

GERMAN FEDERALISM – STILL A MODEL OF SYMMETRY?

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Foreword

The federal Liberal Party's 2004 general election platform heavily emphasized issues that are mainly subject to provincial competence under the constitution (e.g. health care, child care, cities). Since the federal government lacks the authority to implement detailed regulatory schemes in these areas, acting on these election commitments frequently requires federal-provincial-territorial (FPT) agreements.

A controversial question that arises when considering all intergovernmental agreements is whether they should treat all provinces and territories similarly or whether the agreements should be expected to differ from one province/territory to another. This issue of symmetry or asymmetry arises at two levels. The first is whether all provinces should be and should be viewed as "equal" in legal and constitutional terms. The second relates to the political and administrative level and the intergovernmental agreements it generates. When should Canadians expect all provinces/territories to be treated similarly in these agreements and when should difference be the rule?

Given this political context, it is timely to reconsider the factors that are relevant to the issue of symmetry and asymmetry. We are doing this by publishing a series of short commentaries over the first half of 2005. These papers will explore the different dimensions of this issue- the historical, the philosophical, the practical, the comparative (how other federations deal with asymmetrical pressures), and the empirical. We do this in the hope that the series will help improve the quality of public deliberation on this issue.

Harvey Lazar
Director

INTRODUCTION

Canadians often look to Germany as an example of constitutional symmetry in the provision for its provinces, called *Länder* (singular: *Land*). However, even if in some respects, German federalism is a model for symmetry, it has never been purely symmetrical. Unification of the eleven "old" *Länder* of the Federal Republic of Germany with the five newly created *Länder* of East Germany presented a great challenge in 1990. How Germany is coping with the increased pressure for asymmetry from multiplied historical, economical, social and cultural diversity may be a more instructive point of comparison for Canada today.

EXTENT OF "DE JURE" SYMMETRY: THE CONSTITUTION, THE LAW AND LEGAL PROCESS

In Germany only one kind of sub-national unit exists, the constitutionally recognized and full-fledged *Länder*. Even if three of the sixteen German *Länder* call themselves "free states" (Bavaria, Saxony, Thuringia) and three others have the status of "city states" (Berlin, Bremen, Hamburg), there are no entities diverging in their relationship to the federal government as do the territories in Canada. "Free states" do not possess any additional powers compared to other *Länder*, but this special term is used for historical reasons. "City states" have the peculiarity of combining the competencies of the provincial and the municipal orders of government - note that in Germany the municipal level is also constitutionally recognized. However these "city-state" sub-national units do not differ in their de jure political powers, duties and degrees of autonomy from the federal level or in relation to other *Länder* and the whole system.

All *Länder* have the same power to pass and amend their constitutions and to pass laws in their constitutionally assigned spheres of jurisdiction.

In addition, Germany's judicial system has always been remarkably symmetrical. Germany has a uniform civil and criminal law system, the federal higher courts hear appeals on decisions of *Länder*-courts in these areas. Only the federal administrative court is limited in its power to over-

ride *Länder*-court decisions, because of the constitutional competency of the *Länder* for the administration of both federal and *Land* laws (functional federalism). The constitutional court system is a true two-tiered system, in order to guarantee adequate representation of *Länder* interests in the event of a conflict about jurisdictions. But there is no asymmetrical arrangement for any *Land*. This includes the absence of any provincial privileges in the appointment of judges.

PRECONDITIONS FOR SYMMETRY AND OPPOSING PRESSURES

The main precondition of the remarkable symmetry in Germany is the country-wide consensus for national equality, combined with an absence of differing pressures for autonomy even though actual social, economic, historical and cultural differences exist.

When German federal democracy was restored in 1949 the constitution, or Basic Law, enshrined the principle of “uniform living standards” as a goal for the entire federation. The strong popular support for this objective has not changed, and has even been expanded to include the new *Länder*, for the purpose of national unity. Any arrangement of asymmetry would be perceived as a threat to this goal.¹ However, as a consequence of the greater variation of actual living conditions in the east and the west the goal has had to be scaled back significantly from “uniformity” to “equality” in 1993. The constitution authorizes the federal government to intervene if this equality is threatened. Therefore, asymmetry must not lead to unequal living conditions.

There can be multiple sources of pressures for asymmetry, as authors such as Watts, Burgess and Gress² have elaborated, but the potential factors are mostly absent in Germany. To begin with, the *linguistic homogeneity* prohibits

¹ See McGarry, 2005, *Asymmetrical Federalism and the Plurinational State*, Working Draft Paper, <http://www.federalism2005.be/home/attachment/i/580> [last accessed 2005-03-09]

² See the volume edited by Robert Agranoff, *Accommodating Diversity. Asymmetry in Federal States*. (Baden-Baden, Nomos Verlagsgesellschaft 1999).

any conflicts analogous to the Canadian tensions between French and English. Where there have been some regionally concentrated *ethnic minorities* (Danes, Sorbes) they have not developed political salience, mainly due to very small numbers - less than two percent of the respective *Länder* population.³

Also historically important were *religious divisions*. Following the “Peace of Augsburg” that pacified religious conflict in the 16th century, the historic *Länder* were able to impose religious uniformity within the borders of an individual *Land*, but on German territory some Catholic and some Protestant diversity survived overall. Later church and state were formally separated - a principle incorporated in the Basic Law of 1949. Although there are still *Länder* where three quarters of the population belong to one religious community, religion is not now a source of political conflict and will be even less with religious affiliation diminishing. As in Canada, one way of accommodating religious differences is that the *Länder* are responsible for culture and education.

Finally pressures for asymmetry do not accrue from any *centre-periphery discrepancy*: apart from the legal equality of status, this was avoided by moving the capital eastwards after unification, from Bonn to Berlin. In a small country like Germany geographical distance will never matter as much as it “naturally” does in Canada. The potential risk of alienation of the now distant south or west has not occurred since the southern *Länder* Bavaria and Baden-Württemberg are powerful because of their economic strength and large population, and the western Northrhine-Westphalia as the home *Land* of the former capital, retains major influence as the *Land* with the largest population.

One other, historical variation is the date of entry into the federation. Apart from the eastern German *Länder*, which are still considered as “new” after 15 years, there is one peculiarity, the case of Saarland which (re)joined Germany from

³ One exception exists for the Danish minority in the election system, exempting a party representing it from the usual 5% threshold in the provincial election.

France in 1957 following a referendum. Even though the Saarland is one of the poorest Western *Länder*, this is not a political issue as it might be the case of Newfoundland and Labrador in Canada.

In the absence of differing pressures for autonomy - using Ronald Watts' typology and discussion as presented in his article for this series, asymmetrical arrangements in Germany are mainly capacity driven, based on population, geographic size and the economic situation.

The most notable precondition of asymmetry is the variation in the population and the territorial size of the *Länder*. The difference in population as a provincial average is comparable to the Canadian dominance of Ontario and Quebec, with three out of 16 *Länder* (Northrhine-Westphalia, Bavaria and Baden-Württemberg) being the home of roughly half of Germany's population, although there are no large unpopulated areas in Germany. The variation in territorial size is also similar to Canada, the small city states Bremen and Hamburg occupy less than 0.2 percent of Germany's surface, compared to almost 20 percent by the largest *Land* Bavaria - that means up to 200 times as much. Nominal per capita GDP varied between 22,000 and 42,000 Euro in the western *Länder* in 2001.

Unification in 1990 deepened the socio-economic differences and thereby the preconditions for asymmetry. First, the new *Länder* had, and continue to have less favourable economic conditions, demonstrated for example by a much higher unemployment rate (on average the rate is twice that of the western *Länder*), and much lower investment rates or productivity. The new *Länder* still, in 2001, have a considerably lower nominal GDP per capita with on average 16,500 Euro compared to a western average of 27,000 Euro, the variation between the highest and the lowest *Land* now approaching Canadian dimensions. Disposable income per capita varies even more, with inhabitants of the western *Länder* possessing on average twice as much. These differences affect the economic power and revenue of eastern *Länder*. Second, living conditions in the east have generally been poorer, e.g. with housing of smaller size and lower quality, calling

for public expenditure in this area. Third, the new *Länder* are less densely populated, some (Brandenburg, Mecklenburg-Vorpommern) having only one third of the average density of the western *Länder*. Still, this does not seem to be a major variation compared to the huge differences in Canadian density due to geographic and climatic conditions. Nevertheless, this population density differences affects the need for atypical infrastructure investments. Fourth, an important difference has been the separate political culture. Different values and attitudes, for example regarding family and life-styles, grow out of a history of 40 years of communism with an orientation towards the East, compared to the Western experience. One effect is that civil society in the new *Länder* is less organized. A mere "import" of western traditions and norms was neither possible nor desirable. Finally, regional identification with eastern Germany (if not with a special *Land* or region) is still strong. However, where regional identity is important, in the east as in the west, the borders of this regional identity need not coincide with the *Länder*-border. Franconians would never consider themselves Bavarian (a term reserved for people from Upper Bavaria), even if living in Bavaria.

In sum, the preconditions favourable to asymmetry have increased since unification, although the constitutional goal of an equality of living conditions has not been abandoned, thereby limiting the scope of potential asymmetry.

ELEMENTS OF "DE JURE" ASYMMETRY: REPRESENTATION AND EQUALIZATION

Since the origins of the Federal Republic of Germany, de jure asymmetry was part of the representation of the sub-national units in the federal legislative process. *Länder* differences in population are reflected in their representation in the second chamber (*Bundesrat*). In Germany, the second chamber is composed of representatives of the sixteen *Land* governments. Legislation that affects the interests of the provinces, as defined in the constitution (on average two-thirds of all federal government proposals), has to win the support of the majority of this chamber. The weighted votes in the *Bundesrat* is the most important aspect of asymmetry in German federalism. A *Land* government gets between three to six votes ac-

ording to its population. This compromise between federal and democratic principles gives smaller *Länder* a higher proportional influence. For example the *Land* of Bremen with the smallest population, less than 700,000, gets half the weight of the *Land* of Northrhine-Westphalia with the largest population at eighteen million. The logic is that, on the one hand, the provinces with the larger population should not be allowed to overrule the smaller ones, but on the other hand the smaller states together should not have a majority. The weighted votes in the *Bundesrat* have far-reaching consequences for the influence of any *Land* in a number of legislative and political processes: among others, it determines their power in constitutional amendments, which require the consent of the *Bundesrat* with two-thirds of its votes, and in the appointment of the judges of the constitutional court. The corollary is that in all of these processes, legislation, constitutional amendment or appointment of these judges, no single *Land* has veto power on its own.

In fact, even if unification created preconditions more favourable to asymmetry, it actually promoted de jure symmetry, because the special status of Berlin in federal representation disappeared. Until 1990, members of Berlin both in the Parliament (House of Commons/*Bundestag*) and in the *Bundesrat* did not have the right to vote, as the western allies had decided after the Second World War.

The revenue raising power of the *Länder* is de jure remarkably similar, but the financial system does have asymmetrical elements, as in all federations. All *Länder* have the same legal revenue raising power and even the de facto outcome was rather equal until 2004, due to very strong equalization provisions. The *Länder* levy special excise taxes, which result in differences in the actual amount of money raised depending on the tax rate and base. However, these excise taxes account for under five percent of total tax revenue. Three-quarters of total tax revenues are raised by federally harmonised and largely shared taxes such as the income tax and sales taxes.

Equalization is revenue-based, adjusting the financial strength of the *Länder* in relation to their per capita tax revenue. Expenditure needs are only taken into account as far as the higher infrastructure spending of the three city-states and three most thinly populated *Länder* are concerned. Equalization payments consist partly of a transfer directly from “have” provinces, who have to contribute normally up to 72.5 percent of their above-average per capita revenue, to “have-not” provinces. City states are favoured in this asymmetrical arrangement, because a greater weight is attributed to their inhabitants (1.35 instead of 1). Since 2005, three thinly populated *Länder* (Mecklenburg-Vorpommern, Brandenburg and Sachsen-Anhalt) – all of them eastern *Länder* – also get a light bonus (1.02-1.05). But former guarantees of minimum payments to the “have-not” provinces were abandoned within this part of the equalization formula on the request of the financing “have” provinces.

The second part of equalization, supplementary payments by the federal government to *Länder* that are still financially weak after the first part of equalization, have also been reduced significantly from 2005 on. However, these federal government payments are still considerable in international perspective: Financially weak provinces receive payments that close 77.5 percent of the gap between their revenue capacity and the national average. Before this year, the formula was for the “have not” *Länder* to get payments to close 90 percent of the gap. Finally, the federal government pays special, legally fixed unconditional grants to the new *Länder* and to Berlin to enable them to catch up with western infrastructure, as well as to ten smaller *Länder* for their higher per capita costs of government.

In sum, financial transfers in Germany do indeed reflect asymmetry in order to reach a more equal outcome, and the asymmetrical arrangements in fiscal federalism have been increased after unification.

DE FACTO SYMMETRY AND ASYMMTRY

As in all federations, a corollary of the differing economic strength after equalization is a diverging de facto autonomy of the *Länder*. For example they differ in the extent they depend on

federal decisions about major investment. In at least one case, the striving for greater autonomy and power stands behind attempts to reshape constituent units. This is the ongoing struggle of the indebted *Land* of Berlin which is completely surrounded by Brandenburg. As the urban area of Berlin spreads over these boundaries that predated unification, it has sought to be integrated into the *Land* of Brandenburg, but failed to obtain the consent of the Brandenburg population in a recent referendum. In effect Brandenburg does not want to accept the additional financial burden of joining with Berlin. Given the disproportional weight of smaller *Länder* in the *Bundesrat*, there is also no political incentive for Brandenburg or indeed any other smaller *Land* to merge with another *Land* as they would lose votes. As in this case, the smaller *Länder* typically are “have-not”. Therefore, the system protects the current imbalances in population and economic strength.

“Optional asymmetry,” as apparently favoured in Canada by Minister Dion during his time as Minister of Intergovernmental Affairs,⁴ does not exist in Germany. Neither is there a German provision for opting out of national programs, nor is there provision for concurrency of legislation with provincial paramountcy comparable to the Canada/Quebec Pension Plan authorized by s. 94 of the *Constitution Act*. According to the German constitution, concurrent legislation in defined areas means that provinces may pass their own legislation as long as the federal level does not claim this area for itself. As a consequence, national laws and programs apply in all provinces. Given German functional federalism, the administration of national programs is usually in the hands of the *Länder*; de facto differences exist, but they are not a result of diverging powers. In addition, programs under *Land* responsibility such as social services create de facto asymmetries, e.g. the traditionally much

better day care facilities in the eastern *Länder*. As in Canada, however, there is an ongoing competition among *Länder* for federal infrastructure measures. The biggest beneficiary is still the eastern part of Germany, with special programs such as measures of urban reconstruction East (“Stadtbau Ost”) or separate labour market policy programs (“SAM”) and, in the case of the new capital Berlin, special investments in cultural infrastructure. Also, right after unification, the set of programs “reconstruction East” (“Aufbau Ost”) promoted economic investment through subsidies and tax bonuses via the so called Solidarity Pacts I and more recently II, a combined effort of the municipalities, *Länder* and the federal governments.

One of the main political reasons for de facto asymmetry is the differing power of constituent units to influence the federal government. This is an outcome of the integrated party system and party majorities. Party discipline is very strong in the German system, to the extent that votes in the *Bundesrat* generally reflect party positions and not necessarily regional interests. *Länder* are labelled “A-Land” if their government belongs to the same party as the federal government, and “B” if the provincial government belongs to the federal opposition. When the A-*Länder* have a majority in the *Bundesrat* – the so called co-habitation – normally it is only their views that are considered in the process of drafting legislation. During this period, A-*Länder* have an asymmetrical influence on federal government decisions, especially since *Länder*-party leaders automatically hold key positions in their federal party. However, different party majorities in the two chambers are quite frequent – the composition of the *Bundesrat* being changed every time a provincial government changes. In this case – as it has been since 2002 – the B-*Länder* of the federal opposition party or parties gain a greater influence.

Despite these dynamics between “A” and “B” *Länder*, parties do not account for a strong de facto asymmetry and are not a tool in promoting asymmetry. This is because almost all parties represented in the federal Parliament operate nationwide and are organized federally, and are present

4. Government of Canada, Privy Council Office, “Minister Dion states that flexible federalism enables provinces to express their individuality, Press Release, Mexico City, Mexico, October 1, 1999, http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=PressRoom&Sub=PressRelease&Doc=19991001_e.htm [last modified 1999-10-01, last accessed 2005-02-15]

in all *Länder*. There are two exceptions.⁵ One is the Christian-Social Union (CSU), a party only found in Bavaria. But since it has established itself as the Bavarian branch of the Christian-Democratic Union (CDU), there is no space for regionally motivated pressures threatening the national party system. The other exception is the ex-communist party PDS which has considerable strength only in the eastern *Länder* including Berlin. But gaining an average of 20-25 percent of the votes in the new *Länder*, participating only occasionally in a *Land* government, and having lost its party status in the federal Parliament, the PDS has failed to become a leading voice for the eastern *Länder*. What is more, the governments of the eastern *Länder* are divided in party terms, unable to pursue in common a powerful regional strategy for eastern Germany. All in all, the party system does not reflect regional cleavages and does not exert pressure for asymmetry.

In the absence of powerful regional party representatives, one could expect *civil society* to take the role of claimant for regional asymmetrical arrangements. However, again, the existing major non-governmental organizations like employers' and employees' associations or welfare organizations are organized in an integrative way, nation-wide. What is more, eastern civil society is still rather weak in general.

PROSPECTS OF ASYMMETRY THROUGH INTERNAL PRESSURES, EUROPEAN INTEGRATION AND GLOBALIZATION

Unification has proven that German federalism is not very open to asymmetric arrangements, neither in the first wave of euphoria of national unity nor in the more realistic period afterwards that showed the not only transitional but more permanent nature of socio-economic and cultural differences. This author agrees with Sturm⁶ that asymmetry towards the eastern *Länder* is not likely to occur due to a number of

structural reasons. Eastern *Länder* are in a minority position population-wise, and politically with votes in the *Bundesrat*. Furthermore the party and interest group structure does not give them a prominent voice, and their politicians and public administration lack political credibility because they are often "immigrated" Western politicians and officials. Normative assessments of the absence of special arrangements have concluded that despite the constitutional objective of equality the differences are even more likely to persist because there is no legal room left for innovative development. There have already been calls for a "special economic zone" (if not a free trade zone) for areas hard hit by the economic restructuring in the eastern *Länder* of Mecklenburg-Vorpommern and Brandenburg, but without any effect. More probable, however, is the scenario that other challenges for German federalism will lead to a general empowerment of the *Länder*, that would contribute to de facto but not de jure asymmetry.

The enlargement of the European Union in 2004 from 15 to 25 countries has reduced its willingness and possibilities to respect the German need for special treatment because of certain provincial interests. To the extent that asymmetry within the European Union will have to increase because of the growing diversity of its members, equality of treatment within certain groups such as the "old" members on the one hand and the recently acceded countries on the other hand, could be necessary for governance reasons. Already, German *Länder* complain about lacking influence on the European level. Decisions of the European Union will have to be implemented if not with equal means in all *Länder*, at least with equal results. The European Union's relatively new governance tool, the "open method of coordination" could also prove to be helpful on the national and sub-national levels: It consists of agreeing on "symmetric" objectives on the superordinate (supranational) level (for example reducing illiteracy by x percent) while leaving implementation (preventing school drop-outs, training for adults,...) to the subordinate (national) level. Opting in and out of programs could be another option.

Globalization creates a second area of pressure for more asymmetry. It affects export oriented *Länder* and Germany's more rural provinces

⁵ cf. Benz, Arthur 1999, From Unitary to Asymmetric Federalism in Germany: Taking Stock after 50 Years, in: Publius: The Journal of Federalism, vol. 29, no. 4, p. 55-78.

⁶ Sturm in Agranoff, FN 2.

differently. Given the salience of socio-economic diversity, it is likely that ignoring that pressure in the de jure arrangements of federalism will not be a permanent option.

Treating unequal provinces equally is still seen in Germany as the best means to achieve equality and to soothe existing cleavages. But for how long? Despite the increased socio-economic divergence after unification, until now the goal of national unity and equality has not been seriously challenged. It could be that Europeanization and globalization will change identities and political incentives to allow a greater acceptance of diversity, not only de facto, but also in de jure structures. A federal-*Länder* committee to modernize the federal structure has recently searched for possible options⁷, but has failed to reach a consensus in December 2004. However, given the shortcomings of the current system, a new attempt at reform will not be too far away.

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⁷ See e.g. committee document no. 87 by Scharpf, *Abweichungsrechte als Realisierung des Subsidiaritätsprinzips [opting in or out as a realization of the principle of subsidiarity]*, 2004, http://www3.bundesrat.de/Site/Inhalt/DE/1_20Aktuelles/1.1_20Bundesstaatskommission/6_20Dokumente/6.2_20Kommissions-Drucksachen/index,templateId=renderUnterseiteKompllett.html