German Federalism in Translation

The German Grundgesetz's impact on South Africa's 1996 Constitution

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Abstract

Germany's *Grundgesetz* (Basic Law) is one of the world's great constitutions. Adopted in 1949, it has had a vast influence internationally. It is the paradigmatic example of a post-authoritarian constitution, built on the ashes of the Nazi regime. In its place, the Basic Law creates a constitutional democracy built on the foundation of human dignity. These commitments constitute the basic structure of the Basic Law and are placed beyond the reach of constitutional amendment. The *Bundesverfassungsgericht* (the Federal Constitutional Court (FCC)) quickly emerged as the institutional guardian of the *Grundgesetz*. Its highly respected jurisprudence has made it one of the leading constitutional courts in the world. But Germany is not just a constitutional democracy with a justiciable bill of rights. The *Grundgesetz* also creates a federal state. Indeed, the constitutional features of German federalism – including its division into *Länder*, and the participation of the *Länder* in the federal legislative process – are also unamendable. Germany's constitutional democracy is a federal democracy, with federalism and democracy being mutually constitutive. The FCC has also played a crucial role in the growth and development of German federalism. German federalism has had considerably less influence internationally than the other elements of the German constitutional order. With respect to federalism, the Basic Law's influence has been largely confined to the 1996 Constitution of South Africa, which itself is the great post-1989 constitution and is emblematic of the third wave of democratization. In this chapter, I focus on three important elements of Germany's federal model, and trace their influence in the South Africa constitutional system. These are: the *Bundesrat*, the distinctive German approach to bicameralism in a federal state; administrative federalism, whereby

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bureaucratic power vests largely with the *Länder*, including to implement federal legislation; and *Bundestreue*, the duty of federal loyalty, between the *Länder* and the federal government, and among the *Länder* themselves.

Keywords

Federalism, Administrative Federalism, Bundesrat, Bundestreue, Bicameralism, Division of Powers, Judicial Review, Constitutional Amendment, South Africa.

1 Introduction

Germany's *Grundgesetz* (Basic Law) is one of the world's great constitutions. Adopted in 1949 (and amended 63 times since then), it has had a vast influence internationally. It is the paradigmatic example of a post-authoritarian constitution, built on the ashes of the Nazi regime. In its place, the Basic Law creates a constitutional democracy built on the foundation of human dignity (Basic Law, Article 1). These commitments constitute the basic structure of the Basic Law and are placed beyond the reach of constitutional amendment (Basic Law, Article 79(3)). The *Bundesverfassungsgericht* (the Federal Constitutional Court (FCC)) quickly emerged as the institutional guardian of the *Grundgesetz*. Its highly respected jurisprudence has made it one of the leading constitutional courts in the world.

But Germany is not just a constitutional democracy with a justiciable bill of rights. The *Grundgesetz* also creates a federal state. Indeed, the constitutional features of German federalism – including its division into *Länder*, and the participation of the *Länder* in the federal legislative process – are also unamendable (Basic Law, Article 79(3)). Germany's constitutional democracy is a federal democracy, with federalism and democracy being mutually constitutive. The FCC has also played a crucial role in the growth and development of German federalism.

German federalism has had considerably less influence internationally than the other elements of the German constitutional order. With respect to federalism, the Basic Law's influence has been largely confined to the 1996 Constitution of South Africa, which itself is the great post-1989 constitution and is emblematic of the third wave of democratization.

In this chapter, I focus on three important elements of Germany's federal model, and trace their influence in the South Africa constitutional system. These are:

- the *Bundesrat*, the distinctive German approach to bicameralism in a federal state;
- administrative federalism, whereby bureaucratic power vests largely with the *Länder*, including to implement federal legislation; and
- *Bundestreue*, the duty of federal loyalty, between the *Länder* and the federal government, and among the *Länder* themselves.

German federalism had a deep impact on the Constitution of South Africa. As Christina Murray, who was on the Committee of Experts for the Constitutional Assembly of South Africa and centrally involved in the constitution-making process recalls: "[w]e proceeded to explore many models and the fingerprints of many other constitutions can be found in ours. Some are faint, others clear, and the German print is one of the clearest" (Murray 1999, p. 1). But as Murray persuasively demonstrates, German federalism was not copied directly by South Africa. Rather, it was creatively adapted to respond to South Africa's distinctive politics and history. Tracing this process of adaptation should shed light, not just on South Africa's constitutional experiences, but also on Germany's. Murray, in a comparison of bicameralism in Germany and South Africa, provides helpful guidance for how to engage in this comparative exercise:

> "The institutions cannot be fairly compared without a careful examination of the social, economic and political context in which they function. That the demands on legislative bodies in an emerging democracy, on the one hand, and in a stable and wealthy western power on the other, will be very different is obvious. … Accordingly comparisons should not be taken too far. Having said that, South Africa did study German institutions in its constitution-making process …. [and] the choices in constitutional design of the Constitution of South Africa-makers may offer a fresh perspective from which to view the Bundesrat." (Murray 1999, p. 16)

With Murray's advice in mind, my approach will be as follows. I will first examine the influence of the *Bundesrat* (Section 2), administrative federalism (Section 3), and *Bundestreue* (Section 4) on South Africa's constitution. As we shall see, these different components of German federalism are interrelated, and an interesting issue is how their analogs in South Africa are also part of an overall vision and system of federalism. I will then address the following questions (Section 5):

- why was German federalism of particular interest in South Africa, as opposed to other models of federalism?
- how was the logic of German federalism taken even further in South Africa?
- how was German federalism adapted for South Africa's specific context?

- what is the role of political parties in the operation of German and South African federalism?

I conclude with lessons from this case-study for how we should approach the role of German federalism in constitutional assistance abroad (Section 6).

2 Bundesrat

Let us first examine the *Bundesrat*, and its South African counterpart – the National Council of Provinces (NCOP) – by situating them in the comparative context. Bicameralism is a pervasive feature of federal constitutions. In broad strokes, the lower chamber is the house of the people and is elected on the basis of representation by population. The upper chamber is structured on the basis of a different principle of representation – of regions, provinces, or states (which I collectively term "regional" for the sake of convenience) – and is meant to give expression to the federal nature of the constitutional order in the federal legislative process.

However, as Francesco Palermo and Karl Kössler explain, there are two very different ways of structuring regional representation in the upper house (Palermo and Kössler 2017). These are the senatorial and the ambassadorial models. The senatorial model takes its name from the United States Senate. Since the 17th amendment of the US constitution, Senators have been directly elected. As a consequence, their democratic mandate flows from the people of a state, not the government of a state, which has its own and separate electoral mandate. Senators are politically accountable to their constituents and are not the agents of state governments. In the ambassadorial model, by contrast, regional governments select the members of the upper chamber, who are politically accountable to them. Regional governments, through their ambassadors, participate directly in the federal legislative process. Ambassadors serve to advance the interests of the regional governments that have chosen them, as their representatives – making legislative deliberations analogous in some respects to a multilateral process, albeit one that is purely domestic.

The *Bundesrat* is a leading example of the ambassadorial model of an upper chamber. It consists of members of the political executives of the *Länder*, which appoint and may recall them (Basic Law, Article 51(1)). Each *Land* has at least three votes and has no more than six, based on size (Basic Law, Article 51(2)), and may appoint as many members as it has votes (Article 51(3)). All *Bundesrat* members are simultaneously cabinet ministers in the *Länder*, although other members of *Länder* governments may serve as alternates (Basic Law, Article 51(1)). It is a standing body

that is never dissolved, and whose members change when *Land* governments do (usually because of elections).

The members of each *Land* must *always* vote as a single bloc (Basic Law, Article 51(3)). This raises the question of how the votes of *Länder* should be determined in cases of coalition government, which have been become increasingly common as Germany's post-war political party system has fragmented. Indeed, at the time of writing, all 16 *Länder* governments were coalitions. A political practice has developed whereby coalition governments allocate *Bundesrat* seats pursuant to formal agreements which usually craft rules to structure how a *Land*'s delegation votes in the *Bundesrat* as a single entity, even though it is composed of delegates from different parties. If there is internal disagreement within a delegation on how to cast a *Land*'s votes, those votes count as a negative (not an abstention) – which may have a significant effect on the overall vote. This issue came before the FCC in the *Immigration Act Case* (2002) with respect to the vote of the *Land* of Brandenburg on controversial immigration legislation proposed by the SPD/Green coalition federal government. Brandenburg was governed by an SPD/CDU coalition, and its votes were necessary for the legislation to pass. The minister-president cast all of Brandenburg's votes in favour of the legislation, but one CDU member of the Brandenburg delegation voted no at the same time. The FCC held that the votes belong to individual delegates (not the *Länder* that appointed them), and that in the absence of a rule in the coalition agreement for casting the *Land*'s votes, unanimity among the delegates was required to determine the *Land*'s bloc vote. It followed that a negative vote from one member of a *Land* delegation meant that that the *Land* could not cast a bloc vote.

The *Bundesrat* is not co-equal with the *Bundestag*. With respect to many areas of public policy, it only has a suspensive veto (termed an "objection" by the Basic Law) that can be overcome by the same sized majority (simple or two-thirds) in the *Bundestag* (Basic Law, Article 77(4)). The consent of the *Bundesrat* is only required for specified areas of legislation (Basic Law, Article 77(2a)). There is no single provision that comprehensively enumerates all the areas where the *Bundesrat* has a veto. Some examples include asylum (Article 16a), the transfer of powers to the European Union (Article 23), changes to the borders of the *Länder* (Article 29(7)), international terrorism (Article 73(2)), state liability and the civil service (Article 74(2)), unemployment benefits (Article 91e), the apportionment of various tax revenues (Articles 105, 106(3), (4), (6), (5a), (6) and 107)(1)), equalization (Article 107(2), and tax administration (Articles 108(4) and (4a)). Taken together, these areas are viewed as affecting the vital interests of the *Länder*.

But the most important area for the *Bundesrat*'s veto has been federal laws that affect administrative federalism – that is, how *Länder* administer federal law (Sec-

tion 3). The *Bundesrat* has a veto under Article 84(1); also see Article 80(2), which requires *Bundesrat* consent for federal statutory instruments. The main point of constitutional dispute raised by administrative federalism in Germany has been whether a given federal law affects administrative federalism – and is subject to the veto of the *Bundesrat* – or makes a substantive policy change with respect to which the *Bundesrat* may only have the power to object (delaying but not blocking the legislation). The FCC took a broad view of the effect of federal laws on administrative federalism in its famous *Bundesrat* decision (1975), where it held that where substantive policy changes change the meaning and scope of the *Lander*'s administrative responsibilities (even if the legislative provisions governing them were not amended), they also required the *Bundesrat*'s consent. The effect of this decision was to dramatically increase the power of the *Bundesrat*, and hence, the *Länder*, in the federal legislative process, to wield veto power over 60 % of federal laws. I will return to this story later (Section 3).

The NCOP, like the *Bundesrat*, represents South Africa's provinces in the federal Parliament (Wittneben 2002). But there are many important differences. Each province sends a single delegation of 10 delegates, irrespective of population (Constitution of South Africa, section 60(1)), meaning that larger and smaller provinces are represented equally, unlike in Germany. Moreover, each provincial delegation consists of two kinds of delegates – six permanent delegates and four special delegates (Constitution of South Africa, section 60(2)) – also a difference with the German model. The six permanent delegates are allocated proportionately to the parties in provincial legislatures based on their seat count (Determination of Delegates (National Council of Provinces) Act 68 of 1998, section 2(2)). To be eligible for appointment as permanent delegates, persons must be members of a provincial legislature; on appointment to the NCOP, they cease to be members of the provincial legislature (Constitution of South Africa, sections 62(1) and (2)). The Basic Law imposes no requirement that *Bundesrat* delegates resign from *Land* legislatures; indeed, it presumes the opposite. The four special delegates include the Premier of the province (or alternate) and three special delegates (Constitution of South Africa, section 60(2)). The three special delegates over-represent the largest parties in the provincial legislature (Determination of Delegates (National Council of Provinces) Act, section 2(3)). The provincial legislature can change the composition of the special delegates from time to time, with the concurrence of the premier and relevant party leaders (Constitution of South Africa, section 61(4)). The special delegates are more like the delegates to the *Bundesrat*.

Unlike in the *Bundesrat*, NCOP delegations are multi-party entities, even if there is a majority party that forms the government – for both kinds of delegates (permanent and special). Indeed, it is constitutionally required that minority parties

participate in both the permanent and special delegates components of a provincial delegation. Moreover, NCOP delegations are creatures of provincial legislatures, not provincial executives. As mentioned earlier, unlike in the *Bundesrat*, permanent delegates cannot simultaneously be members of the provincial legislature, enforcing an institutional separation between the two bodies. Special delegates, by contrast, can serve in both bodies – as in Germany.

The distinction between permanent and special delegates factors into the role of the NCOP in the national legislative process. The Constitution of South Africa divides up legislative responsibilities into three functional areas: areas of concurrent provincial and national jurisdiction (Schedule 4), areas of exclusive provincial jurisdiction (Schedule 5), and areas of exclusive national jurisdiction over matters falling into neither category. The NCOP has an absolute veto over national legislation in concurrent areas – in theory, enabling the provinces to collectively check national intrusions into provincial jurisdiction on substance (Constitution of South Africa, section 76(3)). This is a marked difference from the *Bundesrat*, which lacks an analogous power with respect to concurrent areas of federal and *Länder* jurisdiction, set out in Article 74 of the Basic Law.

For concurrent areas, delegations in the NCOP vote as a bloc (as in the *Bundesrat*). By contrast, the *Bundesrat* does not have a veto over all areas of concurrent jurisdiction. With respect to legislation in areas of exclusive federal jurisdiction, the NCOP has a suspensive veto, as does the *Bundesrat*. For these laws, each delegate votes separately, not as a member of a provincial delegation. This distinction in voting procedures in the NCOP raises the question of the relationship between regional and party affiliations in the operation of the NCOP and the *Bundesrat* (Section 5).

The multi-party nature of NCOP delegations, means that they are not creatures of provincial executives, unlike delegations in the *Bundesrat*. This raises a question that the German constitutional system does not need to address – how the provincial legislature collectively determines bloc votes. Section 65(2) Constitution of South Africa provides that a national law "must provide for a uniform procedure in terms of which provincial legislatures confer authority on their delegations to cast votes on their behalf". These procedures are set out in the Mandating Procedures of Provinces Act 52 of 2008, which differentiates between two kinds of mandates – negotiating mandates and final mandates. This distinction recognizes that a bill may change during the legislative process in response to public input and political negotiations. A standing committee of the provincial legislature must provide the NCOP delegation with a negotiating mandate for the committee stage of the NCOP's legislative process (Mandating Procedures of Provinces Act, section 5). After the NCOP committee reports out the bill to NCOP for the final debate and

vote, the provincial legislature must confer the voting mandate on the head of its delegation (Mandating Procedures of Provinces Act, section 8).

3 Administrative Federalism

I now turn to administrative federalism. There are two main models for the relationship of executive and legislative powers in federal states. In the first model, each order of government has executive powers that are co-extensive with its legislative powers. The power to enact legislation is bundled with the power to administer those laws, including the power to create and oversee bureaucracies. In the second model, the principal executive power is regional, both for national legislation as well as regional legislation. The national power to administer its own laws is the exception, not the rule. Regional bureaucracies administer both regional and national legislation.

The first model is known as legislative federalism, and the second is known as administrative federalism. Legislative federalism predominates in the common law federations (e. g. Australia, Canada, United States) as well as the Latin American federations (e. g. Brazil, Mexico), but also in Belgium. Administrative federalism is found in Europe in Germany (and also in Austria, Italy, Spain) and South Africa. These models create different dynamics for political accountability. In the first model, executives are accountable to their own legislatures for the administration of laws. This is sometimes referred to as dual federalism, or layer cake federalism, because it implies that relationships of legal authority and political accountability track jurisdictional boundaries. In the second model, issues of accountability and control traverse jurisdictional boundaries. Regional governments potentially have the scope to adapt national legislation to local circumstances. Alternatively, national control could constrain regional autonomy. The second model is sometimes referred to as cooperative federalism or marble cake federalism, because it requires a great deal of interaction and collaboration among governments. It also intersects with the design of bicameralism (Section 2).

Germany is a prominent example of the second model. *Länder* can administer federal laws pursuant to two different frameworks. First, under Article 83 of the Basic Law, *Länder* have inherent authority to administer federal laws, except if the Basic Law provides otherwise. Matters reserved for federal administration include the foreign service (Article 87), federal financial administration (Article 87), federal waterways and shipping (Article 87), national social insurance (Article 87) the federal border police (Article 87c), the armed forces (Article 87a), defence

(Article 87b), nuclear energy (Article 87c), air transport (Article 87d), rail transport (Article 87e), and posts and telecommunications (Article 87f), leaving the bulk of public administration to the *Länder*. Under Article 84(3) of the Basic Law, the federal government may exercise oversight with respect to the legality of *Länder* administration. Second, the *Länder* can also administer federal laws by "federal commission" – i. e., by delegation (Basic Law, Article 85(1)). On this second track, the federal government has greater authority over the governments of the *Länder*. Federal oversight extends beyond the legality to the appropriateness of *Länder* administration (Basic Law, Article 85(4)). Furthermore, federal authorities may issue instructions to *Land* authorities which the latter must implement (Basic Law, Article 85(4)).

Under the German constitution, administrative federalism intersects with bicameralism. As explained above (Section 2), under Article 84, the consent of the *Bundesrat* is required for laws that affect administrative federalism, which as we have seen, is very broad in scope, and was broadened further by the FCC. For several lengthy periods, the *Bundesrat* and *Bundestag* have been under the control of different political parties – meaning that, the opposition in the lower chamber controlled the upper chamber. During these episodes, the *Bundesrat* was less of a forum for the representation of regional interests, and more of a platform for national political competition between the government and opposition. The expansive role of the *Bundesrat* under the German constitutional scheme in this political context led to frequent legislative gridlock – and the criticism that the opposition was thwarting the will of a democratically elected government through its control of the upper chamber, which was not directly elected.

Germany's administrative federalism underwent an important change in 2006 in response to these concerns. A constitutional amendment to Article 84 permitted federal law to affect administrative federalism without the consent of the *Bundesrat* – overruling the FCC. In exchange, the constitutional amendment also gave the *Länder* the right to enact derogating legislation in such circumstances. The goal of the reform was to reverse the growth in the *Bundesrat's* veto power over federal laws that would affect administrative federalism, while at the same time providing an alternative to the *Bundesrat's* veto to protect the autonomy of the *Länder* through the new power to enact derogating legislation. A collateral effect was to disentangle federal and *Länder* administration, by expanding the scope of matters reserved to federal administration (set out above).

South Africa has also adopted administrative federalism, inspired by the German model. However, there are important differences. Section 125 of the Constitution of South Africa sets out that the provinces have the authority to administer three categories of legislation: provincial legislation; national legislation in all areas of

concurrent jurisdiction (Schedule 4) and exclusive provincial jurisdiction (Schedule 5),[1] except where the Constitution or a national statute provides otherwise; and national legislation in areas of exclusive national competence if national legislation has delegated administrative authority to the provinces (Constitution of South Africa, section 125(2)).

There are a few points of comparison with the German constitutional framework. First, administrative federalism only applies to national legislation in areas of concurrent jurisdiction and exclusive provincial jurisdiction. It does not extend to the implementation of national legislation in areas of national jurisdiction – unlike in Germany. Second, in this narrower context, administrative federalism is only presumptive – that is, it can be set aside by ordinary legislation, which would be subject to a NCOP veto. Third, administrative federalism for national legislation only arises by delegation.

Taken together, administrative federalism has considerably narrower scope in South Africa than in Germany. Moreover, in South Africa, a new issue arose that was not a major concern in Germany: the potential lack of provincial capacity. Provincial administrations did not exist prior to the transition to democracy. Provinces varied considerably in their ability to take on such a broad range of functions. Section 125(3) of the Constitution of South Africa puts a limit on the presumptive authority of provinces to administer national legislation in concurrent or exclusive areas of provincial jurisdiction – i. e., "only to the extent that the province has the administrative capacity to assume effective responsibility". That provision also imposes on the national government a duty to "assist provinces to develop the administrative capacity required for the effective exercise of their powers and functions".

Building on this theme, section 100 sets out a procedure whereby the national government "may intervene by taking any appropriate steps" if "a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation" – which includes not just the administration of national laws in areas of concurrent jurisdiction (Schedule 4), but also provincial laws in areas of exclusive provincial jurisdiction (Schedule 5). The national executive may issue directives to the provincial executive. Moreover, it may assume direct responsibility for the relevant obligation, but only to the extent necessary to maintain "essential national standards or meet established minimum standards for the rendering of a service", "economic unity", or "national security", or to "prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the

1 National legislation in Schedule 5 matters is permitted under limited circumstances under section 44(1), discussed further *infra*.

country as a whole" (i. e. extra-provincial externalities). These conditions for national executive intervention are identical to the grounds for national legislative intervention in areas of exclusive provincial jurisdiction under section 44(2).

The focus on national intervention in cases of provincial incapacity differs from federal oversight powers under the Basic Law, which only apply to the legality of Land administration and do not permit the federal government to takeover administration of an area. On the other hand, the conditions for national executive and legislative intervention serve as a check on national power in South Africa. Although these conditions appear to be drawn from Article 72 of the Basic Law, that provision permits federal legislation to establish "equivalent living conditions throughout the federal territory" or to maintain "legal or economic unity" only in certain areas of concurrent jurisdiction. There is no federal power in Germany to legislate in areas of exclusive provincial jurisdiction, as exists in South Africa. Nevertheless, Article 72 has led to or at least supported a process of centralization, since it reflects and reinforces Germany's unitary political culture. As Manfred Schmidt has argued, "[t]his article" proved to be a gateway for the federal government to encroach on domains which had previously been the purview of the *Länder*" (Schmidt 2016).

4 Bundestreue

The third element of German federalism that had a great influence on the drafting of the South African constitution is *Bundestreue*, or the principle of federal loyalty or comity. This is an unwritten doctrine of German constitutional law that has been developed by the FCC and inferred from the structure of the Basic Law. In abstract, *Bundestreue* requires that the federal government and *Länder* consider the interests of other German governments when exercising their powers. It was initially developed in the context of vertical relations between the *Länder* and the federal government. However, the FCC later extended it to horizontal relations among the *Länder*.

The FCC has given concrete meaning to *Bundestreue*, in the form of a series of specific duties. Some of these duties are procedural: for example, the duties of the federal government to act in a procedurally fair manner in intergovernmental relations, to not engage in divide and conquer tactics among the *Länder*, and to not treat *Länder* differently based on political party affiliation. All of these duties were at play in the *First Broadcasting Case* (1961), where the FCC found that the federal government had breached these duties in how it had established a federally operated public television broadcaster. Other duties traverse the boundary between

procedure and substance. These duties, for example, include that of a *Länder* to take into account the impact of a decision on other *Länder* and the broader national interest, or to respect the jurisdiction of another *Länder*. A third set of duties are straightforwardly substantive, such as horizontal fiscal equalization, i. e., the duty of richer *Länder* to provide financial resources to poorer *Länder*, and for *Länder* to observe international treaties entered into by the federal government.

Bundestreue was incorporated into the text of the Constitution of South Africa and taken in new directions (Klug 2000). It is the basis of an entire chapter – chapter 3 on Cooperative Government. Section 41 spells out a series of duties that are arguably derived from *Bundestreue*. Many of these would be familiar to German public lawyers – for example, a duty to "respect the constitutional status, institutions, powers and functions of government in the other spheres", to "not exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere" and to "cooperate with one another in mutual trust in good faith". The latter duty includes, *inter alia*, "assisting and supporting one another", "informing one another of, and consulting one another on, matters of common interest", and "co-ordinating their actions and legislation with one another". What section 41 does, is to codify many legal doctrines that have been developed by the FCC from the general principle of *Bundestreue*, which itself is unwritten.

However, chapter 3 goes much further than the Basic Law. First, it requires that national legislation create institutions and procedures for intergovernmental relations and dispute settlement. Second, it also requires governments to resolve intergovernmental disputes in court as a last resort, only after having exhausted these mechanisms. Third, it requires courts to refer intergovernmental disputes back to these bodies if they are not satisfied that governments have exhausted those non-judicial mechanisms – i. e. an exhaustion doctrine. The Basic Law and the jurisprudence of *Bundestreue* have none of these elements.

The implementing legislation for chapter 3 is the Intergovernmental Relations Framework Act, 2005. Of greatest interest is chapter 4 (sections 39 to 45), regarding dispute settlement, which in fact does not set up much in the way of formal dispute settlement machinery. Rather, it opts for a more traditional approach to intergovernmental dispute settlement that is heavily centred on negotiations and is thinly institutionalized. The Act requires parties to settle disputes in good faith through negotiations before declaring a formal intergovernmental dispute. The first step after a dispute is formally declared is for parties to convene a meeting to determine the issues in dispute, to identify a mechanism for dispute resolution, and to designate a facilitator. Noticeably absent is any standing dispute settlement machinery, such as an agency that would convene such an initial meeting and participate in

it as a neutral third party. This is striking since the Act creates various intergovernmental fora that could serve such a role, such as the President's Co-ordinating Council, which consists of the President, Deputy President, the national Ministers responsible for local government, finance and the public service, the Premiers, and a municipal representative (section 6). The partial exception is the power of the Minister responsible for local government to convene a meeting if the parties fail to do so on their own (section 42(3)). Once appointed, the facilitator's role is to provide a report of the nature of the dispute – but not, it would seem, to analyze its merits and recommend options for it to be resolved (section 43). Interestingly, these reports are privileged and cannot be used in a judicial proceeding (section 44) – a double-edged sword that may encourage candor by the parties, but which may conversely rob the court of the ability to orient its task in relation to that of the facilitator.

5 Lessons from Comparing Germany and South Africa

On the basis of this comparison, I want to offer some reflections on the following issues:

- why was German federalism of particular interest in South Africa, as opposed to other models of federalism?
- how was the logic of German federalism taken even further in South Africa?
- how was German federalism adapted for South Africa's specific context?
- what is the role of political parties in the operation of German and South African federalism?

5.1 Why was German federalism of interest in South Africa?

The influence of German federalism in South Africa is somewhat surprising, because the basic premises of German and South African federalism were radically different. In South Africa, federalism was associated with black homelands and the policy of divide and conquer that was expressly designed to thwart majority rule by the black majority and entrench the power of the white minority. As a consequence, the word federalism does not actually appear in the Constitution of South Africa. Nevertheless, in substance, South Africa's constitution is federal. Federalism was

a political necessity to bring on board the Inkatha Freedom Party, by granting it the prospect of forming the provincial government in KwaZulu Natal.

In Germany, by contrast, federalism was viewed as a check on democratic backsliding, by fragmenting public power to prevent the rise of a future dictator. In a letter to the 11 Minister-Presidents of the Western zone in 1948, the Allies requested that the Basic Law had to be based, among other principles, on federalism. Because of the fear of dictatorship, the residue of powers not granted to either the *Länder* or the federal government goes to the *Länder* (Basic Law, Article 70(1)). Federalism also has deep roots in Germany's post-1871 history.

The reason for the deep interest in German federalism by South Africans was the South African fear that federalism would lead to the breakup of the country, because of its tainted history. German federalism, with its integration of *Länder* into the federal legislative process through the *Bundesrat*, reliance on *Länder* bureaucracies for the implementation of federal legislation through administrative federalism, and *Bundestreue* enforced by the FCC, had created a genuinely national politics in which both federal and *Länder* politicians debated and fought elections on common questions of public policy. Although South African politics would necessarily focus on different issues, such as redressing decades of systematic economic and political discrimination, German institutions offered an attractive model. By comparison, other federal systems – such as that of the United States – with the Senatorial model of an upper chamber, legislative federalism, and the absence of a duty of federal loyalty – seemed to pose a greater risk of instability in South Africa's fragile context.

5.2 How was the logic of German federalism taken even further in South Africa?

South Africa took *Bundestreue* even further than the German Constitution, in at least six respects. First, it is codified, whereas *Bundestreue* is an unwritten constitutional doctrine created by the FCC. Second, the specific duties flowing from the duty to "co-operate with one another in mutual trust and good faith" are spelled out in detail. Third, this duty is anchored in a separate chapter about intergovernmental relations, situating it in a broader context. Fourth, its institutional aspects are spelled out, in the form of a requirement for dispute settlement machinery. Fifth, the chapter requires legislative implementation, which is a constitutional agenda-setting device that put the issue of intergovernmental relations on the legislative agenda. Sixth, the chapter speaks to the courts and provides that its role is one of last resort, after non-judicial mechanisms have been exhausted.

However, the South African adaptation also illustrates the limits of constitutional design. The Intergovernmental Relations Framework Act does not create standing dispute settlement machinery or vest overall responsibility for resolving disputes with one of the intergovernmental forums created by the Act or a national ministry. The power of the facilitator is limited to reporting on the dispute. Overall, the Act adds little to political negotiations that would occur even in the absence of a statute and does not elaborate on chapter 3 to any considerable extent.

5.3 How was German federalism adapted for South Africa's specific context?

German federalism was adapted in a number of important ways for South Africa's specific context. First, voting by NCOP delegates can occur either on a bloc basis (i. e. delegation) or individually, depending on the area of public policy. Bloc voting is reserved for Schedule 4 issues, where the provinces and national government have concurrent jurisdiction. The NCOP also has a veto on Schedule 4 legislation. The veto and bloc voting operate when provincial interests are at stake. With respect to other issues, NCOP delegates vote individually, and the NCOP has only a suspensive veto. These are matters of general public policy where party affiliations drive voting. In that context, the NCOP does not perform a role different in kind from that of the National Assembly, so both party-based voting and the primacy of the National Assembly make sense. The bifurcation of voting procedures depending on subject-matter, and the alignment of these procedures with a different institutional role for NCOP vis-à-vis the National Assembly are South African innovations on the German model.

Second, although NCOP follows the ambassadorial model of an upper chamber, like the *Bundesrat*, there are fundamental differences. NCOP delegations are agents of provincial legislatures, not provincial executives. As a consequence, NCOP delegations are multi-party bodies that must include minority parties in the delegation, even if they are not part of a governing coalition. Moreover, provincial legislatures – through standing committees or in plenary session – grant negotiating and voting mandates to NCOP delegations on Schedule 4 matters. As Murray explains, the shift of power from executives under the German model, to legislatures under the South African model, has a number of sources. Under the apartheid regime, the executive dominated the whites-only Parliament and abused its powers. Distrust of the executive was an important factor shaping the constitutional process and is at the root of many provisions that promote transparency (e. g. the right of access to information), political pluralism (e. g. mandated minority party representation

on certain National Assembly committees), and accountability (e. g. the Chapter 9 institutions to support constitutional democracy). The *Bundesrat* was seen as an institution of executive federalism, where real political debates and decisions took place through closed door intergovernmental negotiations, not in public. The NCOP accordingly is a creature of provincial legislatures. Arguably, the requirement that permanent NCOP delegates must resign as members of provincial legislatures operates to enhance legislative control, by severing a connection between ministerial status and NCOP membership. The retention of the special delegates, including the Premier, is a residual feature of executive model.

Third, questions of institutional capacity loomed large in the South African constitutional process, with respect to the newly created provinces. Provincial administrations were an amalgam of officials from homelands and the previous racist regime. Capacity varied enormously across the newly-created provinces. Although federalism was a political necessity, from the vantage point of public administration it was understood that provinces would not be equally positioned to exercise their constitutional responsibilities. In the context of the wide disparities in service delivery on racial lines, and the need for large investments in new programs and infrastructure in health care and education, there was an acute need to provide a backstop in the event of provincial incapacity. These were not issues in Germany, because of its lengthy history of public administration, and indeed, within a decade of World War Two, state institutions were fully functional. The special provisions in the South Africa limiting administrative federalism to Schedule 4 areas and the provision for federal intervention (both with respect to provincial legislative and executive power) have no parallels under the Basic Law.

5.4 What is the role of political parties in the operation of German and South African federalism?

As mentioned above, during several prolonged periods, the *Bundesrat* and *Bundestag* (and hence the federal government) were under control of different political parties. In those periods, the *Bundesrat* was less a voice of the *Länder,* and more of a platform for the opposition. Party affiliation mattered more than *Länder*'s interests. Because of the *Bundesrat* decision, the control of the *Bundestag* and *Bundesrat* by different parties led to gridlock. The 2006 constitutional reforms were designed to give incentives to the *Länder* to exercise the power to opt out of national legislation, and to diminish the growth of the role of parties in the *Bundesrat*. It is not clear that these reforms have been successful.

In South Africa, the dominance of the African National Congress (ANC) has meant that the ANC has dominated provincial governments, and thereby has effectively controlled NCOP. As of the 2019 elections, the ANC controlled eight of nine provinces, with the opposition Democratic Alliance controlling the Western Cape (where it has been the largest party since the 2009 elections). The 2019 election results translated into 54 seats in the NCOP, out of a total of 90 seats. Because of the highly centralized role of the ANC in selecting provincial political leadership, party affiliation has trumped provincial affiliation in the NCOP. Therefore, as in Germany, party dynamics have trumped regional dynamics in South Africa's upper chamber. However, in South Africa, a single party has been dominant, whereas in Germany, there has been no dominant party.

6 Conclusion

In addition to South Africa, James Fowkes notes that the Basic Law has also had some influence on decentralization in Kenya (Deutsche Welle 2019). But its influence in South Africa was greater. Based on this case-study, how should we conceptualize the role of German federalism in constitutional assistance abroad? The Basic Law had a demonstrable and substantial influence on the Constitution of South Africa, even though the political contexts in which federalism was adopted differed markedly. However, German federalism was not simply transplanted in South Africa. It provided a set of tools, concepts and ideas which South Africans were able to adapt in creative ways. In some cases, the logic of German federalism was taken further – e. g. *Bundestreue*. In others – administrative federalism, the composition and selection NCOP delegations – South Africa differs markedly, albeit with clearly German roots. Finally, political party dynamics have shaped the operation of both countries' upper chambers, but in the context of different party systems – a dominant party system in South Africa, and a competitive multi-party system in Germany. Other countries would do well to learn from German federalism in the same way.

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