



# Federalism: its principles, flexibility and limitations

BY CÉLINE AUCLAIR

**People** often contrast “federal systems” with “unitary political systems” – systems with only one source of central authority. Some see little difference between “federalism and decentralization”, or “federalism and devolution”, or “federalism and subsidiarity”. There are similarities among these concepts, but they should not be confused with one another.

Under the umbrella term “federal political system” there are several possible configurations, the most familiar of which are federations and confederations. When we speak of a federation, we are referring to a political system in which there is power-sharing. The government consists of at least two orders: a central or federal government and the governments of constituent units. Each order of government receives an allocation of financial resources tailored to its specific requirements. Sometimes the municipal level may also constitute a distinct order of government. In all federal countries both the federal or central government and a second order of government are constitutionally recognized and exercise their own powers.

For instance, in addition to a federal government, Canada has provinces; Switzerland has cantons; Germany has *Länder*; the United States has different states; Yugoslavia Serbia and Montenegro, republics; and Spain, autonomous regions. Whatever the name, these are all entities that, like the federal government, have their own exclusive jurisdictions. These jurisdictions are defined by a constitution, not by another level of government. As a result, neither the federal government nor the governments of the various constituent regions are constitutionally subordinate to one another. The people directly elect each order of government.

Professor Ronald Watts of Queen’s University, Canada, has drawn up a list of structural characteristics distinctive to federations:

1. Two orders of government, each in direct contact with its citizens;
2. An official, constitutional sharing of legislative and executive powers, and a sharing of revenue sources between the two orders of government, to ensure that each has certain sectors of true autonomy;

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3. Designated representation of distinct regional opinions within federal decision-making institutions, usually guaranteed by the specific structure of the federal Second Chamber;
4. A supreme written constitution that is not unilaterally modifiable but requires the consent of a large proportion of federation members;
5. An arbitration mechanism (in the form of courts or a referendum) to resolve intergovernmental disputes;
6. Procedures and institutions designed to facilitate intergovernmental collaboration in cases of shared domains or inevitable overlapping of responsibilities. (Watts, 2002, p.8)

## Distribution of powers

There is no a priori formula to determine which powers should be devolved to the federal authority and which to the regional authorities. In Australia, a constitutional committee study (1985) concluded that certain jurisdictions such as defense, international policy, fiscal policy and some taxation areas, require strong federal management. Other jurisdictions can be and are conferred differently depending more on the distinct features of each country: the structure of its population, the strength of the regions, etc.

Despite this variation, there appear to be three general trends in the distribution of powers:

- to grant a list of exclusive powers to the federal government, leaving the residual powers to the constituent states or provinces (Pakistan).
- to identify a list of powers pertaining to the federal and constituent states or provinces respectively, with an added clause according residual powers accorded to the federal government (Canada, Belgium).
- to draw up two lists: federal jurisdictions and concurrent jurisdictions. All residual powers are left to the states or provinces (the United States, Switzerland, Australia, Germany, Austria).

Residual powers confer legal authority on one of the two orders of government for all matters that do not appear among the items listed in the constitution. The primary goal of residual powers is to identify an authority in charge of new affairs for which a jurisdiction has not been determined. When a federation has arisen out of an association of formerly independent communities, a list of residual powers also provides a mechanism to support regional government autonomy. By granting residual powers to constituent units, the new areas of jurisdiction are not seen as a means by which the government can centralize its power and thus threaten autonomy.

**(Sub-national) jurisdictions are defined by a constitution, not by another level of government.**

In practice, when areas of jurisdiction are not defined by the constitution, they are assigned to the most appropriate government. This is determined by legal judgment, normally handed down by a Supreme or a Constitutional Court.

Although each order of government usually has its own areas of jurisdiction, nothing prevents two orders of government from mutually exercising a given power. This is known as concurrent or shared jurisdictions. In fact, almost all federal countries make provisions for concurrent jurisdictions, particularly in legislative affairs. This is not surprising, given that cooperation and interdependence between orders of government are essential to any form of federal governance. In cases of conflicting legislation, the constitution determines which order of government will prevail.

Concurrent jurisdictions offer several advantages in federal structures. They introduce a degree of flexibility and innovation in the distribution of powers. For instance, the federal government may delay exercising its powers in an area that might eventually call for a strong federal coordination. Concurrent jurisdiction allows state or provincial governments to develop their own policies in the interim. The federal government might also decide to establish national standards in certain areas, leaving the states or provinces to develop services in the manner that best responds to the unique identity of each region. Concurrent jurisdictions also allow a federal government to temporarily occupy a state or provincial jurisdiction when that state or province is unable to deliver a particular service. (Watts 2002)

### **Legislating and administering**

In parliamentary systems, both legislative and executive powers are usually conferred on the same order of government. This form of government offers the advantage, from an executive viewpoint, of being both responsible and accountable for the implementation of its own legislation. In presidential systems, legislative and executive powers are traditionally given to different orders of government.

In most federal systems, constituent units are considered to be equal and have the same legislative powers. However, the constitutions of certain federations provide for an asymmetric division of powers in order to reflect the differences among their constituent units. These differences can be territorial, demographic, linguistic, cultural or religious.

Regardless of any asymmetric approach to federalism, the constitution is the supreme legal instrument in any federation. It cannot be amended unilaterally. An amendment would require the assent of a significant number of the federation's component regions and, in certain cases, a majority of the population.

As previously mentioned, the constitutions of federal countries determine the division of legislative and executive powers, as well as the distribution of financial resources, to ensure that the various levels of government have real autonomy.

Normally, the constitution also provides for a supreme arbitration body empowered to resolve disputes and rule on litigious cases involving governments' constitutional powers.

Since most federations have concurrent jurisdictions, they also usually have institutions and mechanisms in place to coordinate relations among the different orders of government.

### **When one level legislates and another administers**

Certain federations, however, have enshrined in their constitutions provisions separating executive and administrative responsibilities in certain fields of jurisdiction. This does not make these countries any less federal. In Germany, for instance, the constitution makes provisions for the federal government to assume most legislative powers, while the *Länder* are in charge of implementing and administering legislation. Thus, from a legislative perspective, Germany can be considered very centralized, while it is decentralized in administrative terms. It should, however, be noted that the *Länder* are also involved in developing legislation through the *Bundesrat*, the Chamber of the Regions.

### **Two types of asymmetric federalism**

There are two main forms of asymmetric federalism. One approach consists of increasing the federal government's authority in regions where the state's or province's capacity to exercise legislative authority is less advanced or is temporarily undermined. In such cases, the federal government may take over until the state or province is in a position to exercise its authority. Such was the case in India where, for the first six years of the Union, the federal government assisted certain less developed states until they were able to exercise their own legislative power.

A more common approach to asymmetric federalism involves giving one or several states or provinces more autonomy. The Malaysian system best illustrates this approach. Although it has a highly centralized system of government, Malaysia has given the states of Sabah and Sarawak powers that normally fall under federal jurisdiction. The aim of this approach is to protect the distinctive characteristics of the two states and their interests.

### **Federalism and accommodating national diversity**

The vast majority of conflicts raging in the world today are domestic and involve national groups demanding better representation or greater autonomy in their respective states. Several of the world's 25 federations are multinational countries within which national groups are demanding greater recognition and autonomy. Although federalism as a system of government has sometimes been successful in easing tensions and maintaining state unity in a country, it has not always been able to meet the demands of national groups. To offer a true political space, federations need to be flexible.

As mentioned above, some federations have opted for the asymmetric form of federalism, thereby granting certain national groups true autonomy. The asymmetry varies from country to country with the division of powers being based on the realities of each federation.

Other federations have also adopted approaches based on the challenges they face. One such approach consists of redrawing state or provincial borders so as to better respect the ethnic make-up of each one. This was the case in Nigeria, which gradually grew from 3 to 36 states. The Swiss adopted a similar approach with the creation of the canton of Jura. The

*"Federalism should not be seen only as a static pattern or design, characterized by a particular and precisely fixed division of powers between government levels. Federalism is also and perhaps primarily the process ... of adopting joint policies and making joint decisions on joint problems."*

- Carl J. Friedrich, *Trends of Federalism in Theory and Practice*. New York: Praeger, 1968.

Republic of India has also created 3 new states carved out of the existing territory.

Sometimes, it isn't really a question of meeting the demands of one or more national groups, but rather it is a question of ensuring that the rights of all national minorities are protected.

In Bosnia-Herzegovina, for example, the Bosnian Serbs have the Republic of Srpska, and the Bosniaks and Croats have cantons in which either Bosnians and Croats constitute the majority, although some cantons remain mixed. However, authorities will still not declare territories or municipalities to be "ethnically pure". The federal government has therefore been given the responsibility of creating an Office of the Ombudsperson that is answerable to the federal parliament to ensure that the rights of national minorities are respected. The Office, which works closely with the Human Rights Chamber, is responsible for ensuring that the rights of Bosnian minorities are respected, regardless of where they live.

Another approach is to enshrine a corpus of fundamental civil rights enforceable by the courts in the Constitution. Such was the case when Canada introduced a Charter of Rights and Freedoms in 1992 at the same time that Canada transferred the power to approve amendments to its constitution from the UK Parliament to Canada.

### **How to manage conflicts**

Today it seems that the idea of assimilating national groups has finally been abandoned. History has shown that a sense of membership in a national group is often stronger than affiliation to the country. As a result, the nation state that so many have striven to build over the past few centuries is giving way to the multinational state.

Governments of such multinational states are increasingly recognizing the merits of demands related to linguistic, religious or cultural protection. They are also realizing that, far from threatening the stability of the country, the conferring of distinct powers on some national groups may actually lead to greater social peace. Conflicts and negotiations are not about to disappear entirely; however, rather than taking place under tense conditions, they will be tackled by constitutionally recognized partners.

Several observers point out that federal structures have not entirely succeeded in crushing separatist movements and they probably never will. Representatives of separatist movements jockey for position on the political stage during elections. Some entities, such as Puerto Rico, Quebec and St. Kitts & Nevis, have held elections or referenda on the issue of separation. However, we should not forget that countries such as Canada, Belgium and Spain would probably not exist in their current form if they had not devised ways of sharing powers with their national groups.

Power-sharing or increased territorial autonomy give national groups more confidence. This confidence would be even greater if they were to become constitutional partners, thereby gaining legal guarantees and further autonomy on issues related to preserving their distinctiveness.

Far from leading to secession, federalism, if applied in a truly democratic fashion, can offer the political space needed to guarantee true regional autonomy.

### **An ongoing process**

Federalism is much more than a system of government. It is also a process of ongoing negotiations, an art of resolving conflicts, an approach based on compromise and cooperation.

Nothing is ever established once and for all, since solutions to problems must be negotiated among constitutional partners and not imposed by a single central authority. That flexibility is one of the greatest advantages of federalism.

What about the ideal model? To satisfy all parties, the federal structure must first and foremost be flexible and reflect the particularities of its constituent groups or regions. There are no patterns to follow. None of the 25 countries that have opted for a federal constitution has won the trophy for "best federation". From them, however, we can learn tremendously. Learn from their successes – learn from their mistakes. ☺

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