Subtheme Paper

Techniques, Structures, and Processes

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 lawmaking. 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 lawmaking 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 lawmaking, 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 administrating 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-

cipation 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 pretentions 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.

Suggested Reading

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