

2005

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Recommended Citation

Ronald A. Brand, *Federalism and the Allocation of Sovereignty Beyond the State in the European Union*, 44 *Duquesne University Law Review* 71 (2005).

Available at: https://scholarship.law.pitt.edu/fac_articles/314

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Federalism and the Allocation of Sovereignty Beyond the State in the European Union

Ronald A. Brand¹

A. INTRODUCTION

This conference has demonstrated that any discussion of federalism necessarily runs headlong into concepts of sovereignty. The problem in any analysis involving the terms “federalism” and “sovereignty” is that they both are subject to Tocqueville’s statement that, in discussing federalism, “the human understanding more easily invents new things than new words.”² Thus, just as systems previously considered to have been “federal” at the dawn of the United States of America were something much different from what was developed for our nation at that time,³ so is the “federal” system of today’s United States different from anything to which we make comparisons.⁴ It is precisely in such circumstances, however, that comparisons are worth being made, and that we might garner important lessons from those comparisons.

It is in this light that Professor Peter Tettinger’s paper provides an opportunity to extend the analysis so far provided in this wonderful conference. As he indicates, the German Basic Law incorporates both divisions of competence internally and opportunities for granting competence externally that set it apart from most other systems. In particular, the role of Germany in the European

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2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 158 (Phillips Bradley ed., 1990) (1835).

3. See, e.g., *THE FEDERALIST* 41-42 (Benjamin Fletcher Wright ed., 1961):

There had been leagues or confederacies, to many of which the term “federal” had been applied, since the time of the Greeks, yet neither the substance of federalism, as it has been known in the nineteenth and twentieth centuries, nor the theory, as it has come to be understood, existed before 1787.

Id.

4. *But see* Wright, *supra* note 3, at 42:

Every federal system of the present time, though there is a considerable amount of variety among the scores of such governments, is in large degree based upon the work of the Federal Convention and the exposition, developed most clearly in *The Federalist*, during the controversy over ratification [of the United States Constitution].

Id.

Union ("EU") and the resulting opportunity for consideration of levels of federalism provide special grist for discussion.

Professor Tettinger nicely sets out the provisions of the Basic Law that are important to a discussion of federalism. From those provisions we can make, and he has made, helpful comparisons with federalism in the United States, as well as with each of the other countries so far discussed in this conference. I do not propose to review all that he has covered, but rather to comment on some specific aspects of the allocation of competence for internal "sovereign" functions within Germany, and external sovereign functions on behalf of the German people.

Professor Tettinger notes that the allocations of authority under the Basic Law depend on the type of function being considered. Thus, there exist clear distinctions in the manner of distribution of legislative, executive, and judicial powers, such that each branch of the national government is not simply mirrored in the *Länder*, but addressed in a manner that is sometimes exclusive, sometimes concurrent, and sometimes divided in order to result in "framework regulation" at the national level, with the completion of the regulatory system at the *Länder* level. Professor Tettinger also explains that in Germany most legislation is federal, while most administration is with the *Länder*.⁵

In the language of James Madison, writing in *The Federalist No. 39*, the German system is not all federal, but rather sometimes federal and sometimes national.⁶ Madison made clear that he did

5. "[T]he Federal Republic of Germany has become a state where most legislation is enacted centrally, whereas the bulk of administration is conducted at the individual state level. . . ." Tettinger, part VI.

6. THE FEDERALIST NO. 39 (James Madison), 280 (No. 39, James Madison) (Benjamin Fletcher Wright ed., 1961). Madison did see the act of ratifying the Constitution as a purely federal one:

That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves . . . Each state, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal*, and not a *national* constitution.

not find the structure of government chosen for the United States to be wholly “federal” as provided in the Constitution:

The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.⁷

With this in mind, let me turn now to some of the elements of the German experience raised by Professor Tettinger that I find particularly interesting — those affecting the external relations of Germany.

B. THE BASIC LAW AND EXTERNAL ALLOCATIONS OF SOVEREIGNTY

The post-World War II Basic Law of Germany was, of course, heavily influenced both by the American experience and by the involvement of the occupying powers in its creation. This makes particularly interesting Articles 23, 24, and 25. As Professor Tettinger has noted, it is Article 23 that provides for the participation of Germany in the EU. It contains language that most Americans could not imagine in our own Constitution: “(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.”⁸

The idea of transferring “sovereign” powers to an external association of states (no matter how we define that association), certainly is not something possible in the current political climate of the United States. While Article 23 is a more recent development in Germany, and was not a part of the original Basic Law, two other provisions reflect the influence of the United States (and other occupying powers) on Germany in the post-war years, even

7. *Id.* at 289.

8. GRUNDGESETZ [GG] [Constitution] art. 23 (F.R.G).

though (once again) we do not find similar language or allocation of competence in the United States Constitution. Article 24 states quite bluntly that “[t]he Federation may by a law transfer sovereign powers to international organizations.”⁹ Thus “sovereignty” may be passed outside the hands of German citizens and their national representatives. This is followed by Article 25, which provides that “[t]he general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.”¹⁰

The opportunity for outward transfer of sovereign authority in Articles 23 and 24, combined with the Article 25 inward acceptance of international law as applicable even in decisions in national courts – a largely “monist” approach to the national/international law relationship – is something found neither in the U.S. Constitution nor in U.S. practice. If the definition of “federalism” is, as *Black’s Law Dictionary* states, “[o]f or relating to a system of associated governments with a vertical division of governments into national and regional components having different responsibilities,”¹¹ then Germany offers an example of vertical division of governments beyond the common two-tiered model, with both transfer of internal authority to external bodies, and the absorption of external rules for internal application at the level of both the national government and the *Länder*.

C. GERMANY AND THE EUROPEAN UNION

Professor Tettinger makes at least three statements about German participation in the EU that I find particularly interesting. First, he describes the relationship as “a system of multi-level governance, where sovereign rights are shared and divided among supranational, national, and subnational (regional) institutions.” This suggests a type of triple-tiered federalism (leaving aside for now the existence of municipal governments below the state/*Länder* level) where authority is shared at multiple levels. But a second statement raises questions about how far we can go with this assumption about the use of the term “federalism.” Professor Tettinger also states that, “due to the fact that the Member States maintain their national sovereignty, the EU has not be-

9. GG art. 24.

10. GG art. 25.

11. BLACK’S LAW DICTIONARY 625 (7th ed. 1999).

come a federal entity.” Thus, it is Germany, and not the EU, that is federal in nature.

From an American perspective, given the changes brought about by the Treaty of Amsterdam and subsequent developments, it would seem there may be many more similarities between the EU and a federal system than there are differences.

In an elaboration on why he finds the EU not to be a federal system, Professor Tettinger states that “the EU currently lacks two significant features of a federal polity.”¹² This is so because (1) “EU Member States remain the ‘masters’ of the treaties, in terms of holding the exclusive power to amend them, change them, and ratify them domestically, as is mandatory,” and (2) the “EU has no real ‘tax and spending’ capacity.”¹³ I would note, as to the latter statement, that it was not until the ratification of the Sixteenth Amendment in 1913 that the United States government had the authority to impose an income tax, and that for most of the years prior to that time our national government was financed primarily from customs revenues¹⁴ — something that finds parallel in financing methods in the early history of the European Community. As an outsider interested in the development of the EU, I would also ask whether the retention of the authority to agree to future amendments of the treaties establishing the EU can continue to support the assertion that the EU has not reached federal status. After all, states in the United States must participate in amending the United States Constitution. Given the rather substantial au-

12. Peter J. Tettinger, *Federalism in the Federal Republic of Germany and the European Union*, 44 DUQ. L. REV. 51, 60 (2005).

13. Tettinger, *supra* note 12, at 60.

14. See, e.g., U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, 1106 (table Y 352-357) (1975). Representative figures indicating tariff revenues and total revenues, as well as the percentage of total revenues represented by tariffs, for twenty year intervals are as follows (figures are in thousands of dollars):

Year	Tariff Revenue	Total Revenue	Tariff Revenue as a Percentage of Total Revenue
1772	3,443	3,670	98.9
1800	9,081	10,849	83.7
1820	15,006	17,881	83.9
1840	13,500	19,480	69.3
1860	53,188	56,065	94.8
1880	186,522	333,527	55.9
1900	233,165	567,241	41.1
1920	322,903	6,648,898	4.9

thority granted to Community institutions and their resulting direct effect in the German legal system as a result of the European Community ("EC") Treaty, Community jurisprudence, and the express provisions of the German Basic Law, it is clear that elements of "sovereignty" have passed from Germany to the EU.

D. THE EUROPEAN UNION AS THE NEW FRONTIER OF FEDERALISM

If the United States of America represented a dramatic development in concepts of federalism at the end of the eighteenth century, so too does the EU represent such development at the beginning of the twenty-first century. As Professor Tettinger indicates in his paper, three Articles of the Constitutional Treaty now before the Member States provide specific focus for a federalism analysis. Article I-9 sets out the principles of conferral, subsidiarity, and proportionality, all dealing with the allocation of competence ("sovereignty") between the Member States and the Union. Article I-10 states the primacy doctrine, the EU equivalent of the Supremacy Clause of the United States Constitution. And Article I-11 outlines the categories of competence, with exclusive competence granted to the Union in some areas, and some areas subject to shared competence.

One example of the evolution of Community competence with which I am most familiar results from Article 65 of the EC Treaty, which was added by the Treaty of Amsterdam.¹⁵ That provision has raised questions that are now before the European Court of Justice¹⁶ — questions that have important implications for negotiations at the Hague Conference on Private International Law.

The 1957 Treaty of Rome creating the European Economic Community ("EEC") indicated the importance of the recognition of

15. Treaty Establishing the European Community, art. 65, Dec. 24, 2002 O.J. (C 325) 33 (2002) ["TEC"].

16. On October 19, 2004, the European Court of Justice held its first *en banc* hearing since the 2004 enlargement to twenty-five Member States. The case was *Opinion 1/03*, involving a request by the Council of the European Union on whether the Community has exclusive or shared competence to conclude the Lugano Convention. The Lugano Convention provides rules for jurisdiction and the recognition and enforcement of judgments in civil and commercial matters in relationships between EU Member States and Member States of European Free Trade Association ("EFTA"). European Communities-European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Lugano, September 16, 1988, 1998 O.J. (L 319) 9 ["Lugano Convention"]. At issue in *Opinion 1/03* is the proper locus of competence for negotiation and signing the Lugano Convention with other countries, and whether that competence is exclusive with the Community or shared with the Member States who, prior to the Treaty of Amsterdam, were the only parties to the Convention.

judgments within the Community. Unlike the U.S. Full Faith and Credit Clause,¹⁷ however, the EEC Treaty provided in Article 220 that the Member States of the Community should “enter into negotiations [further] with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”¹⁸ The six original Member States carried out this dictate by negotiating the Brussels Convention on jurisdiction and the recognition and enforcement of judgments.¹⁹ As each new Member State joined the European Community, it acceded to the Brussels Convention as a part of its package of obligations.

The Treaty of Amsterdam added language to the EC Treaty that moved competence from the Member States to the Community institutions. As part of the establishment of “an area of freedom, security and justice,” Article 61 of the Treaty now provides that “the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65.”²⁰ Article 65 in turn describes the scope of such authority as follows:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

17. U.S. CONST. art. iv.

18. TEC, art. 293 (ex art. 220), 2002 O.J. (C 325) 33.

19. European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Brussels, 27 September 1968, 1998 O.J. (C 27) 1 (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) [“Brussels Convention”].

20. TEC, art. 61 (ex art. 73i).

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.²¹

The Community institutions have not hesitated to exercise this authority. The Council has adopted regulations dealing with: (1) insolvency proceedings;²² (2) jurisdiction and the recognition and enforcement of judgments in family law matters;²³ (3) service of process;²⁴ (4) taking of evidence;²⁵ and (5) jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²⁶

While this internal evolution has occurred, the EU and its Member States have also negotiated to improve conditions regarding reciprocal recognition of jurisdiction and the recognition of foreign judgments in multilateral fora, in particular at the Hague Conference on Private International Law.²⁷ The Hague negotiations have evolved from full participation by EU Member States to full coordination by the Commission on behalf of the Community in the Hague Special Commissions. This has not occurred, however, without some tension regarding the appropriateness of this representation. There has been no clear statement as to whether the competence for such matters now rests (1) with the EU Member States, (2) with the Community institutions, or (3) in a mixed form with Member States and Community institutions each having competence for some, but not all, issues. Thus, the evolving federalism within the EU has had significant impact on external relations in a very specific way.

21. TEC, art. 65 (ex art. 73m).

22. Council Regulation 1346/2000 of 29 May 2000 On insolvency proceedings, 200 O.J. (L 160) 1.

23. Council Regulation 1347/2000 of 29 May 2000 On jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, 2000 O.J. (L 160) 19 ["Brussels II"].

24. Council Regulation 1348/2000 of 29 May 2000 On the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, 2000 O.J. (L 160) 37.

25. Council Regulation 1206/2001 of 28 May 2001 On cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 2001 O.J. (L 174) 1.

26. Council Regulation 44/2001 of 22 December 2000 On jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 012) 1 ["Brussels I"]. The Brussels Convention remains in force for relations between Denmark and the other Member States.

27. For further information on these negotiations, see the Hague Conference website at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

The outcome of the *Lugano* case will have significance beyond just determining who should sign the amended Lugano Convention.²⁸ It is likely to suggest the answer to who represents the Community and its Member States in negotiations at the Hague Conference on Private International Law and other multilateral bodies.²⁹ Moreover, it will indicate — in one area at least — the extent of the EU's evolution toward something most all would call a “federal” system.

E. CONCLUDING THOUGHTS

The evolution of the EU tests current understandings of our use of the terms “federalism” and “sovereignty.” It has created new levels of traditionally “sovereign” authority outside of existing states, with a blurring of traditional concepts of sovereignty and federalism. Is the EU a federal unit? Will it become a federal unit at some point in the future? Unlike the United States and other countries considered in this conference, the EU makes difficult the determination of a specific point at which a federal system comes into being. At the same time, however, recent evolution of Community institutions and transfers of Member State competence tend to make the EU look increasingly like a federal state in structure and operation. Whether it has fully reached that status may be the subject of debate, but the debate certainly has substance to it.

28. See *supra* note 16.

29. The allocation of competence may have implications as well for negotiations in the United Nations Commission on International Trade Law (UNCITRAL) and the Institute for Unification of International Private Law (UNIDROIT).

