CHAPTER 3

Federalism, People’s Legislation and Associative Democracy

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1 Introduction: Federalism and Democracy as Two Basic Principles

Normative theories on federalism suggest that federalism clearly enhances democracy. In the constitutional debate, the federal principle was regarded as a means to limit the power of incumbents and to ensure individual freedom.¹ In addition, in federations citizens can more often participate in elections at various territorial levels. Democracy, for its part, is seen as a necessary condition to safeguard the vitality of federations.² The close nexus between democracy and federalism has consequently preoccupied institutional designers and political scientists since the late 18th century. Although the US model is exceptional and by no means typical for the emergence and functioning of federations, it has often served as a yardstick for understanding other federal democracies.³

Simply conceiving federalism as a subcomponent of democracy can, however, be misleading. Meanwhile, there is increased awareness that federalism may even facilitate non-democratic developments in nascent or defective democracies because their party systems are mostly unconsolidated and not vertically integrated. Instead, they often feature regional parties fueling centrifugal tendencies. In view of such situations, political decision-makers may be inclined to limit participation at the cost of democracy.⁴ Moreover, cooperation and coordination are necessary conditions for securing the functioning

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and viability of any federation. This is not only true for federalist systems, which are, a priori, based on cooperation, but also for those federations which distinctly separate responsibilities. As a general rule, cooperation lowers democratic quality even in established federal democracies for a couple of reasons. Negotiations between federal units are typically prepared by administrations and coordinated through and by the governments, whereas legislative powers cannot be jointly exercised. Parliaments, as “principals”, face serious difficulty in trying to scrutinize governments as their “agents”, the more so as cabinets in parliamentary democracies emerge from the majority parties in parliament; majority parliamentary groups and cabinets naturally constitute a political unit. Furthermore, in most federal systems, votes are not equally weighted, due to regional representation in the second chamber. This leads to serious distortions of varying extent, which conflict with the basic democratic principle of equal representation. The lack of transparency inherent in federal negotiations seems to further boost widespread mistrust in representative institutions. Hence, democratic governments are today under political pressure to allow more “unbiased” participation of their citizens. It is still a contested issue whether or not federalism can meet these demands.

This chapter addresses these tensions between federalism and democracy as two basic constitutional principles. Merely identifying these “tensions”, however, is not sufficient to deal with the problem. For this reason, options for adding channels of participation to a federal system other than just the “traditional” ones are discussed below. In particular, my considerations refer to two specific forms of participation intensely and currently debated in Germany and other established democratic multilevel systems: people’s legislation, which is already institutionalized at subnational and local levels but not at federal level; and “associative” democracy, which is considered a means of improving processes of policy-formulation and of gaining additional legitimacy by incorporating associations of citizens during all stages of policy-making. The argument starts with the assumption that inserting additional channels of participation does not automatically increase the democratic quality of federations, nor does it lead to “better governance”. Quite the contrary, it appears that the addition of specific combinations of democratic participation and federalism may even trigger more distinct institutional tensions.

The initial step in the argument will be to distinguish cooperative federalism, which is basically voluntary, from joint decision making, which is characterized by obligatory negotiations. The former occurs in interstate (“dual”) as well as in intrastate federalism, whereas the latter exists mainly in intrastate federations.

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5 For an overview see Stepan, “Federalism and Democracy. Beyond the U.S. Model” (note 3).