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BACKGROUND PAPER**

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**DISPUTE RESOLUTION**

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**1. The nature of federal disputes**

Disputes are inherent in the federal system of government. The distribution of power between and within levels of government provides a catalyst for conflict, as much a distinguishing feature of federalism as the existence of distinct polities. Accordingly, conflict management is an essential component of the institutional framework of federal societies.

The distribution of power provokes a variety of disputes, between levels of government, between governments at the same level, and between people (or peoples) and a government or governments. All such disputes, however, involve basic issues of constitutionalism: definition and enforcement of limits upon governmental authority.

In preparing this paper I have drawn examples from a wide range of federal, confederal and quasi-federal arrangements at both national and supranational levels. The justification for inclusion of supranational organisations lies in the symbiotic relationship between them and national governments. Federal experience has certainly shaped their design, while they in turn have already begun to influence the evolution of national systems of government.

Fluidity and dynamism are hallmarks of federal societies, intergovernmental relations and conflict management. Even so, four broad approaches to conflict management may be discerned: formal dispute resolution, informal dispute resolution, dispute avoidance and popular dispute resolution. This paper deals in turn with each of them, in an illustrative and provocative, rather than comprehensive, fashion.

Beforehand, however, I note that each federal society will have its own culture of conflict management. That culture will have a subtle but significant impact upon the operation of conflict management systems, so that like structures may operate differently in various societies. Seldom is that culture explicit; it is usually derived from history rather than any constitutional instrument. An exception, however, is provided by section 41(1)(h) of the Constitution of South Africa (1996), which states:

“All spheres of government and all organs of state within each sphere must co-operate with one another in mutual trust and good faith by —

- (i) fostering friendly relations;
- (ii) assisting and supporting one another;
- (iii) informing one another of, and consulting one another on, matters of common interest;
- (iv) co-ordinating their actions and legislation with one another;
- (v) adhering to agreed procedures; and
- (vi) avoiding legal proceedings against one another.”

It is probably too early to predict whether that prescription will determine the constitutional culture of South Africa.

**2. Formal Dispute Resolution**

More than a century ago, in identifying the characteristics of federal systems, A.V. Dicey

drew attention to "the predominance of the judiciary in the constitution". This remains so, despite the fact that in several federations where judicial review has played a prominent part in conflict management (such as the United States of America, Canada and Australia), this role has been assumed by the courts rather than imposed by the language of the constitution.

From the vast literature on judicial review, I have selected four issues of current or potential significance: judicial concepts of federalism; reference jurisdiction; Scottish devolution; and supranational federalism and the European Court of Justice.

## **2.1 Judicial Concepts of Federalism**

An inescapable function of courts engaged in judicial review of the exercise of government power in a federal system is the development of a foundational concept of federalism. The German Constitutional Court has, for example, applied a principle of "federal comity" in adjudicating the division of powers between the Bund and the Länder. This principle requires the Bund and the Länder to conduct their affairs in a manner "friendly to the idea of federation", and is widely regarded as having curtailed (to some degree) the expansion of federal legislative power within the German federation. Similarly, the Supreme Court of Canada's acknowledgment of "federalism" as an underlying principle of the Canadian Constitution has strengthened the hand of the provinces in the determination of intergovernmental disputes in Canada. In contrast, the United States Supreme Court has been reluctant to stem the tide of federal legislative authority, as has the High Court of Australia. The requirements of federalism in the United States of America and Australia appear to be satisfied by the continued existence of the states as political entities, without regard to the scope of their residual legislative authority.

These different concepts of federalism are the product of various influences. The model for distribution of power between levels of government may well be significant. The Canadian Constitution specifies powers that are conferred on the provinces, while the powers of the states are conferred in general rather than specific terms by the constitutions of the United States of America and Australia. More important, perhaps, is the constitutional culture. The courts, no less than the other branches of government, must remain sensitive to that culture if they are to justify their role in conflict management.

## **2.2 Reference Jurisdiction**

The capacity to determine constitutional issues upon reference allows pre-emptive conflict management by the courts. Its significance has recently been demonstrated by the judgment of the Supreme Court of Canada in the Quebec Secession Reference. The question of whether a unilateral declaration of independence would be valid and effective under either Canadian or international law was referred to the Court by the Canadian government following the narrow defeat of the 1995 referendum on secession. The Quebec government chose not to participate in the reference proceedings, and as a consequence, the Court appointed an *amicus curiae* to present the case in favour of a right of unilateral secession. The Court denied any such right, but held that both federal and provincial governments would be obliged to negotiate a constitutional secession if the people of Quebec were to vote in favour of secession at a referendum.

It is difficult to imagine a more critical test of judicial review than this reference, which placed the Court at the centre of the most basic issue that could confront any federation. As in all cases of judicial dispute resolution, the measure of success was the extent of acceptance of the decision. At the same time, the risk to the Court in such proceedings was enormous. Again, it appears that the constitutional culture was decisive regarding the capacity of the Court to perform this task. It may be noted that the High Court of Australia has eschewed any similar role under the Australian constitution.

## **2.3 Scottish Devolution**

A recent example of formal dispute resolution by the courts is provided by the mechanism in the Scotland Act for judicial review of legislation (both proposed and enacted) of the

Scottish Parliament, which has general legislative capacity curtailed by reservations to the Parliament at Westminster. The Privy Council is the final arbiter of disputes over Scottish legislative competence. Both the Scottish government and the United Kingdom government may refer a Bill before the Scottish Parliament to the Privy Council for determination. Questions of legislative competence may also be referred after enactment, either directly or from any legal proceedings in which they arise. The Privy Council may declare legislation invalid, subject to the possibility of rectification by the Scottish Parliament or an order by the Privy Council avoiding any retrospective effect of invalidity.

Viewed in a broader context of conflict management, this mechanism has several notable features. The composition of the Privy Council will now take on an entirely new significance. The power of the United Kingdom Parliament to amend the list of reservations of legislative power, exercisable at any time, could render judicial review nugatory. It could also be a factor which the Privy Council considers in the performance of judicial review. It remains to be seen whether the Privy Council will develop a foundational constitutional concept of devolution in the process of construing reservations of legislative power, perhaps in conjunction with the evolution of a political culture of devolution.

## **2.4 Supranational Federalism and the European Court of Justice**

In performing its role of dispute resolution within the European Union, the European Court of Justice has added momentum to the forces of integration. The adoption of doctrines such as the supremacy and direct effect of European Union law, judicial review of member state legislation, and the granting of standing to European Union nationals to enforce European Union obligations against member states and other individuals, has ensured the autonomous development of European Union law in a manner typical of federal systems.

The impact of the Court's decisions upon the legal systems of member states may still be limited and uneven, but the potential is beyond argument. The Court provides an instructive example of the extent to which a formal dispute resolution process may contribute to the development of a constitutional culture to a degree which is disproportionate to the number and significance of disputes actually resolved.

## **3. Informal Dispute Resolution**

Expense, delay and publicity are recognised shortcomings of formal dispute resolution procedures. Loss of control of a contentious issue, once it becomes the subject of judicial determination, is another factor which may deter governments from recourse to these procedures. Thus attention has recently been directed to the possibility of utilizing alternative dispute resolution techniques for conflict management in federal systems.

So far, examples are few. This approach has been proposed in Canada as a means of removing barriers to interprovincial trade, but has not yet been put into practice. Section 41 of the South African Constitution is an interesting attempt, while chapter 20 of the North American Free Trade Agreement may offer some guidance for federal systems.

### **3.1 South Africa**

In addition to the principles of co-operation, mutual trust and good faith noted above, section 41 of the South African Constitution requires that all governments must "preserve the peace, national unity and indivisibility of the Republic", "respect the constitutional status, institutions, power and functions of government in other spheres", and "exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere". These requirements are aimed at dispute avoidance, considered below. However, section 41 also obliges parties to an intergovernmental dispute to "make every reasonable effort to settle the dispute", and to "exhaust all other remedies" before litigating the dispute. Courts are empowered to refuse to hear any intergovernmental dispute where these requirements have not been met. The section anticipates the enactment of legislation to establish "appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes". The efficacy of section 41 will undoubtedly depend upon the content of this

legislation. It may be hoped that section 41 enjoys a better fate than section 101 of the Australian Constitution, which decrees that “[t]here shall be an Inter-State Commission” to determine constitutional disputes relating to trade and commerce. The combined efforts of the High Court of Australia and the federal parliament have deprived section 101 of all practical significance.

### **3.2 NAFTA**

The dispute resolution process contained in chapter 20 of the North American Free Trade Agreement comprises three stages. The first is consultation between the parties. Where consultation fails to resolve the dispute, the matter may be referred to the Free Trade Commission for mediation, with recourse to technical or expert advisers if required. Where mediation is unsuccessful, either party may request the formation of an arbitral panel to report on the matter. The findings of an arbitral panel are non-binding, but the parties are required to resolve the dispute by agreement in accordance with those findings within 30 days of release of the report.

Again, experience is limited, but chapter 20 raises interesting questions. To what extent are the mediation and arbitration processes amenable to extension beyond the realm of trade disputes to broader issues of governmental authority? Moreover, do such processes allow governments to retain a measure of control over contentious issues that is lost upon recourse to formal dispute resolution procedures? Positive responses to these questions may encourage further experimentation with alternative dispute resolution techniques in federal systems.

## **4. Dispute Avoidance**

Conflict management in federal societies demands measures for control of the number and scale of disputes. Without such measures, government paralysis may ensue. Accordingly, dispute avoidance is an essential element of the conflict management system.

Dispute avoidance techniques are many and varied. They include the drafting of constitutional instruments, constitutional intergovernmental forums, and extra-constitutional intergovernmental forums.

### **4.1 Drafting of Constitutional Instruments**

All federations must have their own examples of drafting which invites disputation. Australia has section 92: “trade, commerce and intercourse among the States ... shall be absolutely free.” This beguilingly simple language has probably incited more litigation than all other provisions of the Australian Constitution, taken together.

The current controversy surrounding the recent decision of the Hong Kong Court of Final Appeal regarding “right of abode” in the Special Administrative Region highlights deficiencies in the Basic Law regarding the powers of various bodies to interpret the Basic Law, along with the failure of the Basic Law to identify the means of alteration of the Basic Law. As a consequence, the “autonomy” of the Special Administrative Region has been called into question.

It must be acknowledged that imprecise expression may well be deliberate, and ambiguity the price paid for achieving agreement upon the terms of a constitutional instrument. This approach, however, merely defers the date of resolution of the difficult constitutional issue. It may also place at risk the constitutional processes of conflict management, if they are unable to resolve the deferred constitutional problem.

### **4.2 Constitutional Intergovernmental Forums**

German constitutional experience is rich in the provision of intergovernmental forums designed to contribute to conflict management. The Bundesrat, comprising delegates of the various Länder governments, is a prime example. The consent of the Bundesrat is required for passage of legislation which amends the Basic Law, affects Länder finances or taxes, or is “administratively relevant” to the Länder. The Bundesrat may also propose modifications of federal laws in light of the administrative experience of the Länder.

Deadlocks between the two chambers of the federal parliament may be resolved by the Bundestag / Bundesrat Mediation Committee, comprising sixteen members of each chamber. This process has advantages of simplicity and efficiency, particularly when compared with the Australian deadlock procedure which requires dissolution of both chambers followed (perhaps) by a joint sitting of the two. Finally, the recent establishment of the "Europe Chamber", a committee of the Bundesrat charged with advising the federal government on the impact of proposed European Union measures upon areas of Länder legislative competence, may be seen as an attempt to manage conflict arising from European integration.

#### **4.3 Non-Constitutional Intergovernmental Forums**

Such bodies pervade federal systems. The Council of Australian Governments, comprising the leaders of all federal, state and territory governments, provides a useful illustration. The desire to avoid disputation by negotiation of agreed policy positions, in such significant areas as competition policy and taxation policy, provides the rationale for COAG. Advantages of flexibility and consistency in policy formulation and implementation are offset by a loss of accountability. Nevertheless, political support for this approach is strong, presumably reflecting popular acceptance. In Canada, "executive federalism" has apparently survived a period of critical analysis and continues to grow in extent and diversity.

#### **5. Popular Dispute Resolution**

Federal disputes may be resolved by the electoral process, in various forms. Governments may be voted out of office. However, opportunities for an election on a single issue (or related set of issues) rarely arise in practice. More interesting, therefore, is article 89 of the Swiss Constitution which requires that any federal law must be submitted to the people for rejection or approval if 50,000 citizens or 8 cantons so demand. By this mechanism, federal legislation is subjected to popular (rather than judicial) review. In addition, the Swiss and German federations have devised means of constitutional amendment which have been employed in practice to resolve intergovernmental conflict. By contrast, Australian constitutional amendment procedures have contributed little if anything to conflict management. The effective control exercised by the federal government over the measures submitted to referendum in Australia may explain the dismal outcome. Skepticism towards government proposals is entrenched in the Australian constitutional culture.

#### **6. Conclusions**

While it is convenient to identify approaches to federal dispute resolution in categories described as formal, informal, avoidance and popular, it is also misleading to do so. The lines of demarcation between categories are indistinct. Moreover, there are complex relationships among techniques within the different categories, and those relationships may at times be as important as the techniques themselves. All federal societies rely on networks of techniques to perform the task of conflict management. These networks impinge, for better or worse, on intergovernmental relations. They also contribute to the development of constitutional cultures, while at the same time reflecting those cultures in their operations.