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# THE DOMESTICATION OF GERMAN FOREIGN POLICY IN THE EUROPEAN UNION

*John Kincaid\**

**I**N *The Allocation of Competences: Foreign Relations Between the European Union and the Federal Republic of Germany*, Professor Torsten Stein provides a rich, analytic overview of both the law and the reality of Germany's foreign-relations competences in the context of the European Union and the recent changes in the Basic Law. His analysis is both insightful and provocative. At the same time, he paints a rather stark portrait of a Germany virtually denuded of its sovereignty with respect to foreign policy. In essence, he argues that foreign-policy powers have been gradually siphoned out of the German Federal Government in two directions: toward the European Union and toward the Länder. The Federal Government has been left wearing little more than a ceremonial cape.

If a true foreign policy needs a respected army, then perhaps this portrait is accurate. Today, however, a true foreign policy, for a democracy at least, needs an air force as well as a naval platform, from which to launch aircraft and cruise missiles, more than it needs an army. Democratic peoples no longer tolerate massive casualties among their military personnel absent a direct threat to the polity itself. However, if one defines foreign relations in terms of diplomatic leadership buttressed by economic muscle, then the portrait of German foreign policy during the past years is surely more robust, if not exactly colorful, and far more fruitful than during the first fifty years of the twentieth century.

Furthermore, as Stein notes, since 1945 Germany has conducted its foreign policy under somewhat unique institutional constraints. These constraints have included rules that the Allied occupation imposed after the war, followed by the more institutionalized constraints associated with NATO, the European Community (EC) and European Union (EU), other European institutions, and international law. Indeed, as Stein suggests, by the time the reunited Germany achieved full sovereignty under the treaty of 1990, Germany was already embedded in and constrained by the well-developed institutional structures of NATO and Western Europe itself. In effect, Germany became sovereign, not in and of itself, but in

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partnership with these institutions. This notion of partnership is critical because these European institutions are not entirely external.

Germany is a part of these institutions, and is often a powerful part. It played a leading and dominant role in building those institutions. Germany, therefore, is not autarkic, but neither is any other European nation today. No nation-state is autarkic.

An important characteristic of German foreign policy since 1949 has been Germany's willingness to conduct foreign relations mostly within rather than outside of, or in opposition to, these multinational institutions. Germany has rarely acted unilaterally, at least in major ways. There have been some exceptions, such as Germany's early recognition of Croatia. But Germany has largely been, or has tried to be, a partner. Its overall approach to the Balkans has been to try to forge a European solution that would give European institutions priority in policy-making, with the United States occupying a secondary position. Thus, Germany's foreign relations appears to be a desirable model that moves humanity away from older notions of national autarky and international anarchy, toward a more domesticated and rule-bound model of global intergovernmental relations. As such, Germany has also acted in constructive ways to help build the very institutions that constrain national autarky and international anarchy.

The powers Western Europe's multinational institutions now exercise, therefore, precipitates an inquiry of whether it is meaningful to describe the relationship between the Federal Republic of Germany and the EU as "foreign relations" or whether they should be described as "intergovernmental domestic relations." The Länder asserted this point during negotiations over the Single European Act and the Maastricht Treaty. The Länder argued that EU matters were no longer questions of foreign relations under Article 32(1) of the Basic Law, and that the EU was no longer an international organization for the purposes of Article 24(1).<sup>1</sup> One need not accept the argument that member-state relations with and within the EU are simply the functional equivalent of domestic relations. But they are not simply "foreign relations" either, and the EU is not merely an international organization. Intergovernmental relations in the EU have a hybrid character containing elements familiar to both students of intergovernmental relations in foreign affairs and to students of intergovernmental relations in domestic federalism.

Article 24(1) may be used as a vehicle for the siphoning of nation-state powers into multinational European institutions and the EU. The Länder regarded Article 24(1) as the "open flank" of the federal system. Through the open flank of its foreign-relations competence, the Federal Government would be able to destroy the fundamental federal principles of the Basic Law in ways the Basic Law otherwise prohibited domestically. The Länder believed that if they could not close the open flank of

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1. GRUNDGESETZ [Constitution] [GG] arts. 32(1), 24(1) (F.R.G.).

Article 24(1), an army of Brussels bureaucrats would march through it and occupy more and more Land powers, thus wrecking the federal system.

During the first three decades of European integration, the Federal Government repeatedly promised to consult the Land governments in advance on all matters affecting the Länder. The Federal Government frequently did consult with the Länder, although European decision-making during those decades rarely had significant effects on Länder competences. Negotiations leading up to the Single European Act of 1986<sup>2</sup> and, then, to the Maastricht Treaty, however, triggered alarms in the Länder. These measures essentially transformed the EC and EU into a functional federation without substantially altering its confederal decision-making structure in which executive heads of national states and governments dominate. Like a confederation, heads of state and government still make all the important decisions of the EU. Yet, like a federation, EU decisions directly affect individuals and, thereby, an ever-widening range of Land competences. Therefore, during 1985-1987, the Länder began opening their own information and liaison offices in Brussels. They pressed for a stronger voice through the Bundesrat in European decision-making and ultimately insisted on changing the Basic Law.

In 1987, the Länder issued *Ten Munich Theses on European Policy*, which included four key demands with respect to European integration. The first was entrenchment of subsidiarity in the Maastricht Treaty. Although accomplished, this effort fails to truly protect the Länder. Subsidiarity applies to the member-states, not to their regional and local governments, and is left to member-state decision-making. A second demand was to open the Council of Ministers to "third level" ministers on matters of exclusive subnational responsibility. The Länder achieved this part. On EU matters affecting exclusive Länder competences, a Länder representative can chair the German delegation in the Council of Ministers. A third demand to sub-national regions was, moreover, not unique to Germany. Alongside European integration, and partly because of this integration, a number of countries, such as Belgium, Italy, Spain, and the United Kingdom, have experienced devolution, decentralization, or federalization. Federalist concepts of polycentric or multi-level governance and domestic asymmetry are replacing older statist concepts of unitary sovereignty and domestic symmetry. A fourth demand was to establish a right of "third level" governments to appeal to the European Court of Justice any regulations of the EU Council or Commission that infringe upon "third level" powers. This was not accomplished, although the government of the federal republic agreed to represent Länder interests before the court.

The issues arising from this double siphoning process have been, perhaps, more visible in Germany because of its fifty-year-old federal sys-

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2. See Single European Act, Feb. 28, 1986.

tem, which has long enabled the Länder to impose certain internal constraints on the conduct of German foreign relations. These constraints were partly external in origin, insofar as the Allied occupying powers urged the establishment of a decentralized political system. However, a federal republic, in which powers are both divided and shared between the federation and the Länder, became possible and viable because federal-type arrangements were already rooted in German history. At the time, few, if any, political leaders had a coherent vision of the future, but the postwar arrangements pointed, in effect, to a United States of Germany within a United States of Europe. Indeed, paragraph 2 of the Preamble to the Basic Law commits the Federal Republic to serving "world peace as an equal part of a united Europe."<sup>3</sup>

Stein argues that as Europe has become more united, the foreign-relations competences of the Länder have been strengthened. He also cites changes in the Basic Law that strengthen Länder powers in foreign relations. He implies, however, that this development is illegitimate. The new Article 23 that was added to the Basic Law was "the result," he says, "of a successful blackmail on the part of the Länder."<sup>4</sup> This is a very provocative statement that provokes a few comments in support of the Länder.

The Länder sought changes in the Basic Law in return for their support for the Maastricht Treaty because the policy competences of the EU increasingly invade the historic powers of the Länder over areas such as health, education, job training, culture, the media, the environment, technology, research, and regional structural policy. Thus, the Länder faced a siphoning challenge. Under its authority to delegate competences and establish an institution for regions within the EU, the federal government could have sucked dry both the autonomous powers and the implementation powers that the Basic Law guaranteed the Länder. The Committee of the Regions, although only an advisory body, achieved this and the Länder must now sit at the table alongside bureaucratic functionaries from regions in some countries that are patently unequivalent to the German Länder.

Internally, however, Article 23 was a significant political achievement for the Länder. Paragraph 1 reaffirms the integrity of the federal system, provides the Länder with a stronger and more direct voice in EU decision-making, and requires, through Article 79, a two-thirds vote in both the Bundesrat and Bundestag on transfers of competences to the EU that would alter the Basic Law or make such changes legislatively possible.<sup>5</sup> This is similar, in principle, to the two-thirds vote needed to ratify treaties in the U.S. Senate. States in the United States were concerned, among other things, that the treaty power could become an open flank for invad-

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3. GG preamble.

4. Torsten Stein, *The Allocation of Competences: Foreign Relations Between the European Union and the Federal Republic of Germany*, 53 SMU L. REV. 505 (2000).

5. GG art. 23(1).

ing state powers. Today, though, the United States government avoids treaties as much as possible, preferring instead to enter agreements that require only simple majority votes in both houses of Congress, or executive agreements that require no congressional consent. Surely Article 23 of the Basic Law will be subject to creative interpretation as well.

Even if one accepts the argument that the Länder blackmailed the German Federal Government or sought to buy concessions in return for agreement to the Maastricht Treaty, the result was mostly consistent with German constitutional policy and political tradition. The new Article 23 was necessitated, in part, by the decision of the German Federal Constitutional Court to reject a challenge to the Maastricht Treaty while, at the same time, opining about the need for domestic federal democratic mechanisms to oversee Germany's participation in European integration and the EU's use of delegated competences. In light of the increasingly domestic character of EU decision-making, Article 23 is also consistent with the tradition of Land participation in national policy-making—including the pre-Article 23 fact that more than half of all federal laws could not be enacted without support from a majority of the Land governments' votes in the Bundesrat. Article 23 is also consistent with the traditional inter-governmental sharing of legislative, fiscal, and administrative functions that produced a system of interlocking politics characteristic of cooperative federalism despite the centralizing features of the Basic Law embedded in a culture that has emphasized national unity and equal living conditions nationwide. It is possible that the Länder will use their power to extract concessions from the Federal Government; however, their interest in fostering European integration is likely to limit their eagerness to do so .

From this perspective, Article 24(1)(a) on transfrontier cooperation with neighboring regions is not really an enhancement of Land foreign-relations powers either. Germany's neighbors are, or will become, members of the EU, and most transfrontier institutions deal with domestic housekeeping matters. In this case, the Federal Government must approve Land transfers of sovereign powers to transfrontier institutions. The constituent governments of most federal systems already possessed this power in varying degrees. States in the United States have possessed this power for 211 years under the Compact Clause of the U.S. Constitution,<sup>6</sup> but until recent decades, states seldomly used it. States cannot enter treaties with foreign governments, but with the consent of Congress they can enter compacts and agreements with foreign governments.

Furthermore, regarding Article 32(3) on Land treaties, Professor Stein notes that the German Federal Government rarely refuses to give its consent to such treaties.<sup>7</sup> Whether Article 24(1)(a) was really necessary considering that the Basic Law already had Article 32(3) is perhaps an open question; nevertheless, Land foreign-relations powers have not been sig-

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6. See U.S. CONST. art. I, § 10, cl. 3.

7. See *supra* note 4.

nificantly enhanced. In the United States, Congress rarely addresses state agreements with foreign governments, and states often enter agreements without informing Congress or the U.S. Department of State.

These transfrontier tools available to the Länder under the Basic Law are also important because economic development and competition in the EU are significantly shifting from member nation-states to regions within the member states. Consequently, vigorous and competent Land policy-making on infrastructure, education, and other facets of economic development is increasingly vital to Germany's economy and to its muscle in the EU. The Länder, therefore, often cooperates directly with the European Commission on economic development and cohesion policies. One potential problem for Germany, however, is that the Länder with greater abilities to compete in the European and global markets will leave the poorer Länder behind. This could produce divisions among the Länder about EU policy-making and place greater pressure on the Federal Government to compensate the poorer Länder through strengthened equalization policies.

In summary, have these developments, which stem from European integration, increased the Länder foreign-relations competences? The answer is "yes," if one views the EU as an international organization. If one views the EU as something else, a confederal federation perhaps, the answer is "no." From this perspective, the Länder did not increase their foreign-relations competences: rather, they sought to maintain their domestic competences and their constitutional roles in the federal decision-making processes.

Finally, it should be noted that the challenges facing the Länder and German federalism are not peculiar to Germany. Such challenges confront all federal systems as a result of globalization and, especially, free-trade agreements. These agreements, which now increasingly seek to eliminate non-tariff trade barriers, pose serious challenges to the constitutional powers of the constituent governments of all federal systems. In most federal systems, the constituent governments exercise most of the powers that can give rise to non-tariff trade barriers. Indeed, the EU has a list of more than 100 U.S. state laws to which it has free-trade objections. The challenges are more acute in Germany because of the deeper and more comprehensive nature of European integration compared to the challenges faced, for example, by U.S. states and Canadian provinces under the North American Free Trade Agreement and the World Trade Organization. The constituent governments in all federations, and even sub-national governments in some unitary systems, are already asserting rights to have a stronger voice in national foreign policy-making and to have an independent presence in the international arena. Consequently, the constitutional and political developments that the Länder initiated in Germany are precursors of, and perhaps models for, developments likely to occur in other federal systems as global integration affects more and more domestic policy-making.