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BACKGROUND PAPER

MECHANISMS FOR INTERGOVERNMENTAL RELATIONS

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1. Introduction

Generations ago it was fashionable to regard federations as akin to a "layer cake" in which the tiers of government occupied separate and identifiable domains of power and responsibility, with little opportunity or need for interaction. However, if it ever existed, the age of dual federalism has passed.(1) Federations today have wide and varied interactions between the levels of government that comprise them. The culinary metaphor appropriately used to describe present arrangements is not a layer cake but a "marble cake", in which there is a complex intermixing of powers and responsibilities between central, regional, and local governments.(2) The rise of intergovernmental relations has brought with it an expansion in the mechanisms that are desirable to effectuate those relations.

The purpose of this paper is to examine intergovernmental mechanisms presently in use in federations around the world. The term "intergovernmental relations" is commonly used to refer to relations between central, regional, and local governments (as well as between governments within any one sphere) that facilitate the attainment of common goals through cooperation. Used in this sense, mechanisms for intergovernmental relations may be seen as consensual tools employed for the mutual benefit of the constituent units of the federation. However, this paper uses the term intergovernmental relations in a broader sense, which includes all mechanisms through which governments within a federation are brought into relation with each other. Some of these interactions are non-consensual, but they are nonetheless important in understanding the range of mechanisms that affect relations between polities within federal systems of government.

It is not possible to survey here the mechanisms for intergovernmental relations in all modern federations—the sheer number and variety of federal systems necessitate a degree of simplification. This paper attempts to survey some principal mechanisms for intergovernmental relations in each of the three traditional branches of government — the executive, the legislature, and the judiciary. This three-fold division of governmental powers, which has been widely used since Montesquieu popularised it in the 18th Century,(3) is not apt to describe every federal system, yet it remains a convenient classification for the purposes of exposition. This paper also attempts to leave to one side the institutions used for intergovernmental relations, which is the subject of a separate paper. It should be recognised, however, that institutions are quite properly regarded as a type of mechanism for effecting intergovernmental relations, so that no bright line can be drawn between the institutions of intergovernmental relations and the mechanisms that they employ. The paper concludes with a review of the criteria that should be taken into account in assessing the costs and benefits of the various mechanisms, and questions for further consideration in the Workshops.

2. Executive Mechanisms

The executive plays a major role in intergovernmental relations in all federations. This role is preeminent in countries with Westminster style systems of government because of the dominance of the executive over the parliamentary process.(4) Intergovernmental mechanisms involving the executive range widely in their degree of formality—from the

making of binding written agreements to informal liaison between governmental officers.

(A) Formal Cooperative Agreements

Agreements voluntarily entered into are generally mutually beneficial to the participating parties because each party, acting in its own interest, can be assumed to participate only if there is advantage in doing so. This basic principle underlies the logic of collective action by governments within a federation.(5) Governments acting in concert may find solutions to problems that cannot be solved when each government acts alone. One mechanism for concerted action is a formal intergovernmental agreement.

Despite the attraction of voluntary agreements, federal constitutions differ widely in the extent to which they acknowledge the importance of intergovernmental agreements in oiling the wheels of the federal machinery. At one end of the spectrum the South African Constitution (s 41) requires all spheres of government to "co-operate with one another in mutual trust and good faith". At the other end, some constitutions contain only sparse acknowledgement of the possibility of intergovernmental cooperation or even appear to discourage it. The United States Constitution (Art 1, s 10, cl 3), for example, prohibits interstate compacts unless they have congressional consent. The deleterious effects of this clause on intergovernmental relations have been avoided only by generous judicial interpretation (see section 4 below).

Where intergovernmental agreements are acknowledged in constitutional law and practice, they are frequently known by different names, serve different purposes, and have differing status. Intergovernmental agreements pass under the name of treaties, compacts, agreements, arrangements, and understandings, as well as other terms.

They also serve a wide variety of purposes. Consider, for example, the differences between the following types of agreements:

- A commercial contract between two governments to lease premises or purchase goods;
- A written undertaking by the central government to provide resources to a regional government for an infrastructure project;
- An intergovernmental agreement in which the parties agree to adopt a particular policy that may be implemented administratively and without the need for legislation;
- An agreement that the parties will use their best endeavours to ensure that their respective legislatures adopt a law, whose terms have been agreed in detail by the parties.

Written undertakings between governments within a federation undoubtedly have moral and political force, but their legal effect may be uncertain. Different types of agreement may have different status in terms of their enforceability. The first type of agreement—the commercial contract—will often be enforceable in the courts because such agreements are generally governed by the law of the land, in the same way as commercial contracts between private parties. However, special procedures or jurisdictional arrangements may apply to litigation between governments.

The second type of agreement, by contrast, might be seen by the courts as purely political in nature and hence not suitable for judicial resolution. The “political questions” doctrine, which is applied in a number of federations with a well-developed separation of powers (US, Australia), permits judicial abstention where a matter is more appropriately resolved by another branch of government.(6) In such cases, the value of an intergovernmental agreement may rest solely on its moral and political force.

In rare cases, agreements between governments within a federation might even be governed by the rules of public international law rather than domestic law. Two preconditions for this are that the constitution recognises the constituent regions as

possessing the capacity to enter into treaties of the relevant kind (as in Russia), and that this capacity is also recognised by other states in the international community.(7) Even then, it is debatable whether international law would accept that an arrangement internal to the nation state is capable of being governed by rules of public international law.

The parties to the agreement may themselves be able to affect its legal status and hence its enforceability. A statement in the agreement that it is intended to create binding legal obligations may be significant, as may the name given to the arrangement. In some federations, use of the term "memorandum of understanding" is an accepted way of signifying that the agreement is not intended to create legal obligations. Uncertainties surrounding this issue suggest that status of intergovernmental agreements may require further consideration by federations. Arguably, however, the greatest significance of formal intergovernmental agreements lies not in their legal enforceability but in the political pressures for cooperation and mutual assistance, which they bring to bear on the parties to the federal compact.

(B) Informal Cooperative Relations

The use of formal intergovernmental agreements is probably less significant than the informal relations that occur between departments of the central and regional executives. The complexity of modern governance often requires coordinated strategies between levels of government in order to meet policy goals effectively. Much of this coordination will occur within functional portfolios (eg health, environment, finance etc). At the highest level, this coordination may take place through meetings of ministers of State from each central and regional government. At an intermediate level there may be regular intergovernmental meetings of departmental officers within a portfolio. At the lowest level there may be little more than informal telephone calls between civil servants in different spheres of government in relation to some current problem. Clearly, the nature of the arrangements between government bureaucracies depends on factors specific to each federation, including historical, institutional, and social factors. Issues that arise in all such arrangements include their transparency and effectiveness in meeting policy objectives (see section 4 below).

(C) Federal Fiscal Relations

The coordination and adjustment of fiscal relations in federations give rise to several mechanisms for intergovernmental relations. These deserve special mention because of the tendency for fiscal issues to dominate intergovernmental relations. These mechanisms include arrangements for coordinating the public borrowings of central and regional authorities, such as the Loan Council established under the Australian Constitution (s 105A).

They also include mechanisms for distributing revenues equitably amongst constituent units of the federation. This is necessary because federations often have a marked degree of “vertical fiscal imbalance”, which is the disparity in the ability of central and regional governments to raise revenue in comparison with their own expenditure needs. Typically, the center has revenue-raising capacity that exceeds its expenditure needs, while the converse is true for the regions. There may also be a degree of “horizontal fiscal imbalance”, which is the disparity between regional governments in their revenue raising capacity (eg the ability of a mineral-rich region to extract mining royalties), or in their cost structures (eg the disproportionate cost of transport infrastructure in a large and sparsely populated region).

Generally speaking, federations have used four mechanisms to make fiscal adjustments to compensate for these problems,(8) and each has different implications for intergovernmental relations.

- Expenditure powers can be transferred, eg from regions to the centre to give the centre a level of expenditure that better matches its revenue raising capacity.
- Taxation powers can be transferred, eg from the centre to the regions to give the

regions a revenue raising capacity that better matches their expenditures.

- Inter-governmental transfers can be made, typically from the centre to the regions, in a way that may address both vertical and horizontal fiscal imbalance. Transfers may also be made by more advantaged regions to less advantaged regions to correct horizontal fiscal imbalance (as in Germany).
- A system of institutionalised revenue sharing can be adopted, whereby the regions receive a fixed proportion of centrally collected taxes, in accordance with a pre-agreed formula (as in Germany).

The adjustment of fiscal relations between governments within a federation has necessitated the establishment of appropriate institutions.

(D) Competitive Relations

An alternative way in which executives within a federation may be brought into relation with each other is through competition rather than cooperation, as the executives of regional governments vie with each other for sources of revenue and employment opportunities for their residents. Examples of competitive behaviour include offering subsidies to encourage businesses to locate within the region, introducing lower rates of taxation, or providing infrastructure to industry. A useful illustration occurred in Australia in the 1970s when the state of Queensland abolished death duties, which existed in all states at that time. The movement of wealthy retirees to Queensland soon led to the abolition of death duties in the remaining states as they tried to prevent the erosion of their tax base through loss of population.(9)

Issues that arise in respect of competitive intergovernmental relations include the following:

- Does competition result in a “race to the bottom”, with each region bargaining away benefits?(10)
- Does competitive federalism produce economically efficient solutions by promoting competition between the laws, practices, and procedures of the jurisdictions?(11)
- Are the preconditions for a competitive market between governments (such as absence of externalities, perfect information etc) satisfied?
- Can competition between regions secure policies that are harmonised around a stable equilibrium?

3. Legislative Mechanisms

Legislatures play an important role in giving the force of law to policies initiated by the executive. Intergovernmental arrangements hammered out by central and regional executives often require legislatures of the constituent regions to act in concert if uniformity, harmonisation or reciprocity is to be achieved in the manner envisaged by the executives. Inevitably, federations with a relatively large number of constituent regions (eg United States, Nigeria, Switzerland) will have more difficulty co-ordinating legislative action than federations with a small number of component units. Size may therefore have a bearing on the type of mechanism invoked. There are many different ways in which legislative schemes may give effect to intergovernmental arrangements.(12) A selection of them follows.

(A) Reciprocal Schemes

Reciprocity is a well-tried but relatively low-level form of harmonisation within federal systems. It permits variations in the laws of the participating jurisdictions but enables one jurisdiction to recognize, on a reciprocal basis, a status conferred by another jurisdiction. Reciprocity is used as a basis for co-ordinated legislative action in a variety of fields. A particularly good example is the scheme for the mutual recognition of goods and occupational qualifications adopted in the European Union in the 1980s, and subsequently

in federations such as Australia.(13) One of the objects of the scheme is to ensure that goods meeting prescribed product standards in their state of origin are entitled to be sold in all other states in the federation. This process is not concerned with the definition of uniform standards, but with the recognition of possibly divergent standards. In practice, however, mutual recognition may generate pressure to adopt uniform national standards so that the lowest common denominator does not prevail.

(B) Complementary Schemes

Complementary schemes are used where no jurisdiction within the federation can achieve a desired objective by itself, so that complementary laws must be enacted cooperatively by several jurisdictions if the legislative goal is to be reached. These problems arise because all federations divide legislative powers between central and regional governments in ways that limit the powers of one or more of the constituent polities.(14) A typical scenario prompting such a scheme is where the central legislature is unable to regulate a subject matter completely because that subject matter travels beyond the limited powers conferred on it by the constitution. Each regional legislature may also be unable to implement comprehensive regulation of a particular subject matter, not because it lacks power over that subject matter but because the reach of its laws is territorially confined. One solution to the limitations imposed by territoriality and subject matter is complementary legislation. In effect, each jurisdiction enacts laws to the extent of its constitutional capacity, and thus adds an additional piece to the "jigsaw puzzle"—the picture is completed by the participation of all units of the federation.

A variation on the theme of complementarity occurs where the central legislature does have the constitutional capacity to enact appropriate legislation, but nonetheless provides opportunities for regional participation on stated terms. One example is where central legislation governs a particular field until such time as a region enacts legislation that is considered by central authorities to be adequate to meet minimum standards. If regional legislation is considered adequate, the central legislation “rolls back” to allow regional laws a field of operation.(15)

(C) Mirror Legislation

Under "mirror" legislation each executive agrees to the terms of a detailed draft statute, which is then enacted by separate legislation in each participating jurisdiction within the federation. This mechanism produces virtual uniformity at the outset, but this often erodes over time as local legislators exercise their independent political judgment and make piecemeal changes to it.

A variation of this method occurs where the terms of the proposed uniform law are settled, not by the executives themselves, but by an independent body comprised of qualified representatives from each region. This occurs in the United States (National Conference of Commissioners on Uniform State Laws) and Canada (Uniform Law Conference), but the lack of direct executive involvement may result in poor adoption of the uniform law, or impromptu alterations to it during enactment. (16)

(D) Application of Laws Method

To overcome the difficulty experienced in keeping mirror legislation uniform over time, an alternative mechanism is sometimes used. This method involves the enactment of a law in one jurisdiction (the host jurisdiction), and the application of that law in other participating jurisdictions. The host legislation contains all the substantive provisions that are to be enacted, and its precise terms are agreed prior to enactment by the host. Every other participating jurisdiction within the federation then passes a statute giving the host legislation the force of law within that jurisdiction. This has the advantage that later amendments to the scheme require legislative change in the host jurisdiction alone—the application provisions of the other regions simply pick up any changes so made.

(E) Agreed Policies

In some cases central and regional executives do not agree to specific laws but to detailed

policies, which must then be implemented by appropriate legislation in each region's legislature. This method of intergovernmental cooperation is less prescriptive than some other methods of cooperative harmonisation, since each jurisdiction maintains a "margin of appreciation" in selecting the precise manner in which the agreed policies are implemented.

(F) Reference and Delegation of Power

Some federal constitutions provide other mechanisms by which central and regional governments may cooperate to solve problems arising from limitations on the legislative power of either level of government. The Australian Constitution (s 51(37)), for example, enables states to refer matters to the federal Parliament, and for the federal Parliament to then make laws on the referred topic for the benefit of the referring state. The purpose of the section is to facilitate the use of intergovernmental arrangements to overcome rigidities in the constitutional allocation of powers between the centre and the regions. Its occasional use to solve otherwise intractable problems signifies the importance of intergovernmental relations in providing constitutional flexibility.(17) By contrast, a similar provision in the Canadian Constitution (s 94) has been described as a “dead letter”. (18)

Analogously to the reference power, some constitutions contemplate a delegation of power from the centre to the regions. The South African Constitution allows the National Assembly to assign any of its legislative powers to any legislative body in another sphere of government (s 44); and also allows a provincial legislature to assign any of its legislative powers to a Municipal Council in that province (s 104).

4. Judicial Mechanisms

The significance of the executive and the legislature in conducting intergovernmental relations often overshadows the role that courts play in shaping intergovernmental relations within federal systems of government. The importance of the courts may be seen in two ways. The first is the way in which the courts set out a legal framework within which the intergovernmental relations of other branches of government operate. The second is the way in which central and regional courts relate to each other, considered as institutions of government in their own right.

(A) Institutional Design

The judiciary is an area in which it is often difficult to distinguish between attributes of the institution and the mechanisms that it employs. It is appropriate, therefore, to say a little about the institutional aspects of courts in federations. Not surprisingly, there is substantial diversity in the approaches taken to the following issues:

- whether there should be a special constitutional court capable of pronouncing on the constitutional validity of government action (South Africa s 167; Germany s 93, Austria), or whether this function should be decentralised and left to the country's general courts (USA, Canada, Australia, India).(19)
- whether central and regional governments should establish separate and parallel systems of courts (USA, Brazil, Mexico), or whether disputes can be satisfactorily resolved within a system of courts that is (apart from the highest court) wholly central (South Africa, Venezuela, Malaysia) or wholly regional (Germany, Switzerland).(20)
- whether the constitution or legislation should identify a separate class of legal disputes (by reason of subject matter or the parties to the action) that are distinct from other types of matters. In the USA and Australia, for example, the constitution distinguishes matters of federal jurisdiction from residual (state) matters.
- whether the class of federal matters (if separately identified) should be determined exclusively by federal courts, or whether federal and state matters should be administered concurrently by state and federal courts.(21)

- whether appeals to the highest court should be confined to federal questions (USA) or range over the entire field of general law (Australia, Canada).

(B) Judicial role in regulating other branches of government

The judicial branch of government plays a critical role in establishing the framework for the conduct of intergovernmental relations by the executive and the legislature. This importance stems from the circumstances that (a) all federations embody a division of powers between central and regional governments and (b) neither level of government should be the sole arbiter of that division.(22) The courts are usually called on to superintend the division of power and hence to determine the conditions under which the other branches conduct intergovernmental relations. The attraction of the courts in this respect arises from the public perception of them as independent and impartial arbiters. Yet the nature of the judicial function sets limits to the way in which the courts can influence the development of intergovernmental relations within a federation. That influence is generally confined to setting the structural parameters within which the constituent governments of a federation are able to relate to each other. The influence may be negative—by limiting the power of government, or positive—by facilitating intergovernmental arrangements that may not find a sure footing in the written constitution. An example of each of these forces is given below.

Judicial Review

Many of the drafters of the United States Constitution regarded the judiciary as guardians of the constitution.(23) A key element of their function was to review legislative and executive action for compliance with the constitution and, if found wanting, to invalidate that action.(24) This principle of judicial review is not unique to federal systems – it is now common in unitary countries. Nor is it universally accepted amongst federal states – for example in Switzerland the Federal Tribunal has power to invalidate unconstitutional legislation of the Cantons, but not that of the central legislature.(25) Nonetheless, amongst federations, acceptance of the principle is widespread and has a significant bearing on the framework within which intergovernmental relations are conducted. For example, judicial invalidation of central legislation, or even the threat of such invalidation, may provide the occasion for cooperative arrangements between regional governments for the purpose of establishing regulation prohibited by the constitution to the central legislature.

Principles of Interpretation

This is one of the most important mechanisms by which the courts may affect the conduct of intergovernmental relations by other branches of government. Many older federal constitutions are silent on key aspects of intergovernmental relations and provide an inadequate framework for the conduct of those relations as we approach the 21st Century. The courts have thus had a significant effect on the success (or failure) of intergovernmental relations in overcoming constitutional rigidities. The courts are faced with a basic policy choice between constitutional interpretations that promote co-operative arrangements between governments, and those that do not. For example, under the United States Constitution (Art 1, s 10, cl 3), states are prohibited from entering into compacts with other States without congressional consent. Yet the courts have interpreted this provision in a way that facilitates intergovernmental cooperation – only state compacts that encroach on the free exercise of federal power are caught by the proscription.(26) The same policy choice is available in interpreting legislation enacted pursuant to a cooperative scheme. It is entirely sensible that courts throughout a federation should interpret national scheme legislation uniformly by use of judicial comity and deference to the decisions of courts of coordinate authority.(27)

(C) Relations between central and regional judiciaries

If one accepts the judiciary as a branch of government in its own right, there is also the possibility of intergovernmental relations between the judiciaries at the central and

regional levels, at least in those federations with dual court systems. Space does not permit a comprehensive examination of this issue, but key issues include:

- The extent to which courts of one level are bound by the decisions of courts of another level.
- The extent to which courts of one level respect the decisions of courts of another level as a matter of judicial comity.
- Whether the courts of one level are able to grant remedies against judges of another level.
- The comparative status of judges in each system, as determined by their remuneration, entitlements, and the type of matters they adjudicate.

5. Issues for Discussion – Evaluating the Mechanisms

The variety of mechanisms available to governments for giving effect to intergovernmental relations makes it essential to establish criteria by which alternative mechanisms can be evaluated. Discussion in the Workshops might focus on the importance of the following factors in making the choice:

(A) Efficiency

- How quickly and easily can the mechanism be initiated?
- How quickly and easily can the mechanism be used to later amend the law?
- Does the mechanism permit harmonisation or uniformity to be maintained over time?

(B) Federal Values

- Does the mechanism facilitate central control over matters that are appropriately dealt with at a national level?
- Does the mechanism encourage innovation and promote respect for regional diversity?
- Does the mechanism respect the autonomy of decision makers at each level of government?
- Does the mechanism enable the constituent governments to be close to the people they serve?(28)

(C) Rule of Law

- Does the mechanism facilitate making laws that are clear and readily accessible to citizens?(29)
- Are the decision-making processes transparent and known in advance?
- Are the bodies that exercise governmental power publicly accountable for their actions?(30)

(D) Other Factors

- Does the mechanism facilitate compliance with international legal obligations?
- Does the mechanism promote respect for human rights and individual liberty?

Space does not permit an analysis of the way in which these factors apply to the various mechanisms outlined above, but it is hoped that these criteria provide a basis for discussion at the Forum.

Footnotes

1 Corwin, E. S. (1950).
2 Zimmerman, J. F. (1992), 201–5.
3 Montesquieu, C. (1748).
4 Sharman, C. (1991), 24.
5 Hardin, R. (1982);Olson, M. (1965).
6 Lindell, G. (1992), 142-158.
7 Uibopuu, H. J. (1975);Opeskin, B. R. (1996), 364–7.
8 Groenewegen, P. (1979), 177-81.
9 Grossman, P. J. (1990).
10 Compare Cary, W. L. (1974) with Winter, R. K. (1977) and Romano, R. (1985).
11 Kitch, E. W. (1991); Kitch, E. W. (1981).
12 Opeskin, B. R. (1998).
13 Majone, G. (1994); Thomas, T. and C. Saunders (1995).
14 The German Basic Law (s 91a) identifies some matters as the joint responsibility of the Federation and the Länder.
15 Zimmerman, J. F. (1992), 197–201, describing "partial preemption statutes".
16 Coulson, R. E. (1991);White, J. J. (1991);Cuming, R. C. C. (1985).
17 Anderson, R. (1951); Ludeke, J. T. (1980); Johnson, G. A. R. (1973); Craven, G. (1990).
18 Palmer, E. E. (1965), 257; Cuming, R. C. C. (1985), 7. See also Scott, F. R. (1942).
19 Cappelletti, M. (1989), 132–149.
20 Duchacek, I. D. (1970), 252–5; Watts, R. L. (1966), 226–8.
21 Opeskin, B. R. (1995).
22 Wheare, K. (1947), 60.
23 Hamilton, A. (1787)
24 See eg Marbury v Madison 1 Cranch 137 (1803).
25 Duchacek, I. D. (1970), 256; Wheare, K. (1947), 61. The validity of federal law is decided by referendum.
26 Anonymous (1989).
27 In Australia see A.S.C. v Marlborough Gold Mines Ltd (1993) 117 CLR 485.
28 Dahl, R. A. and Tufte, E. R. (1973).
29 Raz, J. (1979).
30 See Rosen, B. (1998)on mechanisms of accountability.

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