



Forum of Federations presentation
at the meeting of RIAD (Inter-American Network on Decentralization)
Cancun, Mexico, September 10-11, 2002

My name is Karl Nerenberg. I work for an international organization based in Canada called the Forum of Federations. It is a relatively young organization and does work in the field of federal governance around the world.

Over the past four years we have developed programs worldwide, including, of course, in the Americas, where we have been especially active in Mexico and Brazil, which are the two most populous countries with federal architectures of governance in Latin America. Argentina, the United States and Canada also have federal systems, which means that you can find the federal model from the North Pole to the Tierra del Fuego.

We have been asked to answer three questions: How does federalism facilitate the process of decentralization? What are the lessons of federalism with regard to a genuine sharing of competencies and responsibilities? Can federalism offer useful models for governments seeking to develop intergovernmental and institutions and mechanisms?

I won't be able in a few minutes to deal with all three systematically, but I will touch on all of them. The Forum of federations calls itself an international network on federalism. But we are not preoccupied with federalism narrowly defined. Nor do we seek to proselytize for some kind of ideology called federalism. We're in the business of sharing expertise and experiences internationally. And the whole question of multilevel governance is an important concern for us.

In the democratic, federal context there is great variety in the way powers and responsibilities are shared and assigned. In some cases, such as Germany or Spain, there is a high level of intertwined sharing of duties. In Germany the national or federal government legislates in many areas that the states, the *Länder*, administer.

In Canada and the United States the fields of jurisdiction tend to be more separate and distinct.

In Germany the structures and institutions of government are linked together, with the upper house of the federal Parliament, the Bundesrat, being a true house of the *Länder*. This means the constituent units of the federation participate in the creation and

elaboration of legislation that they then have the constitutional responsibility to administer.

In Canada the upper house does not work that way and collaboration and communication between orders of government takes place more on an ad hoc basis. But this does not mean that, over the years, a whole number of institutional mechanisms haven't arisen to fulfill this role. In fact, they have—one of them being federal-provincial councils of ministers, in the fields of environment and finance, for example.

In multilevel governance systems - especially democratic, federal systems such as those of the USA, Canada, Brazil and Mexico - the constitution provides the framework of rules that govern the roles of the different orders of government. In fact, the notion of constitutionally guaranteed sovereignty for the two or more orders of government, and a direct, normally democratic relationship with the citizens are common and essential features of federal democracies throughout the world.

But no matter how thorough and exhaustive a constitution may be it can never take care of all contingencies. Once a constitution is elaborated and put into practice various orders of government often find themselves resorting to provisions in a way very different from their original intent.

In the United States this has been the case with the federal government's use of its power to regulate inter-state commerce. It has used this provision to regulate and legislate in such fields as the environment, not a major preoccupation of the original constitutional congress that met over two hundred years ago to determine a form of government suitable for the recently liberated American colonies. Modern federal governments have tended to use the constitutional tools at their disposal and adapt them to changing circumstances.

In Canada we see this adaptation of the original roles assigned by the constitution in the federal government's use of what is called the "spending power", the constitutional provisions that gives the federal government the right to spend even in areas of provincial jurisdiction, such as health.

When the Canadian framers of the country's original constitution gathered in 1867 it is hard to imagine that they foresaw that the country would someday have a universal system of public health insurance, financed jointly by both levels of government, created independently by each province and subject to broad, general rules enunciated by the federal government! But that is what exists and contemporary leaders have had to adapt a 19th century instrument to deal with 20th and 21st century challenges.

No set of rules can anticipate all priorities and contingencies for all time. Technology, political ideas and social goals change and evolve. The rules have to be adaptable and flexible. And you generally need some kind of referee to adjudicate disputes and interpret the constitution. In Canada and the United States the Supreme Court plays that role. In other countries, such as Spain, a specifically designated constitutional court acts as the referee.

As the former premier of Canada's largest province once wrote:

“Constitutions don't make countries. Countries make constitutions and what is done by convention and practice is just as important as what is written down.”

That is especially true when we consider the important role played by institutions of governance that are not guaranteed by the constitution, that do not have the official status of constituent units.

In both Canada and the United States that is the case for the municipal order of government. In other countries, such as India and Spain, municipal government is named in the constitution but it is more or less an empty shell that must be filled by legislation and agreements.

Regardless of the differences, in virtually all cases of multi level governance there is inevitably a high degree of over-lap and inter-play between the various orders of government, whether constitutionally enshrined or not. Is there possibility for interjurisdictional friction, for some degree of over lap and duplication of roles? Of course there is. Multilevel governance and decentralized diffusion of power are inevitably more complex than a more centralized model. But so is democracy more complex than dictatorship. While in the field of governance as in the field of logic one should not multiply entities beyond necessity, the complex reality of contemporary society almost demands complex institutions of governance.

We are talking here about empowering citizens and communities, and of inculcating in them a sense of responsibility for the decisions they take, the taxes they collect, the money they spend.

Spain is one of many countries seeking to enhance and increase the role and power of local governments. Since 1978 the country has had a complex system of optional opting-in regional autonomy that has resulted in what experts refer to as an asymmetric federal structure. Different regions have taken different powers and roles that correspond to their differing needs, capacities and wishes. In Spain the autonomous communities are not the constituent units are not the constituent units of the federation as the Canadian provinces or American states are. In both the North American examples we had countries formed by the union of formerly quasi sovereign colonies and the federal model of achieving national coherence and regional autonomy at the same time.

Spain adopted a democratic constitution after the death of Franco in 1978, which stipulates the “indivisible unity” of the Spanish nation at the same time as it recognizes the “right to autonomy of the nationalities and regions of which it is composed” and adds that there must be “solidarity between them”. (We find this principle, in different words, in many constitutions of countries with multilevel structures. In Switzerland, for instance, the constitution stipulates that the cantons must be “loyal to the federation”.)

The principled recognition of the right to autonomy within the framework of a united country is elaborated in a number of constitutional provisions that, in essence, give the regions different options they can exercise.

Under Franco the national minorities suffered brutally repression, and they were the first to exercise their right to autonomy. Galicia, Catalonia and the Basque Country chose to become autonomous communities under the provision that recognized “historic nationalities”. The process included draft “statutes of autonomy” that were approved by plebiscites. Other regions have followed a number of slower and more gradual courses that the constitution provides for. These involved local referenda, and a five-year phase-in period before the community could take over all the responsibilities the constitution provides for.

One community, Andalucia, decided to skip the five year period through a constitutional provision that allows for a system of local initiatives and a series of local referenda.

Today all of Spain is divided into Autonomous Communities. Over time many have negotiated delegation of powers and transfer of financial resources from the central government. This is an interesting feature of the Spanish system. It means that the constitution provides a framework and set of rules but power sharing is negotiated between orders of government. Delegation does not imply that the central government ceded constitutional authority for then powers concerned. It allows for a variety of different arrangements depending on the different requirements and characteristics of the regions.

And so Spain, in the 24 years since its accession to democracy has become, in practice, a decentralized federation in which in all Spaniards have access to two, constitutionally enshrined orders of government. There is a lot to recommend to Spanish way of doing things. It doesn't attempt to precisely define the sharing and distribution of powers for the outset, but allows power sharing and the development of regional institutions to evolve and develop. Part of the reason for its high degree of asymmetry is that a number of the communities are home to national minorities such as the Catalans and the Basques. Now nobody who reads the newspapers can be unaware that, at least as far as the Basque people are concerned, there is not total consensus that the current system is adequate. Unfortunately, Spain has not found the key to totally eliminate extremist nationalist violence on the part of some Basque. But overall the flexible opting in, opting out system has succeeded in maintaining national unity while fostering the growth and development of minority cultures. For the past few years Spain and the Communities have focused on increasing the fiscal capacity of the Communities through the transfer of certain taxes. This is a complex and controversial process partly because the central government is accustomed to having a high degree of fiscal control and partly because some Communities prefer to deliver programs while the central government takes on the odious role of collecting taxes.

Spain is now ready to embark on a widespread process of decentralization to local authorities. This will involve pacts between the local and federal governments and

between the local and autonomous community governments, and legislation on the part of both orders of government. Over the past few years, greater authority has been devolved to local governments to accompany their administrative responsibility in such areas as transport, environment and tourism. They are now looking at other areas such as education, employment and consumer protection. It is an interesting model of evolution towards decentralized governance, starting with the emergence from a long period of dictatorship.

In Canada municipalities are flexing their muscles, seeking increased resources and powers to deal with matters that have fallen to them, either by deliberate devolution or simply as result of the fact that new challenges arose and somebody had to step up to the plate and deal with them.

And while it is most likely true that countries make constitutions and not the other way around, a rules-based framework does give the tools the various actors in the political life of a country require to assert their needs and interests in a civilized way. A formal multi level structure of governance, whether specifically “federal” or not, will not guarantee a smooth and democratic process of decentralization. But it will almost inevitably be an important component of such a process.