

# THE FEDERALISM REPORT

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Volume 20, Number 3  
----- Spring 1995

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## CSF NOTEBOOK

### FROM THE EDITOR

The Center is pleased to announce the selection of J. Wesley Leckrone as an H. B. Earhart Fellow for 1995-1996. Wes will be conducting research at the Center in the areas of confederation and religion and politics as well as presenting short pieces occasionally in the Federalism Report.

"Regionalism in a New Key," a one day conference hosted by the Center on September 15, 1995, will bring together local national and international experts to help us think clearly about what we mean by regionalism. For a brochure and information, please contact the Center.

## CSF NEWS

**Mobilizing Public Leadership**  
**The Second in a Series of Conferences on**  
**Building Civil Community in the**  
**Cities of the Prairie**

Sponsored by  
 The Center for the Study of Federalism  
 with the support of  
 The Bradley Foundation

August 19, 20, 21, 1995  
 Duluth, Minnesota

Since 1959, Daniel J. Elazar and a team of scholars, have been engaged in a long-term study of the political development of medium-size cities of the American prairie. The collective results of this study have been published in two volumes--*Cities of the Prairie: The Metropolitan Frontier and American Politics* (Basic Books, 1970) on the fifteen-year political period from 1945 to 1960 and *Cities of the Prairie Revisited: The Closing of the Metropolitan Frontier* (University of Nebraska Press, 1986) on the next fifteen-year political period, 1961-1976. Scholars are now completing research for the third fifteen-year period covering the years from 1977 to 1992.

Recognizing the potential importance of thirty-five years of community studies for the communities studied, the Center for the Study of Federalism convened, a series of three conferences each focusing on an enduring theme and prerequisite of community revitalization in twentieth-century American society. The three themes are: *Improving Civil Community* explored in December 1994 in Pueblo, Colorado, *Mobilizing Public Leadership*, the subject of our upcoming 1995 conference in Duluth, Minnesota; and *Implementing Local Constitutional Change*. We use the term "the civil community" because it emphasizes the political and governmental side of community life, because it reminds us of the importance of civility in community life, and because it can embrace a city, a county, or an entire metropolitan region. The term "public leadership" is used to refer to all of a civil community's leaders from across all of that community's sectors--government, commercial, and nonprofit. The conference on mobilizing public leadership will focus on the roles and perspectives of the community's citywide political leadership.

## PUBLICATIONS

**Managing Small Cities and Counties: A Practical Guide.** James M. Banovetz, Drew A. Dolan, and John W. Swain, Eds. Washington, DC: International City/County Management Association, 1994.

This edition is a substantial revision of *Small Cities and Counties: A Guide to Managing Services*, which was released by the International City/County Management Association in 1975. The volume applies sound business principles to the daily management of local government. Practical solutions arise from the assumption that efficient and effective management requires a level of managerial knowledge and specialized expertise comparable to that required in a large and complex business.

*Managing Small Cities and Counties* focuses on four broad issues concerning local government. First, it describes the nature and function of community government, with attention paid to the context in which government operates and forms of local government. Second, it addresses the need to build a better community through city planning, improved infrastructure, economic development and recreational services. Third, it focuses on issues of public safety, including management of emergency services, police and fire departments. The book concludes with a discussion on the effective management of government. Here, issues concerning community government's interactions with business, other levels of government and the public are addressed. *Managing Small Cities and Counties: A Practical Guide* is an excellent resource for local government employees as well as for students. ■

**Thomas Paine: Collected Writings.** Eric Foner, Ed. New York: Library of America. 1995.

The Library of America has produced the first selection of Paine's writings in fifty years. Edited by historian Eric Foner, this is the largest, single volume collection of Thomas Paine's works available. In addition to Paine's best known works, this edition includes letters, pamphlets, articles and Foner's informative notes on the texts. It is essential for students of American government and all interested in this revolutionary writer. ■

**The Anti-Federalists and Early American Political Thought.** Christopher M. Duncan. DeKalb: Northern Illinois Press, 1995.

Duncan seeks to wrestle the Anti-Federalists from historical obscurity in this work. He traces the roots of the anti-Federalists from the New England Puritans through the American Revolution and claims that their political theory formed a viable alternative to the Federalists. Duncan asserts that the anti-federalists' belief that localized political participation served as the foundation of public happiness was the true legacy of the American Revolution. He argues that this legacy was destroyed in 1789 when the Federalists, in the Constitution, focused on individualism at the expense of political community. Duncan believes that contemporary America must alter this focus on individualism and instead foster political community by reinvoking the Anti-federalist theory that political activity is an end unto itself. ■

**BOOK REVIEW**

**Conflict and Peace in the Horn of Africa: Federalism and Its Alternatives.** Peter Woodward and Murray Forsyth, Eds. Brookfield, VT: Dartmouth Publishing Company, 1994.

This collection of essays resulted from a conference held at the University of Leicester in late 1990. Sponsored jointly by the Centre for Federal Studies at Leicester and the Council for Civil Liberties in Ethiopia, the conference sought to provide constructive analysis of the political and economic future of the Horn of Africa. While the cast of scholars come from various economic and political viewpoints they agree that any prospect for peace in this war-torn and economically depressed region must include a variation of federalism.

The volume focuses on the countries of Ethiopia, Eritrea, Sudan and Somalia. Ruling parties in each country, even under a federal structure, have concentrated on the centralization of power within a small power base. This has led to the suppression of regions and ethnicities outside the ruling party.

The countries of the Horn of Africa have been mired in warfare which has upset the political and economic balance of the region. Rebel factions and governments, whether funded by the Soviet Union, Cuba or the United States, or by other Horn nations, have caused instability leading to the impoverishment of the region.

The authors argue that if the Horn of Africa is to transcend its history of oppression, it must

incorporate federalist principles. The legacy of pseudo-federalism, in which the central governments of Ethiopia, Sudan and Somalia have suppressed Eritrea, southern Sudan and Somaliland, must be supplanted by a system where each state holds equality of power. In order to guarantee stability and guard against a return to centralized tyranny, institutions such as the military, the bureaucracy and the legislatures must equally represent all factions. Rule of law must also be ensured through the development of a constitution. Again, the inclusion of all parties in the development of this document is of paramount importance. The authors argue that the constitution must specifically address the powers reserved to state and local governments in order to preserve their special status from future infringement by the federal government. Finally, in a nation like the Sudan, where religion is a contributing factor to political instability, the federal government must be instituted as a secular state.

Several authors argue that the political stability of a federal form of government will breed economic growth. They also push for regional economic cooperation between Sudan, Ethiopia, Somalia and Eritrea. These advocates maintain that economic interdependence will contribute not only to political stabilization, but also to the re-development of trade and economic growth. An important factor in the success of inter-regional organizations is a policy of non-alignment for the countries of the Horn of Africa. This will prohibit the re-ignition of rivalries and stifle the influence of outside international tensions.

While *Conflict and Peace in the Horn of Africa* is longer on history than on analysis, this emphasis reinforces the need for federal systems to stem the historic trend toward centralized government. The authors are adamant that equal representation for all the diverse ethnic and religious groups is necessary if the Horn of Africa is to emerge from its impoverished and war-torn state. This volume provides a good foundation of positive solutions to promote economic and political stability for the region.

*J. Wesley Leckrone*  
Temple University

## ANNUAL INVENTORY RESULTS

As a service to the political science community, the Center for the Study of Federalism compiles an activities and publications report.

**Gerald R. Alfred**  
Assistant Professor  
Department of Political Science  
Concordia University  
7141 Sherbrooke, St. West  
Montreal, Quebec H4B 1R6

### RECENT PUBLICATIONS

Heeding the Voices of our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism  
Oxford University Press

Case study of Mohawk politics with particular reference to the rise of a militant rejection of the legitimacy of the Canadian state by Mohawk people, and the move toward an alternate, indigenous, and more authentic vision of federal relations between political communities in Canada.

Cost \$24.95

The Future of Native-Quebec Relations  
Institute for Research on Public Policy (Canada).  
Choices: Quebec-Canada Series  
Discussion of potential implications of Quebec separation for Native-Quebec relations, and of the nature of Quebec as opposed to Native forms of nationalist assertions vis-a-vis the state in Canada.  
Contact: IRPP, 1470 Peel St. Montreal, Quebec, H3A 1T1 (514) 985-2461. ■

**Michael Ross**  
Administrative Law Attorney  
4827 Austin Drive  
San Diego, CA 92115

### RECENT PUBLICATIONS

California: Its Government and Politics, 5th Ed.  
Wadsworth Publishing, 1995  
Textbook on State and Local Government in California. ■

**Mark P. Jones**  
Assistant Professor  
Department of Political Science  
Michigan State University  
East Lansing, MI 48824-1032

### CURRENT RESEARCH ACTIVITIES

"Assessing the Public's Understanding of Constitutional Return: Evidence From Argentina." Examines Argentina public opinion on recent reforms related to Federalism and other issues.

Contact: Mark P. Jones  
Forthcoming in Political Behavior (tentatively March 1996).

"A Comparative Study of the Argentine Provincial Electoral Systems: An Alternative to the Cross-National Method."

Contact: Mark P. Jones  
Jan. 1995 - Sept. 1995.

### RECENT PUBLICATIONS

"A Guide to the Electoral Systems of the Americas"  
Electoral Studies

A reference guide to the key aspects of the hemisphere's electoral systems.

Contact: Mark P. Jones or Electoral Studies

Electoral Law and the Survival of Presidential Democracies

University of Notre Dame Press, 1995.

A comparative study of the link between electoral laws and democracy in Latin America

Contact: University of Notre Dame Press. ■

**Professor J.J. Pincus**  
Department Head  
Economics Department  
University of Adelaide  
Adelaide, SA 3005

### CURRENT RESEARCH ACTIVITIES

"Minimalist Model of Federal Grants and Flypaper Effect" (with G. Brennan) December, 1995.

Contact: J.J. Pincus. ■

**Dr. Andrew Parkin**  
Politics Department  
Flinders University of South Australia  
GPO Box 2100  
Adelaide, SA 5001  
Australia

## CURRENT RESEARCH ACTIVITIES

"The Role of the States in the Australian Federal System"

Focuses particularly on the state of South Australia  
Contact: Andrew Parkin 1991 - 1995

"Federalism and the Australian Labor Party"

Contact: Andrew Parkin 1992-1994

## RECENT PUBLICATIONS

"Frustrated, Reconciled or Divided? The Australian Labor Party and Federalism"

Australian Journal of Political Science  
29 (1) March 1996

"The Intergovernmental Politics of Housing Policy"

Australian Journal of Political Science  
27 (4) November 1992. ■

G. Ross Stephens

Political Science Department

203 Haag Hall

University of Missouri-Kansas City

5100 Rockhill Road

Kansas City, MO 64110-2499

## CURRENT RESEARCH ACTIVITIES

"State Systems of Local Government and the Census Typology"

The Census typology of local governments in the United States is spurious for at least fourteen states and often leads to misperceptions on the part of federal, and sometimes state, policy-makers as to the actual roles performed by different types of local governments.

Contact: G. Ross Stephens  
January 1993-June 1995

"Twentieth Century Institutional Change in the American Federal System"

Note This research is being divided into two articles. The first deals with institutional change over the period 1902 to 1992 while the second outlines changes in public personnel over the last half of the Twentieth Century

Contact: G. Ross Stephens  
January 1993-June 1995

## RECENT PUBLICATIONS

"Politics in Kansas City" (Completely new chapter)  
Discusses the history and development of local government, population, politics, leadership, and the economy of Kansas City, Missouri and the Kansas City metropolitan area. *Reprints not yet available.*

Richard J. Hardy, Richard R. Dohm, and David Leuthold, eds., Missouri Government and Politics. Columbia: University of Missouri Press, 1995.

"Urban Underrepresentation in the U.S. Senate."

Urban Affairs Review, formerly the Urban Affairs Quarterly Vol. 31, No. 1. January 1996. ■

Staci L. Beavers

Graduate Student/Graduate Fellow

University of Nebraska-Lincoln

Department of Political Science

Lincoln, NE 68588-0328

## CURRENT RESEARCH ACTIVITIES

"The Ninth Amendment: Implications for American Federalism"

Duplications of Ninth Amendment for federalism & civil liberties.

Contact: Stacie Beavers  
June 1, 1995. ■

James M. Hoefler

Associate Professor

Department of Political Science

Dickinson College

Carlisle, PA 17013

## CURRENT RESEARCH ACTIVITIES

Between Two Worlds

Right to die decision making for incompetent patients.

May 1995 - Fall 1996

Westview Press

Boulder, Colorado

Smoking & Politics with A. Lee Fritscher (5th ed)

Tobacco politics and bureaucratic regulation

Spring 1994-Summer 1995

Prentice Hall

Englewood Cliffs, New Jersey. ■

# PUBLIUS: THE JOURNAL OF FEDERALISM

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Council for State Constitutional Studies  
G. Alan Tarr  
Rutgers University-Camden

State constitutions have emerged in recent decades as a major field of research and activity. Within the United States, the rediscovery of state declarations of rights during the 1970s has been, according to former U.S. Supreme Court Justice William Brennan, "the most important development in constitutional jurisprudence in our time." Beyond the nation's borders, the collapse of communism has led to a renewed interest in constitutional design and, in newly emergent federal systems, to a particular interest in state constitutionalism.

To study and participate in these developments, Rutgers University-Camden recently established the Council for State Constitutional Studies. This Council will promote the exchange of ideas on state constitutions and sub-national constitutions with interested scholars both within the United States and abroad, as well as the judges, legal practitioners, and governmental officials. More specifically, the Council proposes to undertake the following activities:

- 1) Conference on sub-National Constitutionalism: The Council plans to convene an international conference on sub-national constitutionalism, at which scholars and officials drawn from federal systems around the world will discuss issues of state constitutional design and practice.
- 2) Conference on the New Jersey Constitution: The Council plans to convene a conference marking the fiftieth anniversary of the New Jersey Constitution, at which scholars and officials will assess New Jersey's experience under its 1947 constitution and chart future directions for constitutional development and reform in the state.
- 3) Research reports: The Council plans to issue periodic reports on important topics in state constitutionalism, such as school-finance litigation, constitutional issues in tort reform, and the like.
- 4) Newsletter on international developments in state constitutionalism: The Council plans to develop and distribute a newsletter that will report and analyze developments in state constitutionalism throughout the world. This newsletter will link on a continuing

basis scholars and officials from various countries who share an interest in state constitutionalism.

- 5) Annual conferences: The Council plans to expand Rutgers Law School's annual state constitutional lecture into a one-day conference, permitting a more detailed examination of current constitutional issues.
- 6) Continuing education: The Council expects to develop continuing education programs in state constitutional law for the bench and bar, in conjunction with state bar associations and other organizations.

7) Resources in constitutional law: The Council expects to become the nationally recognized depository for publications and other materials in state constitutional law. It plans to digitize those materials to make them available to a wider audience and to develop computer-accessible data bases in state constitutional law and related policy research.

8) Contract research: Members of the Council will provide expertise and services to governments and the organized bar on state constitutional issues. This research might involve (a) analyzing specific constitutional issues, (b) conducting empirical research on policy issues in state constitutional law, (c) preparing background materials for state constitutional conventions or commissions, and/or (d) drafting state constitutional provisions.

9) Resources in constitutional history: The Council will prepare sourcebooks and other materials in state constitutional history for the bench, the bar, and state historical commissions.

10) Education: The Council will promote research by graduate students in law, public policy, and history, as well as by undergraduates in political science and history. Some students may be chosen as Constitutional Fellows and participate in the work of the Council.

For further information on the Council and its activities, or to be placed on the Council's mailing list, please contact: Alan Tarr, Director, Council for State Constitutional Studies, Rutgers University, Camden, NJ 08102; [tarr@crab.rutgers.edu](mailto:tarr@crab.rutgers.edu).





# IACFS

NEWSLETTER  
BULLETIN  
d'INFORMATION  
RUNDSCHREIBEN

## CENTER TO HOST IACFS MEETING

The Center for the Study of Federalism will host the next meeting of the IACFS in conjunction with an international conference "From Statism to Federalism: The New International Relations". This conference will allow scholars to compare their research findings and report on recent developments in their nation-states or regions where federal and confederal arrangements are being instituted. These scholars will be drawn from an international network of research centers committed to studying federal and regional systems. This conference will also enable researchers to clarify, define and operationalize the various arrangements that have been described. This is a necessary first step in furthering our understanding of this emerging paradigm.

The conference will be held in Philadelphia, PA, where the Center for the Study of Federalism is located. Its format will feature four plenary sessions designed to set out the principal themes of the conference and examine the most significant developments of the paradigm as it is emerging internationally. During the workshop, specific

national or regional developments will be examined. These workshop sessions will feature presentations by scholars currently doing research in these areas.

*For more information, please contact Paul Neal, Conference Coordinator at 215/204-1482. ■*

### Recent Publication

**Rasheeduddin Khan. Bewildered India: Identity, Pluralism, Discord. New Delhi: Har-Anand Publications. 1995.**

Bewildered India explores the complex mosaic of this South Asian country and its formation as a modern federal nation. Rasheeduddin Khan highlights five themes of contemporary relevance. He examines the nature of building a unique Indian identity out of the pluralistic cultures. Important to the complexity of cultures is the interaction of Muslim, Hindu and Christian religions. Khan also explores communalism and violence as well as the problems of building a secular polity in India. Khan stresses the values of composite culture and its relevance to contemporary India.



## FROM STATISM TO FEDERALISM

### Monday, September 11, 1995

12:00 pm - 5:30 pm - Registration

5:30 pm - 7:00 pm - Reception

7:00 pm - 9:00 pm - Dinner and Keynote Address

### Tuesday, September 12, 1995

9:00 am - Plenary Session

"From Statism to Federalism,"

Daniel J. Elazar

Center for the Study of Federalism

Temple University

10:30 am - Coffee Break

11:00 am - Session 1

- *The Uses of Confederation in Integrating Europe: The European Union and Other Institutions*

Bertus DE Villiers, Chair

- "New International Arrangements: The European Union," Murray Forsyth, Center for Federal Studies, University of Leicester

- "NATO: Integrating Eastern Europe," Hans Peter Schneider, Deutsches Institut für Federalismusforschung, Germany

12:30 pm - Lunch

2:30 pm - Session 2

*Confederal Arrangements in Other Areas of the World*

Ellis Katz, Chair

- "CARICOM: Defacto Confederation,"

George Gross, Temple University

- "Experiments with Confederation: South Asia,"

Rashadudin Khan, Center for Federal Studies, India

6:00 pm - Dinner and Business Meeting

### Wednesday, September 13, 1995

9:00 am - Session 3

*Economics and International Trade*

Anne Mullins, Chair

- "Challenges to Federalism and International Trade,"

Conrad Weiler, Temple University

- "NAFTA: Canada, United States and Mexico" Ronald Watts, Center for Intergovernmental Relations, Queens University, Canada

10:30 am - Coffee Break

11:00 am - Session 4

*Problems and Outlook*

J. Isawa Eiaigwu, Chair

- "The European Union as an Intellectual Puzzle: Federal and Confederal Relations in European Integration," Michael Burgess, Hull University, United Kingdom

- "National Experiments with Confederation: The CIS," Viacheslav Seliverstov, Siberian International Center for Regional Studies, Russia

- "Confederal Solutions for Canada," Doug Brown, Center for Intergovernmental Relations, Queens University, Canada

12:30 pm - Lunch and Closing

### • PLEASE NOTE •

Our readers are encouraged to submit articles for publication in future issues of *The Federalism Report*. If you are interested in presenting an op-ed piece or have a research note that you would like to share with the scholarly community interested in federalism and intergovernmental issues, please contact the editor.

The deadline for the Summer issue is August 15, 1995.

✳ If you are interested in advertising in *The Federalism Report*, we offer half-page ad space at a rate of \$60.00 per advertisement. The deadline for the Summer issue is August 15, 1995. Please pay when copy is submitted. If you have any questions regarding our advertisement policies, please contact:

Paul Neal at (215) 204-1480.

## STRUCTURE AND CONSTITUTIONAL STATUS OF LOCAL GOVERNMENT IN GERMANY

Gunter Krings, Temple University Law School

### I. Introduction

As in the United States, local government units in Germany are considered to be a form of "indirect state administration" (*mittelbare Landesverwaltung*). Therefore they are governed almost exclusively by state law. The statutes on the organization of local government differ from state to state, especially with respect to the internal distribution of powers within a municipality (*Gemeinde*) or a county (*Kreis*). Nevertheless compared to the US there is a higher degree of uniformity between these several municipal codes (*Gemeindeordnungen*): the basic system of local government units within a state is the same in all German states except for the city states where either no or only rudimentary types of local government exists. The five new state in former East Germany which joined the Federal Republic of Germany in 1990 and which revised their local government codes soon afterwards produced no substantially new concepts of local government in Germany, either. The structure of the different types of local government entities and their internal organization will be discussed in Section II.

Even though local government law fall in the realm of state law, the Federal Constitution (*Grundgesetz*) contains an important provision guaranteeing the right to "self-government" (*Selbstverwaltungsrecht*) to municipalities and other local government bodies (art. 28 par. 2), whose import and meaning will be discussed in Section III.

### II. The Structure of German local government

Rural municipalities (*Gemeinden*) and counties (*Kreise*) represent the two (major) levels of German local government.

#### A. Municipalities

After the five new eastern states joined the Federal Republic in 1990, there were then 16,068 municipalities in Germany. This number has decreased since then, due to "reorganization of local government" programs (*kommunale Neugliederung*) in most of the new states. In most of the "old" states local government reorganization took place in the early 1970s. Many smaller municipalities were annexed to bigger ones or were merged to form

completely new entities. Therefore North Rhine-Westphalia, the state with the highest population (17.0 million) comprises only 396 municipalities (or an average of one for 43,000 inhabitants), whereas the 2.6 million inhabitants of Brandenburg, where the states government refrained from such reorganization on the municipal level, are scattered over 1,775 municipalities. There are virtually no "unincorporated" areas in Germany.

Municipalities can be grouped in three different types: (rural) communities (*Gemeinden*), "dependent cities" that are - like the rural communities - part of a county (*kreisangehörige Städte*) and so called "independent cities" (*kreisfreie Städte*) which are not part of a county, but have the authority and function of a county themselves. A rural community may become a city, if it complies with certain criteria that are laid down in state statutes. Generally, the community has to have a certain minimum population and the type and extent of building in the community has to be "city-like" (e.g. there has to be a city-center, where a certain variety of shops and services have to be available). Rural communities, dependent and independent cities have in common that none of them has another local government unit "beneath" it.

They are responsible to regulate and to take care of all "local affairs" of public concern and they also implement federal and state statutes, if a statute says so. Since municipalities do not only pursue their own policies in fields which are exclusively in their realm, they can be described as the basic (i.e. local) representatives of governmental power (in a general sense) in Germany. German local government law distinguishes between *Selbstverwaltungsaufgaben* (self-government functions) and *Fremdverwaltungsaufgaben* (tasks which the municipality takes care of on behalf of the state or the federal government).

With respect to self-government functions, the state government can only scrutinize the **legality** of an act of the local government. The state government's powers to supervise and direct the municipality are broader in the latter field (*Fremdverwaltungsaufgaben*). Here, not only the legality, but also the expediency of an action is scrutinized. The control is exercised by the state agency, which can either be a specialized government department (*Fachbehörde*) or by a regional agency (subdivision) of the state government (*Bezirkregierung*). The municipality can challenge

the bureaucratic decisions of the state government before a *Verwaltungsgericht* (administrative court), if it can set forth that the decisions interfered with its right to local self-government.

### 3. Distribution of power within a municipality

Each state follows one out of four different schemes of "power distribution" and decision-making within a municipality. All these systems have in common, (1) that the citizens of the municipality elect the non-professional members of a municipal council and (2) that there is some kind of "executive" organ of the municipality.

The *norddeutsche Ratsverfassung* endows the municipal council with jurisdiction over all matters of the municipality. The council elects a mayor (*Bürgermeister*), who represents the municipality, chairs the meetings of the town council and serves in a honorary capacity. The municipal council delegates the ordinary administrative actions and the day-to-day business of the municipality to a professional municipal manager. Generally, he or she has to meet the pre-requisite of a "higher civil service career" (education, experience in public administration), that are set forth in state and federal statutes. This system has been criticized especially because of its tendency to cause frictions between the two executives of the municipality: mayor and municipal manager. This is why, one of the two states where this system is used (North Rhine-Westphalia) will abandon it in the near future.

According to the *süddeutsche Ratsverfassung* the citizens of a municipality elect the council as well as the professional mayor. Here, the mayor has a catalogue of competencies, which are determined by state statute. The council cannot interfere with these competencies. Similar to the latter is the *Magistratsverfassung*. The position of the single mayor here is replaced by a multi-member executive board (*Magistrat*).

Municipal council and mayor also exist, in the *Bürgermeisterverfassung*. As in the *süddeutsche Ratsverfassung* the mayor has certain competencies, with which the council may not interfere. However, the mayor is not elected by the citizens, but by the council.

### B. Counties

All municipalities except for the "independent cities" belong to a county. The county regulates and

administers those local government affairs which municipalities cannot efficiently deal with. A lot of competencies are however explicitly granted to the counties by the state legislature, in order to avoid disparities between the various counties with respect to decisions of whether the municipalities are capable to deal efficiently with a certain matter. Examples are waste management and waste disposal installations and the maintenance of special schools e.g. for vocational training.

The internal organization of a county is similar to that of a municipality. Generally, the citizens of a county elect the county council (*Kreistag*), which in turn elects the county president (*Landrat*). Depending on the type of power distribution system in the respective state, a county president has either solely a representative and honorary function and a professional county manager (*Oberkreisdirektor*) deals with the day-to-day business, or the county president herself serves in professional capacity and performs representative as well as administrative functions.

Apart from their function as local government bodies, counties (or rather: their organs) may also serve as local administrative agencies, if a state statute provides for execution by the county "as state authority". This means: even though the same county organ may act, the legal nature of its actions may vary, because an organ is either acting in its capacity as local government authority or in its capacity as a state agency. In the latter case, local government organs cannot claim a (constitutional) right to self-government, but they are supposed simply to obey the order of their superior state government body (e.g. the secretary of state).

### C. Special purpose districts

Citizens are not authorized to form special purpose districts (like e.g. school districts in US states). To avoid fragmentation of local government, the municipalities are supposed to remain the only original governmental authority at the local level. However, municipalities and counties have the power and are sometimes even required by state statute to form special purpose districts with other municipalities or counties. They thereby form new local government entities which are endowed merely with a derivative local government power. Thus special purpose districts can be employed for any matter, in which municipalities want to cooperate.

The district's foundation has to be approved by the state. The substantive limit with respect to a municipality's power to enter into such special district agreements is that a substantial part of the local government functions have to remain with the municipality. A complete transfer of the exercise of local functions to the special district is not permissible.

### III. The constitutional status of German local government

For the United States *Hunter v. City of Pittsburgh* made it clear, that the Federal constitution provides no protection of any kind for local government bodies. Instead the Supreme Court held that "the powers conferred upon [local government bodies] rests in the absolute discretion of the State." However, most state constitutions contain constitutional grants of power to local government in the form of "home rule" provisions. Some state courts even invoked an "inherent right" to local self-government.

The German Constitution (art. 28 par. 2) guarantees the right to self-government to municipalities, counties and all other bodies of local government. All state constitutions contain a grant of constitutional self-government as well. These provisions are often more detailed and go beyond the guarantee of the federal constitutions and are therefore of primary interest to local governments, which can enforce these grants in state (constitutional) courts. However, these provisions are seldom made the subject of academic analysis, since the "landmark decisions" in local government law were rendered by the Federal Constitutional Court interpreting the Federal Constitution (Grundgesetz; henceforth: GG). These decisions in turn influenced the interpretation of state constitutional guarantees. Therefore the major academic "playing field" of constitutional protection for local government is federal constitutional law in Germany, while constitutional guarantees for local government in the United States are more or less restricted to state law.

#### A. Legal character of the right of self-government

The (draft) Constitution of the German Empire of 1849 (*Paulskirchenverfassung*) provided for a right to self-government for local governments in its fundamental right section. Today, the structure of the application of the constitutional right to self-government strongly resembles the basic or

fundamental rights dogmatics: There is an extent of protection (*Schutzbereich*) of the right to self-government. On the other hand this protection is not absolute, but there are certain potential limits on this right (*Schranken*) allowing state governments to regulate within the realm of local government. However, these state regulations have to pass the test of "proportionality" (*Verhältnismäßigkeit*). All three features are generally confined to the world of fundamental rights in German constitutional law. One could therefore consider the right to self-government as a fundamental or basic right, systematically belonging to the "bill of rights" chapter in the GG (art. 1-17). However, the fact that the right to local self-government is not part of the first chapter of the Federal Constitution suggests that this conclusion is wrong. This suggestion is strongly supported by the consideration that local government is part of the realm of state government and serves the function of the so-called "indirect state administration." Local government stands on the side of the state. Therefore it is bound by the constitutionally guaranteed fundamental rights rather than entitled to protection by fundamental rights. Consequently, the constitutional "right" to self-government is considered to be an "institutional" guarantee, not a right in the sense of GG art. 1-17.

#### B. Constitutional complaints

To say, that the right to self-government is merely an "institutional" guarantee, does not mean a single municipality cannot assert its violation by state or federal government. The Federal Constitution establishes a special action for alleged violations of this right (*Kommunalverfassungsbeschwerde*). The local government body which deems itself deprived of the right to self-government by state or federal status or statutory instruments may file a constitutional complaint with the Federal Constitutional Court or with a state constitutional court.

#### C. Scope of the constitutional guarantee

What is covered by the "right to local self-government?" Here, the characterization of the "institutional" guarantee becomes relevant: Municipalities and counties are neither protected against the reshaping of their borders nor against their total liquidation. Therefore the waves of metropolitan reorganization especially around 1970 could not successfully be challenged under the

Federal Constitution. However, several state constitutional provisions were considered by state constitutional courts to require a public welfare interest to reorganize local government entities. The constitutional guarantee requires the institute of local government to remain as such, which means that a state cannot liquidate all local government entities and exercise all their functions by itself.

However, GG art. 28 protection goes beyond this basic guarantee. The Constitution empowers local government "to manage, on their own responsibility, all the affairs of the local community". This indefinite legal term (*unbestimmter Rechtsbegriff*) has to be filled with meaning. Attempts of the Federal Constitutional Court to generally define this concept are not satisfying, since they repeat the term "local affairs", without analyzing its content and scope. The complex structure and extensive functions of the modern (welfare) state have produced tendencies towards technocracy, regulation and centralization. These make it increasingly difficult to distinguish local and state affairs. It has even been alleged that there is no such thing as "local affairs" in the modern state any more. Irrespective of the definition of the term, one basic feature of local self-government is the local government's power to address "local affairs" without special and explicit grant of power. This enables the local government to react to new public demands in a flexible way.

Due to the problems of a general definition of "local affairs", a number of local government autonomies (*Gemeindehoheiten*) are traditionally deemed to fall under the concept of "local affair". They form its minimum content, notwithstanding possible further "local affairs". Those autonomies that are undisputedly believed to enjoy the protection of the constitutional right to self-government are:

- Territorial autonomy, i.e. the right to exercise governmental power within the border of the entity.
- Structural autonomy, i.e. the power to organize and structure the local administration (e.g. create departments, decide where the county capital is).
- Fiscal autonomy, i.e. the power to deal with its receipts and expenditures on its own responsibility including the right to collect fees and contributions and arguably the right to certain kinds of local taxes.

- Autonomy on Personnel, i.e. the power to select, promote and dismiss its employees.
- Planning autonomy, i.e. the power to decide on the development of the territory of the local government entity.
- Legislative autonomy, i.e. the power to enact local ordinances.

In addition to these autonomies local government units have the power to provide elementary requirements (*kommunale Daseinsvorsorge*) for their citizens and inhabitants (e.g., water and gas supply) and the power to enter into cooperations with other local government entities.

#### D. Limit on protecting self-government

Similar to the interpretation of the fundamental rights, the right to self-government is not absolutely protected. In fact, there are state statutes and regulations on all of the above mentioned autonomies, that limit the discretion of local government. They are aimed to secure a certain degree of uniformity in the exercise of these powers. The Federal Constitution allows state and federal statutory regulations within the realm of the traditional powers of local self-government, as long as they are "proportional" (*verhältnismäßig*) and do not affect the "inviolable core" of local self-government (*unantastbarer Kernbereich*). To define the "inviolable core", is one of the most crucial and controversial questions in the context of the right to local self-government in Germany.

The Constitutional Court focuses on the essential affairs with which a typical German municipality traditionally deals. Different sets of local affairs have been attributed to different local government units in the several states over the past centuries.

Furthermore, one of the advantages of local government is its capability to react flexibly to new demands in an ever-changing society; that could not have been foreseen historically. Since the Court has hardly ever struck down a statute that took away local affairs from municipalities on the grounds of this theory, this approach has been severely criticized by writers on local government law. Several suggestions have been made as to improve the protection of the "inviolable core" of local self-government.

One proposal seeks to replace the Constitutional Court's vague reference to tradition and typical characteristics by an ad hoc comparison,

between the totality of local affairs that a municipality is in charge of before and after the removal of certain affairs. If the removal has not substantially altered the position of the municipality, the right to self-government has not been violated. This theory would however grant much deference to the state or federal government. It would allow and in fact encourage a policy of small steps, according to which one local competence after the other could be removed, while each removal would not substantially decrease the totality of the remaining local competencies, if compared with the situation immediately before the respective step.

Another modern, functional approach wants to allow the state (and federal) government to take away local affairs, provided that the municipality is substituted by the right to participate in decision-making process at the higher (state) level with respect to the same affairs. However this approach is clearly inconsistent with the language of GG art. 28 par. 2, which guarantees the municipality's right to manage the local affairs "on its own responsibility". A satisfying test that protects the "core" of local self-government has not yet been developed. Thus, the protection of self-government has to primarily rely on the second "barrier" on governmental infringement of this constitutional right: the general constitutional law principle of "proportionality". This principle comprises several tests including a balancing test.

#### E. The European Charter of Local Self-Government

The counterpart of GG art. 28 in the realm of European (international) law is the European Charter of Local Self-government, which came into force September 1, 1988. The charter, that was drafted by the Council of Europe and has been ratified by more than two-thirds of its member states, is the first binding, international agreement, which grants the right to self-government to local authorities in Europe. Art. 2 of the Charter states that "[t]he principle of local self-government shall be recognized in domestic legislation, and where practicable in the constitution." Art. 3 (1) defines the term local self-government as enabling local authorities "to regulate and manage a substantial share of public affairs under their own responsibility". Even though the Charter has generally improved the status of local self-government in Europe, other European constitutions do not yet have constitutional provisions of an equal scope and impact to the *Grundgesetz*.

#### IV. Conclusion

German and United States local government law seem to be almost antagonistic to each other in many respects. The landscape of US local government entities is highly diverse with various categories, sub-categories and classes of general and special purpose entities in the several states, while, in Germany, the general municipality-county-structure as well as the basic scheme of the local government codes are rather uniform. US local government entities do not receive any protection under the federal constitution and have to rely on home rule provisions in state constitutions, that are often construed very narrowly, whereas, in Germany, the federal and state constitutions grant a right to local self-government, which is comparable to the fundamental rights granted to individuals.

Taking a closer look however, we realize that these differences are sometimes smaller than they seem on first sight. For example, the picture of uniformity in Germany changes, if one looks at the internal distribution of powers within German municipalities. These systems substantially vary from state to state. Also with respect to special purpose districts, there are many forms of cooperation between local governments which leads many local government bodies to privatize some of their public services in part by creating private sector entities (corporations). This development now brings new players on the stage of local government in Germany.

With respect to the constitutional status of local government, we have seen that there is no absolute guarantee of the status quo either for an individual local government unit nor for a class of units as such. State and federal governments may take away local affairs that have been managed by local governments for decades. Their regulatory activities continuously undermine local government autonomies. Since local government entities in Germany as well as their counterparts in the US face ever tighter budgets, what they are most concerned about, is the protection of their financial and fiscal status (e.g. rejection of unfunded mandates). Therefore, they often are indeed glad that they are discharged of a "burden", when state or the federal governments take over a local affair.

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### SECTION NEWS

#### 1. The Annual Business Meeting

The Annual Business Meeting of the Section on Federalism and Intergovernmental Relations will be held on Thursday, August 31, 1995 at 5:30 p.m. Immediately following the meeting, the Section will be sponsoring (with Center for the Study of Federalism) a wine and cheese reception. ■

#### 2. 1995 Section Workshop

##### "The Role of the States in National Health Reform."

The crushing defeat of President Clinton's health reform proposals means that the national government is unlikely to attempt comprehensive health system reform until—at the earliest—the beginning of the next century. This failure has inevitably caused health reformers to look more favorably upon the states as the vehicle for major health system reform. Indeed, those universal health insurance advocates who wish the United States to adopt the Canadian system explicitly assume the states will be the locus of authority just as the provinces are in the Canadian health system.

Students of federalism in the United States know that an important role for the states in social

policy is the norm rather than the exception. They also know, however, that federalist systems differ and that equating American states with Canadian provinces is an error.

The purpose of this workshop is to try to bring the insights of federalist scholarship into the analysis of health policy-making. Political scientists specializing in health politics will analyze the "big" issue of universal health insurance and the more "routine" issue of intergovernmental issues in health professionals education, administering the widely varying (borrowing the social typology) term health policy. Leading health policy officials will discuss the intergovernmental management and policy issues they face each day in trying to create and implement health policy. The result of the workshop will hopefully be a clearer realization of how a sophisticated understanding of federalism can improve both the theory and practice of healthy policy-making.

This shortcourse will be held on Wednesday afternoon, August 30, 1995, 12:00 to 5:00 in the Sullivan room (2nd Floor) of Roosevelt University 430 S. Michigan Avenue, Chicago, IL (Roosevelt is two blocks north of the convention hotel). The registration fee for the shortcourse is \$40.00. Please send your registration fee to Section Chair Sarah Liebschutz by August 15.



Temple University  
1616 Walnut Street  
Suite 507 (300-00)  
Philadelphia, PA 19103

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| <b>DIRECTOR:</b>         | <i>Daniel J. Elazar</i>     |
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| <b>ASSISTANT EDITOR:</b> | <i>Kimberly J. Robinson</i> |



CENTER FOR THE STUDY OF FEDERALISM, TEMPLE UNIVERSITY  
1616 WALNUT STREET • SUITE 507 • PHILADELPHIA, PA 19103  
Tel: (215) 204-1480 • Fax: (215) 204-7784 • Bitnet: V2026R@TEMPLE.VM