

Subtheme Paper

Anticipating and Managing Tension and Conflict

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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?