Federalism on Trial: The Third International German Law Journal Workshop

*By Anna S. Zöbeley and Katia Schier**

A. Introduction

"The existing federal system is obsolete",[1] said Federal President Horst Köhler, announcing his decision, in a television address of 21 July 2005, to dissolve the German *Bundestag* (Parliament) and to call new elections. The following day, the German Law Journal hosted its third international workshop on theory and developments in German Federalism at the Max Planck Institute for the Research on Collective Goods, Bonn. The setting was appropriate, since the Institute is located between two former permanent representations of the federal states (*Länder*). The building itself once housed the Egyptian embassy, and so presented "neutral ground" for a discussion on federalism.

German Federalism is currently a topic of much debate, since it is frequently considered to be an obstacle to overdue political reforms. The Association of German Jurists (*Deutscher Juristentag*), for instance, dealt with the question of a clearer allocation of responsibilities between the federal level, the federal states (*Länder*) and local communities at its annual German Jurists Forum in September 2004.

The discussion about the design of the federalist structure has been part of German legal and political debate. The presentations by Frank Schorkopf (University of Bonn and Co-Editor, German Law Journal) and Arthur Gunlicks (Professor emeritus for Political Science, University of Richmond) dealt with this historical

* Anna S. Zoebeley (anna.zoebeley@t-online.de) studies law at the University of Bonn; Katia Schier (kschier@uni-bonn.de) is Ph.D. candidate at the University of Bonn and research assistant to Professor Christian Hillgruber.

[1] "Die bestehende föderale Ordnung ist überholt." Full text at http://www.bundespraesident.de/-,2.625010/Fernsehansprache-von-Bundespra.htm (26 July 2005).

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development. Starting with this inner-German perspective, the debate continued to Russell A. Miller's (University of Idaho College of Law, Co-Editor in Chief, German Law Journal) comparative look at the US system and a sociological perspective on federalism. Ephraim Nimni (University of New South Wales/London School of Economics) then left the concept of federalism as a territorial form of governance behind altogether with his look at national cultural autonomy of ethnic groups as a non-territorial form of federalism. Returning to the German debate, Christian Hillgruber (University of Bonn) elaborated on current criticism of federalism and talked about its prospects in Germany.

B. History, Theory and Development

Frank Schorkopf traced recent developments on federalism in German constitutional law. He focused on the interpretation of Art. 72 (2) Basic Law (*Grundgesetz*). The 1994 amendments to this provision[2] reduce the competencies of the federal legislature and strengthen the federal states (*Länder*), emphasizing that the federal legislature may only act when "necessary". The most important change the reform brought about was to make the requirements of Art. 72 § 2 justiciable. Under the old Art. 72 (2), the Federal Constitutional Court (*Bundesverfassungsgericht*) had held that the federal government had the power to decide whether a regulation on the federal level was required. This assessment was not scrutinized by the court.[3] The reform of Art. 72 (2) sought to change that. The Federal Constitutional Court has accepted the change; in its recent judgements, it emphasizes that it now fully scrutinizes acts of the federal legislator under Art. 72 (2). In addition, Art. 93 (1) No. 2a Basic Law establishes a new procedure before the Federal Constitutional Court through which the federal states (*Länder*) can defend themselves against possible infringements of Art. 72 (2) Basic Law by the *Bund*.

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[2] The reform changed the text of Art. 72 § 2 Basic Law to:

"(2) Der Bund hat in diesem Bereich das Gesetzgebungsrecht, wenn und soweit die Herstellung gleichwertiger Lebensverhältnisse im Bundesgebiet oder die Wahrung der Rechts- oder Wirtschaftseinheit im gesamtstaatlichen Interesse eine bundesgesetzliche Regelung erforderlich macht."

((2) The Federation shall have the right to legislate on these matters if and to the extent that the establishment of equal[2] living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.).

[3] Cf. decision of 30 April 1952, 1 BvR 14, 25, 167/52, BVerfGE 1, 264 and decision of 22 April 1953, 1 BvL 18/52, BVerfGE 2, 213, 224, 225.

Frank Schorkopf illustrated the development by presenting several major decisions by the Federal Constitutional Court made after the 1994 amendment.[4]
Russell Miller looked at federalism from a comparative perspective. He began with a brief account of the "new federalism" in the US. The term refers to the Rehnquist Court's revival of federalism in a number of decisions by employing a narrow definition of the interstate commerce clause and the 14th Amendment's empowerment clause, and by emphasizing the allocation of power between the federal government and the states in the 10th Amendment. These decisions only had a thin majority in the Supreme Court.[5] "New federalism" has also encountered criticism. Some see the real power of the states as lying in presidential elections through the electoral college and equal representation in the Senate. Others hold that American federalism today is only cynical opportunism, claiming that conservatives on the Court will advocate federalism when it serves their purposes (as in Bush v. Gore[6]), while not hesitating to interfere with decisions by state courts and state legislatures to strike down state policies they do not support.[7]

C. Federalism, and What Lies Behind It

This commingling of questions of federalism with party politics was a recurring theme in the discussion. Ralf Michaels (Duke University, Co-Editor, German Law Journal) held the view that the participation of the Bundesrat was in fact used by *Länder* governments to have a say on matters of federal policy and to support their party's views, rather than to represent state interests. Christian Hillgruber replied that *Länder* interests could never be separated from the expression of these interests by their political representatives, and that the notion of an abstract state or federal interest emanated from a pre-democratic concept. With regard to the US, Russell Miller observed that the position of the states was not always only determined by the opinion of the party in power; instead, there were cross-party coalitions on certain issues, such as gun control, because of cultural attitudes.

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[4] Decision of 24 October 2002, 2 BvF 1/01, BVerfGE 106, 62 – "Altenpflege"; decision of 16 March 2004, 1 BvR 1778/01, BVerfGE 110, 141 – "Bekämpfung gefährlicher Hunde"; decision of 9 June 2004, 1 BvR 636/02, BVerfGE 111, 10 – "Ladenschlußgesetz"; decision of 27th July 2004, 2 BvF 2/02, BVerfGE 111, 226 – "Juniorprofessur" and decision of 26th January 2005, 2 BvF 1/03, www.bverfg.de – "Studiengebühren".

[5] They were mostly made by a five-to-four majority with Rehnquist, Scalia, Thomas, Souter, O'Connor, and Kennedy being the "Federalist Five".

[6] 531 U.S. 98 (2000).

[7] For another view, see, e.g., http://www.bc.edu/schools/cas/polisci/meta-elements/pdf/melnick/deregulating-the-states.pdf.

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The commonly voiced arguments for federalism were also mentioned in the debate, such as the argument that a decentralized government is closer to the people and therefore more specifically democratically legitimated and more likely to find solutions addressing the needs of a specific population. On the idea of a competition of sub-sovereigns, it was said that federal competition is only advantageous for individuals if they can move freely from one jurisdiction to another, which may be difficult in practice. Another critique is the fear of a regulatory and fiscal race to the bottom, in which states lower taxes and relax their regulations to avoid losing businesses. Christian Hillgruber was generally critical of the concept of "laboratory federalism". In his opinion, a "trial and error" approach is not appropriate with regard to something as important as legislation.

In his presentation, Russell Miller called the standard arguments for federalism an *anemic* theory. In his paper, he asked whether there was a nexus between community and federalism, whether strengthening federalist structures was linked to a deepening of community. In his analysis of the Federal Constitutional Court's jurisprudence, however, he came to the conclusion that functional arguments are given priority over a historical analysis and a consideration of regional cultural values.[8] It is to be regretted that the discussion did not get back to this thesis and that the question of how communities are deepened by federal structures was not further elaborated upon.

Arthur Gunlicks gave an overview of German federalism reform and the failed Federalism Commission. He started by pointing to some differences between the American and the German concept of federalism, for example the difference between dual sovereignty in the US and the German system where the *Länder* implement federal laws. He made mention of the terms cooperative federalism and "*Politikverflechtung*", describing the *Länder* losing part of their autonomy while being involved in decision-making on the federal level. He also used the terms participatory and executive federalism, terms indicating the fact that more than 50% of all federal laws in Germany need the acceptance of the *Bundesrat,* where state governments are represented.[9]

[8] Cf. decision of 24 June 1997, 2 BvP 1/94, BVerfGE 96, 139 as an example of the Federal Constitutional Court's functional approach.

[9] Statistics at http://www.bundesrat.de/Site/Inhalt/DE/6_20Parlamentsmaterialien/6.6_20Statistik/6.6.2_20Gesamtstatistik_20der_20Wahlperiode/Gesamtstatistik,property=Dokument.pdf.

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Criticism of German federalism includes the claim that there is too little autonomy for the *Länder*, especially since there has been a tendency towards centralization in Germany since the 1950s. Another key issue is fiscal equalization, which describes transfer payments from richer to poorer *Länder*.[10] The criticism is that transfer payments of this magnitude punish richer *Länder* and diminish the impetus for poor *Länder* to improve their own situation.

Another point of criticism is that the *Konnexitäts*-principle is not being followed. Gunlicks explained this principle as the simple rule: "who orders, pays". In the German system, however, the *Länder* may have to pay for a policy of the federal government because they have to implement it. Another difficulty lies in the fact that the roles of the *Länder* regarding the European Union are unclear. Lastly, there is general discontent with the complexity and the lack of transparency of the current structure of German federalism.

There have been several attempts to reform German federalism, from the Ernst commission in the 1980s and the aforementioned change of relevant provisions in the Basic Law in 1994 to the most recent attempt, the Federalism Commission, which began its work in 2003 and ended without results in 2004.[11]

Picking up the thread of Arthur Gunlicks' lecture on federalism reform in Germany, Christian Hillgruber spoke about necessity and possibilities of new developments of federalism in Germany. He gave the workshop lecture in place of Justice Udo di Fabio, who asked not to speak publicly because of his role as reporting judge in the upcoming lawsuit before the Federal Constitutional Court on the dissolution of the *Bundestag*. Hillgruber disagreed with Federal President Köhler's assessment that the existing federal system is obsolete. He began by describing commonly held positions against the present form of federalism. One allegation is that the necessary cooperation between *Bundestag* und *Bundesrat* enables the *Bundesrat* to stonewall the enactment of laws. Hillgruber showed that legislative projects were neither significantly delayed by the involvement of the *Bundesrat*, nor could its behavior be called obstructive. Another prejudice is that the difficult allocation of competences between *Bund* and *Länder* in Arts. 70-72 Basic

[10] See the statistics at http://www.bundesfinanzministerium.de/cln_04/nn_4480/DE/Service/Downloads/Abt__V/LFA_20ab_201995,templateId=raw,property=publicationFile.pdf/LFA%20ab%201995.

[11] The "Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung" was convened in 2003. Two major issues, territorial reform and fiscal equalization, were taken off the agenda at the beginning and were not discussed by the commission at all. Even with this limited agenda, co-chairs Franz Müntefering and Edmund Stoiber announced the failure of the commission on 17 December 2004.

Law is one reason for the current sluggishness in passing reform legislation ("*Reformstau*"). It has therefore been proposed to cancel so-called "concurrent" legislation (Arts. 72, 74 Basic Law), in which the *Länder* can exercise legislative power unless the *Bund* itself acts. There are two possible ways: One would be to completely cancel concurrent legislation, strictly separating the competencies of *Bund* and *Länder*, the other would be to replace it by a kind of "reversed concurrent legislation", a competency for the *Bund* with the possibility for the *Länder* to seize the competency for itself.[12] Hillgruber rejected the latter, because of the chaotic conditions that could occur with federal legislation on the one hand and different regional law in the *Länder* (or not if a *Land* does not exercise the right).[13] According to Hillgruber it would be preferable to separate the competencies of *Bund* and *Länder* and to assign the topics of concurrent legislation to the spheres of either *Bund* or *Länder*. Such a separation would admittedly be difficult but, in his opinion, it would be worth trying.

Ephraim Nimni spoke about national cultural autonomy as a non-territorial form of federalism. This concept was first systematically developed by the Austrian Socialists Otto Bauer and Karl Renner at the end of the 19th century, and aimed at the maintenance of the Habsburg empire.[14] They envisaged a second tier of representation with minority groups having their own national councils; these would then decide on the cultural and educational affairs of the minority. Citizens would have to declare which ethnic group or "nation" they belonged to. One criticism is therefore that this system might cement the separation between ethnic groups. It might also prove difficult to differentiate between questions which affect national minorities and have to be decided by the national councils and questions to be decided by the representatives of the whole population. Nimni mentioned the situation in Northern Ireland and Israel/Palestine as examples of places where structures such as those devised by Bauer and Renner could be applied.

In Nimni's view, the traditional Western system of democracy does not adequately solve the question of minority rights, because it allows the majority to constantly overrule minorities. However, as the surface of the earth is limited and areas of settlement overlap, not all ethnic groups or other minorities can have their own

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[12] On this proposition see P. M. HUBER, *Klarere Verantwortungsteilung von Bund, Ländern und Kommunen, Gutachten, erstattet für den 65. Deutschen Juristentag*, p. D 58-60, D 70-75, D 140 Thesis 16: "Auffanggesetzgebung mit Zugriffsrecht".

[13] Cf. CH. HILLGRUBER, *Klarere Verantwortungsteilung von Bund, Ländern und Gemeinden?*; 59 JURISTENZEITUNG 837, 841 (2004).

[14] Cf. O. BAUER, NATIONALITÄTENFRAGE UND DIE SOZIALDEMOKRATIE (1908) or, in English translation, O. BAUER, THE QUESTION OF NATIONALITIES AND SOCIAL DEMOCRACY (E. Nimni ed., 2000).

nation-states. This brings about the need for alternatives which allow self-determination of ethnic groups without each group having its own territory.

The example of Yugoslavia was debated, in particular the question of whether separate nation states were preferable to a federation of different ethnic groups.

The Kurds, the world's largest ethnic group without its own state, were mentioned as another example. They live in four different states, their areas of settlement always overlapping those of other ethnic groups, and therefore could not build their own territorial nation state without resettlements. According to Nimni they can therefore only be integrated through rights of participation in their respective countries.

In the discussion Gunlicks criticized the use of the term federalism detached from the principle of territoriality, arguing that federalism was by definition territorial and asking why the term consociationalism was not used. This latter term was coined by Arend Lijphart to describe the allocation of power between groups defined by ethnicity, language or other factors within one state, where some rights are given to communities rather than to individuals.[15] Nimni responded that federalism and the system developed by Bauer and Renner had a deeper academic background than Lijphart's consociationalism and that the term federalism had the advantage of being accepted as denoting a form of decentralization. The adjective non-territorial should make the difference clear enough.

Towards the close of the discussion general questions about identity and the nation-state were raised. Ralf Michaels saw as one problem of federalism that it could lead to people understanding themselves as members of their state or *Land* more than as members of the nation. Hillgruber emphasized that federalism in Germany is strongly linked to regional identity. He quoted Helmut Kohl, who has ascribed a layered identity ("*gestufte Identität*") to all Germans, including a regional or *Länder* identity, a national identity and, at least as an ideal, a European identity. As an illustration, Hillgruber mentioned the speech Chancellor Kohl held in Dresden in 1989, alongside not only German but also Saxon flags. If not based on this regional identity, (German) federalism could, in Hillgruber's view, have no sufficient justification; other reasons, like economic advantage, would not suffice.

Having covered such a wide range of topics, the question suggested itself of whether we were actually talking about federalism or rather about connected political issues. This was brought up by Peer Zumbansen (York University,

[15] A. LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977).

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Toronto, Co-Editor in Chief, German Law Journal) in the discussion. It may well have been the intent of the conference hosts to leave that question open. A debate on such a multi-faceted term linked to so many other fundamental questions of a state might also inevitably lead to discussion on surrounding issues; these broaden the understanding on the one hand, but might lead away from the core of the question on the other. Whether closer or further from this core, the presentations and the discussion at the workshop have at least set up some signposts for future work.

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