COMPARATIVE CONCLUSIONS

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INTRODUCTION: A FUNDAMENTAL FEATURE OF FEDERATIONS

The essential characteristic of federations is that they are composed of two (or more) orders of government operating within a constitutional framework, with one order providing *shared rule* through common institutions for certain specified purposes and with the other order (or orders) providing regional or local *self-rule* through the governments of the constituent units for certain specified purposes. Thus, as the foregoing chapters in this volume make clear, a constitutional distribution of legislative and executive authority, responsibilities, and finances among the general and constituent unit governments constitutes a fundamental, indeed defining, aspect in the design and operation of all these federations.

In comparing the distribution of powers within the federations analyzed in this volume four preliminary observations stand out. First, while a constitutional distribution of authority, responsibilities, and finances among the orders of government is a fundamental feature common to all these federations, there is enormous variation with regard to the constitutional form and scope and to the operation of the distribution of powers. There is no single ideal model; rather there are many practical variations. The historical pressures affecting the allocation of functions to one order of government or another have varied. The form and scope of the constitutional distribution of authority have also differed. In some federations powers are assigned to the constituent units symmetrically, in others, in order to take account of particular circumstances in different constituent units, the allocation is asymmetrical. There are variations in the relative roles of the orders of government in different policy areas and in the provisions for intergovernmental interaction. The financial arrangements and the degree of reliance on intergovernmental financial transfers also vary. There is also considerable variation in the degree of centralization and non-centralization (or decentralization) of powers and in the degree of intergovernmental cooperation or competition among governments within federations.

Second, within each federation there is considerable difference between the constitutional form and the operational reality of the distribution of powers. In most cases political practice and processes have transformed the way the constitution has operated. Here the Global Dialogue on Federalism process, on which the chapters in this volume are based, is particularly helpful. The country roundtables, involving an exchange of views between practitioners and academics, helped to bring theory, constitutional law, and actual practice together. Furthermore, the subsequent international theme conference that followed the country roundtables provided a comparative context for the authors of the individual chapters.

Third, while in each of the federations there is a constitutional allocation of specific powers to each government, overlaps and intergovernmental interdependence have proved inevitable in virtually every federation. This interdependence requires a variety of processes and institutions in order to facilitate intergovernmental collaboration. But here too there is much variation from federation to federation regarding the degree and character of such intergovernmental collaboration and the balance struck between independence and interdependence of governments. For instance, Germany and Mexico are marked by closely interlocked relationships while Canada and Belgium lean in the opposite direction.





Fourth, as the final sections of the individual chapters indicate, virtually all contemporary federations are currently experiencing pressures to adjust their distribution of powers in order to meet changing and new conditions. The current context of globalization, with its emphasis on market economics, the benefits of decentralization, and security, requires a rebalancing of centralization and non-centralization and of collaborative and competitive federalism. With this has come recognition that the actual operation of federations should not be understood in terms of rigid structures for the division of powers but, rather, as evolving processes enabling reconciliation of internal diversity within their respective federal frameworks.

INFLUENCE OF THE HISTORICAL AND CULTURAL CONTEXT

To understand the factors that have shaped the distribution of powers in each federation requires an examination of the historical and cultural context that has led to its original creation, that influenced the drafting of its constitution, and that continued to influence the subsequent operation of the federation. A common feature of the federations examined in this volume is the simultaneous existence of two sets of powerful motives: (1) those seeking united action for certain purposes and (2) those seeking the autonomy of the distinctive constituent units of government for other purposes. This feature has in each case expressed itself in the constitutional distribution of powers between a federal government (for those purposes shared in common) and the constituent units of government (for those purposes related to the expression of distinctive regional identities and interests).

As the preceding chapters make clear, however, the specific form and allocation of the distribution of powers has varied according to the nature of the common interests and the diversity peculiar to the particular society of each federation. Different geographic, historical, economic, security, demographic, linguistic, cultural, intellectual, and international factors, and the interrelation of these, have been significant in contributing to the particular strength of the motives for union and for regional identity and, therefore, have affected the specific distribution of powers in each federation. Generally, the more territorial homogeneity within a society, the greater the powers allocated to the federal government. Generally, the sharper the diversity, particularly where linguistic and cultural differences are deep-rooted, the greater the relative autonomous powers assigned to the constituent units of government. Switzerland, Canada, and Belgium provide classic examples of the latter. The constitutions of Canada and Belgium have also tended to emphasize the exclusivity of powers rather than shared or concurrent powers. In some cases, however, where territorial social diversity and fragmentation is strong, it has been considered desirable, as in Canada and India initially, and in Spain, to give the federal government sufficiently strong, and even overriding, powers to resist possible tendencies to balkanization.

The process by which a federation is established also affects the character of the distribution of powers. Where the process of establishment involves the aggregation of previously distinct units giving up some of their sovereignty to establish a new federal government, the constitutional distribution of powers usually takes the form of specifying the new limited set of exclusive and concurrent federal powers, with the residual (usually unspecified) powers remaining reserved to the constituent units. The United States, Switzerland, and Australia are classic examples of this. By contrast, where the creation of a federation involves a process of devolution from a formerly unitary state, the reverse arrangement is often the case, with the powers of the regional units of government being specified and the residual





authority remaining with the federal government, as in Belgium and Spain. Some federations, such as Canada and India, grew out of a combination of processes of aggregation and devolution, and in both cases their constitutions list specific exclusive federal, exclusive provincial or state, and concurrent powers, and the residual authority is assigned to the federal government. As well, in those instances in which there have been previous periods of military or authoritarian rule, such as in Brazil, Mexico, and Nigeria, this has left a relatively centralized distribution of powers. Nevertheless, in these cases in order to express the change from the previous centralized authoritarian regime, the distribution of powers has at least been given the form of defining federal exclusive and concurrent powers, with the residual powers being assigned to the states.

Another factor affecting the character of the constitutional distribution of powers is the influence of earlier models. The example of the United States was consciously in the minds of the constitution drafters in Switzerland, Australia, Germany, Brazil, and Mexico, while in India the Government of India Act, 1935 - itself patterned on the Canadian model - had a strong influence upon the Constituent Assembly shaping the new Constitution of 1950.

Note should be taken of three other sets of significant factors. One is the period in which the constitutional distribution of powers was drafted. The eighteenth century and nineteenth century constitutions of the United States, Switzerland, and Canada distributed powers in fairly general terms. By the onset of the twentieth century the Australian constitutional distribution of powers was more detailed and included references to such new subjects as labour arbitration. The newer federal constitutions of the latter half of the twentieth century go even further, including minutely detailed lists of powers and extensive provisions for intergovernmental institutions and processes. An example is the three lists (exclusively federal, concurrent, and state) of powers in the Seventh Schedule of the Indian Constitution, which contain 97, 47, and 66 entries, respectively, or the very finely detailed distribution scheme in the Swiss federal Constitution of 1999.

The prevalence of a common law tradition (as in the United States, Canada, Australia, India, and Nigeria) or of a civil law tradition (as in the European and Latin American federations such as Switzerland, Germany, Belgium, Spain, Brazil, and Mexico) has had a strong bearing on how the constitutional law is applied and interpreted. A number of chapters emphasize this and the resulting more limited scope for judicial review in federations with a civil law legal tradition.

Finally, a factor that has some impact upon the form and operation of the distribution of powers is the character of the legislative and executive institutions. This particular aspect of federations will be dealt with much more fully in the third volume of the Global Dialogue on Federalism, but it is relevant here. Whether these institutions are presidential-congressional in form (as in the United States and the Latin American federations) or essentially parliamentary in form (as in most of the other federations) affects the diffused or fused way in which the assigned legislative powers are handled within each level of government and, therefore, the character of interactions between governments. In this respect Switzerland's system of collegial executives at both federal and cantonal levels contributes to the uniqueness of its operation.

CONSTITUTIONAL DISTRIBUTION OF LEGISLATIVE AND EXECUTIVE AUTHORITY

Variations in Non-Centralization

Although in federations the basic features of the distribution of legislative and executive authority are typically embodied in the constitution, the orientation and character of this





distribution varies from federation to federation. There has, for instance, been considerable variation in the degree of centralization, decentralization, and non-centralization in the constitutional distributions of powers. Here two preliminary points need to be made. First, the concepts of decentralization and non-centralization are closely related but have different connotations. Some analysts prefer to use the term "non-centralization" rather than "decentralization" on the grounds that the latter implies a hierarchy with power flowing from the top or centre, as occurs in decentralized unitary systems, whereas the former implies a constitutional dispersion of power with limited central authority, thus better representing the character of the distribution of powers in federations. While the term "decentralization" is the one used most extensively in this volume, with regard to federations "non-centralization" may be a more accurate word. In any case, the distinctive character of federal decentralization needs to be kept in mind.

Second, while in ordinary language we may loosely compare differing degrees of decentralization within federations, the comparative measurement of decentralization is actually a complex issue. To begin with, it is necessary to distinguish different forms of decentralization: legislative, executive and administrative, and financial. These do not necessarily correspond with each other. For example, the Swiss federation is more centralized in terms of legislative jurisdiction than is Canada, but it is more non-centralized in terms of administration, finances, and the requirement of cantonal participation in federal decision making. Furthermore, within each of the categories of legislative, executive, and financial jurisdiction the degree of decentralization of different subject areas may vary. Thus a given federation may be more centralized than other federations in some matters while less centralized in others.

Difficult as it is, therefore, to arrive at a precise overall ranking of decentralization and non-centralization among federations because of the variety of relevant indices that have to be taken into account, some broad overall generalizations can be reached on the basis of a review of these various indicators. Three federations - Switzerland, Canada and Belgium - appear to be the most non-centralized. India, although it has some centralist elements, would appear to rank next, given the significant devolution of autonomous revenues and expenditures that has occurred during the past half-century. The United States and Australia, which began as strongly non-centralized federations, have both evolved a considerably expanded role for their federal governments. Germany is relatively centralized in legislative and fiscal terms, but this is moderated by the extensive devolution of the responsibility for administration and expenditures. The remaining federations examined in this volume are marked by relatively greater central dominance, with Brazil, Spain, Nigeria, and Mexico in ascending order of centralization.

One other major difference in the character of the constitutional distribution of powers is that between those federations where this relates to two orders of government and those where it relates to three. In the former, governments at the state level are usually given the power to devolve jurisdiction to local governments as they see fit; in the latter, the constitution expressly recognizes a third order of local and municipal governments. The United States, Canada, Australia, Belgium, and Spain fall in the former category, while Brazil, Germany, India (as a result of major constitutional amendments), Mexico, Nigeria, and Switzerland fall in the latter.

Variations in the Form of the Distribution of Legislative Authority





In most federations some areas of responsibility are assigned exclusively to one level of government or the other, but the extent of these varies greatly. In Canada, originally in Switzerland (but somewhat less so under the 1999 Constitution), and more recently in Belgium, most areas of responsibility were assigned exclusively to either the federal or the constituent unit legislatures. By contrast to these three federations, in the United States and Australia the powers assigned exclusively to the federal legislature are much more limited, and most federal powers are identified as shared concurrent powers. In Germany, India, Brazil, Mexico, and Nigeria the exclusive jurisdiction assigned to the federal legislature is more extensive, but the distribution of powers in each of these federations includes large areas of concurrent jurisdiction. The form of the Spanish distribution of powers is distinctive. The Constitution lists the exclusive powers of the central government but transfers the determination of the powers of the Autonomous Communities (regions) to separate Statutes of Autonomy. Under these, despite an emphasis upon exclusivity in the assignment of powers, in practice many areas have required joint governmental intervention.

Jurisdiction over residual matters not otherwise listed or specified in the constitution has been assigned in each federal constitution to the legislature of one level of government or the other. In most federations, especially those created originally by a process of aggregating previously separate units, the residual power has remained with the federating units. Examples of this are the United States, Switzerland, Australia, Germany, Brazil, Mexico, and Nigeria. In some federations, however, usually where devolution from a preceding - more centralized - unitary regime has occurred, the residual authority has been left with the federal government. Examples are Canada, India, Belgium, and Spain, although in the case of Belgium the governments have formally agreed to reformulate the constitutional distribution of powers so that the residual authority lies with the devolved units (it should be noted that this has not yet been implemented).

The significance of the residual authority is related to the number and comprehensiveness of the enumerated lists of legislative powers in the constitution. The greater the enumeration of specific powers the less significant the potential scope of the residual power. Thus, in federations such as Canada and India, where the constitutions set out three comprehensive lists of exclusive federal, exclusive provincial, and concurrent jurisdiction, the assigning of the residual authority has been relatively less significant. By contrast, in federations such as the United States, Switzerland, Australia, Germany, Brazil, Mexico, and Nigeria, where the state jurisdiction has not been enumerated and has simply been covered by a substantial unspecified residual authority, the latter is highly significant. In most of these federations the assignment of significant residual authority to the states was intended to symbolically underline their autonomy and the limited nature of the exclusive and concurrent powers transferred by the constitution to the federal legislature. It is worthy of note, however, that in practice in most of these federations there has been a tendency for the courts to read the maximum "implied powers" into the constitutionally specified federal authority at the expense of the scope of the unspecified residual state powers. This has contributed over time to the progressive expansion of federal powers in these federations. Paradoxically, in such federations as Canada and India, where the centralist founders enumerated what were intended to be limited specific provincial or state powers, the courts have in practice tended to read those powers broadly, thus limiting the expansion of federal authority.

In a few federations the constitution provides the federal government with specific override, or emergency, powers enabling it to invade or curtail what would otherwise normally





be state constitutional powers. These arrangements reflect the fears of their founders over the prospects of potential balkanization or disintegration. Among the federations reviewed in this volume Canada and India provide examples of such arrangements. The Canadian Constitution continues to include some such federal powers. These include the powers of reservation and disallowance of provincial legislation; the declaratory power relating to public works in the national interest; and the peace, order, and good government clause as interpreted by the courts. However, in practice, over the past half century almost all of these federal unilateral powers have fallen into disuse. On the other hand, the extensive emergency powers embodied in the Indian Constitution of 1950 have, in fact, been frequently used over the past fifty years (although there is now growing political pressure to limit their use).

Relationship between Distributions of Legislative and Executive Authority

In some federations, particularly those in the Anglo-American and common law traditions, such as the United States, Canada (with the exception of criminal law), and Australia, each order of government has been assigned executive responsibility in the same fields for which it has legislative authority. Although derived from different traditions, the Belgian distribution of power also closely ties the allocation of executive powers to the allocation of legislative jurisdiction. There have been several reasons for favouring such an arrangement. First, it reinforces the autonomy of the legislative bodies. Second, it gives each government the authority to implement its own legislation, thereby assuring that the legislation is not meaningless. Third, in such federations as Canada and Australia, where the "Westminster" principle of parliamentary executives being responsible to their legislatures has been adopted, it is only if legislative and executive jurisdiction coincide that the legislature can exercise its control over the body executing its laws.

In some federations, most notably in Germany but also to a considerable extent in Switzerland, there are constitutionally mandated and entrenched provisions for splitting the legislative and executive jurisdictions in a particular area between different orders of government. In the German case this has led to a high degree of legislative centralization coupled with the very decentralized administration of much federal legislation carried out by the Länder. Another example is the case of India, where all federal legislation enacted in an area of concurrent jurisdiction is specified in the Constitution as the administrative responsibility of the states. This sort of arrangement enables the federal legislature to lay down uniform legislation while leaving it to be applied by state or cantonal governments in ways that take into account varying regional circumstances. However, such a bifurcation of legislative and executive responsibilities does, in practice, require extensive collaboration between the levels of government.

In practice, however, the contrast between these two approaches is not quite as sharp as the constitutional provisions might suggest. Even in those federations where legislative and executive responsibilities constitutionally coincide, federal governments have often delegated considerable responsibilities for federal programs to constituent unit governments, often by providing persuasive financial assistance through grant-in-aid schemes. Nevertheless, there are differences in the degree to which overlapping responsibilities have led to intergovernmentalization. As the chapter on the United States indicates, intergovernmentalization there has become almost total, while this has been much less the case





in Belgium, with its emphasis on exclusive jurisdictions. But even in the latter case some intergovernmental agreements have been necessary.

Scope of Legislative Jurisdiction Allocated

Important as differences in the form of the constitutional distribution of authority are in determining the degree of governmental autonomy and non-centralization within federations, the assignment of particular functions and powers to each order of government is also significant.

Broadly speaking, in most federations international relations, defence, the functioning of the economic and monetary union, major taxation powers, and interregional transportation are placed under federal jurisdiction. Social policy (including education, health services, social welfare, and labour relations), maintenance of law and security, and local government are usually assigned to the constituent unit governments. Parts of these areas, however, especially those relating to social services, are often shared, as are the areas of agriculture and natural resources. Despite this general pattern, there is considerable variation in the specific allocations within different federations depending on the degree of emphasis placed upon common action or upon non-centralization as well as upon the impact of particular circumstances.

Some subject matters have proven particularly troublesome. Foreign affairs is an example. In many federations a sweeping federal jurisdiction over foreign affairs and treaties has sometimes been used to override jurisdiction that would otherwise belong to the governments of the constituent units. In a few federations, however, the federal treaty power is limited by the constitutional requirement that, where treaties affect the jurisdiction of the constituent unit governments, consultation must occur (and sometimes consent must be obtained). In the case of Canada, as a result of judicial interpretation of the Constitution, a treaty related to a field of provincial jurisdiction can only be implemented if the required measures (including legislation) are undertaken by the provincial legislatures or governments. In the case of Germany such treaties require the endorsement of a majority of votes in the Bundesrat, which is composed of delegates of the Land governments; since 1993 the German Basic Law has required extensive Länder consultation or agreement with regard to European Union matters. Two of the most recent federal constitutions, that of Belgium (1993) and Switzerland (1999), assign to their respective constituent units a major role in the conduct of foreign relations or require their extensive consultation regarding foreign policy decisions.

The increased interrelation of economic and cultural policy in the contemporary world has made the resolution of multiethnic issues within federations more complex than it was in the past. The original simple Canadian solution of 1867, which consisted of centralizing control of economic policy but assigning responsibility for cultural distinctiveness and related social programs to the provinces, has been complicated by two developments. One is the greatly increased cost of social policies requiring federal financial assistance and the other is the realization by regionally concentrated ethnic groups that their distinctiveness depends not just upon cultural policy but also upon being able to shape economic policies regarding their own welfare. A further complication is that different ethnic groups are never completely demarcated in territorial terms. Consequently, any distribution of powers has to take account of the need to protect minorities within minorities by placing constitutional limits upon state or provincial governments regarding their policies towards internal minorities.

As the foregoing chapters make clear, economic policy and social policy are two areas in which one usually finds extensive activity on the part of both federal and constituent unit





governments. With regard to economic policy, states, provinces, and Cantons are concerned to ensure the economic welfare of their own citizens and to develop policies related to their own particular economic interests. In some cases this has produced a highly competitive situation among governments within federations. It has also sometimes led to states or provinces establishing offices in foreign countries to encourage both trade and investment - a pattern found in the United States, Canada, Australia, and Germany. With regard to social policy, including health, education, and social services, the primary constitutional responsibility is generally assigned to the constituent unit governments. In some cases such standards are provided in federal framework legislation. Often program costs and pressures for federation-wide standards of public service have led to extensive federal financial assistance and, hence, influence. And where constituent units have welcomed such federal financial assistance, it has frequently proven to be a Trojan horse for federal dominance.

DISTRIBUTION OF FINANCES

Significance of the Allocation of Financial Resources

The fourth volume of the Global Dialogue on Federalism will deal in detail with the financial arrangements in federations. Nevertheless, for two main reasons some reference to the allocation of financial resources is relevant to this volume: (1) the distribution of financial resources enables or constrains governments with regard to the exercise of their constitutionally assigned legislative and executive responsibilities; and (2) taxing powers and expenditure authority are themselves important instruments for affecting and regulating the economy.

Allocation of Revenue and Expenditure Powers

Most federations specify in their constitutions (or, in the case of Belgium and Spain, in special legislation) the revenue-raising powers of the two orders of government. The major taxing powers usually identified are customs and excise, corporate income taxes, personal income taxes, and various sales and consumption taxes. A common characteristic of the allocation of fiscal powers is that the majority of revenue sources are assigned to the federal government, although in Canada, Switzerland, and the United States (although to a lesser extent) the constituent unit governments have considerable taxing powers of their own in such fields as personal income taxes and sales and consumption taxes. In some other federations, where the levying and collecting of major taxes are concentrated in the federal government, there are constitutional stipulations for the sharing of the proceeds of these federal taxes with the states. Germany and India are prime examples of this pattern, but such arrangements exist in a number of other federations as well. Three factors have contributed to the frequent concentration of the major taxing powers in federal governments. The first involves the fact that the concentration of resources in the federal government is necessary if it is to perform the redistributive role usually expected of it. The second involves the influence of Keynesian theories concerning the need for federation-wide policies pertaining to economic stability and development. Such theories were particularly prevalent at the time many of the current fiscal arrangements were developed. The third factor involves the promotion of tax harmonization and mobility for the purposes of economic union.





In addition to taxation another source for government fundraising - public borrowing - has usually been open to both orders of government. In some cases, however, foreign borrowing is placed under exclusive federal jurisdiction in order to prevent constituent unit action from undermining the credit worthiness of the federation (e.g., India, Mexico, Nigeria, and Spain). A unique arrangement with the same objective was Australia's 1928 establishment of the intergovernmental Loan Council, which had the power to make decisions that were binding on both levels of government.

Broadly speaking, the constitutional distribution of expenditure powers in each federation corresponds to the combined scope of the legislative and administrative responsibilities assigned to each government. Three points should be noted, however. First, where the administration of a substantial portion of federal legislation is constitutionally assigned to the governments of the constituent units (as in Switzerland, Germany, and India), this has usually resulted in these units being responsible for substantially larger expenditure responsibilities than legislative responsibilities. The need for substantial federal transfers, either in the form of shared federal tax proceeds or in the form of unconditional and conditional grants, has, therefore, been a typical feature of these systems. Second, expenditure requirements of different areas of responsibility vary considerably. Thus, such responsibilities as health, education, and social services usually prove to be high-cost functions when compared to those relating more to regulation than to provision of services.

Third, in most federations the constitution does not impose strict limits on government expenditures, restricting them to specified legislative and administrative jurisdictions. In most cases governments have usually been taken by the courts to possess either explicitly or implicitly a constitutional general spending power. iv This has enabled federal governments to provide grants to states and to use these grants to influence state government policies in areas outside federal jurisdiction. For their part, although typically with much lower expenditures, constituent unit governments use their general spending power to fund trade and promotion offices in foreign countries even when they have no constitutionally specified jurisdiction in external affairs. The recognition of a general unrestricted spending power provides some flexibility in the operation of governments within a federation; however, if this power is used extensively by a federal government, then it may become a device for federal dominance. There are some cases, however, in which a federal constitution does restrict spending in areas not within the government's constitutionally specified legislative or administrative jurisdiction. Belgium provides a notable example, generally limiting expenditures to areas of constitutionally assigned jurisdiction. In Germany the federal exercise of spending in areas of Land jurisdiction requires the approval of the Bundesrat, which is composed of Land delegates. And in Switzerland both long-held traditions and the constitutional provisions referring to collaboration between federal and cantonal governments (Articles 44-6) has led to the avoidance of unilateral federal decisions regarding federal spending in areas of cantonal jurisdiction.

Consequent Need for Financial Transfers

Because in federations it is generally necessary to allocate the major taxing powers to the federal governments in order to facilitate an effective economic union - and to allocate major expenditure responsibilities in such expensive fields as health, education, and social services to the constituent unit governments in order to facilitate administrative effectiveness - in virtually every federation there is an imbalance between the allocations of revenue capacity and of





expenditure responsibilities. In most federations this has resulted in the need for substantial transfers from the federal to the constituent unit governments, although the extent of the imbalance to be corrected varies according to the precise constitutional allocations of taxing powers and expenditure responsibilities. These transfers take several forms. One of these is revenue sharing, which involves the transfer of all or part of the proceeds of certain federal taxes. as in Germany, Switzerland, India, Spain, Brazil, Nigeria, and Australia (in the latter case since the institution of the Goods and Services Tax [GST]). Another is the use of substantial unconditional or semi-conditional block grants. This was the predominant form of transfer in Australia prior to the establishment of the GST and continues to be the predominant form in Canada as well as India. A third form of transfer is the use of specific-purpose conditional grants. These are used extensively in the United States, Switzerland, Germany, Australia, Mexico, Spain, and, to a lesser degree, India and Brazil. The importance of these intergovernmental transfers is illustrated by the fact that, as a percentage of total constituent unit government revenues, in 2000-01 federal transfers in total constituted 72.8 percent in Spain, 46.0 percent in India, 45.3 percent in Australia, 43.8 percent in Germany, 30.0 percent in Brazil, 29.6 percent in the United States, 24.8 percent in Switzerland, and 19.8 percent in Canada.

A further complication in the allocation of revenue powers and expenditure responsibilities arises from horizontal imbalances among the federated units within federations. Differences among units regarding the capacity to raise revenues from the same taxes or regarding the costs of providing the same services are often a source of political resentment. Consequently, in order to enable all units within a federation to provide their citizens with generally comparable services without having to exact excessively different tax rates, most federations have established formal schemes for "equalization" transfers. The United States is, in this respect, a significant exception. The form and scope of equalization transfers and the processes involved in their periodic adjustment vary considerably, and an in-depth analysis of these phenomena will be offered in the fourth volume of the Global Dialogue on Federalism.

The generally prevailing pattern of concentrating taxation powers in the federal government and of relying on intergovernmental financial transfers to balance the cost of the responsibilities assigned to the constituent units raises a number of issues. One is the difficulty of fostering accountability when taxation and expenditure responsibilities reside at different levels of government. There is also the need to avoid the sense of dependency that arises from relying too heavily upon financial transfers. Closely related to this is the need for incentives to encourage lower levels of government to exercise what taxation powers they do have rather than to rely upon transfers. Yet another issue is the danger that the autonomy of the receiving government will be undermined in cases where a substantial portion of federal transfers are discretionary and conditional in nature.

RATIONALE FOR THE DISTRIBUTION OF POWERS AND RESPONSIBILITIES

Each of the preceding chapters examines whether the particular distribution of powers in a specific federation is based on a fundamental logic or is mostly the outcome of political bargaining and interest group compromises. From the examples examined it would appear that the latter has been a strong element in virtually all cases. Nevertheless, out of the process of negotiation some logical rationale for the distribution of jurisdiction embodied in the constitution has often emerged. One of the clearest examples of this is to be found in the Report of the Drafting Committee and its chairperson's presentation to the Constituent Assembly of India.





There the various compromises are woven into a clear explanation of the need for a strong Union government (for economic and security reasons) as well as the need to accommodate India's diversity. Similarly, pronouncements by the founding constitution drafters of other federations often set out the need for a strong and effective federal government while at the same time ensuring that there is sufficient decentralization and, indeed, non-centralization to ensure autonomous regional jurisdiction over those policies particularly important for local self-government and distinctiveness.

It is noteworthy that, while the specific distribution of powers in each federation is the product of its own particular circumstances, not infrequently the drafters are influenced either positively or negatively by preceding examples. In many respects the makers of the 1848 Swiss Constitution took into account the experience of the United States (e.g., the form of the distribution of powers and the Senate) but were determined to avoid concentrating power in the president. Canadians, who were creating a new federation just when the United States was emerging from a horrendous civil war, deliberately tried to avoid what they perceived as a too weak American federal government. On the other hand, the Australians preferred the U.S. model to the Canadian due to the former's decentralized distribution of powers. Later federations have had even more models to consider. For instance, the Constituent Assembly of India included in its deliberations three volumes of constitutional precedents from other countries. But useful as these models have been, ultimately, federations have had to devise solutions to their own particular situations, sometimes coming up with interesting innovations (e.g., the Belgian distribution of powers).

One issue that distinguishes some federations from others involves whether the constitutional distribution of legislative and executive powers should apply uniformly (i.e., symmetrically) to all the federated units or whether there should be variations (i.e., asymmetry) to take into account the different circumstances or particular requirements of some constituent units.

In a majority of federations, including the United States, Switzerland, Australia, Germany, Mexico, and Nigeria, the formal constitutional distribution of legislative and executive jurisdiction applies symmetrically to all the full-fledged member states. In some other federations, however, significant variations among the full-fledged units (arising from different intensities in pressures for regional autonomy, sharp differences in linguistic, religious or ethnic composition, or major variations in economic situation or geographic size and population) makes necessary the provision of constitutional asymmetry in the jurisdiction assigned to full-fledged constituent units. Belgium, Spain, and India are examples of this. The Canadian constitutional distribution of powers is fundamentally symmetrical in form, but there are some unique provisions relating to Quebec, and, in practice, this asymmetry is extended in a number of ways.

Clearly, where there is asymmetry in the constitutional jurisdiction assigned to the constituent units within a federation, this has introduced greater complexity. Nevertheless, it would appear that some federations have found that the only way to accommodate sharply varying intensities in the pressures for political autonomy has been to resort to asymmetry in the constitutional assignment of jurisdiction. The most notable cases involve the "double asymmetry" embodied in the Belgian federation, the cases of the northeastern states and Jammu and Kashmir in India, and the situation of Quebec in Canada. In some other cases, asymmetry is justified as a transitional arrangement accommodating regions at different stages of political development. The justification of the arrangements for the Autonomous Communities in Spain





provides an example of this rationale. In some cases, as in Canada and Spain, pressures for asymmetry have induced contentious counter-pressures for greater symmetry. These suggest that there may be limits to constitutional asymmetry beyond which extreme asymmetry may become dysfunctional. On the other hand, it would also appear that, on balance, the recognition of constitutional asymmetry has in some cases provided the only effective way to accommodate major differences among constituent units.

Another issue is the extent to which the constitutional distribution of powers emphasizes either a system of shared powers and responsibilities and, with that, the interaction between orders of government (cooperative federalism), or the independent and exclusive operation of the dual orders of government (dualist federalism). Virtually all federal constitutions recognize some areas of exclusive jurisdiction for each order of government (either enumerated or residual) and some areas of concurrent jurisdiction, but there is wide variation in the extent of the exclusive and the extent of the concurrent jurisdictions.

The advantages of assigning responsibility exclusively to one level of government or the other would appear to be twofold. It reinforces the autonomy of that government and it makes clear which government is accountable for policy in that area. In practice, however, even where most powers are assigned exclusively to one level of government or the other, experiences such as those of Switzerland, Canada, and Belgium indicate that it is virtually impossible to define watertight compartments of jurisdiction and that, therefore, some jurisdictional overlaps and some intergovernmental interaction are unavoidable. This has, in practice, softened the exclusivity of the allocated powers even where they have been emphasized.

The recognition of the inevitability of overlaps in many fields has, in some federations, led to extensive areas of concurrent legislative jurisdiction being allocated in their constitutions right from the beginning. Examples are the United States, Australia, Germany, India, Brazil, Mexico, and Nigeria. This contrasts with Canada, for instance, where the areas of concurrent jurisdiction are relatively limited. Originally, the only constitutionally specified areas of concurrent jurisdiction in Canada were agriculture and immigration, to which have been added, by constitutional amendments, old age pensions and benefits and the export of non-renewable natural resources, forest products, and electrical energy.

Concurrency has a number of apparent advantages. It provides an element of flexibility in the distribution of powers, enabling constituent unit legislatures to pursue their own initiatives until such time as the subject becomes one requiring federal action. Frequently, federal legislatures use areas of concurrent jurisdiction to legislate federation-wide standards, leaving regional legislatures and governments room to legislate the details and to deliver the services in a manner sensitive to local circumstances. Indeed, in Germany (and, in some respects, in Spain, Mexico, and Brazil) there is a special constitutional category of jurisdiction establishing federal powers to enact "framework legislation" in certain fields, leaving the Länder to fill out these areas with more detailed laws. In addition, in Germany a 1969 constitutional amendment added a category of "joint tasks," in which the federal government would participate in the discharge of certain specified Länder responsibilities.

Concurrent lists of legislative powers also avoid the necessity of the constitution enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one level of government or the other. Such subdivisions of responsibilities are likely, over time, to become obsolete and hence restrictive. Again, however, one has the notable exception of Switzerland, where the recent constitutional revisions have brought such minute distinctions upto-date.





Normally, where concurrent jurisdiction is specified, the constitution also stipulates that, in cases of conflict between federal law and unit law, the former prevails. Thus, areas of concurrent jurisdiction are, ultimately, potential areas of federal jurisdiction. One notable exception occurs in Canada, where old-age pensions are placed under concurrent jurisdiction but where, in cases of conflict, provincial law prevails over federal law. This has enabled the Province of Quebec to preserve its own pension system while the other provinces accept a federal pensions jurisdiction.

EVOLUTION OF THE CONSTITUTIONAL DISTRIBUTION OF POWERS

Federations are not static organizations and, over time, the distribution of powers in each has to adapt and evolve to respond to changing needs and circumstances and the development of new issues and policy areas. Thus, for instance, federations established during the eighteenth or nineteenth centuries have subsequently had to work out which governments should be responsible for environmental and energy issues. But the need to adjust and adapt the constitutional distribution of powers requires finding a balance between flexibility and rigidity. Ease of adjustment to the distribution of powers runs the danger of undermining the sense of security of minorities and regional groups, whose concerns made the adoption of a federal system necessary in the first place. But too rigid a distribution of powers, while assuring the constitutional protection of regional and minority interests, may make effective response to changing circumstances difficult. In seeking this balance federations rely on four processes, although in varying degrees: formal constitutional amendments, judicial interpretation and review, intergovernmental financial adjustments, and intergovernmental collaboration and agreements.

Formal constitutional amendment is one major process that enables constitutional distributions of powers to evolve over time. In most federations, in order to ensure a continued balance between the federal and regional orders of government, the constitutional distribution of powers is not unilaterally amendable by either order of government and requires formal adoption not only by the federal legislature (sometimes, as in the United States, Mexico, and Nigeria, by special majorities) but also by a significant proportion of the constituent units. The latter may be signified by referendum (as in Switzerland and Australia), by legislatures (as in the United States, Canada, India, Mexico, and Nigeria), or by instructed delegates in the federal second chamber (as in Germany). Three federations - Belgium, Brazil, and Spain - depart from the requirement of some form of assent from the constituent units; instead, they require special majorities and special processes in the federal legislature for amendments to the constitutional distribution of powers.

While all these various procedures for formal constitutional amendments introduce some element of constitutional rigidity, the actual degree of rigidity varies enormously in practice, depending upon such factors as the extent to which amendment proposals are minor or comprehensive in scope, the degree of conservatism prevalent in the political culture, and the extent of interparty cohesion or the dominance at both levels of a single party. Thus, despite almost identical processes for constitutional amendment in Switzerland and Australia, over a century some 100 partial constitutional revisions were adopted in Switzerland, while over the same period only eight of forty-four proposed amendments were adopted in Australia. The amendment procedure in the United States is also relatively rigid: the first ten amendments were made in 1791, and over two centuries later there have been only seventeen further constitutional





amendments. In Canada, too, the formal process for amending the constitutional distribution of powers (established in 1982) has proved to be quite rigid. The amendment procedures in some other federations, such as Germany, India, Mexico, and Nigeria, have in practice proved to be less rigid. Of the three federations that do not require assent of the constituent units but that require special majorities and processes in the federal legislature, the Brazilian procedure has proved to be remarkably flexible; however, in Belgium and Spain the political strength of the distinct communities makes their amendment procedures less flexible than might be expected.

Judicial interpretation and review is more important in the evolution of the distribution of powers in those federations (such as the United States, Canada, and Australia) where the constitutional amendment procedures are rigid. Judicial interpretation also plays an important role in other federations in the common law tradition, such as India and Nigeria. As noted in the chapters on Switzerland, Brazil, Mexico, and Spain, these federations, which are in the civil law tradition, rely much less upon judicial review for the adaptation of the distribution of powers. Nevertheless, in both Germany and Belgium the constitutional courts play a significant role in relation to the distribution of powers.

One important process for adding flexibility to the distribution of powers and responsibilities over time involves intergovernmental financial arrangements. Invariably, the processes for adjusting these are more flexible in practice than is the constitutional enumeration of legislative and executive jurisdiction. This adjustment was found to be necessary because the values of revenue sources and the costs of expenditure responsibilities change significantly over time. Federations have, therefore, needed to establish processes and institutions to facilitate the regular adjustment of intergovernmental financial transfers. In those federations characterized by a separation of legislative and executive powers within each order of government (such as the United States, Switzerland, Brazil, and Mexico), the primary arena for making such adjustments to the financial arrangements is the federal legislature (in the Swiss case advised from time to time by ad hoc commissions).

In the other federations characterized by fused parliamentary executives, the primary arena is that of "executive federalism," involving intergovernmental negotiations between the executives representing the federal and regional units of government. In a number of these, special independent expert commissions are entrusted with the primary task of determining and adjusting the distributive formulae for finances. Examples are the Commonwealth Grants Commission in Australia, the quinquennial Finance Commissions provided for by the Constitution in India, and the Revenue Mobilization, Allocation, and Fiscal Commission established by the Nigerian Constitution. In addition to these formal processes for adjusting financial arrangements, in most federations the widespread use of federal grants-in-aid to the governments of the constituent units provides a means not only for assisting these units to undertake costly responsibilities but also for the federal government to influence policy in matters not constitutionally assigned to it. Such grants have provided flexibility and have encouraged intergovernmental cooperation, although sometimes at the price of federal domination.

A fourth process affecting the evolution of the distribution of powers and responsibilities is the practice of intergovernmental cooperation, as such. Without requiring formal constitutional amendment, such practices as interdelegation of legislative responsibilities, administrative cooperation and joint action, and formal intergovernmental agreements enable various federations to respond to changing needs and circumstances without formal





constitutional amendments. A later volume of the Global Dialogue on Federalism will deal fully with such processes.

In some cases emergency powers that enable the federal government in times of emergency, or special constitutional provisions designed to facilitate flexibility in particular matters (such as the creation of new states), contribute to flexibility. India provides prime examples of both types of arrangements.

Also, it is worth noting that, in some federations (such as the United States, Australia, Germany, Brazil, Mexico, and Nigeria), the evolution of the distribution of powers has, over time, displayed a general trend towards the reinforcement and expansion of federal powers. In some of these federations this has been the result of a consolidation of the unifying forces within the federation (or what some would refer to as nation building). In others it has been the result of a dominant political party or of periods of authoritarian rule. Furthermore, the changing importance of different powers and responsibilities, particularly those relating to the global economy and international trade, have also had an influence. But increasing centralization is not a universal trend among federations. Canada, India, and Belgium have, over time, clearly experienced a marked trend towards greater decentralization, reflecting the strength of the diverse communities of which they are composed. While in some respects Switzerland has become more centralized over the past century and a half, it still retains a high degree of noncentralization, as is illustrated by its 1999 Constitution. Spain, since the adoption of its 1978 Constitution, has undertaken major devolutionary development. Nevertheless, in comparative terms it remains relatively centralized.

MAINTENANCE AND MANAGEMENT OF THE DISTRIBUTION OF POWERS

Impact of Interdependence

A major feature in the operation of the distribution of powers in federations is the inevitable interdependence between governments and the need for intergovernmental cooperation. In practice the different orders of government have to treat each other as partners. This requires extensive consultation, cooperation, and coordination between governments within federations. The institutions and processes for intergovernmental collaboration serve two important functions: (1) conflict resolution and (2) a way of adapting to changing circumstances.

One important element of intergovernmental relations occurring extensively in all federations is the great variety of informal direct communications (e.g., by letter, telephone, etc.) between ministers, officials, and representatives of different governments. In addition to these informal interactions, most federations have developed a range of more formal institutions to facilitate intergovernmental collaboration. These usually take the form of a variety of standing and ad hoc meetings involving ministers, legislators, officials, and agencies of different governments. A noteworthy feature in federations with parliamentary institutions, where the first ministers and cabinet ministers tend to predominate within each order of government, is the prevalence of what has come to be known as "executive federalism," in which governmental executives (ministers and their officials) provide the main channel for intergovernmental negotiations and collaboration. The institutions and processes of executive federalism usually develop pragmatically rather than by constitutional requirement. In such federations as Australia, Canada, Germany, and India frequent meetings of officials, ministers, and first ministers are particularly important, providing institutional processes for consultation,





negotiation, cooperation, and, on occasion, joint projects. On the other hand, sometimes these meetings are also the arena for intergovernmental confrontation and conflict.

Among contemporary federations executive federalism is most extensively developed in Germany and Australia. In Germany, the Bundesrat serves as a central focus for a wide range of intergovernmental executive interaction. In 1992 Australia established the Council of Australian Governments (COAG) to oversee the extensive intergovernmental ministerial councils that had already developed. A particular objective of COAG is to make the Australian economic union more effective.

Extensive interaction between governments has not been limited to parliamentary federations, however. In federations where there is a separation of legislative and executive powers within each government, channels for intergovernmental relations tend to be more dispersed. In such federations as the United States, Switzerland, Brazil, Mexico, and Nigeria a variety of channels between executives, administrators, and legislators, often in crisscrossing patterns, can be observed. A notable feature of these federations is the widespread lobbying of federal legislators on the part of various state and cantonal representatives. The 1999 Swiss Constitution also includes numerous provisions requiring intergovernmental consultation and collaboration in a wide range of matters.

In such federations as Germany and Switzerland, where there are constitutional requirements that a considerable portion of federal legislation must be administered by the states or Cantons, the need for close intergovernmental relations is especially accentuated. In Germany this has been a major factor contributing to the "interlocking federalism" for which that federation is noted.

In virtually every federation intergovernmental relations have both vertical and horizontal dimensions. In addition to federal-unit relations, inter-unit relations are usually extensive. These often deal with cross-boundary issues affecting neighbouring states or provinces concerning, for example, jointly shared rivers, transportation routes, or environmental issues. In addition there are efforts by regional groups of units to cooperate on issues of regional concern. Sometimes inter-unit collaboration is extended even more broadly to encompass all the units within a federation in order to avoid resorting to the centralizing impact of transferring responsibility for shared problems to the federal government. This approach is sometimes referred to as "federalism without Washington" or "federalism without Bern."

The inevitable and unavoidable interdependence of governments within federations and the resulting need for intergovernmental collaborative institutions and processes has led, within most federations, to an emphasis upon "cooperative federalism." As noted earlier, the extent of this varies greatly, from those where duality and exclusivity of powers are strongly emphasized to those where the emphasis is on shared and concurrent jurisdiction.

Cooperative federalism has both benefits and costs. It often contributes to the reduction of conflict and facilitates coordination. When, however, it becomes "interlocking federalism" (where action can only occur if both orders of government agree) to the extent experienced, for example, in Germany, it may lead to what has been called the "joint decision trap." This can reduce the autonomy and freedom of action of governments at both levels and can lead to general policy inertia. Furthermore, where executive federalism predominates, it may limit the role of legislators in negotiations. In some instances, too, where the main instrument for inducing cooperation is the employment by the federal government of extensive conditional grants, it may become a form of "coercive" or "collusive" federalism leading to federal government dominance. Nevertheless, virtually every federation, even those such as Canada and Belgium





(which have emphasized exclusivity in the assignment of jurisdiction), have found that it is impossible to isolate the activities of the different levels of government. Consequently, given the unavoidability of overlaps of jurisdiction, some degree of cooperative federalism in the form of intergovernmental collaboration has proved necessary.

There remains, however, the question of at what point such intergovernmental cooperation may, if excessive, limit or undermine the opportunity for flexible and autonomous action by each order of government. Advocates of competitive federalism suggest that competition between governments within a federation may actually produce beneficial results for citizens. Albert Breton argues that, just as competition in the economic realm produces superior benefits when compared to monopolies or oligopolies, so competition between governments serving the same citizens is likely to provide those citizens with better service. He equates cooperative federalism with collusion between governments serving their own interests rather than those of their citizens. But while competitive federalism may contribute to maintaining the duality in the distribution of powers, it must be conceded that, taken to excess, it can lead to intergovernmental conflict and acrimony and can have a divisive impact upon a federation. This is illustrated by the experiences of Canada, Belgium, and Brazil. As with all partnerships, it would appear that, in maintaining and managing the distribution of powers in federations, a blend of both cooperation and competition is likely, in the long run, to be the most fruitful.

Key Actors and Institutions

In addition to the executives and legislatures, a number of other actors and institutions play key roles in maintaining and managing the distribution of powers in federations. These include the electorates, the courts, political parties, and interest groups, although their relative significance varies from federation to federation.

A fundamental question is whether electoral or judicial processes should be the primary means for resolving disputes and conflicts over the distribution of powers and responsibilities. Most federations have, in fact, relied on a combination of these processes. Ultimately, through periodic elections that occur within each level of government in federations, the electorates have the opportunity, where there is a conflict between governments, to express and support their preferences by voting parties in or out of office at each level of government. Consequently, in defending or advocating changes to the distribution of powers, the political parties and interest groups play an important role. For example, where the same party dominates governments at both levels for an extended period - as in the early years of the Congress in India and the lengthy period of Partido Revolucionario Instititucional party dominance in Mexico - the dividing lines between federal and state politics are blurred and the federal government tends to dominate. On the other hand, the recent fragmentation of the Indian party system, with federal governments composed of coalitions of state parties, has imposed restraints upon the dominance of the federal government. In addition to political parties, interest groups have played an important part in managing the distribution of federal powers, tending to support governments whose constitutional jurisdiction coincides with their own particular objectives.

In the case of Switzerland, in addition to participating in elections at each level of government, the electorate plays a major direct role in maintaining and managing the distribution of power through the processes of the legislative referendum and the initiative. In the former process, any federal legislation that is challenged by 50,000 citizens or eight Cantons must be submitted to a direct popular vote in a referendum. As a result, the referendum process becomes





the adjudicative process for ruling on the validity of federal legislation. An interesting byproduct of this constitutional procedure is that, in order to reduce the risk of a successful challenge through the legislative referendum process, the maximization of interparty compromise within the federal government and legislature has in practice been induced. The initiative process adds a further opportunity for the electorate to influence the distribution of powers and responsibilities.

In many federations, especially those in the common law tradition, courts play a major role in maintaining the distribution of legislative and executive authority. In this role the courts perform three functions: (1) impartial constitutional interpretation, (2) adaptation of the constitutional distribution of powers to changing circumstances (especially where constitutional amendment is difficult), and (3) resolution of conflicts between governments over their respective powers. Two types of courts whose purpose is to determine constitutional jurisdiction may be found among federations. One is the "supreme court," which serves as the final adjudicator in relation to all laws, including the Constitution. Examples of this type of court may be found in the United States, Canada, Australia, Mexico, India, Brazil, and Nigeria. The other is the "constitutional court," which specializes in constitutional interpretation. Examples of this type of court may be found in Germany, Belgium, and Spain. A third type of court is unique to Switzerland. There the Federal Tribunal may rule on the validity of cantonal laws but not on the validity of federal laws (the latter being determined through legislative referendum).

The significance of judicial review in maintaining the constitutional distribution of authority, as already noted, varies enormously. In the United States, Canada, Australia, Germany, India, and Belgium it plays a very important role. It plays a more minor role in Mexico, Brazil, and Spain.

CURRENT AND FUTURE ISSUES

Federations are not static structures; rather, they are dynamic and evolving systems. Consequently, any analysis of the distribution of powers and responsibilities within them must see them in this context. The final sections of the preceding chapters on individual federations examine current issues relating to the distribution of powers and likely future responses to changing circumstances and challenges.

It would appear that, in terms of the degree of equilibrium achieved by their respective distributions of powers and responsibilities, the federations examined in this volume can be placed into two broad groups: (1) those in which an equilibrium is yet to be established and (2) those in which some equilibrium has been achieved (even though there still remain issues to be resolved).

In the first group are Belgium, Brazil, Mexico, Nigeria, and Spain. The constitutional structure in most of these countries is relatively recent and the balance in each of them between the appropriate levels of centralization and non-centralization appears to be relatively fragile.

In the case of Belgium, following five stages of devolution over the past thirty-five years, it is not yet clear whether an equilibrium has been established or whether it will undergo further devolution, transforming it into a basically confederal form. And in Brazil it appears that the 1988 Constitution has yet to achieve equilibrium. This is apparent from unbalanced financial arrangements, which have resulted in a "fiscal civil war," and the failure to address regional and social disparities. Although federalism is clearly seen by Brazilians as the model of government best able to reconcile the pressures for both small and large polities, it would appear that further





modifications to the distribution of powers will be needed in order to address the social and regional inequalities within the federation. Mexico, after experiencing the expansion of federal powers during most of the twentieth century, now faces pressures for devolution. It has yet to achieve a regional counterbalance to its federal powers, however. The 1999 Nigerian Constitution is very recent, but the manner of its establishment and the impact of the lengthy periods of military rule that preceded it have meant that Nigeria's distribution of powers does not reflect the current pressures for significant decentralization. A major issue, therefore, is how to achieve a significant measure of decentralization without undermining the effectiveness of the federal government.

Spain is continuing to seek a balance between the pressures for asymmetry and symmetry in the powers and responsibilities of the Autonomous Communities in general as well as to accommodate the strong demands for greater devolution on the part of Catalonia and the Basque Country (among others). There are also issues involving a "second decentralization" to the local government entities and the need for improved intergovernmental relations.

The other six federations have, by comparison, achieved relative equilibrium in their distribution of powers and responsibilities, although in each there are significant current issues of concern. The United States has existed for more than two centuries and, over that period, its federal powers have expanded substantially; however, it still operates under the original Constitution, which means that the states remain relatively strong. Nevertheless, there are three contemporary challenges related to the distribution of powers in the United States: (1) the likely impact of the changing composition of the Supreme Court, which plays such a predominant role in interpreting the constitutional distribution of powers; (2) the declining impact of state political parties and interests within Congress; and (3) the limits imposed on state and local governments by membership in the North American Free Trade Agreement and other international trade agreements.

The new Swiss Constitution of 1999, which followed three decades of deliberations, managed to avoid substantial and controversial reforms. Indeed, it consisted largely of modernizing the language of the older Constitution and bringing the equilibrium in federal and cantonal powers (which had evolved over the previous century and a half) up to date. Some issues, however, have remained. These include reform of the financial equalization arrangements, some refinement in the allocation of tasks between the federal government and the Cantons (along with arrangements for intercantonal and transborder cooperation), and the revision of some cantonal constitutions.

Although marked by a considerable expansion of federal powers, especially in terms of fiscal capacity, the Australian distribution of powers - over a century marked by economic crises and two world wars - appears to have evolved to the point where it is serving Australia well. Among the current and prospective issues affecting the distribution of powers are the likely emergence of the Northern Territory to full statehood (probably requiring some asymmetrical arrangement), responding to global economic and legal pressures, and the impact of the prospective transformation to a republican form of government.

In Canada, too, the distribution of powers has proved relatively flexible over nearly a century and a half, including periods of economic crisis and two world wars. In this case, however, the Constitution has enabled the transformation of a relatively centralized federation into one of the most decentralized in the contemporary world. Among the issues facing Canada in the immediate future are: (1) improving the role and effectiveness of city and local governments and of Aboriginal self-government; (2) developing processes for responding to





unexpected shocks and emergencies; (3) improving intergovernmental cooperation to meet citizens' needs in such fields as health care; (4) responding to the challenges of the global and North American economy; and (5) accommodating the pressures for a more distinctive role for Quebec within the federation.

For half a century the German political reality with regard to the distribution of authority has more or less corresponded to constitutional law, establishing an interlocking relationship between the orders of government. However, in the past decade there have been increasing pressures to enable greater governmental initiative at both levels through introducing an element of disentanglement that would lead to less centralization. Also important are the issues of reforming the intergovernmental financial arrangements and of moderating the impact of European integration upon the German federal structure.

In India, the Union model of distribution of authority has shown considerable resilience and flexibility over more than half a century. As in Canada, in India an originally relatively centralized distribution of powers has been able to adapt to a more decentralized pattern through relying upon consensus via coalition governments at the federal level as well as by turning to intergovernmental forums as a response to the deep diversity marking Indian society. This trend continues to raise many issues relating to the distribution of powers - issues that have recently been addressed by several important commissions. A major current issue is the need to make more genuinely effective the movement begun in 1992 to develop local government as a full-fledged third order of constitutional government in India.

In a number of federations a major current and prospective issue is the impact of membership in suprafederal organizations on the internal distribution of powers. This is major issue in Germany, Belgium, and Spain, who are negotiating their position within the European Union, and it is a factor in Swiss reluctance to approve membership in that body. While the North American Free Trade Agreement is a much looser free trade organization than is the European Union, the United States, Canada, and Mexico feel its impact upon the relative roles of federal and state/provincial governments.

One other issue that is having an impact on contemporary federations involves the relationship between democracy, federalism, and multiculturalism. In Switzerland, with its multicultural context, the processes of direct democracy have, in practice, encouraged consensus politics. By contrast, in the largely bicommunal political context of Belgium, direct democracy is studiously avoided due to fears that it would accentuate the country's bipolarization. Elsewhere, the use of institutions of direct democracy is limited. In the United States some states have adopted processes of direct democracy, but these have not been extended widely, nor have they been applied at the federal level. In Canada, the tendency for executive federalism to involve closed-door intergovernmental negotiations has frequently been criticized as fundamentally "undemocratic," but beyond efforts to ensure greater overview of these processes on the part of legislatures and their committees, there has been little reform. On the one hand, there is considerable public pressure for more effective cooperation between governments; on the other hand, a currently significant trend shows a substantial number of provinces undertaking major reviews of the electoral process.

It is clear that, in all the federations examined in this volume, the issue of the appropriate distribution of powers and responsibilities between orders of government has been of fundamental importance to their character and operation. It is also clear that it will continue to be a lively topic of discussion among their politicians, government officials, and citizens as they attempt to respond to changing circumstances and new challenges.





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ii For a fuller discussion see Ronald L. Watts, *Comparing Federal Systems*, 2nd ed. (Montreal and Kingston: McGill-Queen's University, 1999), pp. 71-80.

iii Ibid., 79.

iv Ronald L. Watts, *The Spending Power in Federal Systems: A Comparative Study* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1999), pp. 56-58.

v Derived from a working paper, R.L. Watts, *Autonomy or Dependence: Intergovernmental Financial Relations in Eight Countries* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2005).

vi In some of these federations, federal territories or peripheral associated states and federacies are treated differently, however.

vii Robert Agranoff, ed., *Accommodating Diversity; Asymmetry in Federal States* (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

viii David Milne, "Equality or Asymmetry: Why Choose?" *Options for a New Canada*, eds. R.L. Watts and D.M. Brown (Toronto: University of Toronto Press, 1991), pp. 285-307.

ix Fritz Scharpf, "The Joint Decision Trap: Lessons from German Federalism and European Integration," *Public Administration* 66 Autumn (1988): 238-278.

x John Kincaid, "From Cooperative to Coercive Federalism," *Annals of the American Academy of Political and Social Science* 509 (May 1990): 139-152. Compare: Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Melbourne: Cambridge University Press, 1998).

xi Albert Breton, "Supplementary Statement," *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Supply and Services Canada, 1985), pp. 486-526. See also Vincent Ostrom, *The Political Theory of the Compound Republic: Designing the American Experiment* (Lincoln: University of Nebraska Press, 1987).



