

Chapter Seven

The Legal Pillars of Federalism

The constitutional basis of federalism

Effective federal governance must be based on a written constitution and the rule of law. The constitution sets the basic framework and principles of the federation. A constitution can be symbolically important in fostering unity or discord within the country. Constitutions vary greatly in their length, specificity, and accessibility.

Written constitutions are essential in federations to establish the framework within which each order of government operates. At a minimum, the constitution must establish certain key institutions and allocations of responsibility within the federal system.

Federal constitutions vary enormously. The older federations usually have much shorter constitutions than those created since the middle of the twentieth century. These older constitutions were written before modern government and often are silent or elliptical on current major responsibilities of government, such as environmental management. Moreover, their allocation of powers can rely heavily on a few basic principles (e.g., residual powers, national interest, trade and commerce) whose interpretation may have evolved very differently from the original intentions of the constitution's authors. Shorter constitutions tend to be more flexible than those with very detailed lists of powers for the different orders of government.

There is a large measure of choice as to what is put into a constitution or left to ordinary laws. This can lead to major debates because advo-

cates can seek to constitutionalize provisions to give them symbolic recognition, or the extra protection of constitutional protection, or both. Constitutional provisions around the definition of the country, the recognition of minority nationalities, language rights, and religion can be very important in dividing or uniting a population around the constitution. In more recent constitutions, there are often long sections on social and economic rights. Ideally, there should be broad consensus around constitutional provisions because it is the ‘basic law’: this is the reason for special thresholds for constitutional amendment.

Constitutional arbitration

Two independent orders of government in a federation create a need for a constitutional arbiter to resolve conflicts over their respective constitutional competencies. This role is usually assigned to the courts.

A federal constitution must provide a method for resolving possible conflicts over the legal powers of the two orders of government. A citizen or company can obey only one of two contradictory laws. Legal conflicts can arise in different ways:

- When both orders of government have concurrent legal authority over a subject, the laws of one order must prevail in cases of conflict; thus constitutions indicate which order has paramouncy. Normally the central government’s laws are paramount, but there are exceptions (e.g., provincial laws on pensions prevail in Canada).
- Both orders may pass laws that conflict, and defend their respective laws as deriving from distinct powers. For example, the central government might have a power over internal trade, while the constituent-unit governments have the power over property, and they pass conflicting laws relating to these two areas. In such a case, resolving the conflict requires determining which power—internal trade or property—is the more relevant.
- Sometimes there is no actual conflict between two laws, but a government or private interest objects to a law passed by another government on the grounds that the law exceeds its legal jurisdiction.

- Sometimes, the objection is on the grounds that the law contravenes a constitutionally established right.

A strong, autonomous judiciary is crucial for the rule of law. Within most federations, the judiciary, in particular the highest or constitutional court, has the ultimate authority for resolving constitutional disputes. Resolving such disputes can put a high court in the sometimes difficult position of rejecting an action or law that a powerful government considers important. Courts in common law countries, which value precedent, tend to have greater latitude for interpretation than courts in civil law countries.

At least two federations do not give all aspects of final arbitration on the constitution to their high court. The Swiss federation, which is based on the concept that ultimate sovereignty rests with the people, decides on the validity of contested federal (not cantonal) laws by referendum. In Ethiopia, the House of the Federation, elected by the state legislatures, has final authority, subject to legal advice from judges.

Emergency and special non-federal powers

In some federations, the central government or its executive can override normal constitutional arrangements in special circumstances, such as emergencies. While justified in limited circumstances, such powers can be abused to circumvent the spirit of constitutional government. The political evolution of some federations has constrained the use of such powers or rendered them obsolete.

Some federations have been deemed quasi-federal because their central governments have extraordinary powers to intervene in the jurisdiction of constituent units. These can take the form of an emergency power, in which the central government may suspend the government in a constituent unit. They can be a general directive power, or a power of suspension, or of disallowance. In each case, there is a question of what constitutional techniques might constrain the central government's use of such powers: the courts might have a role in judging the emergency, or the use of the power may require the consent of legisla-

tors—though this can have limited effectiveness if the head of government's allies control the legislature; South Africa's constitution is probably the most developed in specifying protections. Over time, originally quasi-federal countries, such as Canada and India, have evolved away from the use of such powers. However, they have been used extensively to weaken some federations, such as Argentina.

Emergency and Override Powers in Some Federations

Constitutionally, the **Canadian** central government can disallow provincial legislation before it is enacted and declare any work or undertaking to be federal, but in practice these powers are obsolete. In **India**, a state government can be removed and replaced by President's rule. While this power was intended for emergencies or a breakdown of constitutional government, it was used for partisan purposes and is now subject to greater discipline by the courts and India's political culture. Under **Nigeria's** new constitution, the president may declare an emergency in a state and suspend its government for a period, which has happened once. In **Russia**, the president has broad powers to declare a state of emergency in a part of the country and to suspend acts by the federal units that contravene the constitution, federal law, treaties, or the rights and freedoms of the human being. **Argentina** has seen over 175 federal interventions in provincial affairs, including the removal of governments, but the courts have declined to rule on this matter, which they deem to be political. **Pakistan's** federal government can name provincial governors, approve the dissolution of a provincial assembly by the governor, appoint caretaker provincial governments, and provide directions to a province. The **South African** constitution permits the central government to issue directives to a province or directly assume a provincial responsibility when the province is in breach of its legal or constitutional obligations; but to be continued, such actions are submitted to the upper house and require its approval and periodic review.

Constitutional amendment

Federal constitutions have special procedures and majorities for their amendment, often requiring some measure of consent by the legislatures or populations of constituent units. Consequently, constitutions can be difficult to amend and alternatives to formal constitutional change are frequently sought to adapt federations to changing circumstances.

Democracies usually have special procedures and majorities for constitutional amendment. This is particularly true in federations, where the federal principle leads to a role for constituent units in constitutional amendment, especially in coming-together federations as opposed to formerly unitary federations. Federations often give constituent units an absolute veto over certain matters affecting them directly, notably changes in their boundaries or merger with another unit. Federations vary greatly in how much consent is necessary to change the powers of all constituent units: this can range from not much more than a majority to virtual unanimity.

Consent for constitutional amendments usually involves legislatures and executives, but there can also be a requirement for a majority or special majority in a referendum vote. As well, constituent units may have a smaller or no role in relation to amendments that do not affect them directly. Constituent units are usually free to amend their own constitutions, where changes are within the permitted bounds of the federal constitution.

Amendment rules have often made constitutions difficult to change and the politics of constitutional amendment can prove very divisive. As a consequence, federations frequently look for alternatives to constitutional amendment.

Constitutional Amendment in Some Federations

The **United States** Constitution requires approval of two-thirds of members in both national houses and of three-quarters of states. **Brazil** requires 60 per cent in both houses, but, given the dominance of senators from small states, this is a high threshold. **Spain** requires special majorities within the two houses but no role for the autonomous communities. **Austria** normally requires only a special majority in the lower house or a national majority in a referendum. **Belgium**, though not centralized, has an elaborate procedure culminating in a need for a two-thirds majority in both houses and often a majority vote within each linguistic group as well. **Russia** normally requires supermajorities in both houses and two-thirds of subjects of the federation. **South Africa** requires special majorities in the lower house plus the consent of six of the nine provinces for amendments affecting them. **Australia** requires double majorities of those voting in a national referendum on changes to the federal constitution: a national majority plus majorities in four of the six states.

Some federations have different amendment rules for different sections of their constitution: thus **Canada** has at least five rules, with some issues requiring unanimous consent. Likewise **India** has different rules for different sections: the unusual non-involvement of states in changes to state boundaries was deliberately chosen in the expectation that early adjustments to state boundaries would have to be made.

Rights in federal constitutions

Many federal constitutions have provisions relating to rights that can be invoked in relation to laws or actions of governments. Rights can be political, legal, social, linguistic, or economic. They can be important as political symbols. They can apply equally throughout the federation or be specific to a constituent unit or a population. The interpretation of rights is a central role for courts in many federations.

While federations are based on an allocation of powers to the two orders of government, these powers are typically constrained by provisions regarding rights that are set out in a constitution. Thus legislative authority over criminal law may be constrained by various legal rights, while that over education may be constrained by the constitutional right of certain populations to education or schools in their own language or religion. Such constitutional entrenchment of rights can be an important part of a federal deal or agreement because it provides certain protections when powers are transferred to the central government or to constituent-unit governments when the federation is created.

Protections for minority rights can be especially important in this regard. Constitutions are major symbols in defining a country, and rights provisions can be important with the public. Minority rights provisions can be a source of pride and unity or of discord within a country. Many rights provisions apply equally to all orders of government in a federation, but others, notably minority rights, might be quite different in different jurisdictions. As well, some constituent units have their own constitutions with rights provisions that may differ from, but not contradict, those in the national constitution.

There is tremendous variety in the kinds of rights written into constitutions as well as the way they are expressed. The classic rights are political (freedom of speech, assembly, press, and religion) and legal (protection against arbitrary arrest and detention, due process of law). They may be economic (property). Some federal constitutions also entrench particular rights regarding specified languages or religions (language of government, denominational schools). Some constitu-

tions also protect equality rights (against discrimination on whatever basis). Some have ambitious statements of economic and social rights (to employment, schooling), which may be viewed more as goals than enforceable rights because of the limited means of government, especially in poor countries. Brazil has many highly specific rights, such as no seizure of rural family property for debt or the right to higher pay for night shifts. A few federations have constitutionalized special rights of aboriginal or indigenous populations. Bosnia-Herzegovina's constitution incorporates international human rights instruments into domestic law.

Court interpretations of rights provisions can have very broad implications for the functioning of a federation. Older constitutions usually have more concise and classic lists of rights, while newer constitutions (or those recently amended) have longer lists that cover not just classic rights but also various rights important to key groups.

Role and character of the courts

Given the importance of judicial interpretation of the constitution, the legitimacy of the courts is a key issue. It will be affected by how judges are named, and their tenure, as well as the role courts assume. There are frequent debates about the appropriate role for the judiciary because judges are not accountable to the population. Judicial procedures for dispute resolution need to be balanced by political procedures as well.

Most federations have procedures for ensuring that candidates for judgeships (especially high courts) are screened for professional competence. Some, notably presidential regimes, require judicial nominations to be reviewed by at least one house of the legislature. Some consult the constituent units on such nominations and even require their consent. In a number of federations, there is a formal or informal allocation of places on the high court to judges from specified constituent units, languages, or legal backgrounds (where the country has more than one judicial system). Finally, judicial independence is normally protected by strong tenure—making it very difficult to remove a judge—and long term of office. Good salaries can make judges less susceptible to bribes.

There is always some dimension of political choice in naming judges, so that the balance of a court can be influenced by the political views and preferences of those selecting the judges. Alternation of parties in government tends to produce more balanced courts, as do procedures to ensure high professional competence. No high court is immune from charges of bias, so it is important that it have a stock of credibility and legitimacy when dealing with controversial cases. While some federations are very successful in this, in others, the independence or competence of the courts is regarded as weak—even as heavily influenced by the executive or susceptible to bribes.

However courts are established, a judicial system can be stressed in dealing with very divisive cases. The political fights over abortion and civil rights in the United States have both played out heavily through the courts. In India, frustrated citizens are making increasing appeals to the courts on issues such as air pollution and the monkey population in Delhi, issues that involve as much policy as legal content. Sometimes a court can make costly rulings on such issues with little regard for the practicalities of implementing them.

In some federations, the courts' role on certain matters is limited because disputes are assigned to another body (e.g., the water commission in India), or major agreements are political, not legal (e.g., many federal-provincial agreements in Canada), or governments are required to solve disputes, even over the constitution, through political procedures before recourse to the courts (e.g., South Africa).