxation and spending capacity of the EU, might help to increase policy efficiency and, hence, alleviate the EU's legitimacy problems on the output side. Yet, even if member states agree to strengthen the powers of the EU in these areas, problems of input legitimacy are likely to increase, since the mechanisms of functional interest representation remain weak.

Consequently, from this perspective, the only way for the EU to escape the double 'legitimacy trap' would be to adopt the German model of cooperative federalism. Accordingly, the Council of the EU would develop into a second chamber of the EP, and the current EP would be set on an equal footing with the Council in the EU legislative process (i.e. qualified majority voting and co-decision in the Council would be default procedures). The European Commission would turn into a true European government, with its President being elected by the EP as the first chamber in a new EU bicameral setup. In addition, the EU would acquire competences of stabilization and redistribution. This would also presuppose a tax and spending capacity of the EU, which is independent from the member states. While it is not entirely unthinkable that some day, the member states might agree to strengthen the EP and the Commission by restricting the Council of the EU to a purely legislative role in EU policy-making, the real issue at stake is the taxation and spending capacity of the EU. Its redistributive capacity is currently limited to 1.27 percent of the Gross Domestic Product (GDP) generated by all member states (de facto, however, it lies at only 1.09 percent). A spending power comparable to the German federation, for example, would correspond to a share of about 20 percent of European GDP. An almost twenty-fold increase of the EU's redistributive capacity might certainly strengthen the output legitimacy and effectiveness of European governance, but it is highly unlikely that member states would agree to such a sharp decrease in their revenues, not to mention their autonomy.

Finally, a move towards the German system of cooperative federalism would require some additional balancing of territorial interests through a more effective representation of functional interests at the EU level. Currently, most hopes for increasing the democratic legitimacy of the EU seem to concentrate on an enhanced role of national parliaments. The British Prime Minister, Tony Blair, has called for a second chamber of the EP composed of members of national parliaments that would review the EU's work in the light of an agreed

‘Statement of Principles’. Likewise, the former French Prime Minister, Lionel Jospin, suggested a ‘permanent conference of parliaments’ that would monitor Community institution compliance with the subsidiarity principle and hold an annual ‘State of the Union’ debate. And the President of the European Convention, Giscard d’Estaing, suggested a ‘Congress of the Peoples of Europe’, bringing together the Members of the EP with representatives of national parliaments. In its annual meetings, such a Congress would be consulted on the ‘deepening and widening’ of the EU and the appointment of political offices. His idea found its way into the Draft Constitutional Treaty (Art. 19). In order to bring the Union closer to its citizens, these measures are hardly sufficient, however. Citizens need to be regularly involved in the every-day decision-making processes of the EU. Around 80 percent of national socio-economic regulations originate at the European level. European intermediary institutions should provide citizens with the possibility to control EU institutions and their representatives effectively, and to voice their opinions before political decisions are made, since European law enjoys supremacy over national law and, hence, cannot be overruled at the national level.

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