

CONSTITUTIONAL ASSEMBLY

THEME COMMITTEE 3

2 MARCH 1995

WORKSHOP ON: FEDERALISM

2/4/3/9/14

THIS MEETING WAS NOT RECORDED FROM THE BEGINNING:

CASSETTE ONE - EMPTY.

PROF MUNDT:

(inaudible) ... The Bundesrat, the second chamber is not an organ of the states but it is an federal organ but its members are representatives of the states and this Bundesrat is second chamber, our senate, has some rights even in participating in the federal legislation.

So for instance there are some things the federal parliament 10
for instance is not allowed to give an amendment to the
Federal Constitution without a two thirds majority in the
Federal Parliament and in our senate. Some laws need the
consent of the Bundesrat. There is other laws, the
Bundesrat can only discuss it. So what I want to say is that
the states, and I think that is a good idea, are not divided
from the federation like pepper and salt but again they
participate already in this process of forming a political role
and of course laws on the federal level and that means that
a federal law normally has got the consensus of the states so 20
it, well there will not be so many conflicts because the states
have been already involved in that law.

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Well about fiscal relations powers, I think we have talked already a little bit and what about the status of local government, we have an Article 22, 28 sorry, which says that the municipalities shall be guaranteed the right to manage all the affairs of the local community on their own responsibility as in the minutes set by law. So we are very proud of the system of local government by own responsibility and well, there are laws of the states regarding to this effect but they cannot put away all the responsibility of a municipality from that local side.

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But the question always is, what are affairs of the local community because the local communities have only the right to manage the affairs of the local community and of course the communities try to spread it and say well this is a local affair whereas the state will say no, no, that is not a local affair.

The state has a supervision according to that municipality acts in accordance with law but not whether the municipality acts in accordance to questions of, well let me see, effectiveness. There are sometimes two ways to get to an

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end and they say it is not obliged to put these commands communally, the municipalities to do it in this way or that way. But if the communities are acting against the law, the state can stop that.

CHAIRPERSON: I am sure that is going to provoke a mountain of questions.
(inaudible) ...

UNKNOWN: In your Constitution, what does it say of the status of local government?

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UNKNOWN: Is it referred to in any way in your Constitution in Section 28?

PROF MUNDT: I just mentioned, Article 28 of the Federal Constitution.

CHAIRPERSON: Thank you. Professor you have mentioned to us about the financial equalisation and so on. Could you give us just a little more detail in this respect. What are the procedures and structures or bodies that decide each year, who decides that this is how the taxes are going to be divided?

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PROF MUNDT:

Well the Constitution itself gives some lines and says these taxes are exclusive federal jurisdictions and others are not but if we have a tax which had to be disreputed between the federation and the states, the Parliament and the Bundesrat decide over it. So these numbers, these figures which I mentioned already, 65% and 35% are up to, or political bargaining between the federation and the states.

CHAIRPERSON:

And do you have an institution where that bargaining takes place?

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PROF MUNDT:

No, no there is not a special agency and there is not a special well, ja, there is not a special agency but of course we are now talking about the Constitution before this Bill is passed by the Parliament a lot of experts are heard and maybe even the Bundesbank, you know we have an independent national bank, totally independent of the government and is, Bundesbank will give this advice or that, that has well an important way.

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But again I would say we have some expert committees.

There are the committee of the so called wise men that are

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financial experts and they give advice but well in some way it is a struggle.

CHAIRPERSON:

May I just ask, sir is it a committee of Parliament that in the first instance hears all of this and then makes a recommendation to Parliament. Is that in essence the procedure?

PROF MUNDT:

I do not know the details, every detail, but it is quite sure that before the plenum of the Parliament decides, passes the Bill but that is in nearly every case of the situation, the question has to undergo various committees of the Parliament. We have a committee for financial questions and for legal questions and for economic questions and so on. So of course that has been discussed several times in various committees.

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CHAIRPERSON:

In the South African context we have a Financial and Fiscal commission which mediates that process. To just understand this clearly, you have no such institution?

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PROF MUNDT:

No, no. May I ask you is the decision of your commission

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binding on the Parliament?

CHAIRPERSON:

Not binding but it has a very high recommendatory effect.

Yes, a difference does appear to be that in our system, I

mean we have not really used it yet because the bodies are

just, you know, but our Constitution provides for that body

in essence to recommend to the executive how the division

take place, which then in due course presumably there

would have to be Parliamentary sanction for it but it is a

process via the cabinet, whereas if I understand you

correctly, in your system it is a process directly between

Parliament who consult experts for expert advice but

Parliament in itself as opposed to the cabinet comes up with

the equalisation. Is that correct?

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PROF MUNDT:

Well I would not say it starts at the parliament. At the end

it goes to the government. It is in some way a circle. You

have the government and you have the parliament and you

have the second chamber. Now you are going towards the

year let us say 1996 so and you have the situation, huge

financial problems and few financial means. Now how to

distribute it and I would think that firstly, firstly the

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government makes a proposal.

Why? Because it is easier to find a way in the government than in the parliament.

In the government you have the federal minister for finances and so on and most of the Bills which are brought to parliament are initiated by the government at all. So you see in our country, the government, the parliament and the second chamber may put the draft of a Bill into the parliament but more than 50% of the drafts are put to parliament by the government, not by the parliament itself. Why, because in a ministry it is easier to work out. 10

So again I would say in speaking on the practical ways a government will have an idea then the government will, via the caucuses and so on and so on, think what are the ideas of the parliament but at the end the parliament has the last word and it has to pass this question in form of a Bill and I think that is right. Why, because that is one of the most important Bills you have and so it would be very strange for me that you leave this very decisive question just to 20

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somebody else.

DR DU TOIT:

Now I still want to go on detail regarding this fiscal and financial matters because this is where the power lies as everyone knows. Now we know that in Germany the legislative powers on taxation, for some parts the federation has exclusive powers and then it has concurrent powers. Some taxes accrue to the federation and some taxes accrue to the Länder and the provinces and some is divided in church.

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Now the quantification of that, what I am after is, is it worth our while to federalise our fiscal and financial system. If you take into account the numbers which I have is that the taxes which accrue to the Länder in terms of Section 162, is about 9% (I have just worked it out) out of what accrues to the provinces, the Länder, it is 29 'miljard Deutsche mark' out of 260.4. It is about 9%. That is now things like (now what is this in English - (inaudible) ...) it is motor vehicles and bier (inaudible) ... and things like that. Now it is such a small amount to federalise your fiscal system. In a way we are sitting basically with a unitary system of

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renown. Shouldn't one work just with shares as in Section 116 (iv)?

CHAIRPERSON:

Your question (inaudible) ... do you want to address this one?

UNKNOWN:

You explained that it in the end that the Bundestag has got to decide by passing a Bill on the allocation. As I understand the basic law, the principles by which it has to decide on those allocations are stated in the basic law. 10
There has to be an equalisation. There has to be a reasonable claim from the various Länder so that while the mechanisms are not stated, the principles on which the allocation should take place are written into the law.

PROF MUNDT:

You are quite right in saying that the budget of the federation is much, much more bigger than the budgets of the states but I think that is no argument against federalism at all. It depends on the allocation of power and either you find this allocates the power of the armed forces with the 20
federation and I think there is no way around that and as we know, the armed forces need a lot of money nowadays.

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In former days you had just a sword and now you have a jet and all these things. So it is quite natural that the budget of the federation must need much more higher than that of the states. Now you say is it worse to federalise it, no?

DR DU TOIT:

My point is the difference between the taxes which is allocated to the provinces in terms of your Section 106 (iii) vis-a-vis the joint system in 106 (iv)(v) etc. Where I say that the non-joint system, those taxes which are, if I can put it in German Länder (inaudible) ... that is so small, it is only 9% which is really going in the hands of the provinces, while the rest is nice in the legislation and shared out.

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PROF MUNDT:

Ja but the 9% are very important due to the psychological view of the states.

DR DU TOIT:

Ah that is it.

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PROF MUNDT:

So, because again you might put all taxes through the federation and say well they can give it back but the states

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want to be, well I put it now in the roots of a family which is not very comparative but it looks to me now, I just get this idea, the federation are the parents and the states are the children, so the budget is mostly with the family because the, but a child wants to have some pocket money call it, to finance its own thing.

DR DU TOIT: So that is now a reason ja.

CHAIRPERSON: Individuality and independence but we will go into that. Dr 10
van Heerden?

DR VAN HEERDEN: Mr Chairman to latch up with the, on with the ...

CHAIRPERSON: We are going to take just two more questions and then there will be an opportunity informally to talk to Professor Mundt.

DR VAN HEERDEN: The family description that Professor Mundt just made, if the states are being regarded as the children ... 20

PROF MUNDT: That was just...

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DR VAN HEERDEN: Well yes, no, no, I am just taking your example a little bit further and then the federal as the parents. What would you say the responsibility of the Bundesrat who actually represents the Länder, are they mostly accountable to the states or to the Länder that they represent or are they also accountable or mostly accountable, not also, but mostly accountable to the Bundestag or the federation as such.

In other words do you consider then the structure of the Bundesrat being representative of the provinces as a very important check and balance in order to maintain the structure of the federation? 10

UNKNOWN: I never even read the question.

CHAIRPERSON: We will come back to that one. This is the second chamber issue now.

PROF MUNDT: Fine, you know that the Bundesrat consists of members of the state governments which appoint and may even recall them. So the members of all second chamber are not independent members like in a parliament but they are 20

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members of the governments of their states and so they may be instructed and of course in practise it happens. I have been a member of this Bundesrat as I mentioned already and before going to a meeting, to a session of the Bundesrat, the government instructed me so in this question say yes, and that question is no, and that was all right, I took it.

So your question was what, how is it accountable? Now it is...

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DR VAN HEERDEN:

Then just, is this, do you consider this a very important check and balance for the maintenance of the federal structure? The other one you have answered already.

PROF MUNDT:

Ja, well in the Federal Republic of Germany it works very well because you have this linkage, you are a representative of the state but at the same moment going to the Bundesrat, you are a member of a federal organ and all you, you have to overlook all the things then but again I would say there might be other federal states without such a Bundesrat.

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Federal structure means that is a roof and you could put a lot into the houses under this roof and for instance United States, the senate of the United States is quite different from our Bundesrat. So again you can fit it according to your necessities. You can say for this state, the second chamber should be organised in this way or in that way but we have had good experiences.

CHAIRPERSON:

A quick question. There are certain, you know, from what has been said, there are certain taxes which the states (inaudible) ... and there are certain taxes which the federal gathers, sets and gathers. I presume that is the 9% and the 91% Of the 91% that the federal gathers, other than the general requirement for equalisation is there any proportion of that 91% that Constitutionally has to go back to the states? 10

PROF MUNDT:

Sorry. You have been in the institute of resource of federalism and I do not know is, I wonder whether there would be a clear percentage how many percent of the federal budget has to go to the states, I... 20

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UNKNOWN: Section 163.

PROF MUNDT: What is it? Yes, some but not all, he asked whether - but your question was whether there is a distribution of the federal budget at all, no, of the income of all taxes which has to go in this way or that way. A portion of tax review you see in the Article you mentioned already is one regulation and I mention for instance let us say 106 Section 3 (ii) says "Corporation Tax and Income Tax 50% to the federation, 50% to the states" but I think your question was... 10

DR VAN HEERDEN: No, that was in a sense, so there are certain taxes of that 91% whatever portion I do not know, that by, in terms of the Constitution, automatically has to go back to states and then there is the whole negotiation on equalisation. Fine, thank you.

CHAIRPERSON: The distinction between collection and distribution. Professor Tung, the last word? 20

PROF TUNG: Yes, professor I have heard you speaking, it seems to me

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that you have been in South Africa, you have, you must have come across the big argument about segmented autonomy in this country. For instance there is a view which says that the constituent provinces must have autonomous power over certain jurisdiction of points with which the central organ may not and cannot interfere in law. That is segmented autonomy as some people understand it in this country.

If I understand you correctly you are saying that in the 'Deutsche verwyschen' there is no question of provincial or state autonomy. All the powers that are granted constitutionally to the state are subject to override one way or the other by the federation and in that context I understand you to be saying that this is a totally different situation to the difficult situation in the United States for instance, where in terms of the Constitution the states have what is called residual power with which the federation cannot interfere.

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Now what I am saying, what I am therefore asking is, in your view do you think in South Africa we should go a

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'Deutsche' federation model, a federal or the United States federation model? What do you think?

UNKNOWN: The South African model.

PROF TUNG: Just asking, if only I could think of some...

PROF MUNDT: I shall (inaudible) ... say a word against the United States or Germany generally but I think you would take the good things from the United States and the good things from the Federal Republic of Germany but I think at least our system is better. Why, because we have the situation that the States have some exclusive powers, okay, but of course the exercise of these exclusive powers are not allowed to be inconsistent with the Federal Constitution. 10

For instance in the United States you have capital punishment in some states and in others not. That would be impossible for us, why, because the Federal Constitution says capital punishment is abolished and that means for all states, so I think, and again even in education, school education is the area of the states but if the state would 20

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violate the basic right of equality that would be against the Federal Constitution.

So I think our system is better because it works better in a practical sense, why, because there cannot be these very big gaps between the states and the federation. Abortion law, it is impossible to our view, that abortion law is in one state different from another law, so that the girls have to move from one state to another to avoid (inaudible) ... that is fantastic.

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So if you want to have a clear answer I would not say follow the German system but consider the German system more than the American one. Thank you.

PROF TUNG:

Just one follow-up question Mr Chairman, just one follow-up. Are you therefore saying that, or let me ask, is your system a federal system with unitary characteristics or is it a unitary system with federal characteristics?

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PROF MUNDT:

I think it is a fair compromise, it is a fair compromise. You have the most legislation with the federation but you have

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a second chamber which participates already in the, well in the process of the role and so what I only can say of my country has undergone under this system very, very difficult situations of this re-unifications and we have had millions of refugees from the eastern parts of Germany which are under Polish and so on.

So you should not think you are a country with poor regions and richer regions and this is a South African problem. We have had these problems too. Some persons had lost 10 everything because of the war and others had been enriched by the war. So then under the system and under, we call it the social state and I would suggest to put this word in your preamble, that you are not only a Constitutional state but a social state too. We managed to solve these problems.

CHAIRPERSON:

As long as you do not have the IST for some people. Well ladies and gentlemen on your behalf let me thank Professor van Mundt and Doctor Woest and the last word I am going to give to Doctor Woest in a minute to comment on this 20 process. I think we have had a lively discussion. The bottom line is still every country has its own unique

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processes. We can certainly borrow from others and it looks, that without looking too much at the German model, we have already emulated it in some ways in the Interim Constitution and we trust this area process actually enriches that so that ours is ultimately the far superior system than even the German one. They will have to come back to us and work on how to democratically draft a new Constitution.

But thank you very much, it has been a very useful exchange and a lively one. We apologise for the limitations in terms of time but hopefully on your next visit we will be able to spend more time together. The last word Doctor Woest is yours. 10

DR WOEST:

Thank you very much, on this evening in order to make it a successful and useful afternoon for you, Professor Foreman has prepared a synopsis on these two Constitutions, on your Constitution and on our Constitution. If you have interest please take it, please serve yourself. Once more thank you very much for the afternoon. 20

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