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CONTENTS

THE POLITICAL PROCESS IN RUSSIA

<i>Zaslavsky S. E.</i> Russian Party System: Current State and Dynamics of Development	261
<i>Monahov D. N., Pronchev G. B.</i> From a Digit to the Digital Society	277
<i>Abramova M. A., Goncharova G. S., Kostyuk V. G.</i> Theoretical Models of Ethnopolitics in Modern Russia	285

PROBLEMS OF EURASIAN AND POST-SOVIET COOPERATION

<i>Amiantov A. A., Grachev-Vorontsov A. V.</i> Trends in the Development of Inter-Parliamentary Cooperation (On the Example of the CIS Inter-Parliamentary Assembly)	293
<i>Ivanchenko V. S., Chimiris E. S.</i> Russian Language in the Post-Soviet Space as a Factor of Politics	305

INTERNATIONAL RELATIONS AND WORLD POLITICS

<i>Khoperskaya L. L., Pshenichnaya N. Y.</i> Coronavirus: The Foreign Political Dimension	316
<i>Morozov I. L.</i> Legal Basis of State Management Decisions in the Field of Russia's Information Security: Politological Analysis	331
<i>Primova E. N.</i> On the Peculiarities of German Cooperative Federalism	339
<i>Yan Jie, Czin' Zhu.</i> Economic Interests of Russia and China in the Central Asian Region: Comparative Analysis	347

OUR AUTHORS	352
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AUTHORS' GUIDELINES	354
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ON THE PECULIARITIES OF GERMAN COOPERATIVE FEDERALISM

The article analyzes some, in the author's opinion, important characteristics that give German federalism a number of features that allow it to be called cooperative federalism. The main attention is focused on the substantiation of the thesis according to which the peculiarity of German cooperative federalism in contrast to Russian and some other national types of federalism, where the jurisdictions or competences are divided on the entire range of issues, in Germany it is carried out primarily in the legislative sphere. In Germany, the key place is occupied not so much by legal norms, principles and procedures governing the competence of the federation and the lands, but by the identification and coordination of principles, forms and methods permitting mutually beneficial cooperation between them. At the same time, it is shown that in the FRG the power of the federation is derived from the will of the lands, and not vice versa.

Key words: Federal Republic of Germany, federation, subjects of the federation, types of federation, corporate federalism, lands, power, subjects of jurisdiction, division of competences.

The German federalism is called cooperative federalism (Kooperativer Föderalismus) or a cooperative type of federation. The very concept of "cooperative federalism" has entered the scientific lexicon in 1938, when the American researcher J. Clarke published his work prepared under the direct influence of the US President Franklin D. Roosevelt's New Deal [3].

The cooperative type of federalism, which is recently becoming more widespread, is based on the principles of close cooperation between the federal center and the subjects of the federation. Naturally, this type, like any other type of federation, is based on the division of subjects of competence between the two main levels of government. It is impossible not to pay attention to the fact that if the Constitution of the Russian Federation refers to the "subjects of competence," the Basic Law of the Federal Republic of Germany refers to the competencies. Moreover, as a rule, the exclusive competence of the federal center, the joint or

concurrent competences of the federal center and the lands, and the exclusive competence of the lands are distinguished. In contrast to the Russian Federation, where the division is carried out on the entire range of issues related to the division of the subjects of competence, in Germany it is carried out primarily in the legislative sphere.

In Germany, legal documents and scientific literature highlight the exclusive competence of the Federation, the concurrent competences of the federation and the lands, and the residual competence of the land legislators. Articles 73 and 74 of the Basic Law of the Federal Republic of Germany define federal and joint (or competing) areas of the legislative competence specified in a number of other articles on such issues.

According to Article 73, “The Federation has exclusive power to legislate in the following matters”: foreign affairs and defense, including the protection of the civilian population; protection of the foundations of the constitutional order; international politics and defense; citizenship in the Federation; freedom of movement; immigration and emigration; national currency, monetary circulation, monetary issues, weights and measures, as well as the determination of standards of time; the unity of the economic space, customs and trade; navigation, air and railway communication (railroads of the Federation); postal affairs and telecommunication; the legal status of persons employed by the Federation and by the federal corporate bodies; copyrights and publishing law; cooperation between the Federation and the Lands concerning criminal police, protection of the free democratic basic order, the existence and the security of the Federation or a Land, etc. [11. Article 73] The Federal center has the right to adopt laws regulating the legal status of civil servants at all levels, general principles of the organization and functioning of higher education, mass media and cinematography, nature protection, etc. It is obvious that we are talking about key areas of national significance.

According to Article 74, “concurrent legislative powers cover the following matters”: civil and criminal law, the organization and procedure of courts; nationalization of land and natural resources; banking; land, economic and labor law; antimonopoly regulation; social insurance, including unemployment insurance; state social security; meteorological service; energy; production and use of nuclear energy for peaceful purposes; food supply, import and export of agricultural and forestry products; fishing on the high seas and in coastal waters; navigation on the high seas and in coastal waters, etc. [11. Article 74]. These are the areas that can be regulated by Land legislation in cases that are not regulated by Federal law.

The Lands have the right to make their own laws in the areas that are either not mentioned in the Basic Law at all, or where the Federation does not exercise its powers. Thus, Article 70 states: “(1) Lands have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation. (2) The division of competence between the Federation and the Lands is determined by

the provisions of this Basic Law concerning exclusive and concurrent legislative powers” [11. Article 70]. At the same time, the Basic Law by Article 71 reserves for the Lands the right to legislate in matters within the exclusive legislative power of the Federation only where and to the extent that they are given such explicit authorization by a federal statute. At the same time, Article 72 of the Basic Law in the field of concurrent legislation grants the Lands the right to legislate in cases where the Federal center does not exercise such right. Through the Bundesrat, the Lands participate in federal lawmaking. In addition, the Bundesrat has the right of absolute veto over federal laws adopted by the Bundestag that are not considered to be in the interests of the Lands.

The Basic Law of Germany guarantees the participation of the Lands in the exercise of power at the federal level. Article 30 of the Basic Law formulates this competence of the Lands in the following way: “Except as otherwise provided or permitted by this Constitution, the exercise of governmental powers and the discharge of governmental functions is incumbent on the Lands” [11. Article 30]. According to Article 83 of the Basic Law, the Lands on behalf of the Federal center and under its control can independently implement federal laws. However, in accordance with Article 86, the Federal center has the right to implement laws itself through its subordinate state authorities. At the same time, Article 31 emphasizes: “Federal law takes precedence over Land law”.

All areas that do not fall under the exclusive competence of the Federal center or to the concurrent competence fall within the exclusive competence of the Lands. These are: the exercise of executive power, legislation on local self-government, land administration, administration of culture and education, police, municipal law, mass media, issues related to the development of the municipal sphere; general rules for the organization and maintenance of public order.

At the same time, as H.-P. Schneider, Director of the Institute for the Study of Federalism, noted with good reason, land legislation plays a much less significant role than the Federal laws [13]. The essence of the issue is that the central Federal government is practically the main subject of the legislation. Lands have the right to pass laws on issues of exclusively regional or local significance, such as internal administration, finance, culture, etc.

It can be argued that this type of Federation involves not so much legal mechanisms and procedures governing the competence of the two levels of government, but rather a mechanism for identifying and coordinating the principles, forms, and methods of mutually beneficial cooperation between them. [6. P. 246] By participating in the implementation of decisions taken at the national level, the Lands take on those functions that they are able to perform more effectively. At the same time, the problem of dividing the spheres of responsibility between the Federal center and the regional authorities does not take the character of a political struggle but is of an administrative and legal nature. Sanctions for non-compliance with Federal laws and refusal to bring local legislation in line

with national laws practically do not take the form of direct coercion. In these cases, the Federal government relies on measures of financial impact – reducing budget support.

As noted by D. Eleizer, the definition of “cooperative” means the principle based on solidarity and mutual responsibility of the Federation and the Lands, in which functions previously considered exclusive to each of the parties become joint. Cooperation between the Federal center and the Lands is based on negotiation procedures, in which, as noted by D. Eleizer, the principle applies: “Maximum consent – minimum coercion” [4. P. 133].

It is obvious that cooperative federalism is based on cooperation between the two levels of government. At the same time, it is characterized by horizontal cooperation of authorities between different regions of the Federation. This is evidenced, for example, by the formation of regional associations of various groups of Lands that establish various forms of cooperation. Relations with the Federation include not only individual subjects, but also regional associations. Such associations are primarily economic, not political. As noted by V. A. Litvinov, in Germany, interregional relations are manifested “in a special system of “self-coordination” of relations between Lands. The forms of such self-coordination are quite diverse: state agreements, administrative agreements, joint decisions of conferences of branch ministries of Lands, annual congresses of state experts of Germany, etc. [10].

However, experience shows that such an association has a greater influence than individual entities (for example, in Brazil and Mexico). They are mainly advisory in nature, which allows them to prevent and resolve political, national, ethnic, religious and other conflicts through negotiations between the central government and regional authorities (for example, meetings of the Prime Ministers of the Federation and provinces in Australia, Canada, and India).

The advantage of cooperative federalism is that it is based not so much on abstract legal norms as on actual political realities and specific socio-economic conditions. As K. Hesse emphasizes, cooperative federalism makes it possible to solve many state problems with an active cooperation of the two main levels of government, while avoiding centralization [7. P. 123].

In this regard, the fact that the cooperative federation presupposes a relationship of cooperation between the Federal center and the Lands, on the one hand, and between the Lands themselves, on the other hand, is of no small importance. This formula is fixed in a number of articles of the Basic Law: “All Federal and Land authorities shall render legal and administrative assistance to one another” (Art. 35, para. 1). “In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, a Land may call upon police forces of other Lands, or upon personnel and facilities of other administrative authorities and of the Federal Border Police” (Art. 91, para.1). Accordingly, it is the duty of the state authorities of the Federal center and the Lands to provide

assistance to each other. Cooperative federalism includes a broad network of such interactions. Such a mechanism in Germany is called the “policy of interweaving” (Politikverflechtung) of the Lands and the Federation.

From the point of view of the principles of cooperative federalism, certain problems arose with the accession of five new lands of the former GDR to the FRG. As a result, it became necessary to make adjustments to the system of Federal relations. During the discussions and negotiations that began and were conventionally called “Bonn-Berlin,” new principles of the integration model of Federal relations were developed [1]. From this point of view, the documents adopted during these discussions and negotiations are of interest. We are talking about the statements “On recognizing Berlin the capital of a united Germany” [8], “On obtaining legal capacity” [5], “On completing the unification of Germany.” Based on the results obtained, an “Independent Commission for the reform of the system of Federal relations” (Unabhängige Föderalismuskommission) was established by a decision of the Bundestag of June 20, 1991, which developed and proposed recommendations for amendments to the Basic Law on the transfer of its representative offices to the new Federal Lands [12].

If legislation is primarily within the competence of the Federal center, then administrative management is mostly transferred to the competence of the Lands. In contrast to the Russian Federation, where the Federation Council acts as one of the chambers of Parliament and performs exclusively representative and legislative functions, in Germany, the Bundesrat of the Lands, participating in the legislative process, simultaneously performs managerial functions. Moreover, the Prime Ministers of the Lands head the land offices in the Bundesrat.

In this context, an important role belongs to the institute of annual meetings of the Federal Chancellor with the heads of Land governments, established in 1951 to discuss key issues of socio-economic, political, financial and other nature that are important for both the Federation and the Lands. We should also mention conferences of presidents of land parliaments, meetings of Prime Ministers of lands, etc. These conferences have as one of their goals the exercise by the Federal government of control over the implementation by the Lands of Federal laws. As S. A. Levansky notes, “every year 4 to 5 conferences of Land Prime Ministers and about 10 to 13 conferences of heads of related ministries are held in Germany. The resolutions of these conferences are legally non-binding, but until the 70s they were usually strictly implemented [9. P. 120].

At the same time, according to the para. 1 article 35 of the Basic Law, “All Federal and Land authorities shall render legal and administrative assistance to one another” [11. Art. 35]. In this context, it is interesting that in 1969 the Bundestag supplemented the Basic law with section VIII-a “General tasks of the Federation and the Lands” in order to expand coordination between the Federal center and the Lands. It defines the forms of cooperation between the Federal center and the Lands in the socio-economic sphere. The Federal center should as-

sist the Land authorities in carrying out their tasks of national importance. In particular, it deals with the construction and development of institutions of higher education, clinics, improvement of regional economic infrastructure, protection of the sea coast, etc. In this context, Article 91-a declares that “the Federation shall participate in the discharge of responsibilities of the Lands, provided that such responsibilities are important to the society as a whole.” According to that article, the Federation’s participation is required in such areas as “enlargement and construction of facilities at institutions of higher education; improvement of the regional economic and agricultural structure.” Continuing this theme, Article 91-b of the Basic Law establishes: “The Federation and the Lands may mutually agree to cooperate in certain cases by entering into agreements in the field of education, assistance to scientific institutions and in the implementation of research projects, the significance of which goes beyond regional borders. The distribution of expenses is regulated by agreements” [11. Articles 91a and 91b].

Developing this attitude, para. 4 of Article 106 of the Basic Law reads: “The Federation may grant the Lands financial assistance to cover the critical necessary costs carried by Lands and communities (associations of municipalities) in order to avoid disturbance of overall economic equilibrium or to compensate for possible economic differences within the Federation.” “The respective shares of the Federation and the Lands in the revenue from the turnover tax shall be apportioned anew whenever the ratio of revenues to expenditures of the Federation becomes substantially different from that of the Lands; reductions in revenue that are taken into account in determining the respective shares of revenue from the turnover tax under the fifth sentence of paragraph (3) of this Article shall not be considered in this regard.” Article 109 of the Basic law is also of interest, it emphasizes: “The Federation and the Lands shall, within this framework, give due regard to the requirements of overall economic equilibrium.” (Article 109, para. 2)

It is obvious that there are more or less significant differences in terms of the division of powers or competencies between the Federal center and the Federal subjects in Russia and Germany. Despite the validity of this thesis, it is important not to absolutize this provision, since the division of legislative competence implies the division of subjects of competence across the entire spectrum of problems in the most important areas of public life. However, in Germany, laws are passed primarily at the Federal level, and executive power is exercised primarily at the Land level.

However, this does not mean that the Federal government is deprived of its competence and functions in the Executive branch of government, while the Land authorities are deprived of their functions in the legislative branch. From this point of view, the paragraphs 1 and 2 of Article 72 are of interest. The first one states: “On matters within the concurrent legislative power, the Lands shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law.” In addition to this provision,

the second paragraph states: “The Federation shall have the right to legislate, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.”

According to para. 2 of Article 85, “the Federal Government, with the consent of the Bundesrat, may issue general administrative rules to the Land authorities for the management of the relevant areas of public life.” Or, as stated in paragraph 3 of the same article, “the Land authorities shall be subject to instructions from the competent highest federal authorities.” From this point of view, it is impossible not to mention Article 86, which implies that there are areas where “the Federation executes laws through its own administrative authorities or through federal corporations or institutions established under public law.” Article 87 is of special importance, because according to it “the foreign service, the federal financial administration,” and, in accordance with the provisions of Article 89, “the administration of federal waterways and shipping shall be conducted by federal administrative authorities with their own administrative substructures.” Further on, that Article and a number of other Articles of the Basic Law enumerate a large number of areas, the governing of which falls under the competence of the Federal center [11. Articles 30, 73, 85 and 86]. Important from this point of view are Article 32, which gives the Federal center the authority to regulate foreign policy, as well as the paragraph 1 of Article 87b, according to which “Federal Defense Administration (the Bundeswehr) shall be conducted as a federal administrative authority with its own administrative substructure” [11. Article 87b, para. 1].

At the same time, it is impossible to disagree with those researchers who believe that in Germany the power of the Lands is not derived from the Federation, but, on the contrary, the power of the Federation is derived from the will of the Lands. As I. M. Busygina correctly notes, “the Lands exercise those powers that are not derived from the Federation, but are constitutionally recognized by it, i.e. they cannot be abolished” [2]. It means that there are powers that are derived from the Federation. At the same time, this provision cannot be absolutized, since the Federal center exercises more or less strict supervision over the implementation by the Land authorities of key provisions of the Basic Law and Federal laws.

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