

Comparative Reflections

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Every country's constitution is somewhat distinctive, a reflection of the country's history, culture, and character of its populace. Nonetheless, as the preceding articles have shown, there are significant commonalities among constitutions as well. In many instances, the resemblances that one finds among constitutions are the product of design, not of chance. Because constitution-making represents the most fundamental exercise of political choice, constitution-makers are well advised to seek the broadest possible perspective on the task in which they are engaged. Thus, countries devising new constitutional regimes characteristically look to the experience of other countries, learning from their successes and their failures, and borrowing from them, even while adapting what they have learned to the circumstances within their own borders. One can scarcely overstate the importance of this process of learning, borrowing, and adapting for informed deliberation on constitutional matters. By presenting snapshots of constitutional arrangements and developments in 12 federal democracies, these articles furnish public officials and citizens with a useful guide to constitutional design and constitutional practice in federal democracies.

In part, the common features found in constitutions reflect the fact that a constitution plays a distinct function in a country's political life. A constitution embodies a country's fundamental choices about government, and in some countries--Brazil, South Africa, and the United States, for example--its creation is a source of pride and a symbol of national unity for citizens. The constitution also designates offices and specifies how those offices are to be filled. It allocates power among the various offices and indicates the aims for which political power is to be exercised. In most countries it also establishes limits on the exercise of government power, most obviously by elaborating rights that are to be secured against violation by government.

When a country adopts a federal system, the tasks of the federal constitution are multiplied. In addition to the functions mentioned above, the constitution in a federal system determines what the component units of the federal system are. It may establish two orders of government, as is found in Germany and the United States, with local governments created by and controlled by the constituent governments. Or it may institute a three-order federal system, as in Nigeria, Russia, and South Africa, giving constitutional status to local governments and guaranteeing them certain powers. Or it may devise a more complex variation, as in Belgium's double federation of language communities and territorial units.

The federal constitution also decides what role the component units will play in the structure and operation of the federal government. In most federal systems, the component units participate in the process of constitutional amendment, illustrated by both Australia's and Switzerland's requirements that amendments be approved in a referendum by a majority of voters nationally and a majority in a majority of the states. Many federal systems also ensure a further role for the component units by creating a bicameral federal legislature, with the upper (federal) chamber representing--and often elected by--the component units of the federation. Indeed, reformers seeking to enhance federalism in both Canada and Mexico have focused on creating a stronger role for the federal chamber. Switzerland has gone the farthest in securing participation of the

component units in the federal government, establishing a multi-member executive composed of representatives from seven different cantons.

The federal constitution also determines the range of discretion available to the component units of the federal system in creating their own polities. Federal systems differ in the extent to which they allow component units to determine their form of government, the purposes for which they will exercise political power, and the rights that they will protect. In India and Nigeria, for example, the component units do not have free-standing subnational constitutions. Decisions about the structure and operation of the governments of the component units are enshrined in the federal constitution, which can be said to "include" the subnational constitutions, or contained in federal legislation. By contrast, in Australia and the United States (among others), the component units devise and revise their own constitutions. States in Brazil and Mexico also have some room to devise and revise their constitutions, but many details of state government are prescribed by the federal constitution. Russia and South Africa have pioneered special arrangements. In Russia, some component units (republics) are authorized to create their own constitutions, while others (e.g., regions) can only devise charters. In South Africa, provinces can adopt provincial constitutions, but they are not obliged to do so, and in fact only one province (Western Cape) has availed itself of the option.

More generally, the federal constitution allocates power between the federal government and the constituent governments. The federal systems described in this volume differ dramatically in their degree of centralization. Federal systems engaged in the task of social and economic transformation--such as India and South Africa--have tended to choose a highly centralized federalism. The recent centralizing reforms by President Vladimir Putin in Russia show the attractiveness of this model for countries undertaking fundamental change. In contrast, federal systems seeking to accommodate diversity within their populations--such as Belgium and Switzerland--have usually opted for a more decentralized federalism. Obviously, there is no optimum degree of centralization or decentralization; the circumstances within the particular society should be decisive. Nevertheless, it is interesting that the studies of Canada, Germany, and Nigeria in this volume all point to problems associated with excessive centralization and stress the need for devolution of power.

In allocating powers, a constitution determines what powers are the exclusive prerogative of each government and what powers are shared or concurrent. The federal constitution also defines how conflicts among the governments regarding the distribution of powers are to be resolved. Both concurrency and separate spheres can lead to problems. When powers are divided between the federal government and the component units, the federal constitution typically provides a mechanism for policing the division of authority, usually a constitutional court or a supreme court. The rulings of the judicial umpire can then dramatically alter the federal balance, encouraging a greater centralization of power (as occurred in Brazil and, until recently, in the United States) or a greater decentralization (as in Canada). Moreover, a constitution that emphasizes separate spheres for the federal and component governments may discourage the sorts of intergovernmental coordination necessary for addressing problems, as was pointed out in the study of Brazil's constitution. Yet when powers are shared (concurrent), this can lead to federal dominance over policymaking. Most federal systems recognize the supremacy of federal law over that of the component units, giving a hierarchical cast to cooperative arrangements.

Although the creation of concurrent powers usually was meant to allow the federal government to craft framework legislation, while ensuring component units considerable discretion within the framework, in practice--as the experiences of Russia and South Africa suggest--detailed federal legislation may leave little room for initiatives by the constituent governments. The tendency toward federal dominance may be particularly strong in systems in which the federal government dominates the collection and distribution of tax revenues, as in Germany and India.

The drafters of a constitution may establish a division of authority between the federal government and the component units, but that division is likely to evolve over time in response to developments both within the country and beyond its borders. Several broad factors have contributed--and will continue to contribute--to changes in federal constitutions and the federal systems they govern, producing either new constitutions or changes within existing arrangements. Some of the most important developments have been economic, as federal constitutions have sought to accommodate and manage the shift from localized to national economies and, more recently, the shift to globalization. Political changes have also had a significant impact. The development of the European Union has dramatically affected European federations, and democratization has provided an impetus for new or revived federations in Africa, in the former Soviet bloc, and in Latin America. Finally, the resurgence of ethnic, linguistic, and religious loyalties has created challenges for virtually all federal systems, as they seek to combine unity and diversity.

Some mature federal democracies--for example, Australia and India--have created durable constitutions that have not required fundamental reform. The United States might have fit into that category too, had its history not been punctuated by a civil war and by constitutional changes flowing from that conflict. Another long-standing federal democracy, Switzerland, adopted a new constitution in 1999, but it did so while retaining its constitutional foundations.

Other mature federal democracies have had to confront new challenges to their constitutional orders. In the wake of reunification, Germany has had to deal with the economic backwardness of the "new *Länder*," and this has led to calls to re-examine the federal structure and particularly the system of fiscal equalization. In Canada, the rise of separatist sentiments in Quebec led in the 1980s and 1990s to "mega-constitutional" politics in which Canadians debated a series of proposals to radically restructure their constitution. Although none of those proposals eventually won approval, the adoption of the Charter of Rights and Freedoms in 1982 inaugurated a fundamental constitutional shift in Canada.

Other federal democracies are involved in the difficult task of creating a durable constitutional order after a period of dictatorship. In some instances--for example, Russia in 1993 and South Africa in 1996--the new constitutions represent the country's attempt to fashion a viable constitutional democracy. In other instances--for example, Brazil since 1988 and Nigeria since 1999--the challenge is to restore constitutional democracy after previous constitutional arrangements failed or were overthrown, leading to military dictatorship. The success of these federal democracies will depend on their ability to solve the economic problems and ethnic conflicts that they inherited from those dictatorships.

Finally, some federal democracies, such as Belgium and Mexico, are in the midst of significant constitutional changes that are designed to strengthen the authority of the component units of those federations. In Belgium, however, the aim is to ensure that devolutions of power to the component units do not trigger ethno-linguistic cleavages that will lead to the dissolution of the country. In Mexico, the aim is to revitalize federalism after a long period of dominance by a federal government controlled by a single political party. Whatever the outcome of these efforts, there is no doubt that they can serve as guides--or cautionary lessons--to citizens, eager to learn how their counterparts in other countries have addressed common problems and concerns.