

**INTERACTION IN  
FEDERAL SYSTEMS**

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**UNITY IN DIVERSITY  
LEARNING FROM EACH OTHER**

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Volume 1 : *Building on and Accommodating Diversities*

Volume 2 : *Emerging Issues in Fiscal Federalism*

Volume 4 : *Local Government in Federal Systems*

Volume 5 : *Policy Issues in Federalism: International Perspectives*

UNITY IN DIVERSITY  
LEARNING FROM EACH OTHER

VOLUME 3

# Interaction in Federal Systems

*Edited by*

**John Kincaid**

and

**Rupak Chattopadhyay**

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FORUM OF FEDERATIONS



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## Preface

*Rupak Chattopadhyay*

This volume is one of five books that cover the proceedings of the 4th International Conference on Federalism. This conference, entitled *Unity in Diversity: Learning from Each Other*, was held in New Delhi between 5 and 7 November 2007, and coincided with the Diamond Jubilee of India's independence in 1947. This was the fourth in a series of major international conferences organized in partnership between host governments and the Forum of Federations. The earlier conferences were held in Canada in 1999, Switzerland in 2002, and Belgium in 2005.

The Forum of Federations was established by the Government of Canada as the secretariat for the 1st International Conference on Federalism held at Mont Tremblant in October 1999. This event provided the first opportunity for experts and practitioners from around the world to ponder the relevance of *Federalism in an Age of Globalization*. Following the Mont Tremblant conference, the Swiss government invited the second conference to be held in Switzerland. A joint initiative by the federal and cantonal authorities, the 2nd International Conference was held in August 2002 at St. Gallen under the title *Federalism in a Changing World: Learning from Each Other*. At the conclusion of the Swiss event, the Belgian prime minister invited the next conference to Brussels. This third conference was held in March 2005 in Brussels under the title *Federalism: Turning Diversity into Harmony, Sharing Best Practices*. The conference was timed to coincide with a series of events aiming to celebrate the 175th anniversary of Belgium's independence, and the 25th anniversary of federalism in the country.

India announced its intention to host the 4th International Conference on Federalism at the conference in Brussels. The Inter-State Council Secretariat (ISCS), Government of India, was identified as the nodal agency to organize the 2007 conference in India, and the Forum of Federations as the permanent secretariat to the International Conferences on Federalism was invited to cooperate with the ISCS. The objective of the 4th International Conference on Federalism was to promote dialogue on the renewal and development of federalism and greater cooperation among practitioners in pursuit of better governance.

The 4th International Conference on Federalism was a two-and-a-half-day event based around four broad themes and twelve subthemes. Each theme was developed by a panel of Indian and international experts. Thematic papers were peer reviewed at a pre-conference held from 21 to 23 February 2007, before being published as background reading for the conference. These papers were not presented at the conference but were made available to practitioners sufficiently in advance to serve as input for informed discussions. These papers influenced the selection of issues and case studies for discussions at the conference work sessions. The rationale and relevance of the themes selected is discussed in the introductory essay by the co-editors of the post-conference publications, Ronald Watts and John Kincaid. The pieces published as part of this series include the revised background papers—revised in the light of discussions at the conference—and analytical summaries of the proceedings from the work sessions. The analytical summaries represent the authors' analysis of discussions at the work sessions that they participated in. Each volume is organized by theme—*Building on and Accommodating Diversities*, *Emerging Issues in Fiscal Federalism*, *Interaction in Federal Systems*, and *Local Government in Federal Systems*.

The organization and structure of the 4th International Conference was inspired by the example of International Conference in St. Gallen. The triennial conferences provide a unique forum where practitioners of federalism, academics, and members of NGOs are able to interact and learn from one another. The thematic work sessions are the core events of these conferences. Unlike inter-



governmental conferences, senior officials and ministers present did not present existing government positions from prepared texts. Rather, senior practitioners were expected to participate actively in the interactive work sessions, where colleagues from around the world were exposed to diverse points of view and new insights arising from the dialogue. Such a format allowed for maximum participation, while providing an opportunity for peers to draw inspiration from each others' experiences. The work sessions fed their conclusions to theme sessions on each day of the conference. The working days of the conference were capped by plenary sessions where participating heads of state and senior ministers were invited to share their observations on issues of federalism.

The integration of young professionals into the program of the main conference provided an additional international facet. Fifty young professionals from India and other countries were paired up to produce policy-relevant pieces on the conference themes and present their perspectives at the work sessions. The Forum intends to publish a selection of these papers in due course.

Because these conferences are designed to address the needs of all who share an interest in the practice of federalism, these volumes are meant to be accessible even to "non-experts". The volumes are meant to provide surveys of the themes and subthemes. However, each volume contains a select bibliography of suggested readings for anyone interested in pursuing any of the topics in greater depth.

The publication of these volumes constitutes the final step in a process that first began three years ago and would not have been possible without the support of a great many people. The conference would not have been possible without the support and generosity of the Government of India, particularly the Prime Minister's Office and the Ministry of Home Affairs. The Honourable Prithviraj Chavan, Minister of State, Prime Minister's Office, at the initiative of Prime Minister Manmohan Singh, invited the Forum of Federations to partner with the Indian Government in organizing the 4th International Conference on Federalism in New Delhi. The Honourable Shivraj V. Patil, the Home Minister of India, served as host and took great personal interest in ensuring the success of the conference.

Credit is due to the staff of the Inter-State Council Secretariat, the Forum's partner and co-organizer, who, against all odds, successfully organized the largest International Conference on Federalism to date with 1300 participants from more than 100 countries. The Forum could not have hoped for a better partner. In particular, we offer our thanks to Amitabha Pande and S. Lakshminarayanan, who, as Chairs of the Organizing Committee, oversaw management of the whole process. Thanks are also due to the Additional Secretaries, past and present—Ravi Dhingra, S.D. Sharma, Atul Gupta, and Veena Upadhyaya for their diligence and support. On the administrative side, Deputy Secretaries Sudhir Kumar and Amaresh Singh were instrumental in keeping the organizational machinery running and in good order. Raoul Blindenbacher, then Vice President of the Forum, based on his experience of St. Gallen, contributed immensely to the development of the conference design. The Young Professionals Programme was ably coordinated by Assefa Fiseha, Andrea Iff, Paul Morton, and Rekha Saxena. Arif Ali Khan, in addition to the many other hats he wore during the conference, and Libby Johnston helped with the copy-editing of the analytical summaries. Rod MacDonnell deserves special thanks for managing the entire publications process.

Following the tradition of past conferences, we had initially planned on producing a single volume post-conference publication. Significantly, it was George Anderson who first suggested a series of more accessible publications by theme, an idea embraced enthusiastically by Amitabha Pande and the Inter-State Council. Last but not the least, gratitude is due to both the authors of the papers and all those who actively participated in the conference, without whose inputs these volumes would have been difficult to produce.

# Introduction

*Ronald L. Watts*  
*John Kincaid*

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The overall theme of the 4th International Conference on Federalism held in New Delhi, 5-7 November 2007, was “Unity in Diversity: Learning from Each Other”. Internationally, this topic was a highly relevant focus because in the contemporary world, federalism as a political idea has become increasingly important as a way of peacefully reconciling unity and diversity within political systems. Diversity is seen here primarily as qualitative collective characteristics based on language, religion, ethnicity, nationality, culture, and race rather than gender, class, status, occupation, and the like (although the latter are certainly not unimportant). Use of the word “in” purposely signifies that unity can be grounded in diversity, that diversity can give rise to unity, that unity need not dissolve diversity into homogeneity, and that there is no necessary contradiction between unity and diversity. Indirectly, the title also signifies the diversity of federal systems in today’s world and the need for citizens and public officials in those systems, as well as in emergent and would-be federations, to learn from each other in both practical and theoretical ways.

Federalism has grown in importance, in part because modern developments in transportation, social communications, technology, industrial organization, globalization and knowledge-based societies have all contributed to simultaneous needs for both larger and smaller political units. Thus, there have developed two powerful, thoroughly interdependent, yet distinct and often actually

opposed motives for federating. One is the desire to build dynamic, efficient, and modern nation states (e.g. India and the United States) or supernational political systems (e.g. the European Union) for economic progress, for security, and for influence in the world arena. The other is the desire to express distinctive identities through smaller, directly accountable self-governing political units able to give expression to historical, social, linguistic or cultural diversity.

In such a context, federal solutions have had an increasingly widespread appeal. They enable a combination of (a) shared governance in a large political unit for certain common purposes, and (b) autonomous self-governance for the various diverse groups in smaller constituent units of government directly and democratically responsible to their own electorates. By combining elements of shared rule in larger units and self-rule in smaller regional units, federal political systems provide the closest institutional approximation to the complex multicultural and multidimensional economic, social and political reality of the contemporary world.

As a result, there are in the world today some two dozen countries that are federal in their character, claim to be federal, or exhibit the characteristics typical of federations. Although federal institutions are not applicable to all situations, nearly 40 per cent of the world's population encompassing a total of some 510 federated political communities (e.g. cantons, provinces, or states) now live in countries that can be considered or claim to be federations, many of which are multicultural or even multinational in their composition. Furthermore, a number of countries such as Belgium, Ethiopia, Italy, South Africa, and Spain, among others, appear to be forging new and innovative variants of traditional federal forms.

Another notable contemporary trend in response to changing world conditions has been the evolving character of the existing and older federations. Many are undertaking reforms and modifications of institutional arrangements and processes in order to adapt to these new conditions. It is these developments that led to the formation of the International Forum of Federations in 1998 as a way of facilitating the exchange of experience among practitioners, politicians, civil servants and academics in federations. A key feature of the operation of the Forum of Federations has been

the holding of large triennial international conferences on federalism. The one held in New Delhi in November 2007 was the fourth.

Indeed, it was particularly appropriate that the 4th International Conference on federalism provided an opportunity for participants from other federations, as well as many other countries, to learn from the experience of the Indian Union in uniting its rich diversity of 1.1 billion people within an embracing unity. Among federations, the magnitude of India's diversity and its achievement of an encompassing unity stand out, although partition into the Dominion of India and the Dominion of Pakistan, along with some population exchanges, were required at the time of independence in 1947, and certain intergroup conflicts have persisted since independence. There are more linguistic variations in India than in any other federation on the globe. But also there is an enormous range of other forms of diversity. Four of the world's major religions—Hinduism, Buddhism, Jainism and Sikhism—originated on the Indian subcontinent, and Judaism, Zoroastrianism, Christianity, and Islam arrived there long ago. Indeed, Pandit Jawaharlal Nehru's *Discovery of India* (1946) described in lyrical terms the diversity of India from north to south and east to west. Hence, the appropriateness of the holding of the 4th International Conference in India.

Within the general focus of reconciling unity and diversity, the 4th International Conference was based on four broad themes; within each of these, there were three subthemes. These themes and subthemes were developed by a panel made half of Indian and half of international experts. The four theme and the twelve subtheme papers were prepared by expert scholars and were distributed in advance as background reading for the participants in the conference. These papers provided a framework for identifying specific cases and issues that were considered and discussed at the working sessions of the conference.

The four broad themes identified for the 4th International Conference on Federalism were: (1) building on and accommodating diversities, (2) emerging issues in fiscal federalism, (3) interaction within federal systems, and (4) local governments and metropolitan regions in federal systems.

The first theme, *Building on and Accommodating Diversities*, was chosen as the lead-off theme because of the widespread use of federalism throughout the world to accommodate diversities and the variety of arrangements that have been developed for doing this in different federations (e.g. Belgium, India, Nigeria, and Switzerland). The theme paper draws attention to the extent to which diversity is not to be viewed simply as a problem but as an asset to be built upon in the process of nation-building. This paper also makes the very important point that diversity can enrich a polity. Subtheme paper “Nation Building and Diversity” deals with the various forms of diversity that have to be accommodated in the process of nation-building. Nation-building is a necessity when the social milieu is diverse, and the various constituent groups need both identity and voice within the nation state rather than marginalization or homogenization. Subtheme paper “Autonomy and Diversity” relates to the use of autonomy by the constituent orders of government to accommodate the distinctive interests of diverse groups. The paper attempts to elucidate the concept of autonomy, suggest which groups can legitimately and realistically claim institutional autonomy, and examine the pros and cons of various territorial and personal accommodations of diversity. Subtheme paper “Managing Conflicts of Diversity”, deals with the various ways in which conflict among diverse groups has been moderated in federations, including lessons for mature federations drawn from the experience and innovations of newer federations. The author emphasizes that there are various good and effective conflict-management devices even while there are no universally applicable best practices. The preceding four papers constitute Volume I of four published volumes of the conference papers.

The second broad theme was *Emerging Issues in Fiscal Federalism*. This theme was considered to be of particular importance because the financial arrangements within a federation have significant impact on its operation. These arrangements can be especially salient and volatile in federations characterized by high levels of diversity wherein various groups are highly sensitive to who pays what and who gets what out of any given system of fiscal federalism. Here too, three subthemes were identified. The theme paper

examines the appropriate allocation of revenue and expenditure responsibilities, an important issue in all federations. The authors attempt to base the analysis on neutral principles derived from empirical research in political economy. Subtheme paper “Assignment Systems in Federations” examines the problems of establishing a harmonized VAT (value added tax)—which is a very widely used tax internationally—in a federal system, especially because of the difficulty of designing a destination-based subnational VAT. Subtheme paper “Managing Fiscal Conflicts” includes lessons from the experience in different federations. Fiscal conflicts, which are a regular feature of federal systems, can arise intergovernmentally between the national, regional, and/or local governments or interjurisdictionally between constituent governments or between local governments themselves. The existence of viable and long-lasting federations (e.g. Australia, Canada, Germany, Switzerland, and the United States) clearly indicates that such conflicts can be managed pacifically, but the existence of societal diversity and cultural cleavages within a federation can certainly make conflict management challenging. Subtheme paper “Fiscal Federalism and Regional Equity” includes appropriate corrective objectives and methods, especially in light of the mismatches between the resource-raising capacities and expenditure responsibilities of the various constituent governments of a federation. Issues associated with such mismatches can be heightened in federations characterized by diversity because various groups are desirous of remaining within various territorial units rather than being mobile across territorial jurisdictions. The preceding four papers make up Volume II of four published volumes of the conference papers.

The third overall theme was *Interaction in Federal Systems*. Given the unavailability of overlaps in the responsibilities of governments within a federation, as well as the existence of culturally diverse constituent political communities in most federations, intergovernmental interaction has been an important element in all federations. The authors chose the term “interaction” in order to emphasize the breadth of the topic and the blurring that has occurred between government institutions and the many private and non-profit organizations in the market and in civil society that engage

governments. Three subthemes were selected for this discussion, too. Subtheme paper “Anticipating and Managing Tension and Conflicts” examines judicial, legislative, and executive approaches to managing conflicts that go beyond those associated with fiscal federalism. The author focuses particularly on financial equity across constituent units, threats of terrorism, and the ownership and taxation of natural resources. Subtheme paper “Techniques, Structures, and Processes” examines principally relations between federal or national governments and their constituent units. The author looks at both intra-state and inter-state interactions and seeks to uncover common features and converging trends of intergovernmental relations across federal countries. Subtheme paper “Accountability and Transparency” focuses on problems of corruption and on the importance of ensuring accountability and transparency in intergovernmental interactions. The preceding four papers constitute Volume III of four published volumes of the conference papers.

The fourth theme, *Local Government in Federal Systems*, was not a focus in any of the three previous international conferences. In all federations in recent years, there has been a growing awareness of the importance of local governments and also metropolitan regions. The fourth theme overview paper emphasizes local government’s closeness to civil society and its role in enabling disadvantaged groups, including women, to participate in governance. The authors also look at the differential constitutional arrangements for local governments in federal countries and highlight the complex challenges of governing megacities. The three subthemes include the following. Subtheme “Enhancement of Democracy through Empowerment of Disadvantaged Groups” focuses on enhancing democracy through the empowerment of disadvantaged groups and civil society in local government arenas. The author argues that there is a need to establish inclusive local democratic institutions by strengthening civil-society organizations locally, empowering women and disadvantaged groups, making local decision-making more participatory, and making participatory decision-making itself more inclusive. Subtheme papers “The Functioning of Local Governments and their Relationship with Upper Levels of Government” and “The Functioning of Local Government in



Federal Systems: Perspectives from India” focuses primarily on local government in India and critically examines a number of issues involving India’s local self-governments, including the utility of using the term “local self-government” as opposed simply to “local government”. Subtheme paper “Governance of Megacities in Federal Orders” examines the challenges and options for governing metropolitan regions and megacities, namely, cities of more than 10 million inhabitants. Given the growth of the number of megacities around the world, the importance of these regions as drivers of the economy and their position and relation to other governments and to states within federal systems make them somewhat anomalous in relation to traditional federal structures. According to the United Nations, 2007 was the first year in human history that the world’s urban population exceeded the rural population, a trend which indicates the importance of including an examination of the role of megacities within federations. The preceding four papers make up Volume IV of four published volumes of the conference papers.

These four sets of significant issues in contemporary federations are of interest to those working in all federations, old and new. Each set is related to the overall theme of the conference, the reconciling of diversity and unity. The theme and subtheme papers, revised to take account of discussions at the conference, and the analytical summaries of the workshop discussions, are now published in the form of four post-conference volumes, one for each theme. These issues discussed at the conference involve problems common to many federations. There is, therefore, a genuine value to those working in each federation, whether old or new, in learning from the experience of federations elsewhere. Of course, each federation reflects the particular circumstances and conditions that produce it; therefore, there is no pure ideal model of federalism that is applicable everywhere. Nevertheless, there are useful lessons to be learned from the discussions of the themes that served as the key foci for the 4th International Conference on Federalism.



**THEME AND  
SUBTHEME PAPERS**

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## Theme Paper

# Interaction in Federal Systems

*Balveer Arora*  
*Beryl Radin*  
*Cheryl Saunders*

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### Abstract

This paper looks at the different ways in which institutions of government interact with each other in federations. The term “interaction”, has deliberately been chosen in preference to “inter-governmental” to acknowledge the expansion of the actors and groups involved in contemporary governance, and the blurring of boundaries between formal government institutions and those in the private or non-profit sector.

The subthemes deal, respectively, with the use of interaction to manage conflict and tension; the techniques and structures of interaction; and their implications for accountability and transparency. Three lateral logics that apply to all of them are: the *diversity* of federal systems, the *specificities of developing countries* and the significance of *contextual change* for interaction.

They explain the range of parties between whom interaction takes place, the purposes and varieties of interaction, and the resulting challenges. The diversity of federal systems makes each one unique in some ways. Nevertheless, for comparative analysis, they can usefully be grouped according to size; institutional design; and scale of diversity. Another key point of difference lies between presidential and parliamentary federal systems.

Focusing on the specifics of interaction in federal systems in developing countries, we find that many of them have adopted some institutions and techniques from older federations but have

adapted them, through innovations, to their own needs and circumstances.

Traditionally the concept of federalism involved relationships between central governments and federated units. Defined in legal-constitutional terms as different power distributions between the central government vis-à-vis the states and local governments, they typically limited relationships to those between governments, notably between various actors in the executive branch.

Interaction involves a greater degree of interdependence between spheres than the simple model of distribution of powers suggests. New challenges have given rise to shifting views about the role of government, created greater interlocking between levels of government, and accommodated public-private interdependence through shifts in policy boundaries. Interaction has to be effective for the purposes to be achieved. It has to be used appropriately, to support shared rule without undermining the potential of self-rule. Finally, it must meet appropriate standards for accountability and transparency.

## 1. Introduction

The subject matter of this theme is the different ways in which institutions of government work with each other and with others across jurisdictional boundaries. The term “interaction” has deliberately been chosen, both to emphasize the breadth of the topic and to ensure the neutrality of the theme across different types of federations. It may be noted in passing that, while the focus of the paper is on interaction in federal political systems, some of the modes of interaction are found in some unitary political systems as well. For example, both systems have somewhat similar responses to performance measurement requirements. Many of the dynamics that stem from social, economic and political changes in unitary systems are similar to the dynamics traditionally associated with federalism.

Interaction is one of four themes of the 4th International Conference on Federalism. This is the first International Conference to be held in a developing country and it thus offers an important opportunity to explore the experience of these countries with the

practical operation of federal political systems. Use of the term “interaction” instead of the traditional term “intergovernmental” acknowledges the expansion of the actors and groups involved in governance in the twenty-first century. The boundaries between formal government institutions and those in the private or non-profit sector have become increasingly blurred. As a result, the term “interaction” sets the stage for inclusion of a wide variety of players beyond the traditional groups defined by economic, legal and constitutional lenses.

At the turn of the twenty-first century both federal and non federal systems have confronted a range of developments related to governance. The demise of the Soviet Union and scepticism about the effectiveness of government action have led to an interest in making government more like the private sector market, to a degree that varies between countries. During this period, shared power not only refers to interactions between levels of government but to a range of private sector and civil society actors who are involved in the crafting of new policies as well as their implementation. Conversations about variations within a country are not limited to constitutional actors but to this broader set of players.

To talk about the concept of interaction in federal systems today, thus requires an acknowledgement of the role of elected officials from the legislative, executive and sometimes judicial institutions at both the national and subnational spheres. It also may involve administrators and officials at all levels, political parties, the private sector, and non government organizations within the country. For developing countries, players can also involve multinational organizations (such as the World Bank and the IMF) whose resources have brought them to the decision table.

The proliferation of players and the broadening of the concept of governance have also required federal countries to look beyond formal, legal and constitutionally defined methods of interaction to a range of informal modes of interaction. The issues that are before federal countries are extremely challenging and not amenable to simple solutions. At the same time, the citizens of these countries (and others) are making accountability demands, which put pressures on officials that are difficult to manage.

This consideration has played a major role in designing this theme. At the conference itself, the theme will be focused through three subthemes, relevant to developing and developed federations alike. The subthemes deal, respectively, with the use of interaction to manage conflict and tension; the techniques and structures of interaction; and accountability and transparency. Each subtheme will be the subject of a separate paper. The purpose of this paper is to explain the choice of these subthemes and to place them in a broader context, so as to assist the process of understanding and evaluating the experience of different federations.

The paper is organized as follows. It begins by identifying three cross-currents that apply across the entire theme. These are:

- The diversity of federal systems
- The distinctive position of developing countries
- The changing context for interaction

The next part examines and explains the concept of interaction itself, including the parties between whom interaction takes place. The remaining parts deal respectively with the purposes of interaction; the varieties of interaction; and the challenges presented by interaction. The three subthemes are, respectively, subsets of these and are briefly developed in this context.

## **2. Three Cross-Currents**

Three common factors cut across all three subthemes, and can usefully be explored at the outset.

### ***2.1 Diversity of Federal Systems***

The first concerns the diversity of federal systems, which in turn affects the varieties of interaction and the extent to which experience can be shared across national boundaries.

Every federal system is unique. Nevertheless, for analytical purposes, they can usefully be grouped in different ways. One such grouping, which distinguishes developing and developed federations, has been mentioned already and is considered separately



below. Other groupings particularly relevant to the theme of interaction concern the size of the federation; its institutional design; and the diversity of its peoples.

*Size* can be measured in different ways: by reference to the numbers of federated units; the number of spheres of government involved in interactive processes; the geographical area over which the federation extends; the population numbers in the respective federal units and in the federation as a whole. Each of these is potentially relevant to the forms of interaction that occur and to the reliability of comparisons that are made. Today's technological age creates a different dynamic than earlier periods but, nonetheless, size continues to play a role because large jurisdictions have to deal with complexity. Thus, for example, in Russia, with a geographical size of 17 million square kilometres, physical meetings of officials, whether formal or informal, face greater challenges than in Austria, with a geographical size of 80,000 square kilometres. In an example of a different kind, the dynamics of interaction may be different in a state such as South Africa, where local government is formally recognized as a partner in cooperative government and is entitled to representation in the National Council of the Provinces and in states such as Canada, where local government is essentially a creation of the provinces and its involvement in formal interactive processes is contested.

One aspect of size with particular relevance to forms of interaction concerns the number of federated units. Multilateral arrangements, including regular multilateral meetings, are likely to be more practicable in federations with a relatively small number of units than in those with a large number. Thus, in Australia and Canada, with 6 states and 10 provinces respectively, multilateral arrangements are common. They are less so in India, with 28 states and Nigeria with 36, although there may be other explanations for such differences in practice as well.

The dynamics of interaction are also affected by significant discrepancies in the strength of the respective federated units, whether measured in terms of wealth, population size or political influence that is attributable to other factors (such as hosting the national capital). Differences of these kinds may feed into institu-

tional structures by, for example, entitling stronger units to greater representation in second chambers, as in Austria and Germany. They may have a variety of other effects as well, ranging from creating a source of tension in relations between governments to disturbing the equilibrium of intergovernmental negotiations. More positively, in many circumstances, stronger units also can play a leadership role.

The *design of the institutions of government* inevitably affects the design and operation of processes of interaction between governments in federations and the converse also is true.

One key point of difference lies between federal systems with a presidential form of government and those with a parliamentary system, particularly where the latter is coupled with a disciplined party system, giving the government firm control over the processes of decision-making in the popular House. In both types of systems, interaction is likely to occur primarily (although not exclusively) between members of the executive branch. In parliamentary systems, however, the partial fusion of the legislature and the executive makes implementation of joint action more straightforward than in systems where the legislature and the executive are separate. On the other hand, creation of a powerful second chamber, which is a feature of many federations, appears to cause less disturbance to the structural logic of presidential than parliamentary systems. In parliamentary systems, the expectation that a government drawn from the parliament can rely on the parliament to implement its programmes and policies may be defeated by a second chamber, which in this case will be a source of friction. There is no such expectation in a presidential system. While a second chamber may be an additional hurdle for the President to surmount, it has no implications for the design of the presidential system.

The distinction between dual and integrated federations may also affect both the design and purpose of interaction. In a dual federation, of which the US is a classic example, at least in terms of underlying design, each sphere of government has a complete set of governing institutions. In an integrated federation, of which Germany is the prime example, the federated units implement much of the legislation enacted by the federation and some other

institutions may also be shared. The distinction may be significant in various ways. Most obviously, however, where one sphere of government implements legislation enacted by another, the degree of interdependence (often conflict) is greater than in systems where each sphere enacts, executes and adjudicates over their own policies and programmes. In these cases, the interdependence may not be acknowledged and the various players challenge the legitimacy of each other to be involved in the process. Interdependence in turn may raise questions about whether the lines of accountability for action that is taken lie between governments, between governments and voters, or both. In Germany, Austria and Switzerland, it also is associated with expectations that all governments in the federation will act in good faith towards the others.

It should be acknowledged, however, that in the early years of the twenty-first century, most federations fell somewhere between these two paradigm cases. In particular, most federations, whether dualist or integrative in their underlying design, provide for some sharing of institutions and some forms of joint action. The structure and operation of the Indian Administrative System is a particularly interesting case in point because it structures the bureaucracy as an institution which is accountable to both the centre and the states.

Two other kinds of institutional difference may be mentioned more briefly. One is the legal system. The principles of the common law and civil law differ in ways that affect the enforcement of inter-governmental agreements and the extent to which governments can make grants for purposes beyond their allotted areas of constitutional competence. Another difference, of an entirely different kind, concerns the initiative and referendum. As the example of Switzerland shows, the possibility that any legislation may be challenged by a popular vote encourages elected representatives to be more consensus oriented than in purely representative systems and may also be conducive to closer scrutiny of forms of intergovernmental interaction.

The degree of *diversity of the peoples* of the federation is one further distinction between federations that affects the processes of interaction. Cultural diversity may manifest itself in a number of ways, of which language and religion are prominent examples.

It is of course possible for a federation to have a culturally heterogeneous population in circumstances that have no particular correlation with federalism, as the United States and Australia show. The distinction between federations to which this part refers arises in cases where federalism is linked to cultural diversity in some way: where federalism has been adopted as a means of accommodating cultural diversity, for example, and the boundaries of the federated units complement the diversity of the population. India, Switzerland, Canada and Nigeria are examples.

In federations of this kind, diversity has an impact on the operation of federalism more generally. It may, for example, cause the federation to develop greater resistance to the forces of centralization, as in Canada. It may lead to a greater emphasis on features of shared rule in the original design of the federation, to discourage the emergence of secessionist tendencies. Relevantly for present purposes, however, where the cultural diversity of the population is reflected in the federal organization of the country, it is likely to affect the processes of interaction as well. In such cases, interaction offers an alternative means of demonstrating and reinforcing the values of unity, without necessarily detracting from autonomy and difference. It also offers a means of anticipating, avoiding and handling conflict, which may take different forms, in federations of this kind. At the same time, however, interaction potentially faces additional challenges, ranging from cost (for example, to accommodate language differences) to the barriers to trust that sometimes accompany cultural difference.

## *2.2 Interaction in Developing Countries*

It was noted earlier that one important dimension of this theme concerns interaction in federal systems in developing countries. The federal experience of developing countries has received disproportionately less attention, both generally and in the context of inter-governmental interaction. This is true despite some efforts to reach beyond the experience of countries in the Americas and in Europe. An international conference on federalism hosted by India provides an opportunity to broaden world knowledge and understanding of federal practice in this important respect.

This issue is one on which much will be learned in the course of the conference. In the interim, however, the following may assist to prompt reflection on it. It should be acknowledged at the outset, of course, that developing countries that also happen to be federations are in no way homogenous, and that, for all of the generalizations made, there are likely to be obvious and important exceptions.

One typical difference in the circumstances of developing and developed federal countries concerns wealth and the associated issue of capacity. Developing countries may lack the financial or staff resources to support some forms of interaction. While this is true of more developed countries as well, the impact of limited resources may have a greater impact on less developed jurisdictions. Equally importantly, they may lack the capacity, in some or all spheres of government, to engage effectively in some forms of interaction. Lack of capacity is likely to be felt most keenly at the level of the federated units, or in more local spheres of government. In the case of such federations, there may be a tendency to compensate by accepting more intrusive forms of unilateral central action, or by adopting asymmetric arrangements, often on a bilateral basis, that distinguish between units on grounds of capacity. Such tendencies in turn may have implications for lines of accountability and hence for relations within the federation itself. They may create, for example, an expectation that the federated units are answerable to the centre. They may cause arrangements to be put in place to enable central institutions to intervene in the affairs of the constituent units. This carries the concomitant risk that such powers may be abused, suggesting the need for appropriate safeguards to be put in place.

Interaction offers solutions to such difficulties as well. There is room for collaboration between the federated units or between units and the centre in order to raise the capacity of poorer units and to compensate for asymmetries of this kind.

A second category of differences between the circumstances of developed and some developing federal countries relates to the stability of government generally and to the effective functioning of particular aspects of the system of government. Most obviously, many developing federal countries also are relatively new democracies, or democracies that have experienced periods of authoritarian

rule in relatively recent times. The habits from pre-democratic times are likely to retain a degree of influence. Until a democratic culture is embedded, a willingness to compromise and to accept limits on power that federalism generally requires and that is critical to many forms of interaction may be elusive. Such difficulties will be exacerbated if one party is dominant, particularly in the central sphere. Difficulties of other kinds are presented for interaction where a party system is fragmented and fluid or where other allegiances, including cultural allegiances are more significant, changing and further complicating, the patterns of interaction.

New democracies may also struggle with the requirements of accountability and transparency on which democracy depends. This may be because accountability systems are unfamiliar; because they are not fully developed; or because to give them effect would expose deficiencies in government resulting from misjudgment, maladministration or, in some cases, corruption. In these cases, the problems of accountability and transparency associated with many forms of interaction in federal systems may be greater still.

The distinguishing features of developing, as opposed to developed, federal countries may lead to new insights into the possibilities of interaction from which the developed federal countries also may learn. Many developing federal countries have been established more recently than most of the older, developed federations. Many of them have adopted institutions and techniques from the older federations and have adapted them to their own needs and to contemporary circumstances. Often, the result is interesting innovation. The Fiscal Commissions in India and South Africa are examples. In some cases, also, efforts are being made to give transplanted institutions and practices indigenous roots. The association of cooperative government arrangements with the *ubuntu* in South Africa is an example. In other cases, the circumstances of the developing federation have given rise to new forms of interaction. The Inter-State Commission in India is an example. Also, in many developing federal countries, the vibrancy of civil society has added a new dimension to the practice of interaction in federal systems, perhaps offering alternative lines of accountability that could be further explored.

### 2.3 *Changing Context*

One final cross-cutting factor, which should be understood as affecting all dimensions of this theme, is the constant evolution to which all federations are subject and which necessarily affects interaction as well. Thus, it must be borne in mind that patterns of interaction that exist in any federation at any point in time are likely to be subject to ongoing pressure that will force innovation and change over time. This process is facilitated by the informal and flexible character of many of the forms of interaction in federal systems. It is likely to be enhanced by interchange between federations, to enable innovations on matters of shared interest to be understood more widely and, if appropriate, adapted and applied.

Forces for change may be internal or external. Internal factors include new policy challenges and changes in the system of government itself. Some internal changes will be specific to the country itself. Thus, the changes in the Indian party system, away from the major national parties towards smaller, often regionally based parties changed the dynamic of federalism and patterns of interaction. On the other hand, sometimes internal changes respond to new fashions in government, affecting many parts of the world. Examples with particular relevance to federal interaction include the privatization of public services, giving rise to a greater degree of public/private interdependence, with obvious relevance for the range of parties with an interest in interaction; the growing significance of local government, often resulting in its formal recognition as a partner in federal government and its right to participate in intergovernmental forums; increasing experimentation with forms of indigenous self-government; and the priority now accorded to accountability and transparency.

External forces for change are those commonly associated with internationalization and globalization. The former is understood to include the dramatic extension of international arrangements, sometimes including the deepening of supranational arrangements, that was a feature of the world at the end of the twentieth century. These developments have created new tensions in many federations, in part through their impact on the distribution of power between

the spheres of government and in part because of the many new policy questions thus raised, ranging from the removal of barriers to trade, to global warming, to measures to tackle international terrorism. In some federations, some of these tensions, at least, have been eased through new forms of interaction. The forces of globalization are more intrusive still, often forcing domestic policy changes in response to pressures for greater international competitiveness. These forces also have a tendency to widen the stakeholders with an interest in the outcome of interaction and thus to affect the forms of interaction themselves.

### **3. The Concept of Interaction in Federal Systems**

Until the end of World War II, federal systems were defined in relatively simple terms. The concept of federalism involved relationships between central governments and governmental units found in states, provinces or local levels (often called subnational governments or, as in this paper, federated units). While the countries that were originally described as federal systems varied in terms of their histories as well as the relative powers of each sphere of government, many students of federalism, particularly in Anglo-Saxon countries, argued that the multiple (usually two) spheres of government contained distinct separation between those levels and that they were independent and autonomous. Others maintained that this view about independence was unrealistic as nations took on responsibilities related to the welfare state. These responsibilities sometimes required interaction between spheres of government. In some instances, powers of the central government increased as national policies were crafted.

The powers of the spheres were usually defined in constitutional terms but the assumptions behind this allocation were related to the historical development within the country. This legal framework resulted in different balances between the relative roles of the central government vis-à-vis the states, provinces or local spheres. Despite these variations, the construct of federalism was limited to relationships between governments. Typically, the relationships



lay between various actors in the executive branch, although increasingly, ways are being sought to involve legislatures as well.

In the post World War II era, newly independent states were formed as colonialism diminished around the globe. These newer states were created as variations on the federal theme. They were not always built around existing governmental units but rather reflected demographic patterns involving ethnic, religious or language differences. Issues of political representation, language rights, self-government, control over resources and internal migration had to be confronted. In addition, independence sometimes created scepticism about central government powers and the desire to create systems with fragmented and shared powers. At the same time, development agendas made it important to attempt to create fiscal systems that provided a way to distribute resources in some equitable way across the nation.

Interactions between the players in this post-colonial period often involved decisions about the allocation of resources and the criteria that would be used to make those evaluations. As such, the bargaining process that led to these decisions was likely to include political issues and players that moved beyond constitutionally defined powers and roles. Given below are the rationales for the choice of subthemes.

#### **4. The Choice of Subtheme: Purposes of Interaction**

Federalism involves a combination of shared rule and self rule. In a federation, by definition, public power is divided in some way between at least two spheres of government. The federal or central sphere exercises its powers in relation to the national community, to which it is accountable. Each of the other spheres serves defined parts of the national community to which, also, it is accountable. Each polity enjoys a degree of autonomy in the performance of its functions, in order to respond to the needs of the community that it serves.

Even on this understanding of the feature that lies at the heart of the design of federal political systems, interaction plays a role.

Most federations are structured in a way that enable the people organized in federated units and, sometimes, the institutions of the federated units themselves, to contribute to the formulation or implementation of national policy. Conversely, in some federations, institutions of the federated units may perform functions on behalf of the federal sphere, regularly or intermittently. In some federations, also, institutions have been established that perform functions for more than one sphere and, in that sense, are shared.

As the definition of interaction in the earlier part shows, however, it has long been accepted that the practice of government in a federal system involves a greater degree of interdependence between spheres than the simple model of distribution of powers suggests. The exercise of a function by one sphere of government will often impinge on the functions and responsibilities of others. The several spheres of government in any event operate within a single polity, affecting the same people, collectively considered. It is remarkably difficult to divide powers clearly between spheres of government, in any event. Even if a neat division were possible, at a particular moment in time, it is likely to become less appropriate in due course, as the context within which the federation operates changes.

These considerations, which apply to all federations, make additional forms of interaction inevitable, of both formal and informal kinds. In the light of these considerations, it can be seen that interaction provides the necessary flexibility to make a federation work in a manner that meets the needs of its people, despite the relative rigidity of the formal constitutional division of power. It enables policies to be coordinated, even where harmonization is not sought. It enables information to be shared, statistics to be gathered for the purposes of subsequent policy development and economies of scale to be achieved. It facilitates the spread of successful innovations, which is one of the principal claimed advantages of a federal form of government, and provides a warning mechanism against those that are less successful. It assists to build trust, between groups that may be inherently mistrustful of each other.

As the earlier analysis of the concept of interaction also shows, the range of actors potentially involved in such processes has grown. At the very least, interaction in a federal system in the first decade

of the twenty-first century now involves officials of all kinds, from all branches of government. Typically, it also now includes representatives of more local spheres of government as well, although the degree to which this is so varies between federations. As internationalization and globalization progresses, interaction also may involve actors from the international sphere. In developing countries their role is likely to be particularly significant, as the examples of the World Bank and the IMF suggest. In the face of privatization, private sector organizations and agencies of civil society potentially are involved as well, although often through different processes and still in a somewhat embryonic way.

As the range of actors expands so, too, do the purposes of interaction. In all cases, knowledge transfer necessarily plays an important part. Depending on the circumstances, however, interaction also can assist, for example, with the accommodation of the policies of international agencies with national and subnational needs and priorities. They can enhance the effectiveness of joint schemes between the public and the private sectors and they can improve the responsiveness of policies and programmes to the electorate.

These broad purposes of interaction should be born in mind in evaluating the techniques and considering the challenges of accountability and transparency in subthemes “Techniques, Structures, and Processes” and “Accountability and Transparency”. The particular purpose of interaction on which the Indian Conference on Federalism will focus, however, is its use to manage conflict and tension, whether between spheres of government, between government and the private sector or between groups in the community themselves.

The subtheme has been chosen for several reasons. Firstly, the management of conflict is central to the effectiveness of any federation and to the security and fulfilment of the lives of its people. Some conflicts can of course be resolved by judicial determination but others cannot. Litigation in any event involves cost and delay and typically is used only after conflict has crystallized, making alternative mechanisms for anticipating and resolving disputes attractive. Secondly, despite the obvious importance of this potential use of interaction, much of the federalism literature has emphasized issues related to legal, constitutional and fiscal relationships. Thirdly, problems of conflict and tension are increasing in all coun-

tries, including federal countries and it is timely to examine and to share information about ways in which they might be eased. Finally, while there is potential for conflict in every federation they are exacerbated in some by particular factors including poverty, socio-economic disparities between people, uneven regional development, and deep cultural difference. Many of these factors affect developing countries, sometimes in an acute form. Examining the use of interaction to manage conflict thus fits with what we have identified as one of the most significant contributions that the Indian Conference can make to the understanding of the practice of federal government.

## **5. The Choice of Subtheme: Varieties of Interaction**

A range of instruments of interaction have emerged across the globe in a variety of settings. These instruments have developed from many different sources and are best understood in the context of specific government structures and specific policy areas. Some of these instruments have been primarily used as tools of centralized control while others reflect a tendency to look to decentralized forms. In a world that is characterized by new demands and shifting boundaries, it is important to create instruments that are able to serve as boundary spanning devices. Four broad categories of instruments are of interest: structure, programmatic, research and capacity building, and behavioural.

### **5.1 *Structural Matters***

Structural matters have to do with formal roles and relationships; patterns of authority and leadership; rules, policies and regulations; and mechanisms for differentiation and integration of formal roles, tasks and relationships. They include attempts to redesign or reorganize government to respond to changing needs and priorities; attempts to decentralize or devolve responsibilities is another way to change the distribution of power between national and sub-national players. There are also a number of instruments that faci-

litate coordination. These coordinating mechanisms are a way to facilitate both horizontal and vertical relationships in federal systems without formally changing the rules or players. Meetings of the leaders of states or provinces are sometimes used as a coordination device.

Other structural instruments involve the creation of commissions, policies related to the imposition of regulation or, the opposite, deregulation. Oversight requirements can also occur at the input, process or output side of programmes. They can include elements such as citizen participation or planning requirements as well as evaluation requirements.

## 5.2 Programmatic Instruments

Programmatic instruments are those employed to deal with the dilemma that involves the application of resources and redesign of programmes and grant types. From the national government perspective, they have often been used as a way for states, provinces, localities or regions to attack social and economic problems by providing them with the resources to deal with these issues.

Some countries have moved from highly specific categorical grants toward broader purpose grants as a way of giving subnational players latitude to deal with issues as they define them. While providing latitude for these players, the national government may lose its ability to impose accountability on them.

Other programmatic instruments involve the creation of partnerships or other forms of collaborations. Partnerships generally involve setting priorities and providing incentives at higher levels of government and letting others take action to achieve them. This may mean less reliance on service delivery through public bureaucracies and more utilization of public-public or public-private partnerships. Under partnership schemes, governments share, trade services or contract with one another for specific services. Collaborations may involve the granting of national government funds to a set of subnational players conditioned upon their ability to work together and share resources. Collaboration is often based on recognition that no single agency or system of services can effectively

respond to those who need them. Inter-agency collaboration calls for partners to relinquish total control of resources in favour of the group process, pooling resources, and jointly planning, implementing and evaluating new services.

### ***5.3 Research and Capacity-Building Instruments***

Research and capacity-building instruments are those that assist in the building of capacity at all levels to empower players in the system. Research is an indirect instrument that may help people understand problems and issues, options and consequences of action. As such, it can aid those promoting coordination activities. Similarly the creation of clearing houses for those seeking information can improve coordination and strengthen subnational discretion.

Capacity building is a widely used tool that involves efforts by the national government to strengthen the capabilities of subnational groups to manage programmes or policies on their own. Central governments may provide technical assistance in the form of grants or contracts which provide for training and skill building in a range of responsibilities that allow the grantees to improve skills in the management of grants. They may also ensure accountability through development of management skills that facilitate compliance with national grant requirements.

### ***5.4 Behavioural Instruments***

Behavioural instruments highlight methods of allowing more or less autonomy or imposing more or less accountability. Accountability can be viewed in a narrow fashion, or as emphasizing performance. It requires attention to individual and group processes of communication and processes of conflict management. These instruments can be used to respond to conflict that emerges from political or other macro forces or to deal with communication problems at either the group or individual level. Conflict management is not an attempt to avoid or suppress conflict but to prevent unnecessary conflict and manage the conflict that does occur toward productive ends. Conflict prevention may involve methods of build-

ing consensus among actors in a particular programmatic or policy area. Use of negotiation is one way to deal with differences between actors about the development of rules and regulations.

Hearings are a form of group communication that provides a forum for representatives of groups in and outside of government to take positions and express their views. They also provide a means for governmental actors to collect information and shape ideas that later may become policy.

Individual communication improvement is also a way to deal with differences between a national government and other actors. An environment of resource scarcity and political uncertainty demands openness in interactions across governments and other actors. Players need to be able to listen, delegate, manage conflict and build consensus.

None of these instruments is a panacea to deal with interaction in federal systems. It is important to look at issues and situations from a number of different perspectives simultaneously. While one might search for rules of thumb that make particular instruments more or less appropriate in particular situations, the determination to adopt any one of these approaches appears to be highly idiosyncratic to particular countries and to specific situations. This is a time that calls for players in this process to experiment with new instruments that are appropriate to meet current needs.

Subtheme “Techniques, Structures, and Processes” is concerned with the techniques and structures of interaction. These issues lie at the heart of the concept of interaction itself. The range is potentially vast, and growing. Even though not all arrangements are relevant to all federations, given differences of other kinds between them, there is much to be learnt from a shared understanding of how other federations work in this regard.

## **6. The Choice of Subtheme: Challenges for Interaction**

While various forms of interaction have always taken place in federal systems, a number of developments have occurred over the past decade or so that have increased the importance of interaction.

These include the many new challenges that face contemporary governments, shifting views about the role of government, greater interdependence between levels of government, the emergence of public-private interdependence and movement in policy boundaries. At the same time, some of these developments have increased the range of actors involved in interaction, potentially increasing the complexity of the systems. Arguably, the consequences are not yet fully understood. In many countries, structures and processes have not been adequately accommodated to the new reality.

Interaction in federal systems faces a range of challenges. One is for it to be effective for the purpose or purposes to be achieved. Another is for interaction to be used appropriately, to support shared rule without undermining the potential of self-rule. Interaction is generally a positive force in a federation. If used inappropriately, unnecessarily, or too extensively, however, it can be a façade for centralization, stifling initiative, inhibiting the capacity of public institutions to be responsive to the needs of the communities that they serve, or leading to deadlock, rather than to coordinated action.

One of the most significant challenges to federal interaction lies in meeting appropriate standards for accountability and transparency. It may be noted in passing that these may also contribute towards tackling the earlier challenges as well. Effectiveness of interaction is likely to be improved by scrutiny and accountability of results. Inappropriate use may also be inhibited by public debate and demands for performance at more local levels. On the other hand, both accountability and transparency are more complicated in this context than may at first glance appear. In a federal system accountability claims may be made by a number of actors, some of whom may be in conflict with each other. Voters or taxpayers are the most obvious, seeking to hold public officials from the various spheres of government to account, in the face of complex and interdependent decision-making processes. One government may also be accountable to another, for actions taken on its behalf or in circumstances where one has a legal or de facto power of intervention, when there is a significant shortfall in performance by another. Accountability claims of different kinds may be made by international institutions, such as the World Bank; by international



donors and other members of the international community; and by other governments involved in supranational arrangements. Transparency is the general concomitant of accountability, but will not always be an unqualified good, if it inhibits the capacity of actors to effectively achieve beneficial outcomes, without compensating rewards.

Questions about accountability and transparency arise in this context for a variety of reasons. Interaction in a federal system by definition involves multiple actors in decision-making processes, thus blurring traditional lines of accountability, to a greater or lesser degree. This aspect of the problem may be diminished when interaction is recognized in constitutional or legal form. More often than not, however, this is not the case. In any event, many forums for interaction are informal and private, making transparency difficult and enabling accountability to be avoided. In addition, to the extent that interaction involves financial transfers, it breaks the traditional democratic link between accountability for raising and spending public money. Partly because of the informality of much interaction and partly because of its shifting and flexible nature, mechanisms to record and scrutinize the processes and results of interaction tend to be underdeveloped, in comparison with other governmental forms.

Accountability and transparency are appropriately chosen as a subtheme for these reasons alone. But additional factors also underpin the choice. In the first decade of the twenty-first century, accountability and transparency are more important than ever before. More educated and alert voters, modern modes of communication, the pressures of international competition and, in some cases, the standards set by international agencies combine to impose new demands for performance on governments. Conversely, there is heightened concern about mismanagement and corruption, with accountability and transparency a necessary, if not sufficient, part of most solutions. Not surprisingly, in these circumstances, considerable innovation has taken place in governance and public sector management. Much of this has focused on the activities of governments, considered independently of each other, leaving processes of interaction unaffected. Slowly, however, the changes are begin-

ning to affect interaction as well. For these reasons also, a focus on accountability and transparency in federal interaction is timely at an international conference on federalism in 2007.

## Subtheme Paper

# Anticipating and Managing Tension and Conflict

*Rajeev Dhavan*

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### Abstract

Cooperative federalism is something of a misnomer because its converse, “non-cooperative” federalism, seems to be a recipe for disaster. All federations have to find intergovernmental answers to reduce tension. But federal states vary in respect of (1) geography and demography, (2) differences in constitutional design and practice, and (3) the varying challenges facing each federation, as well as the goals each federation sets for itself. At least one can get experiential insights from different federations without necessarily discovering best practices. Although judicial solutions to federal disputes are necessary, they serve limited purposes. Legislatures provide a form of representation for the constituent states or provinces, but without creating concrete results. Formal intergovernmental councils provide an opportunity to meet, but they cannot take matters farther without the empowerment to do so. Executive federalism has found some answers, but it is not responsive to democratic participation. There has been a general increase in the goals of governance to ensure that all people are protected not just in their civil and political rights but also in being assured welfare and facilities to enhance their capacities and capabilities. If financial resources are unevenly distributed across the federation, the capacity of a poor unit to do all it can for its people is seriously undermined. Contemporary federalism, then, faces three distinct challenges: (1) ensuring an equitable

distribution of finances among states, (2) confronting the challenge of terrorism in federal systems, and (3) devising new answers for natural resources (especially oil and water) in respect of ownership, royalties, and revenues.

## 1. Introduction

No federal system can survive without the active cooperation of the Union and its constituent units (e.g. states) with one another. To that extent, taxonomies of federal systems delineating “cooperative federalism” as a distinct type are something of a misnomer. A “non-cooperative” federalism is a prelude to failure even though levels of interactivity within systems may vary. It is hardly surprising that both institutional provisions and practice yield mechanisms for cooperation, tension management, and conflict resolution. This prefatory note is necessary in order to avoid getting too caught up in academic classifications that serve only as heuristic vehicles for explaining and not for understanding federal arrangements. Cooperation and competition are thus in-built into all federal systems.

Federal systems are hugely complex and diverse in at least three major particulars. In the first place, there are diversities of territory, geography, and demography—including social and cultural diversity. The sprawling Russian Federation cannot be compared with the dense but diversely populated Indian federal system, which in turn cannot be compared with Switzerland or even smaller federations.

Second, there are differences in design and practice—traceable to the constitutional text and evolved practice. The US system started with a simple division of powers, formally resolving disputes through judges. India’s Constitution follows suit but prescribes other resolution mechanisms for various disputes, especially those relating to water. The South African Constitution specifically sets out both principles and mechanisms for cooperation.

Third, each federation faces different challenges and goals. India defined its goals in terms of an egalitarian, socialist, and secular society. While fiercely protecting states’ autonomy as part of its liberal outlook, American federalism has rewritten part of its script

to devise education and welfare goals for all. The issue of a single health-protection system has been a serious issue in Brazilian federal governance. Sri Lanka is besieged with armed conflict and views many matters in terms of containment and peace. Various African federations have gone into overdrive for military reasons, leading to the collapse of both federalism and the constitutional system. Russian federalism struggles to deal with both diversity and rebellion. Iraqi federalism struggles against discontent over resource-distributions and armed conflict, while also struggling to achieve minority protection and peace. Nepal has opted for a federal system, but must decide its objectives in this regard.

Many states are faced with issues of self-determination. Fully conceded, the federation would suffer dissection or break-up. With caution, principles of asymmetrical treatment would have to be devised to justify unequal treatment of unequals. The point at issue is that both generally and interstitially, different federations define their challenges and goals differently—both long-term and when faced with crises. There is a spirit that guides the governance of each federal system. This spirit need not embrace the principles of liberal democracy or equal treatment even if they are a vector through which it should purport to move.

These points of differentiation—namely (1) geography and demography, (2) differences in constitutional design and governance, and (3) the diversity of challenges, goals, and structures—lead, in turn, to considering three important facets that underlie comparative discussion. First, it is very difficult to find a point of equivalence between federal systems. While this permeates all comparative efforts in all social science disciplines, it is particularly teasing in the present case. Second, it is not possible to evolve a transferable and transformative “best practice”. But, if we are not necessarily looking at “best practices”, then what is the purpose of comparative endeavours? This leads to the third point of emphasis, namely, that discussing comparisons is necessarily only “experiential” so as to share ideas and devise individual solutions individually. In my view, it remains a moot point as to whether all federal systems should be imbued with principles of equality and equity within a framework of a liberal rule of law based on democracy. Would any

other trajectory be wrong? If not, is there a normative framework for assessing initiatives, endeavours, and solutions within federations?

## 2. Types of Conflict

Conflicts and tension within federal systems may broadly encompass issues relating to (a) jurisdiction and autonomy, (b) distribution of natural resources, including water, (c) redistribution of wealth and taxes for governance and programmes, including those relating to health, education, and development, (d) pressures relating to policing and national security, (e) the impact of global governance on federal structures, and (f) the general need for evolving uniformity of the law and justice systems in order to protect human rights. Within these broad conceptual descriptions, there are subdivisions and subdivisions of subdivisions. No doubt, there must also be an unclassified miscellany of other issues, including local government.

The traditional areas of concern concentrated on matters relating to jurisdiction and autonomy. In simpler models, such as that originally conceived in the US Constitution, the distribution of powers gives limited legislative competence to the Union and leaves all residual powers to the states. Other federations have more a complex division of powers. In all cases, the system depends on an assumption of giving some protection to territorial integrity and intergovernmental immunities. But, the division of powers in federal systems does not obviate—indeed, it creates—problems about how disputes within federations are to be resolved.

One answer is to leave the resolution of disputes to the judiciary, which, in any event, claims to be the final arbiter on all questions that are part of the custodianship of the constitution. This judicial approach has profoundly affected the career and prospects of most common-law federations, if not all. In some federations such as Canada and India, the superior court also has an advisory jurisdiction. Federal disputes do not necessarily arise only at the instance of one state against the Union, but also in the course of ordinary litigation affecting inter-state relations. Although it is

necessary for the judiciary to interpret the federal constitution, the judicial model has been controversial. Decisions on revenue-raising in India and some other federations have affected the financial viability of the constituent states, creating dependence on the Union and fiscal imbalance in the budgets of the states. The Union's "emergency" powers have been both expanded and disciplined by judges. But disaffection with the judicial model persists. Judges are not accountable to the people except through the law. Their experience and understanding of complex federal issues are often divided, and their views change over time. In the end, while the judicial resolution of disputes is as critical as it is limited, it can never be the exclusive method of resolving federal disputes.

Apart from the adjudication of disputes, many constitutions contain *formal methods* of dealing with particular kinds of disputes through special arbitration methods. One example of this deals with water disputes. In some countries (e.g. the United States), disputes are reposed partly in the mainstream judiciary; in others (e.g. India), water disputes are constitutionally reposed in special commissions or tribunals. Such a special mechanism emulates adjudicative patterns developed internationally as in Europe; in Africa in relation to the Nile, the Niger, and the Sénégal; in India in relation to the Indus and the Brahmaputra; and elsewhere. However, the experience of intra-national water disputes has had only half-hearted success. Such mechanisms are slow, produce contentious reports, and reoccur no sooner than they have been resolved. This is true of decisions in relation to some American river basins (e.g. the Colorado River). Furthermore, the procedure is judicialized, other than in cases where negotiations provide an answer. We will return to the issue of water and river basins, which are matters of global concern.

It is precisely because the judicial models suffer inherent limitations that federal practice resorts to other forms of conflict resolution. There is an inevitable quest for alternative and, perforce, innovative formal and informal methods of consultation and dispute management.

Federations vary. Within some strong federations that empower the Union government with a vast cache of national, concurrent,

and other powers, the empowerment itself cuts down the scope of disputes. In such a situation, a constituent unit is put under constitutional obligations to act with “full faith and credit” (e.g. the United States). Often, elaborate machinery is devised to ensure that legislation is implemented through administrative means. This becomes easier in cases where high-level administrative officers are shared between the Union and state governments. In other cases, where the states have self-contained policy decision-making mechanisms with strong supporting finances and bureaucracy, there is room for acrimony, contention, dispute, and resolution through executive interaction (e.g. Australia and Canada). Where the federation government overshadows the constituent states, the Union is in a position to impose its view (e.g. the United States and India). In such circumstances, the need for the evolution of conflict-resolving mechanisms is all the more necessary.

The sheer fecundity of tensions, practices, and solutions defies any common or “best practice” approach. The potential for evolving solutions through legislative mechanisms was an early innovation. Here, the various constituent states were specially represented in the second chamber of a legislature, with the first chamber being drawn from the populace directly. It was thought that such second-chamber representatives would protect the interest of the states, both individually and generally. But this proved to be an incomplete solution. Where the upper chamber (e.g. senate) was elected directly by the people, it vied with the states, and often eclipsed the large and often unmanageable lower chamber as the direct representative of the people (e.g. the United States). Where the “council of states” is large and unwieldy, the upper house became just another branch of the legislature in parliamentary systems (e.g. India). Where appointments to the second chamber are made by the federal government, the senate’s role in such matters diminishes further (e.g. Canada).

Upper house senates or councils of states vary in their relative authority. They may be, and indeed are, divided by political loyalties that weaken their role as representative of the states (e.g. India and Australia). No doubt, some federations assign a special “federal” formation to their upper houses, which consist of either the execu-



tives of the constituent units or those nominated by the government of these units (e.g. Germany and South Africa). Executive representation in legislative bodies remains an incomplete answer to finding actual solutions even if it provides an opportunity for discussion, albeit amidst political divisions. Thus, where the representation of the states in the national legislature is salutary to mobilize questions, reactions, and obstructions, it does not necessarily represent a forum for discussing inter-federal problems and devising answers.

There are, of course, formal constitutional provisions to promote intergovernmental relations (e.g. India, which overlooked these provisions for 40 years, put in place an Inter-State Council in 1990 with indifferent results). Apart from representation in the upper house of legislatures, some countries have evolved statutory mechanisms relating to budgets, education, foreign affairs, and finances (e.g. South Africa and, on some issues, Brazil). This is, in a sense, reminiscent of putting together the New Deal in the United States during the 1930s, but not through national administrative bodies but inter-state mechanisms. Some countries have specially evolved constitutional mechanisms to deal with fiscal redistribution. Some of these are effective (e.g. India); others are not so effective (e.g. Brazil).

What we are left with is a bewildering variety of measures to promote intergovernmental legislative mechanisms to ensure the representation of states in the national legislature but fall prey to party politics. Even so, where legislative mechanisms work well, they open the door to the people from state constituencies to register their presence. This is less workable where the upper houses are nominated. The formal mechanisms to effect reconciliation, such as inter-state councils, often become formalized with out-of-date or, conversely, premature agendas without too lucid a focus on issues. One reason for this is that those engaged in inter-state councils are often forced to recognize that *realpolitik* lies elsewhere. It is this power play that has led political forces to find and create political solutions, which are likely to produce results.

At a day-to-day level, both politicians and bureaucrats set up ad hoc meetings to identify matters with a view to finding contentious issues and working arguments or solutions. In India and no

doubt virtually every federation, the Union and the states talk to each other. If they do not, the federation will fail. But ongoing day-to-day interaction takes place within policy frameworks and cannot be a substitute for formulating policies and agreeing on their implementation. That is why innovative mechanisms have emerged for meetings of premiers (e.g. Australia and Canada), whether annually or otherwise. This occurs because, without an interplay between the actors who actually possess power, no real political momentum attaches to the discussions. This basic premise has also evolved mechanisms to enable powerful governors, presidents, and others to get together to find solutions (e.g. Brazil). These informal meetings of the heads of the constituent units and the Union occur in countries where the provinces are unevenly matched (e.g. Canada and Australia) or, in different ways, unequal (e.g. Brazil). Executive federalism is founded on real power plays. Amidst shadow boxing, the institutional procedures created by such power plays are effective in creating negotiation frameworks that enable those actually in power to make decisions.

To some extent, however, this array of solutions seems to bypass certain articles of democracy. Judicial solutions are necessarily non-democratic, although they may strengthen the democratic framework by binding it together through the rule of law, which includes justice considerations. Legislative federalism results in the units being represented in the legislature as part of an upper house. But this representation, which is often on partly political lines, does not always represent the interests of the state units or their people. When “senators” are directly elected, they claim parity with and may overwhelm the lower house without necessarily playing a role in resolving federal tensions as a primary activity. Their legislative role (including committee work) becomes more important than their federal role. Where senators are nominated by the centre or the states or elected by state legislators, some upper houses are often unwieldy with their legislative role acquiring credibility.

Given that real power vests with the executive, it is the executive mechanisms that have proved to be most effective. But the more we move to executive-based solutions, the more we move away from democracy. If executive federalism cannot find an appropriate demo-

cratic basis for its functioning, it becomes somewhat oligarchic, even if those in power have to renew their mandate from the people from time to time. This becomes even more marked where the treaty-making power is used to usher in a predator globalization without democratic consultation. To my mind, the democratization of intergovernmental relations and mechanisms must remain a formidable challenge to discipline the emergence of executive federalism, without the latter losing its efficacy or vitality. Is this possible? Surely democracy depends on it. If democracy creates executive federalism, it does not seem right that executive federalism created by democracy can undermine democracy.

### 3. Principles of Intergovernmental Relations

Intergovernmental relations in federal systems have to be made to work on principles of (1) efficiency, (2) justice and fairness, and (3) democracy. No doubt, there is a view that forms of governance are only enabling in nature. They set up a system of governance without assigning any goals to the system as a whole other than to ensure that democratic processes are repeated. It is, then, up to the democratic process to define the goals to be pursued from time to time. Efficiency is not a goal in itself. Electoral democracy chooses between competing elites and goals. Such elites may appropriate the system without defining fair and just goals for all. The disadvantaged and disempowered may feel vulnerable. Their future is not necessarily vouchsafed by majoritarian electoral democracies.

It is strongly urged that apart from protecting civil and political rights to ensure a live democracy, both the Union and the constituent states must also create opportunities for all people in respect of social and economic rights. Neither judicial, legislative, nor executive modalities of intergovernmentality guarantee these concerns. Democratic inputs are required to ensure that the aims of efficiency and social justice run hand-in-hand. To that end, participatory democratic elements need to inure to all instruments of intergovernmental relations in every federal system. No federal system can ignore the economic and social rights that build the capacities and capabilities of people. Thus, apart from protecting

multiculturalism and the process of live democracy, each person is entitled to rights of capacity and capability. This is especially important in the areas of education and health. Thus, the infrastructure on which governance rests is both (1) physical in terms of roads, communication, technology, and physical and natural resources and (2) social and economic in terms of human resources that enhance individual capabilities and expectations for the betterment of all at all levels. Although these were once regarded as welfare goals, they form a part of governance as a matter of right for both individual persons and society. But such an infrastructure requires a proper distribution of financial resources within and across a federal system. To that extent, all federal systems are necessarily goal-based.

Although it may be possible to examine all the possible tensions and conflicts in a federal system, such an exercise would be as futile as it may prove to be incomplete. No doubt, due attention has to be given to all intra-federal dispute-resolving systems, whether judicial, legislative, administrative, or executive. At a time when globalization is advancing, it seems odd that treaty-making in most federations is not an open, consultative exercise in which people are properly informed of the portentous events that will alter their lives. Further, federal governance confronts larger questions of implementation of legislation and policies that suffer entropy in a federal system that fails to coordinate its own initiatives. We need to examine various structures, institutions, and procedures of inter-governmentality in federal systems. This is not done in the hope that there is one right answer but because interactive dialogue across countries can generate ideas that may transplant into possibilities, even though not always complete solutions.

However, I wish to concentrate on three questions and issues of contemporary significance. They are as follows:

1. Why are some governments within a federation rich and others poor—with consequential effects on what constituent units can do for their people?
2. Does the advent of terrorism threaten the federal system by creating tensions within the system and necessitating imbalances in the federal structure?

3. How are physical resources, especially water and energy, to be appropriated and distributed?

### 3.1 *Wealth Distribution*

Inevitably, some constituent states are poor and some are rich. The richer states tend to generate more revenue than the poorer states. The poorer states need money for governance, administration, infrastructure, and, no less importantly, the welfare and development on which the future of each individual, group, and collectivity depends. If we further accept that protecting rights and enhancing capabilities are part of the duties of the states, a considerable re-distribution of revenue may be necessary to ensure that the states can deliver this basket of goods. In all this, something depends on the revenue-raising capacity of the units devised by and under the constitution of the federation.

Most states have relatively smaller revenue-raising capacities than the Union, which gets the lion's share (e.g. India). This may not be true of other federations. But in each case, the formal revenue-raising power can only raise revenue if there is economic potential in that state to yield revenue. Where economic and financial activity is scarce, natural resources minimal or difficult to exploit, and the infrastructure and incentives inadequate, this will be reflected in the revenue raised by the state. State lotteries have become popular in some states with depleted financial resources (e.g. India's north-eastern states), but lotteries can hardly solve the financial problems of a federation.

Problems of fiscal federalism stare us in the face. Some countries have created constitutional finance commissions. Programmatic distributions may come from the Union in various areas of infrastructure, development, and welfare. This would be tied to the programmes in question and may add to the provincial debt if given by way of loans or under conditions where matching contributions are required from the state or where there are recurring expenditures to be provided by the states. An important problem sometimes arises when the Union passes expenditure-burdening legislation but the finances are not to be borne by the Union but by the states.

In theory, this raises questions of intergovernmental immunities. In fact, states are often grateful recipients. More funds flow in for important programmes and activities but not without state contributions adding to their financial impoverishment. State contributions could be made a precondition for the grant. But such programmatic distributions do not provide financial autonomy for the states. Financial autonomy in this context means the capacity to devise their own governmental objectives in their own way. If such a financial autonomy cannot come from the states' resources, how will they be generated?

Federations cannot be selfish in their aims. That is why many states devise (a) intergovernmental institutional processes to ensure that fiscal federalism can create mechanisms to enable fiscal redistributions and (b) use these institutions and processes to devise "equalization" formulae to redress imbalances. Sometimes these imbalances have to be remedied vertically (Union to states). Sometimes horizontal transfers have to be effected so that the very rich states part with funds for the more needy states. Some constitutions have created constitutional finance commissions to devise equalization formulae (e.g. India). This works more easily for vertical transfers from a rich Union to all the states on the basis of population, need, performance, and revenue deficits, but may be inadequate for effecting equitable transfers within the system as a whole. This has become all the more important where some states are plush with oil (e.g. Alberta in Canada). When I was in Iraq in 2005, legislators were most concerned as to how oil revenues from the Kurdish and Shiite regions would work to the benefit of all.

I do not think we have found an appropriate answer to all this. There is a considerable rigidity in federations in respect of revenue-raising. The rest is a matter of negotiation. But how? In what way? On what principles? Many states try to work out solutions informally (e.g. Canada and Australia), but more concrete answers elude them. There is a need to evolve more comprehensive and reliable processes to ensure that vertical and horizontal answers do not respond just to need but move toward a more responsible equity that assures financial autonomy in the larger sense.

### 3.2 *Challenge of Terrorism*

My second question relates to the challenge of terrorism. This is both an old and a new challenge (e.g. India, which has had administrative preventive-detention laws since 1950 and more specific anti-terrorism laws since 1987). But this challenge acquired a new dimension and zeal after the attack on the twin towers of New York City's World Trade Center on 11 September 2001. In the view of some observers, the post "9/11" anti-terrorism drive has victimized Muslims and entailed a loss of civil liberties for all. This is being examined at length by an Eminent Panel Group of the International Commission of Jurists. However, there is great international pressure both through the United Nations and otherwise to enact anti-terrorism laws. This may entail strong anti-terrorist legislation as part of international obligations entered into by the Union. The implementation of the legislation may be left to the Union or the states or both. In many federations, policing and public order are left to the states (e.g. the United States).

Where does terrorism fit into all this? The Union may devise emergency regimes in its constitution through legislation to override the exclusive autonomy of the states in respect of law and order and policing. This may not just be in countries faced with civil war (e.g. Sri Lanka) or where there are low-intensity operations (e.g. India) but also where there is just a threat of terrorism. The army may be sent in as part of an undeclared martial law but ostensibly to aid the civil authorities (e.g. India in the north-east). Anti-terrorism responds to both real and imaginary emotive fears. It sweeps normal governance aside, invades civil liberties, and cuts across intra-federal limits. It is often grossly abused, especially in wars of self-determination (e.g. India, Russia, and Sri Lanka). We have not really examined this issue in detail; yet we should do so.

### 3.3 *Distribution of Natural Resources*

My last area of focussed concern is the distribution of natural resources, especially in relation to energy and, most important, water. Coal and oil have changed the destinies of nations and federations.

There is a primary question of the ownership of these resources. To whom do they belong? Iraqi legislators were most concerned as to whether oil located in Kurdish and Shiite areas should be held in trust for all Iraqis. Some countries treat these resources as part of national wealth. Others say it belongs to the states. Revenues that arise from such resources consist of income from both sales and state and federal taxes on the income and sales. To some extent, equalization formulae may redistribute the revenues but not the incomes. Fractions of ownership of the resources and the dividends flowing from such ownership may be allocated to a common pool. The states are not always happy to share their resources with others, nor are they always ready to treat these resources as part of the common wealth. Eventually, the present solution encompasses revenue distribution and persuading the resource-rich states to join a system of intra-federal distributive justice. Concepts of distributive justice within federations are weak and incomplete. States want to hold on to what they have: "Tax us but do not take away what is rightly ours." But who rightly owns what? Who should?

Federalism has tried also to answer the more fluid question of sharing water resources. Some observers say the wars of the twenty-first century will be about water. If they will take place across nation states, they will certainly create tensions within federal states—as indeed they have. But a far more elaborate and systematic approach has been made in respect to both international and intra-national water disputes. The Helsinki Principles of 1966 delved into both theory and practice. In the course of resolving water disputes, many approaches have been espoused ranging from prior appropriation, natural flow, or equitable apportionment. Federal determinations have veered toward accepting equitable apportionment. But that is only the beginning of the problem. Who is going to apportion? How much and in what way?

Constitutional mechanisms may be created especially for water disputes (e.g. India). They may be left to the ordinary courts (e.g. the United States). In all cases, there are zealous and ceaseless negotiations that precede the precipitation of a conflict. But, then, who decides? With what emphasis? The most fertile states demand a replenishment of their fertility. As a contemporary example, this



is precisely what happened in the award with respect to the Cauvery Dispute of 2007. Use of the waters of the Kaveri River has long been a source of serious conflict between the states of Karnataka and Tamil Nadu. The Cauvery Water Disputes Tribunal issued its final decision on 5 February 2007. However, the fertile delta state of Tamil Nadu wants more water. The upper riparian state feels it needs more water for its farmers. Tension, demonstrations, and violence follow. This is only an example. By the time a case is decided, years pass by. By then, we are ready for the next dispute. Although mechanisms for water disputes are better defined and act on a wealth of principles, a great deal of thought needs to be given to trusteeship principles in relation to water, not just from rivers but also from other sources.

#### 4. Summary

To sum up is always difficult. In the process, something is lost and something is gained. This paper broadly proceeds on the basis that:

- (a) All federations must necessarily develop intergovernmental mechanisms, processes, and institutions without which they run the risk of lowering the standards of governance.
- (b) The sheer diversity of federal structures in terms of (1) geography and demography, (2) differences in design and practice, and (3) challenges and goals of governance make it difficult to find points of equivalence. Yet, experiences can be shared.
- (c) The goals of governance have been enhanced so that both the Union and the constituent states are not just expected to provide efficient governance and protect civil and political rights, but are also expected to ensure that welfare measures for and enhancement of capabilities and capacities of all are vouchsafed. This makes the problems of intergovernmental sharing of resources more complex and challenging.
- (d) The traditional method of leaving matters of constitutional interpretation and dispute settlement to the judiciary has proved to be both indispensably crucial as well as inadequate. At some point, it was thought that legislative solutions might provide an answer. But the representation of states in the Union

does not guarantee results, nor does it obviate tensions and conflicts. Many states have, therefore, looked for answers through executive-based processes and solutions. Sometimes formal intergovernmental councils are created by the constitution. They have often taken shape without setting concrete agendas or evolving results. In other cases, more informal and semi-formal methods that bring the executives of the Union and state governments together have worked better. But in the age of globalization and under the intense pressure under which federalism works, the importance of democracy is overlooked by this executive takeover. We need to look for better answers.

- (e) The paper has thus focused on three questions. (1) Why are some states rich and others poor? Given the tasks of governance, can we equalize the capacities of states to meet the challenges of governance uniformly for the population of all states? (2) Has the challenge of terrorism tended to undermine federalism to create tensions and conflicts? (3) Has federalism adequately resolved issues relating to the distribution of natural resources (especially energy and water)?
- (f) With this specific focus in mind, how will intergovernmental relations respond to these challenges?

Subtheme Paper

# Techniques, Structures, and Processes

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*Stefan Hammer*

## Abstract

This paper provides a structural framework for comparing patterns and mechanisms of interaction in federal systems. It concentrates on the relations between the federal government and the constituent units. The analysis broadly develops along an evolutionary cross-cut of the various governmental types of federal systems.

Historically, judicial adjudication of power conflicts between the different jurisdictions and representation of the constituent units in the second chamber of the federal legislature represent the core interaction mechanisms. Beyond this dualistic model of securing the interests of the different jurisdictions against mutual encroachments, integrated federalism has made the federated governments implement federal policies that were previously designed with their participation through the federal chamber of the national parliament. This cooperative model has often been supplemented by additional bodies for integrated policy planning.

National party structures have undermined effective collective representation of the component units in many federations. By contrast, growing interdependence of government tasks has raised the need for policy coordination also in dualist federations. The resulting informal patterns of cooperation mainly involve the executives of the different jurisdictions. While they remain more

fluid in presidential/congressional federations, they have been institutionalized more sustainably in parliamentary federations where executives command parliamentary majorities. However, their potential is limited where the logic of divided parliamentary accountability prevails.

A recent trend toward interaction models allowing both disentanglement and flexible cooperation between the federal partners is common to all federal systems. In some federations, the diversification of political parties has added to the individual profiles of the federated units. Concluding agreements has become a widespread practice that facilitates asymmetric solutions.

## 1. Introduction

In the history of federalism, forms and techniques of intergovernmental interaction have increased in both extent and variety. The classical dualist design of federal systems has largely relied on two types of instruments: political representation of the component units in the federal legislature and resolution of conflicts among the different jurisdictions by the judiciary. Where such judicial mechanisms became operative, they have retained their important role of maintaining the delimitation of jurisdictional spheres, but their role has become increasingly limited because the growing interdependence among the different jurisdictions calls for mechanisms of coordination and integration of policies.

On a constitutional level, this new integrative task was first contemplated on a broader scale in federal systems that established a functional integration of federal legislative and regional administrative powers. In this Central European model of integrated federalism, the second chamber of the federal legislature, beyond merely protecting the interests of the federated governments in the federal arena, has been designed as the pivotal instrument of integrated policy-making. Especially where similar models were adopted by developing countries after World War II, additional constitutional and statutory bodies of central coordination were established in order to facilitate national unification and development.

However, both in dualist and integrated systems, institutions originally designed for the political representation of the consti-

tuent units in the federal arena, especially the federal chamber, have lost much of their original function under superseding political party systems. The resulting need for alternative interaction mechanisms, however, has not become obsolete, but has rather increased over time with the expansion of government tasks and their growing interdependence. Thus, various other patterns focussing on coordination and integration of policies have been developed in almost all federations, mostly involving the executives of the different orders of government. Although one can observe a global trend toward this type of executive federalism, the scope and functioning of the respective techniques depend largely on the institutional structure and the political system of the respective federations. The extent to which the different instruments have been enshrined in the constitution or otherwise put on a statutory basis varies considerably, thus leaving much room for a variety of informal mechanisms in many federations.

Nowadays, economic globalization requires further adjustment and harmonization in many policy fields, not only nationwide but also internationally, while at the same time calling for deregulation and decentralization in many governmental areas that are being opened to market competition. In addition to the increasing diffusion of governmental and societal spheres, cultural diversity, regionalism, and empowerment of minorities have contributed to the fragmentation of federal polities. These contradictory precepts have put federal systems under pressure to readapt their respective arrangements of power sharing in order to accommodate the conflicting needs connected to international political integration and the unifying trends of global civilization on the one hand and to national decentralization and the particularizing effects of fragmented societies on the other. As a result, new coordinative interaction mechanisms seek to adjust both responsibility for policy coherence and autonomous performance of independent actors.

## **2. Federal Distribution of Powers and the Judiciary**

A basic dimension of interaction in a federal system is the management of disputes arising from the distribution of powers among

the different orders of government. As the delimitation of governmental competences in a constitutional text inevitably remains indeterminate, the exercise of divided powers within a common polity entails interferences. In particular, the growth of government tasks that could not have been contemplated when constitutional texts were drafted increases the chances of mutual interference and thus the need to manage the resulting conflicts. "Classical" federal states have mostly included an independent judiciary capable of reviewing such power interferences between the federal and the federated governments under a common constitution. The logic of resolving power conflicts by judicial enforcement of a constitutional delimitation of jurisdictions is clear in a dualistic model where government powers are mutually exclusive and can be exercised independently. Yet over time, it has become pervasive also in systems of integrated federalism.

The judicial approach was first adopted in the common-law setting of US federalism, where the so-called American system of judicial review of legislation by the ordinary judiciary evolved as a means to enforce the limits of federal powers on the basis of the constitution as higher law. Yet in the various federations of a common-law background, the impact of the judiciary on the practice of power sharing has varied considerably. In the United States, the judiciary, relying on the political mechanisms of representation of states' interests in the federal arena, has allowed a tremendous expansion of national powers since the early twentieth century. To a lesser degree, this has been true in Australia, too. In India, the powerful Supreme Court has also practiced deference to the federal government in interpreting its constitutional powers. Only more recently has judicial doctrine reinforced constitutional limits on national powers in all three countries, thereby also immunizing essential elements of the status of the component units against federal encroachments. As opposed to the previous cases, judicial interpretation of the constitutional division of powers in Canada has generally favoured expansion of provincial powers since the first half of the twentieth century. This is also due to the fact that most of the enumerated powers that cover the enormous increase of public tasks under the welfare state, and which are being

attributed to the federal government in most federations, have been attributed to the provinces in Canada. In the United States and Australia, courts have also limited the voluntary surrender of regional powers to the national government, a practice that emerged more recently in the context of cooperative federalism. Thereby, the judiciary has asserted the dualist logic of distinct spheres of democratic accountability.

In the first half of the twentieth century, a civil-law model of centralized judicial review concentrated in a specialized constitutional court with well-defined exclusive jurisdictions was created in Austria and in Germany. The constitutional courts in these two federations have always exercised their powers of review of legislation equally against the federal government and the federated units, but due to the dynamic potential of the federal powers enumerated in the constitution, this also has resulted in a progressive expansion of federal powers. Yet the underlying assumption has always been that the federal and federated jurisdictions are on an equal legal footing and that the relationship between them can be conceived in purely legal terms. This formal perception contrasts not only with the substantive preponderance of federal powers but also with the nature of the model of integrated federalism adopted in Central Europe and with the elements of both hierarchy and cooperation attached to it. The functional interdependence between the different orders of government calls for a cooperative pragmatism that cannot be imposed by the judiciary. Thus, the legalistic approach and the central role attributed to constitutional adjudication could not overcome political deadlocks resulting from the “consociational” character of Germany’s integrated federalism. The South African Constitution, which has adopted a markedly integrative model of federalism influenced by the German system, establishes an explicit principle of “mutual trust and good faith” under which the federal partners are bound to seek friendly settlements of disputes outside the courts. Under South Africa’s system of constitutional adjudication, which combines the European and American models, the exercise of federal power is in principle subject to judicial review, and even preventive judicial instruments have been established to ensure compliance of legislative bills and provincial

constitutions with the federal Constitution. Yet under the constitutionally mandated spirit of cooperation, the political overweight of the national government, alongside the pervasive dominance of the national ruling party, inevitably puts the provinces under the “cooperative” leadership of the centre.

Against such a background, the examples of Austria, Germany, and India show that taking seriously the relationship between the national and regional governments established by the constitution as a judicially enforceable standard has some merits not only for dual-sovereign federal systems but also for integrated systems as a counterweight against otherwise centralizing forces and hierarchical features. Constitutional principles of mutual respect and trust (*Bundestreue*) have been developed by the constitutional courts in Germany and, to some extent, also in Austria as judicially enforceable standards that limit the centralizing effects of the growing interdependence of federal and regional legislative powers. Although concurring powers and overlapping responsibilities in integrated federal systems mostly involve rules of legal precedence (predominantly federal over regional law as in Germany, South Africa, and, most extensively, in India), the limits of federal precedence can be the source of jurisdictional disputes that call for judicial settlement as well.

Upholding the rule of law in the relationship between the federal and the federated governments becomes especially crucial where the national government exercises extensive powers of control over or intrusion into the regional jurisdictions. Beyond the classical precedence of federal law over state law, such powers can include the power to give directions to the states, to act instead of the states, or coercive measures such as the power to depose state officials or to dissolve state legislatures. Such powers of federal control (*Bundesaufsicht* and *Bundesintervention*) do exist in almost all federal countries, but some countries allow their implementation beyond exceptional circumstances narrowly defined in the constitution (e.g. India, Argentina, Russia, Nigeria, and Malaysia). The Indian Union executive, for example, disposes of wide and frequently used powers to give directions to states and to displace states’ governments by imposing “President’s rule”, but in the last



two decades, the judiciary has implemented constitutional limits on the exercise of these federal powers. By contrast, the Supreme Court in Argentina, being strongly dependent on the federal presidency, has declined to review the frequent federal interventions into provincial affairs. Likewise, the Malayan government has managed to curtail the independence of the judiciary, thus leaving to the central executive a large discretion to override the balance of powers in the federal system, especially under a broadly defined “emergency” regime.

There are federal constitutions that do without judicial enforcement of the constitutional limits on federal legislative powers without thereby subjecting the constituent units to centralizing pressure. This is true for Switzerland where federal legislation is generally not put under judicial review of its constitutionality. Yet the cantons do not run the risk of losing their powers because they rely on effective representation in the federal law-making process, which is backed by a direct involvement of the people. A doctrine reflecting a similar logic under the US Constitution has been adopted by the US Supreme Court, but during the decades when the judiciary followed this doctrine and largely refused to enforce the constitutional limits on the powers of Congress, the states became increasingly subject to coercive uses of federal powers. As a result, the Court resumed its review power more recently. In some ways, the development in India reflects a similar experience.

### **3. Federal Parliament, Federated Units, and Party Systems**

It is inherent to the concept of federalism that the federal order is conceived simultaneously as a single polity under a national government and as a (con)federation of smaller polities under a common federal government. Thus, national and federal elements can be found in the design of the federal government, so that interaction between the different levels is always somewhat built into the central sphere already. However, federations vary considerably in balancing those two elements. Here again, an important distinction runs between dualist (divided) and integrated federal systems. This

distinction entails, above all, a different conception of the second chamber of parliament. Another relevant factor is the prevailing type of horizontal relationship of powers in a federation, either representing a presidential/congressional or a parliamentary system. However, in addition to the respective constitutional design, socio-political factors, such as the party system and the conditions in civil society at large, have a practical impact that is at least equally important.

### 3.1 *Dual (divided) Federalism*

The integration of provinces in the national sphere is perhaps least developed in Canada's radically dualist model. As senators are appointed by the federal government, the second chamber is not conceived as a federal chamber, so provincial politics and national politics stay apart. Even though parties in the national arena feature marked regional affinities, their members in the lower house do not act as representatives of the provinces either; hence, relations between the federal and the federated governments remain competitive.

According to the classical dualist model, however, the second chamber of the national parliament represents the component polities primarily in order to safeguard their autonomous spheres against federal encroachments. However, the role of regional governments in the federal parliament varies considerably, and where regional influence is powerful, it is often not confined to the upper house. In the presidential systems of Brazil and Argentina, members of both houses are directly elected, but the governors of the federated entities, which are directly elected as well, exert great influence on the selection and the behaviour of members of the federal parliament. Thus, the regional executives and their relation with the president largely determine the degree to which the policies of the federal presidency are supported in the National Congress. The political power of regional governors has always been very strong in Brazil due to the large fiscal autonomy of the states and has also increased in Argentina in the context of a party system offering room for political strategies in the regional arenas. In both

countries, the basis for coherent national-development policies remains fragile, while regional asymmetries of both economic conditions and political representation in the federal arena sustain considerable distortions.

State governments were once very influential in the US Congress, too. As opposed to Brazil and Argentina, however, they have lost influence since the direct election of senators was introduced in 1913 and since members of the House of Representatives were made largely independent from support of state governments through electoral reforms in the 1960s. Presidents still seek to lobby Congress members with the help of state governors, but for Congress, the importance of intergovernmental relations and thus of the respective committees of both houses has declined. The structural impairment of state influence in Congress and the resulting growth of “coercive federalism” have enhanced the legitimacy of judicial enforcement of constitutional limits on congressional powers.

To an important extent, the role of the federated units in the federal legislature depends on the party system, which often supersedes the constitutional framework. There can be some room for effective representation of constituent polities if the cohesion of parties in the national arena and the resulting party discipline among the members of the national legislature is not too tight, as in presidential/congressional federations like the United States, Brazil, Nigeria, and Argentina, even if the national parties also pervade the regional arenas. As the members of both houses are directly elected in these countries, they may still advocate specific interests of the federated units’ governments if institutional links to such interests are upheld, mainly through the electoral system. As mentioned above, this was formerly the case in the United States and still is the case in Brazil. In Argentina, where members of the federal parliament are likewise dependent on the provincial executive, a powerful president who controls the provincial executive can thereby secure some discipline among Congress members. In contrast, there is no such institutional link between the members of the Senate and the state governments in Nigeria; thus, the federal president has to rely on variable party loyalties for support in both

houses. In Russia, where the president controls the federal legislature with the help of a restricted party system, the members of the federal chamber are directly appointed by the regional governments. Here again, it is the dependence of the regional governments on the federal presidency that serves as a decisive additional factor to guarantee the political loyalty of the federal chamber. In Mexico, the monopoly of a single party contributed for a long time to the lack of effective representation of the states in the federal parliament and to the centralizing effects of the all-dominant executive. Recently, however, the rise of regional parties has reinforced federalism and the regionalist functioning of the federal chamber.

More clearly than in presidential federations, it is the political parties in parliamentary federations that can become decisive in curtailing an efficient representation of the federated units within the federal parliament. Together with an elevated party discipline resulting from the dependence of the executive on stable parliamentary majorities, a pervasive cohesion of national parties covering both the federal and the regional orders of government can transform the federal chamber into a forum of national politics. Thus, in Australia, where direct election of senators intensifies their affiliation to national parties, equal representation of the states in the Senate allows for diverging majorities in the two houses, which transforms the federal house into an instrument of national opposition politics. From that, there arises an element of checks and balances originally alien to the logic of parliamentary government.

### ***3.2 Integrated Federalism***

Unlike Canada and Australia, most parliamentary federations have adopted a model of integrated federalism. Participation of the regional governments in federal law-making is perceived not primarily as a safeguard of their jurisdictional sphere against federal interference, but rather as a cooperative instrument by which they contribute to formulating the policies to be determined in the federal laws they are supposed to implement through their administration. Both the construction and the powers of the federal chamber reflect that purpose. With the exception of Switzerland, where the federal

chamber is directly elected and basically has coextensive equal powers with the first chamber, the members of the federal chambers in other federations of an integrated type are selected either by the regional legislatures (e.g. Austria and India) or by the regional executives of the federated units, like in Germany, or by a combination of both, as in South Africa. The powers of the second chambers in these systems tend to focus on the fields that affect the governmental functions and interests of the federated units. Only in Switzerland and, by and large, also in India are the powers of the federal chamber basically coextensive and equal with those of the lower house.

Thus, in most integrated federations, the competitive logic of the Westminster parliamentary system has been altered from the outset by a distinct feature of consociationalism. Yet this does not mean that it is exclusively or even predominantly the federated governments (legislatures and/or executives) that collectively act as bargaining partners in the federal legislature. Despite their decisive involvement in selecting the members of the federal house, it is rather the political parties who take hold of the federal chamber as a forum of national party politics. Even in Germany, where the federal chamber represents the regional executives, strong leaders of *Land* governments associate with others across party lines only when existential interests of regional governments are at stake. Normally, they follow their national party affiliation on other questions.

### 3.3 *Party System, National Opposition, and Political Deadlocks*

Overall, in whatever way the composition of the federal chamber and the selection of its members is organized, regional representation can be prevented from being superseded by national party affiliation only to a very limited degree. However, particular structural conditions decisively determine the chances of the federal chamber functioning as an opposition instrument of checks and balances on federal governmental politics supported by the majority in the lower house. In Germany, blocked votes for each state (despite their weight being adjusted to population size), combined with the timing of elections, have often led opposition parties to

exercise a majority in the federal chamber. Likewise, in India, although the federal chamber is composed roughly proportionally to the size of the state populations and to the parties represented in the state legislatures, the time difference with national parliamentary elections has frequently prevented the actual party in power from commanding a majority in the federal chamber as well. Within recent decades, an increased fragmentation of the Indian party system and the rise of parties with regional strongholds have added both to the opposition and to the regionalist impacts in both the federal and the lower house. Thus, bargaining within unstable coalition-government majorities and the need for compromise between differing majorities in the two houses indirectly contribute to strengthening intra-state federalism in national legislation. In the semi-parliamentary system of Switzerland, where the members of the States Council (*Staenderat*) also act according to their national party affiliation rather than to specific cantonal interests, direct election by majority vote and equal representation of cantons can also produce different majorities, but the problem of sustained political deadlock has not yet become as acute as in Germany.

If, on the other hand, the structural conditions tend to produce equal majorities in both houses, the federal chamber can be deprived of any meaningful role if the national party affiliations of its members prevail over regional interests. In Austria, a nearly proportional representation of the provinces in the federal chamber and the proportional election of its members by the state legislatures results in largely identical majorities in both houses. Thus, abolishing the Federal Council has been a recurring proposal. A comparable decrease of political weight of the federal chamber could be observed in parliamentary federations with one dominant party, such as South Africa or, in previous decades, in India. In such cases, the ruling party not only tends to superimpose representation of distinct interests of federated units but also eliminates the chance for national opposition politics in the federal chamber, however it is composed. In South Africa, it is also a lack of sufficient capacity on the side of provincial governments and their representatives in the National Council of Provinces (NCOP) that prevents them from engaging the complexity of national politics. Low poli-

tical esteem of the federal chamber as such, comparable to the Austrian situation, contributes to its failure to represent regional interests in national politics.

Disagreement between the two houses, even for reasons of party difference, is perceived somewhat differently according to the governmental system of the respective federation. In systems of divided federalism of a presidential/congressional type, such a deadlock tends to be accepted as inherent to the system of checks and balances. Nigeria, where joint committees regularly negotiate solutions, is an exception. In Australia's parliamentary federalism, a more competitive logic can be discerned in that the impasse arising from a possible deadlock allows for the new election of both houses. The logic of integrated federalism, however, supersedes the competitive logic of parliamentary government and calls for a transformation of conflict into cooperation. In Germany, parties are forced to seek compromise in the joint mediating committee whenever the consent of the Federal Council is required. Similarly, South Africa provides for negotiation in a mediation committee; if the conflict persists, a final decision can only be taken by a two-thirds majority of the first chamber. In India, a joint session of the two houses provides a formal fall-back mechanism that is rarely used. Its mere existence rather induces compromises through informal negotiations. But in case of sustained deadlocks between the two houses, the competitive logic of parliamentary systems may again prevail over the consociational traits of integrated federalism and may thus trigger discussions about the legitimate role of a federal chamber. In Germany, a recent reform has aimed at disentangling the national and regional levels in federal legislation to some degree by reducing the requirement of consent of the Federal Council, while in turn allowing the *Länder* to depart from federal legislative parameters to a larger extent.

#### **4. Integration of Public Tasks and Patterns of Cooperation**

In recent decades, an increasingly integrated perception of policies spanning different jurisdictions as well as a growing density of reper-

cussions between different policy areas have increased interdependence between the different orders of government in federal systems. In developed countries, this tendency was induced by the growth of public tasks in the welfare state after World War II, ranging from health care and education to economic development and regional planning. The same tendency has somewhat recurred in a reinforced version in several developing federal countries. After they had attained independence, their perception of politics was integrative from the outset, in the sense that all policy areas and all spheres of public responsibility were directed toward the common goal of development in all spheres of society.

The way in which federal countries have met the challenge of policy integration and diffusion of jurisdictional boundaries varies considerably. As far as classical dual federalism contemplates interaction between the different governments at all, judicial dispute-resolution and collective representation of regional units in federal legislation can provide means of stabilizing a system that is presupposed to be balanced in allocating political power to the different jurisdictions. However, this dualist set of instruments does not meet functional expectations that go beyond the mere preservation of jurisdictional spheres and interests. Thus, many such countries have developed techniques of informal intergovernmental cooperation mainly between the executives of the different spheres. Partly, these arrangements of inter-state federalism have been institutionalized in more permanent patterns of council government, which, to some degree, approximate the formalized intra-state participation of federated governments in federal law-making as it is familiar in integrated federalism. Mostly, these informal structures have not been put on a statutory, let alone a constitutional, basis. Some constitutionally dualist federations, however, have scarcely developed any institutional framework for a sustained integration of policies, so collaboration happens, if at all, on an essentially contingent basis.

By contrast, the integrated model of federalism provides a nucleus upon which various intergovernmental structures can be established in line with the essentially cooperative spirit of the constitutional design. Thus, some developing federations have provided



for a complex arrangement of formal institutions of cooperative federalism already in their constitutions. In many such cases, however, these structures also are subject to the superseding features of the political party system that have already been mentioned as interfering with the original purpose of a federal chamber. Under certain political conditions, these collective institutions of cooperative federalism are being marginalized by informal bargaining processes in which the federated units interact individually with the national government. Being less institutionalized and more flexible in character, these patterns of inter-state intergovernmentalism get closer to cooperation mechanisms that have been developed in dualist federations.

#### 4.1 *Intergovernmental Interaction in Systems of Integrated Federalism*

The German and Austrian constitutions provide for cooperative institutions beyond the federal chamber. In Germany, so-called joint tasks, which include post-secondary education, regional planning, and agriculture, are subject to joint public financing determined in joint planning committees in which the federation and the *Länder*, taken together, have an equal share of votes. In the field of fiscal federalism, Austria's Constitution provides for a highly developed mechanism of general financial equalization between the federation and the *Länder* as well as among the *Länder*, covering the distribution of both taxation powers and financial transfers. Based on rudimentary substantive rules on the distribution of expenditures, the partners of the federal system determine their shares of fiscal revenues every few years through negotiations among their executives on a federal bill on financial equalization to be formally adopted by the federal parliament. This mechanism has recently been supplemented by a formal consultation procedure that enables the federation and any *Land* to challenge a financial burden to be expected from a specific measure planned by any other partner. If consensus is not reached in the relevant consultation committee, which is composed of representatives of the executives of the federal partners, the additional burden has to be borne by the entity that

caused it, even if constitutional rules provide otherwise. In Germany, the substantive shares of fiscal equalization are largely prescribed by the constitution. Implementation mostly requires the consent of the federal chamber.

Beyond formal institutions of cooperation, integrated federalism, with its interdependence of the different orders of government, has also triggered a machinery of informal (non-statutory) but institutionalized consultation mechanisms that supplement the formal representation of the federated entities in federal law-making. On the one hand, implementation of federal policies by federated entities may require consultation on the administrative conditions and their harmonization; on the other hand, the required cooperation of the federated entities in determining those federal policies calls for an assessment of the impact of proposed legislation on the administrations of the federated entities and for a preliminary political coordination preventing deadlocks in the formal law-making process. Following the functioning of the parliamentary structure of such integrated systems, such informal cooperation practices are led by the executives who can rely on parliamentary majorities required for supporting the negotiated arrangements. Standing consultation practices between the different governments entail horizontal coordination among the federated governments on an equal level. In Germany, the federal chancellor occasionally meets with *Land* prime ministers, whereas permanent consultation between the federal and the *Land* executives is led by a state secretary of the federal chancellery and a consultative council of the federal chamber representing the *Land* executives. Among the *Länder*, regular prime ministers' conferences are supplemented by standing conferences of branch ministers, sometimes with the participation of their federal counterparts, and by coordinating committees and working groups among the specialized departments of ministries. In Austria, permanent conferences of the heads of *Land* governments and of the heads of *Land* administrations are supported by a permanent liaison secretariat, which also serves as the contact to the *Land* governments for the federal executive. In addition, permanent conferences of experts representing the federal and *Land* governments exist in specific policy areas such as regional and environmental planning and public finance.

Although the national parties supersede the federal structure in both countries, the paramount administrative role of the *Länder*, together with their powerful position in the *Bundesrat* in Germany, makes the *Land* executives important strongholds of the national parties. This has a federalizing effect on the internal power structure of the parties, by which the parties paradoxically also contribute to keeping federalism alive through a powerful performance in the national arena. Nevertheless, the unitarizing effects of a highly integrated form of federalism cannot be overlooked, and the focus on collective participation of the *Land* governments in national bargaining processes makes the system complex and leaves little room for flexibility. More recently, therefore, moves toward empowerment of the federated units in their individual capacity can be identified. Thus, the German *Länder* have been granted more legislative autonomy in exchange for less participation in federal law-making, and the individual bargaining position of the Austrian *Länder* has been somewhat increased in fiscal and other matters.

In South Africa's integrated federalism, the features of centralization and complexity are even more pronounced. Inspired by the central European model of federalism, the Constitution provides for cooperative intergovernmental bodies in addition to the federal chamber to represent the provincial governments. However, the functioning of these institutions has to be seen against a background marked by a distinct predominance of the centre over the provinces, concerning both the legislative and the executive. First, constitutionally, provincial legislative powers are very limited, and provincial executives are confined to implement policies designed by the national government and under supervision of the national executive. Second, politically, the centralism of the ruling party and the comparably low capacity and prestige of the provincial political establishments prevents the latter from interacting with the national government on an equal footing. Thus, by and large, the machinery of cooperative bodies, both formal and informal, merely reproduces the hierarchical features inscribed into the political system.

The Financial and Fiscal Commission, a formal advisory body to the national and provincial legislatures on matters concerning the provincial share of revenues, has been designed as a cooperative body representing the different orders of government. For the

reasons that have been mentioned and which have also undermined the regional role of the federal chamber, provincial governments have played no substantive role in shaping national fiscal equalization policy in this commission. In recent years, the structure of the commission has been changed to reinforce dominance of the national executive at the expense of provincial representation. Likewise, recent national legislation on the reform of institutions of other intergovernmental cooperation mandated by the Constitution entrenches control by the president on intergovernmental relations, again reinforcing political centralism.

In India, where the federal chamber reflects the specific role of the states in integrated federalism only to a very limited degree, the Constitution provides for a number of institutions of cooperation between the Union and the states. Yet this has to be evaluated against a structural background that constitutes the most centralist and hierarchical example among the parliamentary federations of an integrated type. Unlike the federated units in most other federal systems, the states do not enjoy an indestructable status under the Constitution. They are subject to territorial readjustment by federal legislation without their consent. Federal legislation also disposes of various powers of intervention into state legislative spheres. The hierarchical features are particularly pronounced with regard to the executive. The state governors are designed as constitutional heads of state in parliamentary systems, normally acting on the advice of state governments, but as opposed to other comparable federal structures, they are appointed by the federal president on advice of the Union cabinet, and they have considerable power to act as agents of the Union government and thus to thwart state politics, especially if the power holders in the respective states are in the opposition on the Union level. Governors may put state legislation under approval by the Union executive, and most important, it is on their initiative that "President's rule," the most far-reaching instrument of intervention by the Union executive into states affairs, can be imposed by the president on advice of the Union government. By this instrument of "federal execution" (*Bundesexekution*), which has been used nearly 100 times, the legislative and executive powers of a state are taken over by the Union, and the actual power

holders in the state can be deposed to enable the election of others favoured by the Union government. But even outside such scenarios, which the Supreme Court has confined to emergency conditions in some instances, the Union executive has a general power to direct states' policies besides the Union legislature in all matters in which the latter has not exhausted its powers. Especially in matters of development planning, on which the federal design of the Indian Constitution puts particular emphasis, the Planning Commission established and appointed by the Union government is a central body. In addition, the Constitution provides for directive powers of the Union executive in matters of infrastructure, and a number of Union statutes have set up all-India bodies to regulate such matters as health and education. Finally, implementation of Union policies by the states is also secured by the unbalanced distribution of fiscal powers. While the states' governmental responsibilities exceed their own fiscal resources, the Union government, upon recommendation of the Fiscal Commission appointed by the Union executive, decides on the share of fiscal revenues for the states. The financial preponderance of the Union also enables it to direct state governance through conditional financial transfers.

Under these structural conditions, the increasing demand for strengthening the position of the states could hardly be satisfied by additional cooperative bodies that were institutionalized over time. Thus, the National Development Commission should enable the state executives to get involved in framing and reviewing implementation of the development plans designed by the National Planning Commission and adopted by the Union government. Likewise, state governments are represented in specific councils established under diverse Union statutes. Yet under the power imbalance described above, state governments have not evolved to powerful collective-bargaining partners in framing India's national development policies. The same is true for the Inter-State Council in which the Union and all states are represented and which had been envisaged by the Constitution as a forum for political conflict-resolution and cooperative policy-framing. Following increased state discontent about inter-state relations, the Inter-State Council was established on a permanent basis in 1990, but through its complex

design of collective representation of interests, it has hardly enhanced the states' bargaining power.

The revival of federalism in India has resulted from the fragmentation and regionalization of the party system that has replaced the long dominance of one ruling party. Paradoxically, the former unilateral Union policy of territorial readjustment of the states according to cultural factors also provided a basis for the subsequent rise of regional parties with cultural and even religious orientations. Together with the exigencies of fragile coalitions, the new multiplicity in the party system has reinforced the weight of parliamentary support for the ruling executive in the parliamentary systems of the Union and of the states respectively. Thus, on the Union level, political interaction with regional parties within the representative bodies amounts to a kind of political intra-state federalism that forces the Union's power holders to take into account the interests of majority governments in certain states and prevents them from fully exhausting their wide constitutional powers to control the states jurisdictions. Among the states, increasing bargaining power has enabled individual states to embark on bilateral negotiations with the Union and thus to bypass the institutionalized bodies of collective policy-framing that do not allow enough flexibility.

Thus, Indian federalism has become a negotiatory federalism, which in some aspects, is comparable to the informal cooperation developed in some dualist federations. Seen in comparison with South Africa's integrated system, it seems that as long as the political autonomy of the component units remains too weak under a dominant and pervasive national party, formal collective bodies of cooperative federalism only reproduce the predominance of the centre. Once the component units have acquired a sufficient political weight of their own through a pluralized and fragmented party system, they are likely to attain more bargaining power and to succeed in imposing informal individual consultation procedures on the federal government, thus bypassing the formal machinery of collective cooperative federalism.

A distinctive feature integrating the federal and the federated jurisdictions in India is the fact that in broad areas, the Union even provides the public service structure by which the states administer

the policies prescribed to them by the Union legislature or executive. Thus, both Union and state administration are being performed by a so-called All-India Service acting under the directives of the Union or the state governments, depending on which of the two orders is responsible for administering the matter. Together with the other centralizing features of the Indian system, this centralized bureaucracy is also being blamed for undermining Indian federalism. In some formal sense, it represents the opposite counterpart of the Austrian integrated system under which a large portion of the administration of federal laws remains within federal jurisdiction, but is to be performed by *Land* authorities who then act under the directives of the federation (*mittelbare Bundesverwaltung*). But the fact that Austria's Constitution prescribes the structure of the *Land* authorities in great detail, taken together with the federal directive power in the respective matters, might have a comparable centralizing effect on the way in which federal standards are administered with the help of the federated entities. In any case, the unifying effect of the All-India Service need not necessarily have a detrimental effect on the federal system as long as the political autonomy of the states in their own jurisdictional spheres and their role in defining the Union policies is being preserved. Under such conditions, a unified administrative structure may help to combine both regional political autonomy and the necessary cooperative efficiency in a polity which, in a globalized world, is marked by an unprecedented degree of both interdependence and cultural diversity.

#### 4.2 *Cooperative Federalism in Divided Federal Systems*

In federal systems without constitutional arrangements for integration of the federated governments into federal governance, functional integration of the government tasks of the different orders and corresponding patterns of institutional integration have been brought about by developments on the subconstitutional level. Together with the expansion of government tasks in the growing welfare state, the exercise of the federal spending power has often had a centralizing effect that has been only partly balanced by parti-

icipation of the federated governments in federal policy-making. The type of government system prevailing in a federation is decisive for the extent to which such patterns of cooperative federalism are developed and put on a permanent institutional basis.

Unlike exceptional cases such as Brazil, where the centre rather depends on the fiscal resources of the states, or Canada with its fairly balanced share of fiscal revenues, a more or less pronounced federal preponderance in fiscal matters can be found in most federations. This vertical fiscal imbalance necessitates financial transfers to the federated units and has enabled the national government to attach policy conditions to such financial grants and thus to exercise control over matters that constitutionally belong to the component units. Although its constitutional basis is more contested in some federations (like the United States) than in others (like Australia), this so-called spending power has become widely used to centralize welfare-state policies. Even in Canada, where both substantive powers and taxing powers would allow the provinces to act independently from the federal government, the provinces have not exhausted their taxing powers and have relied on federal grants, which at times have reached a considerable portion of their budgets. To some degree, the federal spending power in many dual federations has developed into a functional equivalent of integrated federalism with its federal control of governance of the component units. Conversely, the fiscal flexibility that has developed with dual federalism could not develop to a comparable degree in integrated federations, where the constitution provides for functional integration from the outset and therefore sets up a more detailed system of fiscal equalization among the partners of joint fulfilment of public tasks.

The dualist constitutional model of the United States provides for no formalized cooperation between the orders of government, and due to the dispersal of powers in its presidential/congressional form of government, most informal cooperation patterns have not been institutionalized permanently. Thus, intergovernmental cooperation remains not only informal but also “fluid”. It plays no decisive role in shaping and operating the government system on a high political level, as in parliamentary federations of an integrated,



as well as dualist, design. Rather, intergovernmental interaction is mostly focused on concrete policy fields and specific programmes based on federal funding in matters such as health, welfare, and infrastructure. American “picket-fence-federalism” consists of small, personalized sets of cooperation between officials of corresponding administrative branches which lack an overarching coordination.

In trying to articulate their policy interests vis-à-vis the federal government, state officials often find themselves in a position similar to private lobbyists rather than to partners in a public governmental system. From the federal perspective, state governments are commissioners alongside private organizations involved in the delivery of funded programs. In order to exercise joint pressure on the federal government, state governments have formed various forms of horizontal cooperation among themselves. This horizontal cooperation has been institutionalized to a large extent, often in the form of private associations of the respective office holders, such as the National Governors’ Association and other associations regrouping officials from corresponding state administrative branches or agencies. Such associations are also composed along regional criteria or party alignment, such as the Western Governors’ Association and the Republican Governors’ Association. Informal interaction also takes place within private professional and scientific associations of which officials of the corresponding administrative branches of the different governments are members. In the government sphere, the only formalized cooperation explicitly provided by the Constitution is the conclusion of compacts between states, which require the consent of Congress.

Regarding participation in devising federal policies, state governments remain dependent on the goodwill of the federal government. After being initially included in the process of programme design, they are increasingly confronted with grant conditions and general regulations (“mandates”) unilaterally imposed on them by the federal government. Yet there have been various attempts at deregulation and thus at reducing the constraints on the states. The most recent move, in line with “New Public Management”, seeks to confine federal policy prescriptions to the definition of objectives to be attained, while leaving to the state and local

governments the choice of concrete strategies for fulfilment. With this result-oriented flexibility, responsibility for concrete programme design and delivery is sought to be devolved to the regional and local partners.

As opposed to presidential/congressional federations with their diffusion of power, cooperation between the executives in parliamentary federations is more institutionalized, as the executives can usually rely on parliamentary majorities to support and implement intergovernmental arrangements they have agreed upon. However, there is some tension with the spirit of the Westminster model and its idea of parliamentary sovereignty which, in the context of divided federalism, translates into an exclusive accountability of each of the executives to the respective parliament within the respective jurisdictional sphere. Australia and Canada provide examples for different alternatives.

Australia, despite its dualist constitutional design, which recognizes intergovernmental relations only to a very limited extent, has developed an elaborate subconstitutional network of institutions for intergovernmental cooperation, which, in a few instances, has gotten closer to features of integrated federalism than allowed by the Constitution. Beyond the centralizing practice of the federal spending power, by which states are subjected to conditions attached to Commonwealth grants, the states are integrated in a hierarchy of bodies for joint policy-making and administration which, by far, exceeds joint lobbying as practiced in the United States. First, a huge number of ministerial councils composed of the responsible national and regional ministers have been established for many subjects such as agriculture, health, and education. They have been equipped with standing committees of officers and with secretariats and have been given a partly formal structure. Since 1992, this intergovernmental network has been headed by the Council of Australian Governments (COAG) composed of the heads of Australian governments. COAG may refer specific matters to functional ministerial councils, and the latter report to COAG for final endorsement.

The intergovernmental network provides a framework not only for joint substantive policy framing, including negotiation of condi-

tions attached to Commonwealth grants, but also for the establishment of joint regulatory and administrative bodies implementing joint legislation agreed upon by the participating governments. By and large, such intergovernmental schemes provide a combined centralizing integration of both legislative and administrative powers of the Commonwealth and of the states and thus reminds us of structures related to integrated rather than divided federalism. It is no surprise that the High Court has enforced certain constitutional limits. In so far as the powers of a joint regulator are derived from the states, this can only be based on a formal referral of state power to the Commonwealth for which the Constitution provides an explicit possibility. Thereby, the exercise of the referred power is again put under exclusive accountability to the Commonwealth Parliament and is thus adjusted to the precepts of parliamentary government in a dual federation.

Concurrence between the federal and the provincial spheres of government is much more marked in Canada, mainly due to the lack of regional representation in the federal arena as well as to profound economic and cultural diversity among the regions, which is also reflected in the party system. Thus, the history of collaborative federalism in Canada has always been overshadowed by virtual governmental concurrence and has undergone critical phases in which the very constitutional basis of the federal arrangement has been contested, especially concerning the position of Quebec. As the federal partners have never reached unanimity on a definite constitutional arrangement, they have relied on a more pragmatic practice of ongoing policy-oriented cooperation on specific matters. However, unsettled questions about the basic constitutional relationship between the federal partners have put the partners in a virtually “independent” position from each other and have preserved a specific character of Canadian cooperative federalism that has been described as “quasi-diplomatic”.

Based on these premises, patterns of intergovernmental cooperation among federal and provincial executives have become more sustained since the 1990s. First ministers conferences and “summits” comprising the heads of federal and provincial governments have given way to more pragmatic meetings that have con-

cluded substantive agreements on social policy and health care. Unequal pretensions among the provincial partners have been accommodated pragmatically in asymmetric arrangements through which Quebec has been accorded larger leeway. The provinces have strengthened their position also by horizontal cooperation since the 1960s in premiers conferences that have been complemented by regional premiers conferences. In 2003, a Council of the Federation was established as a permanent cooperative institution for the component units. It is assisted by a secretariat and by a permanent executive committee composed of senior civil servants. Full participation of the federation is expected and would bring even the radically dualist model of Canadian federalism nearer to the systems of integrated federalism.

As compared to Belgian federalism, where the constitution largely relies on procedural integration, negotiation and cooperation have secured the viability of Canadian federalism on an unsettled constitutional basis that does not even address the procedural framework. Negotiatory federalism thus substitutes for a stable constitutional compact, which is thereby put on an implicit basis and virtually kept under constant revision. It is no surprise that under these premises, the lack of transparency and democratic accountability attached to executive federalism, which poses a problem for parliamentary systems generally, is increasingly felt as a specific deficit.

### ***4.3 Synopsis: Disentanglement, Asymmetry, and Treaty Federalism***

Due to a global change of conditions, converging trends can be identified in the development of interaction practices across the various types of federal systems. On the one hand, countries following the model of divided federalism have gradually developed practices that function as equivalents to features of integrated federalism. The extensive use of the federal spending power has transformed component units into executors of federal policies, akin to the integrated model of executive federalism, and parliamentary federations of a dualist design have developed structures of executive

cooperation that approximate council government through federal chambers in integrated systems.

On the other hand, a need for disentanglement of the federal and federated governments is increasingly being felt, especially in federations with complex constitutional arrangements of integrated federal policy-making. Thereby, the individual position of the component units is being strengthened either by granting them more substantive autonomy in fields previously reserved to integrated federal policy-making, as with the German constitutional reform of the *Bundesrat*, or by an enhanced individual standing of the component units in the processes of federal bargaining in fields that remain within federal jurisdiction. Thus, Austria's *Land* governments have been formally vested with an individual right of objection against federal acts on the ground of an undue financial burden. Thereby, the federal government is compelled to negotiate with individual *Land* governments outside the regular collective negotiations on financial equalization. In India, some state governments have gained a widened room for manoeuvre in federal bargaining on an informal level through the diversification of the party system, which allows them to bypass the formal bodies of collective and integrated federal policy-making. Yet the move toward disentanglement of the federal and the federated spheres and empowerment of the component units is not limited to federations following the integrated model. It also extends to originally dualist systems that have adopted "secondary" features of integrated federalism only subsequently, as can be seen with the American example of granting the individual states more latitude in delivering federal programs. Here also, one can identify a more recent reorientation toward a clearer detachment of responsibilities.

In the context of this trend toward institutional disentanglement, the conclusion of agreements, accords, or "concordats" between the partners of a federal system has become more widespread for bridging the functional interdependence between jurisdictional spheres, both in divided and integrated federations. These instruments serve a common need for more flexibility in several ways. First, they provide a procedural alternative to the proliferation of standing bodies of collective decision-making that often involve

cumbersome negotiation processes. Second, agreements allow for differentiated solutions among individual partners and thus for substantive asymmetry that can address different regional needs. Third, contractual coordination across jurisdictional spheres can help to evade cumbersome procedures for revision of the constitutional distribution of powers.

Intergovernmental agreements are being concluded between the federation and component units on matters cross-cutting federal and regional spheres, among which health care and environmental protection are important examples (e.g. Canada, Austria, and Germany). Such agreements have also been concluded on food regulation in Australia, economic and social union in Canada, and emergency assistance in Austria. Especially in divided federations where each government disposes of its own administrative authorities, such agreements can also facilitate integrated administration in order to overcome duplication and overlapping responsibilities.

Horizontal agreements among component units are even more widespread, as they can intercept the demand for federal competence and unified regulation. For instance, harmonization agreements concerning post-secondary education have been concluded among the German *Länder* and the Swiss cantons. An inter-state compact on emergency assistance has been concluded in the United States. Of course, harmonization accords require a unified arrangement among (nearly) all component units. Others may extend only to a certain regional group of component units, for instance where a joint authority is established between neighbouring states (such as the Port Authority of New York and New Jersey) or for the construction of roads and tunnels as in Argentina. Due to the asymmetrical conditions among the provinces in this country, a consolidated horizontal cooperation encompassing all provinces has not yet developed.

Although this increased practice of treaty federalism presupposes some degree of structural separation of the partners, it entails interdependencies and mutual relations of accountability that undermine the logic of divided federalism, especially in parliamentary systems. Parliamentary federations adhering to the integrated model such as Germany, Austria, and Switzerland, apparently face

fewer difficulties acknowledging intergovernmental agreements as a new and more flexible technique of integrated governance. In Austria, for example, the Constitution provides for both horizontal and vertical accords and requires the consent of the respective legislatures for agreements that touch upon legislative powers of the respective partners. For specific matters, for instance concerning coordination between the federation and the *Länder* in EU policy areas, vertical agreements are even mandated by the Constitution. In contrast, divided federal systems, especially those adhering to the Westminster logic of exclusive parliamentary accountability within each jurisdictional sphere, seem more reluctant to acknowledge formal ties between executives across jurisdictional boundaries. However, some of them follow the American example and provide for formal agreements among the component units requiring the consent of the federal legislature. Yet in particular, agreements between executives bridging the boundaries between federal and regional jurisdictions seem to entail gaps of parliamentary accountability. The question of democratic legitimacy becomes especially crucial where the flexibility offered by treaty federalism is also used to replace formal constitutional changes that usually require an elevated involvement of the electorate. Especially here, new channels for democratic transparency and popular participation will have to be developed.

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## Subtheme Paper

# Accountability and Transparency

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### Abstract

Accountability has become a crucial concept in public governance in recent years, thanks in part to more educated voters, more pervasive media, and globalization of markets, which have contributed to rising expectations. Yet, the concept itself is fraught with multiple meanings, expanding from the original focus on preventing the arbitrary exercise of power to now encompass achieving performance results. Achieving accountability and transparency in governance is a challenging task for all governments. The issues and dilemmas are even more daunting for federal and intergovernmental systems and programmes. Challenges are presented when governments share power across boundaries, often separating the financing and administration across different jurisdictions. The growing reliance on third parties such as private contractors and NGOs further complicates accountability by more broadly distributing authority for delivering public services across many diverse independent actors. Developing nations face particular challenges in designing accountability frameworks and applying these frameworks to policy implementation and programme delivery. Systems with weakly developed professional norms and managers, traditions of informal rules and personalized decision-making, and underdeveloped pluralistic institutions to serve as checks on public authority have a steep climb in developing the institutional systems, cultural norms and expectations, and administrative capa-

city that is essential for effective public accountability. Although pressures from international finance agencies can make a difference, the commitment and leadership must come from within each nation for reforms to be sustained.

Accountability is a crucial concept in public governance. More educated voters, more pervasive media, and globalization of markets have contributed to rising expectations for first-rate government services and public finances. Emerging sources of influence, such non-governmental organizations (NGOs) and international finance agencies, have combined to decry corruption in public office, highlighting the critical role that accountability can play in protecting nations against official corruption and malfeasance.

This paper will cover the challenges associated with defining concepts of accountability and implementing them in modern governance systems. The paper will then assess the unique accountability dilemmas posed by federal and intergovernmental systems, and will address the implications of using a broader range of “third parties” to deliver public services, including non-profit and for-profit entities. Developing nations face particular challenges in designing accountability frameworks. The paper closes with a discussion of the strategies and approaches used in federal systems to promote accountability, with special emphasis on initiatives in developing nations.

## **1. Accountability: The Elusive Concept**

From its origins as “computing” and giving account for the expenditure of public funds, the concept of accountability has been stretched to encompass other increasingly important dimensions. The checking and balancing of potential abuses of power by public officials has constituted the historic core of the concept, with the goal being to limit the potential for corruption of public offices and officials. Aristotle advised that “all money be issued openly in front of the whole city” so as to protect the treasury from being defrauded. Concerns about corruption continue to this day. Recent World Bank reports have documented how corruption can reduce GDP growth, lower the quality of education and other public services,

hamper effective infrastructure, and adversely affect capital markets. For instance, auditor-general reports in Kenya concluded that “questionable” public expenditure amounted to 7.6 per cent of GDP.

The public management goals underlying accountability have expanded during the past 50 years. As government spending grew in developed nations to become a larger share of the economy, officials were increasingly held accountable for improving efficiency and reducing waste in carrying out public programmes. Most recently, accountability concepts have again been expanded to focus on the effectiveness of government in meeting publicly desired outcomes for programmes and operations. The growing significance of government in the social and economic lives of nations has prompted the institutionalization of performance measures and reports designed to provide more systematic information on government results. Equity is another important accountability goal in many nations, as public officials work to assess how well services are provided across income groups and other important groups.

Answering the question—accountability for what—is anything but straightforward as managers are often expected to satisfy each of these accountability goals. Answering the question—accountability to whom—is also a complex issue in many nations because many principals have standing as legitimate holders of accountability in democratic systems. Citizens, politically elected executive and legislative officials, ministerial leaders, civil servants, and an increasingly wide range of interest groups are among the actors who have played roles in defining expectations for public management and programmes in democratic systems. These are supplemented by a broad array of information brokers who facilitate the information flow to principals necessary for public accountability to work; auditors, media, and NGO institutions are prime examples.

As a result, public managers at all levels of government face multiple accountabilities. Mark Bovens has suggested that modern public managers in any system face five different accountability relationships, each with its own expectations, norms, and information requirements that may conflict or reinforce one another:

- Organizational—superiors in administrative and political positions

- Political—citizens and their elected representatives and political parties
- Legal—court systems and legal rulings
- Auditors and reviewers—independent agents empowered to exercise oversight over agencies and programmes
- Professional—standards and codes adopted by professional peers

Not surprisingly, these multiple principals have differing priorities and perspectives on the standards for which public officials should be held accountable. The criteria for accountability are contestable. Some principals such as auditors and legislators may wish to stress financial and compliance standards; others such as political ministers may emphasize results and outcomes. Advocates of New Public Management assert that there are tradeoffs; greater emphasis on compliance and financial controls can undermine efficiency and effectiveness in delivering outcomes. Even where the emphasis is on results, disagreement often exists about the nature of the goals themselves, the metrics used to measure them, and the relative weights assigned to multiple goals. Criteria and weighting change over time as well, and sometimes criteria may be established retrospectively.

Correspondingly, an ever wider array of “agents” is the object of accountability, including many of the same officials listed earlier. Such agents can include both political and bureaucratic officials in the traditional sense. The number of agents is multiplied by federal systems where authority for many programmes is concurrent and shared across jurisdictions. In recent years, even unitary systems such as the United Kingdom have come to rely on a growing variety of “third party” actors to finance and deliver public services, ranging from private for-profit contractors to non-profits and quasi-government agencies. For developing nations, the World Bank estimates that public-private partnerships for infrastructure development rose from less than \$13 billion in 1990 to more than \$114 billion less than ten years later.

The ability of principals to hold agents accountable for public goals and objectives is often limited. The presence of multiple principals permits agents, even those in hierarchical bureaucracies, to

gain leverage when principals do not agree on goals or priorities. Separation-of-powers regimes enable bureaucratic officials to gain autonomy when presidential and legislative officials are of different parties, for instance. Principals also suffer from classic information asymmetries that characterize principal-agent relationships. Agents typically have superior information about their own programmes, finances, and intentions that provide an advantage in the accountability relationship. Although principals can set the goals, agents have the information that can help determine whether the goals were in fact met and the reasons why.

The most egregious breaches of accountability are defined under the broad rubric of corruption. While corruption is condemned for eroding the legitimacy of the state and undermining the efficiency of the economy, it is not surprising that there is no agreement on what this term means. While the World Bank has suggested that corruption is defined as the abuse of public office for private gain, others provide more nuanced and variable typologies. For instance, some would broaden the definition to include abuse by private corporate actors; others would extend the definition to include political parties, bureaucracies, and other public actors who abuse power in order to advance their own political prospects. Yet, this is not without controversy. Some observers, such as Edward Banfield, observed that while the control of city governments in the United States by political parties through patronage was condemned by many, the urban “political machine” succeeded in performing such latent social functions as assimilating waves of new immigrants and other disadvantaged citizens, providing new routes for social mobility, and integrating fragmented jurisdictions across metropolitan regions.

## **2. The Unique Accountability Challenges in Federal Systems**

From the broadest perspective, federal systems can have both positive and negative consequences for accountability and public management when compared to unitary and other systems of governance. On the positive side, one of the most compelling arguments for a

federal system is its potential to serve as a check on central power. As one observer noted, “the great virtue of a federal system is it prevents one damn fool at the top from screwing it all up”.<sup>1</sup> From a performance perspective, decentralizing the design and implementation of programmes can result in services that are better suited to different local populations, and can inspire policy learning through what can amount to a series of local experiments or policy laboratories. Moreover, the potential for competition among local governments can induce incentives to improve services at lower costs, assuming the public is mobile enough to migrate elsewhere. South Africa, for instance, found that a shift from national to local delivery of infrastructure improved service provision in a relatively short time, as local governments took ownership and provided better matches of resources with local needs.

On the other hand, a federal system multiplies the numbers of both principals and agents, thereby confusing the ability of publics to assign credit and blame for results. Such systems complicate the projection of national goals by sharing power over implementation and even policy goal setting with other levels of government. They also can undermine the maintenance of local priorities as well because participation in national programmes causes local resources and staff to be diverted to national as opposed to purely local purposes.

The implications of federal systems on the potential for corruption have been found to be mixed in developing nations when compared to more centralized models. While decentralization can bring greater public visibility and pressure, it can also multiply opportunities for corruption. As noted in *The Federalist*, smaller communities are more easily prone to being captured by hegemonic majorities or local elites that are unchecked by other interests and values. In Russia, political decentralization led to greater corruption as local governments were captured by firms and local officials engaged in rent seeking. In China, political centralization contributes to party discipline, which limits the opportunity for local corruption. A major factor is whether decentralization leads to greater or lesser transparency and visibility in government transactions. Local elections generally receive less coverage and visibility than national elections, but studies in Bangladesh and Ghana found that decentralization led to enhanced transparency at the local level.

### 3. Accountability Dilemmas in Intergovernmental Management

The nature of these accountability challenges will in large part reflect the degree to which power, responsibility, and financing are shared across governments. Where powers and responsibilities are assigned to separate orders of government, accountability follows and reinforces the separate assignments. However, in most federal systems, old traditions of “dual federalism” have given way to cooperative systems where high degrees of interdependence have become commonplace. Cooperative systems are distinguished by a high degree of formal or informal concurrency in power and authority for important functions. Moreover, significant fiscal interdependence has evolved in federal systems to capitalize on the comparative advantages of each order of government in modern systems. National governments have unique revenue-raising capacities owing to their position in national and even international markets, while subnational governments have superior information about local conditions and preferences. For instance, in Brazil, the federal government is in charge of general rules and financing for social welfare, while states and municipalities are responsible for implementing such programmes as medical services, food, schools, and family assistance.

While such cooperative and interdependent fiscal systems have many advantages, they also pose major challenges for accountability. Central to the accountability challenge is the multiplicity of legitimate perspectives and capacities brought into the determination of programme goals and the delivery of services to local populations. By inviting multiple governments into the design and implementation of these programmes, programmes become accountable, to some extent, to multiple principals across the intergovernmental system. Thus, a programme administrator for a national programme working in local government is expected to be accountable not only to the local government administrator and legislative officials, but also to the national government that authorizes and funds the programme, to say nothing of state governments, clients, NGOs, and other stakeholders. In nations such as India, federal systems distribute power across national, state, and local govern-

ments in a three-tier structure that further complicates power sharing and accountability arrangements. The consequence is a complex accountability system where programmes are influenced by interests and values prevailing at many levels throughout the system.

Unlike command-and-control systems, federal systems must work to balance and possibly reconcile vastly different goals, priorities, and capacities distributed across governments. Federal, state, local, and other regional governments necessarily will have different goals and interests; indeed, one of the strengths of a federal system is the institutionalization of differences in the structure of governance. Governments will also have different levels of administrative and technical capabilities.

Whether and how these differences are integrated will vary across systems, and the processes for determining the responsibilities distributed in a federal system across and within programmes are inherently political. In highly decentralized systems, each order of government has political resources that make it difficult for even the national government to make unilateral policy determinations. In some systems, states and local governments have formal representation in national legislatures, such as Germany, while the party system can reinforce the role of subnational governments, as the rise of regional parties has done in India. In other systems, the national government has more hegemonic influence, based in part on the presence of strong, and nationally based political parties. Other factors influence the allocation of responsibilities and the relative balance of power between national and subnational governments in a federal system. For instance, the constitutional assignment of powers plays a large role; India, Brazil, Mexico, and Nigeria are among the federal systems whose constitutions assign considerable concurrent powers to the national and state governments, fortifying a cooperative approach to programme assignment and management. The presence of cultural, religious, ethnic, and racial heterogeneity will have an important effect on how federal systems are designed, particularly where these divisions are reflected and reinforced by the boundaries of the federal system itself.

The accountability problems associated with the intergovern-



mental management of jointly shared programmes can be considered from the perspectives of both national and subnational governments. The accountability issues are particularly challenging for national grants and mandates with discrete programmatic goals and objectives (e.g. tied aid or categorical grants). However, even general fiscal transfers can entail national conditions and commitments that are viewed as binding on subnational recipients. From the national perspective, intergovernmental programmes are vulnerable to certain inherent problems:

- **Goal conflict.** Differences in goals and priorities are to be expected in federal systems due to inherent differences in the concentration of interests. Subnational entities, for instance, have fewer incentives than national governments to support programmes with benefit spillovers or redistributive programmes that could undermine their ability to attract business and higher income residents. While grants, mandates, and other tools are deployed by national governments to change the priorities of subnational governments for these and other purposes, in fact considerable slippage, nonfeasance, and even refusal to cooperate with national programmes can be expected.
- **Fiscal windfalls.** Subnational governments have incentives to misallocate grants tied to specific programme purposes for other purposes. A study in Uganda found that in the early 1990s, only 13 per cent of government primary-education capitation grants made it to the intended destination, primary schools. The rest went to purposes unrelated to education or to private gain. Studies in Cameroon, Tanzania, and Uganda estimated that 30 per cent of publicly supplied drugs were misappropriated; in one case as much as 40 per cent was “withdrawn” for private use. Even when grant funds are ostensibly used for their intended purposes, they can, in effect, be diverted if they simply substitute for subnational government funding that would have been otherwise provided for the aided activity. A study by the US Government Accountability Office, the national audit office, found that nearly 70 per cent of federal grant funds are used by state and local governments to replace their own funds in aided programmes.

- **Principal agency.** Information asymmetries and weak information systems complicate the capacity of national officials to assess accountability for financial-aid performance under cooperative programmes. Subnational governments can shirk and fail to report in nationally consistent categories. The problem of “many hands” complicates the assessment of responsibility for outcomes because many results are the product of numerous factors and government actors whose specific contributions are often difficult to specify.
- **Efficiency.** Incentives can erode intergovernmental programmes when the spending responsibility is separated from the raising of funds for those programmes. The presence of effective matching requirements can restore disciplinary constraints on subnational recipients, assuming that the matching requirement is sufficiently stringent to motivate interest and ownership by subnational officials. However, many systems find that matching requirements can undermine fiscal equalization goals by screening out poorer jurisdictions where the match constitutes a burden.
- **Weak partners.** Subsidy programmes can attract weak partners, both those with low capacity and those with low interest in the aided programme. The various subnational recipients such as local governments, non-profit entities, and even private profit-making businesses participate in the programme for the rents gained rather than for a substantive commitment to the programme’s goals. Programmes most vulnerable are subsidies that entice participation without sufficient risk, or cost-sharing or screening, to ensure commitment to the programme.

Participation in national programmes creates a different set of accountability challenges for subnational governments. From their perspective, tied or narrow-purpose aid and mandates set up a tension between loyalty to the goals of their own local principals and those of national principals. These become most distressing for those governments with a high dependence on external aid from national governments. For instance, 87 per cent of the revenue for provincial governments in South Africa comes from the national government. The Spanish subnational governments receive 72 per

cent of their revenue from the Spanish national government, the Indian states receive 46 per cent from the Government of India, and the Brazilian states receive 30 per cent of their revenue from the Government of Brazil. Such aid can distort spending priorities by encumbering state or local funds for national purposes through matching requirements or other mandated costs. Moreover, sub-national governments must typically agree to a wide range of specific standards that may not be flexible enough to adapt to local conditions.

Each nation will negotiate these accountability questions and concerns in different ways. The existence and resolution of tensions in accountability to different orders of government will be influenced by such factors as the roles assigned by constitutions, history of relationships, presence of significant tensions in civil society, the extent of involvement by interest groups and media, and the availability of multiple venues—legislatures, executive agencies, courts, auditors, and media—for the different orders of government to press their claims and seek redress of grievances. The nature of the party system will be particularly important. Nations with decentralized and pluralistic party systems will be more inclined to take the perspectives of subnational governments into account when considering government roles and programmes, while those with more centralized party systems will tend to favour more centralized policy responses.

In addition to these more external factors, other variables endogenous to the management and policy processes across the inter-governmental system will influence the way accountability is achieved in the process. The capacity of each actor to finance and manage its responsibilities has a major bearing on the performance of the entire system and the extent to which actors can be expected to work collaboratively to satisfy accountability expectations. The professionalization of civil servants has been shown to help tie together like-minded experts across governments into epistemic communities sharing common goals and approaches to problem-solving. Goal congruence across the actors in the system is a major factor determining whether the actors in the system will work together in these programmes. The degree of autonomy enjoyed by

each actor will also play a formative role determining the kinds of relationships in intergovernmental systems.

The following chart suggests that actual collaboration across governments can be expected only when goals are congruent and government actors enjoy autonomy. Accommodation characterizes relationships with high congruence, but low autonomy; here, the subnational governments become relatively passive implementers of government policies. Competition characterizes areas where subnational government networks are strong and autonomous but where goals are not shared with the national government. Finally, avoidance captures those kinds of relationships where neither autonomy nor goal congruence is present.

**Patterns of Intergovernmental Collaboration**

	Goal Congruence Yes	Goal Congruence No
Autonomy High	Collaboration	Competition
Autonomy Low	Accommodation	Avoidance

#### **4. Developing Nations Face Unique Accountability Challenges**

The issues and concerns discussed above constitute challenges for any system. In addition, the ability of developing nations to develop and implement accountable intergovernmental programmes will be tested by several discrete factors, including:

- Underdeveloped management capacity throughout a diverse federal system
- Traditions of informal rules and governance arrangements that frustrate the formal criteria, standards, and reporting requirements comprising accountability in intergovernmental systems
- The lack of continuous and stable relationships between national and subnational governments, creating greater potential

for distrust, gaming, shirking, and other practices that undermine accountability

- Lack of tradition and experience within the many governments in the system with public accountability, transparency, and democratic rule
- The underdeveloped role of pluralistic institutions at all levels of government, which can serve as a vital check and reinforcement for accountability
- Wide disparities in economic resources available to the public sector that have the potential to undermine horizontal equity in the implementation of major national initiatives through a federal system
- The absence of professions in civil society that respect the rule of law. For instance, in Mozambique, there are only 10 lawyers outside the capital.

As these nations begin to modernize and expand the role of government in the social and economic lives of their citizens, opportunities for corruption multiply. Nations with weak economies inspire entrepreneurs to seek rents through the public sector. World Bank studies show, for instance, that SubSahara Africa has an endemic culture of corruption affecting many nations. Neopatrimonialism exists in these nations where the distinction between public and private erodes and where the state becomes personalized under the rule of autocratic leaders. At worst, states become sultanic states where government office is used to carry out criminal activities, such as diamond smuggling.

However, developing nations are acquiring resources and institutions that can help enhance their capacity to promote accountability. Positive developments will be discussed in the next section, but they stem from broader institutional augmentations, including (1) a significant presence of international institutions and stakeholders with technical and financial assistance to modernize management and governance, (2) the growing role of NGOs as significant players in governance systems in these nations, and (3) the social accountability movement and its emphasis on grassroots capacity-building and accountability.

## 5. Strategies for Strengthening Accountability in Federal Systems

Federal systems face certain broad issues in establishing and promoting accountability. These issues can be mitigated or overcome by the adoption of strategies that improve the prospects for accountability. These strategies must be considered in the context of the particular political and governance system under review.

First, effective strategies for promoting accountability in inter-governmental programmes rest on the establishment of effective governance institutions. Developing nations in particular have been struggling to upgrade and institutionalize effective accountability rules and practices. These include building the rule of law, establishing a strong professional corps of civil servants and other professionals staffing management positions, and setting up watchdog and audit institutions to serve as checks and balances on the actions of government leaders. While government institutions are important, strengthening the role of civil society is critical as well. Opening up government to greater public scrutiny, building strong pluralistic organizations where stakeholders and other interests can gain effective representation, and encouraging a strong and competitive media have proven to be essential.

Several nations have instituted notable governance reforms to improve accountability and reduce corruption. Uganda's President Yoweri Museveni mounted a major set of reforms, including establishing a Department of Ethics and Integrity with a visible position, an inspector general, a strengthened national audit office, and reforms to the public service, including higher wages. One observer concluded that the nation had succeeded in overcoming the climate of corruption and criminalization of politics that had plagued it in earlier years. Other nations have set up anticorruption agencies but they have proven ineffective without broader reforms in governance institutions, civil society, and the political environment. For instance, Tanzania's Prevention of Corruption Bureau produces only six convictions a year.

World Bank studies show that many developing nations are enhancing accountability by decentralizing service delivery. These include decentralization of service delivery to local governments,

community participation, direct transfers to households, and contracting out delivery to private providers and NGOs. The programmes include a wide range of infrastructure services (e.g. water, sanitation, electricity, telecommunications, and roads) and social services (e.g. education and health and welfare programmes). Countries where such trends have gathered include Latin America (e.g. Bolivia, Brazil, Colombia, and Costa Rica), Africa (Ghana, Uganda, and South Africa) and Asia (Bangladesh, Indonesia, India, and Pakistan). In many cases, these initiatives are intergovernmental in nature, as national governments remain involved as funders and standard setters.

As developing nations increasingly join the developed world in delivering services through intergovernmental and non-governmental providers, many are exploring the following strategies for improving accountability for these complex governance arrangements.

## **6. Selection and Design of Government Tools**

Governments interact through a complex range of government “tools” (e.g. grants, regulations, loans, insurance, contracts, cooperative or joint partnerships, and other arrangements for sharing public and private resources). The choice and design of these tools can have a formative role in influencing performance and accountability. The fiscal impacts of grants offer a good case study of tool choice and design. Grants affect the priorities of subnational governments when they are designed to shape the choices and behavior of those governments at the margin. Targeting of grants to those places with greatest need and least resources is a key design principle to offset disparities that can undermine equity and national uniformity of benefits and service delivery.

For instance, in 1989, Mexico introduced a poverty-alleviation programme spending 1.2 per cent of GDP annually on infrastructure and electricity for poor communities. Assessments of the programme found that it had reduced poverty by only 3 per cent. Had it been effectively targeted to those areas where poverty was concentrated, it could have reduced poverty by more than 50 per

cent. Even if grants get to the places needing them most, other provisions are important to deter fiscal substitution, thereby ensuring that scarce resources are in fact additional rather than simply a replacement for current resources.

The choice and design of the tool should be sensitive to the accountability environment and the nature of the recipients involved. For instance, in Brazil, federal grant funds are provided to municipalities for health care through two different grant mechanisms depending on the management experience and commitment of the state. For states with less complete health systems, funds are provided in specific categories based on negotiations with national government officials. The jurisdictions with advanced systems, on the other hand, receive a block grant with considerably greater discretion and flexibility. They negotiate for specific funds.

## 7. Choosing Providers

In intergovernmental systems, national governments often have little choice but to work with subnational governments. National governments often seek to build support for new programme initiatives by cultivating like-minded cadres of professionals and specialists in subnational governments who are disposed to support the programme. Programme design can nurture these networks by prescribing qualifications for personnel working on aided programmes and by institutionalizing roles and rights for beneficiary groups.

However, in developed and some developing nations, both national and subnational governments are promoting competition by dealing with alternative service providers, such as NGOs and private contractors. Moreover, some nations are circumventing public monopolies by using vouchers to simulate a market for public services.

When well designed and monitored, contracts have proven to be promising ways to introduce more effective programmes and instil greater accountability for results even in the public sector. After its civil war, Cambodia found dramatic improvements in health outcomes through contracting with NGOs. However, World Bank studies show that contracts in developing nations suffer from inadequate competition among suppliers, tendencies by private



providers to serve better-off clients, and classic principal-agency problems in measuring contractors' performance. Defining appropriate incentives and standards, monitoring performance, and leveraging contractors' performance become far more complex where competition is limited or non-existent.

The tradition of altruism among NGOs enabled them to provide health care in Uganda at higher quality and lower costs than the public sector. NGOs in developing nations are often better positioned to serve hard-to-reach and high-risk-clients that tend to avoid public servants. However, developing nations are hampered by a limited supply of non-governmental non-profit and private entities available to compete for public work.

## 8. Monitoring and Oversight

National governments and subnational governments deploy both formal monitoring and oversight. Several distinctions will be drawn to describe different strategies.

*Ex ante vs. ex post.* National government actors bargain up front under the *ex ante* approach, negotiating detailed goals and accountability procedures. Under the *ex post* approach, oversight occurs after the fact through audits, information reporting, and evaluations. Each approach has certain advantages and drawbacks for accountability. *Ex ante* approaches maximize leverage by the principal over the agent, as agents must demonstrate compliance with conditions up front. Under *ex post* approaches, the burden of proof often shift to the principal to demonstrate compliance problems after funds are spent, a point when the principal has arguably the least control. Notwithstanding the advantages accruing to principals from the *ex ante* approach, there are compelling reasons to rely on the more passive oversight strategy implied by the *ex post* approach. Generally, *ex post* oversight is far less expensive and can be expected to be used as the numbers of agents grow in programmes. Moreover, because *ex post* oversight generally provides less intrusive national control, many federal systems prefer to provide funds to subnational governments under this system.

**Police Patrol vs. Fire Alarm.** Active oversight of subnational governments and other providers is sorely limited by shortages of national staff and by political constraints. However, national legislation often institutionalizes roles for actors such as clients, NGOs, and others to sound the “fire alarm” by providing these entities with access to information, courts, and public forums to register their concerns and gain redress. In developing nations, international financial agencies, NGOs, and other client groups can become effective monitors of programmes among all orders of government. Important gains in performance have occurred when clientele, community, and other groups have engaged in monitoring and oversight. For instance, charging farmers for water and electricity in Andhra Pradesh, India, has made the irrigation department more accountable to them. In the words of one farmer, “We will never allow the government to again give us free water.”

## 9. Sanctions and Incentives

These can supplement oversight and accountability but are limited by several factors. The use of funding sanctions is limited by the desire to continue funding for clients in need of services. Unless alternative institutions are available to deliver programmes, governments are loathe to penalize governments if such actions will defeat a programme’s objectives. The use of incentives is more politically feasible, but rests on the ability to design performance metrics that are consistent with the programme’s goals and that resist gaming by recipients. Some grants and contracts are performance-based, which provides specific targets that must be reached, often with incentives. In Haiti, NGOs were awarded contracts from the US Agency for International Development (USAID) to provide preventive health services with performance targets; immunization rates increased dramatically.

## 10. Transparency

Public information on performance and finance is important in its own right and is often used as a strategy in intergovernmental pro-

grammes. Reports on programmes are often made transparent to the public in the hope that local publics will gain the necessary information to become effective actors in local and national debates about accountability. This involves two steps that are often difficult for governments worldwide. The first is to gather systematic information on costs and performance from the numerous subnational governments and other providers in the intergovernmental system in standard ways that facilitate national reports and evaluations. This can constitute a burden if the data have not been collected previously or, as often happens, it is collected in a different format with different categories for other principals. Second, the public reporting of this information can be inconvenient and sensitive to governments and providers, particularly if performance is compared across jurisdictions and providers. However, it is the potential for shame that often triggers pre-emptive or reactive policy change to address public concerns.

Developing nations have seen improvements occur as a result of public reporting. For instance, in 1995, official Ugandan statistics indicated that a threefold increase in funding for primary education seemed to have produced no increase in enrolments because local governments diverted grants intended for schools to other purposes. The central government responded by publishing amounts transferred to the districts in newspapers and radio broadcasts; requiring schools to maintain public notice boards on monthly transfers of funds; and strengthening legal provisions for accountability and transparency. By 1999, schools were receiving nearly 100 per cent of the grant funds. In India, benchmarking is used to compare the performance and costs of local governments for standardized tasks. This brings public pressure to bear on jurisdictions when these data are made public.

## 11. Conclusion

The foregoing suggests that public officials are tapping a rich array of strategies and approaches for improving accountability and transparency. While some of the examples cited may indeed constitute best or better practices, the reader should be appropriately

wary of the transferability of innovations across nations. Accountability models and processes have significant implications for the distribution of power in federal systems and powerfully influence which values and interests will be advantaged in these systems. Reforms that may work well in certain contexts and systems may not be viewed as legitimate in others. Moreover, the feasibility of certain accountability approaches will also be a function of the management capacity, political system, and broader development of institutions of civil society, among other key factors. Accordingly, policymakers and public managers are advised that there are no universal prescriptions for accountability; rather accountability relationships and models are highly contingent. Interesting questions remain as to whether accountability reforms can drive changes in the overall political environment, and more research would be helpful on this question, but at least in the short term, models that work will be those that rest on a foundation of political will and capacity.

### **Note**

1. Quote is attributed to Frank Bane, the first chairman of the US Advisory Commission on Intergovernmental Relations.

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**ANALYTICAL  
SUMMARIES OF  
WORK SESSIONS**

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**Subtheme**

## **Anticipating and Managing Tension and Conflict**

Work Session 7: How do Federations  
Deal with Water Disputes?

Work Session 19: How do Federations  
Coordinate Policing and Deal with  
Public Security?

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*Ajay Kumar Singh*

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### **1. Introduction**

In the contemporary context of “global” becoming “local”, and “local” becoming “global”, the federal matrix of “self rule plus shared rule” is being fine-tuned in each federation to meet the challenges of “coordinated action” in the areas which have been traditionally marked with strict separation of powers and responsibilities. As the global federal experiences show, federalism begins with the neat division of powers and authorities, but soon converts into a shared action, or shared governance of the larger public issues, even though the realm of public is constitutionally delimited as local/regional and national. Shared governance of the “public” is made necessary as a result of several factors, including the need for rule harmonization and standardization, redistributive stress, common

resource management, fiscal needs, conflicting societal demands, ownership conflict and overlapping of jurisdictions, trans-regional and trans-boundary implications of actions and decisions, cross border movements of public goods and trafficking of crimes, criminals and terrors. The most crucial challenges for shared governance are seeking a balance between autonomy and integration on the one hand, and between centralization and non-centralization on the other, in addition to containing conflict and ensuring coordinated actions. Generally speaking, coordinated action involves: (i) regular interactions among the actors-in-situations, (ii) a formal mechanism of resolution of conflicts and shared governance, (iii) laying down the formal rules of games, and (iv) an independent judicial mechanism of conciliating differences and arbitrating competing claims of interests. There are no universally accepted principles of shared governance and coordinated action on the matters of common public concern. Thus, while the Australian approach emphasizes a combination of both formal and informal executive mechanisms of shared governance and common policy outlook, the Canadians favour a formal—legal approach of rule based cooperation and collaboration. India uniquely combines formal structural mechanisms (i.e. institutions of shared governance such as Inter-State Council, National Development Council, etc.) with political negotiations (especially in the process and through the good—offices of the Prime Minister’s Office), judicial resolution, and semi judicial arbitration by regulatory authorities.

In order to avoid conflict among the different actors and polities, federal methodology recommends an unbundling approach in which responsibilities and authorities are split up into many micro actions, which are then assigned to the actors on the basis of equity, subsidiarity and economies of scale. Such an approach of allocation of responsibilities and authorities is further fine tuned to critically blend the basics of autonomy and integration. In other words, a kind of even playing field is created for each level and each unit of the federation. This offers a tremendous opportunity for coordinated action and shared governance of such vexatious and complex issues of public security and water sharing. These two issues, in the contemporary context of techno-managerial perspectives of development and international regulation, pose a critical

challenge of redistributing competences, redefining and restatement of the problems, redrafting of laws, reinventing better methodology of public management, reinvigorating existing institutional mechanism, designing new institutions, revisiting the role of judiciary, redesigning the state-society relationship in a manner ensuring greater involvement of public at large both in decisions and actions. Given the multidimensionality of the issues, we find in practice no one stroke solution of the problem, but a variety of practices are emerging from the federations.

## 2. Resolving Water Disputes

One can hardly find any uniformity in resolving water disputes across federations. Interregional water flows produce conflicts between regions sharing the water source over its use. This raises the complex question of water rights, community ownership, national regulation and extension of federal control over the jurisdictions of the regions. The Canadian, Australian and US constitutions hardly elaborate and provide for any significant mechanisms for resolving water disputes. The recourse to judicial mechanism is the principal mode of resolution of conflicts in these federations. However, one can further classify the various modes of resolution of competing claims on water as the following: (a) Constitution of commissions and other national level regulatory institutions with due consent and partnership of federating units, particularly of the affected regions. (b) Nationalizations of contentious inter-state river waters for federal regulation. (c) Establishment of semi judicial institutions like water tribunals to arbitrate between contesting units. (d) Judicial resolutions. (e) Contesting states agreeing among themselves to institute a lateral authority to regulate the sharing of waters. (f) Striking consensus through executive interventions, particularly of the Prime Minister or President's office. (g) Behavioural regulation through adoption of national mission statement on water.

Indian federalism constitutes an interesting case of the relative successes and failures of multiple modes of resolution of water disputes. Constitution bestows upon the Union government/parliament to make necessary laws with regards to "regulation and development of inter-state rivers and river valleys in the larger

interests of the public". To the extent of conformity with this provision of the constitution, the states have vested rights and authorities over "water supplies, irrigation and canals, drainage and embankments, water storage and water power". But the federal government has an obligation under Article 262 of the constitution to adjudicate the river water dispute through tribunals, which, as provided under Inter-State River Water Dispute Act, 1956, "shall investigate the matters referred to it and forward to the central government a report setting out the facts as found by it and giving its decisions on the matters referred to it within a period of three years". The tribunals are required when "it appears to the government of any state that a water dispute with the government of another state has arisen or is likely to arise by reason of the fact that the interests of the state, or of any inhabitants thereof, in the waters of an inter-state river or river valley have been, or are likely to be, affected prejudicially by: (a) any executive action or legislation taken or passed, or proposed to be taken or passed, by the other state; (b) the failure of the other state or any authority therein to exercise any of their powers with respect to the use, distribution or control of such waters; (c) the failure of the other state to implement the terms of any agreement relating to the use, distribution or control of such waters; the state government may, in such form and manner as may be prescribed, request the central government to refer the water dispute to a tribunal for adjudication."

The primary responsibility for the execution of the tribunals' decision lies on the federal government. And to this end, the government can either create an independent authority to oversee the execution of the tribunals' award, or a high-level office of the central government, such as the Prime Minister's Office (PMO) to monitor the progress in the implementation of the tribunals' award.

In the matter of Cauvery Water Disputes Tribunal (1993), the Supreme Court of India rejected the fundamental theory of water rights as claimed by some of the southern states of India. It has held as under:

"Though the waters of an inter-state river pass through the territories of the riparian states such waters cannot be said to be located in any one state. They are in a state of flow and no state can claim exclusive ownership of such waters so as to deprive the

other states of their equitable share. Hence in respect of such waters, no state can effectively legislate for the use of such waters since its legislative power does not extend beyond its territories. It is further an acknowledged principle of distribution and allocation of waters between the riparian states that the same has to be done on the basis of the equitable share of each state.” Recent stress is on developing a common national perspective on the use and exploitation of water. In this regard National Water Policy 2002 was announced by the Government of India. The salient features of this mission statement inter alia include: (i) bringing water resources within the category of utilisable resources to the maximum possible extent; (ii) inter-basin transfer of waters in order to meet the need of water short area; (iii) planned development of hydrological unit such as drainage basin; (iv) establishment of river basin organization; (v) promotion of participatory approach to water resource management, a user and stakeholder’s perspective of water development; and (vi) “the water sharing/distribution amongst the states should be guided by a national perspective with due regard to water resources availability and needs within the river basin. Necessary guidelines, including for water short states even outside the basin, need to be evolved for facilitating future agreements amongst the basin states.”

Undoubtedly the growth of national outlook would harmoniously resolve the water disputes. However, nationalizing a water route may also cause undue centralization of powers, an encroachment on the autonomy of states. Neither the “Swiss cheese” approach to water management, as shown from the Australian experience with regards to Murray-Darling Basin, nor the executive-political route appears to be a fool-proof federal mechanism of resolving water disputes. This is perhaps one of the crucial areas of public policy to which federalism is yet to adequately address as an integrated discipline.

### **3. Coordinated Policing and Public Security**

Generally, maintenance of law and order and public security falls within the core competence of the regional/local governments. And

the federal government has been generally responsible for the maintenance of national security. It has resources and competence to raise defence forces, paramilitary forces, highly specialized national security guards to perform specific and targeted functions, and to institute an investigating agency. In the realm of internal security management, it only has a secondary role to play. It at best can extend helping hands to local police in performance of certain specialized tasks. But given the transforming nature of public security, each federation now emphasizes upon collective management. The evolving approach emphasizes upon the following: (i) synthesizing or the systemization of a differentiated approach to public security management into one-integrated national policy framework to which each unit of a federation is party to decision and action. While doing so, large responsibilities lie on the federal government; (ii) vertical integration of intelligence agencies; (iii) lateral integration of departments involved in tackling different challenges posed to public security; (iv) bringing out a new regime of law in the areas where no regulatory system is at work; (v) greater involvement of local governments, because they being the first-line responders play a crucially important role in the management of public safety and emergency and disaster management; (v) greater involvement of people, a public-private partnership initiative in the management of public security.

An interesting document in this regards is the DPR 2004-5: Public Safety and Emergency Preparedness, Canada. It favours a holistic approach to public safety management with lateral integration and coordination of departments, portfolio agencies and review bodies engaged in public security. The passing of the Public Safety and Emergency Preparedness Act, 2005, is an important step in this direction. "The principles enshrined by the Act—national leadership, portfolio coordination, partnerships and information sharing—are fundamental to a progressive and comprehensive approach to public safety." Another important initiative is the Policy Statement of Federation of Canadian Municipalities, 2006-7. It strongly recommends for intergovernmental partnership and agreement, saying: "a strong responsible municipal government is key to building a safe and healthy community. Community based

holistic approaches to combating crime and victimization are most successful when developed and implemented through intergovernmental and community-based partnership. We must recognize municipal governments as critical partners in emergency management, disaster mitigation and pandemic planning.” As the “fifty-two per cent of all policing expenditures in Canada come from municipal budget”, the Federation of Canadian Municipalities strongly believes that “an integrated policy model would significantly improve communication and tactical coordination across jurisdictions, and better employ resources and well coordinated responses in the events of public emergencies”. In the aftermath of 9/11 the federal government of USA initiated a thorough revamping and reorganization of its homeland security. Twenty-two separate organizations were merged together to constitute the Department of Homeland Security, principally responsible for prevention and protection from terrorist attacks and violence. US defence departments act in close cooperation with homeland security, especially in the areas of intelligence-information exchange and humanitarian relief. As a matter of fact, the issues of illegal migration and cyber crime have blurred the traditional distinction between military and police forces.

In Switzerland, cantons and confederation have joint responsibility over national security and public safety. Article 57 of the Swiss Constitution deals with the forms and format of cooperation between federal government and cantons. Besides ministerial conference, meeting on internal security lays down the formal rules of game in striking coordination in the area of public safety. Public security is shared responsibility in Indian federalism. There is a basic uniformity in the Police Act and Criminal Justice System. States have authority to employ different forces to deal with crime and public security. Yet state forces largely depend on the deployment of paramilitary forces in dealing with trans-border or interstate crimes. For modernizing its police forces, states largely depend on central assistance. Primary intelligence input is provided by the intelligence agencies of the Union government. Coordinated actions are maintained through formal executive modes such as departmental meetings, etc. So far as the role of local government in policing

and public safety is concerned, it has yet to be mapped out by the government. Another grey area is quasi-policing. Over the years, the development of private security agencies and organizations has been increasing, but they are yet to be legally formalized and institutionalized. In recent decades, Australian federation is coping with the question of “hybrid policing”, redefining the roles of state police and private policing, and policing by regulatory institutions. What appears from above is the fact that federalism as a design of cooperative-collaborative governance has yet to prepare a blueprint for policing and public security. There appears to be greater dependence of states on the federal government in performing their primary constitutional mandate of providing security to the people.

#### **4. Unresolved Dilemma**

Inter-state issues like water and public security pose an interesting unresolved federal dilemma. This is possibly because none of the federal designs as mentioned above provide an adequate role model of resolving water disputes and effective management of public security. Yet one can critically learn from the others. Shared governance of water and public security require a redefinition of cooperative federalism, because integration of actions and decisions are bound to produce centralization of powers and authorities. This may countervail the essence of federalism—non centralization. However, the need of the hour is coordinated action and a partnership view of governance.



Subtheme

## **Techniques, Structures, and Processes**

Work Session 8: What are the  
Effective Approaches to  
Intergovernmental Relations?

Work Session 20: How can  
Disasters and Emergencies be  
Effectively Managed?

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*Carol S. Weissert*

### **1. Approaches to Intergovernmental Relations: Australia, Austria, and India**

The underlying theme of this session was far-reaching and difficult. Examining the various effective approaches to intergovernmental relations is a complicated task. Federal systems are far from uniform. They vary markedly and depend on the relationships between governments, variations in the federal constitution, the socio-cultural contexts, the political and social history, and the expectations of the citizens and demands of the time. There can be no common solution to equalize these differences. However, through this session an effort was made to probe whether a political solution was feasible. The

case studies examined intergovernmental relationships in Australia, Austria and India.

### 1.1 *Australia*

In Australia, intergovernmental relations have been centralist, opportunistic and coercive during the 2007 national elections in which the coalition government led by the Liberal Party Leader and Prime Minister John Howard was replaced. In this case federalism was an issue, but not in priority. Some Australians argue that changes need to be made in the constitution since it was framed in the nineteenth century. However, amending the constitution is difficult. One problem is a fiscal imbalance among governments. The commonwealth takes in over 75 per cent of the revenues, but states are responsible for half of the governmental expenditure. Moreover, the money the commonwealth gives the states depends on certain policy prescriptions. The federal government intervenes selectively in areas of traditional state responsibility to make ideological or political points.

A recent report by Twomey and Withers concluded in their paper (Federalist Paper I “Australia’s Federal Future: Delivering Growth and Prosperity. A Report for the Council for the Australian Federation”) in 2007 that federalism in its Australian incarnation is a flexible and efficient structure, providing significant financial and efficiency dividends. They concluded that the country’s per capita GDP was 10.5 per cent higher under a federal system than it would be under a unitary system. The authors recommended the following: reallocation of roles between the commonwealth and states to reduce duplication and clarify responsibilities, improvement in mechanisms for IGR cooperation; and reform of federal-state financial relations both in the operation of tied payments and vertical fiscal imbalance.

### 1.2 *Austria*

The Austrian Conference on Spatial Planning (OROK) was established in the early 1970s. The conference is chaired by the federal chancellor and provides a political platform in which all federal

ministers, regional governors and leaders of the associations of municipalities and towns are represented. It provides a platform for dealing with regional policy issues. Over the years the conference has worked on a variety of issues, and cooperation in principle has worked out well. The conference has gradually become a coordination platform for administration where civil servants at all levels can contribute and collaborate. There is a highly pragmatic understanding of governance among the involved players in the conference and in Austria. Key factors in Austrian intergovernmental relationships include: joint objectives, a certain potential of win-win situations, a generally accepted moderator and the political will for cooperation.

### 1.3 *India*

In India, there is a growing confidence of subnational systems. However, there are three issues that can engender conflict and resentment. The fiscal relationships are still dominated by the central government. While there have been changes over the past five years in the fiscal relationships, many conditions have changed. There are also establishment costs, for instance the Pay Commission decides pay for bureaucrats and does so without thinking of states' capacity. Public order is the executive responsibility of states, but they don't have much freedom in this area. Appointment of governors is supposed to be done with the consultation of the states. However, the governors are the eyes and ears of the national government and this is a reason for much resentment. There has been gradual erosion of Section 370 of the constitution that guarantees autonomy to the state of Jammu and Kashmir. This has become a major source of resentment. Residents of those states argue that when there is a crisis of governance, there is an assurance of autonomy that is later shelved. Another issue that sparks intergovernmental distrust is the creation of new states in India. Parliament decided to separate the 25 states to 28 with little consultation with the states on the issue.

These three case studies highlight the structural differences in federalism. Austria's federalism is highly integrated and uses informal networks effectively as might be expected in a small

country. Australia has what has been called dualist federalism with many constitutional constraints. India's federal system has centralist features and hence cooperation can be very difficult. The cases clearly point out the immense diversity encompassing small *vs.* large countries, established *vs.* new federalism, settled *vs.* unsettled federalism, and crisis *vs.* non-crisis situations. According to one of the participants in the session, there are nine states in India in which some form of armed forces are engaged to establish control. "The centre gets greedy in a crisis state", this participant said.

Nevertheless, there are also commonalities that cut across these variations. The commonalities were addressed in the form of questions including: How are good relationships defined? How important are formal and informal relationships? What are the constraints against intergovernmental cooperation? What is the role of the judiciary in assuring a balance needed for good intergovernmental relationships? What is the role of the public in encouraging and demanding intergovernmental cooperation? What about the democratic accountability of institutions?

## **2. The Importance of Formal and Informal Relationships**

While this was not a predominant question for the group, it did launch forth a discussion on trust and conflict. Trust can be very difficult when there are losers in the power struggle. Those losers are often states and localities. Trust can also be difficult to achieve if the participants believe that attempts to come together to solve problems are symbolic or political in nature with no intent to follow-up on discussions. Finally, it was pointed out that it is a mistake to define effectiveness as "no conflict". Conflict can be good. It is an opportunity to exert power.

While tension is inherent in federalism, this tension can be either creative or hostile. Formal organizations where national, state and local officials come together on a regular basis to discuss problems can help generate trust and create institutions that are responsive. These institutions can fill the need of ongoing and recurring relationships.

Australia uses primarily formal mechanisms for cooperation, although the states are exploring informal mechanisms as well. The main vehicle is the Council of Australian Governments (COAG) made up of the prime minister, state premiers, territory chief ministers and the president of the Australian Local Government Association. In the 1990s, it was viewed as successful; in more recent times, however, it has been less productive. Some feel that the agenda seems to be more about newspaper headlines and partisan show-casing. The COAG provides a means for some level of cooperation, but it is not robust and has little capacity to enforce and implement agreements.

In 2006 the Council for the Australian Federation was launched to ensure better cooperation among the states and territories and to give them a united voice in their dealings with the Commonwealth. The Council does not substitute the COAG but rather complements it by providing a forum for state-territory agreement. India has many formal mechanisms but they are not working well. There are formal ministers' conferences, but these haven't been very successful. There is also North-East Council that has both horizontal and vertical dimensions. It is horizontal because it involves seven states. It is vertical because their main concern is a greater voice in the centre.

It was generally agreed that informal relationships were also the key. These may involve efforts as diverse as political parties and civil servants working together. In India, for example, the proliferation of state-based political parties has been an important component of the progress of federalism.

### **3. Constraints Affecting Intergovernmental Cooperation**

The size of a country is an important constraint. Austria has eight million people. Switzerland is smaller than Delhi and has twenty-six cantons. There is a great deal of horizontal cooperation in these countries. In Switzerland cantons have to work together to build prisons since the cantons are too small to do it alone.

Heterogeneity is also a key. More homogeneous societies might

find cooperation much easier than more complex governments. For example, Nepal is exploring federalism. Nepal is a small country but it has twenty-nine different ethnic groups. Belgium is another small and socially complex country, which is an excellent example of cooperation and peace.

#### **4. The Roles of the Judiciary, the Public and Democratic Accountability of Institutions**

In Australia, the Supreme Court has been responsible for weakening the spirit of federalism. In 2006 the high court in Australia defeated the states' challenge to the Commonwealth's national industrial relations laws that expand the Commonwealth's power to make laws with respect to certain types of corporations. The decision was part of a series of rulings that the powers expressly granted to the Commonwealth. The tendency of high courts to support the national government led one participant to note that federal and state governments should avoid going to courts and should settle their difficulties on their own—using formal or informal mechanisms discussed earlier.

In Austria people know what is going on in different regions and expect cooperation among governmental officials. In other countries, newspapers and the media can help inform citizens. India has a strong regional media that helps put pressure at various governmental levels. Civic education can also enhance the potential role of the public in monitoring events and promoting intergovernmental cooperation.

In federal countries and others, there is often a democratic deficit because most decisions are made by executives who tend to be secretive and are reluctant to involve the public. Canada was seen as an example where the power of administrators making decisions with little public involvement has been a hot issue. The key is to encourage discussions among politicians and administrators. Intergovernmental forums where politicians and administrators can engage each other would be helpful. The issues facing federal countries—poverty, inequality, and security—are difficult. Intergovernmental relations need to be helpful not obstructive in addressing

these issues. Federalism and democracy are complicated—especially if not well developed in both spheres. The challenge is to make existing federal/state structures more workable, more rational, and less dysfunctional. Constitutional changes, establishment of formal intergovernmental linkages, and improving informal cooperative arrangements are important steps in the process.

## **5. Managing Disasters and Emergencies Effectively**

Work session 20 focused on intergovernmental responsibilities in planning for and executing responses to disasters and emergencies. It focused primarily on issues in India and the United States but also took into account the intergovernmental response to disasters in Austria and Canada. A discussion ensued on the intergovernmental management of disasters and emergencies and the age-old questions regarding who should do what in the federal system. Pertinent questions were posed probing into the government's responsibility in disaster management cases. An important observation was made on whether the responsibility should go from top to downward or upward from the local level, and then to the state levels of government. Most agreed that responsibility in such cases should go upward, from the local level, to the state level and finally to the national government. It is at the local level that the initial response takes place. However, the participants agreed that the plan had to be in place before the event—a plan that was devised at the state or national level.

In addition, in extraordinary events such as Hurricane Katrina in the United States in 2005 or the tsunami that hit Indonesia and India in 2004, an international dimension has to be taken into account. International groups and the United Nations play a role at least in the response phase. For example, the United Nations called the 1990s the “International Decade for Natural Disaster Reduction”. The agenda was to improve the capacity of each country to mitigate the effects of natural disasters expeditiously and effectively, and to develop measures for the assessment, prediction, prevention and mitigation of natural disasters through programmes

of technical assistance and technology transfer, demonstration projects, and education and training, tailored to specific disasters and locations and to evaluate the effectiveness of those programmes.

The group made a clear distinction between pre-disaster and after-disaster phases. They felt that in the pre-disaster phase which includes planning, the higher government levels—national and state—were crucial. India can be seen as a relevant case in this context. India started planning 7-9 years ago when the Finance Commission first looked into disasters. With an earthquake hit in Kashmir, the responsibility for responding came primarily from the state. The armed forces were seen as the last option. While the first responses come from local officials, they should implement a plan beforehand; however, they should not be responsible for paying for the response or devising solutions. Issues dealing with rehabilitation are particularly problematic for local governments. Local governments do not have the responses to provide long-term housing solutions or to put incentives in place for building away from disaster prone areas.

The group concluded that a number of lessons could be learnt from the intergovernmental experiences of India and United States:

***5.1 Good public policy concerning emergencies and disasters cannot simply rely on reaction; it calls for a proactive initiative.***

In India and other countries dealing with major disasters in recent years, public policy has generally focused on relief-funding for immediate relief and restoration. The proactive approach in India includes issues of prevention, mitigation, preparedness, responses, relief, reconstruction and recovery. The role of the government has expanded from search and rescue operations to the prevention of disasters through effective early warning systems and usage of latest technology to mitigate the effect of cyclones, tsunamis, earthquakes, landslides, floods, drought, and river erosion. However, this responsive approach has not been ideal. In 2001, India put in place the National Calamity Contingency Fund. The fund is recouped every year by the levy of a surcharge on central taxes.



### *5.2 It is necessary but not sufficient to have an emergency plan in place.*

Disasters can be effectively managed when we are prepared. Taking preventive steps to curtail damage, getting the rescue and relief machinery in place, arranging for rehabilitation strategies and funds well in time, helps to control the damage. However, a plan is only a plan. It must be implemented by those who are well trained and have the resources to carry it out. In a country as large and diverse as India, the implementation can be difficult. The discussion focused on the difficulties in carrying out plans devised at higher levels.

In December 2005 the Indian Parliament enacted a law with the passage of the National Disaster Management Act. It was the first of its kind in Asia and helped to shift the focus from response to proactive preparedness. The National Disaster Management Authority is headed by the prime minister and the State Disaster Management is authorized by the respective chief ministers.

The Government of India has shifted focus from response and relief and now concentrates on achieving a holistic management of the entire disaster cycle—prevention, mitigation, preparedness, response, relief, reconstruction and recovery. The role of the government has expanded from mere search and rescue operations, i.e. merely providing immediate assistance to the affected people.

However, participants expressed their concern to integrate developmental planning at the Planning Commission level. This will then percolate down to the local governments and panchayats at the village level.

### *5.3 Plans alone won't work if localities and states don't have resources or will.*

The Indian Ministry of State for Home Affairs in collaboration with the United National Development Programme (UNDP) is implementing a large community based Disaster Risk Management Programme in 169 multi-hazard districts in 17 selected states of India. Initiated in 2002 at a cost of \$34 million, it includes targeting vulnerable groups; preparedness and mitigation plans; public awareness campaigns, and institutionalization of the response

mechanism including early warning mechanisms. It also provides for disaster management to be introduced as a subject in the school curricula.

There was considerable discussion on whether these districts were receiving the training and were developing plans as they were supposed to. Among other issues raised was the lack of proper monitoring to assure implementation. The community based disaster management programme has not been uniformly administered.

#### ***5.4 Technology is an important component of disaster-management.***

Modern GPS and satellite technology systems can greatly assist communities and states in anticipating a natural emergency. Yet there are more examples of where technology has failed. Indian officials said they were not informed of the 2004 tsunami until hours after it had hit Indonesia. Had they known earlier, they might have alerted their own citizens of the imminent danger. However, availability and use of this technology to mitigate effects would be a crucial step to initiate an emergency response.

#### ***5.5 Countries can't rely on the UN or NGOs for assistance.***

Global challenges need global cooperation. Disasters do not recognize state systems or borders. While the UN General Assembly in the 1990s highlighted national disaster reduction and tried to improve the preparedness amongst the common public to avert disasters, plans must be put in place and implemented by the countries in question.

There was also a detailed discussion on the role of NGOs in alleviating the suffering of those affected by disasters and emergencies. There were some complaints about the NGOs and their goals. Perhaps they were advancing their own organizational goals rather than helping those in need. Concerns were raised regarding the importance of NGOs providing long-term solutions. This is possible only if initiative is mainstreamed into an existing pro-

gramme and spearheaded by a department having a considerable rural base. Finally, there were concerns regarding credit taking. For example, during the 2004 tsunami more than 150 NGOs came forward to offer help, however, only a dozen were able to provide financial assistance.

## **6. Was Katrina an Exception in the United States?**

There was also a discussion on the largest recent natural disaster in the United States—Hurricane Katrina in 2005. Most agreed that Katrina was an exceptional case. In the United States, the shared intergovernmental arrangement generally works well. The local government is the first responder; states are the second responders and they step in when the local governments request them to do so. The federal government is the third responder and step in when states put forward a request. The federal government provides assistance during and after disasters and funding to prepare for disasters. State/localities must have disaster management plan. While the Katrina hurricane was and continues to be a difficult case for the United States, other natural disasters like forest fires and floods follow the more usual cooperative course in the United States.

Interestingly, recent assessments of the governmental response to hurricane Katrina in the United States by the White House and Congress concluded that the role of the federal government should be more proactive and that the federal government should acquire more power and control over disaster relief and response. The model suggested by the White House is one of a centralized national command structure controlling the forces in the field. While these recommendations have not been implemented, the implications for federalism are immense and threatening.

## **7. What about Intergovernmental Arrangements in Other Countries?**

Discussions were held with regard to Canada and Austria. In Austria, there are only two kinds of disasters—avalanches in the

winter and floods in the summer. These are primarily dealt with on a regional basis. Village groups have the primary responsibility for response. The army is involved only in larger disasters. In Canada, responsibility for disasters lies primarily with the municipal level, it then moves up to the provincial and finally the federal level. All municipalities must have disaster responsive plans. Yet local government officials work part time which often results in failure at the implementation stage. Premiers take political responsibility for handling the management of post-disaster initiatives.

### **8. Are there Other Ways to Deal with Issues such as Risk Assessment?**

This has been a major concern in India. Are there ways to keep people, particularly poor people, from living near the water? One suggestion in India is to plant mango groves by the waterside as a way to alleviate the problem. However, this might result in additional problems if during high winds or floods these trees are swept into the houses. In the United States, the opposite is true. Land near the water is typically very expensive but the result may be the same—rebuilding occurs in areas that are vulnerable to further natural disasters. Regional planning is also very crucial. In the US, states have adopted a mutual assistance compact so that their national guards can provide assistance to other states. In the wake of Hurricane Katrina, these troops were ready even before the federal assistance came in.

### **9. What is the Public's Role?**

What should be the level of involvement of the common public? Should they be responsible for issues concerning the alleviation and response to natural disasters? There was discussion about the importance of alerting the people about the expected responses to natural disasters and then alerting them to impending disasters. The media can play an effective role in this case. In some countries, information is not available to the media and to the people. This can lead to confusion and cause greater casualty. Technology might

provide advanced information to the media who could inform the public on impending natural disasters. Another key point is taking care of people's dignity. For example, after 9/11 the media was conscious about showing no bodies. In India, however, the first images telecasted after any national disaster are the bodies of the dead.

In India, there were issues of bureaucrats blaming other bureaucrats for problems in response. In the United States, governments blamed other governments and the citizens often assessed blame on them all.

## **10. Future Issues Related to Natural Disasters and Emergencies**

Global warming raises many concerns about flooding and other natural disasters. The public should be informed on the potential impact of the rising sea level and the impact on vulnerable areas, particularly low-lying areas. Most delegates posed that natural disasters are often a global issue. No single country or state can handle the disaster alone. Another challenge today, is the degradation of the environment. Communication and involvement of the common public is important in dealing with these long-term issues.

## Subtheme

# Accountability and Transparency

Work Session 9: Can Accountability and Transparency be Achieved where Executive Branches Dominate Intergovernmental Relations?

Work Session 21: Are Centralized Election Agencies Compatible with Federalism?

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*Rekha Saxena*

Federalism is formalized through a written constitution, which requires a high degree of accountability and transparency. This is why two or more orders of government have been increasingly moving towards a process of governance, bringing together partnerships between state, civil society and market. Operationalization of federalism presupposes mutual trust, constitutionalism, rule of law, honesty, and fair and free federal interaction. These values are becoming all the more necessary not only in smaller federal systems with direct democracy, but also in large federal polities based on representative democracy, as participatory inputs by citizens are being increasingly emphasized both by theorists of democracy as well as political activists and practitioners.

Yet elections continue to be the most institutionalized mechanism of participation and accountability in the world. With the growing salience of mass media and information technology, transparency in federal governance has never been more demanded as well as more feasible, by virtue of deepening democratic values and the globalization and availability of technology.

In a modern democracy, elections based on universal adult franchise have become a global norm and practice. The electoral process is purported to perform the basic functions of political mobilization, representation, putting together coherent and workable policy packages, and electing political elites to perform the roles of government and opposition. Given these vital functions, free, fair and transparent elections are crucial to democratic legitimacy of the political system. It is, therefore, necessary to raise such questions as the following: Are elections constitutionally embedded or legally provided? What kind of electoral laws are followed—plurality/proportional/majority systems? Are elections autonomous of the federal and provincial governments? Are centralized election agencies compatible with federalism? How do the people perceive the fairness or lack thereof of the electoral process?

Elections in multilevel federal systems are increasingly becoming a hot political issue. This is because many federal systems lack a centralized election commission. The recent experience of the Presidential elections in the US has brought to the fore the requirement of ensuring free and fair elections in a federal system where the electoral responsibilities are shared by multiple authorities at different levels of the political system. The need for at least some amount of commonality is widely felt. It is also felt that laws and practices related to the federal elections should be uniform.

Typically, the popular parliamentary chamber is directly elected by the people in multiple single member constituencies spread throughout the nation. The federal second chamber has greater variability of electoral laws and practices, and such chambers are directly elected by the people in the US and Australia, while it is indirectly elected by the elected members of the state legislatures in India. In Canada, the Senate is appointed by the Federal executive in numbers constitutionally assigned to the provinces and regions.

Generally, it is crucial that an election agency cannot be part of the government and should be insulated from the governmental influences of any levels. This has been done in India by entrenching such a commission in the Constitution itself and mandating it to hold presidential, vice-presidential, parliamentary and state assembly elections. The Chief Election Commissioner and other Commissioners, if any, are guaranteed the security of tenure and service condition comparable to the Supreme Court judges. The experience of India at least shows that there is no incompatibility between a centralized Election Commission and federalism. If anything, India's success story as an electoral democracy of considerable creditability at both Union and state levels is largely attributed to such a centralized but autonomous election agency. Evidence shows that where electoral responsibilities are shared between the federal and regional governments, as in the case of USA and Canada, there have been difficulties as a result of this decentralization. And, these countries have shown a great deal of interest in the Indian electoral system.

At present, the Central Election officer at the centre is answerable to the parliament, not to the government. Central election officers at both federal and provincial levels have been independent and autonomous. Since the electoral system at the centre has not posed any serious problem, as it has in the US in recent years, there has been no serious proposal for comprehensive changes in the method of conducting elections. Rather, free and fair elections need a massive exercise of coordination.

The centralized election agency provides the opportunities to learn from the experiences of different subnational elections. For instance, in West Bengal election, the system of Booth Level Officer worked very well. With some modification, a similar system was applied in Uttar Pradesh (UP), which led to deletion of 7.8 million bogus voters and the addition of 6.2 million genuine voters. The Election Commission also checked the West Bengal electoral rolls and, detecting 85 lakhs bogus voters, it deleted these names and added those that were frequently omitted.

Such a centralized agency also does not mean that the process is cut off from the grassroots level. The Indian experience shows that several meetings of district magistrates and block level officers



take place to evaluate and conceptualize the overarching electoral system down to the level of the polling booth.

Centralized election agency is also required to make the whole process impartial. For instance, appropriation of the commission's work by state government of Madhya Pradesh made the electoral process suspicious because a meeting of district magistrate (DM) and his subordinate officers was held with regards to the elections and was chaired by a minister of the state government. When the information reached the Election Commission of India, it took a strong view of the matter and immediately reprimanded and transferred the concerned DM. During the period of an election process, the bureaucracy of the state government dealing with elections is provisionally placed under the directive and disciplinary action of the Election Commission of India.

There is another instance of a by-election in the same state in which the declaration of result was delayed by three hours by the state level administration under the influence of a powerful state leader. The Election Commission's field observers intervened in the matter and got the election result declared. In yet another instance, a Lok Pal was harassed by the Speaker of the house over a corruption scandal; the Lok Pal was able to secure protection from the Election Commission because it is a constitutional body.

As the federal features vary from country to country, election management also varies depending upon history and geography. In a country like US, where federalism was a product of agreement amongst the states, there are variations in election procedure from state to state. Each state has a separate election commission to conduct all elections in that state, and as a result there is no uniformity in the election law and procedures of various states even for elections related to the posts under federal governments. This has indeed resulted in many complexities and confusion in the American election system. But as already pointed out earlier, India, with extreme diversities, followed a different path by having a centralized and uniform election procedure throughout the country, with parliamentary and state legislature elections under a powerful and independent central election commission.

Following the American model in India might have been disastrous. This is borne out by some recent experiences in relation

to State Election Commissions (SECs) created for city and village councils under the 73rd and 74th Amendment Acts. These SECs have not performed with the same degree of impartiality and objectivity as the Election Commission of India. Apart from lack of uniformity, the SECs are often found to be under the clutches of state government for various reasons. The centralized election system in India has indeed contributed to uniformity and unity, while simultaneously keeping at bay those fissiparous tendencies of regional, linguistic, religious and casteist affiliations. This has been achieved without hurting the federal spirit of democracy by making reasonable use of state official machinery in most of the aspects related to the conduct of elections. Every constituency has been so designed that each one is a pluralist society on its own. The uniform electoral procedure for all states has enabled the Election Commission of India to adopt a non-discriminatory approach towards all voters in every aspect of electoral management. Besides these factors, the role of central police organizations has also grown in prominence in the whole electoral process, in comparison to state police forces.

However, the Indian electoral system has thrown up a few problems that have raised some discontent and controversy. Early on, national and assembly elections were held simultaneously, and national issues largely dominated. In 1971 Indira Gandhi called a snap parliamentary election thereby de-linking the elections for the two levels of the federal polity. Mainly for this reason, and subsequently on account of greater politicization of the electorate and deepening of democracy, local issues now seem to override national issues and give a strongly regional flavor to electoral and political processes. The largely illiterate electorate often gets confused and local and national issues get mixed up.

Another point of dissatisfaction has been the sharp discrepancy between the vote and seat ratio as a result of the plurality or first-past-the post system of election. In the initial phases, the ruling parties got disproportionately large number of legislative seats in comparison to the percentage of votes polled. In more recent years, the articulation of cultural cleavages and social diversities has led to another kind of problem, namely extreme fragmentation of the

party system and enormously large number of parties. Thus, it is evident that the plurality system, which in homogeneous societies has invariably produced two party systems, has in India shown effects of proportional representation in the form of a fragmented multi-party system, likely due to extreme diversities.

Until 1999, Nigeria experienced a decentralized election system. The first ever federal elections in Nigeria (1954) were held under different arrangements prescribed in regulations made separately for each region by the Governor General. Elections in the north were indirect while in the eastern region they were direct and based on universal adult suffrage. The 1954 federal constitution also made allowance for regional police force. The 1999 Constitution provides for Independent National Electoral Commission (under Third Schedule, Part I). The commission has power to organize, undertake and supervise all elections to the offices of the president, vice-president, the governor and deputy governor of a state, and representatives to the federal and state legislatures. But Nigerian experience with such a centralized agency has not been painless. Huge numbers of eligible people could not be registered. The commission has been entrusted with monitoring the political parties, but faced with inadequate capacity to do so.

It is also argued that subnational election commissions are more suitable in post conflict societies as the local population may have more trust in it than the centralized election commission. Thus, the Nigerian experience has been at variance with the Indian experience with centralized election agency as discussed earlier. In the case of the US, the states came together to form a federation, but retained control over the election. The latest experience in the US has caused some concern which can be mitigated by having a centralized election agency. As will be discussed later some steps have already been taken in this direction in the recent times.

The US Congress has supervisory power over elections. It is empowered to protect the voter's right and prevent corruption in the election process. In the last 32 years with the establishment of Federal Election Commission, the federal role has gradually increased in the US. Besides the issue of neutrality, that of competence is of equal importance. The US Federal Electoral Assistance

Commission has been set up recently with the task of providing resource assistance to the state election commissions, with respect to certain broad and uniform election procedures.

During the early decades of the Brazilian federation, the member-states had the authority to legislate on electoral matters concerning state and municipal elections. During this period, electoral frauds under the patronage of state governments were rampant. Moralization of the electoral system was one of the forces behind the Revolution of 1930, which led to the end of the Old Republic.

In 1932, the central government published an electoral code to regulate elections throughout the country (federal, state, and municipal), and it instituted a specialized arm of the judicial branch at the federal level, called the Electoral Court, with the function of managing the conduct of elections and settling disputes arising there from. The current federal Constitution, enacted in 1988, maintains the Electoral Court essentially as it was initially established. For different layers of elections, there are different levels of electoral courts. Regional electoral courts are concerned with state level elections, while electoral lower court conducts municipal elections. These courts are not entirely packed with executive—nominated judges, rather some of them come from the bench as well. The Superior Electoral Court has the power to review decisions of the regional electoral courts, though this authority is restricted to the circumstances stipulated in the Constitution. The management of elections by the Electoral Court in Brazil is fully compatible with the principle of federalism, both in its structure and in its functioning.

It is evident that in older and relatively developed federations, the presence of a centralized electoral agency is not only compatible with federalism but also more effective in ensuring the legitimacy of the electoral process throughout the federation. However, in a relatively new and developing federation like Nigeria, the local voters are more suspicious of a centralized election agency and place greater trust in local agencies. In such a scenario, accountability and transparency of the electoral process becomes crucial for building up trust and legitimacy.

The issues of accountability and transparency with special reference to federations, where the executive branches dominate inter-governmental relations (IGR), have become increasingly more important. This is in the backdrop of regionalization and decentralization of centralized federations and the contemporary challenges of privatization of the state sector of the economy, rise of the civil society institutions, and globalization of national economies. Executive federalism is even more likely to dominate the federal-provincial relations in parliamentary federations than in presidential federations, where the principle of separation of powers, and checks and balances ensure a certain degree of mutual accountability and deliberative democracy due to the very design of such a constitution. Nevertheless, the question of accountability presents a formidable challenge in how to conceptualize it and enforce it in a system where despite separation of powers in the constitution, the federal system must in its functioning become mutually interdependent. On account of this, it often becomes very difficult to attach responsibility of a sector, level and an agency of a government which is so divided that it becomes difficult to determine where sovereignty lies in the US. Fixing responsibility and accountability also requires understanding where the money came from, to whom it came for, and how is it supposed to be spent and accounted for. The states can be more or less accountable for what they are doing. But when the money comes from the federal exchequer and schemes are to be implemented by state action and supervision, legislative autonomy and control is lost throughout process. States resent federal supervision and since the money comes from Washington, state legislatures have no legitimate authority over it. Thus, there is neither congressional control nor state legislative control.

Executive federalism in parliamentary federal systems over the years became vulnerable to centralization of power as a result of economic crisis' and wars. The relative peace and unprecedented prosperity in developed Western federations tended to bring the issue of accountability and transparency to the forefront of the governance debate. Relatively successful federal systems in the developing parts of the world like India, Malaysia, Russia, and South Africa have also found themselves face to face with similar, if lesser

magnitude, pressures in favour of accountability and transparency. In Canada, the federal government gives bloc and specific grants to provincial governments for use. Ottawa initially made an attempt to ensure uniform standards across the provinces and did some monitoring. The provincial governments have increasingly questioned undue federal interference and the governments in Quebec have gone to the extent of opting out of federally sponsored schemes, demanding that they be given their share of the grant to be utilized for province sponsored schemes without any federal inputs. In India, in the Nehru and Indira Gandhi eras, centrally sponsored schemes were implemented by the state governments under continuous and active monitoring by New Delhi. Prime Ministers Indira Gandhi and Morarji Desai often visited state capitals with Union officers to supervise development activities funded by the Union. These practices have virtually disappeared under subsequent regimes, especially in the era of federal coalition governments. In Germany, the accountabilities of the federal and *Land* governments are in a way interlocked because of direct representation of provincial chancellors or their nominees in the *Bundesrat*, the federal second chamber. Thus, *Land* governments are directly associated with federal legislative process. However, the implementation of laws is divided between federal and *Land* governments and this divided accountability may pose some problems. *Land* governments have their own compliance system and federal control appears tenuous.

In European governments, the problem of accountability appears to be especially complicated because there are three levels of federal and confederal authorities in federations, namely, federating states, the federal member states, and the confederal European Union. It requires an enormous amount of political and administrative ingenuity to simply get this labyrinthine machinery moving. Yet it seems to be slowly but steadily evolving with occasional hiccups.

Moreover, the question of accountability and transparency is also complicated in asymmetrical federal systems where units enjoying asymmetrical powers and autonomy at the cost of symmetrical units engender envy and a sense of relative discrimination among those who are denied such privileges. On the one hand, the trend

of regionalization all over the country prompts all units to seek to devise a new federal balance of forces that would allow more equitable and just sharing in federal power and national resources. On the other hand, privatization and globalization empower the civil society and market to demand a freer, accountable and transparent partnership between the government, civil society and the market in governance. The Indian experience shows that special status to Jammu and Kashmir, Nagaland, and Mizoram are strongly resented by the states with strong regional identities elsewhere such as Punjab, Tamil Nadu, Andhra Pradesh, and other states of the north-east. The new partnership in political, corporate and civil society governance in India is passing through its teething trouble and terms and patterns of relationships including statutes in some cases still in the process of being formulated and evolved.

The newer trends in contemporary federations have underlined the accountability of the executive branch to the legislative branch, that of the federal government to the state governments, that of state governments to the local governments, and finally, that of all public authorities to the public and the media. The mushrooming of non-traditional agencies and forces like the NGOs, old and new social movements and international financing agencies have contributed to the greater concern with the problem of corruption in public office. The media are also becoming more numerous and investigative in exposing government, corporate and civil society institutions associated with governance and development.

Federal systems are responding to the imperatives of accountability and transparency through a variety of mechanisms, such as open processes of negotiation, policy formulation, and implementation by various orders of governmental and non-governmental institutions. The meetings of executive heads of government are now more openly reported in the media and the representatives of civil society and the corporate sector are invited to participate in the intergovernmental interactions and decision making. In federal systems like India where the constitutionally entrenched autonomous office of the Comptroller and Auditor General of India (CAG) is mandated to audit the accounts of the Union and state governments, as well as any important authorities created under acts of

Parliament, it is observed that the effectiveness of parliamentary committees over government accounts and expenditure is somewhat better at the parliamentary level though it leaves much to be desired at the level of state legislatures. An area of darkness is the accounts of local bodies and NGOs which are outside the jurisdiction of CAG of India. At this level, there is neither parliamentary nor legislative control. In a few states like Rajasthan and Maharashtra, the practice of what is called social audit has been initiated by the vigilance of the civil society which forces such agencies to open their records to the public.

The experiment of the institution of Ombudsman in India is still not very developed. At the Union level, the need for a Lok Ayukta has been debated for decades without any parliamentary statutes being passed, and the issue of exempting the prime minister from its net has not yet been resolved. Several state governments have enacted Lok Pal Acts but studies show that the institution is neither very powerful nor very active. A notable recent development is the enactment of the Right to Information Act by the Parliament under which a reasonably powerful union Information Commissioners Office has been set up. The kind of information that was completely closed to the public has become accessible under this Act covering both the Union and state governments.

In a globalizing world, the problem of accountability and transparency is particularly amplified because of growing levels of violence, terror, corruption and criminality. Federal constitutions were not drafted anticipating these unforeseen problems especially at their present levels of incidents. Enactment of anti-terror laws at federal and provincial levels has often risen to insurmountable levels of difficulty especially in a developing federation like India. Such laws are more easily enacted and implemented in developed and institutionalized federations than in the developing ones. Similar problems have been encountered in dealing with corruption and criminality at the legislation and implementation levels.

To sum up, in the emergent discourse on good governance involving in a joint venture, the state, civil society and the market, the problem of ensuring accountability and transparency has acquired a centrality that cannot be gainsaid. The complexity of



the problem stems largely from the fact that the process of federalization has been expanding both *within* and *among* the nations. The new global political and economic order cannot postpone this problem much longer. Federalists all over the world must apply their intellect in devising institutions and practices to adapt democratic and federal governance to the challenges of the twenty-first century. In the end, it is needless to add that the stepping stone to these goals in governance is free, fair, and transparent elections.



## Contributors

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