

Chapter Four

Dividing Powers — Who Does What and How?

Two models for assigning legal powers

There are two broadly different approaches to distributing powers within federations: the dualist and integrated models. Many countries have elements of both. The dualist model typically assigns different jurisdictions to each order of government, which then delivers and administers its own programs. The integrated model provides for many shared competences and the constituent-unit governments often administer centrally legislated programs or laws.

Under the dualist, or classical, model of federalism, constitutional jurisdiction over different subjects is usually assigned exclusively to one order of government. In this model, each order of government normally delivers programs in its area of responsibility, using its civil service and departments; the federal government's departments are thus present throughout the country.

In practice, the dualist model does not achieve a neat separation of powers because so many issues have regional, national, and even international dimensions and many different responsibilities of governments are themselves intertwined.

- In all dualist constitutions there are some shared or **concurrent powers** in which both orders of government can make laws. Canada and Belgium have few concurrent powers, while Australia has very exten-

sive concurrency. Where powers are concurrent, federal law is generally, but not always, paramount, meaning it prevails in cases of conflict.

- In addition, there can be **de facto concurrency** when both orders of government have different powers that bear on a question: this is a **kind of shared power** and typically it does not involve paramountcy. For example, in old constitutions, the environment is not usually a head of power, but both orders of government may have different legal powers that permit them to regulate the environmental impacts of a major infrastructure project, so it can proceed only if they both agree.

Under the integrated (or interlocking) model of federalism, exemplified by Germany, some subject matters are exclusively assigned to one order of government (e.g., defence to the federal government), but most subject matters are concurrent, where the central government sets framework legislation that the constituent units can complement (but not contravene) with their own legislation. As well, the governments of the constituent units deliver programs in these concurrent areas. Thus the central government has a small civil service in the regions, largely limited to its areas of exclusive competence. This model is also sometimes called administrative federalism because the principal powers of the constituent units are administrative. A great challenge in this model is restricting the detail of central policy making so as to leave room for decisions and laws at the level of constituent units. The German model also provides for joint decision making affecting these areas of concurrency, in that relevant federal laws must be approved by a majority vote of the representatives of the Länder in the Bundesrat. South Africa has adopted aspects of this model.

Canada, Brazil, and the United States are examples of largely dualist federations; Germany, Austria, South Africa, and Spain follow the interlocking model. India and Switzerland have strong features of both. Australia is largely dualist in administrative arrangements, but has so many areas of concurrency that it has some strongly interlocking features. No federation is purely of one form.

These considerations of legal powers need to be combined with the financial arrangements in a federation. The next chapter will show that

the control and distribution of revenues is central to the real distribution of powers in federation.

Legal sources of powers

Normally, the distribution of legislative and fiscal powers is set out in the constitution. In some federations, the powers of individual constituent-unit governments can be substantially determined through bilateral agreements with the federal government. Some federations permit the delegation of legislative responsibility between orders of government while others do not.

All federations have provisions in their constitution dealing with the allocation of powers between the central and constituent-unit governments. Constitutions differ enormously in the level of detail and approach. For example, the United States Constitution has only 18 headings for the powers of the federal government and most of these are actually concurrent with federal paramountcy; all other powers (residual powers) lie with the states. The Indian Constitution, by contrast, has three long lists: the union list has 97 headings, the concurrent list, 47, and the state list, 66. The Spanish Constitution lists competences that may be assigned to the autonomous communities, but this is done legally through statutes of autonomy for each community, and these statutes can vary.

In many federations, interpretations by the courts and evolving practice has shifted the real division of powers significantly away from the intent of the constitution's drafters, making the federation more or less centralized than was first envisaged. This is probably most true of the older, less detailed constitutions.

Varied federal distributions of powers

While there are important commonalities between federations regarding which powers are allocated to which order of government, there are also significant differences.

Federal constitutions have been written over the last 230 years in widely different contexts. More recent constitutions reflect lessons from the

experiences, good and bad, of earlier constitutions. It is not surprising, therefore, that there is great variation in the approaches taken to the distribution of powers among federations. A few powers are almost always assigned to the federal government and others almost always to the constituent-unit governments, but, for many powers, we have a pattern of tendencies, strong or weak, frequently with outliers. Sometimes there is no clear pattern. The box below gives a rough sense of these patterns. In practice, the precise allocation of powers within any federation is a complex matter that reflects not just the text of the constitution, but also court decisions and other developments.

**Patterns in the Distribution of
Some Powers within Federations**

The following indicates tendencies regarding the allocations of powers across most federations. ('Concurrent' means both orders can make laws in a defined area, usually with federal paramountcy. 'Joint' means the two orders make some concurrent decisions together. 'Shared' means each order has some different legal powers in the broad area and decisions are made independently.)

- Currency: always federal
- Defence: always federal, sometimes constituent-unit (CU)
- Treaty ratification: almost always federal, sometimes CU
- External trade: usually federal, occasionally concurrent, joint, or shared
- Interstate trade: usually federal, occasionally concurrent, joint, or shared
- Intrastate trade: usually CU, sometimes concurrent
- Major physical infrastructure: usually federal, sometimes concurrent, joint or shared or CU

- Primary/Secondary education: usually CU, occasionally concurrent, rarely federal
- Post-secondary education and research: no clear pattern
- Income security: mix of federal, concurrent, joint, and shared
- Pensions: either concurrent, joint, shared, or federal
- Health care: usually CU, sometimes concurrent, joint, or shared
- Mineral resources: no clear pattern
- Agriculture: no clear pattern
- Environment: usually concurrent or joint, rarely CU
- Municipal affairs*: usually CU, occasionally joint, or shared
- Court system*: usually joint or concurrent, occasionally federal, rarely CU
- Criminal law: no clear pattern
- Police: usually shared, occasionally concurrent or joint, rarely federal or CU
- Customs/excise taxes: almost always federal, sometimes concurrent
- Corporate and personal taxes: usually joint, shared, or concurrent, sometimes federal

* Supreme and Constitutional courts are almost always established in the constitution and are thus not a head of power. In some federations, municipal, or local governments are also constitutionally established, though the federal or CU governments may have some powers over them.

Constitutions differ not just in the assignment of powers, but also in their specificity. Even the most complete listing can overlook something, so constitutions must assign residual powers specifying which order of government gets any power that is not mentioned. Typically, residual powers go to the federal government in federations that emerged from previously unitary regimes and to the constituent-unit governments in federations that brought previously separate units together. Residual-power clauses can be important, notably in constitutions, such as that of the US, where the federal powers are defined (in a short list) and residual powers are the sole source of constituent-unit powers. However, courts have tended to give broad interpretations to specified powers, whether federal or constituent unit, so the effect of residual power clauses has been less than envisaged by constitutional drafters.

Criteria for distributing powers

There is no simple formula for determining the appropriate allocation of powers between orders of government.

While there are some patterns in the allocations of powers within federations, there is also great variety. The European Union has a continuing debate on which powers to allocate to Brussels or to leave with the member states. In this regard, Europeans have developed the concept of subsidiarity, a principle that the central government should take on powers only when it is necessary to achieve an objective and when it adds value in comparison to what the governments of the constituent units could achieve on their own. While helpful, the principle has proven elusive in practice. It is notable that the European Union has not empowered Brussels in the areas of defence and foreign policy, which are the classic central powers of federations. Inevitably, each country has its own debates around the allocation of powers. Decisions will reflect questions of efficiency and effectiveness, but also, critically, views of what are shared objectives across the federation.

Asymmetry in the distribution of powers

Federations usually allocate the same powers to all of the constituent-unit governments. However, in some federations, some constituent units receive different powers than others. Constitutional asymmetry is usually limited because major asymmetry poses challenges in the management of a federation. There can also be more pragmatic forms of asymmetry.

The term ‘asymmetry’ is applied to many aspects of difference between the constituent units of federations: asymmetrical political weight, asymmetrical group or language rights and status, and asymmetrical powers. Each of these poses different issues. Clearly, different constituent units have different political weights because of their population, wealth, or strategic position; some federations try to limit this by giving extra weight to the representation of smaller units within central institutions. Special and distinct provisions regarding group, linguistic, or religious rights within particular constituent units are a frequent feature in very diverse federations.

Asymmetrical distributions of power between constituent units in a federation are unusual. This is particularly true of constitutionally established asymmetries. Flexibility of this kind can address demands coming from a particular region for a decentralization of a power or powers that the constituent units elsewhere may not consider a priority. However, special treatment for one constituent unit can create pressure for the same treatment for the others. As well, if the powers that are devolved asymmetrically are very important, or go to a very large constituent unit, this can create pressure to limit the weight of representatives from that unit in the central government’s decision making on these subjects. In practice, most constitutional asymmetries of powers in federations are of relatively secondary powers or special arrangements for very small and recognizably distinct constituent units. (This is different from the lesser legal status of territories or tribal areas and of national capitals in some federations.) A number of federations do have non-constitutional arrangements that permit some asymmetry in the administrative or policy responsibilities of constituent units.

Examples of Asymmetrical Distribution of Powers in Federations

Virtually all the long-established federations allocate the same legislative powers to their individual constituent units. However, in **Canada**, Quebec effectively has non-constitutional arrangements with the federal government, which give it different authority from—though usually harmonized with—that given to the other provinces (e.g., pensions, taxes, social programs). Of the newer federations, **Malaysia** provides the Borneo states special powers over native laws, communications, fisheries, forestry, and immigration. **India** has similar provisions for Jammu and Kashmir and some of the smaller states. **Russia** made extensive use of very different non-constitutional bilateral agreements with constituent units of the federation that tended to favour certain powerful units, but these variations have now been largely eliminated. **Spain** also engaged in bilateral arrangements, notably in giving special powers to the autonomous communities that had historic nationalities; again, the differences have greatly diminished over time, with the exception of ancient historic fiscal rights for the Basque country and Navarre. **Belgium, Comoros, Bosnia and Herzegovina, and St. Kitts and Nevis** also have some constitutionalized asymmetrical arrangements. Perhaps the most significant such asymmetrical arrangements are with Scotland in the **United Kingdom**, which is not a federation; the implications of this are still being debated in the UK. The **European Union** has member states that are not part of the monetary union.

Dealing with conflicts over powers

Federations can deal with conflicts over the distribution of powers by using the courts, emergency powers, constitutional amendments, political compromise, and elections.

The classic way to resolve differences over how to interpret the division of powers is by reference to the courts, though a few federations have more political processes such as referendums and upper houses. Many federations also have special provisions—the most extreme being emergency powers—that permit the federal government in certain circumstances, notably emergencies, to suspend the normal authority of the government in a constituent unit.

Very often, the conflict is not over the legal interpretation of what the powers are, but over what the respective powers or roles of the two orders should be. Such disputes must be addressed politically. The governments can negotiate to try to reach an agreement on how to operate within the existing constitution. Or they may agree to amend the constitution, which in most federations requires a special majority (and not always the consent of the constituent-unit governments). Where governments cannot agree, they (or the different political parties) can take their respective cases to the population during elections to seek support for their views.