

A Global Dialogue on Federalism

Theme Development Conference

for

Theme 2 : Distribution of Responsibilities

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by

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As John has said, I have been asked to review the ground covered by the conference. It is difficult to do justice to all the discussion that occurred. in the 30-40 minutes that have been allotted to me for this purpose, because so much ground was covered. It is also difficult to do justice when there are so many parallel sessions and you shuttle back and forth between them. One hopes that one got the gist of the important points that were made. But one may have missed some.

But the first thing that I would like to emphasize by way of introduction is what, I think, has been the achievement of this conference. I think, it has been a valuable and useful conference. I particularly like to congratulate Prof. Akhtar Majeed as the theme coordinator. I would also like to congratulate the country coordinators and presenters for what has been the most interesting conference.

This theme that the conference has focused on is an important part of a series of what will be something like a dozen themes on aspects of federalism, and as the second in the series, it is particularly important. It is important not only because it is the second in the series but also because, I think, the topic of the distribution of powers and responsibilities relates to one of the defining features of federal political systems, that is, the constitutional allocation of responsibilities among different organs of government. One of the things that distinguishes federations from unitary systems, for instance, is the fact that the allocation is constitutionally determined and not simply at the whims of one level of the government or the other.

At the outset, I would like to emphasize two aspects of the joint IACFS - Forum of Federations' global dialogue programme. The first is that it is intended to encourage

exchanges of views between practitioners and academics. Too often, they have operated in isolated compartments. But the purpose of the country round-tables, and of this international theme conference, has been to have a dialogue at which individuals drawn from both elements, some individuals who themselves have been in both elements, could have a chance to talk to each other and to try to make sure that theory and practice are brought closely together, that theory can take account of practice and practice can take account of theory. It is important for a second reason, that is, it is a part of the process for the production of a series of handbooks which are intended to represent the state of the art on the study of federal systems. One of the purposes of these conferences is to provide comparative contacts for the writers of the individual country chapters so that having heard what others have had to say, they have some idea of how their own chapter, what they write about their own country in the handbook on this theme relates to similar or different dimensions from those in other federations. I think, this conference has contributed to both of those objectives though we may in the end have to, as we progress along, think about whether other forums of conference would be more useful in terms of helping the drafters of the handbooks and so on. But I think it has achieved that purpose of both providing for an exchange of views and for helping those who are going to be writing or who have written or will be revising their individual chapters on their particular federations.

But we begin with some general observations on the conference. I think, the significant feature, of course, has been the identifying of similarities and differences apparent amongst the federal countries. Amongst the major similarities, what seems to me is that all of them obviously are typified by constitutional distribution of responsibilities and competencies. The second point that emerged certainly in the discussion is not surprising, but that is the extent of inter-dependence of responsibilities amongst the different organs of government. The notion that governments can operate in water tight compartments has long gone out of the window and certainly the discussion in every session brought to the fore the degree of inter-governmental collaboration that has been necessary in most federations.

The third feature that seemed to me to mark the similarities among the federations is the degree of complexity that is involved in most federations in trying to reconcile the

political realities of their societies. It is illustrated by the complexities within India, for example, which should have been well outlined in a number of sessions as well as the introductory one, but also in others such as I can recall the comments when we heard, for the first time, the arrangements in Belgium and the double symmetry in Belgium ---- obviously another very complex situation. And all that reminded me of a favourite saying of one of my predecessors, if I could call up that J.A. Kori Alkori at Queens, who used to be a noted writer on federalism in Canada and comparatively who was in the generation preceding me. He used to frequently tell his students often, not just once, that it needs a tidy mind with a crippling disability in understanding federal systems. Given the complexity that we have observed here, I think, that is certainly a truism. But also, I think, it has been apparent from what has been said that there has been a wide range of variations amongst the dozen federations. That is how we have been looking at it. Sometimes this has been masked in the parallel sessions, different sessions, each tending to compare relatively similar federations. I thought, for instance, in the first sub-theme, the first pairing of the United States and Australia pointed to rather two similar federations in terms of the character of the distribution of powers. And the other one of Canada and India pointed to two or rather similar. But having them in two parallel sessions separately meant that one did not realise what a contrast there was between one pair and the other pair. But certainly with me shuttling back and forth, it was very apparent to me what a contrast there was between the two pairs. Clearly in the five sets of issues that we have examined, there has been a wide range of variations among federations. There are no pure models of federalism but many practical variations, variations in the form and scope of the constitution or distribution of authority in the emphasis on concurrent or on exclusive areas of jurisdiction and the degree of symmetry or asymmetry amongst the constituent units, in the relative roles and the interaction of different levels of Government in policy areas, in the financial arrangements, in the degree of cooperation or competitive federalism, in the degree of relative centralization and decentralization. One of the things that clearly this conference brought to the fore - we did not realise it before, I think, most of us probably did - was that there is a wide range of variations within the common framework of federal systems.

Well, let me turn to a more specific review of the ground covered in the conference. We began, of course, with the introductory plenary session in which the inaugural address by Dr. Rangarajan and the keynote address by Mr. Justice Venkatchelliah drew attention to important financial and legal aspects of the distribution of responsibilities within federations. The former drew attention particularly to the current context of globalization, emphasis on market economics and the benefits of decentralization that have an impact on governmental structures in the contemporary world, that is, on the governmental structures and federations in the contemporary world, particularly the tension between collaborative and competitive federalism. The latter distinguished between decentralization and non-centralization and drew attention to federalism characterized not in terms of rigid structures but evolving processes and the flexibility of the concept of federalism in the varied ways in which it has enabled the reconciliation of diversity within a federal framework. I was delighted that he picked one of my favourite quotations when I was first engaged in the comparative study of federal systems. My first book, in fact, was on a comparative study of federalism in India, Pakistan, Malaysia and Nigeria. While I was going through the Constituent Assembly debates in India, I came across the quotation which I had never heard anyone else repeat until I heard the Justice repeat at the introduction. It is one of my favourites because, I think, it typifies why Canada originally adopted a federal system. We had also deadlocks within a unitary system, within the province of Canada, and the way we decided to resolve that, was to take the contentious issues out of the central politics, devolve them to the constituent units - to the provinces - so that the federal Government could operate more effectively on those issues on which they agreed. The quotation was simply the comment of one Member of the Constituent Assembly of India who declared that the danger of over centralization was deadlier to extremities and apoplexy at the centre. So, we had experienced apoplexy in Canada that led us to try to get away from it by adopting a federal system.

The five sessions that followed enabled us to review some significant aspects of the design and operation of the distribution of responsibilities in federations. Here I was struck by both what was said and, in some instances, by what might have been said and was not. So, I would refer to both as I go through. As I review the sessions briefly, I

make some comments on both those aspects. In the first session, that is, on constitutional provisions, their logic and their working, as I have already mentioned, the two pairs of cases contrasted with each other although each session only saw the particular pair very similar to each other. In the United States and Australia, the form of the distribution of powers was basically similar federal, very limited list of federal exclusive powers, most of the federal powers largely concurrent ones and the unlisted residual powers being assigned to the States. That was the form of the distribution of powers. In terms of scope, quite clearly those powers assigned to the Central Government were intended to emphasize the decentralized nature of the federation and the particularly strong role and responsibilities of the States, and what has signified the evolution of both of them has been a strong trend of centralization. In Canada and India on the other hand, again there are similarities which contrast very sharply with the United States and Australia. Each of them has a three list system, that is, they include not only a federal exclusive list and a concurrent list but also a list of exclusive state or provincial powers although one difference is that the Canadian concurrent list is very short – only two items initially but expanded slightly. It has doubled. It increases to four whereas there is a significant size of the Indian list. Then, I am talking about the form of distribution of powers. In terms of scope, both of them began with a relatively high degree of centralization in the allocation of powers. Both of them indeed working in practice have gone through a process of decentralization.

What are the reasons for these contrasts? I think, one important reason which came out in one of the discussions was that whereas you have a state list explicitly stated even though the constitution may have originally intended to be centralized, the statement of an exclusive State List paradoxically provides the courts with something to pin the defiance of state provincial powers. When there is simply an unspecified residuary power, court interpretation tends to expand the implied powers built into the list of federal items at the expense of the State powers.

Other factors, of course, are also important, for instance, the multilingual and multiethnic character of both Canada and India by contrast with the degree of relative homogeneity in the United States and Australia. So, among the issues that were raised in these sessions or parts of the sessions that I was able to sit in were five points. In each

case, the constitutional distribution emerged from the particular circumstances of the origin of the federation and evolved over time in response to some of the particular circumstances and the circumstances varied. The second one was that in identifying some of the factors that affected the evolution, whether in the direction of decentralization in Canada and India or to greater centralization in the United States and Australia, were constitutional factors, such as, what I have already referred to in terms of the nature of the list and including a list of exclusive State or provincial powers. The financial arrangements are also an important factor. But the questions of financial arrangements are a part of the distribution of powers. So, those two aspects were the form and content of the distribution of powers that affected the evolution. On the other hand, there are important extra-constitutional factors to the relative homogeneity as compared to the very sharp diversity in cultural terms, in linguistic terms, in both India and Canada. Prof. Fleiner identified the impact of ideological differences, the general tendency of conservatives to favour decentralization and local decision-making and for liberals to identify central and common decision-making.

I would add another one which, of course, is the party structure. The fragmentation of the party structure in India, for example, has been a major factor here in terms of the decentralization over the five decades. There was a discussion in one of the sessions, that is, on the United States and Australia, about whether lists of jurisdiction matter. I think, if those who participated in that discussion had attended the other session, they would have clearly concluded that they do matter. It was quite clear from the discussion in the session on Canada and India that lists do make a difference. The relative form of the executive-legislative relationship is a factor that he drew attention to in terms of its impact on how the distribution of powers has evolved. It is not something that was discussed at a great length but there is quite a variation between presidential congressional systems and parliamentary systems. That theme will be discussed much more fully, of course, in the next theme, that is, the third theme, which is directly on that subject. But it is important not to forget that that can have an influence as well on the way the distribution of powers is handled.

Another issue that was raised was the issue whether there is an irreducible minimum of federal powers that a federation must have in order to be effective. There

was a discussion on it. But I do not think the irreducible minimum was actually identified. I would simply add that from my experience of studies, I can cite at least one federation that clearly collapsed because it lacked that irreducible minimum. I am thinking of the West Indies Federation. The West Indies Federation had such weak powers for the Central Government that it was like an automobile with no engine. And all it proved was a frustration to everyone with providing no benefits to anyone and it did not last very long as a result on issues that might have been raised. I was partly surprised that they were not five but distribution of legislative powers focused on four cases. The four cases were old cases where the legislative and the executive distribution of powers coincided. Well, that is where the executive authority corresponded to the allocation of the legislative authority. But other federations exist where the major element of the distribution of authority is between the allocation of legislative authority to one level of Government or most of it, and the executive authority mostly to another level. If Germany had been one of the examples, that difference would have been brought to the fore as a major contrasting difference with four federations that we were looking at. This would also be true of federations like Austria, although not quite to the same degree Switzerland, a fairly common pattern amongst European federations then of a division between the allocation of legislative and executive authority in a particular area. The second one was the difference between those federations based on common law and those based on civil law traditions.

Another topic that was not raised, which is implicit but I was surprised, was the influence of earlier models. The Australian model very clearly followed the American model. It consciously rejected the Canadian model and adopted the American model. Similarly the Indian model was heavily influenced by the Canadian one. I found in my studies, if you could trace, how the Government of India Act of 1935 was heavily influenced by the British North America Act and then the Act of 1935 had served as the interim Constitution of an independent India and had an influence upon the Constituent Assembly. So, one of the points to look at, it seems to me, and looking at the distribution of powers why a particular form is adopted, is to see what models a particular federation looks at and why they select those particular models.

Another one is the difference in the process of creation of a federation between those established on the basis of aggregation - bringing together - of units and those based on devolution of a pre-existing unitary system. It is not surprising that in this respect, Canada, India and Belgium should put a major component of the residuary powers, leave that with the Central Government and that in the case of Canada and India, they should have started with a relatively centralized distribution of powers as they were created in a process of devolution by contrast with the aggregatory process that existed or was carried out in the United States and Australia in creating the federation.

Finally, it seems to me that there are variations in the status of local government, which did not come up in this session. It did tend to come up in some of the latter sessions. There is a variation amongst federations in terms of whether the third order of government, local or municipal government, is treated as a constitutionally recognized order of government or is simply derived from and created by the second order by provinces, States and so on. That has some bearing in defence on the relative roles of local government.

Well, I have gone at some length in that because that first session, it seems to me, laid the groundwork. I will try to be more brief and go more quickly over the other sessions. The second session dealt with concurrence and symmetry. Here unlike the other sessions, the two sessions dealt with different subjects, not just different cases but one of concurrence again focused on examples where concurrence was prevalent. Unfortunately, it seemed to me that we did not get into a discussion over what happens in those where there is a large measure of concurrence and those where there is a small measure of concurrence, we mainly dealt with issues such as what was described as the opportunity that a larger concurrence provides for federal polity. I think, no one particularly liked the implication that larger concurrence also can contribute therefore in the long run to centralization. But it would have been interesting, I think, to pair up those that had a large measure of concurrence with some that have a very small measure of concurrence. The obvious examples are, of course, Belgium and Canada where virtually all but a very small area is in the domain of either exclusively federal or exclusively constituent unit powers.

On asymmetry again, the concentration was on two examples which were quite clearly strong cases of asymmetry. But no discussion really emerged between how does the asymmetry make a federation operate differently from those that are symmetrical. At least, I did not hear any discussion on that contrast. The discussion was mainly on what forms symmetry might take. Here was the examination of the Spanish case. I think, some interesting issues were about the difference between whether asymmetry is transitional, temporary and a permanent arrangement. It seems to me that there has been some retreat in Spain from the initial symmetry. But, on the other hand, it is also proved difficult to eliminate asymmetry even though there has been an effort to try to equalize the powers of the constituent units. Belgium provides, of course, a unique and special example because there the symmetry is not just in the defence of powers of different units but actually involves two quite different kinds of units that cut across each other. Hence, the terminology which I rather liked referred to the case of doubling symmetry in the Belgian case.

Here a number of issues how this operated were referred to. I thought there were again some points that could have been raised. For instance, there was not, I thought, enough discussion on different forms of a symmetry or how a symmetry might be achieved by different mechanisms. Perhaps because I am a Canadian, I take up the example, for instance, of the Canadian device in which there is an area of concurrence with provincial paramountcy. That is an area of concurrence in which provincial law prevails over federal law. That enables the federal parliament to pass certain laws for the provinces but the provinces, in effect, upheld that by exercising their paramountcy. So, arrangements for opting in and opting out provide a scheme which on the surface is symmetrical because it is available to all the provinces and yet legally gives them the power to have that power applied differently.

Let me go on to the third session which dealt with the allocation of major policy areas and its compatibility with the culture and the economy. Here a broader range of cases was presented initially, that is, three in each session. The sessions were a little longer enabling more discussion - one session on the United States, Belgium and Switzerland and one on Belgium, Nigeria and Mexico. I think, the discussions covered a wide range of issues. They pointed to the degree of inter-dependence that has developed in most

federations in handling interrelated policy issues and, therefore, devices for handling these had to be developed. There is a considerable variety again in the degree of inter-governmentalization. In the United States, they presented it. It is almost total. On the other hand, at the other extreme, although there are inter-governmental agreements in Belgium, on almost every issue, the emphasis is upon the exclusive operation of the constituent units.

The second issue is the degree in which in the handling of these policy areas, one level of a Government in a particular area would play a predominant role. Clearly in the United States, the federal Government plays a strong role. But in some other policy areas and in some other federations, other levels of Government in particular areas play a strong role.

Then, you see the inter-relation of social and economic policies, especially where social policies are a responsibility of the constituent units, the States or provinces or whatever it is. These are expensive activities and responsibilities but the financial powers are particularly concentrated in the Central Government. This makes it clear that social policy and financing and economic policy have a close relationship.

Another issue that was raised was the relationship of economic and cultural policy especially in those federations which are multi-ethnic or multi-national in character. I think in recent decades in Canada, it has become clear how with the original logic of the solution in 1867, the federal Government handled economic issues and the provinces handled issues of cultural significance like education, social policy and so on. In the latter half of the 20th century, particularly it became clear that to have cultural autonomy, you really also have to have control over your own economy. Hence, the economic powers are significant and relative to the development of a distinctive culture. Other issues that were raised - I will just touch on them - were questions on how you handle policies, whether there are minorities within minorities, a situation that exists virtually in all federations, certainly multi-ethnic ones, the relationship between internal domestic policy, the handling of that and foreign policy, particularly as exemplified by the role of the Swiss cantons, the Belgian regions and one might also say certain aspects of Canada. That is a topic but by the way, that will be the fourth major theme so that it is relevant to this particular theme. But the fourth theme in the global dialogue series is going to concentrate fully on the issue of handling of foreign relations within federations.

It was also the issue how you handle the new policy areas, not originally identified in the constitution.

One of the issues that was not raised – it was raised in a much latter session – was the issue of how you handle policy regarding security and police especially in the ‘post-9/11’ era. This was touched on by Mr. Richard Simian in the fifth session when he was referring to crisis federalism and how issues of crisis are handled. But it is a significant issue. I think, that needs to be looked at. I can recall some decades ago when Americans pointed out to me that one real test of the federal system to know whether the system is really federal is that either police is responsibility of the State Government or the federal government. If the police is the responsibility of the federal government, potentially the federal government can eventually impose its will on the States. Therefore, that is a threat to the genuine federal character of the country. Well, if it is so, then in an era of crisis federalism, the relative role of governments in handling security issues becomes a very important issue.

On the fiscal balance between responsibilities and revenues clearly, this is relevant to the theme that we have been discussing at this conference. But I would point out that this would probably be the fifth theme in the overall series of the global dialogue so that it will be handled much more thoroughly and fully in its own separate volume later in the series of the global dialogue. But it is relevant to consideration here for two reasons. First of all, the assignment of taxing powers affects the ability of one level of Government or the other to exercise an influence on economic policy. So, if we try to decide whether it is the federal government or the states or both, that have an influence in shaping of an economic policy. Where the taxing powers are assigned, it is an important part of that.

The second, of course, is the financial resources affect and limit the capacity of a government to perform its assigned legislative and executive responsibilities. You can assign all the legislative and executive powers you want. But if government that handles powers does not have the resources to exercise them, that assignment becomes virtually meaningless. So, there are issues here on the capacity of federal or state governments to perform their assigned legislative and executive functions in terms of whether they have sufficient resources in a vertical sense, in terms of the distribution between the federal

and state governments or in the horizontal sense, in terms of the existence of disparities where some states are wealthier or poor and others and what resources are given to assist the poor units to exercise the responsibilities assigned to them. Here, of course, the whole system of fiscal relations - transfers and adjustments - comes into play.

Finally, let me get to the fifth topic – the evolution management, challenges and future trends in the distribution of powers. I attended the first part of the session on Germany and Canada and the second part on Switzerland and India. I got the impression that they were talking about two totally different topics, that is, I could not see any connection between what I heard in the two sessions. So, I will try to make an amalgam out of them. I spend more time on Germany and Canada. So, my comments will first relate to that. It seemed to me that there were some common issues for federations that came out of that discussion. One was the need in all federations to balance rigidity and flexibility. Rigidity is necessary in the distribution of powers in order to provide minorities with a sense of security. If a constitution is totally flexible, then minorities have no sense that their position is secure. On the other hand, obviously, adaptability is an important element in a federal structure as well. So, the importance that arises is the role of different procedures to enable flexibility without violating the security that is provided for the minorities or the states representing minorities. Among the processes that were identified were constitutional amendment processes, judicial review, fiscal arrangements and inter-governmental agreements or for important elements. In some federations, enormous transformations have occurred because of virtually no constitutional amendments by using the devices of judicial review, fiscal arrangements, changing fiscal arrangements and through inter-governmental negotiation and agreement.

The second common theme was the need to manage interdependence given the overlapping and interconnectedness of different policy fields and areas of jurisdiction, the need to develop instruments and machinery for managing interdependence. The sixth or seventh theme in the global dialogue series will be focusing on inter-governmental relations. But clearly, it is closely related to this particular theme.

The third was the role of major international cities. Especially under the pressures of globalization, what should be the roles of the federal government or the state governments in terms of operation of what have become in many federations very major

international cities, often much more active and much more influential on the economy of the country than many of the states. But there are significant variations too. The first one, which was much discussed in the session on Germany and Canada, was finding the balance between cooperative federalism and competitive federalism. We heard about some concerns in Germany about the degree of entanglement between levels of Government in a cooperative federalism and the need for disentanglement in the recent establishment of a commission to examine those issues. At the other extreme was the Canadian case in which it is typified heavily by what might be called arms link federalism and competitive federalism where the pressure has been to improve the collaboration. So, it looks as if Canada and Germany are coming from opposite ends in trying to find a balance of sufficiently effective collaboration without having stultifying interlocking arrangements, which is called the joint decision trap.

The second area of variation is the impact of centralizing and decentralizing pressures and the resulting degree of non-centralization. The examples of the United States and Australia with the centralizing trend, the decentralizing trend of Canada, India and Belgium to take examples, and other federations fall on various points between these extremes. It is important there to identify the factors and processes leading to these variations.

The third of these variations is an issue that arises from the Canadian experience of the past four decades and the tentative beginnings of a process of constitutional review in Germany. It is the issue adapting to change in the changing circumstances, how far is it possible to achieve comprehensive change and how far it must be incremental. The Canadian experience is that after four decades of trying to achieve comprehensive constitutional change, everybody in Canada has agreed that that is not the route to go. The route to go is to go by incremental piecemeal approach in adaptation not solely by constitutional amendment, but by extra constitutional means and so on. On the other hand, the recent total revision of the Swiss Constitution does give some hope for the possibility of comprehensive change although in reality it was more an updating of the Swiss federal system than a radical change to the system as was being contemplated in Canada. Well, Germany is now launching itself on this process. As a Canadian, I

simply say: “Be cautious about mega constitutional politics. It can turn out to be extremely divisive.”

The balance of my remarks relates to the totally different discussion that I had when I moved up here to hear the discussion about Switzerland and India. There I found a fascinating discussion about the relationship of direct democracy, federalism and multiculturalism and the contrasting significance of direct democracy which, in Switzerland, is being seen as a process encouraging consensus politics but in Belgium was feared as a process that might turn out to be extremely divisive. There was also in that session raised the issue particularly relating to European federations, the impact on federations as Members of the European Union in terms of trends for the future, the impact of the European Union, whether that has a centralizing impact upon the member federations which happen to be federations, and also the issue of what role the constituent units in those federations might play at the European level in terms of policy making and representation.

Another issue that was discussed there was the issue of coalition politics in India and its benefit for democracy but coupled with problems for coherence.

Well, I have rattled through a wide range of issues. This conference has, in my view, covered a very wide range of issues and examples. I would like to congratulate all who have contributed to the conference and wish those who are engaged in preparing the country chapters for the handbook on this subject well in their tasks of revision. Thank you.
