Speech for the international conference

"Federalizing Process in Italy – Challenges from an International Perspective"

Rome, 19 February 2010

Ladies and Gentlemen,

"Living with Asymmetry" – for a representative of one of Germany's eastern federal states this is a riveting topic indeed. After all, the reunification of Germany and the accession of the new federal states in 1990 posed a multitude of novel problems for the German federal system and gave new impetus to the nearly moribund discussion of federalism issues in Germany.

Since then Germany has undergone a lengthy process of constitutional reform. No fewer than three constitutional commissions on reform of the federal system have been instituted since 1990[1]. These have yielded numerous amendments to Germany's constitution, the Basic Law (Grundgesetz).

The questions central to the federal form of government are: How much unity is necessary? How much diversity can be permitted? On the one hand, federalism aims to achieve a certain degree of uniformity and integration. On the other hand, however, the federal states – or Länder, as we call them in Germany – should retain their independence and

[1] 1993/1994 constitutional reform; 2005 Commission on Modernization of the Federal System (so-called stage 1 of the federalism reform); 2008 Commission on the Modernization of Federation-Länder Financial Relations (stage 2 of the federalism reform)

distinctive features in order to continue to develop in a flexible and innovative manner.
As the Commissioner of Land Saxony-Anhalt to the Federation, I would like to take this opportunity to outline the lively discussion of these questions in Germany from the perspective of one of the new Länder.

In a recent interview, former Federal President Roman Herzog voiced the opinion that the guiding value in a free polity must be diversity and that uniformity did not constitute a value. Roman Herzog thus advocates a more competitive federalism, competition for the best solutions.

The Federal Republic of Germany consists of 16 Länder. Only some are the product of historical evolution; most were newly created after the Second World War as a consequence of political necessities. The Länder differ greatly in their structure: There are city-states, for example, which are simultaneously a Land and a municipality, as well as territorially larger non-city states subdivided into numerous municipalities. In terms of land area, the Länder range in size from 419 square kilometres (Bremen) to 70,500 square kilometres (Bavaria). Their populations vary from 0.6 million (Bremen) to 17.9 million (North Rhine-Westphalia). With an area of 20,400 square kilometres, Saxony-Anhalt falls in the middle in terms of land area, but it is struggling to stem a further decline in its already small population of 2.4 million. And, not least, a distinction can be made between financially strong and structurally weak Länder. So as you can see, Germany's 16 Länder are really very different indeed.

In light of these very different points of departure, a purely competitive form of federalism would be to the distinct advantage of the large and

financially strong Länder. Overall, the financial resources of Germany's five new Länder are still significantly below the average in the "old" Länder, and the gap yawning between the new and the financially strongest of the old is immense. Under these circumstances, competition among the Länder would be completely illusory. Fair and true competition can only take place if the starting points are nearly the same.

The system of federalism enshrined in the German constitution largely counterbalances this existing asymmetry among the Länder. Under the constitution, the Länder are legally independent states. They may enact laws of their own for their sphere of competence. In fact, the Basic Law even presumes that in principle the right to legislate lies with the Länder, stating in Article 70 paragraph (1) that "the Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation". In practice, however, the Federation dominates the legislative process. The loophole for this is a constitutional provision dealing with concurrent legislative power, namely Article 72 paragraph (2) of the Basic Law. In its original wording, this provision only permitted the Federation to legislate in the field of concurrent legislation if this was necessary to establish uniformity of living conditions.

In light of the disparities among the Länder this clause has been the focus of discussion on reform in recent years, for the imperative of establishing uniformity of living conditions has been the basis for a highly complex system of equalization mechanisms both among the Länder themselves and between the Federation and the Länder. For Saxony-Anhalt and Germany's other new Länder, which started from zero in 1990 and were confronted with many formidable problems – notably the nearly total collapse of the economy, a severe population drain and the

need to restructure nearly all areas of life – this clause and the solidarity expressed therein initially represented nothing less than a guarantee for their existence. From the very beginning, however, the East also understood the great solidarity of the West to be burden-sharing of limited duration and set about the task of mastering the problems and closing the gap.

In the so-called "minor" constitutional reform of 1993/94, the Länder succeeded in bringing about an amendment to the Basic Law that was intended to prevent the Federation from continuing to claim for itself the right to legislate on practically all matters of concurrent legislation on the grounds that federally uniform regulation under federal law was necessary. The phrase "uniformity of living conditions" in Article 72 paragraph (2) of the Basic Law was replaced by the phrase "equivalent living conditions". This was to afford the eastern German Länder the opportunity to bring their distinctive features to bear on the process of completing Germany's internal unity.

Since then, the Federal Constitutional Court has upheld the legislative competence of the Länder in a number of decisions.[2] According to the Court, the Federation only then had the power to legislate if living conditions in the Länder came to seriously diverge and a fragmentation of the law was imminent. This severe restriction of the powers of the Federation was one motivation for the Federation to begin negotiations on a redistribution of powers with the Länder in the year 2005 within the framework of the first federalism commission, the Commission on Modernization of the Federal System.

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[2] The decisions of the Federal Constitutional Court concerned the legislative competence of the Federation in the areas of elder care, dangerous dogs, shop hours, junior professorships and tuition fees for students.

The objective was to achieve a clearer distribution of powers between the two levels of government.
As a result, 13 subject-matter areas that had previously fallen within the legislative competence of the Federation were transferred to the exclusive legislative power of the Länder.

In addition, agreement was reached on an amendment to the Basic Law that took equal account of the interests of the Federation and the Länder but also became very complicated as a result. Pursuant to this amendment, the Federation may enact federally uniform laws in certain regulatory areas without proving the necessity of federal regulation. In addition, the Federation may, in certain regulatory areas, enact federally uniform laws from which the Länder may deviate by enacting laws of their own.

This option of divergent legislation is new in German law and introduces an element of asymmetry into the legislative process. One conceivable result is that federal law might eventually only apply in certain regions. For this reason, the introduction of the option of divergent legislation was accompanied by great concern that it could inter alia give rise to a fragmentation of the law or to "ping pong" legislation, i.e. a situation in which the Federation and the Länder continually enacted contradictory regulations. I am pleased to note that the Länder have made extensive use of their new powers. Saxony-Anhalt was one of the first Länder to pass a law of its own on the right of assembly that took specific regional circumstances into account for the first time. The Federation, too, has already availed itself of its new unlimited legislative powers in several areas.

In other areas, however, the opportunities afforded by this amendment have been rather hesitantly utilized. During the negotiations, for instance, the Länder had vehemently argued for a transfer of legislative competence for civil service law in order to be able to regulate the remuneration of their civil servants on their own. While there have meanwhile been increasingly frequent instances of divergence, the anticipated competition among the Länder in the area of civil service remuneration has not materialized.

The Federation, too, has not exercised its new regulatory powers as extensively as announced. It had, for example, demanded comprehensive powers in the area of environmental protection and had for the first time been accorded legislative competence for nature conservation. The envisioned enactment of an Environmental Code, however, foundered on the lack of political will to bring the project to fruition.

The real gain from the option of divergent legislation is the introduction and testing of a new model. Under the coalition agreement of the new Federal Government, special proposals for the new Länder are to be implemented in model regions. These are to first be examined by commissions of experts. It remains to be seen whether new paths towards asymmetry in legislation are to be tread here as well.

Overall, I observe a slightly positive trend towards a strengthening of the independence of the Länder. Practical experience has shown that the Länder are quite capable of enacting regulations tailored to their distinctive features.

In regard to the Bundesrat and its function as a key element of German federalism, my remarks can be briefer, as the Secretary General of the Bundesrat, Mr Dirk Brouër, already discussed this in considerable detail during the previous session of the Conference.

The first stage of the reform of the German federal system also curbed the veto power of the Bundesrat, the chamber of the Länder. Through the amendment of Article 84 paragraph (1) of the Basic Law, the option of divergent legislation was introduced in place of the consent requirement for certain bills: The federal legislator may now regulate Land procedural law on its own without the consent of the Bundesrat, but the Länder may enact regulations deviating from these laws within six months. This option of divergent legislation applies solely to the establishment of Land authorities and their administrative procedures. Since the amendment's entry into force, this option has been utilized in five cases, all of which concerned social legislation. Overall, a reduction was achieved in the percentage of legislation subject to the consent of the Bundesrat, namely from the previous 59 percent to 44 percent. At the request of the Länder, moreover, a new consent requirement was introduced for federal legislation entailing cost burdens for the Länder.

The impact of the first stage of the federalism reform on the actual work of the Bundesrat should not be overrated, however. The Bundesrat procedure comprises not only major political reforms and debates on these in the plenary but also – and above all – the professional cooperation between the Federation and the Länder in the joint drafting of legislation in the committees. To underscore this I would like to point out that of the 10,702 bills submitted by the federal legislator in the years 1949 to 2009, only 851 were referred to the Mediation Committee.

As a result of the negotiations in the Mediation Committee, all but 99 of these bills were ultimately promulgated.

Numerous improvements in the bills are attributable to expertise input from the Bundesrat. All in all, the Bundesrat functions as an instrument of cooperative federalism in which the best solution does not – as Roman Herzog stated – emerge in competition among all the Länder but instead through a joint discussion process. From practical experience I would therefore like to stress that successful solutions can also be found through cooperation and the exchange of views and experience.

I would also like to touch on the subject of intra-German financial relations. These, too, aim for high degree of approximation and symmetry; above all, however, they very clearly illustrate the existing asymmetries among the Länder. The Federation essentially determines the amount of state revenues by law. Article 107 paragraph (2) of the Basic Law, however, states that "such law shall ensure a reasonable equalization of the disparate financial capacities of the Länder ".

Tax revenues are accordingly distributed among the Länder under a complex system. Equalization is effected first and foremost through the fiscal equalization regime of the Länder and supplementary grants from the Federation. As a result of the asymmetries among the Länder, only five Länder pay into the fiscal equalization regime of the Länder and eleven receive funds from it. In 2009 Bavaria was the largest contributor with 3.37 billion euros, followed by Hesse with 1.9 billion and Baden-Württemberg with 1.5 billion euros. The chief recipients were Berlin with just under 2.9 billion euros, followed by four of the new Länder: Saxony with 921 million, Saxony-Anhalt with 519.5 million, Brandenburg with

506 million and Thuringia with 502 million euros. This very pronounced equalization has been criticized by the contributor Länder in particular, but no practicable suggestions for reform have thus far been put on the table.

Moreover, the new Länder receive additional special support under the second Solidarity Pact. The upshot is that the tax capacity of these Länder is equalized up to at least 95 percent of the average tax capacity of the 16 Länder overall.

In 2006 the Bundestag and the Bundesrat instituted a second federalism commission, the Commission on the Modernization of Federation-Länder Financial Relations. In the deliberations of this commission, however, no consensus could be reached on the proposals for strengthening competitive federalism and introducing tax autonomy for the Länder or a right to impose a surtax on certain types of taxes.

On the contrary: The second reform of the German federal system led to an approximation and limitation on the expenditure side and the introduction of a further equalization system between the Federation and the Länder. The major outcome of the second stage of the federalism reform is a new debt rule for the Federation and the Länder which will take effect as of the fiscal year 2011. From then on, the budgets of the Federation and the Länder must generally balance without recourse to borrowing. The aim is to ensure that as of the year 2020 the Länder will not incur any new debt and new federal debt will be limited to 0.35 percent of the gross domestic product.

Five particularly financially weak Länder (Bremen, Saarland, Berlin, Schleswig-Holstein and Saxony-Anhalt) will receive consolidation grants in order to comply with the debt rule. The Federation and the Länder will each contribute half of this assistance totalling 7.2 billion euros. This outcome is an expression of the conviction that competition in the federal system can only function if all members have roughly the same resources.

The development of the new Länder since 1990 illustrates the pronounced integrative capacity of cooperative federalism. Without the solidarity endeavours of the other Länder and the Federation, Saxony-Anhalt – and the new Länder as a whole – would not have undergone the successful development that has integrated them so quickly and firmly into the Federal Republic.

German federalism is readying itself for the year 2020. By then new indebtedness must have been scaled back, renegotiation of the fiscal equalization regime of the Länder will be on the agenda, and the other equalization mechanisms of the second Solidarity Pact and the consolidation grant arrangement will expire. Only then will it be possible to determine whether further elements of competition and asymmetry can be introduced.

As a member of the EU Committee of the Regions, I feel it is important to close my remarks with a reference to the European dimension of today's topic. In my opinion, the successful integration of Europe would not have been possible without the active solidarity of the Member States. My analysis of this would go beyond the scope of today's topic, however, and should therefore be reserved for another occasion.

Thank you very much for your attention.