The Federal Idea
Essays in Honour of Ronald L. Watts

Edited by
Thomas J. Courchene, John R. Allan,
Christian Leuprecht and Nadia Verrelli

Institute of Intergovernmental Relations
Institut des relations intergouvernementales

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Courchene, Allan, Leuprecht and Verrelli, Editors

Queen's School of Policy Studies
McGill-Queen's University Press

IIGR

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The Institute is the only academic organization in Canada whose mandate is solely to promote research and communication on the challenges facing the federal system.

Current research interests include fiscal federalism, health policy, the reform of federal political institutions and the machinery of federal-provincial relations, and comparative federalism.

The Institute pursues these objectives through research conducted by its own staff and other scholars, through its publication program, and through seminars and conferences.

The Institute links academics and practitioners of federalism in federal and provincial governments and the private sector.

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Ronald L. Watts is Principal Emeritus and Professor Emeritus of Political Studies at Queen's University, Canada, where he has been a member of the academic staff since 1955 and was Principal and Vice-Chancellor 1974-1984. He is a former Director and currently a Fellow of the Institute of Intergovernmental Relations at Queen's University. He was President of the International Association of Centres of Federal Studies 1991-1998, was a founding board member of the Forum of Federations 2000-2006 of which he is currently a Fellow. As a political scientist he has worked for over fifty years on the comparative study of federal systems and has written or edited twenty-nine books, monographs and reports and over one hundred articles or book chapters. He became an Officer of the Order of Canada in 1979 and was promoted to Companion of the Order of Canada in 2000.

The Institute of Intergovernmental Relations is pleased to acknowledge our sponsors for the Federal Idea: A Conference in Honour of Ronald L. Watts that gave rise to this publication

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CONTENTS

ix *Preface*

xi *Notes on Contributors*

I Introduction

1 1. Introduction and Overview
Nadia Verrelli

II The Federal Idea

13 2. The Federal Idea and its Contemporary Relevance
Ronald L. Watts

III Celebrating Ron Watts

29 3. Introducing Ron Watts
John Meisel

33 4. Encounters with Ron Watts
George Anderson

39 5. Federalism, Civility and Conflict Prevention: Watts's Research and Legacy
Hugh D. Segal

45 6. The Practical Ron Watts: Glimpses of a Political Scientist in Action
David Cameron

53 7. Ron Watts: The “Go To” Person of Canadian Federalism
Peter Meekison

65 8. Definitions, Typologies and Catalogues: Ronald Watts on Federalism
Jennifer Smith

IV Constitutional Perspectives

77 9. Scholarly Debates about the Charter/Federalism Relationship: A Case of Two Solitudes
Jeremy Clarke and Janet L. Hiebert

99 10. Constitutional Underpinnings of Federalism: Common Law vs Civil Law
Thomas Fleiner

111 11. Can Federalism Have Jurisprudential Weight?
Cheryl Saunders

139 12. Judicial Review and the Federalism Factor
Nadia Verrelli

V Diversity and Federalism

161 13. Federalism and First Peoples
Peter H. Russell

169 14. Symmetry and Asymmetry in American Federalism
G. Alan Tarr

VI Federalism – A Centrifugal or Centripetal Force?

189 15. Success and Failure in Federation: Comparative Perspectives
Michael Burgess

207 16. Preconditions and Prerequisites: Can Anyone Make Federalism Work?
Richard Simeon

VII Citizens' Perceptions of Federalism

225 17. Citizen Attitudes and Federal Political Culture in Canada, Mexico, and the United States
John Kincaid and Richard L. Cole

247 18. Testing Federalism through Citizen Engagement
Kathy L. Brock

VIII Intergovernmental Relations

269 19. R.L. Watts and the Managing of IGR in Federal Systems
Robert Agranoff

289 20. Federalism and the New International Health Regulations 2005
Harvey Lazar, Kumanan Wilson, and Christopher McDougall

313 21. The Federal Role in Canada's Cities: The Pendulum Swings Again
Robert Young

IX Federalism and Europe

323 22. European Futures: The Unbearable Heaviness of Thinking Federally
Peter Leslie

349 23. German Federalism in the Context of the European Union
Rudolf Hrbek

X Devolution and Fiscal Federalism

363 24. Mind the Gap: Reflections on Fiscal Balance in Decentralized Federations
Robin Boadway

379 25. Problems of Territorial Finance: UK Devolution in Perspective
Charlie Jeffery

395 26. The United Kingdom: The Second Phase of Devolution
Alan Trench

XI Shared and Self-Rule: Federal Case Studies

413 27. Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study
Nico Steytler

429 28. Nigeria: The Decentralization Debate in Nigeria's Federation
J. Isawa Elaigwu

445 29. The Federal Idea in Putin's Russia
Alexei Trochev

461 30. "Shared-Rule and Self-Rule" in the Working of Indian Federalism
Akhtar Majeed

XII Second Chambers

473 31. The Senate of Canada and the Conundrum of Reform
David E. Smith

489 32. Ron Watts and Second Chambers: Some Reflections on the Bundesrat
Uwe Leonardy

499 33. The Senate in Australia and Canada: Mr. Harper's "Senate Envy" and the Intra vs. Interstate Debate
Douglas Brown, Herman Bakvis, and Gerald Baier

A Life Dedicated to Public Service, Ronald L. Watts, C.C., D. Phil., LL.D., F.R.S.C.

PREFACE

At the 2006 meeting of the International Association of Centres for Federal Studies in Tübingen, Germany, Sean Conway, then Director of the Institute of Intergovernmental Relations (IIGR), confirmed that the IIGR would organize and host the next International Association of Centers for Federal Studies (IACFS) conference and that it would take the form of a Festschrift for Ronald L. Watts, himself of course a former IIGR Director and currently a Fellow of the Institute.

After consulting with Ronald Watts, John Meisel and the organizers sent invitations to prospective participants. The finalization of the program occurred under the aegis of Thomas J. Courchene, who had succeeded Sean Conway as Director of the Institute of Intergovernmental Relations.

The conference *The Federal Idea: A Conference in Honour of Ronald L. Watts* was held at Queen's University, Kingston, Ontario, Canada on October 18-20, 2007. The event was co-sponsored by the IACFS represented by then President Cheryl Saunders, of Melbourne University, and by the International Political Science Association RC 28 (Research Committee on Comparative Federalism and Federation) represented by Michael Stein, of McMaster University. John Meisel served as Honourary Conference chair. One of the highlights of the conference was Ronald Watts's presentation at the opening banquet in his honour of the *Federal Idea and its Contemporary Relevance* which is reproduced as the second chapter of the Festschrift.

The editorial committee (Thomas J. Courchene, John R. Allan, Christian Leuprecht and Nadia Verrelli) worked with the authors over the following year to prepare the final versions of the papers. At this point the recession sharply constrained the annual revenue inflow to the Institute, with the result that the publication of the Festschrift had to be put on hold for a considerable period. We wish that this were not the case and we apologize to our contributors for any and all inconveniences that this may have caused.

The Institute is pleased to recognize the conference planning and support from John Allan, Mary Kennedy, Patti Candido, Sean Gray, Ryan Zade and Paul Michna. Sharon Sullivan ably ensured that the manuscript was converted into publication format and Mark Howes from the School of Policy Studies Desktop Publishing Unit created the cover design.

It is also a pleasure to acknowledge the financial contributions received from Queen's University, the Ontario Ministry of Intergovernmental Affairs, the Forum of Federations, the Government of Canada's Privy Council Office, Cabinet Office, the Institute for Research on Public Policy, Power Corporation

of Canada, John and Phyllis Rae, Albert Fell, and Donald Rickard and the Drager Institute.

All that remains is for the Institute, on behalf of the editors and on behalf of Ronald Watts, to express our sincerest gratitude to the authors for their patience, cooperation and, especially, their excellent papers.

It is with utmost sadness that we note the passing of one of the authors, Peter Leslie, on November 18, 2010. Peter was a former Director of the IIGR and a recognized scholar of Canadian federalism and a Canadian expert on the role and operations of the European Union. His final published work *European Futures: The Unbearable Heaviness of Thinking Federally* appears as Chapter 22 in this volume.

On a personal note, having taken over as Director of the Institute in March 2010, I am very pleased that my first preface should be about a conference and book in honour of Ronald L. Watts who has been so generous in introducing me to the Institute and Queen's University.

André Juneau
Director,
Institute of Intergovernmental Relations

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John Meisel is the Sir Edward Peacock Professor of Political Science Emeritus at Queen's University. He has been associated with the Institute of Intergovernmental Relations in one way or another since its inception and has been friends with Donna and Ron Watts from the happy day they arrived at Queen's.

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Section One
Introduction

1

Introduction and Overview

Nadia Verrelli

The Federal Idea: Essays in Honour of Ronald L. Watts *est un recueil regroupant plus de trente études rédigées par d'importants chercheurs et spécialistes du fédéralisme. L'ouvrage s'ouvre sur un texte de Ronald Watts résumant son analyse du statut actuel de l'idée fédérale. Suivent une série d'études sur la contribution théorique de M. Watts à la question du fédéralisme (y compris du fédéralisme comparé) et son rôle clé de conseiller auprès de fédérations dans le monde entier. Les textes des sections IV à VI examinent différents aspects du fédéralisme, dans sa dimension à la fois constitutionnelle et citoyenne, de même que les réussites et les échecs de la doctrine fédérale. Les sections VII à XI traitent ensuite d'un éventail de politiques et de pratiques appliquées dans différentes fédérations. Outre plusieurs études de cas, les auteurs s'intéressent notamment au fédéralisme fiscal, aux relations intergouvernementales, au fédéralisme au sein de l'Union européenne et au régime de dévolution écossais, ainsi qu'aux approches à leur Chambre haute adoptées par diverses fédérations. Nous souhaitons que les lecteurs de cet ouvrage jugeront qu'il vient non seulement renforcer le cadre élaboré par Ronald Watts mais enrichir l'étude de la doctrine fédérale et du fédéralisme comparé.*

The Institute of Intergovernmental Relations (IIGR) at Queen's University, in collaboration with the International Association of Centres for Federal Studies (IAFCS) and the International Political Science Association RC28 (Research Committee on Comparative Federalism and Federation), was privileged to host

and organize "The Federal Idea", a conference celebrating the career and accomplishments of Ronald L. Watts, above all his contributions to the study and practice of federalism. Similarly, the IIGR is privileged to publish the conference proceedings in the form of a festschrift, *The Federal Idea: Essays in Honour of Ronald L. Watts.*

Ron Watts has been associated with the IIGR since its very inception. Indeed, when the Institute was founded by then Queen's Principal J.A. Corry in 1965, Ron was one of the members of Queen's Political Studies department who was consulted on its creation. Subsequently, he served as the IIGR's Associate Director (1988) and Director (1989-93), and has been a Fellow of the Institute ever since. Under his direction, the IIGR was one of the founding centres of IAFCS, and Ron served as the Association's second President (from 1991-98). As Principal of Queen's University (1974-84), he was instrumental in creating the School of Policy Studies in which the IIGR is now housed. As all of the authors enthusiastically attest, Ron was not only a major contributor to the development of the theory and practice of federalism and federations internationally, but as well has been an important influence on their personal academic and policy careers. Not surprisingly, we are extremely fortunate and proud that Ron Watts has been willing to make the IIGR his intellectual home.

The papers collected in the ten following sections of this festschrift reflect the unifying theme of both the conference and this volume, namely, the contributions made by Ron Watts to the study of federalism and, most importantly, in elucidating of the role of federalism in reconciling unity and diversity. The festshchrift opens up with a paper by Ron Watts wherein he explores federalism and the continued relevance of the federal idea. The papers in section III all pay tribute to and celebrate Ron Watts as a person, academic and practitioner of federalism. The contributors to Sections IV to VI are concerned primarily with the relevance of federalism as a concept or as an ideal. Their papers run the gamut from legal and constitutional perspectives of federalism, through the manner in which it accommodates economic and political diversity within a single political entity, to assessing the sources and circumstances of its success or failure. Sections VII to XI focus on the examination of the federal idea in practice. The papers range from an exploration of the nature of intergovernmental relations, to federalism in the European Union, fiscal federalism, and the differing roles of upper chambers in various federal states. The remainder of this brief introduction elaborates on the thirty-two papers that constitute this festschrift.

SECTION II: THE FEDERAL IDEA

The Federal Idea: Essays in Honour of Ronald L. Watts opens up with a paper by the honoree himself. In "The Federal Idea and its Contemporary Relevance", Watts explores the basic idea of federalism − shared rule and self rule − and how it continues to be relevant in the quest to reconcile unity and diversity within a single political system. In particular, Watts's view is that federalism as a political idea has become increasingly relevant because of its ability to accommodate the changing nature of the contemporary world. The basic level of

federalism as a combination of "shared rule" for some purposes and regional "self-rule" for others has been expressed in practice through a variety of pragmatic institutional forms. Watts notes that during the past century the popularity of federal political solutions has experienced four distinct periods culminating in the current resurgence. Among three recent innovations in the application of the federal idea have been the creations of hybrids, the incorporation of federations into supra-federal organizations such as the European Union (EU) and North American Free Trade Agreement (NAFTA), and the quite frequent acceptance of asymmetry in the relationships of constituent units. The conclusion identifies five major lessons from the experience of federal systems.

SECTION III: CELEBRATING RON WATTS

Section III opens with papers by John Meisel (Queen's University), George Anderson (Forum of Federations) and Hugh Segal (Senate of Canada) followed by David Cameron (University of Toronto), Peter Meekison (University of Alberta) and Jennifer Smith (Dalhousie University). All six authors share their personal reflections on Ron Watts and celebrate his passion for the study of federalism and the accommodation of diversity.

In "Introducing Ron Watts", John Meisel provides insight on the factors and influences (including very prominently Donna Watts) that underpinned and shaped Ron's remarkable career and nourished his unparalleled contributions to Canadian and international federalism. Ron, according to Meisel, is superbly adept at seizing opportunities presented to him and having the discipline, will, talent and character to rise to every challenge before him.

George Anderson, in "Encounters with Ron Watts" relates his many and continuing encounters with Ron, both professionally and socially. He argues that Ron has been influential in both his life and in the lives of others through his dedication and commitment to the study and practice of federalism. He concludes with his assessment of Ron as "always humble, always elegant and always eloquent".

Senator Segal in "Federalism, Civility and Conflict Prevention: Watts's Research and Legacy", recalls the remarkable breadth and depth of Ron's work on federalism, both in Canada and abroad. Stressing Ron's civility of tone and elegance, Segal remarks on how his character and persona underline both his scholarship and his work as a government advisor. He concludes by stating that we will all continue to benefit from Ron's scholarship as we seek to address the challenges of shared rule and self rule.

In "The Practical Ron Watts: Glimpses of a Political Scientist in Action", David Cameron offers reminiscences about his experiences with Ron while they both worked on the federally commissioned Task Force for Canadian Unity, better known as the Pepin-Robarts Commission, 1977. This paper is a light hearted review of Ron Watts as a political scientist in action. It views him as a Canadian – indeed, an Upper Canadian – whose rootedness is the foundation of his international success. Cameron concludes that Ron has made significant

contributions to his university, his community and his country, and to the study of comparative federalism.

Peter Meekison, in "Ron Watts: the 'Go To' Person of Canadian Federalism", focuses on Ron Watts's very significant contributions to Canada's attempts at managing French-English relations and at reforming the Constitution. Beginning with Ron's research work with the Royal Commission on Bilingualism and Biculturalism, Meekison traces his participation through to the Charlottetown Accord. His conclusion is that over this period and beyond, Ron has been the "go to" person on Canada's constitutional challenges.

Section III concludes with Jennifer Smith's "Definitions, Typologies and Catalogues: Ronald Watts on Federalism", assessment of the philosophical foundations and methodology underpinning Ron's work and research on federalism. The paper seeks to clarify the thinking that lies behind Ron's prodigious knowledge and, in particular, the relationship that he sees between the techniques of the federal system and the values inherent in it. As promulgated by Watts, the scope for the design of the federal system is sufficiently elastic to enable political actors to find in it creative processes to meet a vast array of demands from both regionally-based communities and citizens at large. The conclusion reached in the paper is that Watts finds in federalism both the means and the values that can assist citizens to meet the ongoing challenges of living together in fairness and peace.

SECTION IV: CONSTITUTIONAL PERSPECTIVES

The papers by Jeremy Clarke (Queen's University) and Janet Hiebert (Queen's University), Thomas Fleiner (University of Fribourg, Switzerland), Cheryl Saunders (University of Melbourne) and Nadia Verrelli (Queen's University), assess the federal idea from a constitutional perspective. In "Scholarly Debates about the Charter/Federalism Relationship: A Case of Two Solitudes", Clarke and Hiebert explore how the Charter and Charter jurisprudence have affected federalism and the federal idea and how these relationships are perceived differently by scholars in English Canada and by those from Quebec. The authors contrast the ambivalence or lack of concern among English-Canadian scholars about the Charter's impact on federalism with the tensions evident in the Québécois literature between the two constitutional pillars of the Canadian political system. They argue that those in French Canada embrace what they refer to as a "thick" understanding of federalism where they recognize that the Charter can impose serious tensions for federalism. In contrast, English Canadian scholars, embracing a "thin" understanding of federalism, seem to be more concerned with how the Charter may pose more of a challenge to parliamentary democracy than to federalism.

Also concerned with the implications of different constitutional perspectives, Thomas Fleiner in "Constitutional Underpinnings of Federalism: Common Law vs. Civil Law" explores how the federal idea is manifested differently in common-law countries than in those under civil law. He observes that many of the newly created federations have not proven to be very stable and he hypothesizes that the source of this instability may be found in their adherence

to the civil-law tradition. Given this, he concludes that the relationship of the central government to the federal units and the role of the judiciary may have to be shaped quite differently in common-law and civil-law federations.

In "Can Federalism Have Jurisprudential Weight?", Cheryl Saunders focuses on the courts in their role as arbiters of the constitutional division of powers. She finds evidence of a paradox in the operation of some federations, namely, a tendency for judicial review to favour the central government. Using Australia as her case study, she argues that the interpretive approach adopted by the Australian High Court has had an impact in shaping Australian federalism. She notes that this is probably not unique to Australia, and suggests that similar studies might usefully be undertaken for other countries.

Concluding this section, Nadia Verrelli's paper on "Judicial Review and the Federalism Factor" re-examines traditional theories of judicial review, arguing that all seem to underestimate the role an understanding of federalism and socio-political factors play in shaping the judicial review process. Using four references − *The Senate Reference*, 1980; *The Patriation Reference*, 1981; *The Quebec Veto Reference*, 1982; and *The Secession Reference*, 1998 − she demonstrates that a particular conception of federalism underpins all four opinions of the Supreme Court of Canada. She suggests that further analysis is required to assess the degree to which the Supreme Court of Canada is influenced by and influences the dominant understanding of Canadian federalism.

SECTION V: DIVERSITY AND FEDERALISM

In the next section, Peter Russell (University of Toronto) and Alan Tarr (Rutgers University) explore the relationship between diversity and federalism. In "Federalism and First Peoples", Russell examines three dimensions of relations with indigenous peoples within three federal states, namely, Australia, Canada and the United States. First, from the perspective of the division of powers, federal and state or provincial governments in all three countries are just beginning to view their relations with indigenous governments in a government-to-government rather than an imperial context. Second, formal and informal forms of treaty federalism are proving to be the most promising ways of building federal relations with indigenous peoples. However, developing relations with indigenous peoples that are fully federal, meaning realizing both the self-rule and shared-rule aspects of federalism, require more effective ways of engaging them in the governing institutions of the federation. Third, in their relations with their respective indigenous peoples, Australia, Canada and the United States have much to gain from drawing on the confederal traditions of these peoples.

Alan Tarr, in "Symmetry and Asymmetry in American Federalism", highlights the implications of asymmetry in the American federalism design by focusing on non-state constitutional units in the United States, namely, the District of Columbia, Native American tribes, and territories not yet admitted to statehood. He describes the current status of these non-state constituent units and analyzes the factors that have prompted shifts in their status over time and the

problems plaguing efforts to reconcile diversity with the American federal Constitution. Both Russell and Tarr speak to and elaborate on the use and usefulness of federalism as a political tool for the accommodation of diversity.

SECTION VI: FEDERALISM – A CENTRIFUGAL OR CENTRIPETAL FORCE?

The papers by Michael Burgess (University of Kent) and by Richard Simeon (University of Toronto) examine the centrifugal and centripetal effects of federalism on nations. Burgess begins by exploring how we define the terms *success* and *failure* when applying them to the comparative study of federations. In his paper, "Success and Failure in Federation: Comparative Perspectives", he demonstrates that the complexity of demonstrating success and/or failure permits no sweeping generalizations; typically, federations succeed in some things, but fail in others. He also suggests that the key to evaluating the success of federal states must always depend upon how far they have achieved the standard objectives common to all states while maintaining the hallmark of a federal system, namely, union and autonomy. Equally, a federation may be deemed to have failed if the pursuit of good government has been achieved at the expense of the differences and diversities that were its *raison d'*ê*tre*. In this sense, success and failure must be contextualized.

In "Preconditions and Prerequisites: Can Anyone Make Federalism Work?", Richard Simeon examines federations generally perceived to be successful with a view to ascertaining the sources of their "success". While these are commonly believed to include democracy, constitutionalism and the rule of law, mutual trust, shared identities, and the presence of other supportive institutions, he notes that they seldom all exist in any given federation. It is thus necessary to ask which conditions are essential and which are merely desirable. Federalism, he concludes, may not always be the best or the most workable solution, but where it is not, it may be a strong second best to alternative arrangements.

SECTION VII: CITIZENS' PERCEPTIONS OF FEDERALISM

In the following section, papers by John Kincaid (Lafayette College) and Richard Cole (University of Texas), and by Kathy Brock (Queen's University) explore federalism from the perspective of the citizen and the impact of such perspectives on the federal system. Focusing on Canada and the United States, Kincaid and Cole in "Citizen Attitudes and Federal Political Culture in Canada, Mexico, and the United States", assess the nature of the federal culture in both Canada and the United States utilizing the results of various surveys they conducted. The results suggest that in Canada, where federalism and federal political culture are comparatively robust, public trust and confidence in all governments is comparatively low, the perceptions by citizens of the degree to which their province is treated with respect in the federation are also

comparatively low, and there are significant regional and partisan differences in attitudes. In the United States, where federalism and federal political culture are less robust, public trust and confidence in all governments is comparatively high, perceptions by citizens of the degree to which their state is treated with respect in the federation are comparatively high, and there are few significant regional and partisan differences in attitudes. Finally, the response pattern from Mexico suggests that Mexico is the least pro-federal of the three federations.

In "Testing Federalism through Citizen Engagement", Kathy Brock addresses and assesses the relationship between social forces and the development of political institutions vis-à-vis the health of the Canadian federal system. She examines the effectiveness of this relationship by applying what she refers to as the "Watts test" to Canada's experiences with the constitutional amending process, Aboriginal governance, and non-governmental organizations. In each case, strong local identities have competed with and threatened the ability of Canada to maintain the strong sense of common interests that ultimately bind these identities into a national whole. Brock concludes that the institutions of Canadian federalism have adjusted over time to reflect changes in society and societal values, to channel and influence expressions of unity and diversity, and to balance diversity with unity.

SECTION VIII: INTERGOVERNMENTAL RELATIONS

The papers in Section VIII are concerned with the practice of intergovernmental relations in federal states. In the first of these, "R.L. Watts and the Managing of IGR in Federal Systems", Robert Agranoff (Indiana University) focuses on Watts's contributions to administrative federalism. Agranoff first explores the intergovernmental-relations (IGR) groundwork laid by Watts to work on comparative federalism. The particulars of administrative IGR, (or intergovernmental management) developed by Watts is then elaborated. In the concluding section, Agranoff examines six contemporary forces that compound the problems of administrative IGR.

In "Federalism and the New International Health Regulations 2005", Harvey Lazar (University of Victoria), Kumanan Wilson (University of Ottawa), and Christopher McDougall (University of Toronto) analyze and compare how four federations − Australia, India, Canada, and the United States − have responded to the new International Health Regulations adopted by the World Health Organization in 2005. The commitments that result from the adoption of these regulations pose unique challenges for federal states. While it is common for the national government of federations to have the constitutional power to enter into such agreements, important mechanisms for implementing the commitments may constitutionally be assigned to state/provincial governments. Lazar, Wilson, and McDougall demonstrate that in the more centralized federations, India and Australia, governments have made good progress, while in the more decentralized federations the process of implementation has been slower. They suggest that the normal pace of intergovernmental relations that

characterizes decentralized federations, most certainly Canada and the United States, is slower, and this may hinder the successful implementation of the International Health Regulations.

Robert Young (University of Western Ontario) in "The Federal Role in Canada's Cities: The Pendulum Swings Again", looks at how the Canadian federal and provincial governments have handled demands from municipal governments. The extent of federal-government interest in urban issues has varied considerably in Canada. In recent years, the Chrétien government's rather traditional stance of restraint was succeeded by Paul Martin's enthusiastic involvement in the municipal file, as embodied in his government's New Deal for Cities and Communities. The Harper government, in contrast, is committed to Open Federalism, one of the tenets of which is a strict respect for constitutional jurisdiction; consequently, this administration wound down most of Martin's New Deal initiatives. Young argues that, with the division of powers at its core, federalism provides national governments with an excuse to ignore strong demands and needs of municipal governments, an excuse not available to governments of a unitary state.

SECTION IX: FEDERALISM AND EUROPE

Peter Leslie (Queen's University) and Rudolf Hrbek (University of Tubingen) both explore the manifestation of the federal idea in Europe. With "European Futures: The Unbearable Heaviness of Thinking Federally", Leslie begins by focusing on the eventual non-ratification of the Treaty of Lisbon by Ireland. While most member states have since ratified the Treaty, Leslie concluded that no one can be sure it come into force.[1] This is one source of uncertainty about the future of Europe and the EU, but there are others as well. Noting this, he explores the implications of five alternative European futures. He argues that each scenario meets the demands of the EU regionally based communities and hypothesizes that each suggests the need to create a more federal Europe.

Rudolf Hrbek, in "German Federalism in the Context of the European Union", assesses the implications of the European Union on Germany's federal state, its intergovernmental relations and on the balance of powers between the two orders of government. He details the various ways that German federalism has undergone changes in the context of the EU integration process. Indeed, the adaptations of the pattern of German federalism might well be regarded as a case of Europeanization. In particular, the Länder have been successful in acquiring new rights and in gaining procedural means that strengthen their position vis-à-vis the federal government. Both orders, however, remain closely linked and interrelated. He concludes by arguing that "cooperative federalism" continues to be the proper label for characterizing the German federal system.

[1]Since the presentation of Peter Leslie's paper, the Treaty of Lisbon did come into force on Decemeber 1, 2009.

SECTION X: DEVOLUTION AND FISCAL FEDERALISM

In "Mind the Gap: Reflections on Fiscal Balance in Decentralized Federations", Robin Boadway (Queen's University) explores the notion and importance of fiscal imbalance in federations and the manner in which it interacts with the degree of decentralization. He draws upon recent work on political economy and fiscal federalism to illuminate the concept of fiscal balance and to provide useful lessons for the economic management of federal systems, especially those that are decentralized.

Both Charlie Jeffrey (University of Edinburgh) and Alan Trench (University of Edinburgh) look at the importance of territorial financial relations in general and how such relations affect the devolution of powers to Scotland. In "Problems of Territorial Finance: UK Devolution in Perspective", Jeffrey addresses the fundamental importance of territorial financial arrangements in shaping conditions of power and legitimacy in decentralized political systems. These arrangements shape what governments can or cannot do, both directly in equipping them with the resources to carry out (or not) their allotted functions, and indirectly in their significance for shaping the economic conditions that generate – or limit – the take of the public purse. The arrangements are also important in forming citizens' views on the legitimacy of federal political systems. Jeffrey notes that during the two or three years preceding the conference, an intensive discussion about the fiscal relationship of Scotland and the rest of the United Kingdom has unfolded. This, he argues, exemplified contentions about Scotland's place in the United Kingdom.

Alan Trench, in "The United Kingdom: The Second Phase of Devolution", deals with the implications of the 2007 elections to the Scottish Parliament for the National Assembly for Wales and the Northern Ireland Assembly. He argues that these developments have led to significant changes in how devolution works, including more contentious intergovernmental relations, the increasing importance of financial issues, and a developing set of constitutional debates. In Trench's view, this indicates that devolution has entered a distinct second phase very different from that of its first eight years. At the same time, wider issues about devolution – notably what to do about England – remain unresolved.

SECTION XI: SHARED AND SELF-RULE: FEDERAL CASE STUDIES

The penultimate section includes four federal case studies relating to the operations of federalism. Nico Steytler (University of Capetown) in "Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study", details the South African experience in relation to the two models of intergovernmental relations, cooperative and coercive. He argues that in South Africa, a more coercive model of IGR emerged. This, he contends, was inevitable given the South African government's reluctance to embrace a federal type of government. This practice of IGR may shift. However, according to

Steytler, changes to the political culture depend on the larger forces shaping the polity of a particular country.

Isawa Elaigwu (University of Jos), in "Nigeria: The Decentralization Debate in Nigeria's Federation", examines how federalism was and continues to be used as a tool to manage diversity in Nigeria. Over the years, Nigeria has undergone several changes in its structure, institutions and processes; all are indicative of the contemporary challenges facing the federation. With recent changes, including the exit of the military from government in 1999 and the change of government, Elaigwu argues that Nigeria seems to be on the threshold of a new democratic and federal polity. According to Elaigwu, there are signs that federalism may flourish in Nigeria as Nigerian politicians develop a supportive federal culture.

Alexei Trochev (University of Wisconsin Law School) in "The Federal Idea in Putin's Russia", explores whether Russia can still be considered a federation. The life-support system of the federal idea in Russia resides in two sources: the legal framework and the private initiative. Trochev argues that, although severely wounded, Russian federalism is not yet dead, and concludes that the challenges of governing over Russia's vast landmass now require the federal centre to co-operate with the local authorities, leaving them with some degree of policy autonomy.

In "Shared-Rule and Self-Rule in the Working of Indian Federalism", Akhtar Majeed (Hamdard University, New Delhi, India) examines the social and political evolution of federalism in India where, he believes, the desire to identify some common goals and purposes and to establish political legitimacy and political accountability has become the basis of its nationhood. He argues that, if power is properly shared and varied interests are accommodated, there need not be any threat to central authority The Indian federal mechanism is intended to provide precisely the same. In the Indian Constitution, decentralized and grass-root planning and implementation are features of shared governance; and this, in turn, reflects the correct image of federal governance.

SECTION XII: SECOND CHAMBERS

The volume concludes with three papers concerned with upper chambers in federal states. David Smith (University of Saskatchewan) analyzes Senate reform in Canada in "The Senate of Canada and the Conundrum of Reform". He argues that the conundrum of Senate reform rests in the failure of Canadians to recognize that the keystone for Canada's structure of representation is provided by the unelected Senate. According to Smith, a maze of compromises, deals and agreements, and knowledge of Canada's structure of representation is central to any successful reform initiative.

Uwe Leonardy (Bonn University), in "Ron Watts and Second Chambers: Some Reflections on the Bundesrat", reviews the analyses, approaches, and categories utilized by Watts when studying the Canadian Senate. Utilizing these, the chapter tries to discern Watts's always cautiously formulated evaluations and recommendations for federal second chambers. Leonardy points out that Watts has always had a strong preference for the German Bundesrat as a potential

model for Senate Reform in Canada, even though, since the 1990s, he has tended to distance himself from that recommendation.

In "The Senate in Australia and Canada: Mr. Harper's 'Senate Envy' and the Intra vs. Interstate Debate", Gerald Baier (University of British Columbia), Herman Bakvis (University of Victoria) and Doug Brown (St. Francis Xavier) utilize the intra- and interstate federalism distinction to analyze the Australian and Canadian Senates and to assess whether Canada's adaptation of the Australian model would lead to more of a "parties' house" as in Australia, or a "provinces' house". They argue an Australian style elected senate established in Canada would likely see provincially based parties, and that an elected Senate in Canada could enhance the representative capacity of the federal government, serving as a check on executive dominance.

CONCLUSION

We thank the authors for their contributions to this festschrift and we trust that the reader will enjoy the fruits of their endeavours. We also trust that, building on the conceptual framework developed by Ronald L. Watts, the papers have advanced the study of the federal idea and comparative federalism, thereby confirming Watts's enduring contention that the federal idea is the best way of reconciling diversity and unity.

Section Two

The Federal Idea

2

The Federal Idea and its Contemporary Relevance

Ronald L. Watts

Le fédéralisme en tant que doctrine politique a gagné en pertinence au gré de l'évolution du monde actuel et des pressions convergentes qui en ont découlé sur les États de toutes dimensions. L'idée de base du fédéralisme, qui combine une « réglementation commune » à certaines fins et une « autoréglementation » régionale à certaines autres, s'est incarnée sous des formes institutionnelles pragmatiques. Au cours du dernier siècle, les solutions politiques fondées sur le modèle fédéral ont connu une forte popularité lors de quatre périodes distinctes, qui ont mené à l'enthousiasme renouvelé qu'elles suscitent aujourd'hui. Dans la période récente, l'application de la doctrine fédérale a donné lieu à trois principales innovations : création de modèles hybrides, intégration de fédérations à des organisations supra-fédérales comme l'UE et l'ALENA, et acceptation de plus en plus courante de rapports asymétriques entre les unités constitutives. En conclusion sont tirées cinq grandes leçons de l'expérience des systèmes fédéraux.

INTRODUCTION

In the contemporary world, federalism as a political idea has become increasingly important. This arises from its potential as a way of peacefully reconciling unity and diversity within a single political system.

The reasons for this popularity can be found in the changing nature of the world leading to simultaneous pressures for both larger states and also for smaller ones. Modern developments in transportation, social communications, technology, industrial organizations, globalization and knowledge-based and hence learning societies, have all contributed to this trend. Thus, there have developed two powerful, thoroughly interdependent, yet distinct and often actually opposed motives: the desire to build dynamic and efficient national or even supra-national modern states, and the search for distinctive identities. The former is generated by the goals and values shared by most Western and non-Western societies today: a desire for progress, a rising standard of living, social justice, influence in the world arena, participation in the global economic network, and a growing awareness of worldwide interdependence in an era that makes both mass destruction and mass construction possible. The latter arises from the desire for smaller, directly accountable, self-governing political units, more responsive to the individual citizen, and from the desire to give expression to primary group attachments – linguistic and cultural ties, religious connections, historical traditions, and social practices – which provide the distinctive basis for a community's sense of identity and yearning for self-determination.

Given the dual pressures throughout the world, for larger political units capable of fostering economic development and improved security on the one hand, and for smaller political units more sensitive to their electorates and capable of expressing local distinctiveness on the other, federal solutions have had an increasing appeal throughout the world. The reason for this is that federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes in a larger political unit, combined together with autonomous action by smaller constituent units of government, directly and democratically responsible to their own electorates. As such, federal political systems provide the closest institutional approximation to the complex multicultural and multidimensional economic, social and political reality of the contemporary world.

These developments have contributed to the current interest in federalism, not as an ideology, but in terms of practical questions about how to organize the sharing and distribution of political powers in a way that will enable the common needs of people to be achieved while accommodating the diversity of their circumstances and preferences.

As a consequence, there are in the world today some two dozen countries that are federal in their character, claim to be federal, or exhibit the characteristics typical of federations. Indeed some 40 percent of the world's population today lives in countries that can be considered, or claim to be federations, many of which are multicultural or even multinational in their composition.

During the past decade, especially, there has been an international burgeoning of interest in federalism. Political leaders, leading intellectuals and even some journalists are now increasingly speaking of federalism as a healthy, liberating and positive form of political organization. Furthermore, Belgium, Spain, South Africa, Ethiopia and Italy appear to be emerging towards a variety of new and innovative federal forms. In a number of other countries, such as the United Kingdom, devolutionary processes have incorporated some federal features, although by no means all the features of a full-fledged federation. Furthermore, the European Union (EU), with the addition of new member states, is in the process of evolving its own unique hybrid of confederal and federal institutions. Thus, everywhere, with changing world conditions, federal political systems have continued to evolve.

THE FEDERAL IDEA: THE ESSENTIAL FEATURES

Over the years there has been much scholarly debate about the definition of federalism. Definitions have varied from broad inclusive ones to narrow restrictive ones. The basic essence of federalism, as Daniel Elazar has noted, is the notion of two or more orders of government combining elements of "shared rule" for some purposes and regional "self-rule" for others. It is based on the objective of combining unity and diversity: i.e., of accommodating, preserving and promoting distinct identities within a larger political union (Elazar 1987).

This basic idea has been expressed though a variety of federal institutional forms in which, by contrast to the single source of constitutional authority in unitary systems, there are two (or more) levels of government, combining elements of shared rule through common institutions with regional self-rule for the governments of the constituent units. Like Elazar, I have viewed the broad category of federal forms combining shared rule for some purposes and regional self-rule for others, as encompassing a wide range of institutional forms from constitutionally decentralized unions to confederacies and beyond. Within this broad genus of federal political systems, federations represent one distinct species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other, i.e., each has sovereign powers derived from the constitution rather than from another level of government, each is empowered to deal directly with its citizens in the exercise of its legislative, executive and taxing powers, and each is directly elected by its citizens (Watts 1999).

What basically distinguishes federations from decentralized unitary systems and from other federal forms such as confederations is that in unitary systems the governments of the constituent units ultimately derive their authority from the central government, and in confederations the central institutions ultimately derive their authority from the constituent units and consist of delegates of those units. In a federation, however, each order of government derives its authority, not from another order of government, but from the constitution and each relates directly (not through another government) to the citizens.

Consequently, the structural characteristics that distinguish federations as a specific form of federal system are the following:

- Two (or more) orders of government each acting directly on their citizens (rather than indirectly through the other order);
- A formal constitutional distribution of legislative and executive authority, and allocation of revenue resources between the orders of government ensuring some areas of genuine autonomy for each order;
- Provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by a federal second chamber composed of representatives of the regional electorates, legislatures or governments;
- A supreme written constitution, not unilaterally amendable by one order of government, and requiring the consent not only of the federal legislature but also of a significant proportion of the constituent units through assent by their legislatures or by referendum majorities;
- An umpire (in the form of courts, or as in Switzerland provision for referendums) to rule on interpretation or a valid application of the constitution; and
- Processes and institutions to facilitate intergovernmental collaboration in those areas where government responsibilities are shared or inevitably overlap.

At the same time it should be noted that some political systems are hybrids combining characteristics of different kinds of political systems. Those that are predominately federations in their constitution and operation, but which include some federal government powers to override governments of constituent units – an arrangement more typical of a unitary system – have sometimes been described as "quasi-federations". At different stages in their development Canada, India, Pakistan, Malaysia and South Africa have been so described. On the other hand Germany, while predominantly a federation, has a confederal element in the Bundesrat, its federal second chamber, which is composed of instructed delegates of the Land governments. A hybrid, predominantly a confederation but with some features of a federation, is the European Union since Maastricht. Hybrids of various sorts occur because statesmen are often more interested in pragmatic political solutions than in theoretical purity.

In setting out the distinctive characteristics of a federation there are some further important points to note. First, there is the distinction between constitutional form and operational reality. In many political systems political practice has transformed the way the constitution operates. Therefore, to understand how a given federation or federal system operates, it is necessary to examine not only its constitutional law but also its political practices and processes. Significant characteristics of federal processes include:

- A strong disposition to democratic procedures since they presume the voluntary consent of citizens in the constituent units;
- Non-centralization as a principle expressed through multiple centres of political decision making;
- Open political bargaining as a major feature of the way in which decisions are arrived at; and

- A respect for constitutionalism and the rule of law since each order of government derives its authority from the constitution.

While certain structural features and political processes may be common in federations, it must be emphasized that federations have exhibited many variations in the application of the federal idea. There is no single ideal form of federation. Among the variations that can be identified among federations are those in:

- The degree of cultural or national diversity that they attempt to reconcile;
- The number, relative size and symmetry or asymmetry of the constituent units;
- The distribution of legislative and administrative responsibilities among governments;
- The allocation of taxing powers and financial resources;
- The degree of centralization, decentralization or non-centralization, and the degree of economic integration;
- The character and composition of their central institutions;
- The processes and institutions for resolving conflicts and facilitating collaboration between interdependent governments;
- The procedures for formal and informal adaptation and change; and
- The roles of federal and constituent-unit governments in the conduct of international relations; and
- The electoral system and number and character of political parties.

Ultimately federalism is a pragmatic and prudential technique whose applicability in different situations has depended upon the different forms in which it has been adopted or adapted, and even upon the development of new innovations in its application.

One further point about federal systems. Federal systems are a function not only of constitutions, but also of governments, and fundamentally of societies. It is important, therefore, to distinguish between federal societies, governments and constitutions in order to understand the dynamic interaction of these elements with each other. The motivations and interests within a society – which generate pressures both for political diversity and autonomy, on the one hand, and for common action on the other – the legal constitutional structure, and the actual operations, processes and practices of government, are all important considerations for understanding the operation of federations.

At one time, the study of federations tended to concentrate primarily on their legal frameworks. Scholars have come to realize, however, that a merely legalistic study of constitutions cannot adequately explain political patterns within federations. Indeed, the actual operation and practices of governments within federations have, in response to the play of social and political pressures, frequently diverged significantly from the formal relationships specified in the written legal documents. Scholars writing about federal systems have, therefore, become conscious of the importance of the social forces underlying federal systems.

But the view that federal institutions are merely the instrumentalities or expressions of federal societies, while an important corrective to purely legal and institutional analyses, is also too one-sided and oversimplifies the causal relationships. Constitutions and institutions, once created, themselves channel and shape societies (Cairns 1977). For example, in both the United States in 1789 and Switzerland in 1848, the replacement of confederal structures by federal constitutions marked turning points enabling the more effective political reconciliation of pressures for diversity and unity within their societies.

The causal relationships among a federal society, its political institutions, and its political behaviours and processes are complex and dynamic. The causal impact is not simply unidirectional; rather, it involves two-way interactions with each factor influencing the other two. The pressures within a society may force a particular expression in its political institutions, processes and behaviour; but, in turn, these institutions and processes, once established, usually shape the society. They do this both by determining the channels in which the social pressures and political activities flow, and by establishing policies that modify the shape of society.

Thus, the relationships between a society, its constitution, and its political institutions and processes are dynamic and involve continual mutual interaction. It is not sufficient, in considering the experience of different federations, to review only the influence of social forces upon the adoption, design, modification, and subsequent operation of federal constitutional structures. Rather, it is also necessary to consider the influence those federal political structures – and the related political processes and practices – have had upon social loyalties, feelings and diversities. It is thus necessary to assess both how well the institutions in each federation reflect the particular social and political balance of forces within that society, and how effectively these institutions, once established, have channelled and influenced the articulation of unity and diversity within that polity.

THE VARYING POPULARITY OF THE FEDERAL SOLUTION DURING THE PAST CENTURY

One may identify roughly four distinct periods in the popularity of the federal solution during the past century.

Prior to 1945

In the century and a half prior to 1945, federal or ostensibly federal regimes had been established in the United States (1789), Switzerland (1848), Canada (1867), Australia (1901), Germany (1871-1918) and also in Latin America in Venezuela (1811), Mexico (1824), Argentina (1853) and Brazil (1891). Nevertheless, prior to 1945, the general attitude, particularly in Europe and in Britain, appeared to be one of benign contempt for federal forms of government. Indeed, this attitude still prevails in some quarters in Britain today. Many

viewed federation as simply an incomplete form of national government and a transitional mode of political organization, and, where adopted, to be a necessary concession made in exceptional cases to accommodate political divisiveness. The more ideologically inclined considered federalism to be a product of human prejudices or false consciousness preventing the realization of unity through such more compelling ideologies as radical individualism, classless solidarity or the General Will.

For example, writing in 1939, Harold Laski declared: "I infer in a word that the epoch of federalism is over" (367). Federation in its traditional form, with its compartmentalization of functions, legalism, rigidity and conservatism, was, he argued, unable to keep pace with the tempo of modern economic and political life that giant capitalism had evolved. He further suggested that federal systems were based on an outmoded economic philosophy, and were a severe handicap in an era when positive government action was required. Decentralized unitary government, he concluded was much more appropriate in the new conditions of the Twentieth Century. Even Sir Ivor Jennings, a noted British constitutionalist, who was an advisor in the establishment of several new federations within the Commonwealth during the immediate post-war period, did not hesitate to write that "nobody would have a federal constitution if he could possibly avoid it" (Jennings 1953, 55).

The Surge of Popularity Between 1945 and 1970

While up to 1945 the federal idea appeared to be on the defensive, the following two decades and a half saw a remarkable array of governments created or in the process of creation that claimed the designation "federal". Indeed, only eight years after 1945, Max Beloff was able to assert that the federal idea was enjoying "a popularity such as it had never known before" (Beloff 1953, 114). With this occurred a burgeoning of comparative federal studies. This was the period when my own interest in the comparative study of federations was aroused during my studies at Oxford with K.C. Wheare, and led to my first book (Watts 1966).

Three factors contributed to this post-war surge in the popularity of federal solutions. One was the wartime success and post-war prosperity of the long-established federations such as the United States, Switzerland, Canada and Australia, coupled with their development into modern welfare states.

A second factor stemmed from the conditions accompanying the break-up of the European colonial empires in Asia, Africa and the Caribbean. The colonial political boundaries rarely coincided with the distribution of racial, linguistic, ethnic and religious communities or with the locus of economic, geographic and historic interests. In the resulting clashes between the forces for integration and for disintegration, political leaders of independence movements and colonial administrators alike saw in federal solutions a common ground for centralizers and provincialists. The result was a proliferation of federal experiments in these colonies or former colonies. These included India (1950), Pakistan (1956), Malaya (1948) and then Malaysia (1963), Nigeria (1954), Rhodesia and Nyasaland (1953), the West Indies (1958), Indochina (1945-47),

French West Africa and its successor, the Mali Federation (1959), and Indonesia (1945-49). In the same period, in South America where the federal structure of the United States had often been imitated, at least in form, new ostensibly federal constitutions were adopted (some short-lived) in Brazil (1946), Venezuela (1947) and Argentina (1949).

A third factor was the revival of interest in federal solutions in post-war Europe. World War II had shown the devastation that ultra-nationalism could cause, gaining salience for the federal idea, and progress in that direction began with the creation of the European Communities. At the same time, in 1945 in Austria the federal constitution of 1920 was reinstated making Austria once more a federation, Yugoslavia established a federal constitution in 1946, and in 1949 West Germany adopted a federal constitution.

Thus, the two decades and a half after 1945 proved to be the heyday of the federal idea. In both developed and developing countries, the "federal solution" came to be regarded as the way of reconciling simultaneous desires for large political units required to build a dynamic modern state and smaller self-governing political units recognizing distinct identities. Not surprisingly, these developments produced a burgeoning of comparative federal studies by scholars such as Kenneth Wheare, A.W. Macmahon, Carl J. Friedrich, A.H. Birch, W.S. Livingston, and others including myself. Also the first establishment of academic centres specializing in federal studies occurred at Queen's University in Canada in 1965 and Temple University in the United States in 1967.

A More Cautious Enthusiasm for Federal Solutions, 1970-90

From late in the 1960s on, it became increasingly clear, however, that federal political systems were not the panacea that many had, in the early years after 1945, imagined them to be. Most of the post-war federal experiments experienced difficulties and a number of these were abandoned or temporarily suspended. Examples were the continued internal tensions and frequent resort to emergency rule in India, the secession of Bangladesh from Pakistan, the forcing out from Malaysia of Singapore, the Nigerian civil war and the subsequent prevalence there of military regimes, the dissolutions of the federations of the West Indies and of Rhodesia and Nyasaland, and the collapse of most of the French colonial federations.

These experiences indicated that even with the best of motives, there were limits to the appropriateness of federal solutions. In addition, the experience in Latin America, where many of the constitutions were federal in form but unitary in practice, added skepticism about the utility of federation as a practical approach in countries lacking a long tradition of respect for constitutional law.

In Europe the slow pace of progress towards integration, at least until the mid-1980s, also seemed to make the idea of a federal Europe more remote.

Even the classical federations of the United States, Switzerland, Canada and Australia were experiencing renewed internal tensions and a loss of momentum that reduced their attractiveness as shining examples for others to follow. In the United States, the centralization of power through federal pre-emption of state and local authority, and the shifting of costs to state and local governments

through unfunded or underfunded mandates, had created an apparent trend towards what became widely described as "coercive federalism" (Kincaid 1990; Zimmerman 1993). Furthermore, the apparent abdication in 1985 by the Supreme Court of its role as an umpire within the federal system (*Garcia v. San Antonio Metro Transit Auth*., 469 US 528 (1985)) raised questions, at least for a time, about the judicial protection of federalism within the American system.

Switzerland had remained relatively stable, but the long-drawn crisis over the Jura problem prior to its resolution, the problems of defining Switzerland's future relationship with the European Community, and the prolonged unresolved debate for three decades over the renewal of the Swiss constitution raised concerns within the Swiss federation.

In Canada, the Quiet Revolution in Quebec during the 1960s, and the ensuing four rounds of mega-constitutional politics in 1963-71, 1976-82, 1987-90 and 1991-92 had produced three decades of severe internal tension. Aboriginal land claims, crises in federal-provincial financial relations, and the problems of defining the relative federal and provincial roles under the free-trade agreements with the United States, and later Mexico, created additional stresses.

In 1975, Australia experienced a constitutional crisis that raised questions about the fundamental compatibility of federal and of parliamentary responsible cabinet institutions. The result was a revival in some quarters in Australia of the debate about the value of federation.

Through most of this period West Germany remained relatively prosperous. Nevertheless, increasing attention was being drawn to the problems of revenue sharing and of the "joint decisions trap" entailed by its unique form of "interlocked federalism" requiring a high degree of co-decision making (Scharpe 1988). Furthermore, the impact of membership in the European Union upon the relative roles of the Bund and the Länder was also a cause of concern.

At the end of this period, the disintegration of the former authoritarian centralized federations in the Soviet Union, Yugoslavia and Czechoslovakia exposed the limitations of these federal façades.

In such a context, one strand in the comparative studies of federations focused on the pathology of federal systems, examples being Thomas Franck, Ursula Hicks and some of my own writing. Nevertheless, others such as Ivo Duchacek, Preston King and especially Daniel Elazar provided perceptive insights into the character and variety of federal arrangements. Furthermore, the establishment of an International Association of Centers of Federal Studies in 1977 linking ten multidisciplinary centres, and shortly after of *Publius*, a journal specializing in federal studies, contributed during this period to intensified research on the operation of federal systems. In 1984, a second body for collaborative federal studies, the International Political Science Association Research Committee on Comparative Federalism, was established linking individual political scientists working in this area.

The Resurgence in Enthusiasm for Federal Solutions During the Past Decade and a Half

In the 1990s, there developed a revival in the enthusiasm for federal political solutions. Outside the academic realm, political leaders and leading intellectuals have come increasingly to refer to federal systems as providing a liberating and positive form of political organization. Indeed, as I have already noted, by the turn of the century, it could be said that some 40 percent of the world's population lived in some two dozen federations or countries that claimed to be federal. Furthermore, in a number of other countries some consideration was being given to the efficacy of incorporating some federal features, although not necessarily all the characteristics of a full-fledged federation. In Latin America, the restoration of federal regimes has occurred in a number of countries after periods of autocratic rule. In Asia, the economic progress of India showed that coalition-based federalism was a workable response to the problems of development. Elsewhere in the Third World and especially Africa, the failure of "strong leaders" to resolve persistent social and political problems, and the realization by such international bodies as the World Bank that decentralization was the preferred strategy for economic development, have contributed to a widespread renewal of interest in federal or at least devolutionary political solutions.

A number of other factors contributed to this trend. One was the widespread recognition that an increasingly global economy had unleashed centrifugal economic and political forces, weakening the traditional nation-state and strengthening both international and local pressures – a combined trend that Tom Courchene has called "glocalization" (Courchene 1995). Another was the changes in technology that were generating new, more federal, models of industrial organization with decentralized and flattened hierarchies involving non-centralized interactive networks. These developments have influenced the attitudes of people in favour of non-centralized political organization.

Developments in three political areas also appeared to have an impact. One was the resurgence of the classical federations which, despite the problems they had experienced in the preceding two decades, had nevertheless displayed a degree of flexibility and adaptability in responding to changing conditions. Another was the collapse of the totalitarian regimes in Eastern Europe and the former Soviet Union. These developments undermined the appeal of transformative ideologies and exposed the corruption, poverty and inefficiency characteristic of systematic and authoritarian centralization. A third was the progress made during this period in Europe's apparent federal evolution with the Single European Act and the Maastricht Treaty and the broadening of the European Union to incorporate a much widened membership.

All of these factors have contributed to the renewed general interest in federal methods of organizing political relationships and distributing political powers in a way that would enable the common needs of people to be achieved while accommodating the diversity of their circumstance and preferences. It must be noted that this revival of interest in federal political systems beginning in the 1990s has differed, however, from the excessively enthusiastic

proliferation of federations that occurred in the early decades after 1945. Experience since that period has led generally to a more cautious and sanguine approach (Elazar 1993).

There is one distinctive feature of this period, however. In previous eras federation was characterized as the result of political communities freely joining together or devolving to build something better. But in a number of cases today, federal systems are being proposed as a solution for warring communities. In countries like Iraq, Sri Lanka, Sudan and Cyprus, instead of federation being advocated on grounds of providing mutual benefits, it is being advocated as a way of ending acute civil ethno-cultural conflict and of avoiding utter political collapse. The problem in these cases has been a lack of what previous experience has suggested are the prerequisites for an effective federal system: respect for constitutionalism, and a prevailing spirit of tolerance and compromise. Until these necessary underlying conditions are created, efforts to create sustainable federal systems are likely to prove simply futile. Much more effort to establish first the prerequisite conditions will be required in these cases.

A new development at the turn of the century has been the establishment, on the initiative of the Canadian federal government, of the international Forum of Federations. The Canadian government was convinced that there would be real value, particularly for practitioners in federations – statesmen, politicians and public servants – in organizing an opportunity to exchange information and learn from each other's experience. Accordingly, it arranged a major international conference on federalism at Mont Tremblant in the autumn of 1999. Over 500 representatives from twenty-five countries, including the Presidents of the United States and Mexico and the Prime Minister of Canada, participated. Major presentations and papers of the conference were subsequently published in the International Social Science Journal, special issue 167, 2001. Among the themes upon which the conference focused were social diversity and federation, economic and fiscal arrangements in federation, intergovernmental relations, and provision for the welfare state in federations. Such was the success of this conference, that is was decided to put the Forum of Federations on a permanent basis with its own international board (a board on which I was privileged to serve from its inception until 2006). Initially, the funding for the Forum came totally from the Canadian federal government. Although until 2011, it contributed the largest share, the Forum has now evolved to the point where governments in eight federations (Australia, Austria, Germany, India, Nigeria, Mexico, Switzerland and Ethiopia) are sustaining members. A number of others are contemplating membership, and the current chairman of the Board is a former President of Switzerland.

Among the major activities of the Forum have been building international networks fostering the exchange of experience and information on best practices among practitioners in existing federations or countries with some federal features, and the sponsorship at three-yearly intervals of major international conferences of practitioners and academics on federalism. The second international conference was held at St. Gallen, Switzerland in 2002 with over 600 participants from more than 60 countries. The third was held in Brussels in 2005 with over 1000 participants from some 80 countries, and the fourth (for

which I am the international advisor for the Indian government) is scheduled for November 2007 in New Delhi.

RECENT INNOVATIONS

Three recent innovations in the application of the federal idea require special comment. One is the creation of the hybrids. The hybrid character of the post-Maastricht institutional structure of the European Union combines, in an interesting way, features of both a confederation and of a federation. Among the confederal features are the intergovernmental character of the Council of Ministers; the distribution of Commissioners among the constituent nation-states and the role of the latter in nominating commissioners; the almost total reliance upon the constituent national governments for the implementation and administration of Union law; and the derivation of Union citizenship from citizenship in a member state.

Among the elements more typical of a federation, on the other hand, are the role of the Commission in proposing legislation; the use of qualified majorities rather than unanimity for many categories of legislation generated by the Council of Ministers; the role of the Council's secretariat in developing more cohesive policy consideration than is typical of most international or confederal intergovernmental bodies; the expanding role of the European Parliament, which, under the new co-decision procedure introduced by the Maastricht Treaty, has a veto power over about fifty percent of Community legislation; and the supremacy of Community law over the law of the member states.

The net effect of this hybrid of confederal and federal features is that, while member states have "pooled" their sovereignty and accepted increasing limitations on their power of independent decision – to a degree considerably greater even than in some federations – the common legislative and executive institutions still lack the characteristics of a federation in which the federal institutions clearly have their own direct electoral and fiscal base in relation to citizens. Not surprisingly, the resulting technocratic emphasis and "democratic deficit" has undermined public consent and support for the European Union. These are issues which remain to be addressed in the evolution of the European Union.

Another innovation that has come to the fore is the growing trend for federations themselves to become constituent members of even wider federations or supra-national organizations. In the contemporary effort to reconcile supra-national, national and regional impulses, there has been an emerging trend towards multi-level federal organization. Thirty-five years ago, Pennock suggested that multiple levels of political organization were desirable to maximize the realization of citizen preferences, although this had to be balanced against the additional costs of increased complexity (Pennock 1959). Now we have a growing, practical experience of federations within wider federations or supra-national organizations. Germany has been a pioneer in adjusting its internal federal relations to its membership in the European Union, but these experiences have also informed debates in Belgium, Spain and Austria, as members of the European Union. It is worth noting as well that, although

NAFTA is only a free trade area and far from a federal organization, its three members are each federations. In Canada, for instance, the impact of NAFTA upon internal federal-provincial relations has been an important issue. This emerging experience demonstrates the need to study closely and learn from these examples in order to maximize the benefits of multi-level federal organization at supra-national, national, regional and local levels, while minimizing the costs of excessive complexity.

A third innovative, contemporary trend is the acceptance of constitutional asymmetry in the relationship of member units to federations or supra-national organizations as a means of facilitating political integration. Examples are found in Malaysia, India, Spain and Belgium. Another is the impact upon the European Union of the Maastricht Treaty, whereby the European Union has taken significant steps towards becoming a Union of "variable speeds" and "variable geometry". From its beginning as a federation, Canada has included, in relation to Quebec, some modest asymmetrical arrangements, and the debate over the Meech Lake Accord and Charlottetown Consensus during the period 1978-92 turned to a significant degree on whether and how far this asymmetry should be increased. Perhaps the most complex current example of asymmetry in practice was displayed in Russia, in the Yeltsin period, by the then eighty-nine subjects of the Russian Federation, and this in spite of the formal symmetry set out in the new Russian Constitution. Constitutional asymmetry in the powers of constituent units, however, is not unique to federations: Italy and the United Kingdom also provide significant examples. Experience in the various federal examples suggests that constitutional asymmetry among constituent units within a federal system does introduce complexity and often severe problems; but for some federations, it has proved necessary as the only way to accommodate severely varied regional pressures for autonomy.

LESSONS FROM THE EXPERIENCE OF FEDERATIONS

Let me conclude by noting that the experience of federal systems has taught us five major lessons. First, federal systems do provide a practical way of combining through representative institutions the benefits of both unity and diversity. For instance, the United States (1789), Switzerland (1848), Canada (1867), and Australia (1901) are among the longest continually operating constitutional systems anywhere in the world today. Furthermore, in recent years the United Nations has annually issued an Index of Human Development that uses a weighted average of life expectancy, adult literacy, school enrolment, and per capita gross domestic product to rank some 160 countries in terms of quality of life. This has consistently ranked four federations – Australia, Canada, the United States and Switzerland – among the top six countries in the world, and four others – Belgium, Austria, Spain and Germany – not far behind. Moreover, a number of recent empirical studies – including those of Lijphart (1984, 1999), an edited volume by Wachendorfer-Schmidt (2000), and Kincaid (2006) – have indicated that federal political systems have, on balance, actually facilitated

political integration, democratic development and economic effectiveness better than non-federal systems.

Second, it is also clear, however, that federal systems are not a panacea for humanity's political ills. Account must therefore also be taken of the pathology of federal systems, and of the particular types of federal structural arrangements and societal conditions and circumstances that have given rise to problems and stresses within federal systems.

Third, the degree to which a federal political system is effective depends very much upon the extent to which there is acceptance of the need to respect constitutional norms and structures, and an emphasis upon the spirit of tolerance and compromise. Where these are lacking – as they are currently, for instance, in Sri Lanka, Sudan, and Iraq – it is futile to advocate federal solutions unless the necessary preconditions are established first. The dilemma is how such preconditions are to be established in a situation permeated by hostility.

Fourth, the extent to which a federal system can accommodate political realities depends not just on the adoption of federal arrangements, but on whether the particular form or variant of federal institutions that is adopted or evolved gives adequate expression to the demands and requirements of the particular society. There is no single, ideal federal form. Many variations are possible. Examples have been variations in the number and size of the constituent units; in the form and scope of the distribution of legislative and executive powers, and financial resources; in the degree of centralization; in the character and composition of their central institutions; and in the institutions and processes for resolving internal disputes. Ultimately, federalism is a pragmatic, prudential technique, the applicability of which may well depend upon the particular form in which it is adopted or adapted, or even on the development of new innovations in its application.

Fifth, it has been suggested by some commentators – Daniel Elazar (1993) is an example – that federations composed of different ethnic groups or nations may be unworkable or run the risk of suffering civil war. While these are certainly possibilities, the persistence of federal systems, despite evident difficulties, in such multi-ethnic or multi-national countries as Switzerland, Canada, India and Malaysia, in my view indicates that, with appropriately designed institutions, federal systems can be sustained and prosper in such countries. In a number of significant cases where ethnic nationalism has been a crucial issue, federal devolution has in fact reduced tension by giving distinct groups a sense of security through their own self-government, thereby paradoxically contributing to greater harmony and unity.

While federal political systems are not universally appropriate, in many situations in the contemporary world they may be the only way of combining, through representative institutions, the benefits of both unity and diversity. Experience does indicate that countries with a federal form of government have often been difficult to govern; but then it has usually been because they were difficult countries to govern in the first place that they have adopted federal political institutions. And it is that which has made for me a lifetime spent on the comparative study of federal political systems so fascinating.

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Section Three
Celebrating Ron Watts

3

Introducing Ron Watts

John Meisel

To introduce Ron Watts to students of federalism is like introducing Jesus to the Apostles, the Pope to the College of Cardinals, or John Lennon to the other Beatles. Unnecessary. We came here (some from great distance) because we have benefitted from his prodigious contribution to the study and practice of federalism. Some of you have written searchingly about this, and we have spent the better part of the day reviewing and revering his massive work in the field.

Were he less wise and reasonable, he might well deduce from all he heard that he is much too good for us and that rather than feasting here he would be more suitably employed elsewhere, making further improvements to the body politic.

So rather than primarily adding to the catalogue of his accomplishments, I shall briefly speculate about what it is in his background and make-up that has brought him here and has shaped his remarkable gifts.

I must, however, begin with a confession. If he had followed advice I gratuitously offered him in the 1950s, this conference would not be taking place and Ron would have made himself indispensable elsewhere. My specialty, at the time, was the study of elections and political parties. These were then subjects in the mainstream of political research, attracting much media attention and even research funds. Political behaviour was deemed the most promising path for the discipline, not the study of institutions. As for federalism, it was decidedly on some distant spot of the back burner. But not for Ron. He joyfully and persistently toiled in his archaic vineyard, never mind the blandishments of more fashionable fields. He politely, as ever, resisted my efforts to seduce him into

probing elections and he stuck to his last. You know the rest. As I sank quietly into oblivion, he rose to the pinnacles of those addressing the most burning issues confronting the governance of humankind. This conference eloquently attests to who has the last laugh.

This steadfast, sure-footed adherence to a chosen path is highly characteristic of Ron and arises naturally from the formative influences which have shaped him. What are these?

Born in Japan of missionary parents, he spent his first eleven years there and went around the world twice on a boat before he was ten. Among the consequences of this exotic beginning, two stand out: First, he was endowed with the sense of social responsibility and commitment so often found among sons and daughters of the manse; and, secondly, he was exposed at an early, impressionable age to the comparative perspective.

Educated in the best academies all along the way from his mother's knee and the Yokohama International School to Oxford via T.C.S. and Trinity at the University of Toronto, he was also blessed with stellar senior colleagues when he settled to teach at Queen's. Those familiar with the pantheon of Canadian academe will recognize his mentors: J.A. Corry, W.A. Mackintosh, A.R.C. Duncan, Martyn Estall, John Deutsch, J.E.Hodgetts, W.R. Lederman and Daniel Soberman.

It is a little known fact that, after graduation, he trained as an accountant, which paid off handsomely when he assumed very higher responsibilities in university administration. This was vividly brought home to me once when he bailed me out from a seemingly inextricable conundrum. I had been awarded an unsolicited Rockefeller grant to be spent as I wished. I also worked for a Royal Commission, and nevertheless retained part of my Queen's salary and full pension. The implications for my income tax were totally baffling. Ron, who was then Dean of Arts and Science, took the time to tackle the problem. What had caused me sleepless, anguished nights was settled in a jiffy. On a pristine sheet of paper, and with a very sharp pencil, he resolved the crisis by subjecting my file to the columns and rows of figures beloved of accountants. Problem solved. This trivial example attests to the eclectic nature of his bag of tools. He had been taught to keep track of the large and small issues, and above all, despite emerging as a national academic statesman, he retained a keen interest in his colleagues and students. This was manifested likewise in his having worked not only as a senior university administrator but also as the head of a halls of residence. He and his wife, therefore, literally shared the personal lives of many students.

Almost, but not quite, a workaholic, he nevertheless always finds time for non-academic pastimes. He is an expert on issues affecting aeronautics, and even builds model aircraft. A seasoned sailor, he has learnt to capitalize on prevailing winds, and continues to build and race, by sophisticated, remote electronic means, model ships of his own manufacture.

One of the reasons for Ron's great accomplishments is an astonishingly effective, performance-enhancing, support system. It is called Donna Paisley Watts. At the domestic, intellectual, social, emotional and interest-augmenting levels, she accompanies and enriches him everywhere and her passion for travel perfectly complements his globe-trotting ways. She is as fitting a partner at their

regular Scottish dancing events as under the crystal chandeliers illuminating the abodes of the high and mighty, and as she was during the ten years he was the Principal and Vice Chancellor of Queen's University.

These seemingly marginal aspects of his life have not only nourished his contribution as a university instructor, but also his insights and analyses of federalism. Fixing the facts, considering and minding the human dimension, being capable of wearing the other person's shoes, comparing experiences elsewhere, knowing what the essence is without losing touch with the context and the marginalia, these are the attributes required by a master of comparative politics.

What all this adds up to is that fortune has smiled on Ron and provided an unusually wide and relevant range of experiences and opportunities to hone and apply his skills. If ever there was the right person, at the right place, and at the right time, Ron was it, not once but time and again and again, until this day.

But he would not have been so strategically placed and so appropriately suited to the tasks he discharges so well had he not been superbly adept at seizing opportunities presented to him, and had he not had the discipline, will, talent and character to rise with class to every challenge before him.

4

Encounters with Ron Watts

George Anderson

If Ron Watts were the protagonist of a major Russian novel − a bit of a stretch, admittedly, given his untortured temperament − I would be one of those minor characters who crops up from time to time, in chapter twelve, chapter twenty, chapter thirty-five and so on, always in different contexts. The threads running through our relations would be of a growing friendship, of our mutual interest in Queen's and federalism, and of the interesting ways lives unfold, coming together and moving apart, in a fairly small society. If there is any originality in my experience of Ron, it is that I have seen him in such varied circumstances and roles.

I am not a scholar − not of federalism nor of anything else, alas. I fear I may have let my former teacher down in that regard. Consequently, I cannot pretend to deliver a profound, original or even merely pedantic assessment of Ron's contribution to the study of federalism. Clearly he is one of the Great Men of the subject, arguably the Dean of Federalism Studies, but I leave it to others to marshal the evidence and embellish that argument.

My first encounter with Ron was in the early Sixties, when I was an undergraduate pursuing political studies at Queen's and he was a professor. The Queen's of those days looks, in retrospect, more like a liberal arts college than a major university. It did have faculties of medicine and law, but it was still an intimate institution, with a total student population of fewer than 5,000 when I left in 1967. That said, this small university loomed large in Canada and most particularly in such fields as Canadian studies, political science and economics. The politics department was remarkable and perhaps uniquely distinguished in its contribution to Canadian public life. In my time, it included three professors who eventually became Companions of the Order of Canada (Alec Corry, John Meisel and Ron). Flora MacDonald, also now a CC, had escaped the Tory battles around John Diefenbaker and found refuge as the departmental secretary − but of course she was much more, including a tutorial leader. The Dean of Law, Bill Lederman, an eventual OC, gave a seminar on constitutional law for politics students. Ted Hodgetts, OC, was still there in my first two years,. And there were other exceptional teachers as well: of those who left marks on me, I'd mention Jock Gunn, Jack Grove, Hans Lovink, and Hugh Thorburn. The honours politics program was small − some twenty students − and class sizes were a fraction of those today. I remember at least two seminars in which we

were fewer than ten. We students had easy access to our professors and occasionally saw them socially (though I don't remember addressing any of them by their first name in those years). Some of these acquaintances with professors matured into friendships that I have been lucky enough to enjoy for many years.

My first sure memory of Ron is of his fourth year seminar on comparative federalism. Ron had returned to Queen's in the early Sixties after completing his thesis at Oxford. His book *New Federations: Experiments in the Commonwealth* had just been published by the Clarendon Press. He was a late-comer to political science, having started teaching at Queen's as a philosopher before deciding to switch disciplines and return to Oxford for his doctorate. The seminar was small, with lots of discussion. For me, it was illuminating because of its strong comparative dimension, including − because of Ron's field research − a close examination of post-colonial societies which had had very different experiences of federalism. Ron had studied under K.C. Wheare, who emphasized the institutional aspects of federalism, but his own approach was notably eclectic. He steered between the Scylla of Wheare's institutionalist approach to federalism and the Charybdis of W.S. Livingston's sociological approach. Ron was focused on whether political systems in practice functioned in a federal way and what forces and factors shaped them − including their historical development, societal and institutional structures, and parties and leaders. His interest in the new federations, a number of which failed, also led him to reflect deeply on the pathology of federations. A particular originality of Ron's course was that it cut across a wide spectrum of Western and developing countries, in contrast with many courses in comparative politics which were more focused on either Western, or communist, or developing countries. He used the focus on federalism as a prism for looking at how a kind of institutional arrangement played out in very different contexts.

Aside from the content of the course, I was struck by Ron's style. In fact, I think it was virtually identical to his style today. Even in the Age of Aquarius, he was always properly dressed in a donnish way. And though he was only in his late thirties, he seemed older somehow, probably because of his exceptional maturity and soundness of judgment. (No doubt these qualities lay behind his becoming the youngest Principal ever at Queen's.) He was the least ideological or passionate of teachers. Calm reasonableness and balanced judgment prevailed. Despite, or perhaps because of, his strong philosophical background, he was wary of very abstract political science: facts and the complexity of different countries were foremost (he had spent time in each of the new federations on which he wrote). He advanced concepts and taxonomies to aid understanding, but he came to generalizations cautiously and eschewed ambitious theory. He used the comparative method as a kind of laboratory of interesting specimens where hypotheses could be tested. I might not have appreciated that as much then as I came to later because I was very caught up at the time in systems theory. Of course, he was not completely immune to enthusiasms: at the time he was rather seduced by the charms of the German Bundesrat, thinking it might fit Canada's needs; he has since changed his mind on this.

The politics department hoped I would win a Woodrow Wilson fellowship and go off to Yale or one of the leading American universities. I let them down badly. I had not even started on my thesis when I went for my interview, which did not seem to impress the selection jury as it probed for thoughts that I had not yet formed. A few days after the bad news arrived, I encountered Ron in the lower level of the Student Union. He expressed his regrets about the Wilson and asked if I had ever thought about Oxford. I had not, but was thrilled by the idea. So Ron set to work. His plan was to get me into Nuffield College, where he had done his doctorate, and which would provide a full scholarship. However, Nuffield would not make a final commitment until they had interviewed me, which would not happen until I arrived in September. So Ron spoke with his great friend, Christopher Seton-Watson at Oriel, to arrange a place there as a potential fall-back. Fortunately, by this time I had done my thesis and graduated honourably so things worked out at Nuffield.

Unexpectedly, all this put Ron in the unlikely and unknowing role of Cupid. For it was at Oxford that I met Charlotte Gray, who became − after a long friendship and eventual courtship − my wife and the mother of our three sons. Thus the Fates and Ron lined up to steer me towards the best and happiest decision of my life. Often teachers have no idea what impact they have on their students. I am glad to report that Ron approves of my choice: he stood, with John Meisel, as one of Charlotte's two sponsors when she was recently hooded with an honourary doctorate at Queen's.

After Oxford, I took a job with the federal government in Ottawa "for a year or two". I still thought I might eventually teach at a university. I had worked in a few departments by 1977, when I was recruited into the so-called "Tellier Group" that had been set up in the Privy Council Office to advise the government on dealing with the newly elected Parti Québecois government and a possible a referendum on sovereignty-association. An early initiative was the creation of the Pepin-Robarts Commission, which Ron joined as a commissioner the following year. Prime Minister Trudeau had grave reservations about the commission, even as he set it up, because he did not want to confront a long list of proposed changes to the structure of the country that he might not support or be able to deliver. In fact, I saw relatively little of Ron during this period, but it is probably fair to say that we came at the national unity issue from different angles as the great drama unfolded through constitutional rounds, elections and referendums.

Ron's writing, even recently, tends to give great weight to what he calls the "structural problems" of Canadian federalism. Like many in the political science community in Canada, he has seen some aspects of our constitutional arrangements as dysfunctional. This led him to support major constitutional change in the Pepin-Robarts Report and in the Meech and Charlottetown accords. My own optic has been shaped from working within PCO on unity scenarios and strategies in the late seventies. While I recognized structural tensions in Canadian federalism, I was not convinced that they were necessarily much worse than those in some other federations or would be cured by various proposed constitutional solutions. It was hard to see how to rally the PQ to any "Canadian" solution, and their continued opposition would undermine the value of whatever was accomplished. Moreover, addressing some of the structural

issues, such as the Senate and the spending power, risked pitting regions against one another. Many constitutional innovations would bring their own problems. In the contest over national unity, I thought it might be easier to wear down the credibility of independence through incremental change and reasoned argument than to win a clear constitutional victory for Canada. In the end, this has made me reluctant about the major constitutional initiatives of the last twenty-five years. I supported none of them with enthusiasm, because I always had reservations about process (1981) or substance (Meech and Charlottetown). Ron was probably keener on the structural reforms in Meech and Charlottetown. In retrospect, it is hard to say who was right or wrong about what because the story has had so many surprising twists. Ron, in his post-mortem of the Charlottetown Accord, asked whether Canadians are now "inoculated from the disease of wanting to solve all structural problems by means of constitutional change".

In fact, I was not professionally involved in the great dramas of Meech and Charlottetown (and only peripherally in patriation). The next time I seriously engaged with Ron was after I became Deputy Minister of Intergovernmental Relations in 1996. This was in the wake of the near-death experience of the Quebec referendum the previous year. By then, for better or for worse, we were in a world of incremental, non-constitutional change as well as the debate around the rules of secession and the need for "clarity". My minister was Stéphane Dion, very much the former professor of political science, who was voracious in his demand for facts and arguments about Canadian federalism, including comparisons with other federations. This led to my Medici moment, my becoming the unlikely patron of one of Ron's great successes. I phoned to propose that we commission him to write a short book, no more than one hundred pages, putting Canadian federalism in comparative perspective. We would have no editorial control and the book would be published by the Institute at Queen's. Our idea was that such a book could be useful in addressing a number of myths around Canadian federalism. The result was *Comparing Federal Systems.* The book is a classic: a major best seller, now into its third edition, translated into French, Spanish, Arabic, Ukrainian and Kurdish. It was such a success that I went back to Ron and asked for a second short book, which became *The Spending Power in Federal Systems,* an equally masterly product, though on a much narrower subject. The success of these volumes should be an inspiration to scholars at the top of their game as to the advantages in publishing *short* books, even though it is very challenging to do well.

In 1998, I called Ron on another project. In the same spirit of opening the Canadian debate to experiences of other federations, we were thinking of holding a major international conference on federalism and sponsoring an organization to promote an international network on federalism. We wanted him to join a small committee to explore the idea. So began what became the Forum of Federations. Ron has been central to the creation and development of the Forum and has given an incredible amount of time to it. I saw a fair bit of Ron in the Forum's earliest days leading up to the Mont Tremblant conference, but I have come fully to appreciate not just his dedication but his skills and knowledge only since I was selected (by a jury including Ron) to become President of the organization in 2005. He is the committee man *sans pareil*, always totally prepared, clear on the outcomes desired, attentive to all views and

punctilious. At one stage, he was chairing not only our program committee, but also covering off our finance and investment committees. (Not many know that Ron spent a year training to be an accountant. It shows in his committee work.) He has been on the editorial board of the Global Dialogue program from day one and arranged our marriage for that program with the International Association of Centres of Federal Studies. Whenever we are concerned that we may have a problem with clashing egos − often academic egos from around the world − we wheel in Ron to smooth things over and produce a coherent result. He has traveled ceaselessly for us, often to difficult environments. Wherever he goes, business comes first, so he often sees little beyond the walls of a hotel. Too often, his tourism is largely vicarious − experienced through the reports his beloved Donna brings back of her explorations while he has been in meetings. For a long time Ron reviewed every article in our magazine for content. He is always quick to comment on drafts of anything sent to him. Most recently, he has helped to shape and bring order to the Fourth International Conference on Federalism planned for Delhi in November 2007, as he did for the previous three conferences. He can be tough when necessary: for example, he categorized the draft papers for Delhi into four lots, namely "outstanding, good, salvageable, and beyond hope"; appropriate action followed. Through all of this, I have never seen him complain, ruffled or even remotely rude. Finally, Ron was the most assiduous reviewer of drafts of a little book on federalism that I authored and he was unstintingly generous with comments and corrections.

Finally, let me finish where I started − at Queen's. I have been on its board for a number of years and have benefited from Ron's perceptions and careful judgments on a number of occasions. At the same time, even twenty years after stepping down as Principal, he has always shown the greatest discretion and supportive deference towards his successors. We had a particularly happy occasion last year, when a new student residence was designated Watts Hall.

So you can see that it has been my good fortune to know Ron Watts first as my teacher, but in turn as my mentor, my client, my boss and my advisor. It is a measure of the man that with every step he became, more and more, my friend.

5

Federalism, Civility and Conflict Prevention: Watts's Research and Legacy

Hugh D. Segal

I am honoured to reflect on the remarkable breadth and depth of Ron Watts's seminal scholarship, over decades, on federalism both in Canada and abroad. It is hard for me to be in any way detached about Ron's remarkable contribution to Queen's University, to Canada and to a better world. When I served an Ontario premier and, subsequently, a federal prime minister, Dr. Watts was one of those non-partisan scholars on whom we depended for critical advice at serious junctures in the federal-provincial contexts of the day. For an advisor, there is nothing more elegant than offering sage and insightful advice, only to have it not taken. And even when Ron's advice was not taken, his civility of tone and elegance of demeanor reflected the remarkable individual he is.

I know of many occasions, from Cape Town to Islamabad, Zurich to Kuala Lumpur, Queen's Park to Madrid, Barcelona, to Mexico City, Beijing to Delhi, Brasilia to Moscow, where Ron Watts's advice was taken – and – we are all living in a better world as a result. When Ron and I sat around various federal tables on the Meech-Charlottetown constitutional cycle from the mid-1980s through the early 1990s, I witnessed pugnacious turf-guarding federal bureaucrats confusing their own careerist interests with the country's, and set Ron's advice on specific issues aside, to the ultimate detriment of Canada and the vibrancies of our federal prospects going forward. And, just so we are absolutely clear, on those issues my staunch and enthusiastic support for his wise counsel had no meaningful impact at all! In fact, while he is far too much the gentleman and colleague to ever say so, I am sure that as I stepped in to support his insight or counsel, he might well have wished, in terms of ultimate outcome, that I had been on the other side! He never betrayed any such cavil.

And while I will leave to the genuine scholars of federalism assembled this week the more detailed analysis of the broad impact of his scholarship and insights on the study and execution of federalism itself, I do think we can relate the broad themes of his work to the present challenges global and domestic governance face.

Civility is not often a term one associates with the intergovernmental tensions of any country or region. Ron Watts's scholarship, underlined by his character and persona, imply a view of the world where civility is actually the primary social and economic goal to be associated with both outcomes and

processes in government, both robustly democratic or less so. In my view, it is the absence of civility in process that leads most directly to the events, pressures, conceits, excesses and conflicts that produce violence, war, suffering and failed states and societies.

I think it is a fair read of Dr. Watts's many articles, monographs, working papers and books, and certainly of the broad sweep of his many different and contextually precise counsels to emerging, refurbishing or pressured federations that a dynamic and calibrated federalism, where shared sovereignties invest decision-making with just the right balance and built-in sensitivities, is usually the best way for diverse geographic, ethnic and national identities to pull constructively in the same direction; providing, of course, there is the right mix of trust and political will.

It is, in a sense, a matter of both intent and design meeting on the field of political form and substance. While the precise nature of institutional design will vary from Brasilia to Canberra or as between Moscow and its oblasts and a future Iraqi federation – in ways that reflect the competing forces seeking to be reconciled in a workable federal government – the inclusion of positive and structural forces of reconciliation in a government structure constitute the true promise of federalism and its immense creative response to the politics of dissolution, division and dysfunction. The remarkable work of the Forum of Federations, an organization in which Ron Watts's paternity is undeniable, underlines the extent to which the federal idea is very much a force for the future, and not only an analytical template for assessing governance world-wide.

In a background paper written for the second global meeting of the Forum of the Federation in St. Gallen, Switzerland, in 2002, Dr. Watts approached federalism this way:

> Federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes, together with autonomous action by constituent units of government for purposes that relate to maintaining their distinctiveness, with each level directly responsible to its own electorate. Indeed, taking account of such examples as Canada, the United States and Mexico in North America, Brazil, Venezuela and Argentina in South America, Switzerland, Germany, Austria, Belgium and Spain in Europe, Russia in Europe and Asia, Australia, India, Pakistan and Malaysia in Asia, and Nigeria, Ethiopia, and South Africa in Africa, some 40 percent of the world's population today live in countries that can be considered or claim to be federal, and many of these federations are clearly multicultural or even multinational in their composition.

However we view the prospects for expanding world-wide trade and market participation, or the strength and weakness of the global monetary or security architecture necessary to sustain this great march forward, we need also face the confounding threats of poverty, terrorism, environmental or authoritarian blow back. What is clear is the extent to which the quest for sustained local, national and cultural identity confronts, at some interval, the willy-nilly spread of the good and the bad of market growth and expansion.

In the same way, everything from increased Islamist identity issues in the caucuses and North Africa, continued if less acute Quebecois focus on language,

culture and the undue use of the federal spending power here in Canada, tension between rural and urban areas in China, angst about something less than an established federal/oblast funding formula in Russia, all reflect some of this core identity vs. central/global market reality. These tensions are not only driven by this interplay, but also this interplay is a defining parameter for the tensions, scope and reach. The creative federal-design function is still a potent and constructive instrument to alleviate these tensions – if and only if there is trust and political will.

One of the many challenges federations such as Canada have yet to face is the reconciliation of structural federalism where provinces have substantially more jurisdiction and clout than their American state analogues, while the federal government is in its day-to-day legislative function more unitary than the division of powers driving Washington, or Länder-Bundesrat or state-Canberra integrated legislative processes, in Germany or Australia. A critical question relative to Canada's way ahead is the extent to which its brand of federalism remains relevant when it is unable easily to adapt to meet new requirements. While non-constitutional or bilateral constitutional agreements, around revenue sharing, confessional schools, and some international presence for subnational actors and constructive innovations, such as the Council of the Federation, speak to a core will to co-operate, dysfunctional federal-provincial lacunae can produce disturbing competitive downgrades in terms of the excellence and effectiveness of government. This competitive downgrade is not without cost. Incoherent and unduly diverse approaches to securities issues, continued incoherence in large areas of environmental and health policy, strong interprovincial trade barriers that would embarrass Europeans, a discontinuity between our federal system and the key wealth and immigration roles of cities are just a few of the issues that downgrade the economic and social efficiency of Canada's federalism. These all cost jobs, investment and have huge opportunity costs. Quebec's initialing as between Charest and Sarkosy of a medical-services-free-movement zone for doctors from Quebec and France – points out how much work remains to be done.

A democratically detached Senate and almost anti-democratic electoral system – while not necessarily the fault of our federal structure − speak to the difficulties for reasonable, incremental change in systems that have been in place from 1793 or 1864 – depending on how, where and what one starts counting. It is in that reflexive context that we need to look at the dynamic capacity of federalism going forward as both a structural and reconciling framework to serve our interests while also being a determined and creative architecture for greater civility, economic and social progress for Canada and its global partners going forward. As David Cameron and Bob Rae would have found out in Sri-Lanka, Kurdish Iraq and Baghdad, even the most practical and elegant of structuralist federal constitutional solutions cannot be built on foundations infected with warmongering, ethnic hatred and retributive core intent. And, as we see elsewhere, confusing federalism with robust democracy may be more prayer and wishful thinking than hard fact.

Federal systems imply not fixed and separate areas of power and jurisdiction − but ongoing negotiation between jurisdictions so that undue countervailing or programmatic frustrations do not inadvertently demolish the

acuity of either policy competence or service delivery. Many federations world wide, including and especially Canada, have not embraced the same level of subsidiarity of Europe. Waste and duplications overlap and far too often define program failure. Certainly for Canada within North America, the challenge of greater framework integration among Canada, the United States and Mexico in areas as diverse as monetary policy, public health, environment, and migration, are a crucial determinant of our prosperity and sovereignty. We need to be as creative facing these issues as we have been on other challenges of statecraft, such as acid rain, free trade, and NAFTA in the past.

A debate about the spending power will reflect in some important respects the true maturity or lack of same for the Canadian federation as a whole. There is precious little evidence that Ottawa, under any political party, can spend, account for our dollar value for money effectively in many areas under its own jurisdiction, let alone in the jurisdictions shared with the provinces or usurped by the federal government from the provinces in the past. By effectively, I mean in a well-targeted less wasteful fashion, that produces not only barometers as to input but some actual measurement as to output vs. original plans. Both Ottawa and some provinces have real problems in areas such as health care, child health, the poverty gap and the immigration integration challenge writ large. Unemployment statistics in Toronto that are higher than Moncton or St. John's, or public satisfaction in Canada with health care where we fall well below non-federal countries, such as France, speak to these difficulties as does Canada's relative failure on child poverty. Federal structures that facilitated nation-building and great and historic compromises on pensions, equalization or health care cannot be reasons for complacency regarding present-day judgment and evolution on results. Winning the last war counts. But that does not equal being up to today's challenges.

The creativity of an ongoing dynamic between jurisdictions, not based on federal or provincial orthodoxy, but on both effective subsidiarity, fiscal capacity and client and citizen service measures would be healthy indeed for Canada's future federal system. It is not part of our defining culture as of yet – but one can hope and pray.

Civility and mutuality in our collective efforts to serve the public better and advance economic and social prospects for all in a society, is essentially in the DNA code of Canadian federalism – and that is a DNA code that Dr. Watts has worked tirelessly to adapt and infuse with contemporary political and fiscal realities, both at home and abroad.

But even genetically sourced tendencies and behaviour can be suppressed with the drugs of avarice, nationalism, paternalism regionalism, civil service incapacity and greed. And, none among us can assert that these narcotics are unknown to our federal, provincial, or public-service class. For his part, I believe that Prime Minister Harper with his 'Fédéralisme d'ouverture" has joined the government of the day to the long multi-partisan Quebec tradition of "coopération toujours, assimilation jamais" of Mr. Duplessis, the "Maitre Chez Nous" of M. Lesage, the "Egalite ou Indépendance" of M. Johnson, the "deux nations" of Mr. Stanfield, the "fédéralisme rentable" of M. Bourassa. All speak to a more vibrant and necessary subsidiarity. While some may disagree with what it does or does not mean, it does mean a more profound opening to a

qualitative framework for creative accommodation as opposed to top-down "fédéralisme dominateur" often associated with others – which was not really federalism at all, except perhaps for the arch-centralist. More of that civility on all sides will improve the coal-face reality in federal-provincial dynamics that will help fuel Canada's development politically, economically and socially in the decades to come.

Let me beg your indulgence for a final thought. Civility in federal structures requires both an absence of complacency and the will to compromise on the structural components of a dynamic federal system going forward. In democracies that are federations, the federal structure itself and the modalities of its operation are sinews of the fabric of democracy that generated the need for a federation to begin with. There would have been no "Canada" were it not for the federalism in our founding core dynamics. That Canada and Canadians should be such determined promoters and proponents of federalism world-wide is not, with these historical roots, in any way surprising.

But as a part of our superstructure of civility and infrastructure of democracy the competence of our federalism cannot be ignored or set aside. Like any infrastructure it requires apprehensive updating, strengthening and refurbishment. Overpasses wear out, old unimproved machinery can fail. The federal-provincial system is no different.

Much of the tension within the engine of federalism is over the federal-confederal aspirational division that has always been with us. While what the Fathers of Confederation constructed and the British North America Act enshrined was absolutely federal with central legislative bodies directly accountable to the voting public, much of what emerged as a placating prop for local political support or acquiescence in 1864 was of a confederal nature – the colonies having been the creators of the central government and not the other way around. That structural-aspirational divide remains at the core of the challenge facing our federal system. And as we seek to address that challenge in the months and years ahead and sustain the essentially humane and conciliatory promise of Canadian federalism, both at home and abroad, in the years to come, all of us, from whatever areas of study, geographic vantage point, or scholarly or practitioners' perspective, can be immensely cheered by the outstanding benefit Ron Watts's continued sage counsel, remarkable scholarship and vast experience will provide, as an ongoing beacon of light, intellectual support, insight and wisdom for us all.

6

The Practical Ron Watts: Glimpses of a Political Scientist in Action

David Cameron

Ce portrait sans prétention du politologue Ron Watts met en lumière l'intense activité professionnelle d'un Canadien – en fait originaire du Haut-Canada – dont la renommée mondiale repose sur la fidélité à ses racines. Ron Watts a apporté une contribution inestimable à sa collectivité, à son alma mater et à son pays, de même qu'à l'étude du fédéralisme comparé. Mais il a fait beaucoup plus. Ceux qui sont surtout familiers du grand spécialiste du fédéralisme comparé pourraient méconnaître la façon dont il a mis en pratique ses idées et principes en participant à l'élaboration des politiques, à l'évolution constitutionnelle ainsi qu'au développement et à la réforme de diverses fédérations. Il a mené une seconde carrière tout aussi remarquable de conseiller, de consultant, de commissaire, d'allié bienveillant et de stimulateur auprès de nombreux acteurs politiques et gouvernementaux chargés de résoudre d'épineux problèmes aux quatre coins du globe. L'efficacité de son action est enracinée dans trois éléments : sa personnalité, son expérience et son savoir. Tous ses dons et qualités me sont clairement apparus lorsque j'ai collaboré avec lui dans ses fonctions de commissaire du Groupe de travail Pepin-Robarts, aussi connu sous le nom de Commission de l'unité canadienne.

This volume honours Ron Watts. It contains a fine collection of serious and substantial contributions, many of which advance our understanding of the field Ron made his own – Canadian and comparative federalism. Serious and substantial. That may be how one would describe the other contributions in the volume, but certainly not this one. You might better view this chapter as an *amuse-gueul*e or *amuse-bouche* – the little dish before the main meal. A light-hearted and loving appreciation of a fine man and an accomplished scholar. In thinking about this chapter in relation to the others that follow, I am reminded of a comment Chips Channon made in his marvellous, gossipy diaries of England in the inter-war years; he said that one of the great London hostesses, Lady Cunard, used to put Benzedrine in the drinks to make the party go. If our collection of essays were a drink, this chapter would be the Benzedrine.

The *Who's Who in Canada* entry for Ron Watts is long, and packed with information – just like the man himself. But here are a couple of excerpts.

- Watts, Ronald Lampman, C.C. M.A., D.Phil., LL.D.
- Principal and professor emeritus, Queen's University
- Born: Japan, 10 March 1929, son of missionary parents
- Married: Donna Catherine Paisley, 1954

All these things are significant, and I will get to them in a moment.

The entry charts Ron's inexorable rise through the ranks at Queen's, where he spent his entire career: lecturer in political philosophy; warden of men's residences; assistant, associate and full professor of political studies; assistant dean; associate dean; and real dean of the faculty of arts and sciences; principal and vice-chancellor from 1974-84. And here the arc of his administrative career – but certainly not his intellectual life – begins its descent. He becomes downwardly mobile. The next entry is Director of the Institute of Intergovernmental Relations; then, humble fellow of that self-same Institute, which is the title he now holds.

If you stopped reading the *Who's Who* entry at this point, you would conclude that here is a man who has had a distinguished career, but perhaps somewhat local or restricted in nature. Joined the organization; rose to the top; still hanging around.

As all of us know, this would be a gravely mistaken appreciation of our dear friend and colleague. It is true that he served one of Canada's finest universities with dedication and distinction, but, as they say on century farms in these parts, that ain't the half of it.

Look at the rest of the *Who's Who* entry. It lists the following countries which Ron has visited and with which he has been associated professionally: England, Australia, India, Belgium, Malaysia, Germany, Nigeria, Japan, South Africa, Uganda, Papua New Guinea, the United States, Russia, Mexico, New Zealand, Switzerland. I know they've missed several: Cyprus, for example; and Pakistan, where, if my memory serves me well, the Vice-President insisted that he wanted Professor Watts, and no one but Professor Watts.

The entry also reports on the jobs he has taken in some of these places during his long career: visiting professor all over the place; consultant to many foreign governments; member and often chair of numerous commissions of inquiry here and abroad; board member of a half dozen organizations. He was even a federal civil servant, for goodness sake. From 1991-92, Ron was Assistant Secretary to the Cabinet for Constitutional Affairs in the Federal-Provincial Relations Office in Ottawa – a position, I am honoured to say, that I held several years earlier myself. This is perhaps the single occasion when I can truthfully say that Ron Watts followed in my footsteps.

Clearly, when you look at this list of extra-curricular activities, the man must have hated his work at Queen's. He was always trying to get away. And usually succeeding.

Indeed, I have rarely met a man with such an insatiable taste for foreign travel, and such a breezy willingness to accept the travail that attends trips to difficult parts of the world. Ron travels for business. He travels for fun. Where did this travelling desire come from? Well, he first saw the light of day in Japan; perhaps he inherited the adventurous spirit of his missionary parents. That may explain it.

On the other hand, I could offer you another reason for Ron's love of travel: Donna. Donna Catherine Paisley Watts. Donna's desire to see the world is, if anything, even more ardent than Ron's. She it was, if I remember correctly, who arranged for the two of them to take a ship around Cape Horn with the ostensible purpose of visiting the Galapagos Islands. Other people have managed to get to the Galapagos without the antipodean challenges she set for them; but, for Donna, getting there is more than half the fun, even if it means a tempest in the Antarctic.

Perhaps it was on that same trip that Ron had his mishap. At the Forum of Federations we have a video on federalism called *The Kingston Sessions*, which captures a training course the Forum organized at Queen's and the Royal Military College in 2006 for some visiting Iraqi legislators. In the video, Ron is speaking with his usual authority about second chambers, regional governments in a federation, and the like, but – weirdly – every time he gestures, he holds up this great bandaged paw. Rather like the Queen, waving, with her gloves on. His arm had been broken, falling off an all terrain vehicle in South America. I think that was one of his fun trips. So far as I know, he has never broken a limb in the service of the federal idea around the world.

While Ron has always remained true to his home base in Kingston, he is constantly leaving it. I think of him as a kind of rooted gadfly, a grounded gadabout. He displays to a striking degree the gift of travelling widely, while always remaining true to himself. You might well encounter him anywhere, but you are never left in any doubt about where he is from.

Where is he from? From Canada, obviously, but it is possible to be more specific than that. I have always had the impression that he is best understood as an Upper Canadian, and – coming from Vancouver – I speak as one who is not. This may seem an increasingly antique character type in our riotously multicultural, twenty-first century country, but it speaks to some solid virtues that undergird the Canadian experience and are as valuable today as they have ever been – prudence, industry, modesty, a taste for quiet accomplishment, clarity of purpose, courtesy, independence of mind, a dislike of error. I am tempted to sum all this up with an equally antique phrase, by saying that Ron has bottom, but I won't, because I would not want to be misunderstood.

Others will speak more fulsomely about Ron's achievements in political science. While I will touch on them glancingly, I want to focus in my remarks on his practical side, on the way he put his ideas and principles into practice, on his participation in policy-making, constitutional design, and the construction and reform of federations. Those who know Ron mainly as the academic world's pre-eminent student of comparative federalism may be less aware of this, but Ron has had a remarkably distinguished second career as an advisor, consultant, commissioner, friendly supporter, and all round encourager of politicians and government actors who have been working on acutely difficult problems around the world. I will give you one example in a moment, but let me speak first about why he has been so successful in this practical work, and why he has been so much in demand.

I believe his success as a practitioner is fed by three roots: his character; his experience; and his knowledge.

Ron's character I have spoken briefly of. An Upper Canadian type. To meet Ron is to know that you are going to get the straight goods. There is no game playing with him; what you see is what you get. He treats everyone with the same slightly formal courtesy; and he treats bad ideas with the trenchant criticism they deserve, no matter what their source. I have certainly experienced this myself; Ron can make his views crystal clear when he sees that I am possessed of a bad idea or speaking beyond my brief, but he never makes me feel more foolish than the ignorance I have just exposed would warrant. You need to trust the advisor if you are to trust the advice, and Ron's personality and character foster respect for him and belief in the validity of what he says. As my Mother used to say to me, having a good character is very important, and Ron has that in spades. My Mother would have been pleased if I had brought Ronnie home for dinner.

Then there is experience. It is obvious, at this stage in his career, that Ron has tons of experience in offering ideas and support to governments at home and abroad, and that rich repository of prior activity is a resource anyone seeking his counsel today can draw on. But the experience he has gained from his time in administration at Queen's has also been, I think, extremely important in increasing the impact of his practical activity in the "real world". He has not just been a superb academic social scientist. He has run things. Ron has something like three decades of university administration at Queen's under his belt. He has run parts of the University; he has run the University as a whole. I have always thought that university administration is an excellent training ground for a career in politics. The university is filled with academics doing weird and wonderful things, and professors are as independent as hogs on ice. If you ask: "who's running the place?" What's the answer? There is a perpetual, and perpetually unresolved, tension between the formal administration and the collegium, between the president, provost and deans, on the one hand, and the corporate body of faculty members – all of them, in principle, equal – on the other. Achieving practical results in an environment of this sort requires political and diplomatic skills of a high order. So I believe that, through his rich experience in university administration, Ron developed a highly refined sense of what it means to be in charge, to be faced with making changes in a fraught and uncertain environment, to cope with the collision between high ambition and scarce resources, to meet deadlines. This has allowed him to appreciate the problems and issues from the point of view of those to whom he is offering counsel. He understands, not just the formal problem that he is being asked for advice on, but the pressures and constraints that are part of the lives of the politicians and officials whom he is advising. If he is not actually one of them, he certainly knows what it means to be one of them.

The third and surely the most obvious thing Ron brings to his practical activity is knowledge. He knows stuff. He knows a lot of stuff. Blessed with a retentive mind and an awesome work ethic, Ron not only enjoys a theoretical and historical understanding of political institutions in stasis and in change, but he also commands an immense storehouse of information about federal experience throughout the world. Indeed, I venture to say that he knows more about federalism and federal systems than anyone else in the world today. I imagine that most of us in this room have had occasion to go to Ron to check a

fact, to test a generalization, to seek guidance about where to look for what we need. I have never resorted to Ron without coming away a better informed (and often more modest) student of federalism.

These three things – character, knowledge and experience – make for a dynamite combination when it comes to taking what we know in the academy out into the big, wide world. The domestic and international demand for Ron's services is eloquent testimony of just how rare, and how highly valued, this combination is.

I first got to know Ron well, and to have the opportunity to work with him and see him in action, in the late 1970s. I was the Research Director of the Task Force on Canadian Unity, a commission co-chaired by Jean-Luc Pepin and John Robarts, established by then Prime Minister Pierre Trudeau in the wake of the election of the first Parti Québécois government in Quebec. It was a tempestuous time in our national politics, and, such was the level of tension between Ottawa and Quebec, that it was difficult for the government even to find credible Quebecers to serve on the Task Force. It was established in July 1977, but the Government of Canada did not until August of that year manage to identify and name the francophone members – Gérald Beaudoin, a distinguished constitutional lawyer, and Solange Chaput-Rolland, a prominent writer and journalist. Ron Watts, then Principal of Queen's, was not on the original slate of commissioners. In fact, he was not appointed until seven months later, in February 1978, to replace a sitting commissioner, John Evans, who resigned to present himself as a candidate in the pending federal election.

This already tells you something about Ron. First of all, when he was asked to join the Task Force, he was the head of a major university; he already had a full-time job, but he did not let that stop him from taking on another one. Second, he was not invited to serve on the Task Force at the outset, but only to fill a vacancy. Yet he accepted the invitation. This, I think, speaks to several of the virtues I have already mentioned, and one that I haven't. The issue for Ron was not about the proper stroking of his ego; it was never about that. The issue was the significance of the task at hand. Furthermore, as a patriot, he found it very difficult to say no to a request from his government in an hour of need.

He may have arrived on the scene late, but his impact on the life and work of the Task Force was profound. His arrival had a steadying, calming effect on what was at the time a fairly fractured organization, wounded by the abrupt departure of John Evans. The commissioners were from all over Canada, with deeply different understandings of the country's nature and of the challenges it was facing with the accession to power of the sovereignists. Views were deeply felt, and passionately expressed, not least by Solange Chaput-Rolland. She was a wonderfully warm and generous person, but those who knew her would acknowledge that she was, well, excitable. Her presence made Board meetings extremely interesting, but highly unpredictable. Ron was a bridge builder, listening carefully to what everyone was saying, treating everyone with courtesy and respect, struggling to identify the common ground that would allow the Task Force to proceed to a successful conclusion. Very rapidly, Solange connected with Ron – what an odd couple – and she began to depend on him for understanding and for the representation of her views and concerns to the other Task Force members. As I think today about their relationship, I am reminded of

that wonderful *New Yorker* cartoon, in which neighbours are pointing at a couple down the street. The woman looks flighty and anxious; the man is dressed in work clothes and wearing a tool belt around his waist. One neighbour says to the other: "Oh, they make a perfect couple. She's high maintenance, and he can fix anything." That the Task Force, despite its difficulties, was able to deliver a strong, unanimous report was in no small measure owing to the quiet authority of Ron Watts, and to his capacity to fix anything.

With Ron's arrival, the commissioners suddenly had an expert in their midst. Jean-Luc Pepin and John Robarts were highly intelligent and highly experienced politicians with large and generous world views, but they were not possessed of academic expertise. Gérald Beaudoin, another of the commissioners, was a distinguished student of Canadian constitutional law. But until Ron arrived, there was no one with a rich comparative understanding of political systems, especially federal political systems similar to Canada's. He was able to open up a discussion more widely by introducing relevant comparative experience, and to reassure commissioners, when they were on the cusp of recommending a significant reform, that what they were proposing was neither unprecedented nor dangerous. He was also able to play a special role in assessing the work of the research team and the submissions of outside experts.

Finally, I think his practical experience in running a large post-secondary institution was brought very creatively to bear on the Task Force's work. Let's not forget that he was Principal of Queen's during this period, so, when he wasn't with the Task Force, he was coping with the incessant demands any university president confronts. Clearly, he knew something about time management, and about how to get the job done. This became obvious at the end of the Task Force, as it was completing its work.

The Task Force became persuaded in December of 1978 that, if it didn't have its final report published in time for an important federal-provincial meeting, to be held in February 1979, that it would miss the boat. Clunky drafts of possible chapters of a final report had been floating around the Task Force in the fall of 1978, but they were unusable. At their December meeting, the commissioners decided to prepare an entirely new report from scratch and to have it published just seven weeks later, in time for the federal-provincial conference to be held 5-6 February 1979. Ron Watts and I were deputed to write it. It seemed impossible to pull off at the time. The commissioners had not agreed on their recommendations, had not established the structure of the report, had not arranged for translation, had not made plans for printing and publishing.

I was to write the first half of the report; Ron was to write the second half. I began on Boxing Day, holed up in a neighbour's vacant apartment. Ron announced calmly that he was going sailing in the Caribbean over Christmas. "I've promised Donna. She'll kill me if I don't go. But don't worry. I'll write it on the boat. I'll have my part ready when we get together after New Year's." And sure enough, he did. I still find this more than a little irritating, even after all these years. What I thought was a close to heroic accomplishment, drudging away in my neighbour's apartment, Ron was able to do, while sailing with his wife and family in the Caribbean. Ron may seem phlegmatic, but appearances are deceptive. I don't know if you have ever seen a bear in the forest: bears look slow and ponderous, but, can they ever move when they want to. They are

frighteningly fast. That's my image of Ron. I hope he will forgive me, but there are worse things than being compared to a bear.

In January 1979, by the way, all the other steps were taken, and the final report of the Task Force on Canadian Unity, *A Future Together*, was distributed to first ministers at their meeting in February, setting what must surely be a record for the most rapid production of a commission's final report.

Let me close with an observation. Conferences honouring someone are customarily organized towards the end of that person's career. While Ron is of a certain age, he is by no means at the end of his career. He just sent me the draft of the third edition of his matchless little book, *Comparing Federal Systems*, and, so far as I am concerned, he is still the go-to person if I want to know exactly how many federal systems there really are in the world today. Look at the picture of him at the front of this volume; he looks young and green and supple – and pictures never lie.

So I regard this volume as a mid-career celebration of Ron Watts, and it's being done now for a good reason. If we waited until the end of his career, there would have to be a *festschrift* of two volumes, instead of just one.

7

Ron Watts: The "Go To" Person of Canadian Federalism

Peter Meekison

Ce texte retrace l'importante contribution du professeur Ron Watts à l'odyssée constitutionnelle du Canada. Outre les recherches qu'il a menées pour la Commission royale d'enquête sur le bilinguisme et le biculturalisme et sa participation aux négociations de l'Accord de Charlottetown, il a été observateur à la Conférence sur la Confédération de demain en 1967, membre de la Commission de l'unité canadienne et principal auteur de son rapport Se retrouver, *de même que conseiller du BRFP lors des délibérations ayant précédé l'adoption de la* Loi constitutionnelle de 1982. *Pendant la ronde de négociations de Charlottetown, il a collaboré à la rédaction de l'exposé de principes du gouvernement fédéral intitulé* Bâtir ensemble l'avenir du Canada, *puis dirigé lors des négociations proprement dites le groupe de travail chargé d'examiner la réforme du Sénat. En dressant le bilan de cette période, on ne peut que constater son extraordinaire détermination. Un trait de caractère qui repose notamment sur sa connaissance approfondie du fédéralisme comparé mais aussi une habileté consommée en matière de facilitation, de conciliation et de consensus.*

This paper focuses on Ron Watts's extensive and varied involvement in Canada's constitutional odyssey (Russell 1993). In particular, it looks at his influence on the debate with respect to Senate reform. Starting with his research paper for the Royal Commission on Bilingualism and Biculturalism of 1963, the paper traces his participation up to the Charlottetown Accord in 1992. He was an observer at the 1967 Confederation of Tomorrow Conference. He was a member of The Task Force on Canadian Unity (1977 to 1979) and was the lead author of its Report, *A Future Together*. During the 1980 deliberations leading to the *Constitution Act, 1982*, he was an advisor to the Federal-Provincial Relations Office. He was one of the principal architects of the federal government's 1991 position paper, *Shaping Canada's Future Together*, and, during the negotiations leading to the Charlottetown Accord, chaired the Senate reform working group of officials. His extensive and continuing participation in public affairs is in

keeping with the long tradition set by other eminent scholars from Queen's University, such as W.A. Mackintosh, J. A. Corry, and John Deutsch.

If I had to summarize my paper, I would simply say that Watts was the "go to" person of Canadian federalism. There are many reasons why, but the principal ones are: his extensive knowledge of comparative federalism, his wisdom and skills in applying that knowledge, and his generosity in sharing that knowledge. As Watts explained so clearly:

> There is a genuine value in undertaking comparative analyses when considering solutions that might be appropriate for Canada. Comparisons may help in several ways. They may help to identify alternatives that might otherwise be overlooked. They may identify consequences, including unforeseen ones, which are likely to follow from particular arrangements that are advocated. Through identifying similarities and contrasts they may draw attention to certain features whose significance might be otherwise underestimated. Furthermore, we can learn not only from the successes but also from the failures of solutions attempted elsewhere. (Watts 1998a, 359)

By way of introduction, in 1966, Watts published his groundbreaking publication on comparative federalism, *New Federations: Experiments in the Commonwealth.* This work was central to his study, *Multicultural Societies and Federalism*, which he prepared for the Royal Commission on Bilingualism and Biculturalism (Watts 1970a). Although the study was published in 1970, it was completed in the summer of 1967. In his study he noted that:

> most of these federations have wrestled with just the sort of problems with which Canadians are concerned. These include not only problems of "recognized national languages", education in different languages, and the cultural impact of a federation-wide economy, but also the distinctively federal problems which arise from the attempt to accommodate the needs of a multicultural society by means of a federal political system. Among these issues are relation of provincial autonomy to cultural distinctiveness, the place of minorities and majorities within provinces, the impact of the federation-wide economy on provincial autonomy, cooperative and consultative relations between levels of government, and the institutions and processes by which different linguistic and cultural groups may participate in the establishment of a consensus in central politics. (ibid., 3-4)

If this list of issues sounds familiar, it should. Every one of them became an agenda item on the constitutional reform initiative Prime Minister Pearson launched in 1968. Watts was remarkably prescient! At the same time, he also informed the Royal Commissioners that "most of the new federations have attempted to copy certain features of Canadian federalism and in a number of instances to improve upon the Canadian model" (ibid., 4). One of his concluding observations was, "bicameral central legislatures in which senators have usually been appointed by the provincial governments have helped to bring regional cultural interests to bear upon central legislation…" (ibid., 87).

That same summer, Watts became one of the first individuals to participate in the constitutional renewal odyssey upon which Canada was about to embark. In 1967, Premier John Robarts of Ontario convened a meeting of Canada's ten

premiers to discuss the future of Canadian federalism. The gathering was known as the Confederation of Tomorrow Conference. Despite the fact that Canada was celebrating its Centennial that year, the conference proceedings suggested a rather uncertain future for the country. In addition to the provincial leaders, Premier Robarts also invited three leading constitutional scholars to observe the proceedings: Bora Laskin (formerly of the University of Toronto and then on the Ontario Court of Appeal), Frank Scott (McGill University) and Ron Watts (Queen's University). Ron was certainly in illustrious company!

In response to Premier Robarts' initiative, Prime Minister Pearson called for a constitutional conference in February 1968. Over the next three years, federal and provincial governments worked out a constitutional reform agreement that was finalized in Victoria in June 1971. Although the agreement, known as the Victoria Charter, was supported by all 11 governments, the Government of Quebec withdrew its support a few days following the conference, abruptly ending this phase of constitutional reform.

To assist the Government of Ontario in both developing and defining its position during these negotiations, Premier Robarts established the Ontario Advisory Committee on Confederation. Although Watts was not a member of the committee, he was asked to write a paper on second chambers for the group's consideration. Although governments had placed Senate reform on the reform agenda, it was given little attention.

The paper, "Second Chambers in Federal Political Systems", was an important contribution both to the rather limited literature on Senate reform and to the emerging discussion on the fundamentally different approaches to second chamber reform (Watts 1970b). Drawing on his extensive knowledge of second chambers, Watts argued that "a bicameral legislature has usually been an essential part of the federal compromise" (ibid., 318). With respect to the process of selecting the second chamber, he observed that "since control of central power is at stake, it has sometimes been suggested that members of the central legislature should be selected by the provincial legislatures, rather than chosen by direct popular election" (ibid., 331). A compromise solution is to have one chamber elected and the other appointed. He noted that Canada is unique among federations in that the central government appoints all the Senators.

One comment in Watts's comparative analysis of second chambers is particularly significant. He argued that "the Bundesrat is a more influential and significant body than the second chamber in any of the parliamentary federations in the Commonwealth" (ibid., 336). He thereby injected a very different perspective into the debate on Senate reform. As will be seen below, this approach to reforming the Senate was one of the central recommendations contained in the Report of the Task Force on Canadian Unity. Moreover, this approach continues to surface whenever discussions turn to second chamber reform.

Watts stressed that "the starting point for any attempt to reform the Senate must lie in seeing it in its context as one element within an interdependent federal system. To look at it as an institution by itself, or even as one of a group of institutions, is to see its functions out of focus" (ibid., 350). He concluded that

> there appears to be an urgent need to improve the ability of the Senate to assist in the process of generating a federal consensus which accommodates the interests of the different sectional and cultural minorities. Senate reform alone cannot be expected to solve all the contemporary problems of Canadian Confederation, but it may contribute to their resolution. (ibid., 351)

Twenty years later, during the negotiations on both the Meech Lake and Charlottetown Accords, Senate reform became a constitutional reform priority.

The election of the Parti Québecois in 1976 and its commitment to a referendum on Quebec's future status in Canada, once more put constitutional reform at the top of the intergovernmental agenda. One of the federal government's initial responses was the establishment of the Task Force on Canadian Unity in July 1977, otherwise known as the Pepin-Robarts Task Force. Watts was appointed to the Task Force in February 1978 to fill a vacancy resulting from the resignation of one its members. At that time he was Principal of Queen's University. In an interview, he recalled that his Queen's colleagues strongly encouraged him to accept. They assured him that they would do what was necessary to see that he had the time to fulfill the needs of the Task Force. Accordingly, he accepted the federal government's invitation. National unity was reconciled with the needs of Queen's University.

A close reading of the Task Force report, *A Future Together*, reflects his very significant involvement in its drafting. Put another way, his fingerprints are all over it. For example, who else would have thought about a specific reference to Malaysia? Muriel Kovitz, another member of the Task Force, confirmed this observation during an interview. In a few words, she described Ron perfectly. "He was a wonderful driving force, so even keeled (she must have known about his love of sailing). His manner was so positive and constructive. We were fortunate to have him and his expertise." (Kovitz)

Meanwhile, as the Task Force criss-crossed the country ascertaining the public's views, the federal government was actively engaged in developing a policy position and response to the ongoing threat to Canadian unity. In June 1978, the federal government released two key documents, *A Time for Action* and Bill C-60, *The Constitutional Amendment Bill*. The former was the federal government's broad policy paper on constitutional reform whereas Bill C-60 outlined the specific content of a revised constitution. Thus the federal government embarked on a new round of constitutional negotiations well before the Task Force had completed its consultations and report.

One can only speculate why the federal government would release its position paper in advance of receiving the final report, or even an interim report, from the Task Force. One reason may have been the fact that the government was now in its fifth year in office. Another reason may have been that it was under pressure to produce some kind of position well in advance of the yet to be announced Quebec referendum. It is also possible that the federal government did not agree with the general direction in which the Task Force was moving.

At the 1978 Annual Premiers' Conference, the provinces responded to the federal position paper and identified the issues they wanted to include on the constitutional reform agenda. The provincial response led to the Prime Minister convening a constitutional conference in October 1978. The federal government was now well into the fifth year of its mandate. Given the results of the fall 1978

by-elections, there was every indication that the government might be defeated in the general election. Given the federal-provincial negotiations then underway and the rapidly approaching federal election, the Task Force was under tremendous pressure to complete its deliberations and produce its report.

The Task Force released its report, *A Future Together*, in January 1979. It is one of those unfortunate quirks of fate that the release of the Task Force report was immediately before the February 5-6, 1979 constitutional conference. There was simply no time for governments either to absorb or to consider seriously the significance of its recommendations. As a result, *A Future Together* received limited attention at that conference. In my opinion, it was a missed opportunity. One wonders what direction the constitutional discourse would have taken had the Task Force's report been the focal point as opposed to *A Time for Action*.

In terms of its general orientation the Task Force report was much more decentralizing than the federal government's position as outlined in *A Time for Action* and in Bill C-60. The two documents represented very different visions of the types of changes needed to sustain Canadian unity, a reality that probably sealed the fate of the Task Force report. Given the decentralizing nature of the report, Prime Minister Trudeau virtually ignored its recommendations. By way of contrast, at an interprovincial meeting of Intergovernmental Ministers and officials held a few days before the February 1979 First Ministers' conference, Claude Morin, Quebec's Intergovernmental Affairs Minister, fully recognized the general thrust of the report and indicated that it would have provided a solid basis for intergovernmental discussion. Those of us in the room certainly took note of his remarks.

Edward McWhinney, a constitutional law expert, described the report as "lucid and often sparkling in its literary style and presents an impressive analysis and synthesis of the main currents of Canadian federalism" (McWhinney 1982, 9). With respect to the Task Force's position on Quebec's right to self determination, he said, "This was to dare to speak the politically unspeakable and to answer the hypothetical question before it should have arisen concretely. It was in keeping with the courage, intellectual honesty, and generosity of outlook with which the commission approached its task. The commission went on, in this same spirit, to recognize Quebec's 'unique position' based on its 'distinctive culture and heritage'…." (ibid.). With reviews like this, one can see why Prime Minister Trudeau was less than enthusiastic about the report and why Claude Morin, a cabinet minister in the Parti Québecois government, was willing to give it serious consideration.

The Task Force recommended a fundamental institutional change with its proposal to create a Council of the Federation. They selected the name, Council of the Federation, "because it could combine the function of a second legislative chamber in which provincial interests are brought to bear, and a means of institutionalizing the processes of executive federalism (with their confederal character) within the parliamentary process" (The Task Force on Canadian Unity 1979, 97). The Council was to be a legislative chamber replacing the Senate. Provincial representation was to be "roughly in accordance with their respective populations but weighted to favour smaller provinces" (ibid.). Provincial governments would appoint their representatives who would act on instruction. Federal cabinet ministers could participate in the Council's deliberations but only

as non-voting members. While the Council would exercise a suspensive veto on legislation, its powers also included a special role in the ratification of treaties, the exercise of the federal spending power, and certain federal appointments including Supreme Court judges. In arriving at their position, the Task Force concluded that the federal position on reform of the second chamber in Bill C-60 was the wrong approach, giving the federal government another reason to ignore their report. One cannot help but notice the similarity between the institution recommended by Watts in his 1970 paper on second chamber reform and the one proposed by the Task Force.

Constitutional discussions resumed in the summer of 1980, shortly after the Quebec referendum. The federal government enlisted Watts to assist them in developing its position. While he undoubtedly referred to the Task Force report within the confines of the Privy Council Office, its recommendations were not central to the federal government's position. The Charter of Rights and Freedoms, and strengthening federal powers over the economy, were the federal government's main constitutional priorities. While institutions were addressed, they were secondary to other policy areas such as natural resources, regional disparities, and the amending formula. This round eventually led to the enactment of the *Constitution Act, 1982* over Quebec's opposition.

Five years later, discussions leading to the Meech Lake Accord commenced. The main provisions of the Accord addressed the Government of Quebec's five conditions for resuming constitutional discussions.[1] To this list, the government of Alberta added Senate reform. It did so in two ways. The first was an interim measure included in the Accord that provided for the provincial appointment of Senators until such time as "real" reform was achieved. The second was the specific inclusion of Senate reform as one of the subjects that would be addressed at future constitutional conferences following the adoption of the Meech Lake amendment. Watts made a submission to the Joint Parliamentary Committee examining the Accord, and was asked about the idea of Senate reform. He said, "Senate reform, while it certainly will not solve all problems, is in my view desirable" (Special Joint Committee 1987, 13.62).

In the same presentation, he reflected that "the accord expresses the spirit of what the task force on Canadian Unity was trying to urge on the country" (ibid., 13:60). He also pointed to the title of the Task Force report, which was "A future together!" The hearing also provided him with the opportunity to reflect on the centralization-decentralization debate that the Accord had generated. As he said, "excessive centralization can lead to anemia in the extremities and apoplexy at the centre" (ibid., 13:61).

With the expectation that Meech Lake would be approved and in anticipation of the ensuing discussions on Senate reform, the Government of Alberta established a Ministerial committee both to develop its position and to promote the Triple E model with the other provinces. The first witness the committee

[1]The five conditions were: recognizing Quebec as a distinct society; placing limits on the federal spending power; provincial participation in the appointment of judges to the Supreme Court of Canada and guaranteeing three judges for Quebec; a veto for Quebec on constitutional amendments; and a greater legislative jurisdiction with respect to immigration.

called was Ron Watts. He gave the committee a detailed overview of the role of second chambers and the challenges associated with Senate reform. He was the "go to" person, whom the committee felt it had the most to learn from about the challenges ahead.

As the clock wound down on the three-year time limit to ratify the Meech Lake Accord, it was becoming increasingly apparent that it might not receive the unanimous provincial consent required for its proclamation. Watts and two of his colleagues reflected on the idea of a parallel accord process that was being promoted by Premier McKenna of New Brunswick in the spring of 1990 (Watts, Reid and Herperger 1990). He drew upon the American constitutional experience 200 years earlier. He and his co-authors reflected on the differences between drafting a new constitution and a constitutional amendment. In a very telling point, they stressed that ratification of the United States' constitution was not dependent on unanimity.

In a last ditch attempt to save the Accord, Prime Minister Mulroney convened a First Ministers' conference on 3 June 1990, 20 days before the clock ran out. The conference continued for a week. As Senate reform was one of the issues under consideration, Premier David Peterson of Ontario enlisted Watts as an advisor. The negotiations led to the fashioning of what could be called "a parallel accord for future considerations". Should Meech Lake be approved, first ministers agreed to achieve Senate reform by 1 July 1995. Should that deadline not be met, Premier Peterson agreed to reduce Ontario's representation in the Senate from 24 to 18 seats. The representation from Quebec and PEI would remain at 24 and four respectively and the other provinces would each have eight. Despite these efforts, the Meech Lake Accord failed and once more there was a degree of uncertainty about Canada's future.

As a result of this uncertainty, Watts was approached by the Business Council on National Issues to convene a conference, the purpose of which was to identify a series of constitutional options for the consideration of both governments and the public. To the Business Council he was the most qualified and respected person to meet this challenge. Moreover, if the conference was to have any impact, the resulting volume was needed almost instantaneously. According to Watts, who edited the volume with Doug Brown, the conference papers were published in record time by the University of Toronto Press (Watts and Brown 1991). Watts contributed a chapter entitled "The Federative Superstructure". In it, he paid careful attention to the shifting debate on Senate reform, going from the idea of a "house of the provinces" model to one where the Senate is elected. He chided the critics of the "house of the provinces" model, saying they had "overlooked the integrative dynamics that in practice have been induced by the Bundesrat. This occurs in intergovernmental relations because Bundesrat decisions do not require unanimity, thus reducing the leverage of hold-out states" (Watts 1991, 325). He concluded that, "While it should not be considered a panacea, Senate reform would be an important element in improving both the effectiveness and representativeness of our federal institutions" (ibid., 336). Shortly after this conference, Watts became a federal public servant.

Following the demise of the Meech Lake Accord, Prime Minister Mulroney appointed Gordon Smith, then Canada's Ambassador to NATO, as Secretary to the Cabinet for Federal-Provincial Relations. Both felt that in order for

constitutional reform to be successful, a new approach was essential. In an interview, Smith said he asked himself, "Who in the academic world was best suited to provide that new approach?" Without any hesitation he said, "Ron Watts was clearly number one in the country". He went on to stress that it was Watts's extensive comparative knowledge that distinguished him from other scholars of federalism. He added that he really had to twist Watts's arm to come to Ottawa. His persistence paid off and in April 1991, he became Assistant Secretary to Cabinet, Constitutional Development, and began the weekly commute to Ottawa.

Watts played a major role in the development of the position paper *Shaping Canada's Future Together*, released in September 1991. This paper outlined a series of constitutional proposals that eventually led to the August 1992 Charlottetown Accord. In addition to the release of the position paper, the federal government also released a series of background papers prepared under Watts's careful scrutiny. To assist him, Watts pulled together an impressive group of academics including Roger Gibbins, Doug Purvis, Kathy Swinton and Peter Leslie. The objective of the group was to come up with the new approach that the federal government was looking for. In an interview, Roger Gibbins described Watts as the "intellectual godfather" of the group. He added that "Ron brought a broader perspective to the consideration of constitutional issues and was constantly pushing the boundaries of the deliberations".

The preparation of *Shaping Canada's Future Together* is well documented by Bakvis and Hryciuk. They noted that Watts did all the preparatory work for the first major session of the Cabinet Committee on Canadian Unity and Constitutional Negotiations (CCCU) convened in May 1991. As the federal position paper came together by August, "Watts had shifted his focus to the background studies" (Bakvis and Hryciuk 1993, 126).

With respect to the reform of the second chamber, Bakvis and Hryciuk indicated that the CCCU initially favoured a "Pepin-Robarts type of solution". They added:

> The committee was clearly struggling with the problem of finding ways to meet public expectations for a properly elected Senate, whetted in part by the federal government having committed itself to this concept in the parallel agreements of 1990 intended to save the Meech lake Accord, while at the same time providing some kind of institutional mechanism allowing for the direct representation of provincial interests. The end result was the proposal for both an elected Senate and a Council of the Federation that appeared in the September package. (ibid., 132)

Following the release of the federal government's position paper, there were a series of public consultations. These consultations included the establishment of a Joint Parliamentary Committee, the Beaudoin-Dobbie Committee and a series of roundtables or town-hall meetings devoted to a specific theme such as the division of powers. This latter approach included: members of the public who had been encouraged to apply as delegates, constitutional experts, representatives of government, Aboriginal organizations, and representatives of organized groups such as students, and labour and business. While not exactly serving as a series of constituent assemblies, they were deliberative bodies and more than a gathering of the usual suspects.

One of the six roundtable themes was institutional reform, and was convened in Calgary. Both reform of the existing Senate, and the establishment of a Council of the Federation, as outlined in the federal position paper, were considered. The former was greeted enthusiastically by the participants while the latter was subjected to considerable criticism. Given this very clear signal, the proposed Council of the Federation basically disappeared from future deliberations. Perhaps, if the session on institutions had been convened in a province other than Alberta, the proposed Council of the Federation might have received a more favourable reception. At that time Calgary was probably the intellectual hub for debate on Senate reform through organizations such as the Canada West Foundation and individuals such as Bert Brown, the farmer who ploughed Triple E's into his wheat field calling for an equal, elected, and effective Senate.

After concluding its public hearings on the federal government's position paper and having benefited from their participation in the roundtables, the Beaudoin-Dobbie Committee recommended Senate reform through elections and a more equitable distribution of seats among the provinces. They politely, but decidedly, rejected alternative approaches to second chamber reform.

Immediately after the release of the Beaudoin-Dobbie Committee report there followed an intensive series of intergovernmental negotiations. The participants included the federal government, the 10 provinces, the (then) two territories and four national Aboriginal organizations. Seventeen different sets of interests were at the negotiating table. Although it was kept fully informed on the negotiations, the Government of Quebec only decided to participate formally in the process well after the negotiations had commenced.

To facilitate and expedite the deliberations and preparation of recommendations, Ministers established four working groups of officials. One of these working groups was on institutions.[2] Three of these working groups had co-chairs, one appointed by the federal government and one by the other 16 parties. The working group on institutions had a single chair, Ron Watts, reflecting the esteem, trust and confidence that all delegations had in him.

His task was not easy. The Government of Alberta was the leading advocate of Senate reform and was determined to see reform patterned after the Triple E model that it was championing. Premier Don Getty of Alberta made it very clear that his government's support of the final agreement was contingent upon acceptance of equal provincial representation. Put another way, this was a deal maker or breaker for Alberta. While the 1990 agreement to save the Meech Lake Accord had endorsed the idea of an elected Senate, it only went so far as supporting a more equitable distribution of Senate seats among the provinces. Both the federal government's position paper and the Beaudoin-Dobbie report reflected this position. Thus from the very outset Watts was between a rock and a hard place. As a result, the committee spent a considerable amount of time tackling the third E, effective.

[2]The other three were on the Canada clause, Aboriginal self government and the division of powers.

There should be no misunderstanding; the working group was breaking new ground. They had to go from the general principle of reform, factor into their deliberations the existing constitutional provisions and functioning of the Senate within the Canadian parliamentary system, factor in the agreement reached in 1990 with respect to Senate reform, develop a set of principles and draft a legal text over a period of about three months with 17 parties at the table! Among other things, they had to consider size (including the physical size of the chamber), whether or not Ministers of the Crown should sit in the Senate, what constitutes a confidence motion, Canada's linguistic and cultural duality, representation of Aboriginal peoples, deadlock breaking mechanisms, joint sessions, legislative authority over natural resources, money bills, origin of legislation, the role of the Speakers of both houses, methods of election and gender equality. To some this may sound fairly straightforward but in reality it was exceedingly complex, going to the very heart of the functioning and intersection of both our parliamentary and federal systems coupled with the need to accommodate dualism and Aboriginal concerns.

The working group was fortunate because it had Ron Watts at the helm to navigate them through the shoals, reefs and other obstacles that could have led to a shipwreck. Given his encyclopedic knowledge of how other federations, especially parliamentary ones, had grappled with similar challenges, he was able to suggest alternatives for consideration. Because of his diplomatic skills, his patience (which was tested on occasion) and his evenhandedness a legal text finally emerged.

To be sure, it was not a final draft. For example, the specifics of Aboriginal representation, but not the principle, were to be completed after the referendum. However, without his firm and steady hand combined with his knowledge, the draft could not have been concluded in the time available. As with so many of the other provisions of the Charlottetown Accord, the reformed Senate was based on a series of compromises. There were also ambiguities that would be resolved at some point in the future once the new parliamentary structure began to function. As Watts explained to the Joint Parliamentary Committee examining the Meech Lake Accord five years earlier, ambiguities are to be expected in constitutional drafting (Special Joint Committee 1987, 13.61).

The draft legal text represents a significant achievement in Canada's efforts to reform the Senate, one that is unlikely to be repeated in the near future. Although Senate reform is once again being debated or at least under consideration, there does not appear to be any great interest in reopening constitutional discussions. In this context, it is unlikely that we will ever again reach agreement on equal provincial representation. I should probably qualify that comment because Ron Watts will likely be the go to person for that reform.

Let me conclude with a few observations. First, throughout his many and varied roles in and contributions to Canada's constitutional odyssey, Watts has emphasized and demonstrated the importance and relevance of the comparative approach. He has encouraged Canadians to learn from and benefit from the experience of others – their innovations, their mistakes, and as he has so gently reminded us, their improvements on the Canadian model.

Second, he has contributed greatly to the debate on and our understanding of what is needed to achieve second chamber reform. He has done it through his

scholarship, his active participation in the public discourse, as a member of the Task Force on Canadian Unity, and as a fully engaged participant in the thick of the negotiations.

Third, through his comparative analysis he has contributed to our understanding of the treatment of minorities within federal systems. His first study was in 1967 and was commissioned for the Royal Commission on Bilingualism and Biculturalism. He made a similar contribution to the Task Force on National Unity Report, *A Future Together*. He also prepared a study for the Royal Commission on Aboriginal Peoples which was most helpful to that Royal Commission (see Watts 1998b). What the two Commissions had in common, and this was reflected in both of his studies, was their examination of the relationships between peoples. He advised both Commissions on how the Canadian federal system could be adapted to accommodate minority needs and aspirations. The importance of these studies is that as our political institutions continue to evolve, Watts's analysis and ideas will continue to inform the debate.

Finally, from both interviews with people who have worked with Ron and my own personal experience, Ron makes a difference. He has spent a lifetime devoted to the study of federal systems and applying his knowledge to assist Canada and many other countries in furthering their constitutional objectives. He is a very special and generous human being – the one that political leaders, governments, scholars, public servants and many, many others go to! Thank you, Ron.

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8

Definitions, Typologies and Catalogues: Ronald Watts on Federalism

Jennifer Smith

Ronald Watts jouit d'une grande renommée de spécialiste de la notion de fédéralisme et du fédéralisme comparé. Ce texte vise à éclaircir la pensée sur laquelle repose un savoir prodigieux qui confine à l'érudition, pour ce qui est notamment du lien entre les techniques des régimes fédéraux et les valeurs qui leur sont inhérentes.

Comme l'a établi Ronald Watts, la conception des régimes fédéraux est suffisamment extensible pour permettre aux acteurs politiques d'y trouver les processus créatifs répondant à un éventail de demandes issues des collectivités régionales et de l'ensemble des citoyens. Or ces processus sont porteurs de valeurs. C'est donc dire que leur application doit se conformer à une série de valeurs précises en l'absence desquelles les acteurs politiques choisiraient sans nul doute de faire les choses différemment. C'est ainsi que le fédéralisme englobe aux yeux de Watts les techniques mais aussi les valeurs susceptibles d'aider les citoyens à relever le défi du « vivre ensemble » dans la paix et l'équité.

INTRODUCTION

One central concept comes to mind in connection with the academic writings of Ronald L. Watts: federalism. Further consideration gives rise to two more thoughts, namely, definitional clarity about federalism and the facts of comparative federalism. My question is simply this – is that all there is? Is the Watts *oeuvre* nothing more than an analytical catalogue of all things federal?

My answer to the question is – no. That's not all there is. On the contrary, there is a good deal more. However, it takes a little digging to find it. Watts is so utterly professional in the approach to his work that he has done a superb job of hiding his politics. But the politics are there. The easiest way of getting at them is to ask why he has been so interested in federalism that he has devoted a life of study to it. Clearly he finds in federalism both the techniques and the values that assist citizens to meet the ongoing challenges of living together in fairness and peace.

In the remainder of the paper, I propose to examine the techniques and to uncover the values. They are linked closely to one another. As promulgated by Watts, the design of the federal system is sufficiently elastic to enable political actors to find in it creative processes to meet a vast array of demands from regionally-based communities as well as citizens at large. In the processes are the values. Put differently, the pursuit of the processes is consistent with a particular set of values, without which political actors undoubtedly would choose to settle matters differently.

Before turning to the techniques and values associated with federalism, however, it is essential to consider the empirical side of the equation, the definitions and the facts. This is undoubtedly the side with which innumerable students of government and politics are most familiar.

EMPIRICAL WORK ON ALL THINGS FEDERAL

Definition of the Federal Political System

E. E. Schattschneider reminded the group theorists of the mid-twentieth century who were wont to cast all politics in the mould of interest-group politics of the need to "get hold of something that has scope and limits and is capable of being defined" (1975, 22). Otherwise, he said, the subject has no beginning, no end, and ultimately no significance whatsoever. In a careful and consistent approach to the definition of his subject, Watts has given federalism a beginning, an end and therefore significance for those looking for assistance in crafting governmental arrangements and processes in response to the demands of diverse societies.

While Watts's understanding of what is at stake in the work of defining the federal system has been consistent, the actual definition itself has been a work in progress. In *Administration in Federal Systems*, published in 1970, he wrote that the federal system is "a political system characterized by two sub-systems, one of central government and the other of state governments, in which the component governments are co-ordinate, in the sense that neither is politically subordinate to the other, but which interact with each other at many points both co-operatively and competitively" (Watts 1970, 8). At this early stage he was concerned to broaden the definition beyond the legal dimension to include the administrative, financial and political dimensions, and to counter the excessive (in his view) focus of analysts on the cooperative behaviour among governments at the expense of the rivalries between them.

In 1985, Watts and Donald V. Smiley expanded the definition of the federal system to include the concept of intrastate federalism, that is, the ways in which the interests of the regional governments and/or the residents of the regions are represented in the structures and operations of the central government (Smiley and Watts 1985, 4). A few years later this conceptualization took the form known to many students today, that is, "two (or more) levels of government which combine elements of *shared-rule* through common institutions and *regional self-rule* for the governments of the constituent units" (Watts 1996, 7).

The reference to common institutions is the invitation to consider whatever intrastate components they might possess, an exercise best accomplished in the study of particular federal systems and how they actually work.

Distinguishing the Concepts of Federalism, the Federal Political System and Federations

Latterly Watts has fixed on the utility of distinguishing between the concepts of federalism, the federal system and federations. He says that the term, federalism, is now a normative concept associated with such goods as democracy, freedom, sharing, diversity and the maintenance of identities. It is about finding ways of enabling citizens to combine political integration and political freedom within a system of government that is based on consent (Watts 1998, 4). On the other hand, the concept of the federal political system that is outlined above is an empirical one. It is also an umbrella concept within which are housed many combinations of shared rule and regional self-rule ranging from decentralized unions at one end to the league at the other, not to mention the variations in between (Watts 1996, 13). Latterly Watts (1999) has attended to yet another component of federal political systems, namely, the variety of *de facto* and *de jure* asymmetrical arrangements embodied in the structural relationships between the member states and the general government.

For its part, the concept of a federation refers specifically to the American model, and it remains one of the best known types of federal political system. According to Watts, the key feature of a federation is that the powers of the federal government and the governments of the constituent units are derived from the constitution rather than from one another, so that neither is subordinate to the other. In a list often consulted by political-science instructors and their students, he includes other features: two elected orders of government that act directly on the citizens within their boundaries; a written constitution that is not amendable unilaterally by any of the parties to it and provision for an umpire or final interpreter of the constitution to determine disputes arising under it; a constitutional division of powers among the governments and an allocation of revenue resources to them; provision for regional representation within the decision-making arrangements of the federal government; and the establishment of avenues of intergovernmental collaboration where that is required (Watts 1996, 13).

The Importance of the Definitional Exercise

In specifying the scope of the subject matter, Watts lets us get hold of it and helps us to avoid confusing one thing with another. The real eye opener, however, is the commentary that accompanies the definitional exercise, from which it is clear that the right start is everything. The right start is to reject the definitions of the federal political system advanced by the likes of A. V. Dicey, W. P. M. Kennedy and K. C. Wheare. Why? First, because their definitions are

too strict, too confining, too exclusive, and leave out almost anyone and anything with a claim to the federal label. Let us consider Watts's handling of Wheare.

Wheare said that the essence of the federal system is the allocation of power among the federal and regional governments such that each is independent of the other within its own sphere of jurisdiction. As a result, neither level of government is subordinate legally to the other (1963, 10). As Watts points out, even Wheare had to concede at the time of writing in 1945 that, strictly speaking, no federation met the standard of his definition, either in law or in practice. This was not a promising effect of the exercise. Neither was the trend particularly helpful, since the older federations were heading into a period of centralization following the second World War that in some cases would sharply curtail the so-called independence of the regional governments (Watts 1970, 6).

Critical of the exclusionary effect of Wheare's essentialism, Watts continually has sought a definition of the federal system that is mindful of practice as well as law. He knows that political processes can negate unitary features of a system or modify them in the direction of federal practices. He is open to the complexity of the interactions among the governments of federal systems. To the charge that the independence of governments is the key to the federal puzzle, since otherwise governments form a dominant-subordinate relationship, Watts responds that the interdependence characteristic of the conduct of governments in federal systems is not necessarily hierarchical. In practice, he says, it is interdependence that secures the coordinate, non-subordinate position of the constituent governments of most federal systems, not constitutionally-sanctioned independence (ibid., 7).

Being so rigid and therefore exclusionary, Wheare's definition can have the effect of deterring the student of federalism from looking at a vast array of federal-like arrangements and practices. And therein lies a second reason why Watts rejected it from the beginning. The definition is not practical or useful to political and administrative actors who are looking for workable solutions along federal lines. From their standpoint, the workable and the practical win the day over "purity" and "theoretical niceties". "Federalism", Watts writes, "is not an abstract ideological model to which political society is to be brought into conformity, but rather a way or process of bringing people together through practical arrangements intended to meet both the common and diverse preferences of the people involved" (1998, 4).

A final reason that Watts rejects Wheare's definition of the federal system is best described in his own words as the "spirit of federalism", by which he means the habits of pragmatic compromise and negotiation (ibid., 4). He reminds us that the constitution of the United States, the first modern federation, was the product of such behaviour. The implication is that the pragmatism often required to get the federal project underway in any particular country should inform the analyst's understanding of what federalism is really about – and it is not about a fixed definition. And so we are left with Watts's definition of the federal system as the combination of shared-rule and regional self-rule. It is broad enough to encompass a remarkably wide set of governmental arrangements; it is useful to politicians and administrators who are looking for workable federal solutions to various problems; and it is consistent with the pragmatic, flexible approach to

negotiation that produced the American model of federalism and many other federal states. All of which raises this question – why does Watts want to include so many political systems in the federal category?

COMPARATIVE FEDERALISM

Watts is a student of comparative federal political systems who has developed a definitional approach to the subject that results in the inclusion of a staggering number of countries under the federal umbrella. He includes "hybrids", that is, countries with unitary features as well as federal ones. He even mentions the possibility of innovations as yet unknown (ibid., 5). His is a catholic approach.

If there is a good reason for this approach, it comes down to one thing − problem-solving. Not problem-solving on a small scale but problem-solving on a grand scale. The problem is nothing less than the stable accommodation of diversity in unity. It is about how to get citizens who are unlike one another in politically significant ways to live together, on their own volition, peaceably and fairly. Watts describes it as the search for political structures that accommodate the "powerful concurrent pressures both for larger political units and for smaller autonomous regional entities" (ibid., 14).

Given the size of the problem, it is hardly any wonder that Watts prefers to work from the largest toolbox possible. As already indicated, he has amassed evidence from a large number of countries, the political arrangements of which exhibit some type of federal feature. Variety abounds. Nevertheless, the federal tools in the box are not simply there for the taking. Arrangements that look good on paper and work well in one system – say, the design of the Australian Senate − are not necessarily suitable for another. They get lost in the translation. Watts has been fully aware of the implications of this commonplace from the outset, and he is careful to distinguish between the formal federal arrangements and techniques in any one political system and the context within which they are given effect by those who administer the state. To paraphrase his teaching, the particular form that federal arrangements take in any one system needs to be understood against the contextual backdrop that prevails there.

As might be expected, the aspects of the backdrop to which Watts draws attention are numerous, beginning with the very building blocks of any federal system, that is, the number, size (in terms of population and territory) and economic wealth of the constituent units of the system. The effect of such factors on the choice of federal institutions and how well political and administrative leaders make them work are compounded by another set of factors, namely, the political institutions not normally regarded as federal that operate along with the federal arrangements. An obvious example is the form of government, that is, whether it is parliamentary or congressional, a mixture of both, or something uncommon, like the collegial executive of the Swiss. Another is the existence or otherwise of an entrenched bill of rights. Such institutions are bound to affect and be affected by the strictly federal ones.

Watts offers yet another set of factors − the political processes that citizens use to articulate their interests to elected and unelected governmental actors,

processes that are also used by governments to speak to citizens. Among them are interest groups and movements, political parties, the media and the informal networking of societal elites. They play a significant role in the degree of internal cohesion and intergovernmental cooperation found in the system. Finally, there is the most complex factor of all − the economic, cultural and social makeup of the society itself.

Although he never fails to fill in the details of the backdrop that needs to be considered in connection with any particular federal system, Watts's comparative federalism is never merely a study of particulars – interesting in its own right but unhelpful in tackling the problem of accommodating diversity within unity. Certainly he is quick to caution his readers not to expect too much from the comparative exercise (Watts 1996, 1-2). Yet he also observes that, despite the dissimilarities among them, federal systems face many common problems. That being so, he outlines good reasons to study comparative federalism: to get a better grasp of cause-and-effect relationships within federal systems; to see more clearly why our own federal system operates the way it does; to distinguish the more successful from the less successful federal arrangements; and to identify new solutions to old problems (ibid., 2).

Happily, Watts is his own test of the usefulness of comparative federalism. Throughout his career he has looked to the resolution or amelioration of problems that arise in federal systems. There are many examples of Watts in the role of the political scientist in action, and they stand as a model of what political scientists usefully do. In the next section I examine three of them: Nigeria; Canada and the Meech Lake Accord; and Canada and Aboriginal self-government.

PROBLEM SOLVING

Nigeria

Nigeria is an example of thinking big. As he explains in the preface to *Administration in Federal Systems*, 1970, Watts put the book together on the basis of a series of lectures and seminars that he offered to government officials in Nigeria in 1969, while the country was still in the midst of a civil war. The theme is the administrative arrangements in federal systems and the connection between these arrangements and fundamental political issues. Clearly he was looking to offer his audience useful data about other federal systems that they might consider in relation to the amendment of their own as well as some home truths about securing effective and peaceful government.

The home truths reflect sound judgement about governmental and political matters. The book is full of them, a good example being the section on the impact of the form of executive on intergovernmental administrative arrangements. Watts draws the structural contrasts between the American presidential system and the Swiss collegial system, both predicated on the principle of the separation of powers, and responsible cabinet government, predicated on the principle of the collective responsibility of the executive to the legislature, and

then proceeds to outline the effects of each for intergovernmental processes and for cohesion within the federal system. In the American and Swiss cases, he points out, the effect is to give administrators at each level of government more freedom to negotiate with one another within their areas of expertise. Not so in the cabinet model, where the collective responsibility of the cabinet for all executive matters tends to elevate the role of the elected politicians in inter-governmental negotiations and restricts the role of the public servants in them. Watts's analysis is far more detailed than this summary of it, of course, but the point to be stressed is that it holds up today.

So does the analysis of the same linkage between structure and process, this time with political parties as the intervening variable. In the American and Swiss cases, Watts says, the fixed executive coincides with somewhat undisciplined political parties that are unable to maintain close control of the administrative side of government. As a result, public officials can and do take on a bit of a political role in lobbying for their preferred programs. By contrast, in parliamentary systems the dependence of the cabinet on disciplined political parties leaves little room for administrators as independent political actors outside the cabinet system (Watts 1970, 20).

The structure of the executive has an impact on the cohesiveness of federal systems, which is always a concern. Watts makes the argument that in the United States, the combination of the fixed executive and the need for political mobilization generated by the checks and balances sewn in the system have combined to prod the country's political leadership to generate a broad consensus on important public policies, not all of the time, and not at the time he was writing in 1970, but much of the time. The downside, he remarks, is the length of time often required to construct the consensus during which very little is accomplished. By contrast, the lack of checks and balances in the parliamentary systems enables majority governments to get a lot of things done, although not necessarily on the basis of widespread consensus. Thus the political parties have an important role to play in the reconciliation of the conflict of viewpoints. He writes: "If the political parties fail in this task, and particularly if a fragmented multi-party system or primarily regional parties develop, the parliamentary federation becomes prone to political instability" (ibid., 22). He includes Canada in the years 1962-68 as an illustration of the point. One cannot help but think that Canada is now an even better example.

Before leaving the Nigerian example, it must be stated that the book is utterly non-judgemental. Written in the first instance for the Nigerian audience, there is nothing in it that would have signalled to the Nigerians that their problems were unique or somehow worse than anyone else's. The tone invariably is objective, calm and helpful. There is really only one piece of advice. Written in Watts-speak, it needs to be taken seriously: "experience would seem to indicate that in multi-ethnic or large countries, the alternatives [to federalism] have rarely been very successful" (ibid., 9).

Canada and the Meech Lake Accord

In the midst of the impasse in Canada over the proposed Meech Lake Accord, Watts, along with Darrel R. Reid and Dwight Herperger, pursued the idea of a parallel accord as a way out of it. The deadline for the ratification of the Accord on 23 June 1990 was fast approaching, and only Parliament and seven provincial legislatures had voted to approve it. Newfoundland rescinded an earlier vote of approval, and New Brunswick and Manitoba remained hold-outs, demanding that changes be made to the agreement. Meanwhile Quebec, the constitutional satisfaction of which was the real target of the Accord, insisted that no changes be made to it.

There was talk in the air about a companion resolution or parallel accord that would stipulate additional provisions to satisfy the objectors. New Brunswick introduced such a resolution in the province's legislative assembly. Accordingly, Watts, Reid and Herperger saw value in examining the American precedent as embodied in the Bill of Rights, a companion resolution if ever there was one. The result, a study of the ratification of the constitution drafted at the Philadelphia Convention in 1787 and the later addition of the first 10 amendments of the constitution, is a classic exercise in useful public-policy analysis.

Lest the exercise be regarded as naïve or the comparison far-fetched, the authors are careful to outline fully the differences between the two cases as well as the similarities. They point out that the Americans were considering a new constitution while the Canadians were looking at a set of amendments to the existing one; the Americans used specially elected state ratification conventions while the Canadians resorted to their incumbent legislatures; the Americans required that at least nine of the thirteen states ratify the constitution while the Canadians demanded unanimity. Such procedural differences, they continue, imply disparate risk analyses on the part of the participants, the American venture being more high risk than the Canadian one. In addition, there are huge contextual differences to ponder, which they do, an example being the sustained and in-depth character of the American debate of the late eighteenth century versus the skimpier, mediated Canadian debate of the late twentieth century.

By contrast, the list of similarities is shorter. As the authors state, in both cases the proposed documents in question were hammered out in *in camera* negotiations and on release proved to be more extensive than the respective attentive publics expected; the reception the proposals received in the states and in the provinces ran the gamut from enthusiastic to deeply skeptical; concerns were expressed that the proposals would implicate the rights of individuals; and for some, the futures of nations were at stake (Watts, Reid, and Herperger 1990, 3-5).

Whether or not the similarities seem enough to go on, for Watts and his co-authors one compelling feature of the American case – and a lesson to draw from it – is the adroitness with which the supporters of the Philadelphia constitution shifted tactics to win the support of enough skeptics to succeed in their endeavour. They demonstrated flexibility, a prized Wattsian virtue in political conduct, by signaling their commitment to amend a ratified constitution by adding to it some rights provisions demanded by opponents. And they

persuaded their opponents that they could be trusted to keep the promise. In applying the point to the Meech Lake situation, the authors write that "the key to saving the Accord … may lie in keeping the Accord intact while at the same time making in a parallel agreement a firm commitment to additional constitutional revisions that would accommodate the concerns of the reluctant provinces" (ibid., 67).

The other lesson that the authors report from the American experience is the need for proponents of a proposal as significant as the Accord to explain fully what they are doing and why; in other words, the need for public debate − not just a partisan debate or even a robust, lively debate but also an informed debate. This is exactly what the proponents of the Philadelphia constitution were able to do, one of the highlights being the series of newspaper articles that came to be called *The Federalist.* The proponents joined with their opposite side to produce a very high level of public discussion that was carried on throughout the society, not simply at the elite level. By contrast, the authors point to the surveys of public opinion conducted during the three-year ratification period of the Accord that showed not only declining support for it but also an alarming lack of knowledge about it. Over two-thirds of those surveyed indicated that they knew very little about the proposal (ibid., 31-32).

The Meech Lake Accord died before the idea of a parallel accord got too far off the ground. It is impossible to know whether a concerted, early drive to rescue the accord with the promise of further amendments would have been a successful strategy or not. Nevertheless, in their monograph Watts, Reid and Herperger offer a useful discussion of the American case along with some shrewd observations about the reasons for the success of the strategy there. Since Canada faces a lot of unfinished business on the constitutional front, the idea of a parallel accord might still have a future, in which case students of these matters would do well to consult their analysis.

Aboriginal Self-Government

In a paper prepared for the Royal Commission on Aboriginal Peoples (RCAP), Watts writes about federalism in connection with the accommodation of distinct groups within the state in general and the Aboriginal quest for self-government in particular, or at least self-government within the Canadian state. He makes a convincing case that the federal idea and therefore federal arrangements are worth exploring for ways of responding to this quest.

The paper bears all the hallmarks of Watts's scholarship: carefully crafted definitions, the use of comparative analysis, no stone unturned, *caveats* where required, no promise of a rose garden, no over-generalization and sound lessons learned. For the student who is concerned about the prospect of Aboriginal self-government, he offers many leads to track down, ranging from how other federal systems are organized to respond, or not, to such self-government issues to the array of federal arrangements available for consideration and how they might be tweaked to get a result that is workable in the Canadian context. For the generalist, he offers some useful observations about the conditions under which

the federal system can be expected to accommodate the interests and concerns of distinct groups.

There is no question that Watts thinks the federal system offers the likeliest prospect of such accommodation. Certainly he sees no evidence to indicate that, absent the use of coercion, any other candidate is in the offing. Nevertheless, he points out that the experience of federal systems in the years following the end of the second World War is a checkered one, to say the least. Many of the newly-established federations in formerly colonized areas in Africa, Asia and the Caribbean failed, as did the longer-lived and in some quarters much admired federations of Czechoslovakia and Yugoslavia. Even the oldest and most stable federations, like Canada, have experienced significant pressures of disintegration. To use his term, the federal system has proven to be no "panacea" for the goal of establishing and maintaining large states inhabited by communities of varied identity (Watts 1998, 11). There are lessons to be learned from the record, and he identifies four of them, beginning with the point already made – the federal system should never be regarded as a racing certainty in the hunt for solutions to the problem of holding a state together.

The second lesson that Watts draws is the need for the political leadership and the citizenry at large to respect constitutional norms and structures in order for a federal system to succeed. The federal system is rule-governed and therefore dependent upon the maintenance of the rule of law for its survival. Related to the requirement of the rule of law, and the subject of the third lesson, is the all-important concept of trust. There needs to be an adequate level of trust amongst the communities within the system, he writes, meaning the trust that generates among public actors a willingness to negotiate a way through difficult issues, finding compromises that work. These two points are obvious, yet at the same time reveal the normative standards that the political culture has to embody before the federal system can be expected to work at all. The fourth lesson is the importance of the particulars of any federal system and the extent to which they achieve the right note between the demands of distinct communities within the state for some self-governing room and the capacity of the central government to attend to the common concerns of the whole. However difficult it might be to achieve the right note, the achievement is a technical, institutional matter. By contrast, generating and maintaining respect for the rule of law and trust among communities not necessarily used to trusting one another are extremely difficult tasks because they require widespread changes in the behaviour of citizens.

It could be said, then, that Watts does not view federalism with rose-coloured lenses. Certainly he never suggests to the RCAP that it is an easy solution to the challenge of Aboriginal self-government, instead pointing out that most federations have done little or nothing to accommodate their Aboriginal populations within the constitution. Moreover, he suggests that federalism is worth consideration only if people are prepared to think creatively about the possibilities, emphasis on the adverb, creatively. How? Essentially by setting aside some of the standard features of the conventional model of the federation and pondering different features, such as: three or more constitutional orders of government rather than two; constituent units that comprise a federation within the federation; the non-territorial representation of constituent

units; asymmetrical arrangements in the assignment of jurisdiction to some constituent units (ibid., 30-31). Of course each of these entails problems for the system as a whole. Nothing is simple. For inspiration one needs to hold on to Watts's promise that "within the realities of the contemporary world, federal forms of political organization can and do provide practical ways of reconciling common interests and the particular identity of distinct groups in a form based on consent" (ibid., 30).

CONCLUSION: THE VALUE OF FEDERALISM

Federalism is all about rules, processes and institutions. As Watts stresses, these variables can be packaged in an enormous variety of ways. The effect of the package is to channel the behaviour of officials and citizens in complicated patterns as they work their way towards the resolution of the issues of the day. Any one package is unique, however, and the behavioural patterns that flow from it are not as predictable as one would like. In other words, the subject of federalism is technical and complex. It is also value laden. Why would Watts find it so appealing?

My personal view is that Watts is a Canadian liberal pluralist, a liberal constitutionalist at work. He understands that politics inevitably are not simply about difference and diversity, but how difference and diversity will line up in the ongoing political controversies of the life of the political community. The problem is how to get people with disparate interests and identities to make deals and compromises in such a way as to permit public resources to be shared somewhat equitably among them. The problem is how to deal with a politics of public accommodation.

One answer is to cultivate the habit of tolerance, to avoid the adoption of extreme political positions and instead maintain the middle ground. Lester B. Pearson counselled political leaders to stake out the middle ground in an effort to maintain the governing premise of the country, namely, "that by compromise and adjustment we can work out some sort of balance of interests which will make it possible for the members of all groups to live side by side without any one of them arbitrarily imposing its will on any others" (1970, 90).

Federalism is another answer to the problem of the politics of public accommodation, or at least a part of the answer. Through the study of federalism, Watts has found a way of contemplating institutional construction for the purpose of making the politics work. If federalism teaches anything, it is that government need not take a unitary form. On the contrary, federalism demonstrates how sovereignty can be divided amongst governmental institutions. Watts has pursued the next step, or how to tailor the institutions to assist elected and unelected leaders and public officials to develop the habit of give and take in the resolution of the issues before them. Of course as Watts continually reminds us, the institutions cannot stand alone in this venture. But they can have the effect of influencing the individuals who work within them to develop the habit of tolerance that Canadians like Pearson regard as so important in political life.

In describing Watts as a liberal pluralist, I emphasize that he embodies the Canadian version of the type, not the version often associated with the American position. His is not a pluralism that is focused exclusively on pressure-group diversity and the politics of coping with it. The politics of pressure groups, albeit extremely important, are essentially about money. Watts's interest is broader than that. He is looking for institutional mechanisms that encourage the accommodation of community diversity in relation to a vast array of public-policy issues, not simply pressure-group diversity. It is hardly surprising that a Canadian with the approach that I have described would be anxious to study comparative federal government. It is a very Canadian thing to do, this looking beyond the country's borders for fresh ideas, both for help in resolving the country's issues and for help in assisting others with theirs. Watts is the academic statement of both endeavours.

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Section Four
Constitutional Perspectives

9

Scholarly Debates about the Charter/Federalism Relationship: A Case of Two Solitudes

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Cette étude compare l'état de la recherche au Québec et au Canada anglais sur les rapports entre le fédéralisme et la Charte canadienne des droits et libertés. Ses auteurs soulignent que les chercheurs canadiens-anglais se montrent peu intéressés ou ambivalents face aux répercussions de la Charte sur le fédéralisme, alors que leurs homologues québécois sont nettement plus sensibles aux tensions qui opposent ces deux piliers constitutionnels du régime politique canadien. La perception canadienne-anglaise pourrait s'expliquer par un « faible » attachement à la procédure du fédéralisme, la recherche privilégiant les questions de compétence et les pouvoirs consentis aux législatures provinciales plutôt que les fondements du fédéralisme lui-même. Cet attachement est qualitativement différent au Québec – sans l'être nécessairement sur le plan quantitatif –, où le lien établi par les chercheurs entre les fondements du fédéralisme et les finalités de l'État québécois expliquerait que les tensions opposant la Charte et le fédéralisme y soient jugées plus vives et plus profondes.

As a leading scholar of comparative and Canadian federalism, Ron Watts is keenly aware of the probable tension arising from the juxtaposition of constitutionally entrenched rights in a federated system of government committed to

the decentralization of power (Watts 1996, 96-99). As this year marks the 25th anniversary of the *Canadian Charter of Rights and Freedoms*, and as these proceedings are in Watts's honour, it seems an opportune time to reflect on the relationship between these two constitutional pillars of the Canadian political system. To this end, this paper examines scholarly discussion of the Charter/federal relationship, and reveals fundamental differences in how the English-Canadian and Québécois literatures address this relationship.[1] These literatures convey not only a different interpretation of federalism in and out of Quebec, but influence whether, and to what degree, the purported tension between the Charter and federalism is considered serious.

The first half of this paper deals with these differences. Scholars in English Canada are less troubled than their Québécois counterparts about the Charter's potential to generate uniform or homogenous outcomes. Whereas the English-Canadian literature has expressed either optimism about the reconciliation of the Charter and federalism, or a lack of awareness that any tension exists, the Québécois literature perceives the Charter to seriously undermine the rationales for federalism. Where critical of the Charter, the English-Canadian scholarship addresses the impact of judicial review on democratically elected legislatures, but raises concerns that are virtually indistinguishable from the kinds of criticisms of judicial power that arise in a unitary system. They are, for the most part, concerns about democracy or power, not federalism or diversity. In contrast, the Québécois literature is far more acutely aware of the Charter's effects on provincial autonomy or diversity.

The second half of this paper offers an explanation for these differences. It suggests that the low level of interest in federalism in the English-Canadian Charter debate is not explained by an antipathy towards federalism, so much as it is by a theoretically underdeveloped conception of federalism that has provided infertile ground for recognizing and assessing the inherent tensions between these two constitutional pillars. Federalism for English-Canadian scholars is understood primarily in terms of a particular process of government, and the powers that are vested in provincial legislatures to represent provincial interests as defined by provincial governments. This relatively "thin" understanding of the reasons and purposes for federalism helps explain the lack of interest in an explicitly federalist discourse when analyzing the political effects of the Charter. This thin understanding of federalism also explains the non-problematic way English Canadians view the Charter's potential to facilitate pan-Canadian outcomes for how rights constrain legislative objectives. The fact that local preferences might be defeated by Charter interpretations is viewed more as a challenge to parliamentary democracy than it is to federalism. As such, while judicial review of the Charter might be viewed as being in tension with parliamentary democracy, this anxiety about competing constitutional principles is not as obvious for federalism. In contrast, federalism

[1]The definition of "Québécois" and "English-Canadian" scholarship is not a neat and tidy one. Many scholars, for instance, write in both French and English (Guy Laforest is probably the best example), and several English-Canadian scholars reside in Quebec (James Kelly, for one). Here, the definition of "Québécois" and "English-Canadian" scholarship depends on a determination of the author's first audience.

in Quebec rests on the "thick" foundation of the process of decision-making and the diverse outcomes federalism protects. The Charter is considered as imposing serious tensions for the very rationales for choosing and sustaining federalism.

Part One

THE TWO-FOLD TENSION BETWEEN THE CHARTER AND FEDERALISM

According to Peter Russell, the Charter has two political purposes: first, the better protection of individual and minority rights, and second (and perhaps more purposively), the promotion of "pan-Canadian" values at the expense of provincial ones (Russell 1983, 1994; Laforest 1995; Trudeau 1968, 52-60). The problem, for federalism, is that both of these two *Charter* purposes collide with federalism's own political purposes.

Different motivations underlie the choice of a federal, as opposed to unitary, government. Among the most pressing are "the quest for political structures that are closer to the individual citizen" and "the creation of scope for cultural diversity" (Koller 2003, 5). The first of these motivations comes from a desire for a particular "process", one that favours localized decision-making. The second is an appeal for a particular "outcome", the promotion and protection of diversity.

It should be easy to understand why many would be sceptical about the logic of grafting the Charter onto a mature federal society. The Charter appears to constrain both the procedural and substantive rationales for federalism. First, empowering a hierarchical, federally-appointed Supreme Court to ensure provincial compliance with the Charter's protection of individual and minority rights introduces an anti-federal *process*, insofar as another body or agency can interfere with democratically-elected local decision-making. Second, as a statement of pan-Canadian values with which all provinces are expected to comply, the Charter introduces an anti-federal *outcome*, insofar as rights constrain a province's capacity to promote its distinct regional or local views and preferences, thereby undermining provincial diversity.

Concerns for the Charter's impact on federalist processes and outcomes are not, of course, mutually exclusive. Any legislative outcome is the result of a particular process. But as entangled as they are, the process-outcome distinction is a useful way of organizing the literature on the relationship between federalism and the Charter. Indeed, although the particular language of "processes" and "outcomes" is missing, the same two-fold understanding of the tension is manifest in both the English-Canadian and Québécois literatures. Introducing her chapter on "The Charter and Canadian Federalism", for instance, Heather MacIvor identifies the "two ways" the Charter may compete with federalism. First, the Charter promotes "Canadianness" at the expense of "competing regional loyalties", an *outcome* contrary to the federalist's predilection for diversity. Second, MacIvor observes that the Charter "empowers the judicial branch of the national government at the expense of provincial

legislators", a process at odds with a preference for local decision-making (MacIvor 2006, 221-222). In a similar vein, José Woehrling describes "les conséquences … de la charte pour l'équilibre du fédéralisme" as two-fold: "centralisation" and "uniformisation":

> La centralisation consiste en un transfert de pouvoirs des organes fédérés vers un organe fédéral; elle contredit l'autonomie des entités fédérées. L'uniformisation consiste en une imposition, par les tribunaux, de valeurs uniformes qui limitent la capacité des entité fédérées d'adopter des politiques diverses; elle compromet la diversité fédérale. (Woehrling 2006, 264)

Like MacIvor, Woehrling's depiction of a two-fold tension between federalism and the Charter conforms to the process-outcome nomenclature. Woehrling's "centralisation" corresponds to the concern for processes, viewing the transfer of decision-making power to the federal judiciary with scepticism. "Uniformisation", on the other hand, relates to the issue of Charter decisions, or the effects of Charter discourse, that promote pan-Canadianism at the expense of diversity. Beyond the characterization of the issues, however, there is less agreement.

The English-Canadian and Québécois scholarship differs considerably on how it assesses the Charter's effects on three important purposes associated with federalism: the protection for 1) diversity, 2) identity, and 3) provincial autonomy. Differences in how the respective scholarship addresses each of these dimensions are discussed below.

THE CHARTER'S IMPLICATIONS FOR DIVERSITY

One concern for the relationship between federalism and the Charter is grounded in the tension between diversity and uniformity − whereas federalism is a system of government that is committed to the preservation of diversity, the Charter represents and operates as a statement of pan-Canadian rights. Like federalist scepticism more generally, this also is a two-fold concern. On the one hand, there is apprehension that the Charter will homogenize legislation in areas of provincial jurisdiction that had previously allowed for diversity. On the other hand, is the worry that the Charter will transform diverse provincial *societies* into a more uniform, pan-Canadian community. Both the Québécois and English-Canadian literatures have recognized these potential conflicts. But while they remain a concern for Québécois scholars, this concern has largely disappeared from the writing of English-Canadian scholars.

English-Canadian Scholarship

Soon after the Charter was adopted, some scholars recognized tension between the Charter and federalism, discussed under the rubric of the "centralization thesis" (Kelly 2001). According to this thesis, pan-Canadian rights, interpreted by the Supreme Court, would tend toward the homogenization of policy across

provincial boundaries. This effect was attributed to the combination of a hierarchical judicial system and the principle of *stare decisis* − the rule of legal precedent − which meant that if the Supreme Court were to rule that the Charter prohibits or compels a particular legislative outcome in one province, this decision would have the same implication for all other provinces.

In 1983, Peter Russell observed that a troubling element of Trudeau's Charter strategy was to bring provincial policy into line with a single set of national standards (Russell 1983). Two years later, Rainer Knopff and F.L. Morton expressed a similar apprehension. If a Charter claimant successfully challenged provincial policy, this would generate a common constraint on provincial capacity to adopt diverse policies adapted to the particular needs of their populations (Knopff and Morton 1985, 147-150). Yet over time, scholars in English Canada have become ambivalent, even sanguine, about the Charter's conflict with the diversity contemplated by federalism. Although Morton remained steadfast in his assertion that the Charter allowed the central government to craft pan-Canadian "policy outcomes that would otherwise be beyond its jurisdictional reach" a decade after these initial concerns were first expressed (Morton 1995, 188), most other Charter scholars appear to view the homogenization of policy outcomes as less serious than earlier predicted.

For his part, Russell had either dropped issues of homogenization from his work (Russell 1994) or conceded that with notable exceptions, the Charter had not greatly affected "social and economic policies of central importance" to provincial governments (Russell 1992). Subsequent scholarship has emphasized the potential for judicial review to mitigate the possible conflict between federal diversity and Charter conformity. Writing in the wake of the failed Meech Lake and Charlottetown Accords, which would have had implications for the Charter/federalism relationship, Katherine Swinton expressed optimism that tensions between the Charter and federalism could be reconciled. Swinton's reading of Charter jurisprudence led her to conclude that despite a core of pan-Canadian rights, the Supreme Court was sympathetic to the needs of Canada's provincial communities. Due largely to how the Court had interpreted section 1 of the Charter (which recognizes that limitations on rights can be justified where these are reasonable and consistent with a free and democratic society), Swinton suggested that the Court had allowed provincial governments to justify the limitation of Charter rights in the name of the divergent needs of their local populations (Swinton 1995, 307). A year later, Janet Hiebert elaborated on this theme. Although Hiebert was cognizant that the Charter constrains a province's capacity "to promote community values based on [its] own set of priorities", (Hiebert 1996, 126-149) she believed the provinces had the potential to make proactive arguments for federalist interpretations of the Charter. These arguments would most likely be framed under section 1, and would require a court sympathetic to interpreting the Charter in a way that was consistent with federalism (Hiebert 1996, 137-138, 144-147). Based on early jurisprudence, she believed the Court appeared "receptive to arguments that the Charter should not be interpreted in a manner that disregards federalism" (Hiebert 1996, 133).

If Hiebert was cautiously optimistic about the potential reconciliation between the Charter and federalism, several years later James Kelly was unreservedly so. By 2001, Kelly was prepared to declare concerns expressed in

the centralization thesis to be no longer relevant (Kelly 2001, 323; see also Kelly 2005, chapter 7). Like Swinton and Hiebert before him, Kelly found section 1 to be particularly important in the creation of space for diverse policies in a Charter context. Based on his interpretation of the relevant jurisprudence, Kelly concluded not only the need to set aside the centralization thesis, but suggested there has been a "reconciliation" of pan-Canadian Charter rights with the diverse societies of Canadian federalism (Kelly 2001, 354). If there ever had been a tension between rights and federalism, it had since been done away with by the Supreme Court, a conclusion in which Kelly was joined by some English-Canadian colleagues (Kelly and Murphy 2005; MacIvor 2006, 235).

Kelly provided an even more definitive statement on this need to reassess the apparent tension between the Charter and federalism in his 2005 book-length treatment of the Charter, *Governing under the Charter* in 2005, when he concluded that concern of the Charter threatening federalism was now seriously misplaced. The reason for this, he argued, is that bureaucratic evaluations and executive decisions by the provinces have adapted their assumptions and processes so as to ensure that legislative goals are now consistent with the Charter. Due to this, the Court is less likely to conclude that legislation is inconsistent with the Charter. As Kelly states:

> Because federalism is foremost a political arrangement to protect diversity, it is folly to view the courts as the predominant institution in the management of federal diversity and provincial autonomy. The protection of federalism centres on the parliamentary arena because federal and provincial cabinets have guarded this essential element of the constitutional system by reforming the policy process to ensure that entrenched rights are advanced during the legislative design of public policies. (Kelly 2005, 182)

Kelly is arguing, in essence, that the Charter no longer provides a serious problem in terms of blocking provincial legislation because provincial bureaucracies and governments have changed their assumptions about what constitutes a valid legislative objective. But this conclusion does not support the proposition that there is not an inherent conflict between federalism and the Charter; only that provinces' federalist aspirations are not as important as their determination to enact legislation that is consistent with the Court's Charter rulings.

In sum, despite the initial concerns expressed by Morton, Knopff and Russell, the scholarship in English Canada today no longer seems troubled by the Charter's potential to prevent diverse provincial outcomes on issues that implicate the Charter.

Québécois Scholarship

Elements of the Québécois literature build on some of the early concerns about the Charter expressed by English-Canadian scholars. For instance, Guy Laforest, drawing upon arguments of Russell and Knopff and Morton, observes "there has definitely been a homogenization of public policies … [u]niform national

standards have been imposed where previously regional diversity reined supreme" (Laforest 1995, 135). A similar apprehension prompted André Burelle to argue that Canadian courts should interpret the *Charter* less universally in order to balance the *Charter's* individual rights with the collective rights guaranteed by federalism (Burelle 1995, 64, 179).

But while English-Canadian scholars have not elaborated on these concerns and, in fact, no longer seem to question the Charter's unifying effects, this is not the situation for Québécois scholars. Only limited recognition exists in the Québécois literature for judicial efforts to balance federal diversity with pan-Canadian rights (Woehrling 2006, 271; Gaudreault-Desbiens 2003, 47-48). But where the Supreme Court's jurisprudence has come to be viewed in English Canada as the balancing and even reconciliation of the Charter with federalism, the Court has not assuaged the federalist concerns for Québécois scholars, who remain troubled that the Charter will promote uniform policy outcomes, for "il n'en demeure pas moins que la Charte s'ouvre sur une disposition qui postule de façon moniste le caractère singulier et indifférencié de la communauté politique canadienne" (Caron *et al*. 2006, 162). Thus, the occasional instances of judicial willingness to accept variance when interpreting or defining Charter rights do not negate the Charter's threat to federalism (Woehrling 2006, 272).

> [M]algré le fait que le droit constitutionnel offre ainsi plusieurs techniques permettant d'introduire un certain relativisme dans la portée des droits et libertés, la protection de ces droits par le processus constitutionnel et judiciaire aura inévitablement des effets uniformisateurs. (Woehrling 2006, 272-273)

Alain Gagnon and Rafaelle Iacovino challenge the perception of English-Canadian scholars that there is a "reconciliation" between the Charter and federalism. For Gagnon and Iacovino, it matters little if the Supreme Court allows diversity and the Charter rights to coexist, since relatively few provincial legislative decisions will actually be subject to Supreme Court decisions. The real problem is the attempt by provincial public and political officials to comply with the Charter "at the stage of policy formulation" (Gagnon and Iacovino 2007, 41). If pan-Canadian standards are internalized into the entire policy process, in an attempt to avoid litigation, the homogenizing effects of the Charter will be even more widespread than any reading of Supreme Court jurisprudence could possibly suggest. Thus, while Kelly views this internalization of Charter values as diminishing the Charter/federal tension, it is this very fact of political reliance on a common interpretation of the Charter when legislating, that Gagnon and Iacovino interpret as a threat to federalism.

But there is another reason why a focus on judicial decisions is believed to understate or overlook the Charter's potential to undermine diversity. The real problem is not the homogenization of a few provincial legislative acts, but the transformation of diverse provincial *societies* into a single, homogenous Canadian one (Gaudreault-Desbiens 2003, para. 53). And on this score too, French and English-Canadian scholars exhibit different levels of concern.

THE CHARTER'S IMPLICATIONS FOR IDENTITY

English-Canadian Scholarship

Scholars in English Canada do not generally perceive a conflict between the provincial or English-Canadian identities and the values the Charter promotes. Some English-Canadian scholars recognize the potentially adverse effect the Charter could have on cultural and identity claims by Québécois (LaSelva 1996, 96; Tully 1995, 163-164). But they do not perceive the Charter as having an adverse impact on the identities or cultures of English speaking provinces. Although English-Canadian scholars recognize the Charter is relevant for identities, it is not community or provincial identities at issue, but those identities that are based on personal characteristics (those enumerated in s. 15 of the Charter) that transcend provincial identities. But here, the Charter is not a threat to identity but the source of its protection. And it is a protection that far from offending federalism, is believed to address an important shortcoming in federalism; namely the vulnerability of minorities to the preferences of provincial majorities (Cairns 1995, 192, 204; LaSelva 1988, 223). As LaSelva argues, the Charter provides a theory of justice otherwise lacking in federalism (LaSelva 1996, 68).

To the extent there is concern about the corrosive effects of the Charter and the English-Canadian identity, it is expressed not in the context of provincial community, but as will be argued shortly, of community in the abstract. The concern is not only for a loss of the habits and temperaments of federal governance, but for a loss of the "habits and temperaments of representative government" more generally (Morton and Knopff 2000, 149; see also Hutchinson 1995, xi, 92-95).

Québécois Scholarship

Québécois scholars are acutely aware of the potential conflict between the Charter and Quebec's provincial identity. Gaudreault-Desbiens argues that from the perspective of federalism, the most problematic Charter outcome might be the "attitudes que la Charte semble inspirer, particulièrement dans la population" (Gaudreault-Desbiens 2003, para. 53). Worse than the homogenization of policy, is the Charter's tendency towards the "uniformisation des mentalités" (Caron *et al.* 2006, 162) and the corollary "defederalization of the political culture" (Laforest 2007, 70; see also, Woehrling 2006, 265). The problem is with the Charter's insistence on the primacy of individual rights, which describes Canada as an assemblage of rights-bearing individuals, regardless of their regional or cultural distinctions (Gagnon and Iacovino 2007, 87). The Charter identity comes, therefore, at the expense of the different provincial ones, which previously formed the basis of Canadian constitutional society and identity (Woehrling 2006, 265). Seen in this light, the Charter is not simply a statement of individual rights, but of a "roving Canadian nationalism oblivious to provincial boundaries" in general, and "repugnant" to Quebec nationalism in

particular (Laforest, 1995, 143; 2005, 20). Nor should the potential strength of this new identity be underestimated. Invoking the spectre of Lord Durham, Guy Laforest argues that while the Charter's assimilation may be less explicit, the rhetorical force of Charter rights is no less dangerous than the prescriptions contained in Durham's controversial 1840 *Report* (Laforest 1995, 178-179). As Burelle characterizes the problem with the Charter's vision, it "permet de metre en veilleuse les droits collectifs des diverses composantes de la fédération et d'homogénéiser le pays au nom de l'égalité et de l'intangibilité des droits des individus" (Burelle 1995, 64).

THE CHARTER'S IMPLICATIONS FOR PROVINCIAL AUTONOMY

English-Canadian Scholarship

Scholars in English Canada have occasionally made an explicit link between the tension between judicial review of the Charter and federalism in terms of constraining provincial legislation. Morton has characterized the process of Charter review as akin to "disallowance" in reference to the conventionally defunct federal power to overturn provincial policy (Morton 1995, 181). But for the most part, the English-Canadian debate does not centre on the legitimacy of federally appointed judges reviewing the decisions of the provincial legislatures, but instead it focuses on the legitimacy of an unaccountable judiciary reviewing the decisions of elected representatives. But the conceptual framework for this assessment is indifferent to federalism, and is made without distinction for whether the legislation at issue is federal or provincial, or whether the impugned legislative objective relates to a particular community or local objective. As such, it could just as easily be made (as it has been elsewhere) under a unitary system. Debate is framed in terms of the Charter undermining democratic principles of representative government or eradicating the principle of "parliamentary sovereignty", not on judicial interpretations of the Charter that undermine or interfere with provincial autonomy, as it is framed by Québécois scholars (discussed below).

Although Sam LaSelva observed in 1983 what he thought to be a conspicuous absence of concern for federalism in the largely speculative discourse about the Charter's implications for Canadian politics (LaSelva 1983, 383-384), this tendency to overlook federalism continues. Scholars from both the right (Morton and Knopff 2000; Manfredi 2001; Brodie 2002) and left (Mandel 1989; Hutchinson and Petter 1988; Fudge 1987), have produced a sizeable literature assessing the Charter, but their focus is not on federalism but democratic principles they associate with representative government.

The first of these democratic objections emerged as a class-based critique of the "manifest dangers" associated with the Charter's legalization of Canadian politics (Mandel 1989, 376-405). Critics emphasized the unelected, unaccountable and non-representative nature of judges who are charged with interpreting and applying the Charter, and expressed scepticism about whether

legislative measures that seek to redress inequality would be vulnerable if subject to judicial review. This scepticism was rooted in a deeper suspicion for the very project the Charter represents: its preoccupation with a legal form of liberal individualism that portrays the state (and not private power) as the principal threat to rights. Thus the Charter was viewed as an outdated statement of 19th century ideals set upon a modern welfare state, one that could perpetuate and even exacerbate inequalities in society (Hutchinson and Petter 1988, 286; Mandel 1989, 35-64).

This class and power-based critique of the Charter was soon joined by a more conservative critique. Like their counterparts on the left, these critics were also troubled by the "undemocratic" nature of judicial processes policy making. But their concern was not with economic or class inequality, but with the lack of accountability they equate with use of judicial review to change social policies. This critique was expressed most forcefully in the works of F.L. Morton and Rainer Knopff, who argued that the Supreme Court of Canada's power to override the decisions of the elected branches should be limited to policies that are "absolutely clear contraventions of the constitution" (Knopff and Morton 2000, 152). Judicial power under the Charter, according to these critics, is "deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy" (Knopff and Morton 2000, 149; see also Manfredi 2001; and Brodie 2002).

For once, it seems the left and right in English Canada have much in common. Both ends of the ideological spectrum have lamented the Charter's transfer of power from elected legislatures to an unaccountable judiciary. Critics on either side of the English-Canadian ideological spectrum also share in common little reflection about the relationship between the Charter and provincial autonomy (earlier works by Morton and Knopff an exception).

Academic commentary continues to assess the political consequences of the Charter, and debate remains mired in a concern for the Charter's purported "non-democratic" aspects rather than its "non-federal" effects. A recent direction this debate has taken utilizes the metaphor of "constitutional dialogue" to assess the impact of judicial review for democracy. The explicit use of the dialogue metaphor is generally credited to a 1997 article by Peter Hogg and Allison Bushell, who used it to challenge criticism that the Charter represents an undemocratic veto on legislation (although Paul Weiler and Peter Russell discussed inter-institutional engagement with the Charter several years earlier).[2] Following a judicial declaration of constitutional invalidity, so the metaphor goes, legislatures are free to "reply" with new or modified legislation (Hogg and Bushell, 1997; Roach 2001). The dialogue "theory" has not been free of criticism. Use of this metaphor, and what its proponents characterize as examples of dialogue, have been subject to wide-ranging criticisms, including: failure to address judicial remedies that alter legislative intent, such as "reading in" a purpose or effect not intended by parliament; failure to make a moral claim that would justify an authoritative judicial role for pronouncing on the

[2]See, for example, Weiler (1984, 51-92) and Russell (1991).

constitutional merits of legislation; characterizing the notwithstanding clause as an element of dialogue given the strong presumption of its lack of legitimacy; and adopting a court-centred approach that treats parliament's role as entirely reactive − to respond with judicially-defined parameters for what constitutes a reasonable limit on a protected right (Manfredi and Kelly 1999, 513-527; Petter 2007, 147; Hiebert 2002, 50-51; Morton 2001, 111-117; Huscroft 2007, 91-104).

But whatever its flaws, a striking feature of dialogue theory is the almost total exclusion of federalism from its terms. And what is true of those promoting use of this metaphor, is equally true of their critics. For all of the critiques of the dialogue, none has targeted its omission of federalism. By way of punctuation, a recent issue of the *Osgoode Hall Law Journal* on the 10th anniversary of the dialogue included commentary (Haigh and Sobkin 2007), critique (Huscroft 2007; Manfredi 2007; Petter 2007) defence (Hogg, Bushell Thornton, and Wright 2007), and elaboration (Roach 2007) of the metaphor. But there was not a single mention of federalism, let alone an attempt to reconcile the autonomy of Canada's provinces vis-à-vis a federal judiciary. A similar discussion of Charter processes seems unthinkable in French-Canada.

Québécois Scholarship

Quebébécois scholarship similarly expresses concerns about the ideological impact of judicial review (Pinard 2006, 421-454). Yet in contrast to the absence of federalism from English-Canadian debates about how the Charter has affected principles of representative government, federalism remains an important part of many assessments by Québécois scholars. According to Gagnon and Iacovino, one of the prerequisites for meaningful federal governance is the "autonomy" of the constituent units (Gagnon and Iacovino 2007, 62-63; see also Burelle 1995, 128). Citing Réjean Pelletier, Guy Laforest elaborates. Any federation worthy of the name must respect the "principle of autonomy" according to which

> each member of the federation […] can act freely within its sphere of competence and can make decisions that will not be reversed by another level of government. (Pelletier in Laforest 2007, 57)

Provincial autonomy, then, demands two things: first, unfettered decision-making in areas of provincial jurisdiction; and second, a guarantee that the federal government cannot overturn those decisions. From the earliest days of French Canadian nationalism to current political debates, autonomy has been a "near universal" theme in Quebec intellectual circles (Gagnon and Iacovino 2007, 72-73). It is perhaps not surprising, then, to find that provincial autonomy is at the heart of the concern for the Charter's processes in French Canada. Although the Charter does not formally transfer provincial jurisdiction to the central government, it nevertheless has this effect of undermining provincial autonomy.

Section 24[3] of the Charter permits individuals who believe their rights have been infringed by a government to apply to a court of competent jurisdiction for a remedy. If the court agrees that there has been a violation, section 24 directs a court to apply a remedy which it believes "appropriate and just in the circumstances", which can include reading new meaning into the legislation to bring it into conformity with the Charter or declaring the legislation of "no force or effect" according to section 52[4] of the *Constitution Act*. But Charter rights are couched in vague, imprecise language leaving judges with considerable discretion to review and overturn legislation. This capacity is viewed, by some, as elevating Canadian courts to the level of "co-legislatures" (Chevrier, in Caron *et al.* 2006, 162) and undermining provincial decision making (Laforest 1995, 148), thereby violating an important aspect of the principle of autonomy because a province is no longer free to "act freely within its sphere of competence".

But the Charter is believed to also violate a second aspect of provincial autonomy. The problem lies in the structure of the Canadian judiciary, which "reflects the federal reality of our country most poorly" (Laforest 1995, 135). The Canadian judicial hierarchy is quasi-unitary, with a single Supreme Court, responsible for all matters of Charter interpretation at its apex. Compounding the problem is that the appointment of judges to the Supreme Court, as well as to provincial courts of appeal, is the constitutional purview of the central government alone. When provincial policy is impugned by a Charter challenge, provincial governments are forced not only to defend activity that is supposedly within areas of their own jurisdiction, but they also must do so before a body whose institutional, organizational, and cultural ties make it more "sensible aux priorités et aux préoccupations de la classe politique et des élites fédérales qu'à celles des provinces" (Woehrling 2006, 264; see also Gagnon and Iacovino 2007, 42). The interpretations of the Charter not only limit the capacity of provinces to act within their spheres, they result in the possibility of provincial legislation being reversed by "another level of government" − the federally appointed judiciary − and therefore violate the second part of the principle of autonomy.

Concern about the impact of Charter interpretations is thus expressed in terms of a transfer of power from the provinces to the central government − as a "constraint on provincial autonomy" (Gagnon and Iacovino 2007, 41). For instance, when a Quebec law aimed at the protection of the French language was recently struck down as a contravention of the Charter, it mattered little that the court doing the damage was the Quebec Court of Appeal, for the Court does not represent the views of Quebecers: "It is a federal institution. Judges are appointed by the federal government" (Jean Dorion in CBC 2007).

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[3]Section 24(1) states that, "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances".

[4]Section 52(1) declares that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect".

Part Two

EXPLAINING THE DIFFERENCES

The preceding discussion reveals significant differences in how English-Canadian and Québécois scholarship defines and assesses the relationship between the Charter and federalism. First, whereas the Charter's tendency to promote uniform interpretations of rights is a serious and persistent concern for Québécois scholars, English-Canadian scholars have become increasingly ambivalent about this issue. Second, English-Canadian scholars do not perceive the Charter as a threat to provincial identities. To the extent that identity considerations are relevant, the Charter is viewed as addressing a shortcoming in federalism in that it lacked a theory of justice from which to assess provincial legislation (LaSelva 1996, 68). In contrast, Québécois scholars view the Charter's promotion of individual rights, interpreted in universal terms, as inconsistent with the promotion of a provincial identity that is shaped by cultural and linguistic factors. Third, when it comes to assessing the impact of Charter decisions for politics, scholars in English Canada are less prone than their Québécois colleagues to situate their critique or defence of that process in federalism grounds or on the autonomy of the English-speaking provinces.

The remainder of this paper offers an explanation for these differences. It argues that the different interpretations of the Charter's effects for federalism is a product of disparate ideas of "what federalism is for".

The conference for which this paper was prepared is called "The Federal Idea", not "the federal *ideal*". The distinction is an important one, for as Ron Watts himself has noted, "there is no single pure model" – no *ideal* form – of federalism (Watts 1996, 1). On the one hand, this refers to the different institutional arrangements that can be identified in the federal countries of the world. But even prior to differences in institutional design are different ideas about "why federalism" in the first place (Watts 1996, 4-5). As noted previously, one motivation is a desire for a political *process* that is closer to the individual citizen. Another is a desire to protect and promote diverse *outcomes*.[5] It seems likely that some mix of consideration for both processes and outcomes informs every federal arrangement, but the precise balance is apt to vary. From this variance comes a different choice or different level of comfort with different federal institutions. While American federalism, for instance, is most concerned about federalism's value as a process and is indifferent or even hostile to difference (Kymlicka 1995, 28-29), Swiss federalism rests much more on the desire to protect diversity (Schmitt 2005).

But what is true of such interstate comparison can also be true of intra-state comparison (Tarr 2005, 9). Members of the same federation can have different ideas of federalism. Such is the case in Quebec and in Canada outside of that province. In Quebec, federalism exists both to protect diverse outcomes, as well

[5]Others have compiled lengthier records of federal rationale, but these too can arguably be reduced to justifications based on process and outcomes (see, for instance, Gaudreault-Desbiens 2003, 22; Watts 1996, 4-5; Howard 1995, 11-29).

as a process aimed at achieving that outcome. Federalism in Canada also protects a different legal tradition in Quebec than elsewhere in Canada, and some argue that different legal systems affect how citizens view the state.[6] In English Canada, centred primarily outside of Quebec, federalism is valued less in terms of the diverse outcomes it protects than in the process of governing it authorizes. In this sense, federalism in English Canada is supported by a relatively "thin", procedural foundation, which helps explain the ambivalence about the implications of Charter outcomes.

It is not contentious to suggest that in Quebec, from Confederation onwards, the raison d'être for federalism has been to secure a very particular outcome: the survival of diversity, and more specifically, of the French fact on the North American continent. In the debates leading to Confederation, George-Étienne Cartier saw his primary obligation as assuring "cultural survival" amid a sea of English (Vipond 1985, 268-269; Laforest 2005, 2). Speaking a few years later, Wilfrid Laurier echoed Cartier's view:

> C'est un fait historique que la forme fédérative ne fut adoptée qu'afin de conserver à la province de Québec cette position exceptionnelle et unique qu'elle occupait sur le continent américain. (Laurier, in Burelle 1995, 34-35)

And so it remains today that for French Canada, the legitimacy of Canadian federalism remains tied to "le droit à la différence des provinces fédérées" (Burelle 1995, 42, 129). The "historic fact" to which Laurier referred − that federalism is above all a guarantor of a particular outcome − has never been abandoned (Gagnon and Iacovino 2007, 89).

This is not meant to suggest that the *processes* of federalism − autonomous decision-making − are unimportant in Quebec. Rather, it is only meant to stress why so much importance is attached in Quebec to autonomous decision-making. The principle of provincial autonomy is central to the French-Canadian idea of federalism. But it exists alongside the principle of cultural difference. As Gagnon and Iacovino observe, from Canada's beginnings, "the notions of provincial autonomy *and* clearly-defined cultural groupings were already beginning to take shape as the driving forces behind federalism [emphasis added]" (Gagnon and Iacovino 2007, 72-73). In Quebec, provincial autonomy (which is allowed by the process of federalism) is not sufficient in the absence of the "cultural groupings" (the outcome of federalism) it aims to protect, and vice versa. For Quebec, federalism has a dual mandate: a process and an outcome. This federalism might, therefore, be described as having a "thick" foundation for which the Charter is seen as posing a serious conflict with the very rationales of federalism.

The extra, substantive layer to which federalism is celebrated in Quebec, has encouraged considerable scepticism amongst Québécois in the legitimacy of the Charter, because it is perceived to raise serious difficulties for provincial autonomy when exercising the powers given to legislatures under the federal

[6]See the paper by Thomas Fleiner in this volume.

system of government, as well as the provincial legislature's capacity to protect a distinct culture and identity.

In contrast, federalism in English Canada rests upon a much "thinner" foundation. What is more, this thin English-Canadian conception of the "federal idea" has not been fertile ground for the development of an English-Canadian theory of federalism, which helps explain the absence of federalism from English-Canadian discussion of the political impact of the Charter.

In English Canada, it would be historically incorrect to characterize federalism as devoid of any concern for the diversity of its constituent units (see, for instance, Azjenstat *et al.* 1999, 235; LaSelva 1996, 8-9). At Confederation, federalism was seen by some in Canada outside of Quebec as a guarantor of a process and an outcome − a "quête de liberté politique [a process] et de sécurité ou d'intimité culturelle [an outcome]" (Caron *et al.* 2006, 158; see also, Laforest 2007, 58). This view was, however, confined primarily to the Maritimes and the fringes of the Upper Canadian Reform movement (Vipond 1991, 270). Many or even most of the key Anglophone players in the early debates over federalism were less concerned about the protection of a particular outcome than with the creation of a particular process for local decision-making.

Little needs to be said about John A. Macdonald's antipathy toward both the diverse legislative processes and outcomes that federalism permits. But his was not the position of all English Canadians. For George Brown, whose coalition with Macdonald and Cartier broke the deadlock that would lead to Confederation, federalism recommended itself because it met the longstanding grievances of his Reform Party. Confederation offered not only a measure of representative reform in the central government, but also embraced the principle that "local governments are to have control over local affairs" (Vipond 1985, 270-271; 1991, 19). The idea of federalism in process terms, of allowing for local government, would be an enduring theme in English Canada. In the late 19th century, for instance, while Wilfrid Laurier insisted on the importance of diversity to the federal principle, members of the English-Canadian provincial rights movement − in Ontario, the Maritimes, and in Ottawa − expressed their concern about the central government's abuse of the federal principle in terms of self-government. In their struggles against Macdonald's desire for a more unitary state and his repeated forays into areas of provincial jurisdiction, defenders of provincial rights appealed not to the value of diversity. Instead, they underscored "the powerful connection between provincial autonomy and parliamentary self-government". As Robert Vipond observes,

> [T]he autonomists argued that to permit the lieutenant governor to use the veto power of reservation, or to view prerogative as a discretionary power, was in effect to sustain the very sort of arbitrary executive power that earlier generations of constitutional reformers had struggled against. (Vipond 1991, 47)

This same preoccupation with "autonomy" and "self-government", Vipond argues, continues to inform the English-Canadian conception of federalism (Vipond 1985, 288).

But this preoccupation with provincial self-government in English Canada provided a thin foundation for federalism, especially when compared to how federalism is understood in Quebec, where it rests on a thicker foundation of protecting both diverse processes and outcomes. Some might explain this difference as a different level of commitment to federalism. Hamish Telford, for instance, describes English Canadians as "ambivalent" about federalism, even as wanting "less" of it when compared with French-Canadians (Telford 2005, 1). But it is not a matter of different commitments to federalism, but of commitments to different ideas of federalism.

Drawing on an analogy with the political philosophy of Charles Taylor is illustrative. Taylor argues that a fundamental difference between Quebec and Canada outside of that province can be found in their respective answers to the question "What is a country for?" One such difference, Taylor submits, involves different ideas of liberalism (Taylor 1993). Outside Quebec, a more procedural form of liberalism prevails. To the extent that a country should endorse a conception of the "good life", for Canadians outside Quebec, it should only be that everyone should be able to pursue their own conception. In Quebec, by contrast, it is "axiomatic" that the protection and promotion of the French language and culture is a "good" worthy of common pursuit, even if not everyone in the society sees the value in that good. But, according to Taylor, this is no less liberal than the procedural model. Rather, it is a choice to live according to a different, yet equally legitimate "communitarian"[7] brand of liberalism (Taylor 1993).

But we can just as easily ask, "What is federalism for?" According to the preceding, as with Taylor's different forms of liberalism, federalism in the English-speaking provinces is valued for its procedural qualities. It protects a particular process, which allows provincial societies to pursue their conception of the good life unhindered by the national majority. But it takes no position on what that good life should be − it is not concerned with the outcome of the process. Although federalism qua process, which is at the heart of the English-Canadian idea of federalism, can generate diversity (Tully 1995, 140-141), the point of having a federal society has less to do with producing outcomes that are different than it has with allowing provinces to pursue their own objectives (within the logic or reach of their enumerated powers). Contrast this English-Canadian commitment to procedural federalism, with the understanding of federalism in Quebec, where both the processes and outcomes of federalism are highly valued. Not only is provincial autonomy and local decision-making jealously guarded in Quebec, but so is the outcome associated with federalism – the preservation and promotion of diversity – and it is considered an essential reason for having joined (and remaining in) Confederation.

Like Taylor's variations on liberalism, these procedural and substantive versions of federalism cannot be quantitatively ranked. Canadians outside of Quebec are not necessarily less committed to federalism. They may simply be committed to a different brand of federalism. Although a thin, procedural

[7]The term "Communitarian liberalism" is not used by Taylor himself, but has been used to describe his work (Bickerton, Brooks, and Gagnon 2006, 91-118).

understanding of the "federal idea" should not necessarily be equated with a lack of interest in federalism itself, the lack of a deeper, substantive commitment to the different rationales for federalism obviate tensions inherent in the relationship between federalism and the Charter. The thin foundation for how English-Canadian provinces view federalism has both discouraged English-Canadian scholars from elaborating on a meaningful theory of their federalism and has encouraged English-Canadians to be relatively indifferent about the tensions between the Charter and federalism.

This indifference stands in stark contrast to how the relationship between the Charter and federalism is viewed in Quebec where it is seen as inconsistent with both.

THE LEGACY OF A THIN UNDERSTANDING OF FEDERALISM WHEN ASSESSING THE CHARTER

A puzzle arises from this attempt to articulate and understand the different treatments of federalism in the respective literatures in Canada: *Why is the Charter not considered more of a threat to federalism in English-speaking Canada?*

One of the reasons for choosing a federal system for the English-speaking British colonies (as it was for Quebec, or Canada East as it was then known) was its guarantee of local decision-making. This interest in protecting local decision making remained in place after Confederation. Recall the provincial rights movement of the late 19th century, where appeals to parliamentary sovereignty were invariably tied to the "federal principle" and emphasized the principle of "provincial autonomy".

One would expect that this concern would have persisted and would have influenced evaluations of the Charter once it was adopted. But, as discussed above, references to federalism or provincial autonomy have become conspicuously absent in the English-Canadian scholarship. Appearing instead have been concerns about the impact of the Charter on democratic governance. Clearly something has happened in terms of the importance attached to provincial autonomy in the English-speaking literature. More important, at least for the purpose here, is what has not happened. English Canadians have not felt the need or desire to develop a clear or comprehensive theory of federalism; at least one that confronts the implications of the Charter for the rationale and operation of federalism.

Perhaps the explanation for this is no more complicated than the fact that a thin, procedural understanding of federalism, which emphasizes the powers or jurisdiction of a legislature rather than the purposes or outcomes that justify or necessitate this power, does not make for a good theory. In a different context, Robert Vipond has raised this same issue. The leaders of the English-Canadian provincial rights movement of the 19th century may have been successful in their use of the principles of federalism and provincial autonomy to fend off John A. Macdonald's centralizing vision. But they never really explored what was meant by these principles. By portraying provincial autonomy as a "fundamental

principle", the movement was not forced to explain "*why* provincial autonomy should prevail; it had merely to show *that* it was threatened". As a result English Canada has inherited an under-developed understanding of federalism, with little to say about the ways in which federalism related to "the harder questions of liberal democracy" (Vipond 1985, 292).

By contrast, the thicker substantive version of federalism in Quebec – built on a process and geared toward a particular outcome – provides more insight into why provincial autonomy is valuable. It is not simply an important end to promote, but is also a means to an end. Thus, when autonomy is threatened, it opens a debate that provides meaningful answers to the question of "why autonomy?"

The relatively thin foundation on which the provincial rights for English Canada was based has had lasting implications for the understanding of federalism, not the least of which is that it has left federalism amenable to the winds of political change. While Quebec politicians relied vigorously on the principle of autonomy to reject federal incursions in areas of provincial jurisdiction in the first half of the 20th century (Telford 2005, 2-3), English Canadians welcomed those same initiatives as a corrective for flaws in distribution of powers in the federal system, which had hindered the development of responses to emerging needs. Similarly, in the 1960s, when English-Canadian scholarship came to define "federalism as intergovernmental relations", the focus remained on the institutional aspects this concept evoked, "rather than on federalism as political theory" (Simeon 2002, 12). Thus, despite the fact that this generation of English-Canadian scholars was inclined to view provincialism and regionalism more favourably than its predecessors, the thin process-driven view of federalism meant that federal incursions through the second half of the 20th century were not considered as problematic as they might otherwise have been (and were in Quebec) (Simeon 2002, 12). The conception of federalism in English Canada continues to reflect an atheoretical, process-oriented focus on legislative power, which results in little consideration for the relationship between federalism and larger constitutional questions; specifically, the relationship between federalism and the Charter. This lack of a theoretical grounding for English-Canadian federalism, then, predates the Charter. The Charter did not generate the lack of interest in developing a federal theory.

In fact, if there is a cause-effect relationship between a lack of federal theory and the Charter in English-Canadian provinces, it is likely the other way around. That is, a lack of a strong federal theory might explain not only why English-Canadian scholars seem relatively unconcerned with the effects of the Charter for federalism, but also why they have been so taken with the Charter. A constitutional identity built on thin, procedural understanding of federalism is relatively easily displaced by the promises and rhetoric of pan-Canadian rights. Thus, in many ways, the Charter filled a void in English Canada. It provides for Canada outside of Quebec "a common reference point of identity, which can rally people from many diverse backgrounds and regions" (Taylor 1993, 161). If English Canadians had had a strong theory of federalism, likely connoting a strong sense of provincial community, perhaps they would not have required this common reference point to rally Canadians together. This is most certainly the case for Quebec, where federalism itself has provided the common reference

point. For the Québécois, the way of belonging to the Canadian community is by their belonging to a constituent element of it (Taylor 1993, 182). The Québécois constitutional identity is tied to federalism, which is precisely why the impact of the Charter is considered so problematic. In the rest of the country, where the thin federalism has prevented the emergence of a strong theory of federalism, the Charter does not offend the English Canadian sense of self. Moreover, had there been a stronger theory of federalism, the Charter's potential to lead to uniform legislative outcomes might have generated more concerns about its capacity to undermine provincial autonomy. But the Charter debates in English Canada at the time of its adoption were remarkable for the lack of concern about its impact on the principles of provincial autonomy or diversity (Romanow, Whyte, and Leeson 1984, 216-220; LaSelva 1983). Little has changed. Concerns are expressed in English Canada not in the language of federalism, but in the language of democracy and parliamentary sovereignty.

CONCLUSIONS

The discussion offered here of how Québécois and English-Canadian literatures address the relationship between the Charter and federalism reveals the following. The ambivalence or lack of concern amongst English-Canadian scholars for the Charter's impact on federalism can be explained by a thin, procedural commitment to federalism, which focuses more on jurisdictional issues, and the powers federalism authorizes for provincial legislatures, than on the rationales for federalism itself. But this has provided neither fertile ground for a comprehensive theory of federalism to develop nor a context for suspicion about the Charter's potential to undermine provincial autonomy or lead to uniform social policies that undermine provincial diversity. In contrast, the much deeper commitment to federalism in Quebec, and the important link between its rationales and the objectives and purposes of the Quebec state, ensures that these tensions are perceived to be both more acute and serious.

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10

Constitutional Underpinnings of Federalism: Common Law vs Civil Law

Thomas Fleiner

La communauté internationale a contribué depuis quelques années à la création de plusieurs fédérations, qui restent toutefois relativement instables. Parmi les nombreuses raisons de cette instabilité, l'auteur relève la tradition de droit civil à laquelle appartiennent ces nouveaux pays. Selon qu'ils sont issus du droit civil ou de la common law*, les régimes fédéraux doivent en effet être établis différemment en ce qui a trait à leur système judiciaire, au rapport entre la fédération et les unités fédérales et même au concept fondamental de l'État. Les spécialistes des constitutions fédérales applicables à ces cas doivent ainsi comprendre que la légitimité d'un État est beaucoup plus étroitement liée au concept de nation, que la constitution d'une fédération doit s'élaborer en lien avec celle des unités fédérales, et que la répartition des pouvoirs doit prendre en compte le fait que plusieurs questions de droit civil et criminel dépendent dans les pays de* common law *du partage des pouvoirs du système judiciaire, alors qu'elle relève dans les pays de droit civil de la répartition du pouvoir législatif entre la fédération et les unités fédérales.*

INTRODUCTION[1]

In recent years the international community has contributed to the creation of several federations such as Bosnia and Herzegovina, Iraq, Sudan, Somalia, Congo and other states threatened by conflicts. However, the federations created by the international community have not been very sustainable thus far: they

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[1]In this paper, the term "federal units" refers to the governments of the constituent units (e.g., provinces, cantons, Länder, states) and "government branches" refers to the executive, legislative and judicial branches or functions.

function only under the supervision of the United Nations or the United States and its Coalition of the Willing.

These failures have many different reasons. One of them, not to be underestimated, has to do with the fact that in many instances the experts drafting these constitutions have had their roots in the tradition and legal culture of common law, whereas the country they were dealing with was rooted in the tradition of continental civil law. For example, Bosnia and Herzegovina are clearly grounded in the civil law system. And even though Iraq has sometimes been under British rule, its main legal tradition and culture is that of the Ottoman Empire and thus much more linked to the tradition of civil and religious law.

Constitutions for federations in the civil law tradition are not likely to be well served by frameworks devised from common law traditions. For example, the distribution of legislative powers for those federal constitutions drafted at conferences in, for example, Dayton, Ohio, or Amman, Jordan, do not recognize the distinction between civil and criminal law. Nor do they refer to laws with respect to procedure, which are an important part of the assignment of powers in a federation based on the civil law tradition.

Accordingly, the main purpose of this paper is to demonstrate analytically that constitutional architects need to be aware of whether they are dealing with a common-law or civil-law federation. Ron Watts has become the global expert on federalism and in this capacity he has advised many governments with regard to drafting federal constitutions. He is one of the very few political scientists who is fully aware of these issues. Thus, I am happy to be able to contribute to this volume in his honour with some legal perspectives relating to the differences between those federations in the civil-law tradition and those steeped in common-law.

Although both legal systems are committed to the constitutionalism of modernity, their respective divergence is much more fundamental than one might imagine. These different legal frameworks have important consequences for the different structures of these federations. At the same time, the paper will also recognize the tendency for the merging of these systems under the influence of globalization.

When comparing different systems of common law, one has to be aware that common law developed differently in its two main historical places: the United Kingdom, with no written constitutional document, and the United States with its federal constitution. In terms of the latter, the U.S. Supreme Court, with its power to review the constitutionality of statutes, has added many new principles and thus served to modify some of the traditional common law concepts. Moreover, the Founding Fathers of the United States certainly developed a most original and unique concept for a federal system in 1789. Indeed, in the over 200 years since its birth, the U.S. federal system has influenced virtually all of the currently existing 24 different federations, notwithstanding their different legal cultures and traditions.

With regard to the continental civil law system, the ensuing analysis will focus mainly on the French concept. The French system has influenced the fundamentals of administrative federalism followed in continental federations

such as Germany, Austria, Switzerland and even within the European Union itself.

THE STATE AND ITS LEGITIMACY

Nation and Legitimacy

If one were to ask to whom do Canada, the United States, France or Germany belong, one would get many different answers. Countries colonized by peoples from other continents may give a totally different answer than countries where the peoples are historically rooted in a given territory. But even within colonized countries the answer of peoples belonging to indigenous nations will be very different with those of the settler peoples.

The question itself might even be challenged. Would an American, Canadian or British citizen even ask such a question? Probably not, since it presupposes that the state is an object which can belong to someone. Canada, the United Kingdom and the United States are not states that belong to anybody. However, in France the answer will likely be different in the sense that France is thought of as belonging to the French Nation. The Germans would answer that Germany belongs to the German people. What does this mean with regard to federations and federalism? The German and the French answers aim at the collectivity of the nation or the people as the bearer of the sovereignty of the state. The nation emerged from the "big-bang" of the French revolution, and it serves to legitimize the state, its laws and its justice.

Our purpose here is not to look into the different concepts of nation and people. However, what is important for the understanding of federalism is the fact that in the civil law tradition influenced by the French revolution the state is considered to be the result of the collective will of the people or the nation. If one considers the state as a higher being with a higher value than just the added sum of its individuals, the state then becomes the unaccountable authority; in fact, it becomes the fountain of law and justice.

How can such a state be fragmented into several federal units? The answer is that this is only possible if the state is conceived as composed of different units (either homogeneous or further divided into different municipalities). These different units belong to different nations, as in the Ethiopian Federation. The federation represents a "composed state" or a "composed nation". That would be the Swiss or Belgium answer to this question. On the other hand, the German and Austrian answer would be that the unity of the state is not questioned by the federal structure. The federal units are mere decentralized parts of the one people, which is the German people. Federalism is but an additional tool to limit the powers of the central government.

The common law history has never been confronted with a revolutionary body such as the French National Assembly which needed a new legitimacy in order to justify its revolutionary will. The Glorious Revolution of England, from this point of view, was not comparable to the French Revolution. In the French case, the bearer of legitimacy for a new revolutionary state was found in the

collective body of the French Nation composed of equal individual citizens. This body became the source of the new law which had been issued by the national assembly. Thus, there was a clear break from the former law developed by the crown and the courts, and the beginning of a new era and law enacted only by the legislature.

In common law history, the legitimacy of the courts came from the crown which was later replaced by the rule-of-law principle that men are ruled by law, and not by men. The various branches of government did not need to have legitimacy within the nation as bearers of sovereignty. For this reason the fragmentation of the state into different federal units under a common law framework does not fundamentally call into question the legitimacy of the unitary nation, as would be the case in a civil law framework. Within the civil law conception, a real federation has to accept the principle of a composed nation fragmented into different federal units as is the case in Belgium, Ethiopia and Switzerland. The German and Austrian federations are but political instruments for an additional separation of powers but are not a new concept of fragmented legitimacy.

Therefore, if one intends to re-structure a unitary state into a federal state within the civil law system, one has to provide a basis for the legitimacy not only of the federation but also of the different federal units including their local governments.

The State: An Instrument to Change Society?

The conception of the state as a unity is different in systems belonging to the common law tradition than those belonging to the civil law tradition. In the common law tradition, the state is seldom seen as a collective unit, whereas in the civil law tradition the unity or essence of the state is the main legitimizer for the constitution of a state. In the common law tradition, the function of the various governmental branches is to mediate among conflicting interests. According to civil law, however, the state has the function to steer and direct society, i.e., the state not only has to moderate but to guarantee the engineering of the society for the purpose of justice.

The civil law tradition is strongly influenced by the ideals of the French Revolution, including further elaboration by Napoleon. Accordingly, the state is envisaged as an instrument to be used to transform a feudal society into a liberal society with equality and justice. The state thus has the responsibility to determine and implement the common good and common happiness.

Federalism and multicultural societies

One can readily admit that federalism, within this civil-law conception, is much more difficult to implement than in a common-law system. The latter only deals with creating governmental branches as instruments for moderating power and not with legitimizing the power of these governmental branches. This leads to a critical point. Multicultural federations embedded within the civil law culture will have to empower their constituent units to develop the culture and identity

of their nation or nations. The federation can only be integrated on the basis of the co-existence of the different cultures fostered at the level of the constituent units.

Different cultures of multicultural societies within common law systems need not be fostered by either the federal states or by the federal units. The state as moderator has only the function to manage peacefully the various conflicts within the society. The state itself is not the foundation for the identity of these different cultures. Thus, confronted with the issue of multicultural societies, the common law tradition provides no adequate solution. Instead, federalism tends (more) to be a way towards secession of the different nations rather than an instrument to integrate different nations. The challenges associated with the religious diversity of Nigeria and with the reluctance of Sri Lanka to adopt federalism may be explained by this basic view of a common law system which in general bans culture and cultural identity from politics.

Layers of government

In the civil law tradition, one uses the word "state", whereas in the common law tradition the lawyers would prefer to use the word "government". The government, according to the understanding of the common law, does not have the function to "change and to engineer" society, but only to moderate conflicts among the different social groups in order to harmonize society. Thus, if the governmental branches are not only horizontally separated but − as in federations − also vertically divided, their legitimacy is not at stake. But, in the civil law concept, if federal governments or local governments have to be installed, they need first to be embedded in a unit that can legitimize their power and which has to determine the geographic and political borders within which the government has the power and the responsibility for engaging in "social engineering".

Thus, in the common law tradition it is much easier to conceive of two or even three layers of government, since their role is to moderate among the different social groups operating within their own jurisdiction.

In a civil law system, however, the concept of two levels of government raises some difficulties. The state as an instrument to change society requires, in principle, a centralized power which does not allow decentralized legal concepts. For this reason France (and Napoleon) could not come to terms with a conception of federalism that would run counter to the civil law conception of the state as a sovereign, central, unitary and indivisible unit.

Second class states

As a result, many French scholars view a federal state as a second class state. In the famous decision on the breaking up of the former Yugoslavia, the arbitration court of the French president (Badinter) of the constitutional council justified the right of self-determination of the Yugoslav Republics on the basis that a federation blocked by the conflict among its different constituent units is in a status of dissolution. On this reasoning, the various federal republics had an original and initial right of self-determination. Such arguments are only possible

within a concept of the state that considers a federal state as a second class state compared to a unitary state.

How, then, can one conceive of a federation with different constituent units attempting to achieve different goals for changing the society. Such a concept is only possible if one accepts the idea that a state has different societies (such as the Swiss Federation) which, in turn, must address the needs of their distinct social groups differently. This may also explain why civil law federations that are not composed of different societies (such as Germany and Austria) are strongly centralized federations which deliberately delegate mainly administrative (as distinct from legislative) powers to the federal units. The political complexity of the Belgium federation can be explained because in this case the borders of the social units and their unity (e.g., Brussels) composing the federation are overlapping. On the other hand one might understand that the strong centralization of Russia under President Putin falls within the tradition of the Napoleonic idea that the state is the instrument for changing society.

THE CONSTITUTION AND ITS FUNCTION

Constitution Making

The role and processes of constitution-making for a federation are far from obvious. According to the democratic principle, the constitution-making power belongs to the people based on their right to self-determination. But when constitutions have to be framed for federations, the most difficult issue will be: which peoples are relevant. Should the peoples of the constituent units have the power to make the federal constitution, or should there be a role for the federal people overall as well as the peoples of the constituent units?

In the civil law tradition, a constitution does not only constitute or create the governmental branches of the new state, but it also constitutes the unity that is the state. If this is the case, then the question to be solved will be: which entity creates the units of the federation? Is it the overall federation or the federal units themselves out of their right of self-determination? In the case of a federation made by supra-national centralization, such as the European Union, the question is: is this new unit to be created by the member-states or by a European People?

Most of the federal constitutions that have emerged within the common law tradition have been primarily established out of the British colonial power. From where did the constitution making power originate? Did it come from the Westminster traditions or out of a war of independence? Although the American Confederation came out of the Declaration of Independence, it created the federation out of the independent members of the subsequent confederation. In such situations the constitutions were either based on the legitimacy of Westminster or on revolutionary instruments legitimized by a war against the colonial power.

In civil law countries new constitutions have arisen out of sovereign states which created a new state entity and not just a federal government or, as in the

case of Belgium, the central state created new federal constituent units in order to establish a new federal constitution.

The difficulties with regard to the European Union Constitution can be seen precisely in this context of the differing ways of viewing the constitution. A consensus may be found for a better functioning of the different governmental branches of the European Union, but not at all with regard to the constitution of the federation as a new state entity.

In the common law tradition, the constitution has the function of limiting the powers of the governmental branches. Thus the creation of a new entity is not at the core of the issue. Looking at the new historical examples of Bosnia and Iraq, one would have to admit that the issue of the creation of the new Bosnia and Herzegovina or of the constituent units in Iraq was not the main focus of the negotiation. This is understandable from a common law point of view, but not from a civil law point of view.

Is the Role of the Constitution to Limit or to Empower Government?

Linked to the different concepts of the state are also the different conceptions of the constitution itself. In the Anglo-Saxon world, the main purpose of the constitution is to limit governmental powers. The Lockean idea of the rule of law is based on the concept of inalienable rights which can only be protected if governments installed by the social contract are limited by their constitutional powers. The constitution thus does not empower governments: rather, its main function is to limit the powers of the government. The constitution thus has to separate the powers of all governmental branches. The main function of the third branch of government (the judiciary) is to guarantee that men are ruled by law and not by men. Hence the constitution has only to guarantee that the court is not limited with regard to this function in regulating the other branches of government.

In federations, this system of horizontal checks and balances of governmental powers is supplemented by a system of vertical checks and balances. The main function of the federal constitution and the horizontal and vertical separation is to limit governmental powers and to provide a system of checks and balances. Federalism thus constructed can be viewed as a further instrumentality to protect the liberty of persons.

On the other hand, constitutional perceptions can also be based on the idea that the constitution at the same time empowers as well as it limits governmental powers. Constitutions can create constitutional liberties and provide for their protection by courts and by the institutional system of checks and balances. Since the French Revolution, constitutions have also been seen as the instruments implementing state sovereignty and, thus, as the source and the fountain of justice and the legitimate legal system of the state. The law is not given by courts and their historic wisdom over the generations; rather, the law is made by the legislature and has to be applied by the courts.

To empower the different governmental branches, a constitution not only has to provide for checks and balances of the governmental branches, but also

has to decide what function and powers each of these branches will have. In the common law tradition each branch has its own prerogatives according to its function as executive, legislature or judiciary. In the civil law system the constitution has to clearly define the different powers of the legislature, executive and of the judiciary. Only common law countries such as New Zealand and Israel could and can still afford to be states without a written constitution. A constitution is not needed because state sovereignty is not at stake. Moreover, functions of the different governmental branches need not be determined by the constitution because their prerogatives are self-evident so that there is no need for constitutional empowerment to execute their powers.

When one sees the constitution as a document which installs the state and the powers of the government, it follows that there must be only one constitution that has the power to create governmental competences. The consequence of such a constitutional perception is that the powers of the constituent units flow from the federal constitution. Federations can either provide a residual power for the federal units or define the powers of the local units. In any case, if it is the federal constitution's role to determine this, the federal constitution can also be changed and this means that the local powers can be eroded or taken away by centralization. In sum, the governmental powers of the constituent units are also empowered by the federal constitution.

This is probably the reason why continental legal scholars question whether the federal state can be a state with divided sovereignty, as advocated by Madison in the Federalist Papers, or whether, legally, only the federation is sovereign because ultimately only the federation as an entity can legally modify the constitution and thus take powers away or give new powers to the constituent units by constitutional amendments.

This may also explain the European debate around the issue of the constitutional design of the European Union. Were the main function of the constitution to be only to limit governmental power, then a constitution for the European Union would not be a problem. If, on the contrary, the constitution empowers governments, then the constitution becomes a real problem as a concrete challenge to the already existing national sovereignties. This problem cannot be avoided even by requiring unanimity for constitutional amendments or by providing a unilateral right to secession. The label "constitution" carries with it the idea that the European Union, empowered by the constitution, would become a new federal state.

There are federations in the common law tradition, such as in India, where the constituent units do not have their own separate constitutions. However, in the civil law tradition a constituent unit needs to be constituted by a constitution which is the original source of law for the constituent unit. As long as constituent units do not have their own constitutions, e.g., as in the regions in Spain, there is legally not a real federation but only a highly decentralized unitary state. This is so because, legally, a government of a constituent unit needs to be empowered and constituted by its own constitution.

Distribution of Powers: Legislative Vacuum

One of the most important differences between a common law country and a civil law country can be seen in the law-making power. The making of laws is shared in a common-law country by the courts and the legislatures. The development of the "common-law proper" belongs to the courts, while similar regulations are dealt with in civil law countries by the legislature. According to the common law tradition, courts can decide on controversies if there is a writ and thus a remedy to go to the court. Based on these powers courts have, over several centuries, developed principles governing civil law, family law, and criminal law as well as principles of procedure for trials with or without a jury.

In civil law countries there are no traditional powers of the courts. The courts can only decide on the basis of legislation. The legislature has to decide what behaviour is to be prohibited by criminal law, how private parties contractually can create mutual obligations, and what are the rights and obligations of parties within the trial before a court.

Thus, if one looks into the federal constitutions of civil law countries they contain several provisions providing for the distribution of legislative powers with regard to the traditional civil law and criminal law as well as with regard to the power of the courts and the criminal law and civil law procedures. In many federations such powers are granted to the federation. This is now even the case with regard to procedural law in Switzerland since the new constitution of 1999.

If common law experts educated by the common law tradition draft federal constitutions for states with civil law traditions, they need to be particularly careful about the assignment of powers. For instance, with regard to the distribution of federal and regional powers, the draft for a federal constitution to decentralize Iraq cannot simply follow the American model of assigning the residual powers to the constituent units, with only the federal powers being explicitly assigned. This raises consequential issues when it comes to creating federations via decentralization within former civil-law nation states. How will the new federal units exercise their residual powers when they have never been states? Such a system may create a dangerous vacuum of legislative regulations in a civil law country federalized by decentralization. In this context, it is important to note that the draft of the Iraq constitution is silent on the issue of the power of the central legislature to enact legislation belonging to the common wealth. Of course it might be evident that these issues will be decided by existing religious laws. Will this also be the case for the Kurdish area? From my perspective at least, it seems that such issues should be regulated within the constitution.

Empowerment of Local Governments

In a common law country the local governments of the constituent units need not be installed by their own constitutions. This follows because the main purpose of the constitution is not to empower the branches of government but, rather, to limit their power. In other words, a federal constitution can function both as a limit to the federal branches of central government as well as to the

branches of the constituent units. The courts will always have the power to fill this vacuum. In addition the traditional concept of prerogative powers of the executive might also be helpful. Based on these powers the executive of a constituent unit can function without the setting out of precise constitutional powers in their own constitution.

In a civil law country, however, the executive cannot function if there is no valid constitution determining the powers of the executive. Thus, if a constitution of a former unitary state is intended to federalize the country it must be complemented by specific constitutions establishing the powers of the governmental branches of the constituent units. The constitutional design of a newly federalized country thus needs to be supported by additional transitional regulations determining the constitution making power of the constituent units and regulating the powers of their governmental branches.

THE LEGAL SYSTEM

The Judiciary and the Administration of Federal Law

Unitary or parallel legal systems

The common law tradition has a continuous historical development going back to the early court decisions of the Middle Ages. Thus it is the repository of the accumulated court wisdom of centuries. One of the main features of common law is to be seen in the fact that the law evolves mainly from court decisions which, in turn, depend on decisions in different jurisdictions (and even in different countries).

The civil law tradition has its roots in the French revolution and in the sovereignty of the national assembly as the only or at least the supreme law-maker of the state. Civil law is thus not only the law mainly made by the legislature: it is also considered as a united pyramid in which the higher law controls the hierarchically lower law. The unity of civil law is not characterized by court decisions but by the unity of legislation promulgated under the constitution.

Within such a system, the double jurisdiction of the American system, with federal courts and state courts independently deciding on federal or state law cases, is inconceivable. Laws made by the legislature are considered as a united whole which has to be applied by the executive and by the courts loyal to the legislature. Therefore, in civil law countries all law is applied by the same courts be they federal or courts of the constituent units whose decisions can be appealed to the federal court.

This is the basic reason why in civil law countries federal laws are usually applied or administered by the administrations of the constituent units. Civil law systems cannot implement a dual federalism as in the United States. Parallel legal systems are contrary to the principle of unity and hierarchy in the civil law system. Therefore, a civil law federation cannot have distinct court systems and

jurisdictions. The federation is legally composed only by the legislatures of the federation and of the constituent units.

Independence of the judiciary

The independence of the judiciary has always been a much more important issue in civil law countries than in common law traditions. This factor has had important consequences for the federal structure and in particular for the second chamber in Ethiopia. Unlike the case in most federations, this second chamber has no legislative powers. Its function is rather to mediate conflict situations, to promote self-determination and, in particular, to interpret the constitution with regard to the division of powers between the federation and the states. Such a quasi judicial function for a political body would probably never be introduced within a federation embedded in the common law tradition. Being part of the civil law tradition, however, Ethiopia can entrust the second chamber with a judicial function.

Legal Dualism of Civil Law Countries

To understand the concept of federalism within a civil law tradition one has also to understand the specificity of the public law concept in the civil law tradition. It was Napolean who literally invented the so-called public law. What was his intention in doing so? Napoleon considered the state as an instrument to change society. In his view, the state would only have the capacity to perform such a function if the civil servants were not dependent on the traditional, conservative courts and judges. In order to make the administration "immune" from the intervention of the traditional conservative courts, he conceived the public law as a new legal category, distinct from the private law and also excluded from the jurisdiction of the traditional courts. The administration authorized by public law became the only legal authority in France empowered to control the administration. This concept of public law was introduced, with some modification, by Germany and other countries influenced by Napoleon.

Within this new system of public law, legislation could be implemented under the control of the hierarchy of the administration and the political executive. It was only at the end of the 19th century, under the guidance of the French Council of the State, that some court control did develop. Thus, the principle of the rule of law that men are ruled by law and not by men only gradually entered into the exercise of public administration and public law.

This concept had several important consequences with regard to federalism. First, the power of administrative courts has some important limits with respect to the execution and implementation of federal law as it relates to local authorities. The only writ available is an appeal against an administrative decision. In response to such an appeal, the courts can only quash the decision they cannot issue a new decision, nor can they enforce the enactment of a new decision. Any activity (or failure to act) by the administration is usually exempted from the jurisdiction of the court. Courts in the civil law tradition have no power of contempt of court and thus can never enforce their judgments with

regard to the administration. Therefore, the possibility of the courts compelling constituent units to implement central obligations is almost non-existent. The common law power to implement court decisions by contempt-of-court rulings (which would allow a judge to enforce federal law against constituent unit administrative officials resisting federal obligations) does not exist under civil law.

Second, the common law writ of mandamus (which has been developed precisely for the implementation of central law with regard to local authorities) also does not exist in civil law systems.

Third, for these reasons civil law federations need to examine carefully which roles and powers they assign to central authorities in allowing them to enforce central law on constituent units.

CONCLUSION

Experts giving advice with respect to constitution making and the introduction of a federal system in a civil law country should take into account the following specifications:

First, they will need to define the nation or the nations which will be the future units and bearers of governmental legitimacy, since there must exist a legitimization of their powers as well as a determination of their geographical and political borders.

Second, beyond defining the nation or nations in a federal constitution, expert advisors will have to pay attention to constitution making for the constituent units. In particular, they must recognize that one cannot apply the conception of a constitution that has absolute power to create governmental competences as in the common law tradition.

Third, they have to decide on the precise distribution of powers to all the different levels of government, which is often not necessary in the traditional common law. Moreover, they have to determine the powers of the federal governmental branches, to provide for the enforcement of federal mandates within constituent units, and to think carefully about the design of the jurisdiction of the courts at the federal and constituent levels because the courts can only quash decisions and not oblige activities or failures to act.

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Can Federalism Have Jurisprudential Weight?

Cheryl Saunders

Cette étude soulève un paradoxe dans la conception et le fonctionnement des fédérations. D'une part, presque toutes les fédérations habilitent leur système judiciaire à interpréter et à mettre en œuvre une Constitution écrite pour régler les différends sur la répartition des pouvoirs entre les sphères du gouvernement. D'autre part, on observe dans de nombreuses fédérations ce qui semble être une tendance du contrôle judiciaire à favoriser à long terme le pouvoir central. S'appuyant sur le cas de la fédération australienne, l'auteure tente d'établir dans quelle mesure cette tendance s'explique par la rareté des doctrines établies par les tribunaux des fédérations en vue d'interpréter le partage constitutionnel des pouvoirs. Concernant l'Australie, elle soulève la question bien connue voulant qu'en matière d'interprétation et d'application du partage des pouvoirs, le contexte fédéral de la Constitution soit expressément rejeté au titre de considération de jurisprudence, puis elle explique comment ce phénomène et ses doctrines connexes ont favorisé l'extension de fait des pouvoirs du Commonwealth. Or, soutient l'auteure, cette approche des questions touchant la répartition fédérale des pouvoirs est désormais incompatible avec d'autres approches interprétatives de la loi mais aussi d'autres parties de la Constitution. Indépendamment de son incidence sur le fédéralisme, l'approche interprétative de la répartition des pouvoirs en Australie a aussi une incidence sur la cohésion de la législation du Commonwealth ainsi que des répercussions sur la primauté du droit. En conclusion sont proposées certaines mesures susceptibles de crédibiliser la jurisprudence en apportant des modifications même mineures à l'approche judiciaire. Bien que son analyse soit centrée sur la situation de l'Australie, l'auteure soutient que l'efficacité du contrôle judiciaire quant au règlement des litiges en matière de pouvoirs mérite d'être prise en compte dans l'établissement des nouvelles fédérations. Et pour approfondir la compréhension des problèmes et possibilités de la jurisprudence du fédéralisme, elle préconise que d'autres études nationales soient produites sur la question.

THE ROLE OF COURTS IN FEDERAL SYSTEMS

All definitions of federal systems of government require a division of powers of some kind between at least two spheres of government in a way that gives each a degree of autonomy.[1] Institutional arrangements for federal systems typically include a Constitution, by which the division of power is prescribed and arrangements for judicial review, through which the Constitution can be enforced.[2] At the same time, however, analyses of the operation of most federations point to inexorable expansion of central power, through judicial decisions and by other means. In the case of the oldest and most famous of all federations, the United States of America, the courts have largely, although not entirely, abandoned the task of enforcing the federal division of power against the central sphere of government (Barnett 2007).[3]

My contribution to this volume to honour Ronald Watts, who has done so much to assist understanding of federation as a contemporary form of government, is prompted by this apparent inconsistency between the theory and practice of federal government. The gap is significant, not only for existing federations, but for the institutional design of developing federations.

In this chapter I assume that federations have courts that take seriously the task of resolving disputes about the meaning of the Constitution. This assumption underpins my focus on the reasoning of the courts and the legal principles they develop and apply. I acknowledge that there may be room for argument about the extent to which judicial reasons sufficiently reflect the basis on which particular choices are made. Nevertheless, courts are assigned a key role in most federations and their published reasons are critical to their accountability for the performance of that role. The jurisprudence that emerges is an important dimension of such federations that merits understanding and analysis in its own right.

A tendency of courts to favour central power in disputes about the meaning and application of the constitutional division of power might be explained in at least three ways. First, over time, judicial review can not and perhaps should not impede the expansion of central power, because of the greater perceived legitimacy of the sphere of government representing the people organized nationally, the greater perceived efficiency of the exercise of power centrally,[4]

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[1]There is of course more to a federal form of government than a division of power (Aroney 2006, 2).

[2]Switzerland is an exception, where "the referendum becomes the adjudicative process for ruling on the validity of federal legislation" (Watts 2008, 158-159). Ethiopia is another, where the second chamber of the legislature, the House of the Federation, has final authority to interpret the Constitution and resolve constitutional disputes, drawing on recommendations of a Council of Constitutional Inquiry (Articles 82-84).

[3]What Kincaid (2008, 19) has described as the Supreme Court's "federalism sputter" in the last decade of the 20th century proved highly controversial and did not last.

[4]This consideration may become more pressing over time, in the face of increasing mobility within the federation, affecting the ability of sub-national governments to deal with spillovers and externalities.

or a combination of the two.[5] If this is correct, it undermines one of the central premises on which federal systems of government are based.

A second possible explanation is that effective judicial review of a federal division of power depends on other aspects of institutional design. One of the most obvious of these is the form of the division of power itself and in particular the presence or absence of an exclusive list of sub-national powers as a textual brake on the expansion of powers assigned to the centre. Other potentially relevant design features include the constitution of the court with final responsibility for constitutional interpretation and in particular the sufficiency of its independence from both spheres of government[6] and the willingness of the elected branches of government, for whatever reason, to respect the restrictions of the federal arrangement. The hypothesis that the effectiveness of judicial review depends on factors of this kind has implications for the structure of federal systems of government and suggests that generalizations about a division of powers and judicial review may be insufficiently prescriptive.

A third possibility, which I do not suggest is exclusive, is that a pattern of judicial decisions that consistently favours central authority reflects a failure on the part of the courts to develop approaches to the interpretation and construction of federal constitutions that enables them to give weight to federalism as a constitutional principle without unduly inhibiting the capacity of the federated state to manage the complexity of divided power and to adapt to changing conditions. Such a shortfall in judicial doctrine might be attributable to the relative novelty of the idea that federalism is a constitutional principle that merits protection, in contrast to questions of rights or separation of powers, for example. It might also reflect the preconceptions of a previous era when, in Ron Watts's words, federations were viewed "as simply an incomplete form of national government and a transitional mode of political organization…" (Watts 2011, 19). This hypothesis raises the question whether it is possible to identify doctrines that allow a more nuanced approach to the judicial resolution of disputes over a federal division of power.

This chapter is concerned with the last of these possible explanations of the shortfall between federal theory and practice in relation to judicial enforcement of the federal division of power against the central sphere of government. In other words, it asks whether progressive centralization of power in federal states, with the imprimatur or acquiescence of constitutional courts, can be attributed in part to the failure of courts to develop doctrines that take the federal character of the polity adequately into account and, if so, whether alternative doctrines can be envisaged that might enable courts to play a more effective role.

In this chapter, I explore this question in relation to one federal country, Australia, in which the effective reach of Commonwealth constitutional power

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[5]A related argument, with which this chapter is not directly concerned, but which also has implications for assumptions about federal design, challenges the legitimacy of judicial review of federal constitutions (Stone 2008).

[6]For an argument questioning the effectiveness of judicial review largely on this basis, see Bzdera (1993).

has expanded over the course of more than 100 years. Australia is chosen in large part because it is the country whose federalism jurisprudence I understand best; a not insignificant criterion, given the depth of knowledge about judicial reasoning that is necessary for a project of this kind. For comparative purposes, it would be useful for similar projects to be undertaken by scholars in other federations who are familiar with the subtleties of the reasoning of their own courts.[7]

Australia is a useful case study for other reasons as well, however. On the one hand, judicial review of the federal division of power continues to be taken seriously: the High Court accepts that the judiciary "has the responsibility of deciding the limits of the respective powers of the State and Commonwealth governments (sic)": (*Lange* 1997, 564). Federation remains the principal rationale for the entrenched, but thin, Australian Constitution; the High Court insists on its role as the final arbiter of the constitutional validity of both legislative and executive action; and the Commonwealth occasionally loses a case on federalism grounds (*Incorporation* 1990; *Austin* 2003).

On the other hand, Australia lacks all the institutional safeguards for a federal division of powers that, under the second hypothesis outlined earlier, might complement or supplement the role of the courts (cf Gageler 1987). Following the United States federal model, the Constitution of the Commonwealth of Australia enumerates the powers of the Commonwealth Parliament, leaving the unenumerated residue to the States, in a way that was "deliberately asymmetrical" and makes the "role of the States … inherently vulnerable" (Crommelin 1995, 172). Justices of the High Court of Australia, the final court of appeal in constitutional as in all other matters, are appointed by the Commonwealth executive, subject to an insignificant obligation in section 6 of the *High Court of Australia Act 1979 (Cth)* to consult with the Attorneys-General of the States. The Australian system of parliamentary responsible government favours the concentration of political power and values its speedy exercise and to that extent is antithetical to federalism. The federal chamber, or Senate, famously plays no protective role in relation to Australian federalism, beyond ensuring that members of the smaller States are better represented in the two dominant parliamentary groupings that they would otherwise have been. The Australian High Court thus encounters a greater degree of difficulty in maintaining the federal division of powers, while possessing a greater degree of responsibility for it.

This chapter is confined to the role of courts in interpreting and applying the federal division of powers. Questions that arise under the Constitution about other aspects of the federal system thus are excluded from its scope except, occasionally, by way of contrast. Specifically, I do not address directly the extent to which each sphere of government can subject the institutions of other governments to its own legislation (*Austin* 2003*)*, or with the constitutional protection for Australian economic union (*Castlemaine Tooheys* 1990*; Street* 1989) beyond noting that, in each of these areas, the High Court has accorded weight to a conception of Australian federalism. Similarly, I am not concerned

[7]See, however, Leclair (2005, 383).

here with the broad field of fiscal federalism, except to the extent to which it can be considered a dimension of the federal division of fiscal power (Saunders 2006), or with the principles that govern inconsistency between Commonwealth and State law (Evans and Saunders 2005), even though both have contributed significantly to the effective expansion of Commonwealth power.

There is a danger that an inquiry of this kind will be typecast by reference to old antipathies over "states rights" and dismissed out of hand. This would be a pity because the issues are both serious and contemporary, not only in Australia but in federations elsewhere. Governments do not have rights, except as representatives of people. In a federation, people have at least two sets of representatives, each of which has a role to play in the governance of the federated state. If any rights are in issue they are those of the people themselves, to be governed by both sets of their elected representatives in accordance with principles of federal democratic government and the rule of law. The immediate question is what these principles require, especially when the Constitution is relatively rigid and the conditions within which it operates change over time. This chapter does not seek to wind the Australian federation back to a mythological golden age but to ask how, in this first decade of the 21st century, the federal division of power ought to be interpreted and applied. There are some, admittedly small, signs that the question is agitating the Court as well (*Workchoices* 2006, [50], [190]).

The analysis of Australian doctrine that begins in the next part outlines the design of the Australian federal division of power, identifies the interpretative principles that underpin the current Australian approach and examines aspects of their operation in practice that affect not only federalism but also the rule of law. Unavoidably, this part makes reference to a wide range of judicial decisions, but draws on two in particular in which challenges to the adventurous use of Commonwealth power have recently been rejected. One is *New South Wales v Commonwealth* (2006) otherwise known as the *Workchoices* case, in which the High Court accepted that a Commonwealth law that regulated the workplace relations of the categories of corporations covered by the Commonwealth's head of power in section 51(xx)[8] was valid for that reason alone. The other is *Thomas v Mowbray* (2007), in which the Court upheld the validity of Commonwealth legislation that provided for the imposition of interim control orders to protect the public from terrorism as an exercise of the power with respect to "naval and military defence" (sec. 51(vi)).

The final part explores alternative interpretative techniques that would involve the Court taking the federal character of the Constitution into account to a greater extent. Some of these could be implemented without major upheaval in Australia, even now. Others may effectively be precluded for Australia by the weight of judicial authority to the contrary, but may be more readily applicable elsewhere. In any event, the Australian experience with the interpretation and application of the federal division of powers offers insight into both

[8]Section 51(xx) confers power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

constitutional design and the potential impact of judicial review that may be useful in emerging federations.

THE AUSTRALIAN APPROACH

Influences

The Australian approach to determining the boundaries between the legislative powers of the Commonwealth and the Australian States is influenced by both the design of the Constitution and the general interpretative method of the High Court. The latter has varied between parts of the Constitution and is a product of tension between common law techniques of statutory interpretation, which themselves have evolved considerably over the course of the 20th century, and the additional demands of a written constitution. The prevailing technique has been described as "strict and complete legalism", following an influential formulation by Sir Owen Dixon, on his swearing-in as Chief Justice of Australia in 1952 (85 CLR xiv). Legalism is a variant of formalism, in the sense that it relies on a small range of positive legal sources to resolve any questions of meaning that are perceived to arise (Stone 2002, 171). Understanding of what legalism requires, however, has also varied between different members of the Court and Dixon himself famously believed in the "apt and felicitous use" of the "high technique and strict logic" of the common law, rather than narrow textualism (Dixon, 1965).

Design

When the Australian Constitution was drafted, in the last decade of 19th century, the United States, Canada, Germany and Switzerland already had a federal form of government. The framers of the Constitution were aware of all four and drew on each of them to a degree (Maddox and Caplan 2008). They relied most extensively on the United States model, however, in part because of its familiarity and in part because it was perceived as more federal than Canada, otherwise a closer fit with the circumstances of Australia but "more nearly a unified community than a federation" in the view of one of the Australian framers, Andrew Inglis Clark (La Nauze 1972, 27).

Relevantly for present purposes, the Australians broadly followed the United States approach to the federal division of power, by identifying only Commonwealth powers, most of which were not described as exclusive and were assumed to be concurrent. The unexpressed residue of power was left to the States (section 107)[9], although by "continuing" the existing powers of the

[9]Section 107 continues the previous powers of the colonies "unless … exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State". Quick and Garran (1901, 933) understood the reference to "withdrawn" powers to

colonies rather than by "reserving" the residue to the States or to the people as in the Tenth Amendment. No significance seems to have been attached to this difference in wording at the time (Quick and Garran 1901, 933, 936).

In other respects, however, the Australians seem to have learnt from U.S. experience and sought to improve on it. Major commercial powers, such as banking, were expressly included, rather than left to be drawn from the commerce clause or from a "necessary and proper" clause as in *McCulloch v Maryland* (1819). Whether or not as a consequence the Australian equivalent of the necessary and proper clause (Article 1 section 8) is significantly more limited, conferring power only over "matters incidental to the execution of any power…" (sec. 51 (xxxix)). An express guarantee of freedom of interstate trade (sec. 92) obviated the need to construct a "dormant" commerce clause (*Gibbons* 1824). The consequences of inconsistency were prescribed, rather than left to be inferred from federal supremacy (cf U.S. Constitution Article VI, clause 2). Drawing on earlier proposals for Australian federation (Quick and Garran 1901, 648-649) the Commonwealth was given express power to legislate on matters referred to it by Parliaments of the States (sec. 51(xxxvii)). These important details aside, however, the similarity of approach is marked.

The U.S. model was influential in other ways as well. Both federations drew together existing polities with constitutions and governing institutions of their own. In the case of each federation, the new Constitution left existing governance arrangements in place and created new structures only for the national sphere, regulating State institutions lightly, to the extent that they were regulated at all. Significantly, however, in the case of the United States, the 13 original States had enjoyed a period of sovereignty, however brief. By contrast, the colonial status of the Australian States at the time of federation was used to deny them any share in external sovereignty once Australian independence was achieved and further fuelled the view that the Constitution is not a "compact" of a kind that might encourage a more federal friendly approach to interpretation (*Payroll Tax* 1971, 371). This history also contributed to the emergence of the external affairs power as one of the heads of power on which the Commonwealth principally relies (*Seas and Submerged Lands* 1975): a development potentially relevant to the theme of this chapter, but so distinctively Australian as to diminish its usefulness as an example for comparative purposes.[10]

The institutions of government also differed in the two federations; and in some cases markedly. Most obviously, the Australians continued to rely on parliamentary responsible government, in preference to a separation of the legislature and executive. They established a Senate with equal representation from the original States but its members were directly elected from the outset and voted along party lines from the time of federation. They designed the judicature chapter with an eye to article III of the Constitution of the United

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include the exercise of concurrent powers by the Commonwealth in a form that prevailed over State law under section 109.

[10]This is not to deny the significance of treaty implementation for the division of powers in most federations. The link between this power and the acquisition of independence in Australia is more distinctive, however (Saunders 1995).

States but departed from it to provide appeals to the High Court in matters of State as well as federal jurisdiction. In due course, this led to the view that, in Australia, there is a single common law (*Lange* 1997, 563). They rejected the U.S. mechanisms for formal constitutional change, adapting instead a referendum procedure from the Constitution of Switzerland, which they expected, wrongly as it turned out, to strike a better balance between rigidity and change (Saunders 2001, 454).

Two principal questions arise in interpreting and applying a federal division of power of this kind. The first is what the powers themselves mean. What is a "trading corporation" (sec. 51(xx)? What is "trade and commerce among the States" (sec. 51(i))? What are "external affairs" (sec. 51(xxix)? What are "trade marks" (sec. 51 (xviii))? Difficult though these questions may be, they involve the familiar problem of extracting the legal meaning of a text from a range of semantic possibilities (Barak 2005, 6). The second and more difficult question is the reach or scope of each power, often described in Australia as "characterization". This involves a decision about the nature of the connection that is necessary to establish that a Commonwealth statute is validly supported by a particular head of power. To take an apparently extreme case: would a Commonwealth law requiring schools to be established in lighthouses be a valid exercise of Commonwealth power with respect to lighthouses, in the absence of a Commonwealth power with respect to schools (*Huddart Parker* 1909, 410)? Or, to take a more recent and still topical example: may the power with respect to trading corporations be used to prevent the building of a dam in a wilderness area, as long as the construction authority is a trading corporation, in the absence of another, direct head of power, on which the legislation could be based (*Tasmanian Dams* 1983)?

These questions about the meaning and scope of Commonwealth power are the primary focus of this chapter. They should be distinguished from a third, more specific question that has frequently arisen, as to whether Commonwealth power extends to legislation for State institutions and vice versa. Can Commonwealth power with respect to taxation, for example, be used to impose taxation on the States (*Payroll Tax* 1971)? Does the power with respect to the arbitration of certain industrial disputes extend to disputes between State governments and their employees *(Engineers* 1920)? It will be seen that this question is responsible for the early repudiation of reliance on federalism as a value in constitutional interpretation and that, paradoxically, it is also one of the few power-related contexts in which the Court now takes the federal character of the Constitution into account. Otherwise, however, the extent of immunity of instrumentalities is a subsidiary issue, which will be considered only for its considerable role in the development of the interpretative method of the High Court.

Interpretative Method

The problem of interpretative method arose in two main contexts in the High Court in the decades immediately following federation in 1901. First, a series of cases raised the question of the extent to which spheres of government could tax

each other, or each other's officials. By 1906, the extent of claimed immunity had broadened to the point where, potentially, it embraced any form of action by one sphere of government that impinged on the "instrumentalities" of another (*Railway Servants,* 1906). Secondly, a group of cases dealt with the meaning and scope of the powers more generally, in circumstances in which there was room for argument about their use. Could the Commonwealth's power over trademarks be used to provide for the registration of workers' marks to protect goods made by Australian labour (*Union Label* 1908)? Could the Commonwealth rely on its power over trading and financial corporations to prohibit contracts by corporations in restraint of trade (*Huddart Parker* 1909)? Could the power with respect to taxation be used to encourage fair conditions of labour, by providing for the waiver of the tax on manufacturers who provided conditions of employment that met the standards in the Act (*Barger* 1908)? In each of these examples, the Commonwealth relied on a power expressly allocated to it to achieve outcomes in relation to which it had no explicit power.

In resolving the arguments over the immunity of instrumentalities the early High Court relied on a conception of federalism in which each Australian jurisdiction was, "within the ambit of its authority, a sovereign State" (*D'Emden* 1904) and entitled to immunity on that ground. The Court approached the second group of questions, about the meaning and scope of Commonwealth powers, on the basis that each power should be read with reference to the other grants of power and "to powers reserved to the States" through the operation of section 107 (*Barger* 1906). In each of the examples given earlier, *Union Label, Huddart Parker* and *Barger*, the Commonwealth Act was held to be invalid on the basis of reasoning that took into account the effect of the legislation on intra-State trade. Intra-State trade self-evidently was not included in the Commonwealth power over "trade and commerce with other countries, and among the States" (sec. 51(i)) and thus was taken to be reserved to the States. The doctrines of both immunity of instrumentalities and reserved State powers drew on United States jurisprudence, in the face of the similarity of the two Constitutions. Canadian experience was rejected, largely on the basis of differences in constitutional design (*Baxter* 1907).

Over the course of the first two decades of the 20th century, these doctrines ran into difficulties in Australia as in time they would do also in the United States (Claus 1995, 894). It proved impracticable either to maintain a complete immunity of governments from the legislation of other jurisdictions or to develop principled and coherent exceptions to the doctrine. Similarly the doctrine of reserved powers proved too extreme a solution to the problem of determining whether Commonwealth laws were within power. The First World War put more pressure on it still, reflected in the observation of Isaacs J. in *Farey v Burvett*: (1916, 454) "… of what avail is the State right to regulate the internal sale of commodities if the State itself disappears?" Reliance on both doctrines for the purposes of constitutional interpretation divided the Court for over a decade. Finally, in 1920 in the *Engineers*' case, the Court adopted a new approach to interpretation that not only repudiated the two contested doctrines but also, at least for a time, eschewed reliance on conceptions of federalism at all.

The issue before the Court in *Engineers* was whether the Commonwealth's industrial relations power extended to disputes between State authorities and their employees. It thus turned on the doctrine of immunity of instrumentalities, raising reserved powers only to the extent that the defendants, faced with the challenge of identifying a textual basis for the immunities doctrine, pointed to section 107 as a possible source. Nevertheless, the Court majority attacked both doctrines as tainted by reliance on conceptions of federalism rather than explicit constitutional provisions. In its reasoning it pointed to the Constitution as a "political compact of the whole of the people of Australia" (*Engineers* 1920, 142). Earlier formulations describing it as a compact of the people of the States were abandoned (*Whybrow* 1910, 291). Equally, if not more, importantly, the compact had become binding law as a statute of the Imperial Parliament. To interpret such an instrument, the High Court was bound by the "settled rules of construction" laid down by the "highest tribunals of the Empire" (148). This atypical obeisance to the views of the Privy Council on interpretation of the Australian Constitution was complemented by a repudiation of the relevance of United States decisions on the grounds of two claimed structural differences: the "common sovereignty" of the Commonwealth and the States, still manifested in an "indivisible" Crown and "the principle of responsible government" (146).

The rules of construction henceforth to be applied corresponded closely to the then prevalent principles of statutory interpretation. They relied heavily on literal interpretation and encouraged recourse to context only to resolve ambiguity. A "vague, individual conception of the spirit of the compact" on which the doctrine of intergovernmental immunities relied, was precluded by such an approach. Equally, however, section 107 was no longer to be read as reserving power from the Commonwealth that "falls *fairly* within the explicit terms of an express grant … as that grant is *reasonably* construed" (154).[11] Insofar as questions might arise about what was fair and reasonable for this purpose, the Constitution should be read "naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se*" (152).

Famously, *Engineers* did not supply the final word on the aspect of interpretative method with which it was principally concerned. Within less than a decade, it began to be suggested that there were limitations on Commonwealth power to legislate for the States (Sawer 1967, 133). By 1947, this became settled doctrine (*State Banking* 1947). The new intergovernmental immunities doctrine is much weaker than the old one, focussing on the logic of the existence of State polities, rather than on the incidents of State sovereignty. Nevertheless, it draws on a conception of Australian federalism that is not expressed in the text of the Constitution and it continues to be given effect by the Court (*Austin* 2003).

The impact of *Engineers* on the meaning and scope of Commonwealth powers more generally, however, has been pervasive. It continues to be accepted that Commonwealth powers should be interpreted literally and that

[11]Emphasis supplied.

considerations of federalism are irrelevant. In addition, the effect of the case has been extended by a range of other interpretative principles for which *Engineers* itself provides no authority, although it may be a source of inspiration. As a Constitution, intended to last over time, the text should be construed "with all the generality which the words used admit"; at least as far as Commonwealth heads of power are concerned.[12] The Constitution authorizes whatever additional power is necessary to make each head of power effective, either through the express incidental power in section 51 (xxxix) (*Jumbunna* 1908*)* or as an inherent characteristic of any grant of power (*Le Mesurier* 1929). Each head of power is to be interpreted in isolation from the others, in the absence of an explicit restriction on power that cannot be circumvented, of which the express exception of "state banking" from the banking power is an example. Thus in *Russell* (1976, 539) Mason J declined to interpret the marriage power in section 51(xxi) by reference to the power over "matrimonial causes" in section 51(xxii) to give the former "a full operation according to its terms, unrestricted by dubious implications drawn from the existence of another grant of legislative power touching an associated subject matter".

As the sole exception of the defence power, the Commonwealth heads of power are not understood as purposive but are categorized variously instead by reference to activities, persons, classes of public service and standard categories of legislation (*Stenhouse* 1944). Absent the opportunity to resort to purpose, it became necessary to identify other criteria by which to determine whether a law was supported by a power. One such criterion is whether the law operates directly on the subject matter of a power (*Huddart Parker* 1931, 515-516). If it does, it seems now that it is automatically within power even if, for example, the law operates to prohibit the activity, subject to a condition that "gives it the additional character of a law upon some other topic" (*Herald and Weekly Times* 1966, 434). However, the Court looks to both the legal and practical operation of the law to determine whether there is a sufficient connection with the power or, conversely, whether the connection is "so 'insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' the head of power" (*State Banking* 1947, 79). Motive, intention, and the purposes of the legislator are irrelevant, for the purposes of establishing, or demolishing, the requisite connection. The fact that a law has two or more "characters" only one of which is within power does not affect its validity (*Fontana Films* 1982).

Over time, these interpretative principles have become more expansive, as caution expressed in relation to particular conclusions by earlier Courts have been abandoned by their successors in a series of small steps over time. Any attempt to persuade the Court to consider the federal context of the Constitution in determining a question about the scope or application of a Commonwealth power invariably is rejected, often with ritualistic expressions of horror about the "discredited doctrine" of reserved State powers (*Workchoices*: [48]); a story

[12]The quotation is from *Public Vehicles Licensing Appeals Tribunal* (1964). The source of the idea is commonly attributed to *Jumbunna* (1908), drawing on *McCulloch v Maryland*, although *Jumbunna* itself in fact was concerned rather with the reach of the incidental power.

that itself grows in the telling.[13] In reality, however, arguments of this kind do not seek to return to the reserved powers doctrine as it was understood at the time of *Engineers*, but challenge the Court's assumption that the scope of Commonwealth power can adequately be determined in isolation from the rest of the Constitution by focussing on the text of the power alone.

Outcomes

The particular approach taken by the High Court to the interpretation and application of Commonwealth powers has inexorably expanded their reach, with a corresponding erosion of discrete areas of State responsibility. This part is less concerned to establish this somewhat obvious end result than with the implications of the Court's interpretative method for the way in which powers are used and, ultimately, for the coherence of Australian law.

Most Commonwealth powers now have been used to the full for the purposes for which they obviously were conferred. Comprehensive Commonwealth legislation dealing with banking, insurance, marriage and divorce, intellectual property and immigration is based on heads of power explicitly referable to each of those subjects. In some cases, the meaning of a head of power has been stretched over time, in ways subsequently endorsed by judicial interpretation. Thus "patents of invention" has been held to support legislation on plant breeders' rights despite some differences between the two conceptions (*Grain Pool* 2000); broadcasting has been accepted as a service sufficiently "like" post and telegraphs to be covered by the same head of power (*Brislan* 1935; *Jones* 1963); and the need for an industrial dispute to extend "beyond the limits of any one State" before attracting the Commonwealth's conciliation and arbitration power has been rendered largely nugatory by acceptance that the interstate element can be artificially created by the use of "paper" disputes (*Re State Public Services Federation* 1993, 267-268).

Questions of this kind have been resolved by a range of legal techniques, including the Australian distinction between the connotation and denotation of constitutional terms (*Professional Engineers* 1959, 267). This distinction sometimes is used by the Court to explain the extension of Commonwealth power to embrace new developments that the terms of a power are apt to "denote" while its core "connotation" remains stable over time. This is only one of many techniques that might be adopted to choose the legal meaning of a federal power from a range of "semantic possibilities" (Barak 7, 2005). Choices nevertheless must be made and in each of these and other similar cases the result is, in the scheme of things, unremarkable and warrants no further comment here.

Somewhat more noteworthy for present purposes are cases in which the constitutional prescription is more ambiguous and the case for consideration of

[13]In *Workchoices* the majority suggests that the underlying problem with reserved powers is that it treats the Constitution as "preserving to the States *some* legislative power formerly held by the unfederated colonies" – surely an unastonishing proposition (my italics; the Court's italicization of "preserving" removed) (192).

constitutional context is correspondingly more compelling. The decision in *Thomas* (2007) illustrates the point. *Thomas* raised for the first time a question about whether the defence power supports Commonwealth legislation to impose control orders on citizens to tackle the threat of terrorism within Australia. Potentially relevant to the answer was a constitutional provision that requires the Commonwealth to protect a State from domestic violence "on the application of the Executive Government of the State" (sec. 119). It is arguable that this section throws light on the extent of the Commonwealth's power to deal with internal disturbance (Quick and Garran 1901, 964) as well as imposing a duty on the Commonwealth to respond to a State request. A contextual approach to resolving the question of whether the defence power extends to threats of internal terrorism necessarily would take section 119 into account. In the event, however, the defence power was accepted as the basis for the challenged legislation and section 119 was considered only by a dissenting judge ([247-249]).

More significant still for present purposes is the use of powers to achieve outcomes that are indirect, in the sense that they are less obviously indicated by the terms of the power conferred. For the most part the capacity of the Commonwealth to extend the scope of its power by these means is attributable to the Court's approach to characterization, rather than to the meaning of the power itself. Many powers are amenable to indirect use, given the ease with which the connection is established between a law and a power, coupled with the Court's acceptance that a law might be characterized in multiple ways, only one of which needs to be within power. By way of example, the Commonwealth has successfully relied on the taxation power to increase workplace training by private sector employers by imposing a charge on employers equal to the amount by which costs of approved training fall short of a prescribed minimum (*Northern Suburbs* 1993). It has drawn on the overseas trade and commerce power to prevent mining of mineral sands, by prohibiting export without ministerial approval, which can be withheld on environmental grounds (*Murphyores* 1976).

The power to make laws with respect to "foreign corporations, and trading and financial corporations …" (sec. 51(xx)) has proved particularly susceptible to use in this way. For some time, the Court was wary of concluding that a law had a sufficient connection with a "person" power for no better reason than that it imposed obligations on the category of "constitutional" person or provided a benefit to it. Its self-imposed interpretative method, however, made it difficult to draw a sustainable line. Use of the power was incrementally extended, to provide a base for Commonwealth legislation in relation to trade practices (*Rocla* 1971), environmental protection *(Tasmanian Dams* 1983) and secondary boycotts (*Fontana Films* 1982). Necessarily, in each case, the application of the law was confined to trading and financial corporations, providing partial coverage of the area for which regulation was sought. Finally, in *Workchoices*, the Court explicitly accepted what already had become tolerably clear that any law that makes a constitutional corporation an "object of command" is a law with respect to such corporations for constitutional purposes. *Workchoices* thus confirmed the full potential of the corporation's power as a base for laws on any activities in which constitutional corporations are engaged, or by which they

might be affected. The inability of many such laws to extend equally to all affected persons, or even to all affected corporations, may raise questions from the standpoint of public policy in Australia but not of constitutional law.

It is ironic that the one power that has not so far profited from the High Court's generous approach to characterization is the power in section 51(i) of the Constitution to make laws for "trade and commerce among the States". The now-discredited doctrine of reserved powers was linked most closely with section 51(i), as early Justices of the High Court sought to interpret other powers so as to preserve the authority of the States over intra-state trade, which patently was excluded from its scope. The decision in *Engineers* ensured that other powers were no longer inhibited by consideration of the impact of their use on intra-state trade, but the power over inter-state trade itself has continued to be so restricted. The High Court has rejected argument that inter-state and intra-state trade are commingled (*Airlines of New South Wales (No.2)* 1965, 78) and has insisted that "the express limitation of the subject matter of the power to commerce with other countries and among the States compels a distinction, however artificial it may appear" (*Burgess* 1936, 672). In so doing, it has prevented the emergence of an Australian "commerce clause" as an all purpose head of power, capable of obliterating the federal division of powers in the manner of its counterpart in the United States. On the other hand, the corporations and external affairs powers on which the Commonwealth primarily relies are so much less satisfactory as bases for rational legislative regimes that a more effective trade and commerce power appears preferable, notwithstanding the risks to the federal division of power that it obviously presents.

It may be that the inter-state trade and commerce power eventually will develop as a more significant head of Commonwealth power. Until 1988, it was possible to explain its stunted growth as a corollary of the expansive interpretation of the constitutional protection of "absolute" freedom of interstate trade in section 92: the narrower the scope of interstate trade, the narrower the gap in the regulatory authority of the combined Australian governments. Reinterpretation of section 92 in 1988, so as to preclude protectionism but not regulation per se, removed at least this obstacle to a more expansive approach to the power (*Cole v Whitfield* 1988). So far, however, it has had no effect. The Commonwealth has continued to rely primarily on its corporations and external affairs powers and the Court has been presented with no significant opportunity to examine the meaning and scope of the interstate trade and commerce power. There are, however, some straws in the wind. In determining whether a law has a sufficient connection with a head of power, the Court will consider "the practical, as well as the legal, operation of the law" (*Dingjan* 1995, 369). And in a recent decision narrowing the sphere of State regulation exempt from the prohibition against protectionism in section 92, the Court majority noted "that what is purely 'local' commerce today may not be readily distinguished at any practical level from interstate commercial activity" (*Betfair* 2008, [97]).

The interpretative approach taken by the Court to the federal division of legislative power creates an expectation that powers will continue to expand and encourages experimentation by Commonwealth governments and Parliaments to push the limits of their powers as far as they can. Commonwealth legislation often makes adventurous use of the Commonwealth's own powers even when

the States have referred power to the Commonwealth to provide a more stable base. Techniques to maximize the reach of Commonwealth power take two principal forms.

First, a Commonwealth statute often relies on the terms of the power on which it rests to define the application of the law to ensure that the statute extends as far as the power permits, even when the meaning of the latter is uncertain. A statute that relies on the corporations power, for example, typically is drafted to apply to "constitutional corporations", defined to mean "foreign, trading or financial" corporations, without further definition of those terms, which under present constitutional doctrine remain imprecise (Evans *et al.* 2007, 34). Corporations that are marginal candidates for these categories, of which universities are an example, must determine for themselves whether they fall within the legislation. The decision is significant: a corporation that wrongly concludes that it is a trading corporation is not subject to the Commonwealth law and may well be subject to a State law. A former Chief Justice of Australia noted in 1979 that such an approach to legislative drafting "may well prove highly inconvenient and costly to those affected by the statute" and urged the Commonwealth to "assay" a definition, "making … its own judgement of the ambit of its constitutional power" (*WA National Football League* 1979, 199). These strictures had no apparent effect. Use of this technique is now so common that it no longer attracts attention.

Secondly, many Commonwealth statutes experimenting with the reach of Commonwealth powers rely on a smorgasbord of powers. The legislation challenged *Work Choices* legislation is a case in point. The *Workplace Relations Amendment (Work Choices) Act 2005* applied not only to employers who were constitutional corporations but also to employment relations involving the Commonwealth or a Commonwealth entity; certain categories of employment in the course of interstate or overseas trade and commerce, and employers who are located in a territory. The *Water Act 2007* was an even more telling example. To take over from the States the authority to manage the water resources of the Murray-Darling Basin, in circumstances in which at least one State was reluctant to refer power, the Act claimed as its "constitutional basis" powers in relation to interstate trade and commerce (sec. 51(i)); postal, telegraphic, telephonic and other like services (sec. 51(v)); astronomical and meteorological observations (sec. 51(viii)); census and statistics (sec. 51(xi)); weights and measures (sec. 51(xv)); corporations (sec. 51(xx)); external affairs (sec. 51(xxix)); incidental matters (sec. 51(xxxix)); territories (sec. 122); and "any implied legislative powers of the Commonwealth". The complexity of Commonwealth legislation resulting from the combination of these two techniques means that much of it cannot adequately be understood without significant constitutional expertise.

Analysis

The interpretative approach adopted by the High Court of Australia in *Engineers* has been explained, with hindsight, as a response to "a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs" *(Payroll Tax* 1971, 397). The explanation is

now *de rigueur*: most recently, the *Workchoices* majority attributed *Engineers* to "a sense of national identity emerging during and after the First World War" ([193]). Other doctrinal shifts that took place around the same time, expanding Commonwealth power by broadening the concept of "inconsistency" for the purposes of the paramountcy of Commonwealth law (*Clyde Engineering* 1926) and releasing the Commonwealth (temporarily, as it turned out) from the constraints of the guarantee of free interstate trade (*WA McArthur Ltd v Queensland* 1920), can be seen to be linked to the same phenomenon. To the extent that this analysis is correct, it suggests a deliberate substitution by the High Court of one form of federalism for another, in response to changes in external circumstances of an intangible kind.[14] In the aftermath of the Second World War, the judicial conception of Australian federalism was further embellished by the rather improbable observation that: "The framers of the Constitution do not appear to have considered that power itself forms part of the conception of a government. They appear rather to have conceived the States as bodies politic whose existence and nature are independent of the powers allocated to them." (*State Banking* 1947, 82)

There is, however, room for some scepticism about this explanation for *Engineers,* at least as the sole explanation for the doctrinal change. Argument over the doctrines of reserved State power and immunity of instrumentalities had divided the High Court since 1906. The immediate catalyst for the outcome in *Engineers* was the final shift in the balance of judicial power as the last of the original justices retired and the number of seats on the Court increased. And the most obvious underlying point of difference between the two groups of judges concerned the proper approach to constitutional interpretation. It would be simplistic to ascribe the division to a choice between the British and American constitutional traditions, represented by decisions of the Privy Council and of the Supreme Court of the United States respectively, if only because the significance of the constitutional character of the instrument was acknowledged by both. Nevertheless, the explanation has a germ of truth, in the sense that the approach that prevailed in *Engineers* emphasized the statutory origins of the Constitution and endorsed techniques of interpretation indistinguishable from those used for statutes, which in turn were affected by a culture of parliamentary sovereignty, developed in the context of a unitary state.

Engineers provided a foundation stone for the interpretative method of the High Court, which remains authoritative in relation to the federal division of legislative power. Over the almost 90 years since *Engineers* was decided, however, the High Court's approach to the interpretation of both statutes and other parts of the Constitution has evolved considerably, drawing on techniques that, for the moment at least, apparently are precluded in dealing with questions about the respective powers of the Commonwealth and the States.

Interpretation of statutes by reference to purpose is now the norm. While a purposive approach initially was adopted in response to a legislative requirement (*Acts Interpretation Act 1901* sec. 15AA), the modern notion of purpose,

[14]By contrast, later changes in constitutional doctrine as Australia acquired independence responded to new external circumstances that could readily be substantiated by a court: *Sue v Hill* (1999) 199 CLR 462.

mandated by statute, is sufficiently close to the older concept of mischief, developed by the courts (Spigelman 2008), for the latter to have unilaterally adopted a purposive approach to constitutional interpretation, if they were minded to do so. Indeed, only the courts could take this step. The Commonwealth Parliament cannot prescribe the approach to the interpretation of the Constitution on which its own power depends. The *Imperial Interpretation Act 1889*, which once governed the interpretation of the Commonwealth Constitution (Quick and Garran 1901, 792), is, quite properly, frozen in its application to Australia by the evolution of Australian independence (*Australia Acts 1986*, sec. 1). However, the only head of power that has been treated unequivocally as purposive by the High Court is the power to make laws with respect to defence (*Stenhouse* 1944).

The approach of the Court to the interpretation and application of legislative powers now also contrasts with its approach to the rest of the Constitution. The former remains in the realm of what contemporary commentators Quick and Garran referred to as "interpretation…in a narrower sense" (791). The latter is open to the methodology that Quick and Garran described as "construction": "the process of comparing different parts of the document and gathering its intent from a survey of the whole" (791).[15] Quick and Garran themselves assumed that the High Court would use both types of technique and, except in relation to legislative powers, it does so. Structure and context are familiar judicial tools for determining the meaning of constitutional as well as statutory provisions. Constitutional provisions dealing with both representative democracy and separation of powers, as two of the three pillars of the Australian constitutional system, have been understood and developed in this way. Federalism is the third pillar and the federal context of the Constitution also has been used to resolve some constitutional questions. Thus the Court has accepted limits on the capacity of the Commonwealth to legislate for the States, modifying the ratio of *Engineers* itself (*Austin* 2003); acknowledged that both the guarantee of absolute free trade in section 92 (*Castlemaine Tooheys* 1990*;* cf *Betfair* 2008) and the prohibition against discrimination on the grounds of State residence in section 117 (*Street* 1989) must be understood in the light of the nature of federalism; and begun the process of developing a framework of principle to deal with overlapping laws between the States for which the Constitution does not specifically provide (*Mobil Oil* 2002*; John Pfeiffer* 2000). In relation to the interpretation and application of legislative powers, however, it continues to confine itself to "interpretation in the narrow sense", eschewing all except historical context; denying, for the most part, the relevance of purpose; and rejecting any attempt to rely on the federal character of the Constitution as an aid to an interpretative problem.

It may readily be accepted that the two particular interpretative doctrines that were swept away by *Engineers* were unsatisfactory. It is both impracticable and, by current standards, undesirable, to exempt all the instrumentalities of one sphere of government from the legislation of another. It is unduly restrictive to

[15]They also equated "interpretation" with "analysis" and "construction" with "synthetic processes", presumably drawing on the philosophical understanding of the two terms.

resolve all questions about the scope of Commonwealth power by reference to assumptions about the powers retained by the States on federation. Both doctrines, in essence, were too absolute and too extreme. But the response, which requires federalism to be ignored altogether, was equally extreme. In the case of the immunity of instrumentalities, this was recognized over time, as a more limited immunities doctrine returned. As far as characterization is concerned, however, the *Engineers* response has remained in place and has been further embellished over the years.

The explanation for this discrepancy lies in two perceived advantages of the present approach. The first is that the interpretative method of the High Court has enabled the progressive expansion of Commonwealth power under a Constitution that has proved resistant to formal change. On the one hand, the capacity of the Constitution to adapt to emerging needs through judicial interpretation has gone some way towards easing the problems otherwise created by its rigidity. On the other hand, continued expansion of Commonwealth power through judicial acquiescence in its exercise is not necessarily an automatic good. Federalism assumes that power is divided. At some point a concentration of power in either sphere of government jeopardizes whatever values federalism brings to the constitutional system. It is also possible that formal constitutional change could have been secured more regularly in the latter part of the 20th century had the Court been less ready to accept the validity of a creative use of Commonwealth power.

The second perceived advantage of the current interpretative approach in Australia is that it limits judicial discretion in determining the validity of Commonwealth legislation and offers what appear to be legal formulae to guide the discretion that remains. On the one hand, it is consistent with the generally restrained approach to adjudication that prevails in Australia. On the other hand, as the High Court itself has been at pains to emphasize, it is the task of the judiciary to resolve controversies about the meaning and effect of the Constitution that are brought before the courts (*Workchoices*, [134]) and the resolution of controversy by definition involves choice. An interpretative method that masks the element of choice detracts from the purposes of giving reasons for decisions and compromises the value of the judicial process (Dyzenhaus and Taggart 2007, 148).

The current Australian approach presents difficulties for other aspects of the system of government as well. It has encouraged an opportunistic style of legislative drafting that enhances the Commonwealth's chances of success in litigation at the expense of uncertainty for those potentially affected by the legislation. In that sense, it impinges on the rule of law. It produces bizarre regulatory solutions: on the basis of current doctrine it is conceivable, for example, that the Commonwealth could regulate universities by relying on Commonwealth power over trading corporations. The complexity of the system is such that there is no realistic prospect that the solution lies in the political process, through what the *Engineers* Court optimistically described as "the power of the people themselves to resent and reverse what may be done" (152).

In *Workchoices* the majority Justices criticized arguments that sought limits to Commonwealth power in the name of "federal balance" as lacking content ([196]). The absence of a persuasive alternative to an interpretative approach

that has the legitimacy that accompanies long-user is an impediment to change in Australian doctrine. The next part explores some possibilities, ranging from minor interpretative changes to major systemic shifts.

ALTERNATIVES

Parameters

The interpretative change in *Engineers* was a judicial response either to the inadequacy of existing doctrine or to developments in the external context in which the Constitution applied. A case can be made for a further change on either of these grounds now. The current approach is out of step with the somewhat more sophisticated interpretative methodology that Australian courts employ in other contexts and has a distorting effect on the form and coherence of Australian law. The impact of globalization, coupled with the complexity of modern government, has cast federalism in a more favourable light than in the 1920s, when it was widely seen as a transitional, or at least incomplete, form of government. Justice Kirby put the case eloquently in the *Workchoices* decision, when he exhorted the Court:

> …to rediscover the federal character of the Constitution. It is a feature that tends to protect liberty and to restrain the over-concentration of power which modern governments, global forces, technology and now the modern corporation, tend to encourage. In this sense, the federal balance has the potential to be an important restraint on the deployment of power. In that respect, federalism is a concept of constitutional government especially important in the modern age. ([612])

There are limits to the extent of the methodological change that is likely to be acceptable or desirable. These follow both from the constraints of Australian legalism and from the need to maintain an effective capacity for national action in changing conditions over time. The former precludes the introduction of interpretative principles that require the Court to give effect to a particular conception of federalism, formed by material outside the text, structure and context of the Constitution. For the same reason, any new approach must identify tests of a sufficiently legal kind, which the Court can apply in determining the validity of Commonwealth law. The latter requires the scope of Commonwealth powers to be sufficiently flexible to embrace new circumstances. An example from existing case law is the interpretation of the patents power to support plant variety rights (*Grain Pool* 2000). An example for the future, which already has been the subject of some speculation in the Court, is an understanding of the marriage power that includes the union of same-sex couples (*Re Wakim* 1999; *Grain Pool* 2000). The flexibility for which I argue here does not extend to accepting convoluted use of Commonwealth power as bases for national action. In such cases, in any event, as the examples of the Workchoices and Water Acts show, Commonwealth legislation does not in fact deliver consistent national regulation, but deals with the subject matter in a way

that necessarily is incomplete. Public demand for national action that cannot adequately be met by existing Commonwealth powers, including the interstate trade and commerce power, calls either for intergovernmental action, drawing on the reference power, or constitutional change.

Within these parameters there is room for movement in interpretative method. On any view, the Australian Constitution provides a framework for a federal form of government, combined with representative and responsible government and the rule of law. On any definition, federalism involves the organized division of power between at least two spheres of government, each of which represents some configuration of the people. To this extent at least, federalism forms part of the constitutional context, to be taken into account in the interpretative process. As the Court recently confirmed in *Thomas v Mowbray*, "judgmental evaluation" is not antithetical to the judicial function (Gleeson CJ, [20]).

Minor Steps

This part identifies five relatively minor steps that would enable the High Court to take better account of the federal context of the Constitution in determining the meaning and scope of Commonwealth legislative powers.

The first is symbolic, but important nonetheless. The Court should abandon the view, which is patently incorrect, that power does not form "part of the conception of a government" in the Australian federation (*State Banking* 1947, 82). Power lies at the heart of any conception of government and the division of power is central to federalism. To the extent that the views of the framers of the Constitution on this point matters, Alfred Deakin, one of the leaders of the federation movement, famously urged delegates to "embody in our draft [Constitution] such a distinct limitation of federal power as would put the preservation of state rights beyond the possibility of doubt", rather than relying on the Senate for the purpose (Australasian Federal Convention 1891, 82).

Secondly, the Court should bring the interpretative method that it uses for Commonwealth powers into line with its approach to the interpretation of other parts of the Constitution. This would involve, for example, drawing on the context of the entire Constitution, including other heads of power, in determining the meaning of a particular head of power and the manner in which it might be used. This does not mean that a power necessarily would be read down by reference to another. It does mean, however, that the Court may have regard to the full range of relevant legal sources to assist it in its interpretative function. Thus in determining whether the defence power extended to internal terrorist threats, in the case of *Thomas*, the presence elsewhere in the Constitution of a section dealing with the protection of the States from invasion and violence would be a relevant consideration (sec. 119). In determining whether the Constitution authorizes the use of the corporations power to enact industrial relations legislation, as in *Workchoices*, the existence of another power dealing with industrial disputes would be a relevant, although not a determinative factor.

The third draws on the familiar common law technique of resolving legal disputes on the least adventurous ground. Where a Commonwealth law is supported by a State reference of power, the Court should attempt to resolve the question on the basis of the referred power, avoiding the need to consider and approve a novel use of Commonwealth power. By contrast, in *Thomas* the majority Justices dealt first with the arguments based on the defence power, making it "unnecessary to deal with the arguments concerning the references of matters by the States" (Gleeson CJ [6]; see also [131]). Greater deference to the significance of a referred matter on the part of both the Commonwealth and the Court might also encourage more widespread use of the reference technique.

Fourthly, the Court should be cautious before endorsing a significant new doctrinal development that has implications for the existing understanding of the meaning or scope of Commonwealth and State powers *inter se*. Caution in this context might involve more critical scrutiny of a novel interpretation or claimed connection between the challenged law and a Commonwealth power. Arguably, *Workchoices* was a case of the latter kind. While on one view the conclusion that any law that applies to a constitutional corporation is a law with respect to a constitutional corporation followed logically from previous authority, on another view, the case broke new ground. It finally determined a question that had bothered successive Justices for 100 years, about whether a head of power can be used merely as a convenient peg on which to hang a sometimes unlikely law, without further attention to the sufficiency of the connection.

There are other features of challenged legislation that also should trigger more careful scrutiny to ensure that the connection between the law and the power is one of substance and not mere form. Most obviously, these include aspects of legislation that appear questionable from the standpoint of the rule of law because of coverage that is uncertain or arbitrary. There is no developed conception of State power in Australia, along the lines of the police power in the United States (*Lopez* 1995). Nevertheless, the High Court's attention might be alerted by Commonwealth legislation that intrudes partially or on an unusual basis into an area otherwise covered by State law, thus compromising the integrity of both legal regimes. A Commonwealth law for schools that happened to be incorporated would be an example of a law of this kind.

Major Steps

The difficulty with a technique that merely alerts the Court to legislation requiring more careful scrutiny is that it leaves the Court to a case-by-case resolution of the question whether the challenged law is supported by a head of power, rather than providing it with guidelines for general application. This may be appropriate where the problem concerns the meaning of words. Where the problem concerns the scope or reach of the power, however, more guidance may be required. The difficulties raised by the present approach to this problem suggests that more should be required by way of a connection between a law and a power than use of the constitutional activity or person to which the power relates as the criterion for the operation of the law. It is hard to generalize about how this connection might be established, however, as long as the powers

continue to be categorized in terms of activities or persons, which encourages a static process of characterization of the present kind.

A more dramatic methodological shift would treat both the division of powers and the individual powers themselves as purposive and evaluate challenged legislation by reference to whether it falls within constitutional purpose. To determine whether a challenged law is based on a claimed head of power, both the purpose of the power and the more general purpose of the constitutional conferral of power on the Commonwealth could be taken into account. In either case, the constitutional purpose should be derived from a combination of subjective and objective sources, including not only the intentions of the framers, to the extent that they can be ascertained, but also constitutional text and context. In his illuminating study of purposive interpretation, Aharon Barak would accept a range of additional sources to determine objective purpose, including legal culture and tradition and basic constitutional values (Barak 2005, 162-163). Australian jurists may baulk at these as reaching too far outside the range of customary Australian legal sources, although in reality such considerations often are implicitly taken into account. Were a more limited range of sources admitted, however, it would be possible to identify the purposes of many powers and of the general conferral of power on the Commonwealth from the Constitution as a whole. Self-evidently, for example, one purpose of the latter is to enable nationally consistent legislation to be enacted, in which like cases are treated alike.

Adoption of a purposive approach to constitutional interpretation in Australia would have several advantages. First, it would supply a meaningful touchstone by which to evaluate the sufficiency of a connection between a law and a power. Secondly, it would provide a useful aid to understanding the meaning of particular powers. The long-running dispute over whether the corporations power enables the Commonwealth to provide for the creation and dissolution of corporations, for example, would have been assisted by a prior determination of the purpose of the corporations power. Thirdly, it would offer a framework within which the division of legislative power could be given an effect that avoids the complexity and patchy quality of much current Commonwealth legislation. Divided power necessarily adds a measure of complexity to governing arrangements. One lesson from Australian experience is that reliance on powers that are unsuited to the purpose compounds the complexity and is not a necessary feature of the system.

A greater emphasis on purpose would inhibit the extent of Commonwealth dependence on particular heads of power for a wide range of regulatory ends. It would not necessarily be decentralizing in effect, however, across the range of fields of governmental activity. On the contrary, articulation of the purpose of, say, the interstate trade and commerce power would be likely to expand its reach. Whatever the implications of a purposive approach for the respective authority of the Commonwealth and the States, however, it would provide a more sophisticated interpretative regime, with outcomes that are more rational and more easily understood.

An interpretative approach to Commonwealth power that identified constitutional purpose might be coupled with proportionality analysis, although this is not necessarily so. Proportionality typically is associated with human

rights protection and requires care in its application to federalism. Most obviously, proportionality would be useful for identifying the causal connection between a law and a power by asking whether the law is "appropriate and adapted" to achieving a purpose within power. Proportionality would also be useful for determining whether a law meets other goals connected with the federal distribution of power, including the goal of national consistent regulation. On the other hand, at least in the Australian context, a version of proportionality that triggered concern where "federalism" was burdened or that sought to minimize the impact of a law on "federalism" would not be acceptable. Either would tend to set in stone a particular understanding of the distribution of federal legislative power and would come too close to the shibboleth of reserved State powers.

Critics would fear that a turn to purposive interpretation, whether coupled with proportionality analysis or not, would encourage the evaluation of legislation by reference to constitutional standards other than those connected with the federal division of power and, in particular, with standards derived from values linked with rights. There is a basis for this perception in Australian experience, which in 1996 led the Court to reject both purpose and proportionality as tools for determining whether Commonwealth laws were supported by a head or heads of power, with the defence power as the sole exception (*Leask* 1996). This is a peculiarly Australian problem, attributable to the lack of constitutional provisions that provide direct protection of rights, and is unlikely to present difficulties elsewhere.

CONCLUSIONS

The approach to the interpretation of federal Constitutions deserves more attention in the design and operation of federal arrangements than it has been given so far. A variety of issues is likely to arise in the course of giving meaning to those parts of a constitutional text that provide the legal framework for a federation. A range of interpretative techniques are available for dealing with them. The choices that are made may have profound significance for a federal system in practice.

At one level, the task of interpreting constitutional provisions dealing with federalism is broadly comparable to the task of interpreting other kinds of constitutional provisions that protect rights or distribute power between institutions in accordance with the prevailing principles of separation of powers. At another level, however, it is distinctive. As a constitutional principle, federalism does not have the same cachet as separation of powers or rights protection and its contribution to a constitutional system is less well understood. Historically, federalism has suffered from the perception that it is a transitional form of government. To some extent, this persists. Courts may be more ambivalent about their role in enforcing provisions of the Constitution dealing with the federal division of powers, even where federalism was the moving cause for bringing the Constitution into being as fundamental law. Their reluctance is exacerbated by the tendency for questions about whether a central legislature has acted within federal power to become entangled with debates

about democracy and countermajoritarianism, overlooking the reality that in federal systems there are multiple majorities, each with democratic claims of their own, which sometimes give rise to constitutional conflict in which courts have an arbitral role. To complicate the picture further, the apex court is likely to be appointed by the sphere of government that claims the mantle of democratic legitimacy for the polity as a whole.

This chapter uses Australia as a case study to illustrate the issues that may arise in the course of interpretation and the effects that interpretative method can have. The Australian courts have adopted a formalist approach to the interpretation and application of legislative power that largely precludes considerations of federalism. This approach has enabled the role of the national sphere of government to grow, with almost no formal constitutional change. Importantly, from the perspective of Australian legal culture, it has also confined, or appeared to confine, the occasion for creativity by courts in the course of judicial review.

This approach to constitutional interpretation has some less satisfactory by-products as well. Most obviously, for present purposes, it has provided a vehicle for continuing centralization of power to a degree that jeopardizes the value of federalism to Australia at a time when the advantages of multi-level government are acknowledged elsewhere in the world. In addition, it encourages a degree of complexity and arbitrariness in Commonwealth legislation that in any other context would be considered a threat to the jurisprudential rule of law. The method on which the Court relies is dated, tracking its origins to a single decision more than 80 years ago, before the flowering of interest in the interpretation of texts that took place in common law countries in the later 20th century. It is at odds with the approach of the Court to texts of other kinds, where context and purpose now play a greater role.

This chapter has identified a range of measures that would allow a more nuanced approach to disputes about the federal division of power and thus would assist to resolve these problems. All would require the federal character of the Constitution to be acknowledged to a greater degree than presently is the case. Two of the most significant such measures would introduce concepts of purpose and proportionality into the Court's approach to the interpretation of the federal division of powers. Either of these now would be difficult to achieve in Australia, because of the major doctrinal shifts involved.

They may be of greater interest in emerging federations. As with any constitutional comparison, however, conclusions for other federations must be drawn with care. The outcomes of judicial interpretation in Australia are at least in part dependent on the particular Australian model for the federal division of power. The interpretative method adopted by the High Court has been influenced by Australian legal and constitutional culture and by the distinctive course of Australian history.

Nevertheless, despite the challenges of comparison, two broad lessons can be drawn from the Australian experience. The first is the relevance of the method used by judges for interpreting the federal division of powers. Where a federal state is formed, and in particular when a state moves from a unitary to a federal form, it may be useful to sensitize judges in advance to the new issues that are likely to arise and to the options for dealing with them. There is some

precedent for this in the judicial training that often is provided before a new rights instrument takes effect.[16] The second lesson concerns the significance of the model for the federal division of powers. Australian experience suggests that conferral of largely concurrent power on the centre, without providing a State list of power, puts a premium on judicial review. In federations where this is not acceptable, in terms of either process or certainty of outcome, consideration should be given to choosing a different model or to providing methodological guidance to the Courts in other ways.

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[16]See, for example, the training offered by the Judicial College of Victoria to Victorian judges before the Charter of Human Rights and Responsibilities came into effect: 2007 Calendar, http://www.judicialcollege.vic.edu.au/CA256902000FE154/Lookup/JCV_PDFs/$file/Calendar%202007.pdf (viewed 20 July 2008).

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12

Judicial Review and the Federalism Factor

Nadia Verrelli

L'auteure réexamine les théories traditionnelles relatives au contrôle judiciaire en faisant valoir qu'elles sous-estiment toutes le rôle joué dans ce processus par une certaine vision du fédéralisme et différents facteurs sociopolitiques. Grâce à son examen de quatre renvois, à savoir le Renvoi concernant le Sénat *(1980), le* Renvoi relatif au rapatriement de la Constitution canadienne *(1981), le* Renvoi relatif au droit de veto du Québec *(1982) et le* Renvoi sur la sécession *(1998), elle démontre que les avis de la Cour suprême reposent sur une certaine conception du fédéralisme lui servant à déterminer qui a le pouvoir de modifier la Constitution. Elle soutient en outre que cette conception et ces avis ont subi l'influence des circonstances politiques tout en influant sur celles-ci. Elle conclut donc à la nécessité d'une analyse plus approfondie de cette influence à la fois subie et exercée par la Cour suprême sur la vision dominante du fédéralisme canadien.*

INTRODUCTION

Since the abolition of appeals to the Judicial Committee of the Privy Council (JCPC) and even more so since the entrenchment of the Canadian Charter of Rights and Freedoms in 1982, mainstream Canadian scholarship has, for the most part, shifted away from focussing on the role of the judiciary in the shaping and understanding of Canadian federalism. Instead, Canadian political scientists and, to a lesser degree, legal scholars have focused on the impact of judicial review and the power of the judiciary in the post-Charter era. In other words, judicial review of alleged rights violations through public measures has largely displaced attention from judicial review of cases related to federalism.

Although there appears to be this general decline of scholarly interest in judicial review as it relates to federalism, the current state of scholarship in this area can be characterized, in part, in the following way: Academics have centred

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their studies on the legitimacy of judicial interpretation and whether or not the Supreme Court of Canada (SCC) engages in a principled approach when reaching a decision regarding the division of powers by embracing either legal formalism or realism. More specifically, scholars have explored the debate between judicial restraint or interpretivism (objectivity) and judicial activism or non-interpretivism (subjectivity). Those pursuing legal formalism and aspiring to objectivity in the interpretation of the law insist upon "strict adherence to narrow principles of statutory interpretation [and *stare decis*], particularly the literal rendering of the text or the *plain* meaning rule" (Saywell 2002, 70). Those seeking realism, on the other hand, suggest that subjectivity is in fact inevitable. From this, the focus opens up to the correctness of interpretations; that is, whether or not the SCC rendered the *right* decision. While this is a worthwhile endeavour, it does not offer insight into how the SCC conceptualizes federalism and how it uses this conceptualization, either implicitly or explicitly or sometimes both, as an aid when deciding cases dealing with the powers of the two orders of government.

In fact, reviewing the process of judicial review within the strict framework of subjectivity and objectivity may lead one to miss the role that a particular understanding of federalism and socio-political factors play in the decision-making process. Acknowledging this element enables one to recognize that judicial review of impugned legislation or government action and the application and understanding of constitutional powers does not only concern the tandem of objectivity and subjectivity. Hence the study of judicial review should not be confined to this debate alone. As William Lederman points out, the Constitution relates to economic, social, and cultural factors (Lederman 1975, 600). It is only logical then that the interpretation, understanding, and application of the values and principles underpinning the Constitution relate to these same factors. Consequently, beyond matters relating to subjectivity or objectivity, socio-political factors play a role, not only in how judges understand and interpret the Constitution, but also in how the SCC constructs and conceptualizes the nature of Canadian federalism.

Along these lines, Peter Russell argues that "the judiciary is an integral part of a country's political system" (Russell 1987, 3). Essentially, then, we need to acknowledge that the reviewing of impugned legislation and the interpreting of the Constitution through resolving jurisdiction disputes or constitutional references is not simply a technical and non-political action of the SCC. The courts in general and the SCC in particular, "do promote change in public policies and assist individuals and groups who are challenging the activities of other branches of government" (ibid.). Phrased differently, the decisions of the Supreme Court are not isolated, nor do they occur in a vacuum. In deciding cases, justices are influenced by socio-political factors, even if they are not conscious of it and their decisions do inevitably affect the wider political society. As such, an analysis of judicial review of the Constitution in general and of federalism cases in particular should reject the notion of *mechanical jurisprudence* – the idea that general and objective principles decide cases (Reaume 1985, 442).

The purpose of this chapter is to introduce a different approach to understanding the judicial review process relating to constitutional issues, one

that embraces the idea that the justices of the SCC have a particular conception of federalism that they use as an analytical tool when deciding upon the constitutionality of impugned legislation and/or action. With this in mind, I begin by juxtaposing the approaches that different legal theorists have on how courts decide the constitutionality of an impugned legislation or government action (i.e., the judicial two-step). All approaches contribute to a better understanding of the analytical steps judges engage in when testing the constitutionality of legislation. However, they seem to underestimate the role that federalism itself and socio-political factors play in the judicial review process. Using four references, (*Reference Re: Authority of Parliament in Relation to the Upper House*, [1980] (The Senate Reference); *Reference Re: Amendment to the Constitution of Canada, (Nos. 1, 2, and 3)*, [1981] (The Patriation Reference); *Reference Re: Amendment to the Canadian Constitution* [1982] (The Quebec Veto Reference); and *Reference Re: Secession of Quebec*, [1998] (The Secession Reference)), I argue that a particular understanding of federalism underpins these opinions of the SCC, and was utilized as a tool in deciding who had the ability to amend the Constitution, and also that this understanding and subsequently the court's opinions were influenced by the political environment of the day.

THE TWO-STEP APPROACH

Edward McWhinney argues that "constitutional law is shot through with such verbal formulae masquerading as legal guidelines that these individual judges apply in some mysterious fashion to produce a result which tells us the law or at least the law for the time being" (McWhinney 1969, 161).[1] What is this mysterious fashion to which McWhinney refers?

It would be safe to say that most, if not all, constitutional scholars, in looking at federalism (or Charter) analysis, hypothesize a two-step approach that judges engage in when deciding the constitutionality of a challenged law or government action. The justices focus initially on the impugned law or government action in order to decide the pith and substance (matter) (as suggested by Hogg (1996) and Swinton (1997)), or the constitutional value (as suggested by Laskin (1955-56, 1960)), of the challenged law. This is step one. Following this, judges focus on the Constitution to determine whether the impugned law or government action is constitutionally valid. This is step two. In federalism cases, this second step translates into the Court assigning the pith and substance to one of the classes of subjects falling under the "scope or content of the heads of power in the [Constitution]" (Laskin, 1960, 148). (In Charter cases, the second step decides whether or not the government's infringement of a

[1]It should be noted that McWhinney (1969) made this comment 37 years ago. Since the entrenchment of the Charter in 1982, the "mysterious fashion" is arguably more pronounced. This is certainly the argument advanced by Mandel, 1994 in *The Charter of Rights and the Legalization of Politics in Canada*, Knopff and Morton, 1992, *Charter Politics*, Hutchinson, 1995, *Waiting for Coraf: A Critique of Law and Rights*, amongst other Charterphobes of both the left and the right (as categorized by Sigurdson 1993).

particular constitutionally protected right was justified.)[2] In short, in step one the justices characterize the challenged law; in step two they define the boundaries of the classes of subjects by interpreting the power distribution provisions of the Constitution to determine which level of government has the power to enact the impugned legislation (Hogg, 1996, 328; Swinton, 1997, 151). The challenged action or legislation cannot be analyzed on its own; the Constitution must be considered in order to fully recognize the scope and limits of governments' powers (Laskin 1955-56, 115). Thus, it is not necessarily important to decipher which step is done first. Instead, it is more significant to recognize that analysis of the two go hand in hand.

Reducing judicial review to the two-step process is not a contentious issue. In fact, all seem to agree on this process adopted by the Court. Where theorists part ways is on the issue of socio-politics; that is, on what role, if any, do socio-political factors play in the thought processes of the Court when it gives meaning to the impugned legislation and/or the Constitution? Hogg (1996) and Swinton (1997), in their respective interpretation of the two-step process, have different and sometimes opposing views of how the courts analyze and give meaning to the Constitution and to the impugned law or government action; essentially, however, they both concentrate on whether justices informed by subjective or objective principles in their analysis. By focusing on this debate, the two theorists emphasize how the courts use judicial doctrines and principles of the Constitution in reaching their decisions. In turn, Hogg (1996) and Swinton (1997) fail to explicitly acknowledge and account for the weight that federalism and socio-political factors have on the judicial review process. On the other hand, Lajoie (1997) and to a certain extent, Laskin (1955-56) and Lederman (1965) do acknowledge that socio-political factors are key to the process of judicial review and in fact distance themselves from the narrow confines of the subjectivity-versus-objectivity debate by adopting more of a critical and functionalist approach. It should be noted that Lederman and Lajoie do not specifically speak of judicial review within this two-step framework. However, their analysis of the process, like Laskin's, does add to the discussion of the judicial two-step enabling us to broaden the reach of this traditional framework.

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[2]Some elaboration is useful:

> Rainer Knopff and Ted Morton also reduce judicial review to a two staged procedure which they dub the *Charter two step.* In step one, justices define the scope of the right. In defining the scope of the right, the Court simultaneously decides whether or not the right has been violated. If the right has been violated, the Court then proceeds with the second step, within which two forms exist.
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> First, justices question whether the right has been violated and if it should stand. The claimant first has to demonstrate that the right has been violated. If it has been, then the onus shifts to the government, where it must demonstrate that the infringement is in fact a reasonable one. The impugned legislation will stand if it can be proven by the government that the infringement of the right is reasonable and demonstrably justified in a free and democratic society.
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> The second form deals with the admissibility of evidence in a trial. If while acquiring evidence, a law enforcement agent violates an individual's Charter guaranteed right, the Court would deem the evidence inadmissible (Knopff and Morton 1992, 35)

Step One: Characterizing the Legislation

In properly characterizing the impugned legislation or government action, justices "identify the dominant or most important characteristic of the challenged law" by seeking to identify the purpose and effect of the law (Hogg, 1996, 328). In doing so, the courts may refer to government's intentions when they enacted the law. This, according to Hogg, can be misleading; the legislative body that enacted the law may have had many intentions, and not necessarily just one (ibid., 336).

Legislative history may in fact be of more aid in determining the purpose of the law. Hogg argues that the legislative history of the law is helpful in that "it places the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it" (ibid., 336). Strayer (1983), however, is not as convinced as Hogg when considering the weight and benefits of extrinsic evidence in general and legislative history specifically. According to Strayer (1983), part of the legitimacy in the admissibility of extrinsic evidence rests on the availability and clarity of such evidence. For example, the debates leading up to Confederation were ambiguous. Therefore, they did not, nor could not provide much insight into the intentions of the Fathers. For the Charter and the Statute of Westminster, on the other hand, debates have been well documented and are readily available. However, statements and the debates of the legislatures tend to be saturated in partisan politics. As a result, they may not necessarily aid in deciding the purpose of the impugned law or of the Constitution. Nevertheless, courts may be inclined to admit such evidence if it can be shown to be proper, clear, and non partisan (Strayer 1983, 241-242).

When identifying the matter, the courts may also look at the effects of the legislation by considering "how the statute changes the rights and liabilities of those who are subject to it" (Hogg, 1996, 337). Identifying the effects of the law "simply involves understanding the terms of the statute and that can be accomplished without going beyond the four corners of the statute" (ibid.). However, we must keep in mind that determining the effect may not be as simple as it seems. The impugned legislation rarely has just one aspect to it, rendering this first step difficult. Consequently, one aspect of the law may fall within the federal jurisdiction and another within the provincial jurisdiction. The difficulty rests in deciding which aspect is the most important one. For Hogg, this exercise is crucial since the answer in this step dictates the direction taken in the second step. In deciding what *the* pith and substance is, he argues that "logic offers no solution" (ibid., 331). Instead, justices rule on which feature of the impugned legislation is the dominant one, based on their discretion. This dominant feature is then taken to be the matter or pith and substance of the legislation. The other aspect or aspects of the law are then considered to be incidental.[3] As such, the pith and substance doctrine "enables one level of

[3]In the case where one subject matter cannot be identified as the most dominant feature of the impugned legislation, the courts can in fact invoke the double-aspect doctrine. This doctrine recognizes that one aspect of the law falls within the federal jurisdiction and the other aspect falls within the provincial jurisdiction. The double aspect

government to enact laws with substantial impact on matters outside its jurisdiction" (ibid., 331).[4]

According to Laskin (1955-56), when determining both the direct and indirect effects of the legislation, extrinsic aids at times may prove to be helpful. These include: first, other statutes deemed relevant; second, the preamble of the impugned legislation; third, material considered to be *legal material*; and fourth, social and economic reports. Considering these extrinsic aids, certain key questions arise. What extrinsic aids are relevant? What criteria are to be used to decide this? Finally, do we run into biased material when resorting to extrinsic aids? Laskin does not address these issues. It must be noted, however, that it was not his intent to focus on this aspect of the debate. Instead, his aim was to reject the idea, espoused by legal formalists, that law is deductive. Blind and passive objectivity does not guide the Court when characterizing the legislation.

So, if law is not deductive, what then guides the Court when reviewing legislation and determining the matter or constitutional value? For Swinton (1997), the courts use statutory context as the starting point when determining the meaning of the legislation. She, unlike Hogg (1996), believes that the purpose and the effects of the impugned legislation offer the courts the principled guidelines it needs to determine the pith and substance. In looking at the purpose of the legislation, the courts rely on the legislative history or on government reports in "identifying a problem which triggered the legislation" (Swinton 1997, 151). Examining the effects of the law may also be relevant in determining the pith and substance of the challenged statute. If there is a conflict between the two, the purpose tends to override the effects of the legislation in federalism analysis (ibid.).

However, there is no uniformity amongst the justices on which approach will be adopted; it is not clear if the justices will be looking at the purpose or the effects of the law in characterizing the impugned legislation. Some judges tend to place greater weight on purpose, whereas others focus on the effects of the legislation. Nevertheless, "the dominant form of inquiry is into the purpose" (ibid.). We must keep in mind though that prioritizing the purpose of the legislation, without regarding the effects it may or may not have on the other order of government can lead to the expansion of powers for one order of government at the expense of the other.

The question remains: what criteria are used by the courts in determining what the most dominant feature, thus the pith and substance, of the law is? According to Hogg (1996), there are three factors that guide the courts when determining the matter of the law. First, "full understanding of the legislative scheme, will often reveal one dominant feature. Second, precedents will often offer a guide" (ibid., 341). When neither of the two proves to be of aid, the

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doctrine is invoked by the courts when it finds that both aspects of the challenged law are equal in importance. The courts, however, have not stipulated when it is appropriate to use such a doctrine (ibid., 331).

[4]When the courts find that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind may be enacted by either the Parliament or the Legislature (ibid., 334).

choice is then one of policy. "Thus [the criteria of choice] is guided by the concept of federalism" (ibid.). Essentially the courts ask, "Is this the kind of law that should be enacted at the federal or the provincial level?" (ibid.). In answering this federalism question, the justices should be free of any political bias. Further, the approval or disapproval of the matter should neither be a factor or determinant in identifying the matter of the impugned legislation. The only politics allowed are those with a *constitutional dimension* (ibid.).[5]

Nonetheless, in the final analysis Hogg believes that, due to the inherent disagreements in Canada's federal system,[6] there is often no principled way of clearly identifying the matter of the impugned law. Since judges have little to guide them, they may assume "that his or her personal preferences are widely shared, if not implicitly embodied in the Constitution" (ibid., 342). If this is the case, then judicial review is not neutral. Hence, Hogg advocates that judicial restraint be a governing precept in federalism cases. "In other words, where the choice between competing characterizations is not clear, the choice which will support the legislation is preferred" (ibid., 342).

The answer for Laskin (1955-56) is found in functionalism, which is an insight into the purpose of the law. That is, by adopting this methodology, the judge is able to take into account how the law serves the goals of society "that express the character of our society" (Reaume 1985, 445). Here, in interpreting or characterizing the legislation, the Court ought to and needs to consider society, including social, economic and political factors.

Step Two: Giving Meaning to the Constitution

This step is understood as the justices identifying and determining the scope of the classes of the legislative subjects. In other words, they focus on and interpret the language of the Constitution (Hogg 1996, 356). According to Laskin (1960) this exercise remains central to constitutional adjudication (76). Similar to the previous step, Hogg (1996) and Swinton (1997) insist that in this step, judges have discretion stemming from the extensive overlapping regulation in the Constitution, as it stipulates jurisdiction over classes of subjects "rather than

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[5]By constitutional dimension Hogg means "values that may be reasonably asserted to be enduring considerations in the allocation of power between the two levels of government". One might note that in Quebec, the prevailing belief is to strengthen the provincial government in order to enable it to promote and enhance the community. Whereas other parts of Canada have different views (ibid., 341).

[6]Resting in different views and interpretations of Canada's history, political science, economics and sociology, this inherent disagreement stems from the struggle between how English Canada views federalism versus how French Canada views federalism. More specifically, which level of government ought to be the stronger of the two with regard to promoting the interests of its citizens? In English Canada, the prevailing belief is to strengthen the federal government in order to maintain such universal programs as health care. In French Canada, the prevailing belief is to strengthen the provincial government in order to enable it to promote and enhance the community.

jurisdiction over facts, persons or activities" (ibid., 151). As such, the matter, identified in the first step, can fall into either federal or provincial jurisdiction.

In cases where the activity can fall within either jurisdiction, the law can be upheld under the *double aspect doctrine*.[7] Swinton (1997) points out that, by invoking this doctrine, justices are in fact negating the possibility of *watertight compartments*.[8] It has become clear, especially since the second half of the twentieth century, that there is and must be overlap in regulation, as both levels of government may have good reason to regulate the same activity.[9]

According to Lederman (1965), the double-aspect theory is central to judicial review of constitutional issues. The challenge for the Court is to interpret the Constitution in a way that ensures that it maintains a balanced federal Constitution. Implicit in the judicial review of division of powers is the concept that "essential elements must be respected if we are to have a balanced federal Constitution – one that maintains and develops reasonable equilibrium between centralization and provincial autonomy in subject after subject of public concern" (ibid., 92). According to Lederman, in order to ensure that the Constitution remains balanced, the Court applies the double-aspect theory when assigning the matter to one of the classes of subjects.

Lederman goes on to argue that clarity of the legislation as well as of the question put before the Court is necessary to ensure clarity of the decision and subsequently a clear understanding of the scope of powers. Thus, clarity becomes key to judicial review for Lederman. As he states, "laws of a federal country must be specific and detailed enough that they make sense in relation to the categories of the system for the distribution of law making powers" (ibid., 96). However, clarity of aspect does not necessarily mean that overlapping will not or does not occur; because of the broad language utilised, the powers enumerated in section 91 and 92 inevitably intersect (ibid., 97).

In order to maintain a balanced federalism, judges are responsible for interpreting the Constitution in a way that ensures that one aspect of either section 91 or section 92 does not overshadow another aspect of the other section, thereby rendering it inconsequential. Maintaining a balanced Constitution is not an easy task, thus mutual limitations of powers and further analysis or another step to determine which aspect of the law prevails are needed (Laskin 1960, 100).

In dealing with this challenge of balance, Lederman notes that the Court has not defined a power so broad so as to nullify another power; this is understood as the mutual modification of definitions. However, relying on this does not eliminate or solve all the problems; "the ambivalent character of particular laws

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[7]Lord Fitzgerald, in *Hodge v the Queen*, (1883-84) (9AC 117 at 130) defined this doctrine as "subjects which in one aspect and for one purpose fall within section 92, may in another aspect and for another purpose fall within 91". (For Hogg, this doctrine is used in the first step, when the matters of the law are found to be of equal importance.)

[8]Watertight compartments is understood as exclusivity of legislative powers, with no overlap between the two levels of government.

[9]This recognition of overlap in regulation is known as the modern paradigm. The former, that of water-tight compartments, is known as the classical paradigm.

or statutes persist" (Lederman 1965, 102). In addressing this predicament, the Court has a tendency to construe the law so that all features, including the effects, are exposed and considered. If the overlapping of powers continues to exist, the Court then proceeds to list all the aspects of the impugned legislation according to degrees of importance. Essentially, the Court asks and answers, what is the most important feature? This exercise can be problematic if it is not clear which aspect of the law is the main one. It is possible that features of a provincial and a federal law can overlap; both can remain functional providing that the two laws do not conflict. If they do, then the Court employs the doctrine of concurrency[10] in which the federal law is generally assumed to be paramount.

Lederman points out that a trend is developing where, increasingly, the courts are adopting the concurrency doctrine. The danger may be that if the concurrency doctrine (where federal law is paramount) is adopted for almost everything, the balance of federalism may be upset (ibid., 104). In order to avoid such erosion in balance, the Court must be careful when determining which of the two doctrines should be invoked, mutual exclusion or concurrency. In resolving which doctrine is applicable, Lederman argues that the Court resorts to federalism concerns; more specifically, it asks, is it better for the people that this aspect be exercised at the federal level or the provincial level? In answering this, the judges consider or ought to consider "the relative value of uniformity and regional diversity, the relative merit of local versus central administration; as well, the justice of minority claims would have to be weighed" (ibid., 106). In short, Lederman argues that the classification of legislation, and in essence, judicial review of constitutional issues, involves the consideration of both societal and the justices' beliefs as well as precedents. Logic plus social fact are key elements of the thought process of the Court when deciding upon the constitutionality of an impugned law or government action.

According to Swinton, the courts look at precedents and history when defining the scope of the subjects in the Constitution. In other words, they focus on the meanings of the words. Precedent and history may or may not "indicate whether a law should come within one class rather than another" (Swinton 1997, 152). In the case where precedent and history prove to be of no aid, the courts resort to federalism concerns. As such, the courts are guided by "beliefs about the optimal balance of power between the federal and provincial governments" (ibid.). Similar to Hogg (1996) and Lederman (1965), Swinton (1997) asserts that the courts ask which level of government is better equipped to enact the matter in question. Adopting her arguments from Lederman, Swinton posits that "the courts should reach their decisions by weighing the values of uniformity and diversity and by following *widely prevailing beliefs*" (ibid.). As pointed out

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[10]For the doctrine of concurrency to be invoked, three criteria must be met:

"(1) the provincial and federal categories of power concerned must overlap logically in their definitions;

(2) the challenged law must be caught by the overlap, that is, it must exhibit both provincial and federal aspects of meaning; and

(3) the provincial and federal aspects of the challenged law must be deemed of equivalent importance or value" (ibid., 104).

by Hogg (1996), if this be the case, then judicial review is in fact not neutral, but biased as this step is basically based on the discretion of judges.

According to Hogg (1996), once the courts have identified the matter or pith and substance of the law, the next step of assigning the matter to either the federal or the provincial government, according to sections 91 and 92 is straightforward. When interpreting the Constitution and assigning the power to the proper head of legislative power, the courts are guided by the principles of exclusiveness,[11] concurrency,[12] exhaustiveness,[13] legislative history, precedent and progressive interpretation. For Hogg, however, this step is highly subjective. The courts apply a large discretionary judgment to their constitutional decisions, because "the scope of potential government activity that the rules address is so enormous" (ibid., 120).

The doctrine of "progressive interpretation" is the doctrine most advocated by Hogg in the interpretation of the Constitution. This doctrine enables the Constitution to evolve so that it can be in tune with the changing nature of society and the changing nature of the government. The doctrine of progressive interpretation "stipulates that the general language used to describe the classes of subjects is not frozen in the sense in which it would have been understood in 1867" (ibid., 367). Furthermore, this doctrine implies that the Constitution, though it is a statute, is one unlike the others. It is organic in nature in that "it has to provide the basis for the entire government of a nation over a long period of time" (ibid.). Inflexibility in the interpretation of the Constitution would in fact disable the governments. Hogg also points out that, because the Constitution cannot be easily amended, the responsibility rests with the courts to allow the Constitution to adapt to the changing times.

Basically put, there are no explicit guides in the Constitution to aid the Court in deciding the content or scope of powers. Thus Laskin (1960) argues that, similar to characterizing the legislation, the Court may use extrinsic aids. Determining which material is admissible is simply the prerogative of the Court. In essence, constitutional adjudication is "distillation of the constitutional value represented by the challenged legislation, (the matter in relation to which it is enacted) and its attribution to a head of power (or class of subject)" (ibid., 76). Classes of subject, according to Laskin (1955-56), must be understood by the Court in a manner that considers and embodies the social or economic or political policy that is expressed. For this very reason, the Court cannot rely on the doctrine of original intent alone. In consequence, the Court has to rely upon external materials (Laskin 1960, 150); this includes writings on the theory and

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[11]"Each list of classes of subjects in s.91 or s.92 of the Constitution Act, 1867 is exclusive to the Parliament or Legislature to which it is assigned. This means that a particular *matter* will come within a class of subjects in one list." (Hogg 1996, 357)

[12]Concurrency is defined as a power shared by both levels of government. If two laws come into conflict, the federal law is paramount (ibid., 358).

[13]Exhaustiveness is defined as, "the totality of legislative power is distributed between the federal Parliament and the provincial Legislatures". However, justices, when interpreting the Constitution, are aware of the fact that the Fathers could not, thus did not, foresee "every kind of law which has subsequently been enacted" (ibid., 364).

practice of federalism. Nevertheless, Laskin emphasizes the need to place more weight and importance on the purpose and effects of the impugned legislation.

Hogg (1996) and Laskin (1955-56, 1960) point out that the examination of the impugned law is likely to end up being more important than focusing on the Constitution. This is so because, over time, the focus of judicial review is less on the meaning of the Constitution, as the principles established over the years have been embedded, thus becoming part of the common judicial understanding of the Constitution. According to Hogg, "the identification of the matter of a statute will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality" (Hogg 1996, 330).

Minimizing the significance of this step enables both Hogg (1996) and Laskin (1955-56, 1960) to ignore how justices formulate and then use the concept of federalism in the judicial review process. As will be shown later, in both the *Senate Reference* and the *Secession Reference*, it is in *giving meaning to the Constitution* that the Supreme Court speaks of the legal and constitutional responsibility one order of government (in these two references, the federal government), has on the other order of government. In the *Patriation Reference* and the *Quebec Veto Reference*, on the other hand, this responsibility emerges from constitutional convention and not from constitutional law. Though by no means the only factor, the Court's understanding of federalism can help explain why in some cases, the obligations emerging from the Constitution are regarded as a legal requirement and in some, as a matter of convention.

CASE STUDIES

The Senate Reference (1980)

In the *Senate Reference*, the Court was asked to determine if the federal government, under s.91(1) of the *BNA Act, 1867*, can unilaterally abolish the Senate. In deciding that "Parliament does not have the legislative authority to abolish the Senate", (*Senate Reference*, 12) the Court considered first, the matter of Bill C-60 and in doing so, it considered the purpose of the Senate and the reasons it was adopted; and second, the purpose of enacting s.91(1) and its relationship to the *BNA Act, 1867*.

According to the SCC, the Senate plays a vital role in exercising power to enact federal legislation, as its advice is needed before royal assent is given (ibid., 10-11). Indirectly then, abolishing the Senate can and potentially does affect federal-provincial relations because of the invested constitutional and institutional interests of the provinces in the Senate. This, according to the Court, is important because "the Senate plays a vital role as an institution forming part of the federal system" (ibid., 9).

Addressing the relationship between the *BNA Act* and s.91(1), the Court adopts Lord Sankey's understanding of the *BNA Act*:

> Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such

> minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. (ibid., 13)

Consequently, the Court adopts an understanding of federalism akin to the compact theory of Confederation or provincial understanding of Canadian federalism whereby both orders of government are viewed as equals.

This leads the Court to find that an amendment to the *BNA Act*, where the amendment affects more than one government, cannot be effected unilaterally. Section 91(1), the purpose of which was to confer power to the federal government to amend the Constitution in so far as the amendment only affects the powers of the federal government (ibid., 12), does not empower the federal government to unilaterally abolish the Senate. If it did, then the federal government would have the ultimate power to unilaterally amend the entire *BNA Act*. And the Court disagrees with this. "The power of amendment given by s.91(1) relates to the Constitution of the federal government in matters of interest to that government" (ibid., 13).

Rather, the obligations emerging from the Constitution and federalism would require the federal government to obtain provincial consent if it were to amend the *BNA Act* where the amendment affects provincial powers and/or federal-provincial relations. In this particular reference, the obligations are given legal weight. In the *Patriation Reference*, however, the obligation to obtain provincial consent is regarded by the majority of the Court not as a legal, but a political obligation, by way of constitutional convention.

The Patriation Reference (1981)

In this reference, the Court was asked if the federal government is obliged by way of law or by way of convention, to obtain provincial consent before asking the British Parliament to patriate the *BNA Act, 1867*. After a unanimous Court agreed that the proposals under the impugned Canada Act would directly and indirectly affect the powers of the provincial governments (*Patriation Reference*, 20), a majority of the Court found that nothing in constitutional law prevents the federal government from asking the British Parliament to amend the *BNA Act* without first obtaining provincial consent. However, by way of constitutional convention, the federal government is required to obtain *a substantial degree of provincial consent* (ibid.).

Adopting a narrow, legal, positivist view of the law, the majority concluded that because the law was and is silent on the matter, there is no restriction on the federal government to proceed unilaterally. Nor, is there any legal obligation on the federal government or on the U.K. Parliament to await provincial consent before proceeding to amend the Constitution (ibid., 21).

This is most interesting. As we saw in the *Senate Reference*, the Court, adopting the same methodology, arrives at an opposite decision – nothing in the *BNA Act* empowers the federal government to unilaterally abolish the Senate, thus it cannot effect such changes.

Lederman (1983), Russell (1983), Lyon (1987) and Monahan (1987), amongst others, contend that the majority, in adopting such a narrow view of the

law was able to, and in fact did, avoid the issue of Canadian federalism and did ignore the federal principle.[14] This, however, is not entirely true. It is not simply that the Court *ignored* the federal principle in its opinion on the legal issue. In actuality, the majority did consider this factor in its analysis; it simply viewed Canadian federalism in strictly centralist terms as it considered and structured its argument around the idea that there exists a hierarchy between the two orders of government.

This conclusion can be drawn from the logic and the implication resulting from such reasoning of the majority; legally and constitutionally, the federal government is not prevented from unilaterally changing the Constitution, where changes affect provincial powers, federal-provincial relations, and even the federation – thus, constitutionally, the provinces are subordinate to the federal government. This majority does not deny provincial autonomy; however, provincial autonomy is limited and does not extend to the legal realm of altering the Constitution if it is not explicitly written. Therefore, it can be inferred that the provinces are subordinate to the federal government in this particular matter. This is especially important considering the potential significance of one order of government being legally able to amend the Constitution unilaterally even if the amendments affect the other order of government.

In contrast, Justices Martland and Ritchie, forming the minority on this legal question, found that nothing in law permits the federal government to proceed without the prior consent of the provinces. For Justices Martland and Ritchie, the issue at hand is not about legality or illegality; rather, it concerns whether the federal government has the power by virtue of either statute or convention (*Patriation Reference*, 53). Recognizing the role the provinces play in the federation, the minority endorsed the arguments of the eight provinces regarding the powers of the federal government; it cannot do indirectly what it is not empowered to do so directly. "In our opinion, the two Houses lack legal authority, of their own motion, to obtain constitutional amendments which would strike the very basis of the Canadian federal system" (ibid., 73).

The difference of opinion between the majority and the minority on this first issue was not necessarily a difference in the understanding of the *BNA Act* or of the constitutional powers. Rather, at the heart of this difference was the way in which the Canadian federation was conceptualized by each side. Informed by the provincialist vision, the minority outright rejected the possibility of unilateralism as it would offend the federal principle based on the idea that the federation is made up of two equal orders of government. The majority on the other hand, dismissed this conceptualization and argued that nothing legally prevents the federal government from unilaterally effecting the patriation of the Constitution.

The majority on the law question was able to approach such a legal positivist view of the Constitution and decide as it did because of the second

[14]To be fair to these authors, Lederman (1983) in particular, they do acknowledge that the different ideas of provincial consent and whether or not it was required was rooted in the Judges' different ideas of Canadian federalism. This acknowledgement of the federalism consideration, while present in both the majority and minority opinions on the second issue, was restricted to the minority in the case of the first issue.

question concerning constitutional convention. In this second question, the majority, this time comprised of Justices Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer, adopted a broader understanding of Canadian federalism to consider the obligations that emerge from it. It is in taking this approach that this majority was able to recognize and find that there is a political obligation on the part of the federal government, emerging from past practices and the principles of federalism, to consult and secure the prior consent of the provincial government before proceeding to formally submit a request to the British Parliament to amend the *BNA Act*.

The Quebec Veto Reference (1982)

In this reference, the Court was asked to give meaning to *a substantial degree of provincial consent* from the *Patriation Reference* and to revisit the unanimity rule when Quebec challenged the constitutionality of the newly patriated Constitution (*Quebec Veto Reference*, 385). In 1981, the federal government and the provinces, with the exception of Quebec, agreed to patriate the Constitution. Quebec argued that it had to agree to the changes to secure the constitutionality of the newly patriated Constitution for two reasons: first, a convention requiring the unanimous consent of the provinces for any changes to the Constitution that affect the powers of the provinces or federal-provincial relations had developed in Canada; and second, a convention requiring the consent of Quebec where changes to the *BNA Act* affect the powers of Quebec had also developed (Government of Quebec 1982, 7).

In addressing the constitutionality of the new Constitution, the Court began by looking at the purpose of the new Constitution and found, similar to its findings in the *Patriation Reference*, that "the *Constitution Act, 1982*, directly affects federal-provincial relationships to the same relevant extent as the proposed constitutional legislation discussed in the *First Reference*" and the powers of the Quebec provincial government (*Quebec Veto Reference*, 392).

Next, the Court determined whether or not such affects on the powers of the Quebec provincial government and legislature can be effected without the Quebec government consenting. In other words, does Quebec need to consent to the changes that curtail its powers?

The Court argued that the unanimity of the province is not required – the issue was settled in the *Patriation Reference* when it found that the convention requiring unanimity had not been established (ibid., 400). On the direct issue of a convention requiring the consent of Quebec, the court found that "Quebec failed to demonstrate compliance" (from the other parties involved) with the principle of dualism (ibid.). Thus a convention requiring the consent of Quebec cannot be said to have developed (ibid., 402).

In deciding as it did, the Court reaffirmed the vision of federalism and the obligations emerging from it (by way of convention and not by way of constitutional law) elaborated in the previous reference – one that stresses the view that Canada is made up of equal partners. It did so in two ways: first, it reaffirmed that only a substantial degree of provincial consent is required – it does not matter which provinces agree, as long as the ones that do satisfy the

substantial degree requirement; and second, it rejected the dualism principle by arguing that the consent of Quebec is not required despite the fact that the new Constitution directly and indirectly affects the powers of the Quebec government and despite the fact that the consent of Quebec was, in the past, sought out by the federal government and the other provinces before proceeding with changes to the Constitution.[15]

The Secession Reference (1998)

In the *Secession Reference*, the Court returns to a vision of federalism and the obligation emerging from it, by way of law, that it first elaborated and relied upon in the *Senate Reference*. The Court was asked whether the province or government of Quebec has the right under Canadian law and/or international law to unilaterally effect the secession of Quebec (*Secession Reference*, para. 2). The SCC's decision in this reference can be reduced to two, albeit oversimplified, points, both rooted in the four constitutional principles that, according to the SCC, emerge from the Constitution: democracy, federalism, constitutionalism and the rule of law, and protection of the minority. First, if a clear majority on a clear question exists, then the pursuit of secession is democratically legitimate; second, if the pursuit is legitimate, then all parties are obliged to negotiate. In short then, the Court demanded, duly or not, clarity.

In order to answer whether the province and/or government of Quebec can unilaterally effect the secession of the province, and to contextualize the issues pertinent to this Reference, the Court began by outlining the purpose and significance of the Constitution, how the federation evolved, and the fundamental nature of Canada (ibid., para., 33). In doing so, the Court seemed to embrace the provincialist vision of the federal bargain, the purpose of Confederation and subsequently federalism in Canada. It pointed out that the Fathers of Confederation decided upon a federal form of governance to secure acceptance from Canada East and the Maritime colonies, looking to ensure the security of both their autonomy and diversity (ibid., para. 37). Sir John A. Macdonald and his camp, on the other hand, preferred a unitary state to avoid the civil unrest occurring in the United States.[16] In essence then, federalism was adopted in order to manage conflict and appease all parties involved. As the Court argued, federalism was a legal response to the underlying political and cultural identities that existed at Confederation and continues to exist today (ibid., para. 43). The federal-provincial division of powers was a legal recognition of that diversity (ibid.).

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[15]The Attorney General of Quebec argued that the proposed constitutional packages of 1964-1965 (the Fulton-Favreau Formula) and 1971 (the Victoria Charter) were abandoned by the federal government and the provinces because the government of Quebec refused to agree to the changes. Also, the amendments of 1940, 1951 and 1962 to the *BNA Act, 1867*, were realized only after consent of all the provinces was secured (Government of Quebec 1982).

[16]At the time undergoing a civil war believed to be caused by the constituent units being granted too much autonomy.

In addition to federalism as a form of governance ensuring the protection of minorities, federal institutions and federal guarantees were established to enable the expression of diversity, having the effect of reaffirming its protection. According to the Court, this was secured through "guarantees to protect the French language and culture both directly [by making French one of the official languages, alongside English, in the province of Quebec and in Canada as a whole][17], and indirectly [by allocating jurisdiction over education and property and civil rights in the province to the Provinces]" (ibid., para. 38).

In the SCC's understanding of Confederation and the purpose of it, we are left with the impression that the constituent units came together as equal partners to form a central government equal to their pre-existing governments. In this sense then, the Court understands Confederation and the aspiration of the units in territorial-federalism terms in which provincial equality is prioritized. Further, through federalism, these constituent units were not only able to maintain regional identities, but were also able to express these identities and diversities, in Quebec's case, mainly through the protection of the French language and through the division of powers.

Flowing from this understanding of the evolution of Canadian constitutional history, the Court argued that "the evolution of Canada's constitutional arrangement has been characterized by four principles: federalism, democracy, Constitutionalism and the rule of law, and protection for minorities" (ibid., para. 48 and 49). Consequently, these four principles must guide any approach to the questions and consequently the actions of governments. Since, as the Court stressed, principles are unstated assumptions that inform and sustain the constitutional text (ibid., para. 49), respect for these principles is essential to the growth of the Constitution (ibid., para. 52); they are all equally important as no one principle trumps the other (ibid., para. 49-50). In short, principles are equal or equated to constitutional obligations; in turn they limit government action.

According to the Court, "the secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiations" (ibid., para. 84). It argued that the right of one government does not trump the rights of Quebec and vice versa. Thus, the majority of Quebec cannot trump the majority of the rest of Canada. The same is true in reverse. The application of the four principles, as understood by the Court, led it to find that secession requires principled negotiations rooted in the Constitution of Canada if a clear majority on a clear question expresses such desire (ibid., para. 93). The Constitution is above the will of both parties involved.

INCLUDING THE SOCIO-POLITICAL FACTOR

These four references indicate that the interpretation of constitutional principles is not merely a formality, as both Hogg (1996) and Laskin (1955-56, 1960) seem

[17]Whether this came into meaningful and harmonious fruition is a different, albeit important, debate.

to espouse. Instead, it can result in a new understanding of constitutional obligations and, possibly, of federalism. In actuality, the understanding of the principle of federalism has evolved, not only in the courts' jurisprudence, but also in the minds of society. In light of this, we must ask in respect to the division of powers: is the conceptualization of federalism embedded in the Constitution? If not, does that mean that the understanding of federalism and, in turn, of the Constitution, is susceptible to socio-political factors?

When defining or setting the limits of the Constitution (step two), justices do have the discretion to either expand or narrow the powers of the two orders of government. Also, and more importantly, it is in this second step where we are able to locate the Supreme Court's conceptualization of federalism. From this, we are then able to see how the Court uses this conceptualization as a tool in arriving at its decision. Hogg (1996), Swinton (1997), and to a lesser degree, Laskin (1955-56, 1960) and Lederman (1975), do not explicitly or extensively account for this in their explanation of the two-step analytical process of judicial review.

This does not mean that characterizing the legislation is a less important step. In fact, as Hogg argues, the way in which the impugned legislation is understood by the Court can shape the way in which it assigns the matter to the heads of power. What is crucial to keep in mind when analyzing a court decision is that both steps are of equal importance; the theorists do in fact acknowledge that neither step is by itself determinative. Despite this recognition, however, these theories of judicial review underplay the federalism factor. Neither Hogg (1996) nor Swinton (1997) recognizes the role socio-political factors play in the decision-making process. This is not to say that Hogg (1996) and Swinton (1997) would go so far as to say that context is irrelevant. They do, however, fail to look at it in a systematic way and consequently such issues and questions are not a central part of their analysis. Lederman (1975) and Laskin (1955-56, 1960) do consider the influence of socio-political factors. However, they merely touch upon the issue without exploring in detail the degree of their influence. In light of this, we need to consider the work of Andrée Lajoie (1997), who offers a current version of a more critical approach and introduces this reality to the study of judicial review. As Lajoie argues, constitutional decisions are clearly linked to the dominant political ideas (ibid., 110, 175-176). Thus we cannot ignore the political dimension embedded in court rulings when we attempt to theorize the role judges play in the interpretation of the Constitution. The socio-political environment must be considered in some detail.

When testing the validity of legislation, judges do not simply and only ask, *did or does Parliament have the power to enact X?* Other factors, including social, political and economic ones, are also considered and factored into the decision-making process. Also, by looking at matter and motive in the objective way suggested by legal positivists, it is not clear that decisive facts will emerge; "what it [does] yield are legal conclusions that are merely professional judgments" (ibid., 123). If judicial review were straightforward as legal positivists claim, we would not have judgements that are conflicting in nature. Essentially, if it were this obvious, then analysis would yield one answer or viewpoint, but such is not the case. As Laskin argues, it is naïve of us to think

that constitutional law is "divorced from social or economic or political views" (Laskin 1955-56, 117).

The Political Environment

Earlier, I indicated that the Court's understanding of federalism may be one factor to explain the changeability of how it understood the obligations emerging from federalism and from the Constitution, but it is certainly not the only one. The political environment can also help explain the opinions in these four references and the understanding of federalism elaborated upon by the Court.

Given that the Senate Reference came on the heels of discussions concerning Quebec sovereignty and the referendum on this issue; a more favourable role for the provinces, especially Quebec, in the federation endorsed by the Pepin-Robarts Report on National Unity; and the "urgency" to patriate the Constitution in order to "save" Canada, it is not surprising that the Court found that s.91(1) did not authorize the federal government to alter the Senate in such a manner as to affect its fundamental character. The public − political leaders, media commentators and citizens − had its reservations regarding first, Trudeau's assertion that his government acting alone could abolish the Senate, second, the Pepin-Robarts Report on National Unity, and third Lévesque's ideas of sovereignty association. Canadian society at the time seemed to favour a federation where both orders of government were equal to each other and the provinces equal amongst themselves.[18] The Court reinforced this perception of the federation with its opinion in the *Senate Reference*.

With regard to the *Patriation Reference*, it would be safe to argue that the SCC was aware of the urgency of patriating the Constitution given the Quebec national "crisis", the desire of Canadians to have a patriated Constitution with a charter of rights and freedoms, and the growing animosity between the two orders of governments. In light of this, the SCC rendered a political decision by not seeming to lean more favourably to one side; it "reflected a shrewd political judgment on the part of the Court" (Monahan 1987, 192). It gave something to everyone; all parties were able to point to certain aspects of the decision, be it in the legal or convention findings, to claim victory and flex their political muscles.

In the *Quebec Veto Reference*, the Court was asked to deem the newly patriated Constitution unconstitutional. The Court had seemingly no choice but to reach the decision it did for essentially two reasons. First, politics surrounding the case compelled the Court in this direction. Russell (1983), in reference to the opinion rendered by the Quebec Court of Appeal, argues that "a positive answer [by the Quebec Court of Appeal], would have meant that patriation was being achieved in an unconstitutional manner. The courts, however, have managed to avoid reaching such a politically troublesome conclusion" (211). Canadians

[18]This conclusion regarding the perception held by society is derived from a review of various newspapers accounts of the reaction of political leaders and the public to these ongoing issues.

were quite content and relieved that the Constitution was finally patriated. So the timing of the case may have pushed the Court to decide as it did. Second, there was an implicit rejection of unanimity in the *Patriation Reference*. Although the court, in deciding that a substantial degree of provincial consent was required, did not explicitly rule out unanimity, it did so implicitly. This may be inferred from statements made by the majority on the convention issue which indicate that yes, precedents point to unanimity; however, it was and is not clear that unanimity was and is the rule (Hogg 1983, 318).

To explain the actions of the Court by highlighting the timing of the Quebec Veto Reference and the enthusiasm of the public would, however, undervalue the politics of the day, specifically the politics of the two major players at the time, Trudeau and Lévesque. Each had a particular vision of Canada and Quebec's position in the federation. Trudeau endorsed a pan-Canadian identity that promised to generate equality of the individual and, in turn, strengthen the Canadian identity by enabling the galvanization of such ideals through a charter of rights and freedoms, a domestic amending formula, a strong central government with which the individual could identify, equality of Canada's provinces, official bilingualism and multiculturalism. The goal was to have all Canadians align their political allegiance and identity to the Canadian nation and to the government that represents this nation.

Contrast this with the vision held by Lévesque, who stressed respect for the "proper" roles of both orders of government. Lévesque, as well as previous Quebec Premiers, insisted upon the strict adherence to the division of powers coupled with the idea that Quebec represented a nation in both the social and political sense. Thus, the Quebec government ought to be party to all constitutional changes. Lévesque's vision promoted the idea of two nations, equal to each other. This, it seemed, would place the Quebec government above the other provinces vis-à-vis constitutional importance and in turn Quebecers above other Canadians. Special status, it was perceived, would threaten the equality and just society Trudeau promised. In the end, it was Trudeau's vision that won the battle.

In the *Secession Reference*, the Chrétien government asked the SCC to arm the federal government with the ammunition it would need to thwart the secessionist agenda, to strengthen its role both within Quebec and within Canada outside Quebec, and to reaffirm Canada's status as a single political nation. The Chrétien government would have been served well had the Court simply agreed with the government's position and found Quebec to be bound by the Constitution and the vision of Canada it embodied. This, however, came with political risks. First, the federal government, by inquiring into the ability of the province to secede, was indirectly questioning Quebec's ability to hold a referendum on the matter; it was thereby interfering directly in Quebec provincial matters (Schneiderman 1999, 5). Second, the federal government was resorting to an institution whose legitimacy was questionable in Quebec.[19] The Court, however, in rendering an opinion that appeased both sides, avoided any

[19]In fact, the Quebec government decided not to participate in the Reference citing the authority of the SCC as one of the reasons.

significant uprising. As Michael Mandel states, "the Court reads the polls. It knows that the sovereignists have been weakened, and it knows that nothing strengthens weak sovereignists like fresh insults from Canadian institutions. Better to show a little rhetorical generosity" (Mandel 1999, 1).

In constructing or conceptualizing such fundamental concepts as federalism, the Court is not an isolated or completely autonomous institution; it is in fact affected by the environment in which it is a participant and certainly by the environment in which the case or issue unfolds. As Russell argues, judicial decisions *have* an impact as they "reinforce social, political and economic forces at work in the country" (Russell 1987, 55). Thus by adopting the critical approach introduced by Lajoie (1997) and the functionalist approach espoused by Laskin (1955-56, 1960) and Lederman (1975), we can argue that it is in *defining and setting the limits of the Constitution* where Judges conceptualize federalism (influenced perhaps by the socio-political environment) and in *focussing on the impugned legislation/government action (deciding who has the power to enact such a legislation)*, where they use that conceptualization as an analytical tool.

CONCLUSION

As Laskin points out, we need to ask why the Court decided a case in a certain way. We must recognize that cases might very well have been decided in different ways. Cases are decided differently based on the Court's views of federalism (Laskin 1955-56, 124). Laskin (1955-56) does not explore this point in detail in that he does not look at how federalism is understood and how it influenced and determined the various decisions and opinions of the Court. This is a dimension of the issue that needs to be explored in order to fully grasp the process and the impact of judicial review of constitutional issues. It is important that we embrace the reality that the SCC, through its decisions, has "a significant bearing on the meaning and impact of laws" (Russell 1987, 54); as well, it has a similar impact on our understanding of key concepts, specifically federalism.

Once we accept that socio-political factors influence court decisions, then the idea that the Court, in making sense of the division of powers, constructs the nature of federalism and uses this conceptualization as an analytical tool, is not a far leap. If this is true, then we must acknowledge in any theory of judicial review, not only that the Court is not guided by objective principles, but also that federalism as a concept is understood differently by the Court at different times. This understanding underpins court decisions and consequently, is used as an analytical tool when the court renders its decisions on cases dealing with this very issue.

Cheryl Saunders, in a paper published in this volume, demonstrates that the Australian High Court plays an active role in the centralization of the Australian federation through its rulings and court decisions. This is not to say that this is occurring in Canada. However, we must acknowledge that the Canadian Supreme Court does have the ability to shape contemporary understandings and practices of federalism in Canada.

The SCC, as an institution, is important, but it is not the sole cause of an outcome, in this case the social and political understanding of Canadian federalism. By looking at the political environment and behaviour on the one hand, and the SCC decisions and their ability to construct the nature of federalism on the other, we see that the two variables have both an independent and a dependent relationship with each other. It is a symbiotic relationship and this is not surprising. The Court affects society and society affects court decisions. How these two seemingly distinct and independent variables are linked requires further analysis to test whether and the degree to which the SCC influences the understanding of Canadian federalism and whether and the degree to which the Court is influenced by the dominant understanding of Canadian federalism.

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Section Five

Diversity and Federalism

13

Federalism and First Peoples

Peter H. Russell

Si un fédéralisme reposant sur une combinaison idéale d'autoréglementation et de réglementation commune constitue à l'évidence le cadre normatif le mieux adapté aux relations avec les peuples autochtones, la recherche sur le fédéralisme prête peu d'attention à ces relations dans les États fédéraux. Ce chapitre porte sur trois dimensions des rapports avec les peuples autochtones dans les trois États fédéraux de l'Australie, du Canada et des États-Unis. On y voit premièrement que le gouvernement central, les provinces et les États de ces pays commencent à peine à envisager leurs rapports avec les gouvernements autochtones d'un point de vue fédéral plutôt qu'impérial. On y montre ensuite que les formes officielles et officieuses du fédéralisme de traité s'imposent comme la plus prometteuse des approches en vue d'établir des relations fédérales avec les Premières Nations, bien que des mesures plus efficaces soient nécessaires pour assurer leur pleine participation aux institutions qui gouvernent la fédération. Enfin, l'auteur avance que l'Australie, le Canada et les États-Unis gagneraient tous trois à tenir compte des traditions confédérales des peuples autochtones.

Federalism seems an obvious normative idea for thinking about the relations between indigenous peoples and the federal states within which they are embedded. We liberal-democratic non-aboriginal people, at our best, have thought of our relationship with first peoples as one that should combine self-rule and shared rule. A lot of self-rule and a little shared rule is what First

Peoples from the beginning thought treaty relationships would be all about. And yet, although First Peoples are a component of politics and government in a number of the world's leading federations – including Australia, Canada and the United States – texts and surveys of federations and federalism rarely, if ever, deal with the position of First Peoples in federations.

So I welcome the invitation of the organizers of this conference to address this relatively neglected aspect of federalism.

I will approach the topic along three dimensions:

- the role of the two levels of government in relations with First Peoples;
- the potential of establishing and maintaining federal relations with First Peoples in federal states; and
- federal and confederal structures within and among First Nations.

Given the constraints of your time and my knowledge, I will discuss mainly the first two themes, and with reference to the three settler federations I know something about – Australia, Canada and the United States.

ROLE OF FEDERAL AND PROVINCIAL/STATE GOVERNMENTS

The founding constitutions of the two North American federations assigned exclusive responsibility for aboriginal affairs to the central government, Australia's founding constitution did the exact opposite, denying the central government any power to make laws with respect to the "aboriginal race", by default leaving the aborigines and Torres Strait Islanders under the authority of State governments.

The historical reason for this difference is clear. In North America the British imperial government recognized Indian nations and regulated its relations with them through nation-to-nation treaties. It was natural and mutually agreeable for both the indigenous nations and the empire's successor states (i.e., Canada and the United States) to continue to carry on these nation-to-nation relationships. The history of aboriginal relations in Australia is in stark contrast to this. Despite establishing New Zealand through a treaty with the Maori, and early efforts of the Colonial Office in London to have similar treaty-like relations with native peoples in Australia, settler sentiments prevailed on the ground in Australia. In practice, and for over 200 years in law, Australia was regarded as being a *terra nullius* when the white man arrived. Aborigines and Torres Strait Islanders were treated as sub-humans destined to eventually disappear and in the meantime were left to the mercy of the States. It was not until 1967, and as a result of the most positive referendum outcome in Australian history, that the Commonwealth Government acquired a concurrent jurisdiction in aboriginal affairs – and aborigines and TS Islanders were respected as human enough to be included in Australia's census.

Leaving native peoples entirely under local jurisdiction had deleterious consequence for indigenous peoples in Australia. Here we encounter Russell's

iron law: "the further the policy-making authority is from the native peoples, the more liberal (or less oppressive) it is likely to be".

It is not that things went swimmingly for aboriginal peoples in Canada and the United States. On the contrary, once First Nations were no longer needed as military allies or trading partners, they became subject to the plenary authority of central governments, which in both Canada and the United States aimed at the extinction of aboriginal societies through forced assimilation or warfare. In the United States, Congress passed the *Indian Removal Act* in 1830 to remove the Cherokee and other Indian nations to west of the Mississippi, and in 1871 Congress prohibited the President of the United States from making any more treaties with Indian nations. Henceforth, military force would be used to settle relations with native tribes. Canada carried on the treaty process as a means of acquiring land peacefully and cheaply for settlement and resource development. But relations with First Nations were conducted primarily on the basis of the assimilationist federal Indian Act.

Indigenous peoples in Canada and the United States experienced massive dispossession and were subject to cruel, racist treatment – including the forced break-up of their families. Nevertheless, everything is relative, including oppression, and I would judge that the racist oppression Australian aborigines experienced at the hands of Australian state governments was worse than the experience of indigenous peoples in Canada and the United States.

The difference in constitutional foundations has had a positive long-term legacy for aboriginal peoples. It has meant that in both the United States and Canada, there is no doubt about the national government having the paramount responsibility for policy relating to first peoples. And there is a principled and non-partisan constitutional legacy for national governments to draw upon in making aboriginal policy: in Canada, there is the continuous tradition of treaty-making and, since 1982, the recognition of Aboriginal and treaty rights in the Constitution; in the United States, there is the Supreme Court's Marshallian jurisprudence recognizing the Indians as "domestic sovereign nations". There is nothing like this in Australia. The right side of politics tends to see federal leadership in aboriginal affairs on issues relating to land as an invasion of state rights. John Howard's government, has not, to say the least, embraced the High Court decision in *Mabo* recognizing aboriginal title and has done all it can to minimize the effect of that decision.

The lesson from all this is NOT to insist on exclusive federal responsibility in aboriginal affairs or keeping provinces and states from being significant players in this area. Quite to the contrary, states and provinces are already much involved in aboriginal affairs. Relations with aboriginal peoples involve huge land and resource issues, major social, educational, health and urban policy issues, and policing responsibilities, all of which are vital concerns of provinces and states. Most first peoples' leadership no longer insists on dealing exclusively with the central government. The challenge today, is to work out the most effective ways for federal and provincial/state governments to collaborate in their relations with First Nation governments. I believe that the best response to that challenge is treaty federalism – which is the segue to my second theme.

TREATY FEDERALISM

By treaty federalism I mean regulating either the general relationship concerning a first nation's governance and lands or regulating a policy field like forestry development, wild-life management, environmental protection, schooling, health services or policing − through tripartite agreement between the federal, provincial (or state) and aboriginal governments – or, in some cases, bilateral agreements between an aboriginal community and a local authority, or between the federal government and first peoples in the northern territories. Such agreements need not – and usually do not − have all the trappings of a formal treaty. What is essential is that they be negotiated and consented to by the accountable authorities of the aboriginal people, the state or province and the federation, and that they can only be modified or abrogated in the same way.

Clearly, making consensual agreements is not the easiest way for provinces and states to regulate relations with first peoples. It is much easier, to the extent that courts permit, to simply impose regulations and legislation on native peoples. However, in the long term, I believe negotiated agreements hold out a more promising possibility for establishing just and mutually beneficial relations with the native peoples of our federations. More just in that such agreements recognize that those who identify as aboriginal, besides being citizens of the country and the province or state in which they reside, are members of an indigenous people who, in the words of the recently ratified UN Declaration on the Rights of Indigenous Peoples, have "the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means of financing their autonomous functions" and the right to "freely pursue their economic, social and cultural development". More mutually beneficial in that it is in the best interests of all citizens that first peoples recover responsibility for their own societies and become respected partners in economic development rather than being kept as dependent wards of the state.

In the absence of effective collaboration between national and local authorities, courts have played an important role in regulating relations between native peoples and state or provincial governments. A major portion of the U.S. Supreme Court's caseload has been taken up with defining the limits of State authority with respect to Indian nations and their reserve lands. The extensive scholarship on the Supreme Court's jurisprudence in this area shows that the Court has been a very inconsistent and intellectually challenged regulator. Judicial decisions, at their best, are a poor substitute for agreements mutually crafted by accountable political authorities. Courts can keep states or provinces out of indigenous country but they are not the right agency for bringing this level of government into playing a constructive role in indigenous affairs.

The main challenges to moving along the path of treaty federalism I would classify as fiscal, ideological and political. The fiscal challenge is severe because central governments are all too willing to increase the role of provinces or states in delivering services to aboriginal communities if it means off-loading the costs. The real costs of servicing aboriginal communities in relatively remote areas with a host of special needs must be calculated and provided for if agreements are not to be the basis of a cruel hoax.

The ideological challenge is also severe. The three federations (as well as New Zealand) voted against adopting the UN Declaration on the Rights of Indigenous Peoples. In all three, any talk of indigenous peoples' right to self-determination, both for governments and many citizens, causes severe outbreaks of what I call "sovereignty jitters". The best way of dealing with "sovereignty jitters" and other ideological hang-ups is to focus as much as possible on working out agreements that serve the interests at stake and say as little as possible about abstract constitutional principles such as self-determination or sovereignty. The art of sharing sovereignty – which, analytically, is what federal arrangements are all about – often requires remaining silent about the sovereign beast.

Concentrating on interests is also the key to winning the political support treaty federalism requires. Agreements that can be shown to advance the social and economic well-being of first peoples and to reduce their economic dependency can be politically defended by the governments that sign them.

Canada has made more use of treaty federalism than the other two federations. Federal and provincial governments have entered into comprehensive agreements with first nations in British Columbia, Quebec and Newfoundland-Labrador, and agreements on a wide range of discrete policy areas have been negotiated in every province. Unlike the United States, Canadian governments never abandoned the treaty method of regulating relations with first nations. And, for first peoples in Canada, as for their counterparts elsewhere, treaty relations have always been the preferred way of securing their interests in settler states. Nearly this entire province [Ontario] is covered by treaties with first nations, and as the Ipperwash Inquiry spells out, effective resolution of federal and provincial government breaches of these treaties will go a long way to providing the funds and resources needed to enhance the economic self-sufficiency of first nations in the province.

Although treaty federalism is a much harder sell in Australia and the United States, it is not a hopeless cause. In the late 1970s two Australia-wide organizations, one Aboriginal and the other non-Aboriginal, launched a movement for a *makarrata*, a Yulgnu word for a binding settlement of reconciliation. In the 1980s, Labour Prime Minister Bob Hawke took up the idea for a while, but this fluttering hawk soon dropped it when he encountered political resistance. Through the 1990s, as Australia worked at a grand aboriginal reconciliation, treaty arrangements were (and remain) the core aspiration of the indigenous leadership and their non-Aboriginal supporters. Although formal government-to-government treaty-making has not yet happened in Australia, governments have given their blessing to numerous agreements between aboriginal groups and resource companies as means of securing the interests of aboriginal people in economic developments on traditional lands. The *Native Title Act* provides for Indigenous Land Use Agreements as a way of avoiding the cumbersome and litigious processes of the Native Title Tribunal, and a handful of these have been negotiated. Some progress has been made on larger and more comprehensive regional agreements in the Torres Strait and South Australia. If the Australian Labour Party under Kevin Rudd finally defeats John Howard and the Coalition in the November

elections, perhaps we can expect a greater acceleration of these treaty initiatives. Aboriginal affairs remain a highly partisan area of policy in Australia.

Although it is a century and a quarter since Congress terminated treaty-making with Indian nations, I would think it is out of the question that formal treaty-making could ever be restored in the United States. Nevertheless, in the modern period the United States has negotiated important agreements with native peoples, for instance the 1971 Alaska Native Claims Settlement, without calling them treaties. U.S. Senators have played a leading role in brokering such settlements in States that they represent, most recently with the restored Hawaiian Kingdom government in Hawaii. Less formal agreements on specific issues, like casinos, conservation and policing, are the bread-and-butter of regulating relations between States and Indian nations.

ABORIGINAL CONFEDERACIES

The predominant pattern of political organization in North America at the time of European contact was the association of small tribes and clans in confederacies. The Haudenosaunee (Iroquois) was the best known, but there were others – the Pikuni (Blackfoot) confederacy in the western plains, the Lakota (Sioux) in the north-central plains, and the Council of Three Fires in the Great Lakes region. Confederacies provided military and diplomatic strength through central councils and leadership while retaining the fundamental autonomy of the local community bound to its traditional lands and waters. Some of these confederacies survive until this day, and the confederal idea continues to be a fundamental principle of First Nation political organization in North America.

I have not run across any writing about such a tradition among Australian aborigines or Torres Strait Islanders. Although ten years ago, when my wife and I spent some time as guests of the Ngaajatjara people at Warburton in Western Australia, (halfway between Alice Springs and Kalgoorlie), members of their Council talked about the Council representing a number of different communities, and left me with the impression that the Council functioned, in effect, as a confederal tribal council. I have a sense that the Pitjantjatjara people of South Australia have a confederal structure. And in the Torres Strait, representatives of the peoples of the various islands have formed an Island Council to co-ordinate their efforts to obtain regional self-government. Given the strong tradition of island autonomy, it is likely that any government for the Torres Straits that is shaped and authorized by the Islanders will be confederal in nature.

The Aboriginal confederal tradition has two important points of relevance to contemporary politics and government in our federations. First, as first peoples obtain or recover self-government, their structures of governance are likely to be federal or confederal. The strong position of the Nisga'a Villages in the Nisga'a Constitution ("each Nisga'a Village is a separate and distinct legal entity") indicates that the Nisga'a is federal or confederal. The tribal councils that are taking over government responsibility for aboriginal education, health and social welfare are, in effect, new confederacies. These developments are

very much in line with suggestions in the Royal Commission on Aboriginal Peoples report about small First Nations achieving more effectiveness in program delivery by pooling their resources in intergovernmental arrangements. So we can look forward to a lot more federations within our federation – how federal can you get?

The second point is that the American founding fathers should not be the only non-Aboriginal North Americans to benefit from learning about the Aboriginal federal tradition and experience. Aboriginal scholar John Borrows, in his book *Recovering Canada: The Resurgence of Indigenous Law*, gives a number of interesting examples of where we might deal more effectively with a number of issues, environmental protection for example, by drawing on the aboriginal federal tradition.

Well, I have only skimmed the surface of this topic – federalism and first peoples – but I hope I have skimmed enough to give you a sense that a lot of valuable juice remains to be squeezed out of this particular fruit of the abundant orchard of federalism.

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14

Symmetry and Asymmetry in American Federalism

G. Alan Tarr

Généralement considérés comme un système fédéral symétrique, les États-Unis n'en comptent pas moins des unités constitutives aux fonctions et compétences différentes de celles des États. C'est le cas de la capitale nationale (District de Columbia), des tribus amérindiennes et des territoires n'ayant pas encore qualité d'État. Le statut de ces unités constitutives non étatiques est non seulement défini par la Constitution fédérale mais aussi par la loi du pays et, dans le cas des nations amérindiennes, par des accords avec le gouvernement central. Le statut de ces unités ayant varié selon les orientations politiques et les partis au pouvoir, la situation et les droits juridiques de leurs habitants ont également évolué. Ce chapitre décrit le statut actuel des unités constitutives non étatiques des États-Unis, analyse les facteurs qui expliquent au fil du temps l'évolution de ce statut, et examine l'incidence de cette asymétrie sur le fédéralisme américain en comparant ce statut à celui de l'ensemble des États américains. Il recense enfin les problèmes qui freinent les efforts visant à concilier cet éventail d'accords fédéraux avec la Constitution du pays et les valeurs politiques prépondérantes de la société américaine.

The United States is usually viewed as a symmetrical federal system. The original 13 states each exercised the same powers and enjoyed the same representation in the Senate, and the United States Constitution guarantees that all states subsequently admitted to the Union join on an equal footing, with the same powers, representation, and prerogatives as the original thirteen. Article IV, section 3 of the Constitution, in empowering Congress to admit new states to the Union, does implicitly authorize it to establish the conditions under which they will be admitted. Acting under that authority, Congress inserted conditions as to the substance of state constitutions in the enabling acts by which it empowered prospective states to devise constitutions and apply for statehood. When state constitution-makers failed to meet those conditions or inserted provisions of which Congress or the President disapproved, they were able to block legislation admitting the state until the offending provisions were altered or removed. However, once states were admitted, they were free to resurrect the

offensive provisions, as Arizona did with a provision authorizing the recall of judges (Tarr 1998, 42-43). Thus, newly admitted states enjoy the same discretion in constitutional design and in policy development as is available to all other states. Supreme Court rulings have confirmed their equal status, noting that any attempt by Congress to impose restrictions on a new state that deprive it "of any of those attributes essential to its equality in dignity and power with other States" would violate the Constitution (*Coyle v. Smith*, 568).

This understanding of the American federal system as symmetrical suffices, however, only if one restricts one's attention to the fifty states. But both historically and currently the country has included component units whose competencies and functions differ from those of the states. These units include: (1) the nation's capital city, the District of Columbia; (2) Native American tribes, almost 600 of which have been recognized by the federal government;[1] (3) territories that were expected at some point to become candidates for statehood; and (4) territories that are expected to remain permanently in a lesser association with the American polity. The first three of these asymmetries within American federalism were contemplated by the Constitution, which provides guidance as to the status of these units, the political powers they exercise, and the legal position of their residents. These shall be the focus of our analysis.

The status of these non-state constituent units is defined not only by the federal Constitution but also by federal statute, and in the case of Native American nations and some long-standing territories, by agreements between the federal government and those constituent units. Given the crucial role played by non-constitutional legal materials, it is perhaps not surprising that the status of these various non-state units has altered over time, in response to shifts in political perspective and in political power. The legal status and rights of those residing in these component units has likewise changed. This chapter describes the current status of America's non-state component units, analyzes the factors that have prompted shifts in their status over time, and through a comparison of their status with that of the American states, highlights the implications of this asymmetry for American federalism. It also considers problems that plague efforts to reconcile this diversity of federal arrangements with the federal Constitution and with prevailing political values in the society. To provide a baseline for comparison, this paper first reviews the constitutional status of the American states and of their citizens.

[1]In line with common practice, this paper uses interchangeably the terms "Native American" and "Indian" and the terms "nation" and "tribe".

STATES AND THEIR CITIZENS IN THE AMERICAN CONSTITUTIONAL ORDER

The federal Constitution safeguards the position and powers of the American states. It protects state power first of all by conferring only limited powers on the federal government, and the Tenth Amendment confirms that all residual powers not prohibited to the states by the Constitution "are reserved to the States respectively, or to the People". Although the scope of federal power increased dramatically during the twentieth century, since the 1990s the United States Supreme Court has displayed a renewed interest in safeguarding state power and prerogatives and in curtailing federal overreaching (*United States v. Morrison* 2000; *Alden v. Maine* 1999; *Printz v. United States* 1997; *Seminole Tribe of Florida v. Florida* 1996; *Lopez v. United States* 1995). Article VI, section 3 of the Constitution also grants extraordinary protection to the territorial integrity of the states, forbidding tampering with state boundaries not only by congressional legislation but also by the normal processes of constitutional amendment. The Constitution further secures to the states a role in the selection of federal officials and in the processes of the federal government. Initially, state legislatures selected senators, and even after the Seventeenth Amendment (1913) replaced this mechanism with popular election, the states still enjoy equal representation in the Senate. They also play a role in the Electoral College that selects the president. And as long as they do not discriminate on the basis of race, gender, or other factors, the states set eligibility requirements for voting in both national and state elections.[2] Finally, as Article V indicates, constitutional amendments require ratification by three-quarters of the states, so that the federal balance established in the Constitution cannot be altered without the concurrence of an extraordinary, geographically dispersed majority of the states.

Under the Constitution's system of dual citizenship, those born in the United States or naturalized are citizens of the United States as well as of the states in which they reside. Article IV, section 2 of the Constitution guarantees to "the Citizens of each State ... all Privileges and Immunities of Citizens in the several States". Article IV, section 4 promises them "a Republican Form of Government". Finally, the Bill of Rights guarantees them a number of important rights, and Supreme Court rulings have gradually made almost all the safeguards of the Bill of Rights applicable to state, as well as federal, invasions of rights (Rossum and Tarr 2007, 61-66).

[2]This has been undermined somewhat by constitutional amendments (the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth) establishing a federal floor for voting requirements.

ASYMMETRIES IN AMERICAN FEDERALISM: BASIC THEMES

The analysis of asymmetries in American federalism that follows will highlight several distinctive features of the American experience.

The Impetus for Asymmetrical Arrangements

Asymmetries in federal systems are usually introduced to take account of differences in geographical position, politico-social structure, and/or ethnicity among the component units (Watts 2008; Pernthaler 2002; Burgess 2000). In the case of the United States, these factors have also played a role. Geographical position mattered in the case of territories, and differences in style of life and traditional forms of governance influenced the treatment of Indian tribes. However, typically − particularly in multi-ethnic federations − it is the component units that seek distinctive (asymmetrical) arrangements as a means of recognizing and accommodating diversities. In contrast, the asymmetries in American federalism were established and imposed by the federal government, and these steps were taken to serve national objectives, not the distinctive needs of the component units. Thus the creation of the District of Columbia ensured that the national capital would not be under the influence or control of a state government. And the constitutional provisions dealing with Native American tribes enabled the federal government to deal with a problem not of its own creation, namely, the existence of internal, dependent nations within the country's borders. The constitutional provisions for territorial government established an orderly procedure whereby sparsely inhabited territories could be governed until population growth qualified them for statehood.

The Importance of Constitutional Safeguards

One obvious lesson of the history recounted in this chapter is that if one wishes to secure some measure of autonomy for component units, it is not enough to rely on the good faith of the federal government. Constitutional protections for such autonomy are vital. These protections might take various forms. One possibility is that component units might be accorded some representation in the councils of the federal government, so that their concerns could be voiced and their needs addressed in federal legislation. Thus, in the United States, state governments were directly represented in the Senate, at least until the Seventeenth Amendment replaced election by state legislatures with direct popular election. Even now the argument in the United States for limited judicial review of federalism disputes rests in part on the purported adequacy of the Senate as a political guarantor of state interests (Choper 1980; *Garcia v. San Antonio Metropolitan Transit Authority* 1985). Yet Indian tribes enjoy no representation in the federal government, perhaps in part because of their anomalous constitutional position: they are not simply component units but also

national entities. Similarly, neither the District of Columbia nor American territories enjoy representation in Congress. This lack of representation in the councils of the federal government means that these component units cannot protect their interests directly but must rely on the support of political allies, which is not always forthcoming.

A second form of constitutional protection for the autonomy of component units involves *express* recognition of that autonomy: the powers of component units could be constitutionalized. These constitutional protections may be only "parchment barriers", but they can serve as a deterrent to federal invasions of powers, and they can provide a basis for judicial enforcement of constitutional limits.[3] In the United States, constitutional guarantees of state authority have helped the states maintain their vitality despite the expansion of federal power. In contrast, the Constitution expressly recognizes that congressional authority over the District of Columbia and over American territories is plenary. And the absence of guarantees of tribal authority in the federal Constitution has buttressed the conclusion that congressional power over the tribes is likewise plenary. This in turn has encouraged the federal government to invade tribal prerogatives, sometimes to serve the interests of the non-Indian citizenry but often to "civilize" or "protect" the Indian population.

This expansion of federal authority in turn highlights a third form of constitutional protection, namely, the power of component units to consent to – or refuse to consent to – changes in their legal relationship with the federal government. The American states have that power, and thus constitutional amendments divesting them of powers have been rare. In contrast, tribes, territories, and the District of Columbia lack that constitutional safeguard, and thus fluctuations in the power they have exercised have depended exclusively on the political perspective of the federal government. It has been suggested that tribal assemblies be established, affiliated with Congress, with the power to approve or reject extensions of state authority to tribal territory, but this proposal has never received serious political consideration (Barsh and Henderson 1980, 271).

The Influence of Ideas

If the degree of autonomy accorded to non-state component units in the United States is a matter of congressional discretion, what determines how Congress exercises that discretion? One important factor appears to be the legal/constitutional relationships already existing within the federal system. History reveals that these practices and the body of ideas underlying them

[3]Indians seem a prime example of a "discrete and insular minority" deserving of enhanced judicial protection. See the famous Footnote 4 of *United States* v. *Carolene Products Company*, 304 U.S. 144 (1938). There is some evidence, at least on a rhetorical level, that courts have recognized that responsibility of heightened scrutiny – see, for example, *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942).

provide guidance for – and perhaps persuasive influence on – the exercise of congressional discretion.

The scope of home rule in the District of Columbia illustrates how this works. The District's relationship to Congress in important respects resembles that of local governments to state governments in the United States, and this analogy helps explain the fluctuations in the actual powers granted to the District over time. More specifically, Congress' willingness to permit "home rule" in the District has tracked changing patterns of thought and practice relating to American local governments more generally. During the eighteenth and early nineteenth centuries, American local governments exercised broad powers without significant state interference or direction, continuing a tradition that had developed during the colonial era. Although the legal doctrine underlying this practice was not fully elaborated, the presumption seemed to be that the power of local self-government was inherent, rather than a power delegated by state governments. Often these local governments were directly represented in the state legislature, with apportionment tied to municipal or county lines, which served both to recognize the local units' status as governmental entities and to enable them to protect their interests (Libonati 1988, 107-116; Tarr 1998, 19-20). During the period when ideas of local autonomy were regnant, the District of Columbia too enjoyed considerable home rule. But during the mid-nineteenth century, legal theory reconceptualized local governments as entities "whose powers derived from and were subject to the sovereign state legislature". This understanding of states as unitary sovereigns and local governments as subordinate units was formalized in legal doctrine in "Dillon's Rule", under which municipalities could exercise only those powers that were expressly granted to them by the state (*Clinton v. Cedar Rapids and Missouri River Railroad* 1868; Dillon 1913; Frug 1980). When introducing reforms in the 1870s, Congress drew upon these broader currents in legal thought, adapting the reconceptualization of the legal status of local governments to the situation in the District and reassuming federal control over local matters. Finally, during the twentieth century, when the District again attained a measure of home rule, the shift to greater political autonomy once again mirrored developments in the relations between state and local governments. Many states in the mid-twentieth century and thereafter sought to invigorate municipal home rule. They accomplished this in part by repudiating Dillon's Rule – for example, Article VII of the Illinois Constitution of 1970 authorized local governments to tax, regulate, and otherwise deal with matters of local concern, unless specifically prohibited by statute – and these developments provided a model for those seeking to alter the political status of the District.

A less fortunate example of the transfer of ideas involves the treatment of Native American tribes and residents of the District of Columbia in the late nineteenth and early twentieth centuries (Smith 1997; Wiebe 1995; Keyssar 2000). Beginning in the 1870s, a new racial element infected discussions in the United States about the character of the American people – one commentator has described this racial element as "the militant assertion of an overarching American racial identity" (Weiner 2006, 59). Political figures and scholars characterized America as an Anglo-Saxon country, whose long-standing residents – in contrast to both Native Americans and recent immigrants from

southern and eastern Europe – had a genius for constitutional government. This perspective legitimized American imperialism and racial subordination. It is reflected in the South in the end of Reconstruction, the "restoration" of white supremacy, and the purging of African-Americans from the voter rolls (Perman 1984; Perman 2001; Kousser 1974). It is reflected in the North in efforts to restrict the franchise through literacy tests, longer waiting periods before naturalization, and stringent voting registration requirements. Finally, it is reflected in efforts to restrict immigration based on race and ethnicity, so as to preserve the essential character of the American populace.

This set of ideas influenced both the congressional exercise of discretion regarding non-state component units and the rulings of the Supreme Court upholding the congressional policies that resulted. The withdrawal of popular rule from a District of Columbia in which African-American voters played a crucial role is consistent with this perspective. So too is the extension of congressional control over Native American tribes in the late nineteenth century, when such tribes are characterized as "weak" and "helpless", requiring direction from whites (*United States v. Kagama* 1886).

Group Rights, Individual Rights, and Federal Asymmetry

The distinctive position of Indian tribes in the American constitutional universe reflects their anomalous character as rights-bearing collectivities in a system generally predicated on individual rights. This has added a further complication to the problem of asymmetries in American federalism and has led to two responses on the part of the federal government. At times the federal government has sought to destroy the underpinnings of Indian group rights by striving to diminish or eliminate group identity, replacing tribal identity with an identity as Americans. During the late nineteenth and early twentieth centuries, this took the form of a campaign to assimilate Indians into the general population, to treat them as simply a collection of individuals sharing a common ancestry.[4] The Dawes Act, transforming communal property ownership into individual allotments, provides one example. The concerted effort to de-tribalize Indian children by banning Indian languages, Indian dress, and Indian ceremonies in schools represents another. A third would be the federal government's extension of American citizenship to assimilated Indians in an effort to wean Indians from their tribal allegiances. During the twentieth century, the now-discarded policy of termination was potentially the most severe threat to continuing tribal identity. Alternatively, the federal government has ignored tribes altogether and extended rights to Indians as individuals in a way that undermined tribal self-government. Thus, the Dawes Act gave property rights to individual Indians but did so by eliminating tribal ownership and

[4]This campaign to assimilate Indians paralleled efforts to "Americanize" European immigrants to the United States, who were also depicted as groups of individuals with a common ancestry. For obvious reasons, the term "Americanize" could not be used with regard to Indians, so it was replaced by "civilize".

control over property. The extension of American citizenship to all Indians in 1924 gave individuals new rights (at least in theory) but did so by imposing a new, non-tribal identity on Indians. Finally, the *Indian Civil Rights Act* of 1968 extended many of the protections of the Bill of Rights to Indians but did so by imposing new requirements on tribal governments that limited their opportunity to devise their own approaches to balancing communal concerns and individual rights claims.

One suspects that this tension between the American emphasis on individual rights and the tribes' insistence on their collective identity and collective rights will be a continuing source of conflict. But the problem is not limited to relations with Indian tribes. Other component units have also emphasized group identity and ethnicity in ways that clash with the individualistic ethos of the United States. Within the American states, this issue has been most pronounced in Hawaii, where Article XII of the state constitution focuses on "Hawaiian Affairs" and the distinctive concerns of "native Hawaiians" (Lee 1993, 170-180). In *Rice v. Cayetano* (2000), the Supreme Court reaffirmed the Constitution's emphasis on individual rights, striking down a Hawaiian law that restricted the right to vote in certain elections to those of Hawaiian ancestry. Speaking for the Court in *Rice*, Justice Kennedy declared that "it demeans a person's dignity and worth to be judged by ancestry instead of by his or her own merit and essential qualities" and that "using racial classifications is corruptive of the whole legal order democratic elections seek to preserve" (*Rice v. Cayetano* 2000, 517).

Let us now turn to the particulars of the asymmetrical elements in American federalism to elaborate how these themes have played themselves out.

THE DISTRICT OF COLUMBIA

Some federal systems locate the nation's capital in the country's major city and make that city a city-state, granting it the same status and powers as other component units of the federal system (Rowat 1973). A prime example is Moscow, which has the status of a subject of the Federation and powers commensurate with that status. Some federal system, for example Canada and Switzerland, have chosen less prominent cities as their capitals, and these cities remain part of larger territorial units and thus subject to the control of those units, as well as of the federal government. The danger with such an arrangement is "that the government of the state or of the capital city may interfere with the proper functioning of the central government" (Rowat 1973, 342). To avoid this difficulty, the United States created an entirely new city as its capital, and it removed that city from the jurisdiction of the existing states. Article I, section 8, clause 17 of the Constitution confers on Congress the power "to exercise exclusive legislation in all cases whatsoever" within the District.

The subordination of the District of Columbia to Congress underscores the District's distinctive status in American federalism. The American states exercise all powers not granted to the federal government or prohibited to them by the federal Constitution, and they do so without continuing federal oversight. These powers include the right to devise and operate their own systems of

government, subject to constraints found in the federal Constitution. In contrast, the grant to Congress of "exclusive legislation" in the District has been interpreted to mean that local political authorities in the District can exercise only those powers expressly delegated to them by Congress, and that Congress can intervene whenever it wishes to veto the actions of District political officials.[5] Indeed, the very existence of the District's local government and the form that it takes are dictated by Congress.

During the first half of the nineteenth century, the District of Columbia enjoyed considerable home rule. Initially, this home rule was only partial: voters elected a twelve-member council, but the District's mayor was appointed annually by the President. However, in 1812, the appointment of the mayor was vested in the popularly elected council, and in 1820 appointment of the mayor was replaced by popular election. This system continued until 1871, when in the wake of financial scandals involving District officials, Congress effectively terminated self-government in the District. In 1871, it altered the system of self-government by providing for a governor and an eleven-member Board of Public Works, both appointed by the President, together with a twenty-two-member House of Delegates elected by voters. Three years later, Congress replaced this system with a temporary three-member commission, whose members were all appointed by the President, and in 1878, it made the commission system permanent, thus eliminating all election of public officials in the District. Numerous factors contributed to these changes, including racial prejudice. Slavery was abolished in the District in 1862, and by 1866, more than 30,000 former slaves had made their way to Washington, D.C. This influx, plus the extension of the vote to African Americans, ensured considerable black influence on the government of the District, and prompted a reaction by white officials (Harris 1995; Lesoff 1994).

Representative government did not return to the District until the 1970s. In 1967, frustrated by Southern and conservative resistance to reintroducing "home rule" in the District, President Lyndon Johnson used his reorganization authority to revamp the city government, replacing the three-member council with a single commissioner and a nine-member council appointed by the President. This separation of legislative and executive powers, together with a council more representative of the diversity of the District, was the first step towards home rule. In 1973, Congress adopted a home-rule statute, with strong support from African Americans and from the Democratic Party more generally. The statute provided for a mayor and a thirteen-member council, all elected by popular vote,

[5]Whether this is the correct interpretation is a matter of dispute. Royce Hansen and Bernard H. Ross have argued that the language was designed merely to "create a district free from control by any individual state" and not to give Congress control over the local government of the District or to disenfranchise District residents. See Hansen and Ross (1973, 79). Similarly, in Federalist No. 43, James Madison assumed that "a municipal Legislature for local purposes, derived from their own suffrages, will of course be allowed" to the residents of the District (see Hamilton, Madison, and Jay 1987, 240).

the first elected local government within the District for almost a century. This new government's authority was broad but not comprehensive, for example, it was prohibited from enacting an income tax on non-residents working in the District and from making any changes in the existing criminal code. Also, no council action could take effect until thirty days after enactment, so that Congress would have an opportunity to review and veto it. Although this veto power has been used sparingly, the threat of a veto undoubtedly affects the political calculations of council members considering legislation.

Yet in one important respect, the District of Columbia's relationship to the federal government differs from that of states to the federal government. State governments can influence the federal government because they enjoy political representation in those governments. Each of the fifty states has two senators and has representation in the House of Representatives based on its population. In contrast, the District of Columbia has no voting representation in the federal government. Because the Constitution prescribes that only states have congressional representation (Article I, section 8, paragraph 17), the political status of the District of Columbia cannot be changed except by constitutional amendment. The Twenty-Third Amendment, ratified in 1961, marginally enhanced the political power of District residents, empowering them to vote in presidential elections and awarding the District the same number of votes in the Electoral College as it would have were it a state. But more dramatic efforts to eliminate the asymmetry have failed. In 1978, Congress proposed a constitutional amendment to give the District voting representation in Congress, but the amendment languished, securing ratification by only sixteen state legislatures prior to the expiration of the seven-year ratification period. Small wonder then, that the slogan on license plates in the District of Columbia remains "taxation without representation".[6]

NATIVE AMERICAN TRIBES

The Europeans who came to North America adopted contradictory positions on the status of Indian nations. On the one hand, they recognized the tribes as sovereign entities by entering into treaties with them, and they acknowledged tribal property rights by purchasing land from them. On the other hand, they denied tribes the status of nations by purporting to have "discovered" an unoccupied continent, and they rejected Indian property rights by laying down claims to possess and rule the land that they "discovered" (Williams 1990; Anaya 1996). This ambivalence about the status of Indian nations has persisted to the present day.

[6]As one commentator has noted, the disenfranchisement of District residents was arguably consensual "to the extent that future residents of the District had chosen for economic reasons to move to the new city rather than retain their political rights in the states" (see Neuman 2001, 186).

Constitutional Foundations

When the American colonies declared their independence, the United States inherited the problem of how to relate to Indian tribes. The Articles of Confederation, the nation's first constitution, assigned Congress the responsibility for "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated" (Article IX, section 1). The federal Constitution of 1787 vested the power to deal with Indian tribes in the federal government exclusively (Deloria and Wilkins 1999, chapter 3). Indeed, eleven Western state constitutions contain "disclaimer provisions", inserted as a condition for their admission to the Union, that expressly acknowledge their lack of authority over Indian tribes (Wilkins 1998). The most direct grant of federal authority is found in the Commerce Clause (Article I, section 8, paragraph 3), which gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". This clause reveals the distinctive position of tribes within the governing scheme − they are not simply foreign nations (otherwise inclusion of "with the Indian Tribes" would be redundant), but commerce with them is not simply domestic commerce either (otherwise, it would fall under "among the several States"). The only other mention of Indians occurs in the formula for apportionment of representation and direct taxes (Article I, section 2, paragraph 3), which excludes "Indians not taxed" from the population base. This rather obscure phrase, which reappears in the Fourteenth Amendment's discussion of representation (section 2), acknowledges Indian nationhood, at least obliquely. For it implies that Indians who were taxed, who had assimilated and become part of the American body politic, should be represented in government; whereas those who were not taxed would not be represented, because they were not part of the United States, but instead members of another nation. Other constitutional grants and prohibitions, although not focusing directly on relations with Indian tribes, confirm that such relations are exclusively the domain of the federal government. For example, agreements between the United States and tribes often take the form of treaties, and the Constitution both awards the treaty power to the President with the advice and consent of the Senate (Article II, section 2, paragraph 2) and prohibits states from entering into treaties (Article I, section 10, paragraph 1). The Constitution's reaffirmation of previously negotiated treaties (Article VI, section 1) is particularly important, because most of these treaties were with Indian tribes, thereby confirming that tribal sovereignty predated the Constitution and continued after its adoption. Similarly, Congress is given sole authority to govern territory belonging to the United States (Article IV, section 3, paragraph 2), thus enabling it to set rules for areas within the borders of the United States claimed by and occupied by Indian tribes, a power enhanced by the cession of state territorial holdings to the federal government. And, of course, the power to conduct military operations against external foes lay with the federal government (Article I, section 8, paragraph 11), as did the power to protect states against violence arising within their borders (Article IV, section 4).

Yet if the Constitution makes clear the federal government's exclusive authority to deal with Indian nations, it does not clarify the scope of federal power over those nations or what powers (if any) they retain. Although such a constitutional division of authority is crucial in safeguarding the political rights of component units in federal systems, this omission is hardly surprising. Insofar as tribes were analogous to foreign nations, there was no reason for the Constitution to define their powers, any more than there was for the Constitution to have defined the powers of France or Great Britain. And whereas the Constitution needed to address the respective spheres of the federal and state governments, because its major aim was to reallocate powers between nation and state, it did not need to define the scope of tribal powers, because those powers were "both preconstitutional and extraconstitutional" (Wilkinson 1987, 112). Only when the status of the tribes shifted from rough equals to "internal dependent nations" did the respective spheres of the federal government and tribes – or, put differently, the extent of tribal self-government free from federal direction or intrusion − emerge as a major issue (*Cherokee Nation v. Georgia* 1831, 17).

Self-Determination

Perhaps the basic political right, particularly for internal nations within multi-national countries, is the right of self-determination − the power to determine the fundamental character, membership, and future course of their political society. The right of self-determination of tribal nations is inevitably limited by their "internal, dependent" status, but it is not effaced. As Chief Justice John Marshall noted, "a weak state, in order to provide for its safety, may place itself under the protection of one more powerful, *without stripping itself of the right of government, and ceasing to be a state*" (*Worcester v. Georgia* 1832, 560). Moreover, Marshall insisted that this dependent status, together with the surrender of territory by Indian nations, imposed a fiduciary obligation upon the federal government.

This "trust relationship" appeared to promise the tribes federal support and protection. However, during the late nineteenth century, the promise of protection became a power to direct and control, based on assertions of Indian incompetence and an insistence that it was in the Indians' interest to abandon their traditional ways of life and become "civilized". Thus, Congress sponsored efforts to assimilate Indians by supporting Christian missionaries seeking to convert and "civilize" the Indians, by banning tribal rituals, and by educating Indian youth at boarding schools so as to root out tribal customs and practices (Fritz 1963; Prucha 1976; Hoxie 1984). Congress also attempted to eliminate tribal patterns of communal land ownership, and it largely replaced tribal self-government with administration by the Bureau of Indian Affairs. In *United States* v. *Kagama* (1886) and *Lone Wolf* v. *Hitchcock* (1903), the Supreme Court upheld the extension of congressional power. Speaking for the Court in *Kagama*, Justice Miller characterized the tribes as "the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights" (*United States v. Kagama* 1886,

383-384). From this he concluded that Congress had plenary power to "protect" tribes, transforming the trust relationship from a shield for the tribes into a weapon for the federal government.

With the enactment of the Indian Reorganization Act in 1934, federal policy shifted from assimilation to Indian self-determination through the revival of tribal governments. During the 1950s, policy shifted again, this time toward "termination", that is, the unilateral ending of the special relationship between tribes and the federal government. During the presidency of Richard Nixon (1969-1974), policy shifted back once more to self-determination, and more recent presidents have followed Nixon's lead, at least rhetorically, in championing self-determination, reemphasizing the trust relationship, and repudiating termination (Taylor 1980; Burt 1982; Castile 1998; Barsh and Henderson 1980; Cornell 1988; Gross 1989). Nevertheless, the prevailing case law recognizes no constitutional limits to congressional power to act as trustee for Indian nations, and thus the tribes' right to self-determination remains a matter of congressional grace rather than a matter of right, subject to the vagaries of policy shifts.

Authority over a National Territory

During the late eighteenth and early nineteenth centuries, the American desire to expand beyond the Atlantic coastline collided with Indian territorial claims. Initially, the purchase of land from Indian nations helped finesse the question of ownership. But the American appetite for expansion soon outran the tribes' willingness to relinquish their holdings, and thus the question of Indian land rights could not be avoided. The Supreme Court under John Marshall outlined a doctrine of limited tribal land rights. In *Fletcher* v. *Peck* (1810), it argued that tribes possessed a "right of occupancy" rather than full title to the land, although tribal consent was nonetheless required before the right of occupancy was extinguished. Elaborating in *Johnson* v. *McIntosh* (1823), the Court concluded that the tribes' "power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle [of] discovery" (*Johnson v. McIntosh* 1823, 574).

Subsequent congressional legislation diminished even this limited tribal authority over the disposition of Indian lands. In 1887 Congress enacted the Dawes Act, which provided for allotment of tribal lands in severalty to individual Indians and the sale of surplus lands to white homesteaders. Whatever the motivations underlying the Dawes Act – and these ranged from the conviction that Indian progress required individual ownership of land to the desire to open Indian land to non-Indians – its effects were disastrous. Before this policy was abandoned, federal sale of "surplus" lands plus the sale of holdings by individual Indians reduced tribal land from 138 million acres to 52 million acres. The loss of communal control over land and its use also undermined the authority of tribal governments. By opening the reservations for settlement by non-Indians, the Dawes Act destroyed close-knit tribal communities, jeopardized the separate development sought by Indian nations, and undermined their efforts to maintain traditional lifestyles. From a practical

standpoint, the fact that reservations included large numbers of non-Indian residents – in some instances even a majority of the reservation population – complicated the tribes' exercise of political and judicial jurisdiction. As Charles Wilkinson has noted, "With the land base slashed back once again and with strange new faces within most reservations, tribal councils and courts went dormant. The BIA [federal Bureau of Indian Affairs] moved in as the real government" (Wilkinson 1987, 8; Otis 1973; Priest 1942; Trosper 1992).

Authority to Institute a Government

Indian nations had instituted their own governments prior to the European colonization of North America, and they never surrendered their authority to create and re-create their political institutions. The federal Constitution does not restrict the form that those governments take: whereas it mandates that state governments be "republican", it imposes no such requirement on tribal governments. But in practice, by the late nineteenth century the BIA had largely displaced traditional Indian governments as the effective governing authority in Indian country. To reverse the transformation of Indian nations from self-governing peoples to administered subjects, Congress in 1934 adopted the Indian Reorganization Act (IRA), which sought to reinvigorate Indian self-government by encouraging tribes to draft constitutions. Yet even under the IRA the scope of tribal authority was limited. If a tribe voluntarily subjected itself to the IRA (and most tribes did), it was obliged to submit its constitution for approval by the BIA, and any subsequent amendment or revision of the constitution was also subject to BIA approval.

Authority to Conduct Foreign Affairs

One attribute of nationhood is the power to enter into agreements with other sovereign nations through government-to-government negotiations. After Independence, Indian tribes entered into almost 400 treaties with the United States. But in 1871, the United States formally renounced treaty-making with tribes, transforming the relationship to one "conducted along imperial rather than federal lines" (Russell 2008, 16). Even so, the president continued to negotiate bilateral agreements ("treaty substitutes") that were approved by both houses of Congress (Wilkinson 1987, 8).

However, as Chief Justice Marshall indicated in *Johnson* v. *McIntosh*, the doctrine of discovery, under which the European colonizers claimed title to territory occupied by Indian tribes, diminished the treaty-making authority of Indian nations. One element of the doctrine of discovery was that the European power that discovered and occupied a territory gained exclusive title to the land. The country that held title could transfer the land to another country, as Britain did in ceding territory to the United States at the conclusion of the Revolutionary War. However, the Indian tribes, as mere occupants of land under the authority of one sovereign, could not transfer it to the authority of another

sovereign. Thus, although Indian nations could enter into agreements to dispose of land they occupied, the doctrine of discovery decreed that they could only dispose of their holdings to the country that held title to the land. Indeed, as Marshall explained, the limit on Indian treaty-making went beyond the conveying of land:

> They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility. (*Cherokee Nation v. Georgia* 1831, 17-18)

At the beginning of the twentieth century, the Supreme Court in *Lone Wolf* v. *Hitchcock* (1903) undermined the authority of even those treaties that tribes were permitted to negotiate. Rejecting a challenge to congressional action in violation of a treaty, the Court concluded that Congress could unilaterally abrogate treaties with Indian tribes by subsequent legislation, because it had "plenary power" in Indian affairs. This ruling in effect made United States-tribal treaties binding only on the contracting tribe (Wilkins 1996). In addition, *Lone Wolf* insinuated that even when Congress enacted general regulatory laws that did not specifically mention tribes, these laws might be interpreted to override treaty commitments by implication, thereby jeopardizing tribal prerogatives. In recent years the federal judiciary has sought to avoid this result by reading statutes in the light of the special trust relationship between tribes and the federal government, as well as in light of the federal commitment to tribal self-government. Thus, it has generally refused to abrogate treaty rights in the absence of explicit statutory language indicating a congressional intent to do so (*Menominee Tribe of Indians v. United States* 1968; *Morton v. Mancari* 1974; *Santa Clara Pueblo v. Martinez* 1978; *United States v. Dion* 1986).

Authority to Administer Justice

Self-government includes the power to administer civil and criminal justice within the boundaries of the political society. Indeed, according to one scholar, this jurisdiction represents "the cornerstone of tribal sovereignty" (Porter 1997, 238). For Indian tribes, however, this power is limited. For cases involving tribal members exclusively, tribes for most of the nineteenth century retained criminal and civil jurisdiction. Thus in 1883 in *Ex Parte Crow Dog*, the Supreme Court recognized the exclusive power of tribes to make criminal laws and punish Indians who committed crimes against other Indians in Indian territory. For cases involving non-Indians or members of other tribes, the United States and Indian nations by treaty apportioned jurisdiction between their sets of courts. The Choctaw and Chickasaw Treaty of 1866, for example, gave those tribes both civil and criminal jurisdiction over non-Indians as well as Indians within their territory.

Since the late nineteenth century, however, tribal authority to administer justice has come under attack. Congress responded to *Crow Dog* by enacting the

Major Crimes Act (1887), which withdrew tribal jurisdiction over major crimes (such as murder, rape, and robbery) regardless of whether the victim and/or the alleged perpetrator was an Indian, placing this jurisdiction in the federal courts. That same year, the Secretary of the Interior created Courts of Indian Offenses under the Bureau of Indian Affairs, which were designed to replace traditional Indian courts. In 1953, Congress adopted Public Law 280 which authorized six states − Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin − to exercise criminal and civil jurisdiction in Indian country and authorized other states to likewise assume jurisdiction (Goldberg-Ambrose 1998). Acting on that invitation, nine additional states had claimed jurisdiction under Public Law 280 before Congress amended the Act to require tribal consent for state assumption of jurisdiction (Goldberg 1999). In the Indian Civil Rights Act of 1968, Congress restricted the authority of tribes to develop their own standards of due process by extending various guarantees of the Bill of Rights – including most of the Fourth, Fifth, and Sixth Amendments – to Indian country. It also limited the jurisdiction of tribal courts to sentences not exceeding one year's imprisonment and a $5,000 fine or both. Finally, in *Oliphant* v. *Suquamish Indian Tribe* (1978), the Supreme Court ruled that Indian nations have no general criminal jurisdiction over non-Indians even in Indian country (Clinton, 1976).

CONCLUSION

This survey of asymmetries in American federalism shows that it is more complex – and more interesting – than a simple focus on federal-state relations would suggest. The framers of the United States Constitution had to respond to a series of problems that could not be solved within the traditional framework of state and nation, and they crafted distinctive federal relationships to deal with those problems. The overall result has been a variety of federal relationships in America beyond that of the federal and state governments, albeit relationships in which the federal government typically exercises plenary power. The politics involving these asymmetrical elements in American federalism has thus largely focused on efforts to persuade the federal government to grant greater autonomy to non-state component units.

These efforts have met with varying success. In part, success has depended upon the distribution of political forces within the nation. For example, during the middle of the twentieth century the main barrier to greater political autonomy for the District of Columbia was a congressional leadership dominated by Southerners who were hostile to the empowerment of African Americans within the District. It was only in the early 1970s, with the political success of African Americans and of a Democratic Party less reliant on the support of white Southerners, that residents of the District of Columbia once again were granted a power of self-government.

Success also depended upon the body of ideas that the federal government could draw upon in structuring its relationship with non-state component units. Politics seldom involves creation of entirely new arrangements, particularly when the issues involved are not highly salient. Rather, political actors tend to

draw upon a reservoir of ideas and arrangements from situations that appear analogous and use these to structure situations. The adaptation of Dillon's Rule to structure the relationship between the federal government and the District of Columbia illustrates this. So too does the effort of the federal government to transform its relationship with Indian tribes from one between national entities to the more familiar – and hence more comfortable – individualistic relationship it enjoyed with the members of other groups in American society. Thus rather than treating tribes as having a distinctive relationship with the federal government, whose characteristics would have to be accommodated despite a political ethos that was individualistic rather than communal, there was a tendency to try to recast the federal relationship with Indian tribes along the lines of its relationships with the members of other groups, treating Indians as members of another minority group, whose individual rights deserved protection.

The absence of constitutional mandates structuring the federal government's relationships with these non-state component units has meant that those relationships have changed over time, in response to shifts in political power and changes in the dominant ideas in the society. It is to be expected that the relations between the federal government and the District of Columbia, Native American nations, and territories will continue to fluctuate in response to shifts in political ideas and in political power.

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Section Six

Federalism – A Centrifugal or Centripetal Force?

15

Success and Failure in Federation: Comparative Perspectives

Michael Burgess

Dans la majorité des études sur le fédéralisme comparé, il est courant de qualifier les fédérations en termes de réussite ou d'échec. Mais on s'attarde rarement à préciser ce que recouvrent ces deux étiquettes appliquées aux États fédéraux. Ce chapitre vise donc à déterminer le sens des mots échec *et* réussite *aux fins de l'étude comparative des fédérations. En bref, il examine pour ce faire les perceptions et les réalités auxquelles correspondent ces deux mots selon différents types de fédérations.*

L'analyse montre ainsi qu'on ne peut évaluer la réussite ou l'échec d'une fédération sans soulever des questions à la fois épineuses et complexes qui se prêtent mal aux généralisations hâtives. Elle confirme que les fédérations réussissent à certains égards tout en échouant sur d'autres plans. Et elle fait valoir que la clé de leur succès réside toujours dans leur capacité d'atteindre les objectifs communs à l'ensemble des États tout en préservant la marque des fédérations, à savoir leur unité et leur autonomie. C'est pourquoi on considérera qu'une fédération a échoué si l'établissement d'un gouvernement fonctionnel s'est fait au détriment de la diversité et des différences qui étaient sa raison d'être. D'où l'importance de situer chaque fois dans leur contexte ces deux notions de réussite et d'échec.

INTRODUCTION

Those of us who have spent most of our academic lives in one way or another working in the area of federal studies, whether it be on the Canadian, German or Swiss federations, intergovernmental relations and state constitutions in the United States, the federal evolution of the European Union (EU), or the federal practices evident in Spain, South Africa, Russia and Latin America, have little difficulty in appreciating the contemporary significance of the federal idea. Since the collapse of the Berlin Wall in November 1989 – an event that enabled us to rediscover Europe – we have witnessed a discernible trend toward federation in various parts of the world as this idea has increasingly been put into practice. The list of countries that have either embraced federation or have introduced or strengthened existing federal elements since then includes the following: Belgium and Russia (1993), the EU with the Treaty on European Union (1993), Bosnia-Herzegovina and Ethiopia (1995), Nigeria (1999), Iraq (2005), Nepal (2008) and Cyprus still contemplating the fifth Annan Plan.

The global picture appears increasingly to be one in which the international community in the shape of the EU and the United Nations (UN) is turning to the federal prescription in order to regulate the management of difference and diversity in those states where both old and new cultural conflicts have degenerated into violence. We may even be witnessing new methods of federal state formation and reformation and new federal models, with important theoretical implications, if we pause to reflect upon the constitutional consequences of international intervention in Bosnia-Herzegovina, Iraq, Cyprus and eventually perhaps in Sri Lanka, Eritrea, Somalia and Darfur in the Sudan. And if we construe this contemporary trend in the world of states as contributing to an evolving pattern or mosaic of federal responses, it is also obvious that the comparative approach to the study of federation has acquired a renewed significance.

The leading international scholar in this field of research enquiry is Ronald Watts whose first major work on comparative federalism, *New Federations: Experiments in the Commonwealth*, originated in his doctoral thesis at Oxford and was published over 40 years ago in 1966 (Watts 1966). Since then he has effectively pushed back the intellectual boundaries of this subject and opened a door through which many others have followed in eager pursuit of conceptual refinement and comparative insights into a peculiar kind of state formation in which it is often claimed over 40% of the world's population live. Equally interesting in this regard is the important influence of his tutor at Oxford, Sir Kenneth Clinton Wheare, who supervised his doctoral research as a Rhodes Scholar during the early 1960s. This early intellectual influence on the evolution of his thinking about the six new Commonwealth federations of India, Malaysia (formerly Malaya), Pakistan, the West Indies, Rhodesia and Nyasaland and Nigeria left several traces that have endured. In particular it had a great impact upon his approach to comparative federal studies in general, stimulated his continuing interest in matters of conceptual analysis, and, not least, underlined the clarity of thought and expression that continues to characterize his work. Today Ron Watts is fond of paraphrasing Professor J. A. Corry in reported

speech: "A neat and tidy mind is a crippling disability when studying federalism", but his own substantial contribution to comparative federal studies has ably demonstrated that this not undesirable disability can be successfully overcome.

These introductory remarks about the intellectual links between Wheare and Watts have a particular relevance for this chapter because I want to use them as important reference points to help guide me in exploring an aspect of comparative federalism that, to my knowledge, has been almost completely neglected. This revolves around the use and continuing utility of the terms "success" and "failure" when applied to federal states. Wheare and Watts have both used them, implicitly and explicitly, in their own works and this chapter concerning the twin notions of success and failure in federation has been prepared in order to commemorate and celebrate the impressive lifelong contribution to federal studies of Ronald Watts in this memorable *Festschrift.*

There is a small established but growing literature on the pathology of federations – of why they fail – and Ron Watts has himself contributed to it, but very little has been written about the relationship between success and failure in comparative federal studies (Watts 1977; Hicks 1978; Watts 2008). We commonly use these two terms in our intellectual discourse about federation in unthinking fashion, but a moment's pause for reflection will confirm that these are actually blanket terms that are over-simplified descriptive labels frequently concealing more than they reveal. Success and failure are polar opposites: if you do not succeed, you are deemed to have failed. They are usually presented as *either* success *or* failure. I want to suggest that the assessment of federations in this peremptory way is over-simplified and therefore superficial. Consequently the principal purpose of the chapter is to explore the meaning of the terms "success" and "failure" as applied to the comparative study of federal states. In short, I want to explore the perception and reality of these two terms in the different contexts of federation.

SUCCESS AND FAILURE

Success and failure are words that rarely coexist and yet in reality they do just that. Success in practice is always shadowed by failure, or the fear of failure. We succeed in some things and fail in others. Put simply, success and failure are not absolute but relative terms and they should be used carefully when trying to assess the performance of federal states in seeking to achieve their respective goals. Of course in the literature on the pathology of federations it is customary to declare the collapse of a federation, such as the short-lived West Indies (1958-62) and that of Rhodesia and Nyasaland (1953-63), in just such absolute terms as failures. After all, what else could their peaceful disintegration be? As two experiments in federation, both ceased to exist in short succession and remain forever immortalized as federal state failures. But is the question of success and failure in federation as simple and straightforward as these two cases suggest? Should the verdict of failure be restricted to just two eventualities: the secession

of a constituent part or parts of a federation and/or its complete breakdown?[1] And correspondingly, should success be judged primarily on mere endurance? The fact of longevity of federations need not automatically imply that they are condemned to succeed.

In a detailed survey of the pathology of federations published in 1968 and entitled *Why Federations Fail*, Thomas Franck edited the best short collection of essays that addressed precisely these questions (Franck 1968). Looking at the East African Federation (comprising the four constituent units of Kenya, Uganda, Tanganyika and Zanzibar), the Federation of Rhodesia and Nyasaland (comprising the three regions of Southern Rhodesia, Northern Rhodesia and Nyasaland), the West Indies (comprising ten islands or groups of islands including Jamaica, Trinidad and Tobago, Barbados, and the Windward and Leeward Islands) and Malaysia (composed of thirteen constituent units after the secession of Singapore in 1965), part of the purpose of this post-mortem was "to explore the possibilities for comparability and inductive generalization" in the hope of "gaining knowledge necessary to prevent other failures". Given that these four experiments in "creative federalism" derived from "the same imperial connection", it can be assumed that this team of American scholars construed the federal idea in this particular context of the end of empire as a normative "middle way" between what was called "the two polar perils of imperium and anarchy" (Franck 1968, ix and xv).

Franck confronted the question of failure directly and in so doing revealed "shades of grey" rather than the absolutes of black and white. "When … we use the term "failure", he argued, "we are merely invoking a historical fact: the discontinuation of a constitutional association between certain units of the union, or the end of the negotiations designed to produce such a constitutional arrangement" (ibid., 170-171). But there is much more complexity wrapped up in this statement than the mere invocation of an historical fact. Franck's definition of failure was actually double barrelled so that if we add to this first definition of "failure" the following observation taken from the same essay, we will more readily appreciate its duality:

> If "failure" is generally the non-achievement of certain goals, in this study, failure is specifically a non-achievement of *the necessary conditions for survival of a federation as initially conceived*. (ibid., 169 italics the author's)

The first part of Franck's definition of failure identifies an either/or scenario: *either* the disintegration of an existing federation that has ceased to exist *or* the end of negotiations designed to create such a federation. The former refers to the complete collapse of an *extant* federal state while the latter alludes to the demise of Rikerian-style bargaining and negotiations among political elites in the process of federal state *formation*. However, in the second part of his definition of failure the complexity is much more apparent. This also had a

[1]In his essay entitled "Survival or Disintegration" (Watts 1977, 42), Watts appears to have made this broad assumption when he observed that many apparently stable federal systems had experienced "the secession of some regions or total disintegration" which was "outright failure".

dual purpose. First, he not only wanted to explain the reasons why his four federations had failed – in the sense that they either collapsed or were never created – but he also wanted to discover if there were common factors that had brought about their demise. Secondly, he was interested to find out if the negative factors that had wrought failure could, in turn, "offer some clues as to the necessary pre-conditions of success" (ibid., 171).

The search for common factors in the failure of federation was of course one fundamental precondition of serious comparative analysis, but Franck was also alert to the danger of what Sartori once called "comparative fallacies" (Sartori 1970). Assembling factors even with a high degree of correlation in all four federations would still invite prescriptive caution and would not necessarily lead to a list of so-called "pre-requisites" that might enable political scientists to predict either failure or success. Indeed, Franck argued that "the sharing of such things as culture, language and standard of living, while helpful to the cause of federalism, is not an ultimate guarantee against failure" (ibid., 171). And these factors, we are reminded, were also among those that Wheare had already identified as being "unexpectedly absent" from the list of "essential prerequisites of the desire for (federal) union" (Wheare 1963, 38). Evidently the presence of common cultural, linguistic, religious and national characteristics was neither a guarantee against failure in federation but nor was it an essential prerequisite of the desire for federation.

Before we leave Franck's insightful comparative survey of failure in federation, it is also worth addressing some other related aspects of his thoughts on the utility of the term "failure". Clearly the terminological significance of failure was, for him, more than a mere "semantic hazard"; it obviously had anticipated value in terms of learning "the lessons failed federations teach". But it also suggested that such failed federations "frequently accomplish some very important objectives during their brief lifetime – objectives that could arguably be said to be *more important than the continuation of federation itself*" (Franck 1968, 169). This remains an intriguing claim. In the case of the East African project that was stillborn, Franck observed that it was actually successful in reaching at least some of the economic, social and cultural objectives it was originally designed to pursue, while in the Central African Federation "certain important goals were achieved", especially in "the awakening and mobilization of African national self-awareness" (ibid., 169). In the case of Malaysia, the early departure of Singapore from the federation in August 1965 did not bring about its complete collapse. Indeed, it led to the immediate constitutional readjustment and adaptation of the remaining constituent units in the federal state, a process that indicated how far they still desired federation *for its own sake*. Today the Federation of Malaysia is the only one of Franck's four case studies that has endured intact since the rupture of its early years. Together the 11 constituent units of Peninsular Malaysia and the two states – Sabah and Sarawak – of North Borneo across the South China Sea comprise the 13-unit multiethnic, multicultural and multinational federation that most commentators would probably describe as a success. Consequently Franck concluded that "the "failure" or "success" of a federal scheme is not only relative but that failure in one sense may be – and even be attributable in part to – success in another, equally important sense, and *vice versa*" (ibid., 170).

Is it possible, then, to construe federations in this way? Can we suggest that it is in the very nature of federation – as a particular kind of state – for it to succeed *and* fail simultaneously? Or is it going too far to suggest that *all* federations, just like all governments, are in some sense foredoomed to failure? I think that scholars of comparative federalism and federation need to reflect upon the criteria that are used to determine success and failure from the standpoint of historical and comparative perspectives. The next section of the chapter therefore attempts to conceptualize success and failure to encourage us to think about federations in a different way and perhaps also to obtain a better understanding of what they are *for*.

CONCEPTUALIZING SUCCESS AND FAILURE

One way of approaching the conceptual complexities inherent in our subject is to consider some questions related to success and failure in federation as relative terms. Clearly we would need to know how to measure success and failure in relation to the declared goals and purposes of each federal state, that is, what each federation was created *for*. This, then, must be our first yardstick and it is why I have already suggested that we should use historical and comparative perspectives. And in looking at the historical processes of federal state and nation building, we will have to search beyond the standard criteria of territorial and military security, constitutional and political stability and the provision of welfare construed in its broadest sense. All states, whether federal or non-federal, are assessed in some sense for success and failure in these basic respects. Our task is different: it is to contextualize these elemental factors in terms of *federal* state formation and reformation.

I do not think that it is possible to establish hard and fast scientific criteria of measurement for terms like success and failure, but it is possible to seek a relative validity so that we can arrive at an assessment based upon a combination of subjective and objective factors. We can therefore establish a small but wide-ranging set of criteria to help determine success and failure by reference to the following four interrelated dimensions broadly conceived:

- Success and failure in relation to what primary goals?
- Success and failure from whose point of view?
- Success and failure in terms of federal values, interests and identities?
- Success and failure in terms of adaptability, adjustment and innovation?

Primary Goals

Here we are seeking to establish the basic elemental *raison d'être* of each federation. We are not asking how each one was created but rather what each was created for. Leaving aside the conventional analyses of motives for union that focus, like William Riker's notion of the "federal bargain", at a high level of generality upon military threats and security and basic commercial advantages,

it is possible to identify and distil the many driving-forces making for federal union in each case to a handful of primary purposes.

For example, it is perfectly justifiable to conclude that one of the primary goals of the Canadian federation at its inception in 1867 was the bifocal commitment to two equal, distinct English-speaking and French-speaking communities, the former an expanding majority and the latter a large minority whose socio-economic and cultural-ideological development during the last 141 years has gravitated territorially to produce a Quebec that constitutes simultaneously a province, a distinct society and a nation while sustaining an important majoritarian provincial outlook from a minoritarian federal perspective. Few can doubt that this particular primary purpose of Canada as a federation has been successful, as has the extension of "peace, order and good government" from sea to sea.

Similar investigations could be made about federal state formation in other case studies in order to establish the first criterion as a basis for assessment. Clearly context is crucial here and each case study will bear the hallmarks of an historical specificity with unique constitutional circumstances. In Nigeria, for example, the overriding priority – the primary goal – since formal constitutional independence in 1960 has been to keep the federation together while establishing strong liberal democratic institutions and processes in an essentially fragmented political culture. Nigerians have had to come to terms with the British imperial legacy that bequeathed them an extremely difficult federal inheritance with an emergent economy and society that have furnished the bases for deep-rooted, frequently violent, "ethno-national" conflict and, more recently, increasing religious discord. The question of success and failure must therefore be set in the context of a "dizzying political odyssey" that has meant six separate federal constitutions in four decades of independent statehood, "witnessed the rise and replacement of eleven different national administrations, and straddled the political poles between democratic pluralism and military authoritarianism, between pseudo-federalism and institutionally balanced federalism, between Westminster style parliamentary government and American-type presidentialism, and between inter-ethnic reconciliation and fierce, often violent, ethnic conflicts" (Suberu and Diamond 2002, 400).

The complexities of the Russian Federation can also be filtered to reveal, as in Nigeria, an underlying primary goal of keeping the federation together combined with the need to cultivate a liberal democratic political culture. The historical context, however, is completely different. The Russian Federation that came into existence during 1991-93 emerged in the most difficult and unpromising of circumstances that certainly did not bode well for future liberal democratic stability. A combination of the burden of the enduring Soviet legacy of federalism in theory and practice, the tumultuous disintegration of the Soviet Union itself and the simultaneous resurgence of Russia during 1991-93 together with the implications of the Soviet collapse both for the nature of the successor Russian state and for its federal political system has meant that the relationship between success and failure in federation is finely balanced between strengthening the central federal authority while simultaneously respecting the constitutional, legal and political standards required of a still emergent liberal democracy, currently dubbed a "managed democracy".

This highly complicated scenario has served to place enormous demands on the political leadership in Russia with President Putin cast in the invidious role of the villain – for some critics – trying desperately to hold the federation together by increasingly undemocratic and coercive means, however temporary they might be. Richard Sakwa has argued that Putin's overriding aim was to "make the federal system more structured, impartial, coherent and efficient" and that he was caught between the opposing models of reconstitution and re-concentration. The former is a law-based federal model while the latter is a "more authoritarian attempt to impose authority over recalcitrant social actors in which it is the regime that is consolidated rather than the constitutional state" (Sakwa 2004, 235-237). In this sense "success" means strengthening political authority at home and restoring Russian pride and prestige abroad; "failure" would not be an over-centralized federation but it would be to suffer the same fate as the Soviet Union.

These two examples demonstrate that it is possible for us to condense the number and complexity of the motives for federal state formation to just a few decisive criteria that could constitute a basis for the assessment of failure and success in relative terms. There is of course plenty of scope for disagreement about the nature of additional bargains to the primary goals, but we have nonetheless a firm footing upon which to build a developmental model of success and failure. In some cases the very survival of the federation as an end in itself might be construed as a success. Wheare warned that we should not blithely assume that "the reasons which originally led the regions to make a federal and not a unitary union have by now entirely ceased to operate" (Wheare 1963, 241). Federations evolve but the underlying purposes for which they were originally formed do not necessarily fade from view; they are often kept alive as sources of legitimacy even if history becomes legend or myth.

Subjective Viewpoints

If we are to construe success and failure as essentially relative terms when assessing federations, it is obvious that we must engage with the partiality of standpoints. These come from several quarters, both territorial and non-territorial, and occur in many shapes and sizes. There are many aspects to take into account here and the subjective perspectives are potentially endless. Survey data is one particular form of indicator by which to measure the individual citizen's views or distinct group or community attitudes from both territorial and non-territorial angles. However, the methodological limitations of this quantitative approach are well documented and the result can only ever be impressionistic, indicating broad trends of opinion that encapsulate likely predispositions to action rather than action itself. Certainly the relationship between perceptions and action is not simply causal. Citizens' perceptions therefore must never be confused with their actual political behaviour. Nonetheless, perception *informs* behaviour even if it remains unclear precisely how this relationship works in practice.

The recognition of subjective viewpoints in federations has been long-standing in the mainstream literature. Wheare acknowledged it when he referred

to the compatibility of systems of public finance with the federal principle: "that question is one which citizens of federal governments have got to answer". But his lament that they had "not dealt with it so far in more than piecemeal fashion" is not a criticism that could be laid at Canada's door (ibid., 119). The proposition that citizens' views of the successes and failures of federation can be ascertained by various forms of public consultation was famously addressed in Canada by the creation in November 1990 of the "Citizens' Forum on Canada's Future", a task force that (while not a conventional royal commission) set out in eight months to "collect and focus citizens' ideas for *their* vision of the country, and to improve the climate of dialogue by lowering the level of distrust" (Canada 1991a, 16). The end product of this unprecedented national conversation in which some 400,000 Canadians and over 300,000 elementary and secondary students' views were canvassed was the eponymous Spicer Report, named after its Chairman, Keith Spicer (ibid., 17-22).

It is important to note that the Spicer Report was meant to be a "probing consultation and dialogue" and not a national poll (ibid., 22). And despite its many shortcomings, it did engage with those citizens throughout the country who wanted to express their views about national unity in Canada. For our purposes here, the report's section subtitled "Improving Federalism" identified the following areas of citizen concern: overlapping government services that led to the duplication of public service activities and spending; the remoteness of governments from the people they served; a functional reconfiguration of the division of powers between federal and provincial levels that would lead to more efficiency in public spending; a need in some cases for policy-making to be more centralized and its implementation in terms of program delivery to be closer to the people; and an overall concern for equity and national standards while ensuring flexibility to meet local conditions. The report led the task force to conclude that a serious and credible effort should be made immediately to address "duplication and inefficiency" and its recommendations included urging the federal government to work with provincial governments to "eliminate, wherever possible, overlapping jurisdictions and programs, and to identify government efficiency as a major goal", bearing in mind that effectiveness could be increased by placing programs as close as was practical to the people. Finally it warned that the onus was on the federal government, when "revising structures and processes necessary to achieve efficiency", to "ensure that fundamental social values and essential national institutions be protected" (ibid., 133-134). Today the Spicer Report has been largely, and some might say deservedly, forgotten in the context of what Canadians think about the successes and failures of Canada, but it was nonetheless part of the overall process of a general investigation into the "state of the federation".

It is important to note that in their determination to be accessible to all parts of Canada, the report conceded that the participation of "francophone Quebeckers was lower than (they) had hoped, and lower than was representative of their proportion of the Canadian population". Nor did they hear from as many aboriginal peoples as they would have liked, conceding that many of them reacted to the process "with suspicion" (ibid., 24-25). With regard to Quebec, this disappointment was explained by reference to a similar public participatory process that was already being conducted in the province during 1990-91 in the

wake of the failed Meech Lake Accord. The Commission on the "Political and Constitutional Future of Quebec", established in September 1990 by Quebec's National Assembly and its subsequent report in March 1991, known as the Bélanger-Campeau Report, rendered the Citizens' Forum largely redundant in Quebec. In contrast to the Spicer Report, the principal focus of the Bélanger-Campeau Report was its recommendation to the Quebec National Assembly of the adoption of legislation to establish the process by which Quebec would determine its own constitutional and political future. Consequently scholars in Canada took it much more seriously. The choice was between a referendum on Quebec sovereignty and the offer of a new partnership with the federal government, thus reaffirming the predominantly bifocal perspectives of Quebec and the Rest of Canada (ROC) (Canada 1991b, 79-84).

This brief cameo of a particular episode in recent Canadian constitutional history serves to underline the feasibility of gaining access to citizens' and community group perspectives of success and failure in federation, but the context in which it occurred was unique. It emerged from extraordinary circumstances, what the Spicer Report called "creative chaos", and it has no necessary implications for the variety of public consultation mechanisms that are routinely available to access public attitudes and opinions in federations (Canada 1991a, 30). Both Switzerland and the United States, for example, furnish ample evidence of regular political contact and communication between citizens and their federal and constituent cantonal/state governments via the use of a variety of electoral techniques and different measures of accountability. The real test of this kind of participatory democracy, however, is how far the results of such institutionalized public deliberations and national conversations have any real practical public policy impact. And where, as in contemporary Germany, there is conspicuous evidence to suggest that public opinion across the federation has gradually come to favour more uniformity in some policy areas, such as in education standards, this does not necessarily imply that the federal form of government itself has been rejected. However, if such a desire for uniformity in policy preferences were to increase, it might conceivably lead in that direction. As Wheare put it, "if the opinion of a majority of the people is a sufficient guide in a community, then it is likely that that community does not need federal government; that it will be most satisfactorily served by a unitary government" (Wheare 1963, 236).

In Quebec of course there are good reasons to question many of the conclusions of the Spicer Report. Our short episodic survey of subjective viewpoints about the Canadian federation must not be allowed to overlook an important qualification to the evident success of the original "bifocal commitment" mentioned above. There remains a strong perception among francophone *Québecois* of an insidious cultural threat from the endless stream of Anglophone policy preferences that continue to flow from Ottawa and produce much disquiet and anxiety in Quebec. Sensitive policy areas like education, language and fiscal and social policies are intimately interconnected and impinge directly upon culture and identity, and the recent experience of the Social Union Framework Agreement (SUFA) has served to reinforce public misgivings in that province. As Wheare noted over four decades ago when reviewing the prospects of federal government, each constituent unit in the

federation must be allowed "to govern itself and regulate its life in its own way" (Wheare 1963, 244). This assertion brings us conveniently to the third of our four criteria, namely, success and failure concerning the values, beliefs and interests inherent in federation – what I call the federalism in federation.

Values, Interests and Identities

We have established that the longevity of federations should not be the sole criterion of their success or failure. It is important to look closer at how far each has managed to fulfil the goals and expectations of federal state formation, in Franck's words, "as initially conceived" (Franck 1968, 169). We can interpret this to refer to the intentions of the political elites who founded the federation and here we must tread very carefully because we immediately encounter problems of historical interpretation. As Wheare noted, "there is little help to be found in referring to the intentions of the founders" because historical arguments can be adduced for many vested interests (Wheare 1963, 219). However, as we have already noted above, we must make a distinction between the standard criteria associated with all historical state-building processes and those that relate specifically to federal states.

The presumption here is that a *federation* is a particular kind of state, one that at its core is forged by the simultaneous desire for both union and autonomy so that its institutional structure and design deliberately combine unity in diversity. There are of course different kinds of unity and different kinds of diversity, but one implication of these circumstances for the organization of the state's political institutions and decision-making processes is that special respect and recognition has been paid to the values, interests and identities of each politically salient diversity whether it is principally cultural-ideological or predominantly socio-economic or, as is more likely, a complex blend of both broad characteristics. Federations, to paraphrase Preston King, are "still governed by purpose, and this reflects values and commitments" (King 1982, 146).

Logically this line of reasoning leads us directly to engage the notion of federal values, interests and identities by which I mean those values, interests and identities that serve to preserve and promote federation *qua* federation. After all, it is these federal values, interests and identities that breathe life into the federation and continue to shape and determine how the federation works – or how it should work. Hence in seeking to establish what was the principal purpose in the conception of federation at its constitutional formation − what it was created for – we are compelled to investigate the values, interests and identities of those political actors who were responsible for federation in the first place. Put crudely, we could reformulate this in the question "who benefits from federation?" But this really amounts to the same thing (Burgess 1993). Whose values are represented? What interests are at stake? What distinct identities should be preserved and promoted? Clearly once a new federal state is created such questions are historically contingent and the corresponding answers will reflect the relative significance of these values, interest and politically salient identities, but the issue of benefits and beneficiaries also applies to new federal

bargains and commitments made long after the original formation of a federation. Consequently it is possible to assess the successes and failures of federal states from the standpoint of values, interests and identities that can serve as a kind of benchmark of what I shall call their *federality*, that is, how *federal* a federation has become or has remained.

This third of our four criteria of success and failure, then, boils down to how far federal evolution has been true to its original goals and purposes, as Franck observed. From the methodological point of view, each federation has critical systemic characteristics – a peculiar constitution and institutional architecture – that are unique precisely because they betray the hallmarks of their origins and formation, but in reality this historical specificity always exists alongside structural features that also have a discernible commonality among other federal states sufficient to facilitate comparative analysis. Among the federal values that characterize the concept of federation are the following: human dignity and equality; mutual respect; recognition; voluntary consent; tolerance; empathy and reciprocity. These federal values, in turn, generate an assortment of federal principles that are common in a variety of ways to most federations, namely, equality of status, comity (known by the German term *Bundestreue*), proportionality, self-rule and shared rule, subsidiarity, asymmetry and guaranteed individual and collective representation. Together these principles find their way into the constitutional and political structures of federations and, indeed, are integral to their design, the distribution of powers in them and their operational capacity. In short, they are distilled as the distinctive hallmark of federation, namely, union and autonomy.

If we look again at the three multinational federations of Canada, Nigeria and Russia referred to above, we can examine their *federality* by investigating how far their federal values, interests and identities are incorporated and practised in each federation. Wheare did this by distinguishing between the form of the constitution and the practice of federal government (Wheare 1963, 18-19). His conclusion concerning Canada was that it did not have a federal constitution but it did have a federal government. Consequently the Canadian Constitution was "quasi-federal in law", but it was "predominantly federal in practice" (Wheare 1963, 20). In contrast, in Nigeria the reverse would appear to be the case. The incorporation of what is called the "federal character principle" in Section 14 of the Constitution of May 1999 is designed to promote national unity, loyalty and integration and a "sense of belonging" among the "peoples of the Federation". In a multinational federation that has had military government intermittently for 28 years together with six separate federal constitutions since independence in 1960, the overriding priority has been the future territorial integrity of the country so that, like Malaysia, its high degree of social heterogeneity has placed a premium on national unity. This attempt to forge a national federal unity from the "plurinational" state is supposed to be accomplished by provisions for the accommodation of the country's territorial, ethnic and sectional diversity in the composition and conduct of public institutions throughout the federation. However, as Rotimi Suberu has ably demonstrated, although these provisions have "remained the basic institutional requirements for the practice of federal character in Nigeria" and "the idea of

federal character is widely accepted", its implementation has been less than successful (Suberu 2001, 114 and 140).

In the Russian Federation the historical legacy of centralization bequeathed by the Soviet Union in conjunction with the apocalyptic circumstances surrounding the resurgence of Russia during 1990-93 have combined to produce an unprecedented context for the formation of a federation, but the absence of a liberal democratic culture together with an understandable concern for the territorial integrity and security of the state have meant that the complexity of federal, confederal and treaty-based relationships forged from the chaos of those convulsive years has effectively rendered federal-state relations highly unstable. Moreover, the so-called "parade of sovereignties" that led to "contract federalism" and the confederal "war of laws and sovereignties" during the Yeltsin era pushed the concept of asymmetrical federalism to its *reductio ad absurdum* and initially created the impression that federation implied a weak central power in permanent conflict and competition with its constituent units (Ross 2007). The subsequent shift in 1999 from the Yeltsin to the Putin era coincided with a determination to rein in the wayward constituent republics and consolidate the Russian Federation as a single economic and legal space, raising suspicions of a new "liberal authoritarianism" (Sakwa 2004, 235-237).

The brief case study of the Russian Federation demonstrates that, as in Nigeria, the existence of a federal constitution that enshrines many of the principles and trappings of an authentic liberal democratic federal state continues to struggle to live up to them in practice. Federal values, interests and identities have spawned federal principles, but they seem proverbially to be caught between a rock and a hard place. Historical legacies of centralization and authoritarianism in Russia and Nigeria seem to have locked federalism and liberal democracy in a tangled relationship of endless tension and torment. How, then, should we judge Canada, Nigeria and Russia in terms of the practice of federal values, interests and identities – in short, of their *federality*? The basis of an answer must lie in how far we are sensitized to the historical legacies, contexts and specificities of each federal state in order to understand what federation was for. If success and failure are relative terms when assessing federations, they cannot mean the same things in each case study. In certain cases, as in the Russian Federation, compromising *federality* might be deemed by some to be a small price to pay for territorial integrity, political stability and economic welfare. Or it might be deemed a price worth paying for controlling the distribution of economic resources in Nigeria. In Canada where public policy issues directly related to the structure of the national political economy are also highly divisive, it is nonetheless more likely to revolve around Canada-Quebec relations.

In these circumstances we are driven to conclude that the protection, preservation and promotion of federal values, interests and identities are likely to be subordinated to the practical priorities of federal governments. But this verdict is not novel in comparative federal studies. Wheare remarked about precisely this problem when he looked at the impact of fiscal federalism on the federal principle in Australia and Canada in his own classic work:

> The whole distribution of powers in the constitution is made subordinate to the taxing power of the federal government. This does not eliminate the federal principle entirely from the constitution, but it does eliminate it so far as this aspect of public finance is concerned, and it does tend to eliminate it in the practical working of the governments. (Wheare 1963, 108)

In Wheare's terms the federal principle was rooted in constitutional law. There was a constitutional commitment to sustain federal values and principles but he acknowledged in his review of federalism's prospects that it would be an uphill struggle, involving some "modification of the federal principle to some degree, though it need not mean a complete denial of federalism" (ibid., 243). Alas, he doubted whether the federal system in Australia could survive the two wars of 1914 and 1939 and the economic crisis of the 1930s because their combined impact had already gone "far towards converting Australia's federal constitution and federal government into a quasi-federal constitution and a quasi-federal government" (ibid., 239). The answer to the question "how federal is the federation?", then, would appear to be that values, interests and identities that are enshrined in federal constitutions have an important symbolic role to play and can act as a moral imperative related to the legitimacy of both the state and government in practice. But, as Wheare lamented, the constitutional security of the constituent units in law "may be unreal to some degree in practice" (ibid., 243).

Adaptability, Adjustment and Innovation

The fourth and final of our interrelated dimensions through which we can explore success and failure in federations is one that applies to every state, whether federal or non-federal, and it is one that can be aptly summarized as "flexibility". This refers in general to the capacity of the state to be able to adapt and adjust to contemporary change and to be able to innovate in order to endure. In the case of federations the challenge of evolution is one that requires flexibility – adaptability, adjustment and innovation – precisely because it is a *federal* state.

Both Wheare and Watts have paid considerable attention to the importance of change and development in the evolution of federations and they have confirmed the distinction between formal and informal change. Wheare identified formal constitutional amendment and judicial interpretation as legal factors making for flexibility while usage and custom or convention together with various forms of intergovernmental cooperation and the delegation of powers by either federal or constituent unit governments were a mixture of legal and non-legal processes of adaptation and adjustment. He concluded that "for some purposes" federal governments had been highly successful in adapting to change while in others, such as in times of economic crisis, "the degree of adaptability (had) not been so great" (ibid., 235). But his reference to "the degree of adaptability" characteristic of federal governments remains instructive: "the student must beware of applying standards which are customary in judging a unitary government". This was because unitary states had unified

central governments that faced far fewer obstacles than federal governments to acting quickly. Federal governments were reputedly "too rigid, too conservative, too difficult to alter" and "behind the times" (ibid., 236 and 209). Nonetheless, Wheare implied that it was not only federal *governments* that should be the focus of adaptation in federations. Rather it should also apply to the federation as a whole and, indeed, to its very *raison d'être:*

> if federal government is really appropriate to a country, it is most likely that government by a majority of the people is not usually enough. Majorities of regions as well as majorities of people may need to be consulted. The degree of adaptability which a federal government should possess will depend, therefore, on a variety of factors in situations that are at times complex and dangerous. (ibid., 236)

Wheare was an Australian by birth and he brought to comparative federal government his own personal experience of that federation, while Watts (though not born in Canada) has always located his personal experience as an academic living and working in Canada in the context of comparative federal studies. This has undoubtedly coloured his view of the overall flexibility of federations via their adaptability, adjustment and innovation in practice.

In addition to the factors making for flexibility in federations identified by Wheare, he referred to extensive areas of concurrent jurisdiction in federal constitutions, processes of "opting-in" and "opting-out" by a government of certain legislative powers and the practice of formal intergovernmental agreements (federal-provincial and inter-provincial) in federations. But we can also detect the indelible Canadian influences in his emphasis upon asymmetrical federalism, multi-tiered government (related to Aboriginal self-government) and in his own preference for "incremental non-constitutional adaptation … supplemented where necessary by specific constitutional adjustments rather than by efforts at comprehensive constitution transformation". In other words repeated attempts at "mega-constitutional politics" were redundant (Watts 1999, 59-60, 118-119 and 123; and Watts 2008, 120-121).

What about innovation? How do federations innovate in order to meet the challenge of contemporary change? All states are exposed to constant pressures to innovate but in federations this commitment is tempered by the need to introduce new policy ideas and programs that respect the primary goals – the particular values, interests and identities – that constitute the *raison d'être* of each federation. In practice this means that the largely (but not solely) territorially based diversities in federations – the differences of socio-economic interest, cultural-ideological values and distinct identities – that are constitutionally structured in the state as constituent units must be guaranteed the opportunities to determine themselves in those public affairs that impinge directly on their sub-national integrity. In the United States this capacity to innovate from below, springing from the constituent states of the union, received official legal, albeit dissenting, recognition as long ago as 1932 in the famous words of Justice Louis Brandeis who referred metaphorically to the "states-as-laboratories":

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. (*New State Ice Co.* 1932, 285 U.S. 262, 311)

In the mainstream literature on federations and federal political systems it is now widely acknowledged that pressures to innovate in federal states derive from many internal and external stimuli but the notion that constituent units can be an influential source of incremental change in federations and may sometimes even act as catalysts for significant national modernization remains a relatively under-researched area of comparative federal studies.[2]

Examples of such public policy innovation abound if we look carefully for them. In Canada progressive welfare provision in the province of Saskatchewan, governed by the Cooperative Commonwealth Federation (CCF) during the period 1944-64, served as a "laboratory of experimentation" that paved the way for nationwide welfare state provision in the Canada Assistance Plan introduced in 1966 and the Medicare system in 1971 by successive Liberal federal governments. Quebec's pervasive influence in the broad area of progressive social policy must also be included in this company. Additionally, California's pioneering initiatives in the field of environmental public policy, Hawaii's health care system together with the progressive social policies of Wisconsin in the United States and the role of Saxony-Anhalt with its own "Magdeburg Model" in Germany are all examples of constituent units as political laboratories of experimentation.

The main conclusion to draw from our brief focus on the question of flexibility − construed here as adaptation, adjustment and innovation – in federations is that success and failure must be judged on how far the capacity to change and develop is fostered and facilitated by the federality of the federation. Different methods of adaptation operate in different federations because they are ultimately culture-specific, but all of them are consistent with their own respective constitutional structures, and each of them provides the institutional and policy spaces for sub-national self-determination to coexist with national (federal) policy preferences.

CONCLUSION: SUCCESS AND FAILURE AS DESTINY

Success and failure in federation is a difficult and complex subject that permits of no simple, sweeping generalizations. We have shown that federations succeed in some things and fail in others. The key to their success must always be how

[2]An exception to this general paucity of research is Alan Tarr's *Center for State Constitutional Studies* at Rutgers University in New Jersey where he is working on comparative subnational constitutions in federations.

far they can achieve the sort of standard objectives common to all states while maintaining the hallmark of federation, namely, union and autonomy or, in Wheare's terms, the integrity of the federal principle. Equally, a federation can be deemed to have failed if the pursuit of good government has been achieved at the expense of the differences and diversities that were its *raison d'etre.* It is in this sense that success and failure must be contextualized. And the implications of this task are far-reaching. They include an unremitting commitment to fundamental federal values, liberal democratic constitutionalism and the whole panoply of federal institutions together with a prudent recognition of legitimate demands for change and development emanating from the diversity within the federal polity.

One paradox that lies at the heart of federation exists in the very essence of its creation: the coexistence of self-rule and shared rule means that conflict, competition and cooperation are institutionalized in a peculiar way that perpetuates problems of great complexity. This raises the larger question about how far federal states, in seeking to accommodate difference and diversity, actually perpetuate and exacerbate old problems while perhaps even creating new ones. But since all federations are founded upon shared and divided government they *necessarily* institutionalize particular antagonisms, acute rivalries and mutual distrust in the very fabric of the state. Complex problems are therefore inherent in federation. But this predicament need not equate to a tower of Babel – a house divided unto itself that cannot stand – for these differences and diversities are both vices and virtues. Indeed, they are its very *raison d'être* – the price of federation itself.

Wheare noted this paradox when he acknowledged the following conundrum:

> The essentials of federal government suggest difficulties and problems of great complexity at any rate to the citizen of a unitary state, unaccustomed to thinking of governmental problems along such lines. Federal government not only produces peculiar institutions; it produces also peculiar problems in the working of these institutions. … these peculiar federal problems … are … problems arising from federalism. (Wheare 1963, 91)

The implications of this paradox for success and failure in federation are clear and can be conveyed plainly: federations are states that are deliberately founded upon divergent socio-economic and diverse cultural-ideological bases. It is therefore their destiny simultaneously to succeed and to fail. But any judgement about the future of federations based upon their perceived success or failure must be couched in terms of the shortcomings of the alternatives to federation and the emerging varieties of the federal form.

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16

Preconditions and Prerequisites: Can Anyone Make Federalism Work?

Richard Simeon

Sous ses nombreuses variantes, le fédéralisme en tant que mécanisme institutionnel est de plus en plus souvent préconisé pour gérer les conflits qui sévissent dans les sociétés profondément divisées selon des limites territoriales. Mais pour en assurer la réussite, de nombreux spécialistes ont souligné l'importance de remplir un vaste éventail de conditions préalables parmi lesquelles la démocratie, le principe du constitutionnalisme, la primauté du droit, la confiance mutuelle, le partage d'identités et l'existence d'autres institutions de soutien. Or ces conditions sont rarement réunies dans des pays comme l'Irak et le Soudan, qui ont récemment adopté des variantes du fédéralisme. Ce chapitre rend compte du débat sur la question en examinant tout d'abord les facteurs de réussite du fédéralisme définis par Ronald L. Watts, puis en s'interrogeant sur les conditions nécessaires, souhaitables ou superflues de cette réussite. Il en conclut que le fédéralisme n'est pas toujours la plus parfaite ou la plus pratique des solutions, mais qu'il est sans doute le meilleur des pis-aller à ses dispositions de rechange.

INTRODUCTION

When, and under what kinds of conditions is federalism an effective device for managing disputes or conflicts in divided societies? Are there prerequisites or preconditions – in economic, and social conditions, or in the broader political structure of which federalism is a part – for the establishment and successful functioning of federations, especially those being considered in countries emerging from authoritarian rule, and/or in countries experiencing deep internal divisions?

Then we need to ask whether there are specific elements of the federal design itself that are more or less conducive to successful conflict management. How do the institutions and mechanisms within federal structures facilitate or hinder conflict or dispute resolution? The two sections of the paper are linked in the sense that even the best constitutional design is unlikely to succeed if the

larger prerequisites do not exist; and that where the prerequisites do exist, then the design itself may not matter very much. Things will work out anyway.

The literature on these points remains deeply contested. Federalism is Janus-faced. Some argue that federalism is the primary institutional arrangement for the successful management of ethnocultural conflict where the divisions are territorially concentrated. Indeed, virtually all such divided societies embrace some form of federalism, autonomy, or decentralization. A veritable industry of scholars, international organizations – from the UNDP to the World Bank – and NGOs, have vigorously promoted federalism, decentralization and their variants in recent decades. Lessons drawn from the successful accommodation of difference through federalism in western countries like Spain, Belgium, Canada, and Switzerland have been applied in quite different settings – in developing countries undergoing democratic transitions, and, in cases like Sri Lanka, Sudan, and Iraq, countries emerging from protracted conflict.

Whether or not this institutional transfer is possible is a question that those of us who have recently worked in these countries worry deeply about. As Marie-Joelle Zahar puts it, "In recent years policy-makers and analysts have promoted power-sharing arrangements to sustain the peace in deeply divided societies. However, they often assume rather than demonstrate the effectiveness of power-sharing in providing stability in the wake of recent ethnic violence; with a few notable exceptions, there have been no theoretical probes of the limits of the power-sharing panacea."

There is an alternative perspective that is much more skeptical about federalism. These critics argue that federalism can institutionalize, perpetuate, freeze, entrench, and even exacerbate the very conflicts they are designed to alleviate. Federalism, for them, may be part of the problem, not part of the solution. The first step on a slippery slope to secession. The "F-word". These negative assessments of federalism must indeed be taken seriously.

Yet another perspective, argued most persuasively in Daniel Treisman's recent book, *The Architecture of Government: Rethinking Political Decentralization* (2007), argues that federalism is so variable, so contingent on context, so shaped by factors exogenous to federalism itself, that no firm predictions, pro or con, can be made about its effects on ethnic conflict (or, for that matter on democracy or governmental effectiveness). He argues that "Almost no robust empirical findings have been reported about the consequences of decentralization" (ibid., 5). The findings, instead, are complex, obscure, contradictory, and pull in different directions. Tsebelis agrees: as an independent variable, federalism has proven highly "elusive" (Tsebelis 2002, 137). He and Treisman echo Riker's famous article asking whether federalism exists, and whether it matters. His answers were "no" and "no" – first because there are so many variants of federalism that knowing a country is constitutionally a federation tells one virtually nothing else about it; and second, because how a federation works is fundamentally dependent on factors other than the design of the federal system itself, notably the party system (Riker 1968-69).

If blanket support for or opposition to federalism is untenable, then our attention must shift. First, we need to think more carefully about the preconditions or prerequisites that are necessary if federalism is to succeed. If it

is true, as so many analyses of federal experience suggest, that "context is everything", then we need to be thinking more systematically about which elements of the context need to be given the greatest weight. Are some elements essential or necessary; others just desirable or helpful? Are some contexts inherently hostile to the federal solution? And is the context an immoveable given, an ineluctable constraint, or is it something that can itself be changed by political action and will?

Another fundamental question for those exploring the relevance of federalism in democratizing or post-conflict societies is whether the necessary conditions must *pre-exist* the adoption of federalism, or whether the negotiation and adoption of federalism can itself help *create* them. If the answer is that the conditions are prior to success – genuine prerequisites – then we must be pessimistic about its appropriateness in many of the contexts in which it is being promoted. If the latter is true, then we can be more sanguine.

This challenge was brought home to me, and to David Cameron, in the course that we offered to Iraqi professors of law and political science in Amman in 2008, and to me again in 2009, when a similar program was presented to Sudanese scholars. One of our sessions was entitled *Context and Prerequisites: What is needed to make Federalism work?* When we reeled all these conditions off, we realized that we were setting an impossibly daunting task. Could any country – let alone Iraq or Sudan – meet them?

In this paper, I survey the literature to identify others' conceptions about necessary and sufficient conditions for successful federalism, and attempt a preliminary assessment of their importance to achieving success or failure.

What constitutes federalist "success" is, of course, also highly contested. For minorities success is likely to be measured by the capacity of federalism to provide opportunities for autonomy and self-government. Success for the majority or the center is more likely to be measured by the degree to which the majority is free to maintain its authority, and to the extent that unity and stability can be maintained. Is it the self-rule or the shared rule part of the equation that is given greater weight? This phrase lies at the heart of federalism, but it provides few guidelines or criteria for finding or identifying the right balance.

Here success is considered in more neutral terms. It is not defined by the victory or one side or another. Nor does it imply that regional or ethnic conflicts are fully resolved. Rather success will be defined if all sides agree that accommodating and managing their differences through peaceful federalist institutions and practices is preferable to attempting to deal with them either through secession, or through imposition of a centralized unitary state. Success for federalism means, to paraphrase Przeworski on democracy, that it has come to be, for all its complexity and messiness, "the only game in town"[1] for recognizing and accommodating difference.[2]

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[1]The term was coined by Przeworski (1991, 26).

[2]There is another dimension of success that I do not address here. That is when the parties conclude that their continuing association is indeed unworkable. "Success" in this situation is in achieving a dissolution in ways that are peaceful, respectful of human rights, and in accord with the authentically expressed views of citizens.

Two other points about "success": First, it also has a normative dimension. Overall, federations need to be judged in terms of how well they promote – or obstruct – democracy, social justice, and the recognition and accommodation of difference in divided societies (see Simeon 2006). Second, success is variable. We need ways of thinking about why some federations are relatively more successful than others, and along what dimensions?

RONALD WATTS ON PRECONDITIONS AND PREREQUISITES

Appropriately for the purposes of this volume, I begin, by looking at what Watts has had to say about what is required for successful federalism to be established and sustained.

The Institute of Intergovernmental Relations and the Forum of Federations might be considered part of a global federalism promotion industry. Each is predicated on the idea that federalism matters; and that its effects are generally beneficial. Leaders of each of these institutions might be forgiven for what might be called their "vested interest in the independent variable". "You have a problem; we have federalism."

Watts has devoted a whole scholarly life to understanding federalism, and has served as an adviser in a huge variety of experiments to introduce or reform federalism around the world.

But he is not an uncritical advocate. A large proportion of his work (and that of the Forum and the Institute) has in fact explored the difficulties, complexities, and challenges in designing and operating federal systems. Watts has explicitly rejected the idea of federalism as a panacea, the solution to every territorial conflict. He devotes a full chapter of his classic text on comparative federalism to the potential "pathologies" of federalism (Watts 2008). And his early work on new federations in the Commonwealth tells as many stories about failure as it does about success (Watts 1966).

His first book focused on eight countries of the British Commonwealth that adopted a federal form of government after the departure of the British colonizer. It is in these developing countries, with significant levels of diversity and often a limited commitment to or experience with democracy, that federalism was viewed in the immediate post-war period, and again in the 1990s, as a potentially effective mechanism of dispute resolution.[3]

Watts's belief in the potential benefit of federalism was evident in his first book, *New Federations: Experiments in the Commonwealth*. And it was especially as a mechanism for dispute resolution, in what he called multicultural countries, that he saw its greatest value.

[3]Watts's involvement did not stop with the study of federalism. At one time or another, he served as a consultant on efforts to establish federations in East Africa (1963), Uganda (1963), Papua New Guinea (1974 and 1975), South Africa (1993-96, and 1997), Serbia-Montenegro (2001), Kenya (2001 and 2002) and Pakistan (2002).

"Federal government, then, is only one of several possible constitutional solutions, but there would appear to be a prima facie case for arguing that, in reconciling ambivalent demands for unity and diversity, federations possess some advantages over either unitary or confederal systems" (Watts 1966, 97).

This potential of federalism to reconcile unity and diversity has been a constant theme in Watts's work. At the same time, it is because of the difficulty of such a task that Watts has always followed his discussions of the likely benefits of federalism by stressing some caveats. In fact, Watts often agrees with some of federalism's critics. In *New Federations*, for example, he stresses the overly legalistic, complex and rigid nature of federalism. He also acknowledges that concessions to diversity may reinforce and harden divisions, "proving cumulative in effect" (Idem.). His perspective on federalism was undoubtedly influenced by the fact that only two of the eight new post-war federal systems he studied would survive (India and Malaysia), and even these endured significant periods of crisis. In an article published in the mid-1990s, as the idea of federalism was once more gaining in popularity, Watts presented federalism as "a pragmatic, prudential technique, the applicability of which may well depend upon the particular form in which it is adopted or adapted, or even upon the development of further innovations in its application" (Watts 1995, 116). Hardly a ringing endorsement! In fact, Watts's work largely anticipated Daniel Treisman's argument, mentioned in the introduction, about the incapacity of making predictions about federalisms impact on ethnic conflict.

The first question that comes to mind, in light of Watts's cautious endorsement of the federal "technique", is what (pre) conditions must be in place for federalism to be an appropriate mechanism to the resolution of conflict? What is striking while reading the work of Watts and others is how many observations about necessary conditions he makes. Watts focuses his discussion of preconditions on a discussion of K.C. Wheare's three pre-requisites: the desire to live under a single government, the desire to live under regional government, and the capacity to work under this dual system. But this begs the question: what is necessary to bring these circumstances about?

The capacity to maintain unity, according to Wheare, was dependent not only on the existence of a desire for union, but also on the similarity of regional political and social institutions, and on a general respect for the constitution, the rule of law, and independent judiciaries.[4] The capacity to combine unity and diversity, perhaps the most difficult challenge in any federation, "depended upon a delicate balance between general and regional loyalties, upon the avoidance of excessive disparities in regional size and wealth likely to stimulate struggles for ascendancy, and upon the availability of sufficient economic resources and men with the capacity to govern, in order to operate both general and regional governments". In the conclusion *New Federations*, Watts especially focused on the need for the absence of political or economic domination by one group over the other and on the quality of political leadership as key prerequisites to successful federalism. But again we note the paradox: federalism is designed to manage difference; but too much difference renders it impossible.

[4]Summary of Wheare from Watts (1966, p. 100-101).

In a fascinating correspondence with Watts, David Cameron has argued that most of the preconditions usually noted are in fact necessary not only for federalism, but also for the establishment of democracy. Their absence does not necessarily make federalism impossible. Watts in his early work seemed to share Cameron's point of view. He recognizes that in almost all post-war cases of adoption of federalism, most preconditions for the success of federalism were absent. Yet, as he argued, "even when federalism has failed, the alternatives which have been adopted, military and bureaucratic administration in Pakistan, separate island independence for Jamaica and Trinidad in the West Indies, and an independent existence for each of the Rhodesias and Nyasaland, are by no means obviously superior as permanent political solution" (ibid., 352). So if federalism might have seemed to be at time inadequate to democratically deal with deep conflicts, there is little evidence that a unitary system could do a better job. According to Watts, if experience indeed shows that federal countries are unstable and difficult to govern, "it is usually because they were difficult countries in the first place that they have adopted federal political institutions" (Watts 1995, 120).

In many ways, Watts is a realist when it comes to federalism. He is drawn to its study not so much because of its inherent qualities, but simply because he recognizes that in a situation of protracted conflict it often becomes every group's "second best" option, the only possible compromise in particular circumstances. Whether, it is a morally good or ideal system is to a certain extent irrelevant. In his first book he approvingly quoted Norma Manley's assertion that "Federations are not born of anything else except necessity, economic, social, and moral necessity" and Sir Ivor Jennings' statements that "nobody would have a federal constitution if he could possibly avoid it". This is how Watts described the experience of the new Commonwealth federations in the post-war period:

> But although in the new Commonwealth federations there was often a lack of the conditions considered desirable for effective federal government, this did not deter the constitution-makers. It was not that the importance of these was overlooked, but rather that in final analysis there appeared to be no alternative. Where in particular circumstances the federal compromise was the only alternative to political balkanization, the absence of favourable conditions did not deter the constitution-makers. It was not that the importance of these pre-conditions was overlooked, but rather that in final analysis there appeared to be no option.

In his book *Comparing Federal Systems*, Watts point to four factors that have contributed to stress within federations: (1) sharp internal social divisions; (2) particular types of institutional or structural arrangements; (3) particular strategies adopted to combat disintegration; and (4) political processes that have polarized internal divisions (Watts 2008, 110). Besides these four factors, he has also pointed to the problems of the erosion of transitional inducements to union and unfavourable external influences, problems which especially marred federations that emerged during the decolonization era (see, for example, Watts 1977, 43).

With regard to internal divisions, Watts, like many other specialists of federalism, has also pointed to the difficulties that arise when social divisions overlap and reinforce each other or when there are gross disparities between different groups' economic situation. He also emphasizes the unstable nature of bi-communal federations, the challenges that arise when one unit is dominant, the difficulty of finding the right balance between unity and autonomy, the lack of regional representation at the centre, and the failure to recognize minority languages. Watts also noted that during periods of stress, attempts at reforming the federation have often moved towards either too much focus on reinforcing the centre against centrifugal forces, or to too much reinforcing of regional governments against centripetal forces, contributing to a further destabilization. Never one to make the kind of parsimonious, positivist claims associated with some of the more recent literature on federalism, Watts argues that the disintegration of federations is the product of a cumulative combination of factors:

> Where different kinds of social cleavages have reinforced each other, federal institutions have been unable to moderate or have even exacerbated these cleavages, political strategies have involved an emphasis upon either unity at the expense of regional accommodation or regional accommodation at the expense of federal unity, and negotiations have repeatedly failed to produce solutions, this has usually resulted in a decline in the support for compromise and a cumulative political polarization within the federation. (Watts 2008, 112)

It is interesting to note that for Watts, reinforcing cleavages, more than institutional arrangements, seem to be the starting point for problems in a federation. If that is correct, then we might argue that the focus of social scientists ought to be with the design of federations that might reduce the strength of such cleavages. The challenge is to elaborate what kinds of federal institutions, in combination with what kind of broader political arrangements, might help to managing these cleavages, building bridges rather than divisions.

Thus Watts's work includes a wide discussion of numerous factors that support or undercut the successful introduction and operation of federal systems. The problem with this analysis, is not that he has ignored preconditions and prerequisites, but that he and others have a long grab bag of factors the relative importance of which is poorly understood and theorized.

WEIGHING THE PRECONDITIONS AND PREREQUISITES

Indeed, a quick review of Watts's writings suggests at least 14 different observations about the necessary or desirable preconditions for the adoption of federalism. But which are necessary, essential, or required? Which are merely desirable or supportive? Among all the possible factors, which are most important or have the highest priority? Is there a distinction to be made between factors that are necessary for the establishment of federal regimes in the first place; and those necessary for the longer run sustainability and stability of

regimes? Are some of the factors identified in the literature specific to federalism, or are they more general conditions for the establishment of any stable, democratic system?

What follows is an attempt – a very preliminary one – to tease out some of these questions.

It helps to think of each of the factors or preconditions not as a dichotomy, either/or, you have it or you don't. Rather we should think of them as variables – there can be more or less of them. This allows for a more nuanced analysis of the potentials for success or failure.

It is also helpful to distinguish between different types or categories or variables. First are those exogenous to the political system itself, including social, economic and international factors. Second are those in the sphere of values and attitudes – identities, beliefs about democracy, ability to build trust relationships, and the like. Third are factors associated with the larger political regime within which the specific institutions of federalism are embedded. And finally come those associated with the design of the federal institutions and practices themselves.

EXOGENOUS FACTORS: ECONOMIC

Level of Economic Development

Federalism will be more difficult to build and sustain in poor countries. Such countries are likely to have fewer citizens with the skills and resources to manage the complex interactions necessary in federalism; they will have fewer resources to be able to pay for the multiple levels of government federalism requires. In such countries, as well, the state is often the major supplier of incomes and thus competition for control over its (limited) wealth is especially intense. Indeed federations that have failed are most often in the poorest countries. Nigeria and Ethiopia are two poor African countries whose federal systems are in serious difficulty; and this makes it hard to be optimistic about federal solutions in Nepal, Congo, or The Sudan, to take three examples. On the other hand, the case of India demonstrates that poverty is no barrier to creating and sustaining a vibrant federation. Higher income, then, is not a prerequisite for federalism, but is a facilitator of it.

Economic Inequalities and Disparities

Perhaps more serious is the danger that extreme disparities and inequalities in wealth between different regions – especially if these are correlated with ethnicity – may pose for federalism. Such disparities will increase the intensity of conflict over the distribution of wealth, and will likely be associated with large differences in the capacity of constituent units to provide broadly comparable levels of public services. Equalization and other policies to share wealth more equally may alleviate these problems, but those commitments

depend greatly on the willingness of citizens in the wealthier regions to consider their poorer counterparts members of the same political community with whom their benefits should be shared. Nevertheless, India – with its immense regional disparities – again demonstrates that economic equality across regions is not an absolute requirement, though it is highly desirable.

Unequal Distribution of Natural Resources

An even tougher difficulty is that posed when valuable natural resources – oil, gas, diamonds which are by definition immobile – are concentrated in particular regions. Not only does this contribute to wealth disparities generally, but also it is likely to lead to serious battles over the ownership, regulation, and distribution of wealth. Those in regions where the resources are concentrated will push for greater autonomy in order to reap the benefits for themselves; other regions will press for central authority in order to distribute them more broadly. The unequal territorial distribution of resources has caused major strains in every federation in which this situation occurs. Resources, as has often been observed, are both blessing and curse.

EXOGENOUS FACTORS: NATURE AND NUMBER OF CONSTITUENT GROUPS

Federalism tends to be more stable and sustainable when there are multiple constituent groups, none with an absolute majority, than it is when there are only two or three groups or when there is a single dominant group. With multiple groups, there is less likelihood of a confrontation between the central government and all the units, and more room for bargaining and shifting coalitions of groups on different issues. Federalism is therefore less of a zero-sum game. Where there is a single dominant group, it may have little incentive to cede power and authority to the smaller groups through federal institutions. Failures of federalism in Czechoslovakia, Malaysia and parts of the former Yugoslavia seem to bear out this analysis. Similarly, few believe that a three-unit federal Iraq would last for long. It is hard to think of any long-lasting bi-communal federations, with the possible exceptions of Belgium and Canada.[5]

Federalism is also likely to be more successful when the primary political cleavages – region, language, religion, class, etc. – cross-cut each other rather than reinforce or overlap each other. In the latter case conflict among the groups is again likely to be more intense and to reflect fundamentally different world views. The different bases of division are likely to coalesce into single, mutually exclusive, over-arching identities. It may not be impossible to reconcile these within federal institutions, but it will be very difficult.

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[5]There seems to be little glue holding Belgium together today; Canada, of course, is both a bi-communal and a ten-province federation.

Complicating the analysis of factors such as these is that over the long-term the nature of the constituent groups is not unchangeable. Indeed, the design of the federal system itself – the number and borders of provinces, for example – may shape the character, goals and identities of the constituent groups, so the causal arrow is running both ways.

EXOGENOUS FACTORS: HISTORICAL LEGACIES

In many of the newer federations there has previously been no experience with multi-level government or decentralization. Many of their elites have imbued with monist, unitary conceptions of sovereignty. The idea that sovereignty can be shared or divided is simply foreign to them. The result is that majority leaders resist decentralization; and the most obvious option for minorities is secession, both of which preserve the older view. David Cameron and I experienced this deep reluctance to embrace more nuanced conceptions of sovereignty in our work with Iraqi academics. A useful task for federation builders, then, is to encourage leaders to look to their own history – for example much regional autonomy in the Mogul or Ottoman empires – for historical lessons that might be applied to the present.

EXOGENOUS FACTORS: THE INTERNATIONAL CONTEXT

A benign, supportive, or at least neutral international environment seems to be a necessary condition. The presence of external forces with links to domestic groups may well destabilize the accommodations required to make federalism work. Federalism will be less stable if a significant proportion of a community's population lives just outside the boundaries of the state. These groups may prefer a newly constituted independent state to federalism, and this is likely to be strongly opposed by the existing states. Iran and Turkey would certainly prefer a federal Iraq to an independent Kurdistan, but they are also likely to oppose a strongly asymmetrical federal Iraq that they see as a precursor to independence. In addition, kinship to a certain group, for example the Shiites in Iraq and Iran, might lead a foreign power to intervene in the affairs of a neighbour and destabilize federal and democratic agreements.

On the other hand, the international community may facilitate a transition to federalism. Where hostilities are continuing, or levels of distrust are impossibly high, international actors can keep the peace, facilitate trust-building, and offer advice about alternative solutions. But this is no easy task. If trust and mutual cooperation have not become internalized and entrenched, then the careful compromises can fall apart quickly once the foreign presence has departed.

These economic, social and international conditions should be seen as important background or contextual factors. They are not immediately amenable to change through political or policy intervention. But they can have a major effect on whether federalism is a chosen or available option, and largely define

the political challenges that the designers of a federation need to take into account. Federalism will be more difficult to achieve and sustain when it embodies only two or three units, when the economic and cultural disparities between the units are relatively large, and where important difference overlap each other. Multiple units with relatively small differences are not a pre-condition for federalism, but their presence is a major facilitator.

CULTURAL AND ATTITUDINAL FACTORS

Democratic Values

It may be that federalism is not a pre-condition for democracy – though in territorially divided societies a strong case could be made for saying that it is – but is democracy a pre-condition for federalism? In the older literature of federalism – and in the politics of older federations – federalism is seen as part and parcel of democracy. The two are very closely linked. It is thus difficult to imagine functional federalism that is not also a more or less fully developed democracy. Some minimum level of democracy can be seen as a pre-requisite. Federalism requires the arts of bargaining, compromise, sharing, shifting majorities, and so on, all of which are basic elements of democracy. Without such capabilities federalism will likely fail. But it is not clear how high the bar should be set. One can imagine functioning multi-level systems in which neither level of government approaches fully developed democracy. It would be interesting and important to find cases where this is so, and to ask whether their experience is that federalism tends to promote increases in democracy or not.

Trust

Every federal system requires a high level of trust. Governments make agreements that must be honoured and implemented. They must accept each other's role, legitimacy and right to exist. Clear allocations of responsibility, and clear, accepted, and enforceable judicial supervision of the rules of the game may help minimize the need for cooperation and mutual trust, but do not eliminate it. Without trust and respect, then agreements are seen as made to be broken, and rules little more than obstacles to be skated around. A minimal level of trust among major political actors, therefore, seems to be a fairly clear and certain pre-requisite. The problem is that it is just this quality that appears to be most lacking in those conflict-ridden countries where federalism is currently being advocated. Hence the dilemma: you need federalism because you do not have sufficient trust; but you cannot have federalism because you do not trust each other enough. There is no easy way out of this trap. One way is to suggest that if a working federalism can be established, then gradually over time, trust will build. But this does not solve the initial problem; nor is there any guarantee that the initial experience will be positive enough to engender the necessary level of trust in the future. It could indeed have the opposite effect. The

alternative is that a broad range of trust-building activities must take place prior to and simultaneously with discussion of federalism. This was certainly the case in South Africa; but there is little evidence of it in countries like Iraq or Sri Lanka.

Identities

Federalism is predicated on – and indeed virtually defined by – the existence of multiple, shared, nested identities. Citizens need to feel identification both with their local communities (the driver of decentralization and self rule) and with an over-arching political community (the driver of unity and shared rule). Federalism, then, requires a minimum sense of *vouloir vivre ensemble*. Without that whether existing prior to the formation of the federation or successfully constructed by new leaders, a federation will fail.

But I believe that the importance of common identities – at least beyond a certain minimum – can be exaggerated. The key condition is that the differing identities not be regarded as mutually exclusive. In addition, there are other factors beyond common identities that can sustain a commitment to live together. If the federation can provide mutual benefits – economic and military security for example – then that may provide a sufficient rationale for its formation, even without strong mutual loyalties. Such benefits were among the major reasons for formation of the Canadian federation and the European Union. Indeed, one could argue that an effective strategy for outside observers would be to emphasize the practical, material advantages of federal arrangements, rather than to stress the need for a common identity, which may not be possible. Equally important is the need to emphasize to all sides the costs of failure to make the federation work. A shift in the calculus of federalism from finding a common identity to analyzing the costs and benefits of alternative arrangements is desirable.

Constitutionalism and the Rule of Law

A commitment by citizens and elites to constitutionalism and to the rule of law is an important prerequisite. This is because federalism is a system of law, in which the written constitution setting out powers and institutions is central. A constitution that is seen as merely a piece of paper, to be ignored or subverted at will, cannot work in a federal system. A fundamental goal of federalism is to establish rules and procedures for resolving differences that will be seen as legitimate and effective. The rule of law is essential to this goal.

FACTORS ASSOCIATED WITH THE LARGER POLITICAL SYSTEM

Federal institutions, of course, are embedded within a broader set of institutions with potentially important consequences for the viability of the federal system. The key element here is one that has also featured in Watts's writings: the need to balance inter-state federalism – the establishment of autonomous separate governments – with intra-state federalism, that ensures that the federal character of the society are reflected and represented in the institutions of the central government – alternatively described as power-sharing at the center. If inter-state federalism is about building out – to give autonomy to constituent groups, intra-state federalism is about building-in. Ensuring regional representation at the center is perhaps the chief counter-weight to the fear of federalism turning into a slippery slope, a way station on the way to secession. Citizens in the constituent units also need to have a stake in the success of the larger system. And this system needs to build bridges that link citizens in different regions with each other. A number of factors need to be explored here.

Party System

Political parties play a key role in legitimizing federal institutions, potentially serving as effective inter-regional bridges. A federal system in which all parties are regionally based, with none capable of making cross-regional appeals, or in which national and regional parties are quite separate will be less successful. Party leaders will be more likely to play the regional card, heightening and mobilizing regional differences. On the other hand, broad catch-all or brokerage parties can provide an alternative arena for the negotiating of differences, and encourage leaders to emphasize issues that cut across the differences. The key question then becomes how to design electoral systems that provide incentives for political leaders to build bridges rather than destroy them. Proportional systems are most often advocated to ensure full representation of regional minorities in legislatures; it is less clear that they provide effective incentives for bridge-building. The debate on this issue between Arend Lijphart and Donald Horowitz remains unresolved. [6]

Power Sharing

If the main communities in a federation are to perceive central institutions as legitimate, they must feel that they have effective representation and an effective political voice within them. A regionally representative second chamber is the most common way for federations to achieve this. But as we know such

[6]See Horowitz (2000, Part Three). For the Lijphart-Horowitz debate, see Horowitz (2002) and Lijphart (2002).

chambers vary hugely in their design, and in their effectiveness. But there are many other mechanisms for power-sharing as well. They include rules or norms respecting membership in cabinets and other institutions such as the courts. Perhaps especially important is that institutions such as the security forces and the bureaucracy are inclusive, reflecting the regional and ethnic characteristics of the population. Again, representational failure at the center places a profound strain on the institutions of federalism itself. For example, the earlier exclusion of French-Canadians from the higher echelons of the Canadian bureaucracy and the armed forces contributed in Canada to the creation of political parties dedicated to the independence of Quebec.

Independent Judiciary

Federations are prone to battles regarding the interpretation of the constitutions. As such, it is important that for the judicial branch to be seen as free from political pressures and as an impartial umpire in cases of conflicts between the different orders of government. A federation is unlikely to survive if its judiciary is perceived as the instrument of one group or one level of government over another.

Thus there are many ways to ensure that the central government is representative of and responsive to regional forces. No single pattern is necessary, and much will depend on the particular characteristics of the federal society. But some form of effective intra-state federalism does seem to be an essential prerequisite for a successful federalism.

FACTORS ASSOCIATED WITH THE FEDERAL SYSTEM ITSELF

Finally, we turn to the specific institutions of federalism. Clearly they matter. But it seems equally clear that very few generalizations or predictions can be made beyond a very general level. The arrangement for different countries will vary widely depending on context, and on the outcome of the negotiations leading to establishment of the federation.

Borders

An important issue in the design of federations that is often neglected is how many units there will be, and how borders will; be constructed. This is an area of considerable controversy especially, for example in The Sudan today. How many units? Too few – two or three – tends to lead to the potential instability noted by Watts and others; too many and the stage is set for central government dominance. Equally controversial in ethnically divided societies is whether or not the constituent units are designed to be ethnically homogeneous or ethnically mixed. Is Indian federalism, for example, more or less secure as it has moved

towards more linguistically unified states? In most cases the answer should be determined by the facts on the ground. Where populations are already intermingled, creating homogeneous units requires painful and unjust ethnic cleansing. Where regions are already ethnically homogeneous and conscious of their own identity, dividing them is also unjust, not to mention politically extremely difficult. In any case there will almost always be "minorities within minorities" (Cairns 1995) and their recognition and protection is another condition for an effective federation. It is also unclear whether a federation will be more or less stable when units are homogeneous: on the one hand that might encourage a movement towards secession; on the other it might lead the group to feel more secure because it has its own distinct government to protect its interests.

The Division of Powers

Federations must find an appropriate balance between an extreme centralization of powers and too much regional autonomy. In the first case, regional units might resent their lack of powers to protect and influence the future of their community. For example, in Nigeria, the concentration of power over oil resources by the federal government has created significant instability, considering the high environmental costs borne by the population of the southern regions. On the other, too much regional autonomy might limit the opportunity of the different communities to work together, while leading to questions about the relevance of the central government. There are many other design issues for the division of powers – water-tight compartments vs. large measure of concurrency; symmetry vs. asymmetry, whether constitutional or de facto, and so on. Beyond the rather abstract criteria that the fiscal federalism literature provides, there are few general criteria for deciding who does what in the literature and again no one model fits all.

Institutions for Intergovernmental Relations

While in most federations, it is the courts that ultimately decide intergovernmental disputes, most would agree that they are a last resort, and that a variety of other mechanisms are necessary to insure intergovernmental harmony and cooperation in areas where their activities intersect and overlap. The challenge – as Canadians well know – is to find mechanisms that encourage cooperative behaviour and discourage behaviour that focuses on turf protection, blame shifting, and credit claiming. Equally important is to ensure transparency and accountability to citizens and legislatures in intergovernmental relations. It is also important to find ways to ensure the intergovernmental agreements are implemented and enforced. Again, there are many ways to achieve these goals, and no single model applies to all.

As I have noted, getting the institutions right is clearly important. But it is very difficult to get them right without an environment conducive to productive discussion of the various alternative arrangements. And that depends on many of

the factors discussed earlier: a desire to live together, manageable differences, and a degree of mutual trust. Moreover, getting the institutions right is no guarantee of success, but getting them seriously wrong will make failure much more likely.

CONCLUSION

This chapter began by asking whether there are some essential preconditions or prerequisites for the successful design and longer term sustainability of federal systems. We noted a daunting list of factors that have been listed by Watts, and by other scholars. I suggested that if most of these really were absolute requirements, then the prospects for federal success is divided and democratizing societies are slim indeed. It would be a virtually impossible task to transfer federalism successfully from long-standing western federations to the difficult cases like Sri Lanka or Iraq.

I think this is too pessimistic a view, for several reasons:

First, very few of the factors I described appear to be absolutely essential. Desirable? Certainly. Making federalism more or less likely to succeed? Indeed. But this is very different from saying federalism simply cannot be done without them.

Second, not all of them are ineluctable givens. Rather, many of them are subject to change, whether through developments in the larger society and economy, or through determined and effective leadership. Admittedly this kind of leadership may be hard to find in deeply divided societies where leaders making over-arching appeals to the whole often take second place to those who see gain in appealing to one or another group. But it is not impossible, Historical legacies do indeed cast a long shadow over the future, but they are not necessarily destiny.

Third, very few of the conditions are absolutes. Recall, we are to think of them as variables, not dichotomies. This allows us to think that perhaps some minimum level of trust or vouloir vivre ensemble is necessary to get discussion started. But such things perhaps need only to be limited or tentative.

Fourth, it is at least possible that the experience of negotiating federal arrangements within the context of a peace-building process can help bring about the desirable levels of trust, belief in the rule of law, etc. Again leadership and a supportive international climate are important facilitators of this.

Fifth, returning to a point made by David Cameron, even if the chances of success are low, and if the conditions seem unpropitious, there may be still the obligation to try. This is because the costs of failure are so high: continued civil war and blood shed, breakup into potentially non-viable states, or return to a coercive, repressive centralized state. Once regionally based groups are fully self-conscious and politically mobilized, then some form of federalism does seem to be the only acceptable solution.

Perhaps the best way to respond to this literature on conditions, constraints and prerequisites is to suggest that in listing the difficulties it sensitizes up to the nature of the challenge, and to the factors we need to take into account, or to assist in changing.

Finally, this paper may suggest a research agenda. As I noted earlier, clear generalizations in this area are few and far between. A more comprehensive empirical analysis that seeks on the one hand to operationalize and measure the many factors discussed, and that tries to clarify measures of relative success and failure on the other, might permit more solid conclusions about which factors are the most important and why.

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Section Seven

Citizens' Perceptions of Federalism

17

Citizen Attitudes and Federal Political Culture in Canada, Mexico, and the United States

John Kincaid and Richard L. Cole

Selon cette analyse de l'opinion publique sur les différents aspects du fédéralisme au Canada et aux États-Unis, les Canadiens donnent de tous leurs ordres de gouvernement une évaluation moins favorable que les Américains. Ils sont aussi moins susceptibles de juger que leurs provinces/États sont traitées avec respect. L'écart entre les attitudes par région et par affiliation politique est en outre plus marqué au Canada. Mais dans les deux pays, c'est le gouvernement fédéral qui inspire le moins confiance et qu'on évalue le plus faiblement, alors que les gouvernements locaux suscitent la plus forte confiance et les évaluations les plus favorables. Les gouvernements des provinces et des États sont généralement classés entre ces deux extrêmes. Canadiens et Américains estiment ainsi que leur gouvernement fédéral détient trop de pouvoirs et favorisent habituellement l'attribution de pouvoirs plus nombreux à leurs gouvernements locaux. Une moindre proportion d'entre eux juge nécessaire d'accorder plus de pouvoirs aux province ou aux États, et ils sont encore moins nombreux à vouloir accroître ceux de leur gouvernement fédéral. Ces résultats indiquent qu'au Canada, où le fédéralisme et la culture politique fédérale sont relativement plus solides qu'aux États-Unis, la confiance de la population à l'égard de tous les gouvernements est comparativement plus faible, tout comme le respect suscité par les gouvernements provinciaux, ces attitudes variant significativement selon les régions et les affiliations partisanes. Aux États-Unis, où le fédéralisme et la culture politique fédérale sont moins solides, la confiance à l'égard de tous les gouvernements et le respect suscité par les États sont comparativement plus élevés, ces attitudes variant beaucoup moins selon les régions et les affiliations partisanes.

One enduring element of federal theory is the proposition that social forces play a major role in the developing and maintaining federal polities. Even K.C. Wheare, usually viewed as an institutionalist, averred that federal governance requires appropriate social foundations, including not only a desire to federate but also an ability to operate the federation. That is, the constituent communities must have "the capacity as well as the desire to form an independent general government and to form independent regional governments" and make them work together rather than at cross-purposes (1963, 36). Similarly, Carl J. Friedrich argued that it is important "to pay increasing attention to the patterning of the social substructure of federal orders" (1968, 53). In turn, Daniel J. Elazar argued that "the maintenance of federalism involves 'thinking federal', that is, being oriented toward the ideals and norms of republicanism, constitutionalism, and power sharing that are essential to the federal way" (1987, 192).

The vast literature on federalism, however, says little about public opinion, and comparative attitudinal studies are sparse, especially studies involving simultaneous surveys in multiple federations. Yet, it has long been recognized that public opinion may influence the distribution of power in federal systems as well as the legitimacy of the various orders of government. For the authors of *The Federalist*, the dynamics of changing attitudes were central to the scheme of liberty and efficiency embedded in their theory of the federal republic. As James Madison put it in Federalist 46: "If … the people should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities. And, in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due." Contemporary scholars as well hypothesize important links between public attitudes and effective federal arrangements. Public attitudes can be a safeguard for state or provincial prerogatives, protecting them from national usurpation. As Jacob T. Levy put it: "If the purpose of federalism is to compensate for worrisome tendencies toward centralization, then it is desirable that the provinces ... be able to engender loyalty from their citizens" (2007, 459). Robert Mikos notes of the United States that "a growing body of empirical research supports the notion that trust in state governments dampens support for the federalization of state policy domains" (2007, 1701). William A. Livingston argued that the essence of federalism "lies not in the institutional or constitutional structure but in [the attitudes of] society itself" (1952, 84). These and other scholars (e.g., Schleicher and Swedlow 1998; Elazar 1987) frequently speak of the kinds of public attitudes and beliefs they view as conducive to the creation, support, and maintenance of federal polities. Most important, according to many scholars, is the viability of a "federal political culture" (Duchacek 1987, 343).

In order to explore these matters and begin filling the empirical gap in research, we have conducted public opinion surveys in Canada, Mexico, and the United States. This research was begun initially in the United States in 1999 to revive trend-line attitudinal data collected by the former U.S. Advisory Commission on Intergovernmental Relations from 1972 to 1993 (Cole and Kincaid 1999). U.S. surveys have been conducted every year since 1999 (Kincaid and Cole 2008). In 2002, we partnered with the Centre for Research

and Information in Canada (CRIC) and conducted research on Canadian attitudes in 2002 (Cole, Kincaid, and Parkin 2002). Simultaneous research was conducted in Canada, Mexico, and the United States in 2003 (Kincaid *et al.* 2003) and 2004 (Cole, Kincaid, and Rodriguez 2004). Consequently, we have time-series data on Canada and the United States, plus two data years for Mexico.

Sample sizes have varied somewhat from year to year and from country to country, but generally, approximately 1,000 adults (age 18 and over) have been surveyed simultaneously for each survey in each of the three countries, yielding a predictive accuracy range of plus or minus 3 percent. The surveys have been conducted by internationally recognized polling firms having polling abilities in the three countries. Most often, the firms have used the CATI (Computer Assisted Telephone Interviewing) technique in Canada and the United States. The country samples are random-digit probability samples of all households, including those with both listed and unlisted telephones in Canada and the United States, thus ensuring an equal probability of selection for every household in each country. Surveying in Mexico involves a more complex methodology of telephone and in-person interviews. Data generated from the surveys is weighted to ensure that the results reflect accurate proportions of the various demographic characteristics of the populations of the three countries.

What we present here are primarily comparisons between Canada and the United States for which we have the most years of data, but also presented are results of our first effort to measure federal political culture in each of the three North American federations.

IS YOUR PROVINCE/STATE TREATED WITH DESERVED RESPECT?

In studies of federal systems, references are often made to the place occupied by particular constituent political communities within a federal system, especially whether the constituent polities feel that they are a respected part of the federal union and are satisfied with their position and treatment in the federation. Quite often, however, such references in the literature reify the constituent polities while providing little or no data on the actual attitudes of the leaders or residents of the constituent polities. To address this facet of federalism, we asked the following question of Canadians and Americans in 2002 and 2007: "In your opinion, is [name of respondent's province or state] treated with the respect it deserves in the Canadian/United States' federal system of government?" The results are displayed in Table 1 (along with U.S. results for 2005).

Overall, in both years, more American than Canadian respondents reported that their constituent political community is treated with the respect it deserves in the federation. The difference was most striking in 2002, when only 45.4 percent of Canadians, compared to 61.1 percent of Americans, said that their province is treated with deserved respect. Although the difference between Canadians and Americans was smaller in 2007, still, less than a majority of

Table 1: Is Your State/Province Treated with the Respect it Deserves in the Federal System of Government?

	Response and Year					
	Yes (%)			*No (%)*		
	2002	*2005*	*2007*	*2002*	*2005*	*2007*
All Canadian Respondents	45.4		48.0	47.9		46.7
All U.S. Respondents	61.1	54.6	56.8	27.3	35.8	34.7
Canadian Regions						
Atlantic Provinces	38.0		36.8	58.6		63.2
Quebec	42.1		47.3	52.9		52.7
Ontario	64.3		59.7	27.0		40.3
Manitoba/Saskatchewan	26.9		36.4	66.8		63.6
Alberta	30.9		52.2	60.7		47.8
British Columbia	24.0		47.2	70.1		52.8
U.S. Regions						
New England	79.5	54.7	69.0	18.2	41.5	28.6
Mid-Atlantic	60.3	47.1	54.4	24.0	37.5	36.1
East North Central	60.9	55.8	51.7	23.2	33.8	40.0
West North Central	62.5	56.9	65.0	26.3	34.7	27.5
South Atlantic	60.5	66.3	59.6	30.3	26.1	31.6
East South Central	50.8	44.7	46.7	31.1	47.4	45.0
West South Central	64.8	55.7	51.4	25.0	39.2	42.3
Mountain	72.9	56.7	50.0	22.0	31.3	37.5
Pacific	54.3	49.1	63.1	36.0	41.0	27.5
Canadian Federal Political Parties						
Alliance	24.8			69.6		
Bloc Quebecois	23.8		24.3	74.7		75.7
Conservative			59.0			41.0
Green and Others			38.9			61.1
Liberal	59.4		60.3	36.8		39.7
New Democratic	45.7		53.7	43.2		46.3
PC	52.0			45.1		

Sources: Cole, Kincaid, and Parkin 2002; Kincaid and Cole 2005; Kincaid and Cole 2008.

Canadians felt their province is treated with deserved respect. In turn, far more Canadians than Americans said their province is not treated with the respect it deserves. There was a slight decline in "yes" responses in the United States and a slight increase in such responses in Canada from 2002 to 2007, but too few data points are available to suggest trends.

Regionally, more than 50 percent of Americans in all regions in 2002 and in eight of nine regions in 2007 responded "yes" to the respect question. By contrast, Ontario was the only Canadian region to exceed 50 percent in 2002, and in 2007, only Ontario and Alberta exceeded 50 percent "yes" responses. In turn, while no U.S. region in any of the survey years exceeded a 47.4 percent

"no" response, five of six Canadian regions in 2002 and four of six regions in 2007 exceeded 52 percent "no" responses. Additionally, the range of responses across Canadian regions is larger than the range across the United States. In 2002, responses across U.S. regions ranged from 50.8 percent to 79.5 percent (28.7 percentage points); those in Canada spanned 64.3 percent to 24.0 percent (40.3 percentage points). However, the range among Canadian regions narrowed considerably in 2007 (from 40.3 percentage points in 2002 to 23.3 percentage points in 2007, while the range among U.S. regions narrowed only slightly to 22.3 percentage points in 2007).

Generally, New Englanders felt that their state is treated with respect more often than residents of other U.S. regions, while in Canada, Ontarians most often felt treated with respect. Residents of the East South Central U.S. states (e.g., Mississippi and Alabama) felt treated the least respectfully, while in Canada, residents of Manitoba and Saskatchewan generally perceived the least respect, followed by the Atlantic provinces. Perceptions of state respect declined in seven of the nine regions of the United States from 2002 to 2007, although in three regions, "yes" responses were higher than in 2005. In turn, respect perceptions declined in only two Canadian regions (Atlantic and Ontario). Interestingly, there was a noticeable increase in "yes" responses in the U.S. Pacific region from 2002 to 2007 and a notable increase in "yes" responses in British Columbia and Alberta in Canada. Having only two data points makes trend identification hazardous, but the increase in positive respect perceptions in the Canadian West (Manitoba to British Columbia) is quite notable and is also the cause for the greater convergence of Canadian regional attitudes in 2007 as compared to 2002.

Political party identification did not significantly affect responses to this question in the United States, but differential party responses in Canada were significant. Quite evident is that some three-fourths of adherents to the *Bloc Quebecois* reported in both years that their province is not treated with the respect it deserves. These results stand in contrast to the much lower percentages of Quebecers generally who expressed this view. This difference between *Bloc* adherents and Quebec residents is due substantially to the positive view of Quebec's Liberals. In 2002, for example, 70.1 percent of Quebec's Liberals contended that Quebec is treated with deserved respect compared to only 23.8 percent of Quebec's *Bloc* adherents (Cole, Kincaid, and Parkin 2002, 143). Likewise, only a quarter of Canadian Alliance supporters in 2002 felt their provinces are treated with deserved respect; however, there was a sharp regional difference among these supporters, with 47.0 of Alliance adherents in Ontario answering "yes" compared to only 10.1 of Alliance supporters in the West. In 2007, Conservatives and Liberals were virtually equal in positive perceptions of provincial respect, followed closely by New Democratic Party (NDP) supporters.

In summary, compared to Americans, Canadians less often said that their province is treated with the respect it deserves in the federation, and regional differences were more notable in Canada than in the United States. However, while U.S. attitudes were somewhat less positive in 2007 than in 2002, Canadian attitudes were slightly more positive in 2007, and regional differences narrowed in 2007. These changes could be due in part to improvements in the Canadian

economy in 2007, Canada's then healthier fiscal federalism, and Stephen Harper's election as prime minister in January 2006. The percentage of Albertans, for example, saying that their province is treated with the respect it deserves increased from 30.9 percent in 2002 to 52.2 percent in 2007. The percentages of positive responses increased in Manitoba, Saskatchewan, and British Columbia, as well, while decreasing in Ontario and the Atlantic provinces.

TRUST AND CONFIDENCE IN ORDERS OF GOVERNMENT

Public trust and confidence in government is believed to be an important element of a democratic polity. In a federal polity, there is the additional element of trust and confidence in the various orders of government – local, state or provincial, and federal. (We treat local governments as an order of government even though they are legal creatures of the states and provinces.) These attitudes can both reflect and affect the operation of a federal system and the actual and desired distribution of powers among the orders of government. Table 2 displays the responses for three years to the following question: Overall, how much trust and confidence do you have in the federal government, your state/provincial government, your local government [respectively] to do a good job in carrying out its responsibilities?

The most notable overall finding, consistent with the results for the provincial/state respect question, is that Canadians expressed a lower level of trust and confidence in all their governments than did Americans. This is most notable for public attitudes toward the federal and provincial/state governments. At the same time, in both countries, citizens signalled the most trust in local governments and the least trust in the federal governments, with the provinces and states falling in between the federal and local governments on the trust spectrum.

In the case of the federal government, only 46.5 percent of Canadians (compared to 68.0 percent of Americans) expressed a great deal or fair amount of trust and confidence in their federal government in 2002. This dropped to 37.0 percent in Canada and 66.4 percent in the United States in 2004, but then jumped to 51.5 percent in Canada in 2007 while declining to 54.0 percent in the United States. In 2002 and 2004, higher percentages of Canadians than Americans expressed no confidence at all in the federal government.

Thus, the gap between Canadians and Americans narrowed in 2007, as it did on the respect question. The changes in Canada could be due, again, to the improved economy in 2007 and the new Harper federal government, while the decline in trust among Americans could be due to the significant souring of public opinion about President George W. Bush. Additionally, the U.S. results for 2002 and 2004 are high compared to U.S. survey results in previous years. The 2002 and 2004 heights appear to be due to public responses to decisive presidential and federal actions in response to the terrorist attacks of 11 September 2001. By 2007, however, Americans had much less favourable views

Table 2: Overall, How Much Trust and Confidence Do You Have in the Federal Government / Your Provincial/State Government / Your Local Government to Do a Good Job in Carrying Out Its Responsibilities?

	Federal (%)		*Provincial/State (%)*		*Local (%)*	
Year/Trust Level	*Canada*	*U.S.*	*Canada*	*U.S.*	*Canada*	*U.S.*
2002						
A Great Deal	5.9	16.0	6.7	9.6	10.0	14.4
A Fair Amount	40.6	52.0	44.1	55.2	54.1	52.9
Not Very Much	34.5	20.9	32.5	23.3	24.0	20.4
None at All	16.9	9.2	14.5	9.1	8.2	9.9
Don't Know/NA	2.1	1.9	2.2	2.9	3.7	2.5
2004						
A Great Deal	5.0	15.2	5.0	12.5	11.0	21.7
A Fair Amount	32.0	51.2	40.0	55.8	58.0	51.7
Not Very Much	43.0	22.5	36.0	21.7	22.0	16.4
None at All	19.0	9.3	17.0	7.8	7.0	8.1
Don't Know/NA	1.0	1.8	1.0	2.1	1.0	2.1
2007						
A Great Deal	12.4	12.0	9.5	11.0	10.9	18.0
A Fair Amount	39.1	42.0	44.1	55.0	44.7	50.0
Not Very Much	32.1	29.0	33.0	23.0	27.6	21.0
None at All	12.9	15.0	9.8	9.0	12.7	9.0
Don't Know/NA	3.6	2.0	3.5	2.0	4.1	2.0

Sources: Cole, Kincaid, and Parkin 2002; Cole, Kincaid, and Rodriguez 2004; Kincaid and Cole 2008.

of the president and the war on terrorism; consequently, the 2007 results are more consistent with public trust and confidence levels that had prevailed before 2001.

With regard to provinces and states, 50.8 percent of Canadians (compared to 64.8 percent of Americans) indicated a great deal or fair amount of trust in their provincial (state) governments in 2002. This trust level dropped to 45.0 percent among Canadians in 2004 but increased to 53.6 percent in 2007. American responses increased to 68.3 percent in 2004 and declined to 66.0 percent in 2007. In all three years, higher percentages of Canadians than Americans expressed no confidence at all in their provincial governments. Generally, also, attitudes toward the provinces and states are more consistent over the three years than are attitudes toward the federal governments. These results are somewhat surprising, however, given that Canadian provinces are generally regarded as being stronger, more autonomous, and more salient within the Canadian federation than are states within the U.S. system. Perhaps this salience, coupled with the comparatively small populations of most Canadian

provinces, invites closer and harsher public scrutiny of provincial governments than is the case with U.S. states.

Comparatively less favourable views of the provinces might also reflect public concerns about provincial limits on local governments, which are viewed most positively. In the United States, where local governments seem to have more autonomy than their Canadian counterparts, local governments are evaluated only slightly more highly than are the state governments, whereas in Canada, at least in 2002 and 2004, local governments were evaluated considerably more highly than provincial governments. Only in 2007 did the provincial-local gap narrow to two percentage points (the same as the state-local U.S. gap).

WHICH ORDER IS MOST TRUSTED TO DELIVER IMPORTANT SERVICES?

A different perspective on trust in the various orders of government is provided in Table 3, which displays percentage responses to the question: Which level of government do you trust the most to deliver the programs and services that are important to you (Kincaid *et al.* 2003, 150)? This question was asked only in 2003.

Interestingly, Canadians were much more likely than Americans to say they trust all their governments to deliver important services while also being somewhat more likely than Americans to say that they trust none of their governments to deliver important services. Americans most often picked local government and were substantially more likely to do so than Canadians, reflecting, perhaps, the more substantial responsibilities of U.S. local governments compared to those in Canada. Canadians most often picked their provinces, and did so slightly more often than Americans selected state governments, though provinces hold only a slight lead over local governments and an even smaller lead over "none". Canadians, like Americans, least often selected their federal government, though markedly more Americans than Canadians picked their federal government.

Regional differences in Canada were statistically significant, but they were not so in the United States. Residents of Quebec and Alberta picked their provinces most often, while residents of British Columbia and Ontario did so the least. The respondents in these latter two provinces also chose "none" most often. The federal government scored the highest in Quebec, while local government and "none" both scored the lowest in that province.

The results of this question are difficult to interpret because of the "all" and "none" responses. Canadians much more often selected "all" than did Americans. In this respect, the Canadian responses are more positive than American responses and more positive than Canadian responses to the questions analyzed above. At the same time, though, consistent with previous questions, nearly a quarter of Canadians selected "none", and the percentage of "none" responses is larger than the percentages for federal, local, and all, while being only 1.6 percentage points lower than the percentage response for the provinces.

Table 3: Which Level of Government Do You Trust the Most to Deliver the Programs and Services that are Important to You? (2003)

	Federal (%)	*Prov/State (%)*	*Local (%)*	*All (%)*	*None (%)*	*DK/NA (%)*
All Canada	13.8	24.7	19.5	17.7	23.1	1.3
All United States	21.1	22.6	30.6	2.5	17.0	6.3
Canadian Regions						
Atlantic	13.5	25.8	15.5	18.7	26.5	0.1
Quebec	18.4	38.8	12.0	15.1	14.4	1.4
Ontario	12.2	17.4	20.8	21.0	27.0	1.6
Manitoba	13.2	26.3	18.4	18.4	22.4	1.3
Saskatchewan	9.1	21.2	22.7	21.2	22.7	3.0
Alberta	10.0	35.5	20.5	11.0	22.5	0.5
British Columbia	14.1	11.5	30.5	16.0	26.7	1.1
U.S. Regions						
Northeast	21.2	18.2	37.4	2.0	14.1	7.1
North Central	19.1	26.3	32.5	1.9	14.4	5.8
South Atlantic	22.0	19.9	26.7	3.7	19.4	8.4
South Central	20.9	27.2	24.1	2.1	21.5	4.1
Mountain	21.1	22.5	22.5	4.2	21.1	8.4
Pacific	18.9	22.8	33.9	3.1	13.4	7.9

Source: Kincaid *et al.* 2003.

Again, moreover, region is an important variable in Canada. Although the federal and state or provincial governments in both countries fund key social programs jointly, Canadians trusted all or none of them more than did Americans. This difference could be due to the regional differences in Canada, to the absence of local government as a less viable service-delivery option for Canadians than Americans, or to problems of service delivery such as health care waiting times addressed by Canada's Supreme Court two years later when it struck down Quebec's law prohibiting private health insurance and opined that long waiting times violated patients' "liberty, safety and security" (Krauss 2005).

WHICH ORDER GIVES THE MOST OR LEAST FOR ONE'S MONEY?

Table 4 provides yet another way of looking at public attitudes toward the various orders of government. Here, respondents were asked: From which level of government do you feel you get the most/the least for your money?

Table 4: From Which Level of Government Do You Feel You Get the Most/Least for Your Money?

	2002 (%)		*2004 (%)*	
	Canada	*United States*	*Canada*	*United States*
Most for Money				
Federal	21.7	32.0	19.0	32.6
Provincial/State	29.0	24.0	32.0	21.4
Local	20.8	25.0	34.0	35.8
None	19.7	7.0		
DK/NA	10.6	12.0	15.0	9.5
	2003 (%)		*2007 (%)*	
	Canada	*United States*	*Canada*	*United States*
Least for Money				
Federal	42.8	29.8	41.0	40.8
Provincial/State	25.1	23.4	23.4	26.0
Local	18.0	19.5	18.9	23.5
All of the Above	7.6	9.7		
None of the Above	1.9	6.6		
DK/NA	4.5	11.1	16.7	9.7

Sources: Cole, Kincaid, and Parkin 2002; Kincaid *et al.* 2003; Cole, Kincaid, and Rodriguez 2004; Kincaid and Cole 2008.

In 2002, Canadians most often picked provincial government as giving them the most for their money, followed by the federal and local governments. Americans most often picked their federal government, followed by local and state governments. However, Canadians more often than Americans selected "none", which was a given response category in 2002 but not in 2004. In the latter year, Canadians most often cited local government, followed closely by provincial government and more distantly by the federal government, whereas Americans most often selected local government, followed closely by the federal government and more distantly by state government. Again, the results for the United States probably reflect the increase in positive views of the federal government that followed the 2001 terrorist attacks.

That conjecture seems to be supported by the data for the least-for-your money version of the question. In 2003, only 29.8 percent of American respondents said that the federal government gave them the least for their money, but in 2007, this percentage jumped to 40.8, thereby bringing it closer to Canadian attitudes toward their federal government, which equalled 42.8 percent in 2003 and 41.0 percent in 2007. Hence, by far, Canadians in both years

regarded their federal government as giving them the least for their money, while this was true for Americans only by 2007.

In both years and in both countries, provincial and state governments scored in second place on this question, with approximately one-quarter of respondents selecting this order of government. Therefore, local government followed in third place in both countries in both years. In short, on this question, both Canadians and Americans believed that local governments gave them the best value for their money, followed closely by provincial and state governments and more distantly by the federal governments. At the same time, though, a slightly smaller percent of Canadians than Americans picked "all of the above" in response to this question − a more positive result for Canada's governments, while a slightly larger percentage of Americans than Canadians chose "none of the above" − a more positive result for the U.S. governments.

WORST TAX

Pursuant to the above questions, respondents were asked the following question in 2002 and 2004: Which do you think is the worst tax, that is, the least fair [list of taxes]? The results are shown in Table 5.

In Canada, by far, sales taxes were perceived as the worst, although closer analysis suggests that this animus was directed almost entirely at the federal Goods and Services Tax (GST). In the United States, where sales taxes are levied by the states and some local governments, the sales tax was the second least-worst tax. The worst tax in the United States was the local property tax, which was one of the least-worst taxes in Canada. The country difference is due, perhaps, to the heavy revenue reliance of U.S. local governments on the property tax. The federal income tax was the second-worst tax in both countries, while provincial and state income taxes were viewed more favourably.

Comparing attitudes toward taxes in the two countries is fraught with difficulties because similar taxes are not exactly equivalent. This is especially true for explicit social-welfare taxes. In the United States, flat federal taxes are levied on all wage earners (up to a certain earnings limit) to support Social Security (old-age assistance) and Medicare (health care for senior citizens). Together, these taxes are now the single largest taxes paid by most Americans because they affect all wage earners, whereas millions of low-income wage earners are exempt from the federal income tax. Approximately one-third of federal tax filers in 2002 and 2004 had no income-tax liability. For many years, the U.S. ACIR asked the "worst tax" question without including the Social Security tax. Therefore, this tax was added in various alternate years, thus creating two trend lines for this question, one including Social Security and one excluding Social Security (as reflected in Table 5). Posing a similar question in Canada was difficult. One version was tried in 2002 and another in 2004. The results, which are of limited comparability, suggest tentatively that the Social Security tax has emerged as a notable concern for U.S. taxpayers while similar taxes in Canada have not risen to the same threshold.

Table 5: Which Do You Think is the Worst Tax – That is, the Least Fair

	2002 (%)		*2004 (%)*	
Tax	*Canada*	*U.S.*	*Canada*	*U.S.*
Federal Income Tax	20.3	23.8	18.0	27.7
Provincial/State Income Tax	11.4	11.0	6.0	7.7
Social Security Tax[1]	5.5	16.8		
Employment Insurance			10.0	
Sales Taxes[2]	45.6	12.1	47.0	17.0
Local Property Tax	8.4	25.5	11.0	41.4
None/DK/NA	8.7	10.7	6.0	6.2

[1]In Canada: "Employment insurance and Canada pension plan contributions deducted from your pay cheque". In Quebec: "Les cotisations à l'assurance imploi et au Régime de rentes du Quebec déduites de votre salarie". In the United States "social security and Medicare tax".
[2]In Canada: "Sales taxes like the GST or your provincial sales tax". In Quebec: "les taxes de vente comme la TPS ou la TVQ". In the United States: "state sales tax".
Sources: Cole, Kincaid, and Parkin 2002; Cole, Kincaid, and Rodriguez 2004.

WHICH ORDER HAS TOO MUCH POWER AND WHICH NEEDS MORE POWER?

Pursuant to the above evaluations of the various orders of government, we asked respondents in both countries about the distribution of powers in their federal systems in 2003 and 2007. The first question, for which results are arrayed in Table 6, was: Which level of government do you think has too much power today?"

Clearly, respondents in both countries in both years believed that their federal government had too much power. Interestingly, despite the fact that the Canadian federal system is generally viewed as more non-centralized than the U.S. federal system, Canadians (56.2 percent) more often picked their federal government as having too much power in 2003 than did Americans (51.7 percent). However, this pattern changed in 2007. Rather than the 2007 convergence seen in most previous questions, on this question there was a divergence, with only 47.7 percent of Canadians selecting their federal government as having too much power, compared to a whopping 66.1 percent of Americans. These results are quite consistent with earlier conjectures arguing that the election of a new Canadian federal government and the improved Canadian economy and fiscal federalism may have enhanced Canadian assessments of their federal government in 2007 while declining support for President Bush and Congress, along with disillusionment with the war on terror and rising federal deficits, may have increased public displeasure with the U.S. federal government.

Table 6: Which Level of Government Has Too Much Power Today / Needs More Power Today?

	2003 (%)		*2007 (%)*	
	Canada	*U.S.*	*Canada*	*U.S.*
Has Too Much Power				
Federal	56.2	51.7	47.7	66.1
Provincial/State	28.3	15.8	18.8	14.5
Local	4.7	5.9	5.7	4.7
All of the Above	3.7	8.6	11.2	4.5
None of the Above	4.0	8.9	7.1	3.8
Don't Know / NA	3.0	9.2	9.7	6.4
Needs More Power				
Federal	14.0	10.9	10.5	8.2
Provincial/State	31.5	22.7	27.8	35.9
Local	45.4	36.1	39.6	38.3
All of the Above	0.8	1.5	4.7	0.9
None of the Above	5.7	21.1	10.6	12.1
Don't Know / NA	2.6	7.7	6.9	4.5

Sources: Kincaid *et al.* 2003; Kincaid and Cole 2008.

The results also show that both Canadians and Americans regarded their provincial and state governments as being the second order having too much power, although the percentages selecting these governments were considerably smaller than those choosing the federal governments. In turn, very few Americans and Canadians believed that their local governments had too much power. Likewise, only small percentages of respondents picked the "all of the above" and "none of the above" responses to this question, although the 11.2 percent of Canadians who selected "all of the above" in 2007 is slightly out of sync with this pattern, though consistent with previous results showing higher Canadian dissatisfaction with their governments.

Table 6 also shows percentage responses to the following question: Which level of government do you think needs more power today? The results for this question mirror those for the previous question. While both Canadians and Americans were least likely to feel that their local governments had too much power, Canadians by sizable margins most often said that their local governments need more power today. Fully 45.4 percent of Canadians expressed this view in 2003, although the percentage fell to 39.6 in 2007, which is more in line with American views (36.1 percent in 2003 and 38.3 percent in 2007). Thus, while local governments appear to be legally weaker in Canada than in the United States, Canadian citizens clearly want them to be stronger.

Provincial and state governments were the choice in both countries of being the second most in need of more power today, although the percentage of Canadians picking provincial governments declined from 31.5 percent in 2003

to 27.8 percent in 2007, while the percentage of Americans citing state governments increased from 22.7 percent in 2003 to 35.9 percent in 2007. This change in the United States might reflect increasing support for the states in light of decreasing support for the federal government.

Clearly, only small percentages of respondents in both countries believed that their federal government needs more power today. Hence, while relative to the U.S. federal government, Canada's federal government is reputed to be less powerful within its federation, Canadians hold views about the power and need for power of the federal government that are comparable to those held by Americans about their federal government.

Only small percentages of respondents in both countries reported that all their governments need more power today, although notable percentages of respondents in both countries said that none of their governments need more power today. This view was more prevalent among Americans than Canadians.

POLITICAL CULTURE

Finally, we looked at the concept of "federal political culture", and we asked whether such a concept can be measured and whether it can be said to differ among North America's three federal polities. Many federalism scholars have posited the existence of such a concept. In our 2004 survey, we asked several questions designed to measure "federal political culture". We examine here the extent to which such a culture is revealed in responses from these three countries. We also look at the extent to which the concept might be related to the varying federal arrangements in Canada, Mexico, and the United States.

Scholars of federal arrangements have often referred to the "culture" of federalism, or as Duchacek called it, the "federal political culture" (1987, 343-344). This term, according to Duchacek, refers to "a set of orientations toward the federal political system and attitudes toward the role of self ... in the system" (1987, 341). Those who find utility in the term suggest, as did William A. Livingston, that the essence of federalism "lies not in the institutional or constitutional structure but in [the attitudes of] society itself" (1952, 84). For some, such a cultural attitude is necessary for the initial development and then successful maintenance of a federal system. Daniel J. Elazar, for example, argued that "there is no federal system that is commonly viewed as successful ... whose people do not think federal, that does not have a federal political culture and a strong will to use federal principles and arrangements" (1987, 192). For others, variations in such attitudes among different federal polities account at least in part for variations in those federal arrangements as they evolved in those polities. As Livingston put it, "federalism is not an absolute but a relative term ... varying degrees of federalism are produced by societies in which the ... demands for the protection and articulation of diversities [Livingston's definition of the federal culture concept] have been urged with more or less strength ... Societies in which the demand for integration is stronger than the demand for decentralization will produce a set of instructions that is more nearly unitary; and a contrary situation will produce a contrary result" (1952, 90).

Duchacek recognized the importance of such a concept when he said, "the federal culture ... should be considered an important though not yet fully explored part of any study of extraconstitutional aspects of federalism". He also noted the difficulty of measuring and evaluating such a concept when he admitted this to be an "unexplored area, a blank that we have tentatively called federal political culture" (1987, 346).

While scholars generally agree on the importance of the concept, one of the reasons why the empirical study of federal political culture is a "blank" (to use Duchacek's word) is because various authors operationalize the term in varying ways. Some, like Duchacek, define the concept in terms of how citizens view and value various governmental arrangements. He says, "the habit of looking for guidance to the national capital and not questioning its directives constitutes prima facie evidence of a unitary ... political tradition. The ... habit of thinking primarily in terms of local initiative and responsibility may perhaps present prima facie evidence of a federal political culture" (1987, 333-334).

Others, though, cast the concept in more psychological and sociological terms, that is, how people relate to each other and the degree to which they are accepting, or not accepting, of various ethnic, language, and religious diversities. Elazar suggested that a federal society "not only is comfortable with the political expression of diversity but is from its roots a means to accommodate diversity as a legitimate element in the polity" (1987, 66). Aaron Wildavsky said, "Uniformity is antithetical to federalism .... In a word, federalism is about competition and conflict" (1998, 41, 66). As Livingston put it, "the primary requirements for federalism are diversities among the peoples of a nation and diverse values of the people within the society. There is accordingly a psycho-sociological complex of values in any society which determines the shape and character of political and governmental institutions. Federalism, no less than other forms of government, is a response to the values of the society" (1968, 138-139).

Still others view the concept in terms of decision making. They distinguish a federal political culture as being one that values involving the widest variety of groups and widest range of opinions in decision making, as opposed to limiting participation to the fewest possible actors. Elazar saw this as the essential feature of the federal political culture. Referring to the Swiss as a people "that may well represent the most clear-cut example ... with a federal political culture", he defined the concept "as the cultivation of balance, of collegiality, of the involvement of the widest variety of groups in consultations surrounding decisions if not in actual decision making" (1987, 192-193).

Drawing on the cultural observations of Duchacek, Livingston, Wildavsky, Elazar, and others, we asked respondents to agree or disagree with three statements that seem to us to tap many of these dimensions of the federal political culture idea. These statements are: (1) A federal form of government, in which power is divided between a national government and state and local governments, is preferable to any other kind of government (here, agreement is considered a pro-federal culture response); (2) A country in which everyone speaks the same language and has similar ethnic and religious backgrounds is preferable to a country in which people speak different languages and have different ethnic and religious backgrounds (here, disagreement is considered a

pro-federal culture response); and (3) Having a strong leader in government to make important decisions based on what he or she thinks is best is preferable to having a leader who makes important decisions by bargaining and negotiating with a wide variety of groups who have different opinions (here, disagreement is considered a pro-federal culture response). In addition to responses to these three questions, we created a scale of responses to all three questions, ranging from responses that were most pro-federal culture to those that were least supportive of the concept.

If, as the above-cited scholars suggest, a culture of federalism exists, we would expect significant proportions of respondents in each of these three federal countries to display pro-federal culture responses, and, if, as Livingston predicts, varying degrees of federalism are associated with differing cultural orientations, then we would expect these to be reflected in differing patterns of responses from Canada, Mexico, and the United States. Most observers agree that on a scale of federalism centralization, Mexico has been the most centralized of these three federations, while Canada has been the least (Riker and Lemco, 1987, 113-134 and Watts 2002, 450). We hypothesize, then, that in their answers to these three federalism culture questions, response patterns from Mexico will be the least pro-federal culture, response patterns from Canada will be the most pro-federal culture, and response patterns from the United States will fall between these two.

Responses to these questions and to the scale for the countries examined are shown in Table 7.

Table 7 shows that our expectations concerning the federal political culture orientations are substantiated in many instances. Significant proportions of respondents in each of these federal countries display what may be called pro-federal culture responses. More than half of all respondents in all countries (and over three-quarters of the respondents in Canada and the United States) agree that "A federal form of government in which power is divided between a national government and state/provincial and local governments is preferable to any other kind of government." Likewise, more than half of all respondents in Canada and the United States, and 40 percent of those in Mexico, disagree with the statement that "A country in which everyone speaks the same language and has similar ethnic and religious backgrounds is preferable to a country in which people speak different languages and have different ethnic and religious backgrounds". Responses to the "strong leader" question, though, are not consistent with what we thought would be pro-federal culture responses in any of these three countries. It can be seen that more than half of the respondents in all three federal countries agreed that "Having a strong leader to make important decisions based on what he or she thinks is best is preferable to having a leader who makes important decisions by bargaining and negotiating with a wide variety of groups who have different opinions".

In every case, though, *response patterns* to these three federal culture questions followed our hypotheses. Consistently, Mexican responses were the least pro-federal, Canadian responses were the most pro-federal, and those from the United States fell in between. To the extent that our questions actually do measure something that can be called a "federal political culture", there does appear to be a correspondence between a country's federal structure and that

Table 7: Responses to the Federalism Culture Questions and to the "Scale of Federal Attitudes", 2004

	Mexico (%)	United States (%)	Canada (%)
1. A federal form of government in which power is divided between a national government and state/provincial and local governments, is preferable to any other kind of government. (An agree response is considered pro-federal.)			
Strongly Agree	18.0	43.3	28.0
Somewhat Agree	40.0	32.7	47.0
Somewhat Disagree	25.0	12.0	14.0
Strongly Disagree	17.0	5.8	7.0
DK/NA		6.2	5.0
Totals	1200	1000	1500
Sig=.000; cc=.275			
2. A country in which everyone speaks the same language and has similar ethnic and religious backgrounds is preferable to a country in which people speak different languages and have different ethnic and religious backgrounds. (A disagree response is considered pro-federal.)			
Strongly Agree	20.0	16.9	11.0
Somewhat Agree	40.0	20.6	20.0
Somewhat Disagree	25.0	20.0	25.0
Strongly Disagree	15.0	35.9	43.0
DK/NA		6.7	2.0
Totals	1200	1000	1500
Sig=.000; cc=.283			
3. Having a strong leader in government to make important decisions based on what he or she thinks is best is preferable to having a leader who makes important decisions by bargaining and negotiating with a wide variety of groups who have different opinions. (A disagree response is considered pro-federal.)			
Strongly Agree	11.0	29.6	23.0
Somewhat Agree	58.0	31.6	32.0
Somewhat Disagree	22.0	15.5	23.0
Strongly Disagree	7.0	16.8	20.0
DK/NA		6.6	3.0
Totals	1200	1000	1500
Sig=.000; cc=.217			
4. Scale of Federalism Attitudes, based on "strong" or "somewhat" pro-federalism responses to the three attitudinal questions asked above (scale ranges from 0, "least pro-federal", to 3, "most pro-federal".			
0 (least pro-federal)	10.8	5.1	4.6
1	36.5	36.2	27.7
2	38.5	40.5	40.2
3 (most pro-federal)	14.3	18.2	27.5
Mean Score	1.56	1.72	1.91
Sig=.000; cc=.126			

Source: Cole, Kincaid, and Rodriguez 2004, 217.

country's federal attitudes. As shown in Table 7, all of these relationships are statistically significant at the .000 level, with strength of association (as measured by the contingency coefficient) ranging from .217 to .283.

Responses to the three culture questions were combined to form a scale of federal cultural attitudes by summing the "strongly" and "somewhat" pro-federalism answers to the three questions and by weighting responses to each question equally. The resulting scale ranges from a score of zero, "least pro-federal", to three, "most pro-federal". Results for each country, along with the mean score for each, are also shown in Table 7. Reflective of responses to the three questions already discussed, it can be seen that the average "pro-federal" score is lowest among Mexican respondents (mean = 1.56) and highest among Canadian respondents (mean = 1.91). It also is shown that Mexico has the highest percentage of respondents scoring the least pro-federal on this scale (10.8 percent), while Canada has the lowest (4.5 percent). Likewise, Canada has the highest percentage of respondents scoring the most pro-federal (27.5 percent); Mexico has the lowest (14.3 percent). In all cases, response patterns from the United States fall in between those of Mexico and Canada.

The significant differences that on first analysis appear to exist between these three countries in response patterns to these culture questions may disappear when controlling for the unidentified and unmeasured social and demographic factors existing within each country. To test for this, analysis of variance was applied to each culture variable and to the combined scale of federal attitudes. Results are shown in Table 8.

The analysis-of-variance test shows that the differences between country-by-country response patterns to all these questions, as well as the combined scale, remain significantly different, even when considering all factors within each country that might account for these differences. While the sum-of-squares variances "accounted for" by country differences are not great in any case, they are statistically significant in all instances.

All in all, public attitudes as reflected in responses to the three "federalism culture" questions, as well as results from the scale derived from those questions, conform to the general impression of the pattern of federal governance in these three federations, with Mexico having the most centralized structure, Canada having the least, and the United States lying somewhere in between. It is not our argument that a country's federal structure is somehow a direct result of a country's federal political culture (assuming such a concept actually exists and can be measured as above), but we do contend that there appears to be an interactive or reciprocal relationship between the two. Based on this limited three-nation study, a country's federal structure does appear to be correlated with federal attitudes in that country. These attitudes may be reflective of experiences with a country's federal structure, or federal structure may be reflective of a country's federal political culture. Most probably, each is affected by the other. We must leave it for future research to assess the patterns of causation that might exist between these two concepts.

Table 8: Results of Analysis of Variance Test

Federal Attitude Questions	*Between Sum of Squares*	*Within Sum of Squares*	*Total Sum of Squares*	*F Score*	*Sig Level*
A federal form of government is preferable	260.20	2956.88	3163.07	123.78	.000
A country in which everyone speaks the same language and has similar ethnic and religious backgrounds is preferable	268.74	3902.10	4170.84	123.32	.000
Having a strong leader to make important decisions on what he or she thinks is best is preferable	192.12	4021.43	4213.55	85.44	.000
Scale of Federal Attitudes	93.29	2921.75	3015.05	59.02	.000

Source: Cole, Kincaid, and Rodriguez 2004, 219.

CONCLUSION

There does appear to be a relationship between federal structures and governance and citizens' attitudes toward federalism. However, the direction of this relationship remains unclear. The trend data, however, suggest that public attitudes are influenced by the behaviour of federal, state, and local governments more than those governments are influenced by public opinion. That is, public opinion seems to react to the structure and behaviour of federal systems. For example, public trust in the U.S. federal government increased during the aftermath of the terrorist attacks of 11 September 2001 but then returned to normally low levels several years later. However, it also is possible that public attitudes influence government behaviour. For example, were the increased percentages of Western Canadians saying that their provinces were treated with respect in 2007 the result of various changes in the Canadian federal system, especially Harper's 2006 election, or were the low levels of Western perceptions of provincial respect in 2002 motivations to induce changes in Canada's federal system, thus producing Harper's election? Our data alone cannot sort out this important theoretical question. In turn, while our data appear to confirm the existence of a federal political culture, the results cannot determine whether the three different cultural patterns are causes (pre-conditions) or results (post-conditions) of the different structures and operations of federalism in the three countries.

Otherwise, the results indicate that Canadians exhibit lower evaluations of all their governments than do Americans. Canadians also were less likely than Americans to believe that their province/state is treated with respect in the

federation. In addition, regional and political party differences in public attitudes are more salient in Canada than in the United States. It is possible that such regional and partisan differences, along with language differences, produce the comparatively low evaluations of governments found in Canada. Parliamentary federalism might contribute to these low evaluations, as well, by sharpening partisan and regional differences and producing minority governments periodically (e.g., Harper's post-2006 election government). It is, moreover, not unusual for certain provinces to feel left out of the governing coalition in Ottawa, while other provinces feel favoured by particular coalitions. The small number of Canadian provinces (10) compared to the 50 U.S. states may exacerbate feelings of provincial inclusion and exclusion, in part because Canadians may be more aware of the treatment of other provinces than Americans are aware of the treatment of other states. The practice of fiscal equalization in Canada and its absence in the United States, moreover, might create resentments between donor and recipient provinces and among recipient provinces that believe they are not getting their fair share. The federal government's efforts to reduce imbalances in fiscal resources and individual provinces by discriminating among regions and provinces might further contribute to feelings of provincial disrespect. For this and other reasons, there is greater asymmetry in the Canadian federal system than in the United States. The U.S. government has less constitutional ability to discriminate among the 50 states. Furthermore, the Canadian Senate, unlike the U.S. Senate, is weak and not electorally representative of the provinces. In addition, the closed-door executive federalism that can be produced by the Westminster system is not conducive to public affection.

In both countries, however, the federal government was generally the least trusted and lowest evaluated by respondents, while local governments were usually the most trusted and most highly evaluated. State and provincial governments most often fell between these two poles. Similarly, respondents in both countries viewed their federal government as having too much power and, thereby, usually supported the allocation of more power to local governments, with smaller percentages supporting more power for the provinces or states, and even smaller proportions endorsing more power to their federal government. It would be interesting to learn whether similar results prevail in other federal countries, especially developed democratic federations where local and state governments ordinarily possess the resources and capacity to be effective, efficient, and accessible to citizens. As such, the results might point to one advantage often attributed to federalism and appreciated by citizens, namely, the combination of a national government performing necessary general but distant functions while smaller regional and local governments act closer to the people.

However, the results also strike a disturbing note, namely, that in Canada, where federalism and federal political culture are comparatively robust, public trust and confidence in all governments is comparatively low, provincial feelings of respect are comparatively low, and there are significant regional and partisan differences in attitudes, while in the United States, where federalism and federal political culture are comparatively less robust, public trust and confidence in all governments is comparatively high, state feelings of respect are

comparatively high, and there are few significant regional and partisan differences in attitudes.

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18

Testing Federalism through Citizen Engagement

Kathy L. Brock

L'analyse du rapport entre les forces sociales et le développement des institutions politiques est essentielle à la compréhension du fonctionnement des régimes fédéraux. Et selon Ron Watts, trois principes fondamentaux permettent d'établir la nature et l'efficacité de cette relation. L'auteure applique ces principes de Watts au régime fédéral canadien à l'aide de trois études de cas : les récentes tentatives de révision constitutionnelle, la gouvernance autochtone et les organisations non gouvernementales. Dans chacun de ces cas, de fortes identités locales ont menacé de compromettre la capacité du gouvernement canadien de préserver une adhésion à des intérêts communs qui unifieraient ces identités autour d'un même ensemble national. Les institutions fédérales ont toutefois su adapter leur action – certes trop lentement et parfois à contrecœur – de manière à traduire plus adéquatement les changements sociaux et l'évolution des valeurs sociales, à canaliser les manifestations d'unité et de diversité sous forme de mesures avantageuses sur le double plan particulier et universel de la fédération, et à créer un meilleur équilibre entre unité et diversité.

Ron Watts's writings embrace and analyze institutions but transcend the sterile formalism so often encountered with a narrow construction of institutionalism.[1] A learned observer of federalism and constitutions, Ron Watts informs us that:

> Since the 1950s, students of politics have come to realize, however, that a merely legalistic study of constitutions will not adequately explain political patterns within federal systems. Indeed, the actual operation and practices of governments within federal systems have in response to the play of social and political pressures, frequently diverged significantly from the formal relationships specified in written legal documents.
>
> Scholars writing about federal systems … have become conscious of the importance of social forces underlying federal systems. (Watts 1999, 15)

[1]Thank you to the editors and referees of this volume for their very helpful suggestions on improving the chapter.

In short, society matters as an expression of citizen influence on federalism. Studies of federal institutions cannot just be confined to the interplay between two levels of government as suggested by scholars like Friedrich (1968) but must go beyond the process of joint government decision making to be more encompassing. Social forces and citizen action have an impact on the operation and understanding of institutions and constitutions and intergovernmental relations in federal states (Watts 2006, 6). A core idea permeating Watts's writings, then, is citizen engagement in the political realm as one important influence on the theory and practice of federalism.

The theme of citizen engagement and need for constant interaction between social forces and institutions is implicit throughout Ron Watts's writings. As a fundamental aspect of the nature and dynamic of federal institutions, the relationship between state and society cannot and should not be treated separately in his studies of federalism but must be understood as interwoven into his discussion of the shape and operation of constitutions, political structures and political behaviour. Indeed, citizen engagement forms one of the fundamental tests of how effective and legitimate a federal system is.

In this paper, I briefly outline the Watts test for the nature and effectiveness of federalism in engaging citizens. The test has three essential components which I then apply to the Canadian system using three sample cases. The components in the test involve assessing the extent to which federal institutions reflect the balance between social and political forces, the ability of the institutions to channel expressions of social diversity into modes that benefit both the parts and whole, and the achievement of an appropriate balance between diversity and unity. The cases involve analysis of the federal system in relation to citizen engagement in the constitutional amending process, Aboriginal citizens' aspirations for self-governance, and citizen representation through nongovernmental organizations. While each example of citizen engagement must necessarily be discussed in general and selective terms, together they suffice to provide a clear indication of the extent to which citizens and their interests are effectively engaged in the Canadian federal system. But first, it is appropriate to consider the broader relationship between social forces and federal institutions.

Like two other eminent scholars of Canadian federalism, Donald Smiley and Alan Cairns, Ron Watts recognizes that the relationship between state and society is not unidirectional. Institutions are embedded in society in a reciprocating relationship. As he states, "constitutions and institutions, once created, themselves channel and shape societies" (1999, 15). How institutions are configured influence how social actors will arrange themselves and respond to those institutions as well as to each other. Just as the adoption of a Charter of Rights and Freedoms in the Canadian constitution in 1982 enhanced the awareness of rights and identity politics, so too did the 1867 adoption of a quasi-federal structure, as it was characterized by K.C. Wheare (1951), affect the behaviour of social, economic and political actors throughout Canadian history. Despite the intentions of some founders for a dominant national government, decentralist forces sought, used and expanded the resources available to them through legal and political action, resulting in Canada becoming one of the most

decentralized federal systems in the world and characterized by strong regional and provincial social and political identities.

While the reciprocal influence of institutions on actors and social forces on institutions is important, Watts, like his counterparts, Smiley and Cairns, emphasizes that, over time, these relationships become multidimensional. As Watts argues, "causal relationships between a federal society, its political institutions, and political behaviour and processes are complex and dynamic" (1999, 15). The relationships embody change and are not static. Thus, to capture an institution, arrangement or social force in one period is not to capture its nuances or nature in the next period studied. Indeed,

> The pressures within a society may force a particular expression in its political institutions, processes and behavior; but these institutions and processes, once established, in turn shape the society by determining the channels in which these social pressures and political activities flow. Thus the relationships between a society, its constitution and its political institutions are not static but involve continual interaction. (1999, 15-16)

The nature of the relationship can be captured in the logical construct: society influences institutions which, in turn, influence society. Each shapes the other continually in a wide variety of dimensions. This dynamic process over time ensures that the federation remains alive and healthy. If the relationship becomes lopsided or change is not mutual and sustained, the federation atrophies, dies or dissolves.

TESTING FEDERALISM

Any test of the effectiveness of a federal system in engaging citizens must embrace the complexity of the system. As Ron Watts observes, "It is in the interplay of the social foundations, the written constitutions and the actual practices and activities of governments that an understanding of the nature and effectiveness of federal political systems is to be found (1999, 16). Understanding the social forces and dynamics operating in a political system will only yield insight into key problems or structural realities facing political decision-makers. Going beyond that step to understand and evaluate the reaction of politicians or government officials to social tensions or problems within the system, it is necessary to understand the principles and objectives laid down for society in the constitution. Together these measures yield a picture of how well the system is functioning and whether the goals being achieved reflect the animating myths and ideals of the system.

The main difference in evaluating unitary and federal systems is that federal systems are not intended to bridge differences among citizens in a homogenizing way or even to eliminate those differences. Indeed, Watts reminds us that federal systems both are chosen and will function to "preserve regional identities within united rule" (1999, 110-111). Political institutions are designed to channel and influence the articulation of diversity and unity. In a well-functioning federal system, the peaceful articulation and accommodation of differences within

existing structures serving all of society is critical. Thus, achieving and maintaining a flexible balance between diversity (federalism) and unity (the political whole) is fundamental to this exercise. Just as factions in the Madisonian sense should not be suppressed or denied, neither should the whole be sacrificed to a part. Either imperils the system.

Watts takes this logic one step further. He argues that federal systems of government face an important challenge:

> Where diversity is deep rooted, the effort simply to impose political unity has rarely succeeded, and indeed has often instead proved counter-productive creating dissension. It is clear that more regional autonomy may contribute to the accommodation of diversity, but by the institutional encouragement of common interests that provide the glue to hold the federation together. (Ibid., 16-17)

A well-functioning federation, then, will respond to and reflect deep-rooted differences but will also promote common allegiances. These shared allegiances will foster common norms and expectations. Political institutions must reflect these arrangements and allegiances. So, self-rule for units as well as shared rule through accepted common institutional frameworks that transcend the units are both essential to the effective and peaceful combination of unity and diversity.

From these ruminations on an effective and well-functioning federal system, a test may be derived. The three components of the test are:

1. How well and accurately do the federal political institutions reflect the social and political balance of forces within the system?
2. To what extent do these institutions channel the influence and articulation of unity and diversity into peaceful and productive means that benefit both the constituent parts as well as the whole?
3. Is the appropriate balance in combining unity (shared rule) and diversity (self-rule of units) achieved?

Ultimately, a well-functioning and effective federal political system will be one that secures a peaceful accommodation of differences without experiencing undue political paralysis or atrophy. And, as noted in the previous section, this understanding of how well a system is functioning must be viewed in a dynamic and ever changing context with institutional change influencing society and social forces influencing federal institutions in turn. In sum, a healthy federal system engages citizens in a myriad of ways that reflect the differences among them without diminishing those differences and, at the same time, creates a whole to which all can belong. The three following cases of citizen engagement in Canada are explained and assessed in terms of how they fare under the three step test of a healthy federal system.

THREE TEST CASES

The Constitutional Process

Analysts such as Ron Watts, who lived through the constitutional struggles of the 1980s and 1990s, believe that the constitutional process is wanting but paradoxically enough, it may not be seen as so problematic when viewed through the Watts test. Indeed, the framework provided by the test enables us to see both the deficiencies and merits of the constitutional process in relation to citizen engagement as revealed in the 1980 to mid-1990s. This section of the chapter reflects back on Watts's analysis of that period to demonstrate the failings of the process but then uses the test to explore some positive features of the process that may be useful as a future guide to constitutional reform. Contrary to Watts's conclusion that public engagement resulted in stasis, the application of the Watts test here indicates that the results were more mixed. We begin with the Watts analysis.

Ron Watts suggests that Canada has been in constitutional disarray since the mid-1960s. In his view, there are four critical conditions that put Canada in this situation. First, to borrow the language of David Thomas, the relationships of Quebec, Aboriginal peoples, multiculturalism and immigrants to the rest of Canadians all remain in a state of unsettlement (Watts 2002; Thomas 1997). Citing the Task Force on Canadian Unity (1979), Watts argues that Canadians need to develop institutions and processes that accept, embrace and cherish diversity (Watts 2002, 298). Second, the regionalized nature of the Canadian economy and the disparity among regions produces differences and resentments among the regions (ibid., 298). Third, the peculiar Canadian combination of parliamentary institutions with federalism has resulted in a dominance of Ontario and Quebec in federal decision making to the chagrin of the other provinces, thus prompting calls for constitutional reforms aimed at the invigorating and reconfiguring the Senate within the federation (ibid., 299). And fourth, the erosion of uniting beliefs in favour of a polarizing rights discourse has meant compromise based on the recognition of diversity and the need for asymmetry have not been emphasized (ibid., 299). These structural flaws were all exacerbated by constitutional negotiations leading to patriation of the constitution and entrenchment of the Charter of Rights and Freedoms as well as the amending formula in 1982 which impacted so heavily on the constitutional frustrations of the Aboriginal (1982-87), Meech Lake (1987-90) and Charlottetown rounds (1990-92). Canada has failed to date to resolve these critical tensions.

Reflecting back on the Meech Lake and Charlottetown processes of constitutional reform, Ron Watts concludes that both processes were failures but that Meech Lake rendered Charlottetown necessary. Although the comprehensive constitutional reform package of Charlottetown was the logical answer to the failure of a more particularized approach used in Meech Lake to address only Quebec's concerns, he suggests that the failure of both demonstrated that comprehensive as well as more limited constitutional changes may be very difficult to achieve. The records of other federations such as

Switzerland, Australia and the United States confirm this wisdom (ibid., 312-313). Incremental reforms, especially by non-constitutional means, may be more easily obtainable and this is particularly true if a referendum is part of the package (ibid., 314). His logic here suggests that public involvement in the constitutional process may unduly complicate the process and make changes more difficult to achieve.

Watts's second conclusion concerns the use of public consultations in the process of constitutional reform. He observes that even Charlottetown was ultimately decried as an elite process despite "very extensive public consultation" (ibid., 314). He ponders the possibility of alternate forms of public engagement such as constituent assemblies but notes that even this means of change has limited success except in post-revolutionary or post-independence conditions (ibid., 315). And so he asks: "Does the lack of a viable alternative process for major constitutional change mean then that like some other federations Canada is locked into a basically unalterable status quo because there will always be conflicting vested interests resisting change for various reasons" (ibid., 315; cf. Watts 1993)? The alternative he suggests is extraordinary measures and hints at Cairns's suggestion that in some cases unilateral and authoritarian action will be necessary to achieve change (Cairns 1995). Watts concludes that serious thought must be given to a radically altered process of change if the unresolved structural tensions in Canada are to be addressed in future (Watts 2002, 315). In his analysis then, public engagement in the constitutional process resulted in stasis, stagnation even, as jealousies among interests played themselves out.

Reading his work on the constitutional process, one is left believing that not just the process failed but the Canadian federation as well. The right balance between diversity and unity was not obtained, expressions of unity and diversity were not channeled by the institutions into productive ends benefiting social groups and the whole and the institutions failed to reflect society in a meaningful way. In the end, the federation was not able to change and grow to meet changing expectations but remained paralyzed between competing interests. No answer was provided for the way forward. Thus, according to Watts's analysis and the standards of the test devised earlier for a successful federation, Canada failed. But did it? Certainly Canada failed to achieve a set of constitutional amendments to address these problems. However, viewed another way, Canada may have passed the test, just not with distinction.

A review of the four constitutional processes in the 1980s and 1990s reveals that the constitutional process did change to reflect new and pressing social realities. The constitutional process leading to the 1982 deal combined public hearings with elite negotiations in a fairly successful way. This process engaged citizens and citizen interests while ensuring that political decision-makers retained the means to make the critical decisions to move the process forward to its conclusion, patriation of the constitution (Cairns 1992, 62-95; Cairns 1995; Brock 2002). The inclusion of citizens reflected the growing mobilization of citizens and demands to be included in the policy process (Pross 1992; Brock 1996). The 1982 deal was concluded without the signature and despite the strong objections of the Quebec government but included recognition of key demands from the western provinces dealing with resources, reflecting the shift

in demographics and economics occurring in the country (Cairns 1991, 76; Gibbins 1983). The final deal also included recognition of the rights of Aboriginal peoples − a reflection of their rising status in the political world (Sanders, 1983). Similarly, the rights of women were entrenched and protected reflecting the success of their struggles for recognition throughout the 1970s (Hosek 1983). Heed was paid to the position of the multicultural community in the Charter of Rights and Freedoms (s.27). Thus, 1982 reflected a changing society, channeled citizen interests and expressions into a positive form, and achieved a commendable balance of unity and diversity, with the important exception of Quebec. However, that provincial government was reluctant to sign onto a deal that embraced these new realities in Canada for fear that it would threaten Quebec's favoured position in Confederation (Cairns 1991, 231-233). Thus, it was not surprising that Quebec responded to later entreaties to constitutional reform with demands for a clause that would shield that province from the recognition of the diversities that it believed was undermining its traditional social patterns. Canada as a whole met the test but without Quebec or an answer for how to combine that province's self-interest with the common interest of the rest of Canada.

The second round of constitutional reform (1983-87), often overlooked, was not intended to address Quebec's concerns. Instead, it aimed at resolving the complicated question of Aboriginal rights. The existence of the process and inclusion of Aboriginal leaders and negotiators at the first ministers' table reflected the rising political and social influence of Aboriginal peoples and channeled expression of this influence into a powerful venue. In its earliest stage, this process was successful in realizing the 1983 constitutional amendment package that clarified the definition of Aboriginal rights, protected Aboriginal women's rights and entrenched a more elaborate process of discussions. However, in contrast to 1982 where Quebec was the spoiler in the final deal, in this process the western provinces and Newfoundland proved to be the major obstacles to the recognition of the key Aboriginal demand for recognition of the inherent right to self-government (Brock 1989). Aboriginal leaders, who felt humiliated and angered by the failure of the provincial and federal governments to respect and embrace their right to self-rule, were motivated to attempt to use the next round of constitutional negotiations to secure that right, even at the expense of Quebec.[2]

The third round of constitutional negotiations, Meech Lake, was least consistent with the principles of a successful federation in engaging citizens. The process was designed to address Quebec's concerns with the 1982 settlement despite the mobilization of Aboriginal peoples and women's groups, and the changing demographic and economic realities of Canada that were to

[2]One Aboriginal leader observed to the author that some government officials had withdrawn from the negotiations with Aboriginal leaders at the final first ministers' conference on Aboriginal matters and sat in a corner discussing the upcoming Quebec round of talks. The leader said this added insult to injury and mobilized Aboriginal national organizations to make sure that Quebec's demands did not displace Aboriginal demands from the constitutional table. This was later confirmed in conversation with another participant in the final 1987 meeting on Aboriginal rights.

rise up and prove its undoing. The process of negotiations included elite negotiations of a deal combined with a public hearings process that was intended to be limited and to ratify not improve the deal, except, ironically enough, in Quebec. That province held limited but representative public hearings between the negotiations among the first ministers at Meech Lake and the signing into legal form of the final text of the deal at Langevin. In the rest of Canada, the public was given an opportunity to present its views on the Accord in hearings but only after the deal was signed into legal form and being told that no changes would be made unless egregious errors were discovered. Aboriginal peoples, mobilized by the 1982 and 1983-87 processes, were motivated to ensure that Meech Lake did not infringe their rights and that it did not entrench a view of Canada with two instead of three founding peoples. Immigrant and multicultural groups as well as women feared not only the impact of a clause recognizing Quebec as a distinct society on their rights and status but also the changes to immigration and the federal spending power on their ability to settle and succeed in Canada. Less affluent provinces and socially vulnerable groups shared the fear of the diminution of the federal powers in the agreement. The northern territories felt slighted by the change to the amending formula that would require provincial and federal unanimity for the entry of new provinces into confederation, thus setting the bar higher for them to join the Canadian club as full partners. And so the grievances went on.[3] The key point here is that Meech Lake, by focusing on Quebec in both text and process and by rendering the public hearings hollow, did not reflect the changing voices and social realities in Canada. At this stage, Canada failed the federal test of engaging citizens, channeling their interests and balancing the parts with the whole. No wonder then that the summer of 1990 witnessed rising discontent in Quebec, mounting Aboriginal anger at Oka and other places and heightened citizen dispiritedness. Meech Lake only fuelled divisions among citizens and their governments.

In contrast, the 1990-92 Charlottetown process of constitutional negotiations demonstrated the attempt of leaders to grasp the changing social realities and dynamics in Canada. As noted by Watts, the process of public hearings was extensive to the point of public exhaustion, allowing public input at an early stage and prior to government negotiation of a new deal. A second phase incorporated the public through a modified version of constituent assemblies. And while the third stage involved closed negotiations among government officials, representatives of key social groups were included in the negotiating tables, the public was given regular media updates and the final deal was put to public ratification in a referendum (Russell 2004). The final Accord was comprehensive including measures aimed at institutional reform in the national government as well as to the federal-provincial division of powers and the operation of the federal spending power. It recognized the changing face of Canada both in its sweeping provisions on Aboriginal self-government and a more inclusive Canada clause that incorporated the Meech distinct society clause but balanced by other "fundamental characteristics" of Canada. In sum,

[3]This brief list of grievances is based on my reading of the constitutional transcripts and briefs presented in the Manitoba, federal, Quebec, Ontario and Prince Edward Island hearings on Meech Lake.

the Charlottetown Agreement attempted to meet most grievances voiced throughout the Meech Lake process.

So why did the Charlottetown Accord fail at the referendum stage? There were two critical weaknesses (Brock 1993). First, the hearings, constituent assemblies and document lacked a coherent framework and rationale. There was no clear reason for the changes and no explanation was given of how these proposed amendments would benefit Canada as a whole. Unity was being sacrificed at the altar of diversity. Second, there was a disjunction between the public process and final negotiations of the document. A mobilized public was left wondering why clauses were dropped or changed or additions made with no justifications provided. If the public is mobilized, then governments need to move them along by providing a framework for demands and then later justifications for the final outcome or the final deal appears incoherent and to serve government not public interests (Reich 1990). Thus, while the sentiment was right, the means chosen were misapplied. In this way, Charlottetown reflects the spirit of the federal test but fails in application. By the end of the four processes, the Canadian federal system had demonstrated its ability to reflect diversity and to channel expression of diverse interests but was less effective at protecting and promoting unity.

Ironically, the aftermath of the constitutional struggles demonstrates the vitality and robustness but also the fragility of the Canadian federal system. Charlottetown had a curious result: both Quebec and Aboriginal peoples were united with the majority of other Canadians and provinces in rejecting the deal in the referendum, thus perhaps preparing the way for social reconciliation. Ironically, a common interest had been found. Beginning with the federal government's policy statement on Aboriginal self-government in 1994, significant advances have been made in recognizing the self-rule of Aboriginal peoples (Brock 2008). Nunavut, a territory largely comprising Aboriginal citizens came into existence in 1999. Quebec, after teetering on the brink of the separation chasm and rejection of Canada in 1995, has become a more engaged partner in Confederation, albeit not without reservations and dangers of alienation from the Canadian fabric (Brock 2006). The Canadian economy was strong throughout much of the 2000s, with many of the changes envisaged in Charlottetown realized through non-constitutional means (Watts 2002). Immigration and multicultural polices have undergone significant changes with "a remarkable democratic spirit and civility in negotiating new norms and forms of understanding and accommodation as against the rigid Eurocentric view of historical progress and constitutionalism" (Puri 2002, 153). Accords, ranging from the Calgary Declaration to Health and Social policy, and embracing both the distinctiveness of Quebec and equality of the provinces, have been signed. While the change in each area is by no means sufficient, it reflects the Canadian federal will to succeed and how much has been learned about bridging differences over the past two and a half decades.

When the 3-point federal test on unity and diversity is applied to the Canadian constitutional struggles in a broader context Canada passes, but not with distinction. The 1982 process reflected social dynamics, channeled expression of unity and diversity in a productive way but failed ultimately to reconcile shared rule (national unity) and self-rule (diversity) by leaving Quebec

off-side although it did succeed for other groups. The Aboriginal process succeeded initially but ultimately failed to come to terms with the self-rule of those peoples within the Canadian framework. However, subsequently significant achievements were made in land claims and governance arrangements. The Meech Lake process failed to channel social voices into a productive channel and championed the self-rule of Quebec to the exclusion of the common good and common voices of a changing nation but prompted Charlottetown. Charlottetown responded to the harsh lessons of Meech Lake by reflecting social dynamics and demands, channeling expressions of diversity into productive forums but failed to find a balance between unity and diversity by defining the changes for particular groups and governments within a stronger common framework. Perhaps it was the legacy of this common struggle, though, that Canada survived through the dangerous national unity referendum of 1995.

Throughout the constitutional processes, Canada demonstrated a willingness to respond to citizens' demands for inclusion and to experiment with new mechanisms of engagement. In the aftermath, a delicate balance of forces has been achieved but is not to be taken for granted since there are still fault lines within the federation (Brock 2006). Canada has grown, learned and adapted in the constitutional context but only a future constitutional process will ultimately reveal whether the lessons of past struggles have been learned. A qualified pass of the federal test is in order.

Aboriginal Peoples and Governance

While Ron Watts did not devote separate treatises to Aboriginal peoples in Canada, he was cognizant of their growing impact on the Canadian political system and what that meant for federalism. Relations between the federal, provincial and territorial governments and Aboriginal peoples became more robust and multidimensional during the years when Aboriginal representatives were arguing for the constitutional entrenchment of self-government and then later that s.35 of the Constitution Act, 1982 provided constitutional recognition of self-government, particularly obtained through treaties (Macklem 2001, 280-285, 187-188). With his trademark caution, Watts warns Canadians that "while multi-tiered federal systems provide new ways of resolving problems, it will also be necessary to guard against undue complexity that would undermine democratic accountability and introduce substantial costs" (Watts 1999, 119). While his advice is wise and democratic accountability is to be guarded, some costs are necessary even if substantial to adapt a federal system to changing social norms and dynamics. Settling Aboriginal claims, negotiating treaties, and introducing acceptable social and economic standards within Aboriginal communities will incur substantial but justifiable costs if Canada is to build and retain its reputation as a just democracy (Macklem 2001, 5-9, 262-264).

Has the Canadian federal system been able to accommodate to the new social and political reality of Aboriginal peoples? If we return to the 3-pronged federal test then it is easy to label the Canadian federal and political system as having failed Aboriginal peoples. Certainly the persisting and discouraging social, health and economic conditions plaguing many First Nations, Metis and

Inuit would speak to failure. The alienation of many Aboriginal individuals from Canadian social and political life, high incarceration rates among Aboriginal people, and the rise in civil disobedience, demonstrations and political actions like Ipperwash, Caledonia, Deseronto, and among the mining, forestry, fishing and hunting communities would justify a harsh judgment on the Canadian ability to accommodate difference. However, that conclusion may be too easily reached, too quickly. It certainly underestimates the dynamism and resiliency of Aboriginal communities, their complexities and the capabilities of their political leaders. It overlooks the complexity of the network of relations and interactions between Aboriginal peoples and governments and Canadian federal society and government structures. Yes, there are some failures but yes there are successes as well. Three examples suffice.

First, a traditional value of federalism has served Aboriginal peoples fairly well. The division of federal policy for Aboriginal peoples along provincial lines has allowed for experiments in policy development. One prominent example would be the ambitious undertaking of the federal government with the Assembly of Manitoba Chiefs (AMC) to "dismantle Indian Affairs" within that province and to "restore jurisdiction" to First Nation communities in 1994. By the end of that year, federal and AMC officials signed a landmark agreement that would provide a framework for the transfer of powers as well as monies from federal institutions to First Nations in that province. While the process ground to a halt in subsequent years, some transfers of power were realized and the First Nations communities were empowered by a process that recognized their governments as potential full partners in governance (Brock 1995). However, the process also demonstrated the need for provincial involvement in the negotiations despite the primary relations being between the federal government and First Nations. The successful transfer of services such as child welfare or education, generally provided by the province, or fire and police services often provided by an adjacent municipality, necessitated the involvement of two if not three levels of government as well as the Aboriginal political authorities to ensure full democratic accountability. While this process entailed substantial cost and administrative complexity, it provided a means forward for incorporating Aboriginal governments into the Canadian federal framework. Despite the recent lack of progress, this initiative has provided a model and benchmark for the transfer of powers in other jurisdictions.

Similarly, the negotiation of education and health agreements in Nova Scotia between the federal government and First Nations has proven a successful model for other jurisdictions. The 1993 Yukon First Nations Land Claims Agreement set an important milestone in the North. The 1998 Nisga'a agreement signed by the federal and British Columbia (BC) governments with that nation provides an innovative means of recognizing and implementing self-government and realizing the political economic and social aspirations of that community (Macklem 2001, 281-285). Individually all of these (and other) agreements provide models of means of accommodation, and collectively they are empowering First Nations to fight for better terms within the Canadian federal system. The system is channeling their voices in a positive direction that benefits those communities as well as Canada as a whole. With all three levels of government involved (federal, provincial and Aboriginal) significant progress

is being made. More work needs to be done, though, both by the federal government acting with Aboriginal people within provincial borders and by federal and provincial and Aboriginal peoples working together across borders.

In a second example, progress has been made at the federal policy level in fits and starts with some important lessons learned. As mentioned above, 1982 and 1983 witnessed constitutional victories for Aboriginal peoples as their rights were entrenched and clarified. However, in subsequent years, Canada has learned that if the definition and meaning of those rights are to be obtained through the courts then Canada should heed the caution of Watts. While decisions like Sparrow and Delgamu'ukw have provided generous interpretations of Aboriginal and treaty rights, decisions such as the two Marshall cases and Van der Peet have yielded unwieldy results for both Aboriginal peoples and Canadian governments (Brock 2008). As the Chief Justice advised in Delgamu'ukw, political negotiations are preferable to judicial settlements.

However, political negotiations are not without their warts. For example, the Chrétien government's attempt to develop a new framework for Indian government through its First Nations Governance Initiative (FNGI) failed when the process and substance of the policy were viewed as a top-down approach and consultations proved frustrating and meaningless (Brock 2005). Here, a branch of the Watts test proves instructive: unity cannot be imposed at the expense of diversity. Just as the constitutional exercises demonstrated, Aboriginal peoples are formidable partners in policy and not to be bullied.

Two further developments in Aboriginal policy are significant here. The negotiation of the Kelowna Accord by the Paul Martin government with the provinces and territories and First Nations leadership was a response to the failure of the FNGI. This Accord promised $5 billion to build First Nations' health, education and governance systems as well as strengthen relations with the other levels of government. It demonstrated the ability of Canadian governments to work in harmony in addressing a pressing social concern. For this reason, the subsequent decision of the Harper government not to implement the Accord without guarantees of accountability has been widely decried in public media. However, in contrast to these denunciations of Conservative policy as regressive, more advances in land claims negotiations and settlements have been made under that government than its Liberal successors (Curry 2008). And while Kelowna spoke to federal comity, the new Conservative approach to Aboriginal issues reflects the shifting demographics by including and emphasizing urban Aboriginal communities as a prime locus of support. Like Kelowna, the negotiation of a parallel Health Accord and Social Union Framework Agreement with Aboriginal peoples in 2004 demonstrates the ability of the federal system to channel and accommodate Aboriginal needs. Asymmetry is being applied within the federation and not just to Quebec.

The third example of the ability of the Canadian federal system to reflect and accommodate difference is Nunavut. Created in 1999, this new territory includes a population that is over 80% Aboriginal. Thus, although Nunavut is a public government, effective Aboriginal self-government has been achieved at the level of the 14 federal, provincial and territorial governments in Canada. The inclusion of a de facto Aboriginal member in the exclusive Canadian club is no

mean feat. As the territories have acquired more power and status in recent years, the inclusion of at least one premier from a largely Aboriginal territory (and perhaps two with the Premier of the NWT) at the table of First Ministers will change the federal dynamic in a significant way. The natural alliances between Nunavut and the other territories as well as between Nunavut and western provinces with a proportionately large Aboriginal population strengthen this voice whether in constitutional or other policy discussions (Brock 2006). Nunavut represents the achievement of a fine balance between shared-rule (national unity) and self-rule (diversity). The choice of a public government rather than ethnic government within the territory reinforces that balance at the territorial level as both Aboriginal and non-Aboriginal residents are equal participants in choosing their political leaders. However, the real test of the Canadian federal system will lie in whether Nunavut's aspirations for full control equal to the provinces over its resources and economic destiny can be accommodated.

Therefore, the Canadian federal system, while still having much ground to travel before Aboriginal peoples will be full and equal participants in Canadian social, political and economic life, has made significant progress in accommodating Aboriginal aspirations. According to the first prong of the federal test, institutions should reflect shifting social and political forces. While the system has a fair way to go in improving the social, economic and political conditions of Aboriginal peoples within Canada, these three examples demonstrate that over the past 40 years Canadian federal institutions have begun to adapt to and reflect the rebalancing in social and political forces caused by the rising influence of Aboriginal peoples. Second, effective federal institutions should channel the articulation of unity and diversity in ways that benefit the parts as well as the whole. The result of the often tedious and frustrating processes of land claims and constitutional negotiations and policy development is that Aboriginal demands and aspirations have been channeled into more positive means to produce changes in the Canadian system. And although civil disobedience and protests are still one facet of Aboriginal expression, they too have prompted political changes. Finally, has the appropriate balance between unity and diversity been achieved? More attention has been paid by policymakers to achieving a balance between Aboriginal governance (self-rule, diversity) and shared-rule (national unity) but more needs to be done to achieve an appropriate balance that protects Aboriginal culture and traditions while offering the full benefits of Canadian social, political and economic life. Some progress has been made in meeting the federal test. Still, as mentioned at the outset of this section, the continuing social economic and political marginalization of Aboriginal peoples within the Canadian federation and the long legacy of policy failures demonstrate that the Canadian federal structure has not engaged Aboriginal peoples effectively enough. A marginal pass of the federal test on citizen engagement might be awarded here.

Democracy and Non-Governmental Organizations

Since the 1980s, the nature of the state in western democracies has changed from interventionist to facilitative (Kendall 2003). As the state has become increasingly hollowed out, it has come to rely on private and nonprofit organizations in all facets of the policy process from service delivery to policy formulation and research (Craig, Taylor, and Parkes 2004; Boris and Steuerle 1999; Browne 2000; Graves 1997). At the same time, citizens, disillusioned with the state's ability to meet their needs and influence both global and internal pressures on the economy, have turned to organizations to represent their interests and to provide services previously extended by governments (Clark 1995; Shields and Evans 1998). Watts underscored the importance of understanding this shift for federal states when he wrote: "The scope and extent of decentralization to non-governmental agencies as opposed to other levels of government is also relevant in judging the character and scope of non-centralization within a political system" (Watts 1999, 74). A brief look at recent developments in the relationship between the Canadian state and non-governmental organizations is particularly revealing.

In June 2000, the Canadian government together with representatives from the nongovernmental or voluntary sector announced the Voluntary Sector Initiative (VSI), an ambitious joint endeavour intended to investigate and strengthen their relationship. With the experience of the United Kingdom as a backdrop,[4] representatives from the two sectors were confident that they could develop a new framework for the inclusion of voluntary sector organizations in government policy and revamp the regulatory framework to enable voluntary organizations to function more effectively. Ultimately, the goal was to serve Canadians better at a time when these organizations were increasingly assuming functions that had been performed by government departments and agencies. The VSI was given a five-year life at the time of announcement but given the political life of the government, most of the work was completed by fall 2002.[5] Four aspects of the work of the VSI are relevant here.

First, the VSI was a curious creature since primary responsibility for the nongovernmental and voluntary sector falls under provincial not federal jurisdiction. The primary venue for federal influence over the sector is through the taxation system. However, the work of Pross and Webb has demonstrated that despite this formal division of responsibility, the federal government has developed an extensive regime of laws regulating the sector (Pross and Webb 2003). This relationship provided both the federal government and the

[4]See www.thecompact.org.uk/.

[5]Most of this analysis is based upon my observation of the VSI in operation in my capacity as "Official Documentalist and Occasional Advisor to the Joint Coordinating Committee", the central organizing body of the VSI and my participation in the steering groups and research teams for the national surveys of the voluntary sector and my Ontario provincial study. I have recorded and published many of these observations as well as a description of the VSI elsewhere (Brock 2001, 2003, 2004; cf. Phillips 2001, 2003).

organizational leaders sufficient incentive to act. Still, it was not surprising that at the outset of the VSI, there was a desire, particularly on the part of voluntary sector leaders, to involve the provinces and territories in the initiative and to obtain their participation in the development of the centerpiece of the VSI, a framework Accord that would guide future relations. The provinces and territories declined but maintained a watchful attitude and met with federal and select voluntary sector officials for briefings on developments both collectively and individually. And although the federal government signed onto a historic Accord (VSI 2001) with the voluntary sector, to the disappointment of many, the provinces and territories did not. Moreover, throughout the VSI negotiations, federal officials were careful to delineate areas of jurisdiction that were provincial and not to trespass, thus limiting the scope of the exercise. And the problem was not just on the side of governments, in the selection of officials to the successor body of the VSI voluntary sector steering group, it was very difficult to obtain representation from Quebec since leaders declined on the basis that the relationship with the provincial government was more important. While these features of the VSI may be viewed as a failure of the Canadian federal system to transcend arbitrary jurisdictional boundaries to deal more effectively with the sector, it may also be viewed as a strength of the federal system in preserving a diversity of approaches to a sector serving Canadians and allowing for regional variations and needs.

A second aspect of the VSI that was problematic concerned representation of Aboriginal and ethnic and racial organizations. Not unlike in some of the constitutional struggles, these voices were overpowered by organizations representing recognized jurisdictions or traditional social groups in Canada. At the first plenary meeting of the VSI, a look around the room revealed a bias in the participants towards anglo-franco-european middle-aged individuals. While advisory groups were subsequently created to engage Aboriginal and ethnic and racial organizations in the VSI, their status and effectiveness in the process were far from clear. In the hearings on the Accord, criticism of the VSI as unrepresentative of smaller and marginal organizations was repeated. Advocacy and funding were treated by separate government and voluntary sector working groups. Rather than being included in the issues under joint discussion, the VSI's many organizations, whose work involves advocating on behalf of their members and which are adversely affected by the Revenue Canada rules governing charitable status, were disappointed. On this dimension of diversity, the VSI was not an effective vehicle.

A third aspect of the VSI that is more encouraging concerns the aftermath. There was a spillover effect into the provinces and territories. Alberta, Saskatchewan, Manitoba, Newfoundland, and Nunavut, launched similar initiatives to the VSI. Ontario began to develop its relations with its voluntary and social economy sector more vigorously (Brock 2010). Throughout the provinces generally there were renewed activities involving the governments and voluntary sector, particularly regarding the funding and regulatory frameworks. During the life of the VSI and afterwards, voluntary organizations began to develop extensive networks at the provincial level to lobby for similar developments to the ones being achieved federally, and at the federal level to ensure that momentum was not lost at that level but also that knowledge,

innovations and best practices were shared across jurisdictions. Indeed, The Canadian Federation of Voluntary Sector Networks emerged as a leader among these groups[6] uniting provincial, territorial and regional networks. Through the exchange of knowledge in the VSI, commonalities among the sectors were also discovered, such as links between the social economy approaches of Quebec, New Brunswick, Saskatchewan and Manitoba (see, for example, Vaillancourt and Tremblay 2002). If the health of a federation can be found in its ability to learn and transmit knowledge and best practices across jurisdictions, then Canada is doing fairly well – although more can be done, of course.

A fourth, more tangible effect of the VSI in terms of federalism concerned its knowledge instruments. Through the VSI, funding flowed to develop a Satellite Account for Statistics Canada on the Voluntary Sector in Canada and a Canadian National Survey of Nonprofit and Voluntary Organizations (Statistics Canada 2004; NSNVOC 2004). These studies charted the contours of the sector for the first time in Canadian history, identified the voluntary sector as a distinct component of the economy and earned Canada a place in the prestigious Johns Hopkins comparative country studies of the voluntary sector. Flowing from this information was a significant amount of knowledge as well as reports on the provincial, territorial and regional dimensions of the sector which will be useful in developing policies across boundaries. In 2008, the federal government committed to funding the next round of these studies. Further, a web portal was developed by the Community Services Council of Newfoundland and Labrador and funded out of the VSI activities to serve all of Canada in making knowledge on the sector more widely accessible. And more was inspired: for example, in 2005, the Social Sciences and Humanities Council of Canada established a stream of funding devoted to study of the social economy (voluntary sector) across Canada and within the provinces. The federal-provincial divide was crossed with the production of these documents and knowledge generated from these activities so relevant throughout Canada and its regions.

The VSI represented a significant attempt by the federal government and voluntary sector leaders to change the nature of their relationship. In engaging in this partnership, the federal government empowered organizations at both the national and provincial/territorial levels of government. For example, in addition to the coalitions mentioned above, ImagineCanada, a leader among voluntary sector umbrella organizations and one that unites organizations from all jurisdictions, was strengthened as a result of its emergence as a key participant in both the VSI and the creation of the satellite accounts and national surveys. ImagineCanada is a loud voice for the sector on any federal and many provincial initiatives affecting the sector today. While the VSI has faded now, its legacy of awakened interest in the sector remains, playing out across jurisdictions and in various forms of activity. Institutional change is occurring, slowly but inexorably.

Organizations engage citizens. Through the VSI citizens and organizations began to engage with the federal government but also their provincial, territorial and local governments to effect real policy and relationship changes. Through

[6]See www.voluntarynetwork.ca/Welcome.htm.

organizations, a diversity of voices can be heard and channeled into effective policy advice for the federal and provincial governments. The VSI was a historic endeavour by the federal government and organizations to create more opportunities for engagement. As a test of citizen engagement in the federal system, the VSI bears mixed results. On the one hand, it was less successful at representing jurisdictional and social divisions in Canada. Even its centerpiece, the Accord, did not transcend federal-provincial-territorial boundaries and has not had the profound effect on relations there that voluntary sector officials had hoped (Phillips 2003). On the other hand, the products of the VSI have created new knowledge and awareness of the sector that permeates throughout the federation. The VSI also mobilized the sector at the federal and other levels of government inspiring substantive change. The federal government has served as a model and instigator of change that is benefitting Canadians in all jurisdictions. The VSI might be viewed, then, as an example of unity with the benefits of diversity − warts and all. Given that the VSI was imperfectly reflective of changing social and political forces, did channel expressions of interests in means that benefitted the parts and the whole and only partially achieved a balance of unity and self-rule, it merits a qualified pass of the federal test but with a higher grade than in the area of Aboriginal issues.

CONCLUSION

The wisdom of Ron Watts lies in his ability to capture the workings of a federation in a comprehensive overview. He is right to caution students of federalism that the test of any federation is not how it functions in any particular incident or moment but rather how the system performs over time (Watts 2006, 7). A healthy, effective federation will meet the three prongs of his test over time: federal institutions should adapt to reflect the social and political balance of forces within the system; these institutions should channel the influence and articulation of unity and diversity into peaceful and productive means that benefit both the constituent parts and the whole; and, the institutions should help effect an appropriate balance between unity (shared rule) and diversity (self-rule). As Watts realizes, this task is not easy in a country where decentralization of the federation has created strong provincial, territorial and regional identities.

The three cases discussed here reveal that Canada adjusts over time, sometimes slowly, sometimes only out of necessity and begrudgingly, so as to reflect better changes in society and social values, to channel and influence expressions of unity and diversity into means that will benefit both the constituent parts and the whole, and to balance unity with diversity. In the case of the constitutional process, Canadian political leaders grappled with the appropriate balance between government and societal interests over time to achieve a new process of change. While the process was effective in reflecting these new forces and achieving positive outcomes in 1982 and 1983, it was least successful in 1987-90 and only slightly more successful in 1990-92. However, through these difficult times in which the viability of the whole was threatened, Canada emerged and has since enacted measures that reflect the interests expressed during the process, although more work is yet to be done. The second

case demonstrated that while Aboriginal matters remain a pressing and important concern, Canadian federal institutions have adapted over time to reflect better the changing social and political stature of Aboriginal peoples and to address their needs within the federation. The process of change has begun and has been largely peaceful with benefits for both Aboriginal Canadians and the broader Canadian population. However, as both this case and the previous one demonstrated, Canadian federal institutions still have a long way to go to reflect the interests of Aboriginal peoples and the spirit of the original treaties and agreements. In contrast the third case of non-governmental organizations is more positive although rather paradoxical on the surface when the test is applied. Although the provinces and territories declined official involvement in the federal-voluntary sector initiative, both levels of government adapted to incorporate and build upon the VSI and its outcomes with benefits at both the national and provincial-territorial level. The federal experiment inspired action and innovation in the other level of jurisdiction. Here the resiliency and adaptability of the federal institutions is most pronounced of all three cases.

Reflecting back, in each case study strong local identities have competed and threatened the ability of Canada to maintain a strong sense of common interests that ultimately bind these identities into a national whole. In each case, however, the Canadian federation has managed to preserve and respect provincial, territorial and social identities while generating common ground. Indeed, it has been a feature of the functioning of the Canadian federation that by observing jurisdictional boundaries, significant innovations in policy and a sense of good will – or at least common survival – have occurred. Sometimes substance is sacrificed for process in this endeavour, but more often the improved process results in a sense of social cohesion, however loose, that may produce better results in the end. Does Canada pass or fail the federalism test presented here? These cases would indicate that our federal institutions struggle to reflect social and political forces as they shift, to channel the influence and articulation of interests in peaceful and productive ways with benefits to the parts and the whole, and to achieve an appropriate balance of unity and diversity. While the results are uneven and often dissatisfactory, warranting only a weak pass of the test, the very struggle itself is an indication of the vitality of the Canadian federal system thus raising the final grade on the test.

My caution in reflecting upon these cases would be that too often Canadians focus on their failures and neglect or undervalue our successes and the robustness of the Canadian federation. We should not fall into this mental trap; in doing so we forget what makes Canada strong and keeps it thriving. I suspect that Ron Watts's caution would be slightly different: in valuing our successes, we should not underestimate the fragility of the balance between unity and diversity achieved in Canada. We need to maintain a watchful eye and a careful presence without pressure, or at least undue pressure, in maintaining and strengthening this balance between the parts and the whole. I cannot disagree.

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Section Eight

Intergovernmental Relations

19

R.L. Watts and the Managing of IGR in Federal Systems

Robert Agranoff

Cette étude porte sur le contenu et la substance de la contribution de Ronald Watts au fédéralisme exécutif. L'auteur examine tout d'abord son travail préparatoire sur les relations intergouvernementales (RG) en lien avec ses recherches sur le fédéralisme comparé, avant d'expliquer les particularités des RG exécutives (ou ce qu'on qualifie de gestion intergouvernementale) qu'il a définies. Il analyse ensuite son apport à la dimension exécutive du fédéralisme comparé. Dans une dernière section étoffée, il examine « sous l'éclairage de Watts » six éléments qui composent les RG exécutives actuelles : 1) complexité des champs de compétence simultanés ; 2) fédéralisme de gestion ; 3) marchandage et négociations ; 4) partage multiple ou porteur des opérations fonctionnelles des organisations gouvernementales et non gouvernementales ; 5) persistance des réseaux et hiérarchies ; et 6) nature expansive de l'autonomie sous-nationale dans un monde complexe de compétences multiples et de domination financière centralisée.

> All federations, both old and new, have had to come to terms with the changing scope, character, and varied dimensions of interdependence among governments. (Watts 2003, 4)

Federations have always faced interlevel problems and challenges and now must also come to grips with emergent overlays of internationalism and localism. The need to pay attention to how interlevel and lateral connections are managed is therefore an expanding concern within federal studies. It is one that has never been overlooked by Ronald Watts. In one of his earliest works, *Administration in Federal Systems* (1970a), he argued that going beyond the legalities of federal operation includes accounting for the role of administrative actors in the two tiers within federal systems, along with political and institutional factors. Most important, he emphasizes the existence of "dual" civil services, operating in order to balance the efficiency, autonomy, and representativeness needed to achieve the aims of federation. The importance of administration itself as a politically important federal function is also recognized. "In the eyes of the electorate, the strength of different governments within the federation is often judged by the effectiveness of their administration" (34). In this spirit, I aim to examine the contributions of Ronald Watts to the management of intergovernmental relations (IGR) and to expand the discourse in light of emergent administrative practices in federal systems.

Along with other stalwarts like Daniel Elazar (1987), Carl Friedrich (1968), Preston King (1982) and Willliam Riker (1964), Watts broke initial ground for the comparative study of federalism. These scholars took the long view of systems developments over time and the broad view of comparing many federations. For Watts, it included a study of federal experiments in the British Commonwealth (1966), multicultural societies and the federal idea (1970b), a series of articles and book chapters, and two more recent definitive works, *Comparing Federal Systems* (1996, 1999a, 2008) and *The Spending Power in Federal Systems: A Comparative Study* (1999b). Several key themes emerge in these works that relate to comparative federalism: 1) legal frameworks in federal study must be buttressed by institutional and process analyses; 2) institutions, such as presidential or parliamentary systems, make a great deal of difference; 3) institutional design is an important point of comparison and analysis; 4) comparison itself can provide valuable operational lessons; 5) federal governments strive to balance the forces of unity within the drive to preserve diversity; and 6) federal democracy demands a balance between citizen participation and government action. In regard to IGR, four more or less overreaching themes must be added: 1) instead of dual federalism or compartmentalized functions, programming will inevitably lead to overlap among governments; 2) overlap places emphasis on administrators and the need for administrative accommodation; 3) as a result, there are multiple managerial and other channels of IGR; and, 4) federal spending powers − central to subnational − create important politico-administrative contact patterns across units. The last four themes, from Watts's general work on comparative federalism, form the basis of this analysis.

I initially explore the IGR groundwork laid by Watts related to his work on comparative federalism. Next, the particulars of administrative IGR, or what is called intergovernmental management (IGM) developed by Watts is explained. The next section then looks at the contribution of the administrative dimension to the study of comparative federalism. In the last substantive section, I raise the "wattage", so to speak, examining six contemporary forces that compound

administrative IGR: complicating concurrent jurisdictions; managerial federalism; bargaining and negotiation; conductive or multiple government-nongovernment organization functional operation sharing; the persistence of networks along with hierarchies; and the expanding nature of subnational autonomy in this complicated world of multiple jurisdictions and central fiscal dominance.

COMPARATIVE IGR

Running through several of Watts's works is the critical expression that IGR amounts to interactions between governmental units of all types and levels within a political system. These are inevitable forces in multi-sphere systems "because it is impossible to distribute administrative or legislative jurisdictions among governments within a single polity into watertight compartments or to avoid overlaps of functions. Interdependence and interpenetration between spheres of government within a multisphere regime are unavoidable" (Watts 2001, 22). The aim, in most countries, is to organize IGR to facilitate cooperation and coordination while also reconciling the federal need for balancing equity and diversity. This in turn raises four questions with regard to the criteria for organizing such relations: 1) democratic accountability, 2) effective governance in the development of policies, 3) the preservation of diversity through genuine autonomy for the constituent units, and 4) ensuring continued cohesion and continued system cohesion and stability (Watts 2006, 203). It is, of course, the second of these issues that is of the greatest concern in management.

In the analysis of various federal systems, Watts (2001, 25-26) has carefully identified the need for cooperative links between units in order to achieve effective governance:

> Co-ordination between national, provincial and local governments is desirable for a number of reasons: (a) to improve the information base and quality of information analysis available to national, provincial and local governments thus facilitating better decision-making and reconciling policy differences; (b) to co-ordinate national, provincial and local policies in areas where jurisdiction is shared (i.e. concurrent) or complementary (i.e. where provincial or local governments are responsible for implementing national legislation or where there are overlaps in the responsibilities of national, provincial and local governments; (c) to achieve national objectives in areas of provincial and local jurisdiction; (d) to work towards a co-ordinated approach to the economic management of the public sector as represented by the aggregate of the national, provincial and local public sectors; and (e) to accommodate differences among provinces and local governments in policy capacity and fiscal resources for the exercise of their jurisdiction.

These aims cut across all federal regimes, regardless of their basic constitutional-legal features, assigned constitutional jurisdictions, fused or separate legislative/executive arrangements, political party or financing systems.

In *Comparing Federal Systems* (2008, Ch. 5) Watts outlines the prevailing formal approaches to IGR that complement the usual informal approaches (which are underplayed in attention, but perhaps not in importance). They include direct communications among ministers, formal intergovernmental councils and committees, executive federalism or high level ministers working out issues and problems, framework agreements, "interlocked federalism" or administration of federal programs by subnational units, concurrent jurisdiction over certain functions, delegation of federal powers to subunits, opting in or opting-out powers for subunits, and formal intergovernmental agreements. In *Administration in Federal Systems* (1970a, 77-79) he also identifies joint program operations or cooperative arrangements or related shared arrangements plus prior consultation before important decisions are made. Such practices are designed to reduce inter-unit friction, where there is a clear need for second level administrative capacity, to enter into areas where the power locus is mostly top down, and in those areas that are clearly not in the federal government's purview but it wishes to promote activity. In such processes joint programming enhances effective IGR.

In recent years, Watts (1999b, 2000, 2005) has also turned his attention to federal fiscal powers and fiscal relations. Consistent with most studies of fiscal federalism, he indicates that in most federations the jurisdiction appropriate for allocating expenditures tends to be at lower levels (closer to the people), but that the appropriate jurisdiction for raising revenue tends to be at intermediate and higher levels, and often the national level. Because the broad-based taxes such as the personal income tax, the corporate income tax and the value-added tax are typically centrally run, the center is at the revenue advantage and effectively reverses the effective expenditure assignment. This has led general governments to become major policy-makers for economic development and in social welfare. It has also created ties that bind as major redistributors of revenue for second tier and local governments. Due to the influence of Keynesian policies, federal governments have become the major economic stability policy-makers. The mobility of tax bases at the subnational level additionally puts federal governments in the tax driver's seat. Finally, in federations where constituent governments do have significant independent taxing powers, the issues of tax coordination is relevant, both federal-state, and interstate (Watts 2000, 373). Thus, center occupation, economy leadership, redistribution, stability policy, tax mobility, and the need for tax coordination all ratchet up the IGR potential over fiscal matters, requiring bargaining and other mechanisms for adjusting financial relations (ibid., 283).

ADMINISTRATIVE RELATIONS

The focus now shifts to the role and actions of administrators in IGR. In addition to his early work on federal administration, Watts (1989) was one of the first to fully analyze the concept of executive federalism in a comparative context. Executive federalism is defined as "the predominant role of governmental relations in parliamentary federations where responsible first ministers and cabinet ministers tend to predominate within both levels of government" (Watts

1996, 52). He attributes the growth of such dual order interactions among high level executives to growing interdependence and to the effective merger of federal and parliamentary institutions (Watts 1989, 3-4). Since cabinets have become the "key engine of the state" within each of the governments, a continuous process of consultation and negotiation is required. The three most prominent engines of executive federalism are: 1) multitude of federal-provincial conferences, committees and liaison agencies; 2) IGR summitry, that is first ministers' conferences; and, 3) the concentration within each government of responsibility for IGR in the hands of coordinating agencies and specialists.

From a comparative perspective Watts demonstrates the pragmatic, non-constitutional evolution of standing first ministers and sectoral conferences in Australia, Germany, India and Malaysia (ibid., 8-9). The growing number of parliamentary federal/quasi-federal countries, e.g., Belgium, Spain and South Africa have also adopted executive federalism mechanisms. For example, Spain has for some time employed a series of bilateral sectoral transfer commissions, sectoral conferences, joint planning bodies, and cooperative agreements. Since 2004, it informally launched and later formalized a Conference of Autonomous Community Presidents, that now meets biannually with the Prime Minister (Ramos *et al.* 2006). Australia has employed its COAG or Council of Australian Governments, along with a wide range of special conferences, the longest standing of which is the Loan Council, which dates back to 1927, with constitutionally binding powers on both governments (Galligan 1995).

Watts (1996, 49) later looked at ten federations and concluded that seven use a form of executive federalism to resolve financial issues. A contemporary example is that of South Africa, which employs a statutory budget council, that focuses on provincial financial matters. It is comprised of the minister of finance, who chairs the council, along with the nine provincial finance directors or MEC's (members of executive council), five representatives of local government associations, and one local representative nominated by each provincial government. This is the primary deliberative body for subnational finance recommendations, whose proposals are then channeled through the Ministry of Finance (Wehner 2000).

Although an important means of sorting out interdependencies and making policy adjustments, Watts has made it clear that executive federalism can be subject to attack as being undemocratic. The famous Canadian Meech Lake Accord, was described by critics as almost a totally secret deal-making undertaking behind closed doors, where public mobilization was carefully avoided. The critics complained, Watts relays, that executive federalism as a process places the interests of governments at the center of discussion, and public participation is frozen out of representation at the table. Consequently, any other interests not directly linked to governmental actors are excluded. Moreover, the reluctance to upset delicate deals which have been negotiated precludes or renders meaningless legislative debate (Watts 1989, 5; see also 1991). Because executive federalism is an important policy/administrative vehicle, Watts reminds us that these concerns are real.

Finally, in nonparliametary or presidential federal systems executive federalism is less prominent, in part because the separation of powers limits executive policy-making dominance, but also many of these systems experience

more fragmented governmental institutions. In the United States, for example, Watts (1989, 9) correctly identifies the greater variety of vertical and diagonal relationships (not to speak of horizontal) with many distinct and autonomous/semi-autonomous centers of decision-making. "The resulting administrative interlacing and inter-penetration of governmental activities" contrasts with more separable layers of responsibility in parliamentary federations.

Watts delved deeper into administrative behaviour in his early work on IGM. In regard to mediating intergovernmental conflicts, he points to four important means of facilitating administrative action. First, are the professional/ program orientations of administrators who share the same background and outlooks, e.g., civil engineers, foresters, social workers. These professionals who work with one another across governments have a tendency to depoliticize issues in favour of their "common body of knowledge". Second, specialization in the various public services is fostered by common attitudes engendered by journals, conferences, along with increased formal and informal contacts. These vehicles allow public servants to get to know one another personally. Third, powerful forces of self-interest encourage central and subnational officials involved in grants-in-aid to regard their roles as complementary rather than competitive. This, for example, has been the case with regard to mutual support for cost-sharing, which expands the overall pie (Watts 1970a, 82-83). Fourth, professional ties then complement the actions of those generalists who specialize in the work of IGR, along with senior central administrators who provide "the leadership, administrative direction and implementation of decisions" (p. 84).

A key ingredient of intergovernmental trust represents an essential managerial and widely accepted tenet emphasized by Watts. In a report prepared for the South African Department of Constitutional Development, Watts (1997) concludes with a plea for a cooperative culture, encompassing mutual respect and trust. "This is far more important than legal structures, procedures or technicalities provided by a constitution or legislation. To develop a sense of trust requires tolerance towards diversity and autonomous experimentation, and a willingness to consult and take account of the concerns of other governments before taking action" (p. 15). In as much as imposed solutions breed resentment and mistrust, the atmosphere of partnership that emphasizes mutual assistance and support, regular exchange of information and consultation, and cooperation in overlapping areas goes a long way, concludes Watts.

A complementary requisite of managing IGR is in the area of capacity. To the extent that administration at each level possesses "educated personnel, financial resources, and technological facilities enabling them to engage effectively in intergovernmental interaction. To this end the provision of adequate financial resources and communications equipment to enable frequent informal exchanges of views are important (Watts 1997, 15-16). In this respect, courses and training sessions in governance/IGR can be very important to contributors to capacity building.

Finally, Watts emphasizes the importance of managing IGR in the growing number of federal situations where new policy areas emerge that do not fall into neat divisions of power. He identifies such illustrative areas as: communications, environment, and social policy. "The consequence has been a *defacto* situation

somewhat approximating the concurrency existing in other federations, made necessary to a large degree because of the impact of contemporary realities" (Watts 1999b, 51). In other words, he identifies a need for some form of cross-sector collaborative management, because in many of these situations the federal spending power is shifted downwards, so to speak, even in some so-called areas of "exclusive jurisdiction". This also accelerates the need for collaborative management.

MANAGERIAL IGR AND COMPARATIVE FEDERALISM

In many ways virtually all of Watts's work that does not focus on Canada has contributed to comparative federalism, in as much as he has from the earliest of years cast his net to a broad range of federal systems. In fact, even some of his work on Canada has a comparative dimension. Since others in this volume will be exploring many of these comparative dimensions, this focus is on the administrative IGR dimension.

As one of the few "comparativists" to truly reflect on a large number of federations he has been able to communicate the similarities and differences in executive institutional structures. He points out that in European federations, particularly Austria, Germany and Switzerland, administration is largely left up to constituent units, whereas the central government has more of a policy-making role. India and Malaysia have similar arrangements since federalizing. This is also the trend in Europe's two newest federal systems, Belgium and Spain. It means federal uniform or template legislation, leaving regional variation in application. However, he points out that the growing number of grants-in-aid in "Anglo-Saxon" federations means that considerable delegation of administrative responsibility also follows (Watts 2008, 106-107). He goes on to document these differences in some ten federations at both federal and subnational levels (ibid., 110-111).

Executive types also affects IGR differentially, as mentioned earlier. Watts (1999a, 88) links presidentialism to divided institutional power and impasses. The collegial executive in Switzerland leads to high level intergovernmental interaction and promotes cohesion but takes a long time to reach decisions, often frustrating the public. Cohesion at the executive level is strongest with the parliamentary majority, but is considered to be considerably less cohesive when minority governments exist. Multiparty governments overcome this problem but also are known to contribute to instability. Most important is the impact of the executive form on IGR, where presidential systems are executive-centered, due to "dominant cabinets and strong party discipline" (Watts 2008, 86).

A clear comparative federalism contribution is Watts's emphasis on the synergy between formal and informal IGR processes in federal systems. He repeatedly refers to the literature on 19th and 20th century IGR (e.g., Elazar 1962; Grodzins 1966), where there were typically no constitutional provisions for such actions. Most of these practices emerged as programs expanded and problems emerged. Nor in federal systems did a template or universal or integrated set of

IGR procedures emerge. "There is a general tendency in multisphere regimes for a variety of complex intergovernmental relations to develop" (Watts 2001, 24). All systems need to keep their informal channels open, which can enhance the aforementioned trust and respect needed. Then as problems become more regular or patterned, the round of formal and informal councils, committees and conferences ensure representation in executive branches to coordinate and perhaps to take joint action. Building on these informal processes, these activities can lead to formal and informal intergovernmental agreements (ibid., 30). What is important is that from a comparative standpoint, these extra legal processes are found in all federations, regardless of constitutional and legal arrangements.

This suggests the importance of understanding IGR executive processes that cut across all systems. First, is the emphasis on executive branch actors in all systems as they carry forth policy into the implementation stage, as one of several important ways to overcome excessive legalism and dualistic federal conceptions. "This misinterpretation arose from focusing upon the original legal structures rather than the actual political and administrative interactions between governments during the nineteenth century" (Watts 2000, 123). Second, is the rising intensity of cooperative federalism − an accentuation of existing practices − with the rise of government welfare state activity. "Typically in all federations the increased activities of both orders of government led to greater areas of overlap and interpenetration and hence the need to manage intergovernmental competition" (ibid, 124). Third, are the ties that bind due to the federal spending power. In addition to conditional and broad grants for program activities, transfers to correct vertical and horizontal fiscal imbalances, tax sharing and tax harmonization, promotion of tax competition, are fiscal measures that foster IGR in all systems. While some systems are more revenue concentrated at the center than others, all federal operations depend on degrees of autonomy and sharing among the units, and most important the political compromises that lead to each pattern. "Thus, understanding of intergovernmental financial relations in any country requires an understanding of the political context which shapes them" (Watts 2005, 50). Fourth, in a truly comparative fashion, Watts (2008, 113-114) identifies the various IGR arenas for resolving fiscal disputes between levels. While seven of these are common to parliamentary systems, three other variants exist elsewhere, particularly bargaining and negotiation. Again, executive federalism prevails in parliamentary systems. In all systems either one of four patterns is operable for resources distribution: standing commissions, intergovernmental councils, subnational representation in national legislatures, and federal determination without direct representation (ibid., 118-119). This work thus points out the core underlying fiscal managerial similarities and differences in federal systems.

A final contribution to the understanding of comparative federalism is Watts's (2006, 207) important list of why all systems must seek cooperation. In his words:

> Cooperation between governments within federal systems has been found desirable to meet a number of objectives. These include: (1) improving the information base and quality of information analysis available to all

> governments, thus facilitating better decision making and the reconciling of policy differences; (2) coordinating federal and constituent unit policies in areas where jurisdiction is shared (i.e. concurrent) or complementary (i.e. where federated unit or local governments are responsible for implementing federal legislation (as in Germany and Austria), or where there are overlaps in the exclusive responsibilities of governments); (3) achieving federal objectives in areas of constituent unit jurisdiction; (4) working toward a coordinated approach to the economic management of the public sector as represented by the aggregate of the public sectors at all levels; and (5) accommodating differences among constituent units in policy capacity and financial resources for the exercise of their constitutional jurisdiction.

In an era where there is concern for centralizing tendencies in federations and less optimism about the salience of cooperative federalism (Kincaid 1990; Klatt 1999; Wiltshire 1977; Zimmerman 1992) from a comparative perspective, Watts emphasizes the presence of and continuing need to promote cooperative relations in all systems. Also, he has been able to look beyond the inevitable publically visible centralizing actions and conflicts to see that working cooperation, while less visible, exists as complementary forces (Agranoff 2001).

EXPANDING THE "FEDERAL WATTAGE"

The study of comparative IGR owes a lot to the foundations laid by Ronald Watts in regard to executive actions. As stated, he is among the few that has done so in a truly comparative fashion, particularly in looking at features that cut across several federal systems. In this section I expand on this work by looking at some contemporary IGR/IGM trends, delving deeper at what this tradition has wrought. Six areas of interest are highlighted: the complexity of concurrent jurisdiction, the emergence of common executive IGR instruments, bargaining as a systematic IGM tool, the conductive nature of today's bureaucratic organizations, the rise of networks that operate alongside hierarchies, and the nature of federal autonomy. Each of these will be briefly raised as topics of developmental interest, in as much as a literature in each of these areas is emerging.

Concurrency

With regard to concurrent jurisdictions in federal systems there are at least two levels of complexity that can be added to the federal tiers. One would be among Watts's stated idea of confusion in allocation of powers among the tiers. To illustrate, a thirteen (12 federal, one unitary) country study, *Federalismo y Autonomía* (Argullol *et al.* 2004) broke down some ninety policy areas by the following distinctions: 1) exclusive federal power; 2) federal exclusive legislative/regulative power state (second level) administrative enforcement established by state legislation; 3) federal normative principles and state power over all other functions; 4) shared powers, where both levels enjoy normative power but federal prevails if there is a conflict; 5) exclusive state power; 6) local

power; and 7) other powers such as various joint powers. While most systems allocate some exclusive powers to their first and second levels, the overwhelming majority of powers are shared in various forms: 1) federal exclusive and state administration, 2) federal normative, state all others, 3) shared powers, and, 4) joint powers. This work indicates that not only does dual federalism rarely exist, except perhaps normatively, but sharing of powers is actually quite complicated and clearly beyond mere complementary powers (see also Watts 2008, 194-198).

A second aspect of concurrency is the myriad of jurisdictions that exist *beyond* the usual three tiers in federal countries. It turns out that while the United States has the highest number of governmental units, with some 88,000 units of local governments (in 2002) to add the federal and 58 state and territorial governments (Stephens and Wikstrom 2007, 25), many other countries extend local government as well. In Germany, in addition to city-counties, rural counties and land government districts, there are communal/lower-level governments, county-free cities, local federations of small municipalities, special single purpose districts, and regional level supra-municipal associations, plus various forms of indirect administration by nongovernmental bodies (Gunlicks 2003, Ch. 3). Spain's federalizing system demonstrates even greater complexity. Under the joint normative powers of federal and autonomous community governments are two statutory levels of local government − provinces (intermunicipal bodies) and municipal corporations − along with *comarcas* (county-like) in some regions, *mancomunidades* (intermunicipal service districts), vertical (municipality-province-region-state) consortia, municipal corporations, municipal-private ventures, and neighbourhood government units. All told, around 15,000 units of government exist in a country of 45 million people, about one per 2,800 persons (Agranoff 2007b). These counts involve only governmental units and entities and do not include a myriad of other cooperative arrangements and agreements such as contracts for services or public-private partnerships. The quotient for concurrence can therefore be very high in some federal countries.

Executive Instruments

As governments have become more involved in different policy and program areas, and as concurrence has become compounded, executive activity has become differentiated into an arsenal of managerial techniques. This would appear to be consistent with Watts's concern for the tools executives and managers employ to make policy work. For example, in addition to executive federalism and multi-sector cooperative negotiations and policy making, several other IGR instruments are now commonplace in most federal systems. There are, of course, economic mechanisms like grants or subventions, tax sharing/tax forgiveness/shared and reciprocal taxes, fiscal audits and accounting standards, and intergovernmental loans. Normative or legal approaches include many of the legal mechanisms previously identified plus regulatory measures, co-operative agreements, interdependent legal actions, and organic laws governing local governments and intergovernmental procedures. The administrative arsenal

includes the imposition of program standards, contracts for services, exchange of personnel, program audits (look behind reviews) and negotiated deregulation in lieu of program targets (Agranoff 2007a). In addition, Agranoff and McGuire (2003) identified some twenty-one managerial activities that build on Watts's list of contact methods: eleven vertical information (e.g., seek program interpretation of standards) or vertical discretion (e.g., negotiated flexibility) and ten horizontal project (e.g., financial partnerships for projects) or horizontal structural (contract for planning or implementation). All twenty-one proved to be frequently used by the studied jurisdictions. Finally, each program area has its own set of program or policy tools (Salamon 2002) in order to foster the governance process. In the economic development arena, Agranoff and McGuire (2003) found that under state and federal authorization governments operated some 63 policy tools, such as improving infrastructure, promotional activities, regulation actions (e.g., zoning), tax forgiveness and other subsidies, and physical improvements and human resource development. All of these IGR/IGM approaches are now exercised by elected officials/department heads/program managers as they compliment the broader political negotiations in joint policy-making and executive to executive conferences.

Bargaining

Inherent in these processes are various forms of bargaining and negotiation. As Watts correctly observes, bargaining has not only become a regularized process but one that is well accepted, given differing jurisdictional interests among federal actors. Its prominence was first identified in the United States regarding the study of federal grants. Jeffrey Pressman (1975) initially captures this type of management and reminded us that, "donor and recipient need each other, but neither has the ability to control fully the actions of the other. Thus, the aid process takes the form of bargaining between partly cooperative, partly antagonistic, and mutually dependent sets of actors" (106-107). Helen Ingram's (1977) study of environmental programs concluded that programs are not necessarily instruments of federal control but, rather, opportunities to bargain. Similarly, Liebschutz (1991) depicts an intergovernmental fiscal system in New York as one defined by bargaining and negotiation. Whereas federal officials would like to bind state and local program managers to federal policy, subnational governments seek the maximum possible leeway to pursue their own separate goals and objectives with federal help. In social services programs, as Richard Elmore concludes, "this give and take has become a managerial strategy in the implementation process. [The] bargain is a two-way affair, inherently different from hierarchical control. A contract is not an instrument of coercion" (1985, 36). It is a managerial game that, according to Walter Williams' study of manpower and community development, "requires . . . subtle skill and much knowledge about the roles, the players, and available strategies in the federal-local bargaining situation" (1980, 197). In an early nod to the importance of bargaining and grants management, Morton Grodzins concluded that …:

> the grant-in-aid technique does not tell the whole story; but it tells a good part of it. It is a story of growing expertise; growing professionalization, growing complexities; it is a story most of all, or an ever-increasing measure of contact between officials of the several levels of government within the federal system. Contact points bring some disagreements and produce misunderstanding and some enmity. But most of all, they have produced cooperation, collaboration, and effectiveness in programming and steering the multiple programs of modern government. (1996, 373)

Management research in the United States reveals that in both historical (Elazar 1962) and contemporary programing (Church and Nakamura 1993) bargaining extends beyond the grants process to include a host of the other techniques, including regulatory programs and fiscal and program audits.

In an analysis of bargaining within federalism in the United States, Agranoff and McGuire (2004, 505) identify a research agenda that includes determining the conditions and activities that lead to bargaining success, which type of intergovernmental actors bargain and which do not, to whom do bargainers direct their activity, linkages between bargaining and other governmental activity and the impact of bargaining on intergovernmental programing effectiveness. In Germany, Hesse (1987) describes such bargaining at the policy level as most successful when the resources to divide (between Bünd and Länd) are the most plentiful. Under terms of scarcity the game becomes more one of protecting one's turf/resources rather than constructive program development. Joint decision arenas are said to restrict policy outputs to the *status quo* (the default solution if no "consensual" alternative can be found) or to those changes made acceptable to all parties, often through special line-item "bribes" to the dissatisfied. Nevertheless, because the Länder forfeited their right to legislate potentially more beneficial solutions for their own land (Adelberger 2001, 51). This dilemma is what Fritz Scharpf (1988) has identified as the "joint-decision trap", that is situations where beneficiaries of the *status quo* can block all reforms, or at least extract exorbitant side payments. The trade-off for joint policy agreement is widely believed to be loss of autonomy. Scharpf (1966, 365) concludes that joint policy-making coupled with the goal of achieving inter Länd uniform living conditions has led to making Germany a "unitary federal state". In political terms, it is fair to say that "Länder governments have traded their autonomy for political influence at the federal level" (366). This process underscores that there is much about bargaining that is yet to be learned, both at the macro joint-policy making and micro administrative level.

Conductive Bureaucracies

The bureaucracies that are now engaging in this type of bargaining through the myriad of IGR instruments and policy tools are increasingly open in nature. Watts has constantly demonstrated an interest in changing governmental agencies, including the executive. The conductive organization is one that enhances its performance through knowledge created by energetic external interactions (Saint-Onge and Armstrong 2004). The conductive organization

internally develops processes that constantly involves exchanges with outside interests − clients, customers, partners, collaborators − and stresses the importance of creating partnerships, alliances, coalitions, forming and reforming teams across functions and organizational boundaries, and collaboratively acting to manage interdependencies (ibid., 191). In the intergovernmental field this changes the role of the manager from enforcement of the law or compliance with the law related to another government to partner or co-worker with a variety of corresponding interests. This process involves reaching agreements about the implementation aims of programs and determining the parties responsible for carrying out which aspect of programs within the parameters set by laws and the rules of financing.

The conductive bureaucracy now transacts deliberatively over programs that deal with a host of interest associations, nonprofit organizations, public and public-private planning agencies, public-private ventures, statewide networks, elected and appointed advisory boards, along with the longer standing standard government-to-government linkages. A lot of the interactive work involves less of the standard bureaucratic advice giving and/or reaction to and approving proposals in a favour real deliberative participation in program design and operation (Cooper, Bryer, and Meek 2006), a type of "cogoverning partnership" (Fung 2006, 69). It has more of a growing and learning together as partners try to accomplish something. As Forester (1999, 62) suggests, in deliberative work citizens [and intergovernmental partners] integrate the worlds of "is" and "ought" as well as "science" and "ethics" as they learn how to get something done and what ought to be done in application to new and unique situations. "Connecting governance and dispute resolution, politics and ethics, deliberative practice involves the most intellectually intriguing issues ... how can we learn not only about technique but about value; how can we change our minds about what is important, change our appreciation of what matters, and, more, change our practical sense about what we can do together too." The intergovernmental administrator in the conductive agency thus cannot sit back and react to a proposal or a request but must become a part of this process.

Network Era

In this world of multiple agents and actors, networks of an intergovernmental nature are being superimposed on conductive agencies, a fact that Watts identified when he discussed multiple professional experience across levels of government. Here the reference is beyond the social network of intra and interorganizational contact but chartered and non-chartered multi-organizational arrangements for solving problems not easily achieved by single organizations. These networks involve the different levels of government and the nongovernmental sector in a nonhierarchical fashion (Agranoff 2007c; O'Toole 1997). Networks perform many functions, including information exchange, mutual capacity building, identification and adaptation of technologies, knowledge development and management, reciprocal programing and joint strategies, and reach solutions and make policy/program adjustments.

This type of connectivity puts a high value on the intergovernmental actor to participate with others in a form of mutual learning organization (Senge 1990) where the art and process of the power to find new possibilities (Stone *et al.* 1999) is paramount. The most sage advice needs to mix this exploratory process with doses of political and governmental reality. For example, Chrislip and Larson (1994, 52-5) suggest that collaborative network actors proceed to take advantage of: 1) good timing and clear need, 2) broad-based involvement, 3) credibility and open processes, 4) commitment of high level nongovernmental leaders, 5) support or acquiescence of governmental bodies, 6) overcoming mistrust and skepticism, 7) exertion of strong leadership, 8) building incrementally on small successes, and 9) a shift to broader concerns as efforts evolve.

Network processes are deliberative and mutually participative but do not replace the role of government agencies or their authority, nor those of politics. Michael Walzer (1998, 138) reminds us that networks of associations can incorporate but not replace the agencies of state power "... the state itself is unlike all other associations. It both frames civil society and occupies space within it, fixing the boundary conditions and the basic rules of associational activity, compelling association members to think about the common good".

Effective Autonomy

Since the state and in this case the federal state at two levels fixes the boundaries and basic rules, when does federal autonomy for federal-state, and federal-state-local, federal-local, and state-local come in? To Watts, this is central to his idea that promoting subnational diversity is essential within federalism (1970b). The importance of this issue for Watts's work is also that as federal scholars have moved from dual federalism to more interactive models, what is the role of subnational autonomy in an area of central fiscal and program dominance? In another place, I have suggested that the modern experience of territorial organization is not only inextricably bound with autonomy, but also the shared rule aspect of federalism (Agranoff 2004; see also Loughlin 2000, 10) and to devolutionary processes (Smith 1985; Fesler 1965). Autonomy in modern terms virtually always has a territorial focus (Rokkan and Urwin 1982).

In an IGR managerial sense federal countries almost always have avoided the *tutelage* system of both *a priori* and *a posteriori* control. The tenets of autonomy assume that after a legal template has been established constituent units under the variety of normative guidance mechanisms or shared powers (Argullol *et al.* 2004) have the leeway to act after appropriate consultation on these programs as independent agents, even applying programs to local circumstances. Does this affect the concept of autonomy?

That would, of course, depend on the operational use of autonomy in intergovernmental systems. Extending Watts's notion of the absence of dual federalism, "leaky compartments" are due to national programing coupled with normative and fiscal controls at the center and subnational implementation. That raises the autonomy ante considerably (Watts 2008). How is federal autonomy thus defined? In fact, modern autonomy has come a long way in definition from

constituent units paying tribute to empires in return for foregoing defense and foreign affairs power to operate internally. Today autonomy has been defined by Clark (1984, 198-199) as the power of *initiative* or to act in a goal-oriented fashion in response to communal need and the power of immunity or the power to act without fear of oversight authority of the higher state. In today's intergovernmental world, Libonati (1991) also suggests that a degree of freedom from central preemption of local functions and concurrence-oriented IGR. The latter is based on the idea that "local autonomy also follows from the recognition that a [local] government has capacity and standing as a collective entity to participate actively in decisions by other governmental agencies which affects its interests and responsibilities" (ibid., 88). In this regard, Keating and Elock (1998) indicate that this kind of residual authority to make key decisions are important to such contemporary challenges as economic territorial management, European integration, the emergence of *meso* or intermediate governments as change agents, territorial-based political parties, and increasing democratic impulses among citizens and local governments.

Within the federal arrangements between center and constituent units these issues are normally worked out either in the dispute resolution process − legislative-executive-judicial (Watts 1999a) − or through managerial interactions. Under these circumstances a test or measure of autonomy under federation would be difficult, although it has been attempted on a comparative basis (Argullol *et al.* 2004; Nathan and Balmaceda 1990). At a minimum it would have to involve some measure of real second level powers, perhaps divided between exclusive and the other measures of shared normative ability. For local governments the issue can similarly be assessed but the difference is that in federal countries they are normally subordinated legally to second level governments. Nevertheless, in many countries they do enjoy "general powers clauses" to adopt services and policies that other governmental bodies do not exercise. They almost never amount to *Imperium* in *Imperio* blanket grants of power. As a result, reliance on the four fold assessment introduced earlier stands as one possible measure of autonomy. The autonomy issue is basic to developing a comparative theory of IGR. It appears to be an implicit thread in all of Watts's intergovernmental work, particularly his interest in civic involvement in federal democracy.

CONCLUSION

The largest body of work on federalism that has focused on individual countries tends to concentrate on the legal and political aspects of federalism. Even when comparisons are made favourite topics include federalism and democracy, institutional arrangements, legislative behaviour, presidentialism, regional and territorial conflicts, political parties and elections. Most of the work brings these topical "flavour of the decade" applications to a single country. As a result, one normally reads about "democratic evolution in Mexico", "territorial cleavage in Spain", "institution building in Belgium", or "federal parties and elections in Brazil" (e.g., Amoretti and Bermeo 2004; Gibson 2004). Country studies that focus on legal and institutional single country federal, legal and processes works

would include Moreno (2001), Aja (2003), Galligan (1995), Smiley (1987), and Zimmerman (1992). Works of a broader theoretical nature would include Burgess (2006), Elazar (1987), and King (1982).

The work of Ronald Watts is primarily comparative and institutional-process oriented. Moreover, he is among the few in the comparative field who has focused on the executive role in IGR. The body of work is truly comparative in that the net is almost always cast to a variety of federations, established and emerging, in the developed and developing world. The focus on institutions is new institutionalism process oriented, examining how presidential and parliamentary systems operate, make adjustments, interact by cooperation and conflict, making policy and program work while the compartments leak into one another. And Watts is among a select group of federalism scholars who realizes that by and large it is *executives* who make the most IGR moves in both a policy and administrative operations perspective. To call attention to this core phenomenon nearly four decades ago, so ignored in most federalism studies, should be an inspiration to those who study policy implementation and public administration. It clearly is to this author, in my three decades of searching for answers to the managerial and network processes within IGR (Agranoff 1992; 1997; 2007c; Agranoff and McGuire 2003).

Clearly the work of Watts has pointed the way to the different ways of facing the extremely complicated nature of concurrent jurisdiction, the norms of cross-government management, the centrality of cooperative negotiations, the need for open organizations, multiple governmental units, and the role of constantly changing autonomy. It is now up to the rest of federal scholarship to catch up to his lead by incorporating these concerns into their work. It is fundamental to process, that is the focus on executives as they make core policy and operational processes work within federal systems.

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20

Federalism and the New International Health Regulations 2005

Harvey Lazar, Kumanan Wilson, and Christopher McDougall

Ce chapitre compare la façon dont quatre fédérations ont rempli leurs engagements en vertu du Règlement sanitaire international (RSI), adopté assez récemment (en 2005) par l'Assemblée mondiale de la santé en vue de « prévenir la propagation internationale des maladies, à s'en protéger, à la maîtriser et à y réagir par une action de santé publique proportionnée et limitée aux risques qu'elle présente pour la santé publique, en évitant de créer des entraves inutiles au trafic et au commerce internationaux ». Car le respect de ces engagements crée des difficultés particulières pour les fédérations dans la mesure où leur gouvernement national dispose souvent du pouvoir constitutionnel d'appliquer les accords dont ils sont issus, même si d'importants mécanismes de conformité sont constitutionnellement assignés aux gouvernements de leurs provinces/États.

Parmi les quatre fédérations à l'étude, l'Inde et l'Australie sont les plus centralisées. Ces deux pays appliquent des processus de planification descendants, leur gouvernement national ayant la capacité d'assouplir ces liens de haut en bas au moyen d'accords fiscaux centralisés. C'est ce qui leur a permis, surtout en Australie, de s'acquitter à bon rythme de leurs obligations aux termes du RSI. Du moins sur le papier, car ces progrès ne seraient évidemment être confirmés qu'en cas de véritable urgence. Pour ce qui est des processus de planification du Canada et des États-Unis, les deux fédérations plus décentralisées, ils sont à la fois moins descendants et moins réactifs. On ne saurait donc y tenir pour acquise une rapidité d'exécution qui joue un rôle crucial face aux menaces à la santé publique, comme l'ont montré certains événements de la dernière décennie tels que l'épidémie du SRAS et l'ouragan Katrina. De sorte que le rythme auquel évoluent habituellement les relations intergouvernementales dans ces deux pays soulève une certaine inquiétude par rapport à la rapidité d'exécution indispensable à la pleine application du RSI.

The United Nations (UN) System is intended to provide a measure of international governance on such matters as peace and security, human rights, economic and social development, labour, agriculture and other issues crucial to

the future of humankind. For many purposes, unfortunately, the UN System lacks the effective instruments to enforce the commitments to which the international community is pledged.

This paper focuses on one case where the UN System has the potential to work effectively. On June 15, 2007, new International Health Regulations came into force. Approved by the World Health Assembly in 2005, the purpose of the International Health Regulations (hereafter IHR) is to "prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade". To accomplish this the IHR: (1) require State Parties to develop, strengthen, and maintain the capacity to detect, report, and respond to public health events; (2) impose new requirements for State Parties to report to the World Health Organization (WHO) on possible public health emergencies within 24 hours of assessment; (3) authorize the WHO to use non-governmental sources of information for disease surveillance purposes; and (4) authorize the WHO to issue public health recommendations to the international community without the consent of potentially affected State Parties.

David Fidler has pointed out that the obligations that State Parties have assumed involve a "dramatic expansion of the scope of the IHR" (Fidler 2005, 63). Where the old International Health Regulations applied only to a short list of infectious diseases, the new regime embraces an all hazards approach that includes chemical, radiological, and microbial threats. Where the old rules focused mainly on governments, the new ones integrate governmental, intergovernmental, and non-governmental actors. Fidler also emphasizes that the "creation of obligations on State Parties to develop minimum core surveillance and response capacities" extends a prescriptive power to shape the parameters of domestic policy far beyond the usual reach of international law (ibid.).

The IHR thus potentially represent a quantum leap in international public health governance. But whether the new international rules also represent a quantum leap in protecting people from existing and emerging health risks will depend in large part on how effectively the rules are implemented within the borders of each State Party.

The IHR entail challenges for all State Parties. For federations, there is a unique challenge in that the constitutional authority to implement the new rules is fragmented among two or more orders of governance. Since it is commonplace for constituent units (variously called states, provinces, cantons, Länder, territories) in federations to create additional levels of governance for administrative purposes, at a practical level the capacity to meet the new international commitments may be even more scattered.

The importance of this issue is linked to the substantive challenge. In attempting to prevent public health threats from becoming serious incidents, and in seeking to contain them when they do, *time* is often a crucial factor. Acting sooner (an hour, a day, a week) rather than later may have huge effects on mortality and morbidity rates and on economic impacts. The IHR recognize this imperative by establishing time lines for reporting. In contrast, the wheels of intergovernmental relations can grind slowly and may seize up entirely during a crisis. Having effective domestic intergovernmental governance arrangements in

place before an incident occurs therefore is crucial to managing the tension between the normal pace of intergovernmental relations and the requirements for timely action set out in the IHR.

Ron Watts has written extensively about the value of comparative analysis in determining such governance arrangements. It may help identify options that would otherwise be ignored and to anticipate the effects of different models. It may provide both positive and negative lessons (Watts 1999). For these reasons, this paper compares how different federations have been organizing themselves to comply with their new international commitments in public health.

RESEARCH QUESTIONS

This focus in turn suggests the questions of interest. Under what constitutional authority and political environment have the IHR been approved and implemented? What are the decision rules? How are roles and responsibilities allocated among governments? Does the allocation change during an emergency? What are the mechanisms for coordination and collaboration? What are the intergovernmental funding arrangements? Are there arrangements for dispute avoidance and resolution? Finally, does the whole multilevel governance scheme look like it might work?

It is also important to note that this paper is not about the adequacy of the resources on the ground − the stockpiles of drugs and the number and distribution of trained health care professionals ready to respond. The concern here is on the intergovernmental dimension of governance preparedness only.

METHODOLOGY

Our main source of information is the record of a September 20-21, 2006 international workshop on *The State of National Governance Relative to the New International Health Regulations* held in Ottawa (Institute of Intergovernmental Relations {IIGR} 2006). This source has been supplemented by literature and web searches, and e-mail exchanges and interviews with public health officials. Although the IHR are not solely focused on infectious threats we have also examined how State Parties have been preparing for an influenza pandemic given the considerable level of anxiety surrounding this issue.

Four federations are compared: Australia, Canada, India, and the United States. India is a developing country and the other three are developed. Three have Westminster systems of government while the United States has a separation of legislative and executive power at both the federal and state levels. Two are relatively centralized (Australia and India) and two relatively decentralized (Canada and the United States). Two are officially unilingual (Australia and the United States) and two bilingual or multilingual (Canada and India). Together, they are home to about one-fourth of the world's population. Given this diversity, their experience to date provides some indication of the

challenges that federal systems may generally face in implementing their international health obligations.

ANALYSIS

The Constitutional and Political Context

The Australian constitution dates from 1900. Although not initially designed to be a centralized federation, judicial interpretation since 1920 (*Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 – commonly known as the *Engineers' Case*) has favoured the Commonwealth. Since then the power of the Commonwealth has grown relative to the state and territorial governments which are also heavily dependent fiscally on the Commonwealth. The political culture of Australia also supports the idea of a strong central authority.

The authority to enter into the IHR for Australia is a Commonwealth executive power under Section 61 of the constitution (IIGR 2006). Nonetheless, the Commonwealth recognizes that the key public health powers rest at the state/territory level and that success in implementing IHR require a joint and cooperative venture among state/territory and Commonwealth governments. The Australian Parliament passed a *National Health Security Act, 2007* to help the Commonwealth, state and territory governments give effect to the International Health Regulations. That statute is also binding on these governments.

Until the 1990s, the Indian federation was highly centralized. This reflected the commitment of India's leaders to national unity in the immediate post-colonial period helped importantly by the monopoly power of the India National Congress at all levels after independence. Since 1989 the power of the Congress party has weakened, centralization relaxed and India has become more market-oriented (Majeed 2005, 202). Nonetheless, India's federal system remains relatively centralized compared to the other federations considered here. For example, the constitution grants extensive emergency powers to the Union and they have been used frequently.

The tenth amendment to the U.S. constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people". The effective result is that the U.S. Congress has constitutional authority to deal with public health issues at ports of entry and exit for international trade or travel and to the extent that inter-state commerce may be affected. Congress can also influence the way in which states manage public health issues through conditional grants. But the constitutional authority to deal with public health matters *within* the boundaries of a state rests with that state. Moreover, the idea of state sovereignty is a significant force in U.S. politics. The U.S. Administration acknowledged this when, in signing the IHR, it issued a reservation to the effect that it would implement the new international rules in a manner consistent with U.S. principles of federalism. The federal authorities would attempt to persuade state and local governments to comply but they could not guarantee such a result.

Canada is the most decentralized of the four federations. Its provinces rely less on the federal government for their funding than do the constituent units in the other three federations and its intergovernmental transfers are generally less conditional (Watts 2005, 52-54). The Canadian political culture also favours strong provincial governments. Public health as such is not explicitly mentioned in the Canadian constitution. However, court decisions make clear that provinces have extensive authority concerning public health matters within their borders. And in practice most routine public health activities are provincial responsibilities, including disease surveillance and containment. The one aspect of public health explicitly referred to in the constitution is the law making power relating to quarantine and it was allocated to the federal government under section 91(11). To this point the federal government has primarily used this power to address public health matters at points of entry. Significant federal authority is also derived from the power to enact criminal law which has facilitated a substantial federal role in health protection.

What are the Decision Rules?

"Decision rules" refer to the intergovernmental provisions and practices under which decisions are taken. In this regard, the IHR set out specific tasks for local, intermediate and national governments. (Constituent units such as states and provinces are the intermediate units in federations. Unitary countries may also have intermediate levels of government for administrative purposes.) Those specifications fit reasonably well with the way that most State Parties are organized. Typically, local health care workers, emergency personnel, hospitals, public health officials, and local laboratories are the first line of defence against an incident. Coordination and confirmation roles are conducted at the intermediate level. Border management and international communications are handled by national governments. The IHR also require integration and information flow among the different orders of government. The Regulations mandate as well that the national government provide support for "on the ground" public health activities and links with hospitals, clinics, airports, and ports for the dissemination of information and recommendations from the WHO.

These IHR requirements thus raise the question about how decisions are taken among the different orders of government. One point to note in this regard is that the constitutions of Australia, Canada, and the United States do not grant constitutional powers to municipal governments. This was also true of India until 1992 when constitutional amendments gave status to local bodies as "almost a third order of government" (Majeed 2005, 191). Even in India, however, the main focus is on the Union government's relationship with the states and administrative units created by the states. When considering decision rules, therefore, the focus here is on the relationships between the federal government and constituent units.

At the broad strategic level (especially on deciding "who does what" and "how to coordinate") the Australian and Canadian manner of acting is consensual in that these decisions are taken without coercion. In the case of Australia, planning for pandemic and other public health threats has been

worked out through the Council of Australian Governments (COAG) on a collaborative basis. COAG is chaired by the Prime Minister and includes state and territorial premiers as well as the head of the Australian Local Governments' Association, even though local government is not constitutionally recognized. COAG and other intergovernmental executive bodies subordinate to it have taken the IHR and related pandemic threat seriously. One result was a 2006 comprehensive intergovernmental agreement on a National Action Plan for Human Influenza Pandemic. A second was the 2007 national health security legislation referred to above which, among other things, provided statutory authority for the April 2008 National Health Security Agreement between the Commonwealth and the states. While not legally binding, the 2008 Agreement is a formal political commitment by governments to work together to implement the IHR within an agreed surveillance, decision-making and response framework.

Strategic decision making is also consensual in Canada. From a constitutional perspective, there are significant federal powers that might enable the federal government to impose its views in an emergency (Attaran and Wilson 2007, 381-414). But the federal government has chosen to pursue a collaborative intergovernmental planning approach without national health security legislation similar to Australia's and without amending those parts of the *Emergencies Act* that would strengthen the federal authority in emergency situations. Instead, voluntary collaboration has been emphasized. Such collaboration is harder to make work in Canada than Australia, however, given the strong powers of the provinces. Thus, as this paper was being completed in December 2008, key federal-provincial agreements relating to roles and responsibilities and data sharing had still not been signed (except with Ontario) even though drafts of these agreements had been ready for over two years (Canada 2008b, testimony of Butler-Jones).

Strategic decision making in India concerning IHR implementation is done by the Union government. Health is constitutionally "a state subject in the main" (Krishnan 2008, 14). Surveillance falls principally to the states and increasingly to the different sub-state administrative levels. But the Union has legislative competence in respect of many aspects of public health including even a constitutional stricture to improve public health (article 47). In this regard, one goal of the Union is that state and local governments acquire and develop the capacity to implement those sections of the IHR that fall to them. The Union government funds a large portion of activity at the state and more local levels (in 18 of 35 states and territories the Union provides 100 percent of funding for National Health Programs and 50 percent in the remaining states) which facilitates intergovernmental cooperation. At the practical level, that is, surveillance, testing, and information sharing, there is much cooperation.

Strategic decision making in the United States is also done at the federal level but with Washington sensitive to states' roles and responsibilities. This is well illustrated by the White House's 2005 National Strategy for Pandemic Influenza. Unlike the National Action Plan in Australia, it was not a joint federal-state plan. The federal government alone issued the document. The strategy laid out all that the federal authorities would do to play their appropriate role in planning for and containing a pandemic and called on the states and

communities to prepare their plans for their areas of responsibility (United States 2005). The Secretary of Health and Human Resources (HHS) followed up by meeting with state and local counterparts to establish an integrated federal-state planning process. But at the same time, HHS recognized that "each state and local jurisdiction should determine for itself whether it is adequately prepared for disease outbreaks in accordance with its own laws and procedures" (United States 2006).

Table 1 below compares the decision rules in the four federations.

How are Roles and Responsibilities Allocated?

The question here is which IHR obligations fall to the different orders of government. Equally important is it clear "who does what"?

Annex 1 of the IHR declares:

> States Parties shall utilize existing national structures and resources to meet their core capacity requirements under these Regulations, including with regard to:
> (a) their surveillance, reporting, notification, verification, response and collaboration activities; and
> (b) their activities concerning designated airports, ports and ground crossings.

The Annex then calls on the local community and/or primary public health response level to "detect events involving disease or death above expected levels for the particular time and place …", "to report all available essential information to the appropriate level of health care response …", and "to implement preliminary control measures immediately" (WHO 2008, 47).

Regarding constituent units, the Annex requires them to: (a) confirm the status of reported events and to support or implement additional control measures; and (b) assess reported events immediately and, if found urgent, to report all essential information to the national level. As for the national level it must be ready to "(a) assess all reports of urgent events within 48 hours; and (b) notify WHO immediately through the National IHR Focal Point when the assessment indicates that there is a "public health emergency of international concern" (PHEIC), a term that the IHR defines (WHO 2003, Annex 2, 50-53). The Annex then outlines in detail the capacities for "public health response" that are expected of the national government. Required core capacities at designated airports, ports, and ground crossings are similarly detailed (WHO 2003, Annex 1, 48-49). In brief, the IHR assume that all State Parties, whether federal or unitary, are organized on a multilevel basis for managing public health issues. This brings us to the question of how the four federations are allocating roles and responsibilities.

Australia

In July 2006, the Government of Australia released a *National Action Plan for Human Influenza Pandemic* that "outlines how Commonwealth, state, territory

Table 1: Comparing Decision Rules

	Australia	*Canada*	*India*	*United States*
What Are Decision Rules?	Consensual for planning broad strategy. Otherwise each order of government carries out its responsibilities.	Consensual for planning broad strategy. Otherwise each order of government carries out its own responsibilities.	Union in charge of strategic planning and plays key role in ensuring that states develop capacity to implement their responsibilities.	Strategy set at federal level. Otherwise each level carries out own responsibilities.

and local governments will work together to protect Australia against the threat of an influenza pandemic and support the Australian community should one occur" (Australia 2006, i). The document sets out the Commonwealth responsibility for surveillance at border points and managing quarantines at international and internal borders. State and territorial authorities have the primary operational responsibility to respond and are responsible for surveillance and reporting of outbreaks (ibid., 14-16). The *National Health Security Act, 2007* adds clarity in three ways. First, it provides for a National Focal Point with the authority to liaise with Commonwealth, state and local bodies in relation to public health events of national significance and "with the World Health Organization and State Parties at all times for the purposes of giving effect to the International Health Regulations" (ibid., Section 10). Second, the legislation authorizes the exchange of surveillance information, including personal information, between jurisdictions and between the Commonwealth and the WHO and foreign governments in accordance with the IHR. Prior to that enactment, some state governments had been concerned that their responsibility to report information to other jurisdictions on outbreaks might infringe privacy law. Third, the legislation provides for a National Health Security Agreement that enhances and formalizes existing intergovernmental arrangements, including responsibilities for providing surveillance information and responding to public health emergencies. The overall allocation of roles and responsibilities fits well with the requirements specified by the IHR. On paper, Australian governments have done an excellent job in clarifying "who does what". Moreover, in the event of a PHEIC, the Commonwealth has strong powers to lead a national response.

Canada

In Canada, responsibility for surveillance and response rests at the provincial/ territorial level while the federal government is responsible for international commitments and border crossings, including quarantines. In this sense, the Canadian situation is broadly consistent with IHR provisions. There is a system of intergovernmental relations to deal with the overlaps between the different governments.

But the Canadian system is not seamless. Writing in the aftermath of Canada's 2003 SARS epidemic in October, 2003, the federally appointed National Advisory Committee on SARS and Public Health stated:

> Only weak mechanisms exist in public health for collaborative decision making or systematic data sharing across governments. Furthermore, governments have not adequately sorted out their roles and responsibilities during a national health crisis…. so far from being seamless, the public health system showed a number of serious gaps. (Canada 2003, 19)

A month earlier, anticipating the Committee's analysis, federal, provincial and territorial ministers of health agreed to work collaboratively to clarify roles and responsibilities for preventing and responding to public health threats "in a manner respectful of federal, provincial and territorial jurisdiction". Two years later they announced the creation of Pan-Canadian Health Network made up of senior public health officials from the various jurisdictions. Yet a May 2008 report by the Auditor General of Canada, an independent officer of Parliament, found that the Public Health Agency of Canada (PHAC) still needed to resolve "long-standing uncertainties about roles and responsibilities" with provincial governments (Canada 2008a). The Agency, in its formal response to the Auditor General, agreed with the general thrust of this criticism.

The Auditor General also criticized the lack of data sharing agreements between Ottawa and all provinces but one. In response the PHAC stated that:

> The Agency continues to work on a comprehensive plan to ensure that it meets its obligations under the *International Health Regulations*. This includes finalizing the Memorandum of Understanding on Information Sharing during a Public Health Emergency developed by the Public Health Network's Surveillance and Information Expert Group, and, during the 2008-09 fiscal year, supporting and participating in the collaborative action plan for its implementation. (ibid.)

Unlike in Australia, therefore, at the end of 2008 clarifying roles and responsibilities was still a work in progress. A statement from the Office of the federal Minister of Health acknowledged this: "While the Public Health Agency of Canada is currently getting much of the information it requests without a formal agreement, it must rely on informal arrangements and the good will of the provinces" (*National Post* 2008).

The federal government also has relatively weak emergency powers in the event of a PHEIC even though it probably has constitutional authority to enact stronger powers (Wilson and Lazar 2005).

India

The post-independence Indian constitution is relatively recent (1950) and partly for that reason it has a longer and more up-to-date list of powers than the constitutions of the other three federations. These include more explicit provisions related to public health.

The allocation of public health responsibilities in the Indian Union is broadly consistent with the IHR multilevel scheme. Yet it is also more complex entailing various forms of asymmetry that seek to accommodate the reality on the ground such as that some states are much poorer than others and require all the fiscal and scientific capacity that the Union government can bring to bear. While there are also income differentials among constituent units in Australia, Canada, and the United States, the rich-poor gap among India's constituent units is much greater.

When the IHR came into force, India's systems of disease surveillance, early reporting and response were already in place notwithstanding many limitations in capacity. The systems involve lots of intergovernmental communication without undue concern for formal niceties. For example, the National Institute of Communicable Diseases (NICD) in Delhi receives public health information directly from over 400 out of 600 administrative districts rather than waiting for information to flow initially to the states and then to Delhi.

The centre also has the authority to step in quickly when there is a health event of significance. According to Sampath Krishnan (IIGR, 2006):

> Now, a recent development is that in the case of certain diseases which can cause pandemics like in the case of SARS or avian or pandemic flu the situation could be declared as a biological disaster and the centre could take complete control. The country also established a National Disaster Management Authority in 2005, headed by the Prime Minister so all the issues – especially inter-sectoral coordination and funding – is much more easier in this type of a system.
>
> Whenever a large outbreak is reported with significant deaths, then the centre usually sends a central rapid response team which invariably includes members from the National Institute of Communicable Diseases – which functions somewhat like the CDC – and they co-opt other members. They are empowered to go in with or without the request of the state. Invariably the states do request for assistance as they are also keen to avail of central expertise in dealing with large outbreaks.

While surveillance is carried out mainly at the local and state levels, the federal level concentrates on capacity building and training and maintaining rapid response teams that can move swiftly to manage incidents that are beyond the capacity of local or state authorities. The central government also manages India's international borders including international airports, ports and land crossings. As in Australia and Canada, it is also responsible for quarantine legislation.

United States

In the United States, state and local governments are responsible for disease surveillance, for detecting and responding to disease outbreaks within their jurisdiction, and implementing measures to minimize their effects. The federal government assists states on request. But otherwise, it respects state jurisdiction.

The federal government's leadership role is illustrated in the *National Strategy for Pandemic Influenza: Implementation Plan*. It includes advancing international preparedness as well as surveillance, response, and containment of disease functions by protecting border crossing points, by providing expertise, diagnostic reference services and testing support to state and local authorities, and through funding and guidelines (United States 2005, 10). The *National Strategy* also requires the Department of Health and Human Services (HHS), with the Department of Homeland Security, to review the Pandemic Influenza Operations Plans of all states. The goal has been to secure state agreement to a common set of priorities, capabilities, and benchmarks and ultimately to comply with federal guidelines with respect to pandemic planning. To this end, HHS held bilateral summits with all 50 states and to varying degrees reached agreement with state governors that confirm roles and responsibilities. Interestingly, the proto-type federal-state agreement in this regard puts the emphasis on the state government to "coordinate effectively" with federal plans and the U.S. authorities use conditional grants to encourage states to do so. The

Table 2: Allocation of Roles and Responsibilities

	Australia	*Canada*	*India*	*United States*
Who Does What When No Emergency?	Allocations clear. States/territories (STs) do most surveillance, reporting, notification and verification under ST law. Commonwealth involved in analysis and dissemination of information. It manages quarantines at border and within Australia and surveillance at border. Commonwealth is WHO focal point.	Allocations generally clear. Provinces run public health (PH) activities at local/regional level- surveillance, reporting, notification, and verification under provincial law. Federal government responsible for international and border measures and WHO focal point. Still some ambiguity in who does what and deficiencies in data sharing.	Allocations complex. Surveillance done at local and state levels with some direct reporting from local to Union. Data sharing is good. Union focuses on capacity building, including lab support and training rapid response teams. Union administers borders and quarantine and WHO focal point in Delhi.	Allocations clear. State/local does surveillance, reporting and verification. Federal government assists on request. Federal government does international (WHO focal point) and inter-state. Federal role also in dissemination. CDC operates information sharing system.
What happens in the event of a Public Health Emergency of International Concern	Clear authority to Commonwealth to provide leadership.	Federal government has relatively weak emergency powers, which limit Ottawa's scope to lead.	The more serious the situation, the larger the role the Union plays.	The U.S. plans are not explicit on this point.

agreements are silent on whether the federal role would be enhanced in the event of an actual pandemic.

The federal government plays other crucial roles. Through the Centers for Disease Control (CDC) it operates a firewall-protected privileged information sharing system between federal, state and local governments. "The National Electronic Disease Surveillance System (NEDSS) project is a public health initiative to provide a standards-based, integrated approach to disease surveillance and to connect public health surveillance to the burgeoning clinical information systems infrastructure" (CDC, 2002). NEDSS is intended to improve the nation's ability to identify and track emerging infectious diseases, investigate outbreaks, and monitor disease trends.

The ability of the U.S. government to intervene in a public health emergency that is limited to one state, without the permission of that state, remains uncertain. Such difficulties with emergency response were identified during the response to hurricane Katrina, where federal involvement was not requested at the early stages of the disaster.

Institutional Mechanisms for Internal Coordination

In calling for all orders of government to be engaged in the management of public health risks the IHR are not demanding a new form of governance for most State Parties but rather reflecting the logic that is already built into their existing multilevel arrangements. For a multilevel arrangement to function as a *system* however there must be some means of connecting the various levels so that they at least come close to approximating a seamless web. This in turn raises questions about the nature and efficacy of domestic coordinating mechanisms including for data sharing purposes.

On this point, the distinction between the Westminster and U.S. presidential governmental systems is paramount. In the former, there are typically vertical functional coordinating mechanisms linking the executive branches of the different orders of government (referred to as "executive federalism" in Canada). It is normal to have permanent committees of ministers from the federal and constituent unit levels that meet periodically to establish priorities and authorize various actions. It is also usual to have sub-committees of appointed officials working under the direction of the ministerial committees. One result of this system of executive federalism is that intergovernmental agreements reached under its auspices are typically, although not always, administrative agreements. As such, they are not sanctioned by the legislatures of the different levels and they remain in force only for as long as the participating governments are willing that they do so. (The 2008 intergovernmental agreement in Australia is an exception to this generality.)

In the United States, there is no comparable vertical system. Owing to the separation of the legislative and executive branches at both federal and state levels, the executive cannot commit to action as freely as is the case in Westminster systems, where the executive members are also members of the legislature and normally enjoy majority support in that body. Relatively weak discipline in the U.S. party system adds to this difference compared with the

Westminster system. In any case, as will be seen below, the United States employs a different model for internal coordination than the Westminster systems.

In Australia, COAG is the overarching mechanism for ensuring coordination among governments. COAG approved the National Action Plan for Human Influenza Pandemic. This approval also included the intergovernmental committee structure for managing the threat of pandemic and that structure applies as well to the implementation of the IHR (Australia 2006, 16-17). This includes vertical committees at the level of health ministers and advisory bodies to the health ministers. Australia's *National Health Security Act, 2007* includes statutory provision for a National Health Security Agreement between the Commonwealth and other levels of government to deal with such issues as information sharing, formalizing and enhancing consultation thus improving Australia's ability to identify and respond quickly to public health events of national significance (Australia 2007, Division 2, section 7). In short, Australia has effective arrangements for coordinating relations within its multilevel system.

Canada's system of intergovernmental coordination is less formal and less developed than Australia's. Canadian federal, provincial and territorial heads of government meet less often than their Australian counterparts. COAG maintains a public website that provides information relating to its structure and function as well as the outcomes and agreements reached. There is nothing similar for First Ministers' Conferences in Canada.[1] Nor have Canadian First Ministers dealt with a planning document with the level of precision of what is contained in Australia's National Action Plan. Nonetheless, the federal government created a separate Public Health Agency of Canada in 2004 with a view to enhancing federal leadership and partnership with provinces and territories in matters relating to public health. The 2004 First Ministers' meeting included a commitment to further collaboration and cooperation in developing coordinated responses to infectious disease outbreaks (Canada 2004).

Reporting to First Ministers, the main Canadian institution for dealing with public health issues including the IHR is the Federal-Provincial-Territorial Conference of Health Ministers, its related committee of officials at the deputy minister level, and the Pan-Canadian Public Health Network. In May 2006, the Ministerial Conference undertook to:

> Finalize a Memorandum of Understanding by December 2006 to formalize roles and responsibilities, including funding, as outlined in the current federal budget, in pandemic preparedness and response.
>
> Finalize a mutual assistance agreement to enable the sharing of health human resources and supplies across jurisdictions during a public health emergency, reflecting best practices and shared priorities.

[1]The Canadian Intergovernmental Conference Secretariat provides a cryptic listing of First Ministers' Conferences since 1906 at www.scics.gc.ca/pubs/fmp_e.pdf .

> Complete a pan-Canadian public health information system and an agreement on the timely sharing of information in preparing for and responding to a public health emergency. (Canada 2006)

As this chapter was being completed in December 2008, none of these three agreements had yet been formally finalized except for the information sharing agreement with Ontario. This is not by accident. Canadian intergovernmental relations are less developed than Australia's and purposefully so. Some provincial governments, especially Quebec and Alberta but other provinces on occasion as well, are reluctant to enter into agreements with Ottawa that might in any way be interpreted as ceding provincial sovereignty either *de jure* or *de facto*. In this sense, Canada's federal system is less cooperative than Australia's.

India's provisions for coordination between Union and state levels include both *intra-jurisdictional* and *inter-jurisdictional* arrangements. The intra-jurisdictional provisions are reflected in the Rajya Sabha, the upper chamber of India's Parliament. The vast majority of this chamber's members are elected by the members of the state assemblies and electoral colleges of the territories. In this respect, India is unique among the four federations being considered here.

As for the inter-jurisdictional provisions, they are both constitutional and non-constitutional relationships. Unlike the Canadian and Australian constitutions, the Indian constitution (article 263) provides explicitly for an Inter-State Council made up of Chief Ministers of Union, state, and territorial governments as well as other Union ministers. But it has not been heavily utilized, less than the non-constitutional National Development Council which has a similar although not identical composition and which was set up by Cabinet resolution (Saxena 2002). It is focused primarily on intergovernmental planning issues including the quinquennial reports of the Planning Commission of the Government of India. These reports generally include a chapter on health issues, especially public health (see, for example, India 2008a, 74-127). The National Development Council usually meets once a year.

The coordination of India's multilevel system is strongly driven by the Government of India and focused on very practical needs. In addition to the role of the National Development Council, the Union health minister also convenes meetings with state counterparts as necessary, such as was the case during the SARS episode and during the Chikungunya outbreak (Krishnan 2008).

Fundamental to coordination is the Integrated Disease Surveillance Project (IDSP) launched by the Union Ministry of Health and Family Welfare in 2004. The IDSP seeks to assist the central and state/territory governments to shift from a centrally driven, vertically organized disease surveillance system to one which is coordinated by the centre but implemented by the states, districts and communities with improved laboratory support to the surveillance system (India 2004). IDSP pre-dates the formal adoption of the IHR but fits well with its multilevel concept. IDSP is focused on operational needs almost exclusively. The IDSP is now located under the umbrella of the National Rural Health Mission which the Union government launched in 2005 with a view to improving the basic architectural changes of the health care system. Strengthening public health is a big part of its mandate including "prevention

and control of communicable and non-communicable diseases" that should also improve India's capacity to meet its IHR obligations (India 2008b).

In the United States coordination and cooperation are fostered through conditional grants and other mechanisms. The *Pandemic and All-Hazards Preparedness Act, 2006* provides the legislative framework including the way in which grant agreements are reached with state and local governments to meet federal conditions. The National Strategy for Pandemic Influenza is illustrative. The threat of pandemic and other health hazards, including terrorism threats, have created a functional need for intergovernmental cooperation that state and local governments have bought into, to varying degrees, as reflected in the federal-state agreements discussed above. The federal authorities, mainly through the CDC, also encourage harmonization of standards among professionals by funding training, professional development and technical support programs, by extensive use of advisory committees, and by extensive consultation between CDC professionals and state and local professionals. One result of these efforts is that the Council of State and Territorial Epidemiologists (CSTE) has urged its members to provide epidemiological data required by the IHR:

> The World Health Assembly adopted revised international health regulations … which will officially take effect for the U.S. on July 17, 2007. Agreement is required on what events are reportable to the World Health Organization … under these regulations. CSTE is forwarding this position statement to help reporting entities (states and territories) identify what public health events should be reported to CDC as an event that may constitute a public health emergency of international concern under these new regulations. This will assist the Centers for Disease Control and Prevention (CDC) in responding to the IHR. (Council of State and Territorial Epidemiologists 2007)

The CSTE is a professional association that works in partnership with the CDC to improve public health. Although not the formal voice of state governments, it effectively facilitates federal-state coordination and cooperation. The strong firewalls the CDC has created to protect private data are a significant factor in enabling the CSTE to play this role.

Whether this kind of coordination and cooperation is sufficient is uncertain, however, in a system of government that is as large and complex as the U.S. system, with its separation of executive and legislative power and federal structure, all the more so when federal-state relations are also integral to the desired outcome. In a 2007 report on the state of preparedness for an influenza pandemic, the General Accountability Office (GAO) observed on the many steps the Administration had taken to prepare but still pointed to gaps in accountability and in federal-state relations. The GAO report stated:

> Key federal leadership roles and responsibilities for preparing for and responding to a pandemic continue to evolve and will require further clarification and testing before the relationships of the many leadership positions are well understood. Most of these leadership roles involve shared responsibilities and it is unclear how they will work in practice. (United States 2007, 1)

Table 3: Comparing Systems of Internal Coordination

	Australia	*Canada*	*India*	*United States*
Institutions for Internal Coordination Among Orders of Government	Elaborate and well-established set of vertical committees that include COAG and other committees that involve health ministers and public health officials.	Under broad mandate from FPT health ministers Pan-Canadian Public Health Network is main integration mechanism. The Network functions at level of senior PH officials and experts with extensive committee structure. Some inter-jurisdictional conflict at political level.	India's Union and state health ministers meet as necessary but most coordination is through operational mechanisms driven from the centre. Key mechanisms are the NICD, the IDSP, and the National Rural Health Mission. .	Vertical coordination through federal conditional grants, technical support for states and intergovernmental agreements. Extensive role of advisory committees, consultation between CDC and local and state professionals. Feds play big role in disseminating info and analysis. It is uncertain whether these mechanisms are adequate given the complexity of U.S. governance.

It also noted that "officials told us that state, local, and tribal entities were not directly involved in reviewing and commenting on the Plan", even though they were crucial to its effective implementation (United States 2007, 9). The report suggested that there were opportunities to improve coordination and planning.

From a comparative viewpoint, at least on paper, U.S. coordination is not as advanced as Australia's. How it compares on paper to Canada's is harder to assess. In Canada the challenge is mainly one of political will. In the United States political will may also be an issue but, given the constitutional structure, complexity is perhaps the greater challenge. India's coordination is largely operational since broad planning is centrally controlled.

Funding of IHR Implementation

In Australia there are Commonwealth-state cost-sharing agreements for health care and for public health with Canberra typically paying 60 percent of the bill. The health care agreements are controversial given the large sums. With regard to the public health agreements, some of the funding is untied and some is conditional. There are no explicit arrangements to alter these funding provisions in the event of a public health emergency of international concern although, given the Commonwealth's much stronger revenues, Canberra would probably

have to pick up a larger share in that eventuality. The current agreements began in 2004-05 and terminate in 2008-09 (Australia 2004).

In India, total spending on health, at around 5 percent of GDP, is, in relative terms, a much smaller share of the economy than in the three developed federations (where it is from two to three times as high relatively). It is also noteworthy that only one-fifth of health spending in India comes from government sources while again the government share is much higher in the other three federations. Within that framework, states spend roughly twice as much as the Union on health issues and raise most of the required funds through their own budgetary processes (India 2007).

Nonetheless, the Union does transfer some funds to the states for public health purposes as reflected in its financial support for the Integrated Disease Surveillance System to enhance state and local capacities, and the National Rural Health Mission. In the latter, Delhi pays 100 percent of the costs for the 18 poorest states and territories, and 50 percent of the costs for the remaining states.

In the United States, both federal and state governments have public health responsibilities that they are responsible for funding. As noted above, the federal government also uses conditional grants to encourage state and local compliance with federal plans. Between 2002 and 2007, HHS provided all states, territories and four major urban areas with roughly $2 billion to enhance surge capacity in hospitals and other healthcare entities (United States 2008, 12). However, there are still differences among governments and other actors on pandemic preparedness funding. According to the HHS Secretary:

> HHS has stressed repeatedly in State pandemic influenza summits with governors and in numerous other meetings that preparedness for pandemic influenza must be a shared responsibility among governments at all levels, the private sector, and individuals. To the extent that potential partners refuse to apply their talents and assets unless the Federal government foots the bill, they are abdicating their responsibility and thereby placing their communities at higher risk than need be. (ibid., 12)

This suggests that there is still work to do to bring the funding arrangements for the National Pandemic Plans to the level that the federal government desires, with implications as well for IHR implementation.

During the second half of the 1990s and early 2000s, political differences between the federal and provincial governments about how much Ottawa should pay for provincially delivered health care was a major source of tension in the Canadian federation. In 2004, governments resolved this with a ten-year agreement, which runs until 2013-14, stipulating how funding responsibilities for health care were to be shared. In 2006, Ottawa committed additional funds specifically for pandemic preparedness. The federal government position appears to be that its financial undertakings in those commitments implicitly include the costs of IHR implementation (Canada 2004). Some provinces seemingly take the view that Ottawa has entered into new international commitments and it should therefore pay for the additional costs that these commitments entail (Interviews 2007). While this disagreement does not affect

the day-to-day intergovernmental implementation of the IHR, it does suggest that the planning process for sharing public health costs is still incomplete.

Provision for Dispute Avoidance and Resolution

While there are a number of issues that could lead to intergovernmental disputes, information sharing and funding arrangements are among the most common.

In the case of Australia, funding arrangements are precise. The 2007 National Health Security legislation clarifies the legal authority of states/territories to transfer information to the Commonwealth subject to appropriate protection. In addition, the 2008 National Health Security Agreement includes specific dispute resolution provisions. The Australian constitution also provides that where there is an inconstancy between Commonwealth and state powers, the Commonwealth will prevail.

The Canadian situation is much different. Federal-provincial disagreements regarding funding of pandemic planning remain. The Public Health Agency of Canada (PHAC) and Ontario have a signed 2007 Memorandum of Understanding (MOU) on data sharing for infectious disease but not with the other nine provincial governments. In other words, Canada is less advanced than Australia in avoiding disputes in these two areas. Nor does Canada have special mechanisms to resolve disputes. Canada's treaty power cannot be used to enforce the IHR in provincial areas of constitutional responsibility in the event of a federal-provincial dispute. Further, Canada's *Emergencies Act* is a relatively weak instrument for federal leadership in the early stages of a major infectious disease outbreak (Wilson and Lazar 2005).

In India, intergovernmental public health funding provisions are relatively uncontroversial. Nor is data sharing among governments a major concern. India also has a strong treaty power and strong emergency powers. Furthermore, in principle, the Inter-State Council/National Development Council could play a role if a dispute between the Union and a state government could not be resolved in other ways.

The U.S. federal government uses conditional grants, technical expertise, and the bully-pulpit to encourage state and local cooperation in the event of differences among governments. To date there is no indication that the U.S. authorities contemplate the need for special dispute resolution mechanisms for IHR implementation.

Comparing Systems of Governance from an Effectiveness Perspective

The effectiveness of the multilevel governance systems in meeting the requirements of the IHR in the four federations examined here is of course uncertain. To the extent that there is no major public health emergency of international concern these arrangements cannot be fully tested. At the same

time, the more effective the arrangements, the lower the probability that such an incident will occur.

In Australia, governments understand clearly their roles and responsibilities. The Commonwealth has provided leadership and the states and territories have worked well with the national authorities. Functional mechanisms for cooperation and coordination are in place. Minor barriers to information exchange have been removed by legislation. Money is not an especially divisive issue for public health. The National Health Security Agreement includes dispute resolution provisions.

Canada's intergovernmental planning processes are broadly similar to Australia's. Canadian officials speak confidently about their readiness to meet their international obligations and various expert groups carry on the tasks required to do so. But the fact that governments have yet to formally finalize federal-provincial agreements, including one on roles and responsibilities, which have been ready for signature for over two years, suggests that significant disagreements remain, including differences on money. Dispute avoidance and dispute resolution provisions are also not well developed. On paper, Canada is not as well prepared as Australia.

India's constitution provides explicitly for executive federalism, and the national planning process includes planning for improvements in public health. Heads of government are the principal coordinating mechanism in India but they do not typically focus heavily on public health issues (given the vast array of other planning challenges they face). While the Union Minister of Health and Family Welfare meets periodically with counterparts from the states and territories on a multilateral basis, senior public health officials are the driving force to improve India's capacity to meet IHR obligations. The Integrated Disease Surveillance Project is structured to create the kind of multilevel system called for in the international rules. The fact that the initiative rests more at the level of senior experts and bureaucrats is consistent with the way in which the Indian Union manages many functional files. If India is less advanced than Australia, and probably Canada, in planning for effective IHR implementation, this has mainly to do with the size and complexity of India and the huge differences in development among states and territories.

At one level, the assessment of the United States should be a "no brainer". The CDC is the world's leading public health organization. The United States has vast epidemiological, scientific, and laboratory resources, to the point where it has capacity overseas to help developing countries prepare for the threat of pandemic. The federal government also has a detailed plan to meet the threat of pandemic that covers many provisions of the IHR. However, the U.S. Government has not committed to implementing those provisions of the IHR that are constitutionally reserved to the states. Instead, Washington is employing conditional grants and technical support to encourage state and local officials to take the necessary actions to implement those provisions of the IHR that are within their constitutional competence. And in general the states, partly through the influence of the Council of State and Territorial Epidemiologists, are providing the CDC the data required by the IHR. Yet it is difficult to assess whether the U.S. approach to implementing the IHR would enable the U.S. authorities to provide an integrated and timely response to a public health

Table 4: State of Preparedness of Implementing IHR Comparison of Four Federations

	Australia	*Canada*	*India*	*United States*
Constitutional Power of Federal Government to Implement IHR	Strong	Strong in some areas and weak in others	Strong	Strong in some areas and weak in others
What are Intergovernmental Decision Rules?	Consensus	Consensus	Union in charge	Strategy decided at federal level. Each government otherwise acts independently
Who Does What When No Emergency?	Roles and responsibilities clear	Roles and responsibilities generally clear	Allocation of roles and responsibilities complex	Roles and responsibilities clear
Who Does What During an Emergency?	Clear	Some ambiguity	Clear	Nothing explicit
Mechanisms for Internal Coordination Among Governments	Well-established vertical committees with strong commitment from highest level	Established vertical committees with main coordinating at level of senior public health officials	Vertical coordinating committees of ministers exist but less important than NICD and Integrated Disease Surveillance Project	Conditional grants and technical assistance used. Effectiveness uncertain
Who Pays for What?	Clear. Explicit cost sharing arrangements among orders of government	Some disagreement regarding who pays for IHR implementation	Public funding in aggregate small. But clear for National Programs	Clear. Each government responsible for costs of implementation within its sphere. Some conditional cost sharing
Dispute Avoidance and Resolution Mechanisms	2007 legislation facilitates dispute avoidance. There are agreed dispute resolution mechanisms. Should these fail the Commonwealth power to resolve disputes strong	Data sharing and money still potential source of dispute. No strong special dispute resolution powers	Avoidance built into data sharing arrangements and Union fiscal leadership. Strong dispute resolution powers if needed	State commitments on data sharing limit one potential area of dispute. Otherwise nothing specific
State of Preparedness Relative to IHR Commitments	Strong on paper	Both orders of government seem prepared but functionality of link between two uncertain given slow pace at which key intergovernmental agreements signed	Good progress in a huge and complex federation but still large challenges	Federal government preparedness strong on paper. Functionality helped by CSTE commitments on data sharing but further work on federal-state links still required

emergency of international concern. The U.S. strength lies in its pool of highly qualified personnel who would be responsible for managing a public health crisis. Its weakness may lie in the numerous boundaries within and between governmental entities that would need to be managed.

CONCLUSIONS

In all four federations, the IHR are taken seriously. In all four cases, there are multilevel governance arrangements in place or being developed (India). In all four, the new domestic governance provisions are an improvement over the preceding regimes.

Through legislation, Australia has created an effective bridge between the IHR and Australia's domestic governance system. India also appears to have a system with clear roles and responsibilities and has fashioned its own approach to internal coordination through its IDSP. In both cases, the leadership is top down. In neither case, however, does top down mean that the system is not multilevel. In both, there is a strong recognition that the substantive work of meeting IHR *operational* obligations begins at the local level and builds up even if the *planning* is top down.

In the United States, the federal government is the strategic planner. Although the federal authorities do not guarantee state and local compliance with the IHR, state and local governments are, in general, going along with Washington's approach. This makes for a system that is operationally functional in a non-crisis situation. Whether the governance system would be seamless in a pandemic situation without more power in Washington is an open question as reflected in the concerns expressed by the General Accountability Office.

The 2008 independent assessment of Canadian readiness found significant shortcomings given the difficulty federal and provincial governments have had in signing off on key intergovernmental agreements. With regard to emergency situations, Ottawa has chosen not to test the strength of its constitutional powers for fear of annoying provinces and thus potentially undermining ongoing multilevel collaboration.

It was noted at the outset that Australia and India are more centralized federations than Canada and the United States. The governance arrangements that have been evolving in all four are consistent with these differences in constitutional and political culture. These distinctions are reflected most clearly in the *planning* processes for meeting the IHR commitments. In Australia and India, planning is top down with the federal governments in unquestioned leadership roles. In both cases, the federal authorities can either legally and/or fiscally compel state and local compliance even though in practice they strongly prefer intergovernmental cooperation to unilateral coercion. In Canada and the United States, the federal governments also play leadership roles but in a way that recognizes fully the extensive constitutional authority of the constituent units in public health. In all four cases there is the expectation that constituent units and local authorities will play a large operational role in meeting IHR requirements.

While the planning processes in Canada and the United States are consistent with the constitutional and political cultures of the two countries, it is far from certain whether they are consistent with *time* as a crucial factor in managing public health threats. In both, the federal authorities can be seen to be straining to achieve the kind of intergovernmental arrangements that are functionally effective. In both, there is recent evidence that timely intergovernmental responses to crisis situation (SARS and Katrina) cannot be taken for granted. The normal pace of intergovernmental relations in Canada and the United States rests uneasily beside timeliness as an essential element for the successful implementation of the IHR.

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21

The Federal Role in Canada's Cities: The Pendulum Swings Again

Robert Young

L'intérêt du gouvernement fédéral pour les questions urbaines a grandement varié au Canada. Dans la période récente, l'approche traditionnellement discrète du gouvernement Chrétien a fait place à l'engagement enthousiaste de Paul Martin dans les dossiers municipaux, comme en a témoigné le Nouveau pacte pour les villes et les collectivités. En revanche, le gouvernement Harper souscrit à un « fédéralisme ouvert » dont l'un des principes consiste à respecter scrupuleusement les compétences constitutionnelles, de sorte qu'il a mis un frein à la plupart des initiatives du Nouveau pacte. Certes, on peut s'abstenir d'intervenir dans les affaires municipales pour d'excellentes raisons. Mais les plus courantes n'expliquent pas vraiment l'approche du gouvernement conservateur, qui semble plutôt motivé par d'autres facteurs comme l'électoralisme, une tendance à se soustraire au blâme et l'interminable liste des besoins des municipalités. Ce chapitre allègue donc qu'en raison des compétences partagées qui en sont la caractéristique fondamentale, le fédéralisme offre aux gouvernements un prétexte pour ignorer des demandes et des besoins majeurs, prétexte dont ne disposent pas les gouvernements centraux des États unitaires.

INTRODUCTION

On 31 May 2002, Finance Minister Paul Martin Jr. gave a speech to the Federation of Canadian Municipalities (FCM). It is normal for senior ministers and even prime ministers to address the annual conference of the FCM, where mayors and councilors from all over Canada gather to discuss their common interests, and often to co-ordinate their demands on other governments, particularly the federal government. But never had FCM members heard such sweet music as Mr. Martin delivered. Recounting the problems, challenges and opportunities confronting Canadian municipalities − which the FCM had recited for some time − he promised a "New Deal" for them, hinting at funding increases, new programs and perhaps new revenue sources, and committing himself to formal pre-budget consultation with a group of mayors (Martin 2002).

He did not intend to be daunted by the constitutional and political obstacles to a federal role in Canada's cities. As he put it "[w]e've all seen good ideas, backed by the best of intentions, crash against the coral reefs of entrenched ways and attitudes. We can't let that happen here. The stakes are simply too high". Mr. Martin, however, had been asked by Jean Chrétien's Prime Minister's Office to refrain from using the term New Deal in the speech (which he did 15 times), and three days later he was no longer Minister of Finance (Delacourt 2003, 6-24; 239-244).

Of course there were deeper issues in the long-running Martin-Chrétien battles than the stance of the federal government towards municipalities. But Mr. Chrétien was cautious when considering this file. In the late 1990s, Torontonians were furious about the treatment of their city by Ontario's Harris government, and presumably their Liberal M.P.s felt the same way about forced amalgamation and the downloading of services. In response to this pressure and others emanating from academics, business groups, the FCM, and mayors across the country, the Chrétien government established the Prime Minister's Caucus Task Force on Urban Issues in May 2001. After extensive hearings and an interim report, the Task Force issued a final report in November 2002. This called for a strengthened and more co-ordinated federal presence in cities, but only in three particular areas – affordable housing, infrastructure, and transit and transportation (Prime Minister's Caucus Task Force 2002). Initiatives in these areas could be handled through the tax system and existing programs – especially the various infrastructure programs begun in 1993 and expanded regularly during the Chrétien years. Although a small unit established within the Privy Council Office was charged with thinking about urban communities, the Task Force recommendation that a minister be designated to represent urban interests and to co-ordinate federal activities in urban regions was not taken up by the government. Mr. Chrétien was not an adventuresome prime minister, especially concerning intrusions into areas of provincial jurisdiction.

OTTAWA MOVES IN (MARTIN) – AND OUT (HARPER)

The same was not true of the governments headed by Paul Martin (2003-06). One of his very first initiatives was to create a Cities Secretariat within the Privy Council Office, with a Parliamentary Secretary, John Godfrey, holding the cities brief. In early 2004, he also established a large External Advisory Committee on Cities and Communities, headed by Mike Harcourt, a former British Columbia (BC) premier, and mayor of Vancouver, and with a membership heavily weighted towards urban areas. In July 2004, Mr. Godfrey became a Minister of State, responsible for the new portfolio of Infrastructure and Communities. The 2004 budget, as promised, provided that municipalities would receive a 100% rebate of their GST/HST payments, a benefit estimated at $7 billion over ten years (Canada 2004b). As well, the budget committed more money for the Urban Aboriginal Strategy, extended $4 billion over ten years for cleaning up contaminated sites, and accelerated spending under the Municipal Rural

Infrastructure Fund. In the 2005 budget, more promises were realized. The government pledged $5 billion in transfers to municipalities over the coming five years – nominally from the federal share of the tax on gasoline – with the $600 million allocated in 2005-06 set to rise to $2 billion by 2009-10 (Canada 2005). As well, another $300 million was added to the Green Municipal Funds (which were administered through the FCM).

The Martin government drove deeper on the urban front. Some programs established under the National Homelessness initiative were renewed and strengthened. More important, two tripartite urban development agreements (UDAs) were renewed. One involved Winnipeg, where joint and individual efforts by the three governments were to be focused on urban re-development, economic competitiveness and new opportunities for Aboriginal people (Canada 2004a). Another, the Vancouver Agreement, targeted community building in the Lower East Side, through a highly co-ordinated approach of many agencies. The expressed belief was that "by working more closely together, all three orders of government can foster and enhance sustainable economic, social, health and community development in the City of Vancouver" (Vancouver Agreement 2005, 2). Smaller UDAs were signed with the government of Saskatchewan and the cities of Regina and Saskatoon in May 2005.

Negotiating the Vancouver Agreement involved enormous transactions costs (though the public servants responsible for it received several awards). Other agreements were also complex. The Canada-Alberta gas tax agreement ran to 51 pages, and involved extensive reporting, auditing and evaluation requirements (Canada-Alberta 2005). The Quebec agreement was much shorter, but administratively complex nevertheless: given the provincial government's policy of sequestering its municipalities, the federal monies were to be transferred to a new body called the *Société de financement des infrastructures locales du Québec*, which would make distributions to municipalities (Canada-Québec 2005). Still the Department of Infrastructure and Communities was only hitting its stride. With the gas tax agreements successfully negotiated, its leadership was contemplating further UDAs along the lines of those signed with Winnipeg and Vancouver, and was already negotiating with officials from Victoria and the city of Toronto.

All of this changed, however, with the election of the Conservative government in early 2006. Moving quickly to restructure his administration, Prime Minister Harper folded the Department of Infrastructure and Communities into the Department of Transport. Officially this merger created a new "Transport, Infrastructure and Communities Portfolio". But the separate position of Deputy Minister of Infrastructure and Communities did not survive very long, and the Communities branch has disappeared from Government of Canada websites. Negotiation of new UDAs ceased.

To understand the Conservative government's approach to municipalities – or, more precisely, its retrenchment and withdrawal from the adventurous initiatives of the Martin government – it is necessary to understand its general approach to federalism. This is subsumed under the slogan of "Open Federalism". As with all slogans, this is open to interpretation, and one of the political virtues of the concept is its flexibility, but through a careful reading of Conservative Party documents and of Stephen Harper's writings, speeches and

interviews we can infer the following features of the Open Federalism approach (Young 2006):

1. There should be rectitude and order in the conduct of federal-provincial relations. These should not involve *ad hoc* arrangements, special bilateral deals or desperate last-minute compromises but should work towards principled agreements made for the long term.
2. The provinces should be strong. Provincial governments are legitimate and occupy important fields of jurisdiction where they have a duty to serve their citizens.
3. The constitutional division of powers should be respected, and a "strict constructionist" reading of the Constitution Act should guide the federal and provincial governments. The federal government should focus on its core functions, such as defence, foreign affairs and the economic union. When Ottawa must involve itself in areas of provincial jurisdiction, such as highways, health and higher education, there should be no unilateralism but rather a cooperative relationship with provincial governments.
4. There has been a fiscal imbalance in the Canadian federation. While the provincial governments have heavy and rapidly growing responsibilities in areas like health and education, and are under considerable financial stress, the central government has abundant revenues which it has used to intrude upon areas of provincial jurisdiction. Correcting the fiscal imbalance was the critical priority for the new Conservative government.
5. Quebec is special. The provincial government has particular "cultural and institutional responsibilities" which make it distinctive (Conservative Party of Canada 2005, 3). So, where culture is involved in international forums such as UNESCO, the province should have a voice. Not only must Quebec's specificity be recognized, but it is of the utmost importance that Quebecers perceive that federalism can work.

This approach to the Canadian federation has obvious implications for the municipal file. The constitution states clearly that municipalities fall within provincial jurisdiction. Determination to maintain this control is found most keenly within Quebec provincial governments, and harmonious relations with Quebec are vital. Municipalities might be interested in secure and stable revenues, which they require, but the provinces are the principal actors *vis-à-vis* municipal governments. Ottawa may devise policies to attack particular problems that occur within cities, such as crime and immigrant settlement and transit, but continuous tripartite relations are not congruent with Open Federalism.

The Conservative government of Stephen Harper has been carefully incremental in its policy moves, as planned (Flanagan 2007). Concerning municipalities, the government has said little, except for extending the gas tax transfers through to 2014. The government remains committed to infrastructure programs, however, and has increased allocations steadily. It aims to make agreements with the provinces to provide municipalities with access to the new Building Canada Fund (which integrates some infrastructure programs), while still maintaining the Borders and Gateways Fund and the Municipal Rural

Infrastructure Fund. It has also announced a new National Urban Transit Policy; however, the content of this is quite unclear, except that details will be worked out through agreements with the provinces and territories (Cannon 2007).

Perhaps the clearest message about the Harper government's withdrawal from the ambitious Cities Agenda of its predecessor was delivered by the Prime Minister in a 2006 address to the Federation of Canadian Municipalities (Harper 2006b). Mr. Harper complimented local governments, and recounted his commitments to infrastructure, urban transit, policing, and immigrant settlement. He spoke of maintaining the gas tax transfer and even mentioned that it had originated under the "New Deal for Cities and Communities". However, he referred several times to the "levels" of government in Canada, whereas the FCM had been fighting for years to have municipalities termed an "order" of government. Addressing the fiscal imbalance, he mentioned local governments' financial problems, but also maintained that "for decades − and especially in recent years − Ottawa has stuck its nose into provincial and local matters". He insisted that Ottawa would confine new program spending to "jurisdictional areas that are clearly federal". Speaking about infrastructure, he argued that "[t]he federal role must be defined to deal with projects of national significance", and noted that "[c]onstitutionally, of course, the federal government must deal with the provinces on many of the issues that are important to you". Perhaps most significantly, he pointed to Quebec, which "zealously guards its constitutional responsibilities, including those for municipal affairs", observing that the Charest government had struck a new arrangement for transfers to municipalities which was to substantially increase their revenues. Mr. Harper then stated: "I recommend you urge your provincial governments to examine the Quebec model closely". In short, while maintaining transfers and remaining involved in infrastructure and transit, the new federal government was obviously pulling back hard from its entanglements with municipalities.

EQUILIBRIUM IN FEDERALISM?

On the municipal file in Canada, the pendulum of federal involvement has swung from caution under Mr. Chrétien to deep involvement − through institutional re-structuring, spending, and negotiating cooperative arrangements − under Mr. Martin, and then backs to a much more limited and traditional role under Mr. Harper. This is the empirical story. But is there a theoretical lesson? Is it possible that there is an equilibrating tendency or mechanism in Canadian federalism or even in federalism generally? In honour of Ron Watts, some such larger speculation is warranted.

One possible mechanism is the constitution. Both Mr. Chrétien and Mr. Harper have invoked it as a constraint. And yet the Canadian constitution is very flexible. In particular, Ottawa can use the spending power to achieve its objectives in almost any area. It has made direct transfers rather freely, and by placing conditions on access to funds, the federal government can provide incentives for provincial and municipal governments to behave in particular

ways. This it has done in many areas of policy. Mr. Martin's government, for instance, made increased federal transfers to the provinces for health care conditional on provincial measurement and management of waiting times for certain procedures. And it spent freely on the UDAs with provincial agreement. We will see shortly that the constitution can be useful in restoring equilibrium, but not in the sense of legally or practically constraining federal intervention.

Perhaps public opinion was instrumental in pushing Ottawa back from the cities and communities file. It might be that public attitudes and electoral consequences weighed on the federal government. Certainly Mr. Martin was attuned to opinion. This is why, to the displeasure of many champions of cities, his New Deal for Cities quickly morphed into the New Deal for Cities and Communities: the Martin government was not about to sacrifice support in small-town and rural Canada by concentrating all its efforts in the big connurbations. But public attitudes do not seem to explain the federal withdrawal. In general, the Canadian citizenry approves of intergovernmental cooperation and of governments working together to achieve common goals. This was most thoroughly tested in surveys conducted in Alberta and British Columbia after the 2000 federal election (Cutler and Mendelsohn 2004). Even in areas like health, the environment and energy, large majorities (over 75 percent) took the view that the federal and provincial governments should "work together" (ibid., Table 2). Moreover, Mr. Martin's initiatives were rewarded by strong support in the big cities. Whatever the cause, in 2006 his Liberals won 77 of the 85 seats in the Census Metropolitan Areas of Vancouver, Toronto and Montreal.

Perhaps it was provincial pressure against Ottawa's initiatives that led to the retreat. In the late 1970s, this factor seems to have helped cause the demise of the Ministry of State for Urban Affairs (Feldman and Graham 1979). But in the recent period, there appears to have been no strong provincial pressure for Ottawa to back off from cities and communities. On the contrary, in 2004, the provincial and territorial government ministers responsible for municipal affairs had reached agreement on a set of principles about federal-government initiatives regarding municipalities, and the first principle about funding was this: "[a]ny federal funding likely to concern the municipalities must be stable, on-going and thus reflect a commitment to achieving long-term solutions" (Provincial-Territorial 2004a). Of course, there were also principles involving "respect for provincial and territorial fields of jurisdiction", which included the declaration that initiatives involving municipalities must abide by provincial and territorial priorities, and that all projects and programs required the approval of provincial and territorial governments. But at another meeting two months later, "[m]inisters stressed their individual readiness to begin bi-lateral negotiations immediately with the federal government", and they met with the minister, John Godfrey, who supported the principles advanced; hence the leaders looked forward "to a constructive relationship with the federal government to meet pressing municipal and local needs" (Provincial-Territorial 2004b). And this stance did not change. In 2005, the ministers met again, affirming "principles" that were identical to those passed the previous year (Provincial-Territorial 2005a). So arrangements seem to have been satisfactory for the provinces and territories. Indeed, at the 2005 meeting, they advocated that federal funding for

infrastructure be made permanent (Provincial-Territorial 2005b). At least from public declarations, then, the provincial-territorial order of government was not pressing for a federal retreat from the municipal file.

Ideology is perhaps an answer. Stephen Harper and his Conservative colleagues appear to genuinely believe in a clear division of responsibilities between the federal and provincial governments (see especially Harper 2006a). This theme peppers Mr. Harper's speeches and the party's policy declarations and platforms. On the municipal front, a good deal of the tripartite negotiations about the gasoline tax in particular involved the federal government in what the Conservatives would regard as undue extra-jurisdictional micro-management, something that Ottawa should forswear. However, the Conservative Party has consistently exempted some policy fields from the general stricture against federal interventions in areas of provincial jurisdiction. The two main ones are infrastructure and health (Conservative Party of Canada 2006). Higher education is also seen as a valid area of federal activity and federal-provincial cooperation. So ideology alone cannot account for the swing of the pendulum − for Ottawa moving back from the cities and communities agenda.

What else is there? I think we must return to the constitution. Simply enough, the division of jurisdiction in Canadian federalism, as elsewhere, provides a rationale for the federal government *not* to act in some policy area. It can argue that it does not have the constitutional authority to act in the municipal realm. Contrast this with the situation in a unitary state, where one government is responsible for the entire scope of public policy, and where all public demands about any significant problem inevitably target the central government, sooner or later. Normally, we assume that demands escalate as a function of the severity of the problem. As they do, the pressure tips the government into action, and policy innovation is the result. In federations, however, jurisdiction is a constitutional obstacle to this process: an extra increment of political effort is necessary to surmount it and to generate action. A government determined to avoid responding can raise the barrier, rhetorically, and invoke constitutional strictures that inhibit action − by itself. Perhaps this is blindingly obvious, but the essential nature of federalism provides governments with a rationale *not to act* in some policy area.

In Canada, there are many examples of this phenomenon. Both the federal and the provincial governments invoke jurisdictional reasons for not dealing seriously with the problems of Aboriginal people living off reserves. Foreign policy provides another example. In early 2008, Ontario was sending a trade delegation to China, and the government wanted this to proceed despite considerable public condemnation of Chinese repression of Tibetan protesters. The Premier attempted to sidestep demands that the delegation be kept home. He stated that "[a]ccording to our constitution there is one authority which has responsibility for articulating foreign policy. It's only sensible. It is the federal government" (Blizzard 2008). Further, "[u]ntil such time that they tell us it would be inappropriate, I think it's important for us to practise the style of foreign policy that Canada has adopted for several decades now, which is a policy of engagement" (Howlett 2008). It was all very transparent, but it helped Mr. McGuinty dodge some criticism.

We often think that governments both federal and provincial are eager to move into policy fields and solve problems in order to garner political support. Governments seek power wherever support is to be found. But the real political calculus is more subtle, for governments seek to spend where the dollars maximize votes at the margin. Much of the demand for spending on communities emanates from urban areas where the Harper Conservatives have very few seats. The leadership must respond not only to opportunities for growth but also to the wishes of members of the existing caucus and cabinet, especially in a minority situation and despite the tight control from the centre. This does not support an active urban agenda. (On the other hand, Mr. Harper can still target big cities, should he choose to do so, through the transit envelope and the hugely discretionary infrastructure programs.)

Governments may also want to avoid the blame that can accrue when new adventures backfire or are perceived as insufficient. Big new policies like the New Deal for Cities and Communities raise expectations across the country. If these are not met, then resentment, not support, is the outcome. And the requirements of Canadian communities are enormous. In fact, local governments are a bottomless pit for spending. They can absorb any amount of money that can be thrown at them, both through meeting the perceived needs of various segments of the citizenry and also by keeping taxes low and "gold plating" the goods and services they supply. Ottawa could be drawn inextricably into municipal policy areas, with severe consequences for the treasury and uncertain political returns. Mr. Harper wanted out, and the Martin foray was recent enough and had sufficiently shallow roots that his government could manage to withdraw. For a federal administration ambitious to act boldly in some of its areas of responsibility, such as defence, and also to cut its own tax take, there needs to be an excuse not to act in other areas. Insofar as Canadian municipalities are concerned, the federal constitution provides that excuse.

CONCLUSION

Theorists of Canadian federalism have debated the impact of this institution on the growth of the state, and particularly the welfare state (Banting 1982). More general theories of "market-preserving federalism" show how a federal system restrains state growth, if it is designed so that micro-intervention is restricted to the sub-state level while the economic union is maintained by the central government, so forcing sub-state horizontal competition (Weingast 1995; McKinnon 1997; see also Harmes 2006). The suggestion here about the pendulum of federal action and withdrawal is not so sophisticated; nor has it been developed or tested systematically. It is simply that the division of jurisdiction in federalism allows a government reasonably to eschew action in some area where it estimates that blame would be accumulated, calculates that political support would not be generated optimally, or determines that its preferences lie in other policy areas and fiscal choices. Federal constitutions can provide an excuse for the pendulum of involvement to swing back. This is an underappreciated but intrinsic aspect of federalism that warrants more

consideration, perhaps through the sort of careful comparative work that the inestimable Ron Watts has taught us to do.

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Section Nine
Federalism and Europe

22

European Futures: The Unbearable Heaviness of Thinking Federally

Peter Leslie

La « Constitution pour l'Europe » signée en 2004 par les chefs d'État et de gouvernement de l'Union européenne n'a jamais été ratifiée. En 2007, on s'est entendu sur une proposition moins ambitieuse, celle du Traité de Lisbonne, mais celui-ci a été rejeté par voie de référendum par les électeurs irlandais. Depuis, la plupart des États membres l'ont ratifié mais personne ne saurait dire s'il sera mis en vigueur. Cette incertitude quant à l'avenir de l'Europe et de l'UE s'ajoute à plusieurs autres. La présente étude propose donc cinq « scénarios possibles pour l'avenir de l'Europe » qui anticipent le développement de l'UE et de l'Europe proprement dite. Certains de ces scénarios reposent sur une vision plus franchement supranationale que d'autres. L'auteur fait ainsi valoir que de nombreux observateurs et dirigeants politiques jugent nécessaire d'opérer d'importants changements structurel – qui créeraient en bref une Europe plus « fédérale » – pour faire de l'UE un véritable instrument d'intégration capable d'accueillir de nouveaux membres. Mais à ce positionnement qui reste tendancieux, certains opposent un contre-positionnement en vérité plus conforme aux buts déclarés de l'UE selon lesquels l'Europe et les peuples européens seraient mieux servis par un système qui évite délibérément la surinstitutionalisation, *c'est-à-dire un système ne reposant* pas *sur la notion ou l'idéal du fédéralisme. Cette question est analysée dans une conclusion qui minimise la portée des définitions structurelles ou institutionnelles du fédéralisme pour mieux mettre en lumière ce qui en constitue l'essence, à savoir la création d'une communauté politique multicouche. Les identités et les filiations politiques sont en effet multiples et complémentaires sous un régime fédéral, et elles existent à différents niveaux sans domination d'aucun d'entre eux. Or, au sein de*

l'UE, chaque État national reste dominant en tant que point central de ces identités et filiations. En cherchant à créer une Union européenne fondée sur des institutions dotées d'un trop grand pouvoir pour susciter un vaste appui, on risque de miner sa légitimité et donc de compromettre sa capacité d'accomplir certaines des fonctions limitées mais importantes que lui confèrent les traités constitutifs.

INTRODUCTION

Consider the following two statements, not at all unusual in the literature on the European Union (EU):

> … although most scholars would agree that [the EU] has been a federation in the making since the 1960s, the language of federalism, the very term, continues to be highly contested. …there is little doubt that the EU will never be called a "federation" *tout court*. This is neither likely nor desirable. (Howse and Nicolaïdis 2001, 8)

> ... the European Union already is, and will remain in the future, a "Partially Federal Union". This means that the EU is not a federal State and that, in the foreseeable future, it will not become one. (Piris 2006, 192)

Both statements, although appearing in major – and quite admirable – works about the EU, sow confusion. Terms such as "federation" and "federal" are used, then seemingly withdrawn, or qualified in ways that make one wonder why they were used at all. Moreover, both statements mix description with prediction. The authors evidently want to describe what the EU is, and to say something about where it may be headed. To do this, they assume readers can recognize a federation when they see one, and will better understand the EU and its dynamics if they use the language of federalism – but they also say, in effect, that such terminology does not quite fit.

There are two reasons for such equivocation. One is that the EU is a complex system that is evolving quite rapidly, but not along a well-marked path: it is possible to imagine, both for the EU as an institutional structure and also for the whole continent of Europe, a number of "alternative futures", all plausible. Some scenarios might be said to be taking the EU in the direction of federalism, others, away from it. The second reason for equivocation is that it is not so clear, after all, what the implied benchmark is. Simply put, to describe the EU as "a federation in the making", or as "partially federal" raises as many questions about the federal idea, as it does about the EU and the forces that are shaping it.

Does it matter if the EU is "federal", or is at least said to be tending towards federalism? If what is at issue here is the matter of definition, then, no: there is no reason to put a lot of effort into classification and concept-building, for their own sakes. People will take different views on the matter of "a federal Europe", whether as mere description, or as political goal (*finalité*). So why get mired down in scholastic disputes over the meaning, or appropriateness, of words like "federalism" in the context of EU studies? This chapter tries to avoid doing so.

It seeks, instead, to focus on the views of various leaders and opinion-shapers in Europe who deem it necessary to strengthen EU institutions and to extend EU policy capabilities to work towards fairly specific goals, shared by many of the states of Europe and probably by all of the EU member states. Such a "deepening" of European integration is sometimes described as moving in the direction of federalism, but such a characterization is tendentious simply because "federalism" means very different things to different people. For example, in Germany the idea of creating a federal EU is often equated with a cautious strengthening of EU institutions, counterbalanced by guarantees of the powers and autonomy of national states, and indeed of its *Länder*; by contrast, in Britain "federalism" in the context of the EU carries connotations of the indefinite extension of the role and powers of the EU and its institutions, overriding those of the member states. In this situation, misunderstandings are inevitable, which is one reason for avoiding the term "federalism" in discussions of the future of Europe and the EU.

In general, in this chapter I seek to steer clear of semantic disputes, and to focus on matters of substance.

- In a first section, I trace some recent events: the EU leaders' endorsement of a new Constitutional Treaty, commonly called a "Constitution for Europe", in 2004; the abandonment of this project some time between 2005 and June 2007; behind-the-scenes negotiation to draft, instead, a Reform Treaty; and the signing, December 2008, of the Treaty of Lisbon (as the Reform Treaty is now known). My approach here is descriptive, and has the aim of providing background information for what follows.
- I then, in the next section of the article, set out five "alternative European futures": different scenarios for the future development of the EU. Some scenarios envision a more supranational[1] (some would say a more "federal") future than others do. An important consideration is that the Lisbon Treaty, which the voters of Ireland rejected in a referendum in June 2008, may never be ratified.[2] Ratification or non-ratification is an important factor,

[1]Much scholarly analysis and public debate over the development of the European Union and its predecessor Communities (the EC/EU) has focused on the distinction between supranationalism and intergovernmentalism, and the admixture of the two in EC/EU institutions and processes. *Intergovernmentalism* means that the national governments – the member states – are in charge; decision is by negotiation, all states must at least acquiesce in the decisions taken, and EC/EU policies reflect the lowest common denominator on which agreement can be reached. Publics are involved through their national states, and only secondarily through direct representation (that is, through the European Parliament). *Supranationalism* means that EC/EU-level institutions have an important role to play, sometimes independently of the member states, and that the member states agree to be bound by decisions to which they themselves were not party (for example, certain decisions of the European Commission), or that were taken by a qualified majority in the Council, with the consent of the European Parliament (co-decision). The Lisbon Treaty makes co-decision (described as the "ordinary legislative procedure") the default rule for enacting EU legislation.

[2]Since the presentation of this paper, the Treaty of Lisbon did come into force on December 1, 2009.

though not the only one, that can be presumed to affect the future development of Europe and the EU.

- In a final section I ask: What sorts of constitution-like change, if any, will be needed if the EU is to achieve objectives that the more strongly committed "Europeans" are aiming for? (In this context, "Europeans" indicates adherence to a political program: the term refers to those who endorse a more unified, more fully integrated Europe, and usually also a European Union that continues, at least for a time, to admit new members.) I point out that it is the belief that significant structural change will be needed if the EU is to achieve its goals, that has led some observers and some political leaders in EU states to urge movement towards a "federal" Europe. But is there any gain in understanding, if one uses the language of federalism in the EU context? The question will lead us to reflect on and to clarify the federal idea, or the federal ideal – equally in the context of established federations, and of the European Union. The aim of this section, then, and indeed of the article as a whole, is to help identify important political and social goals, to which the adoption of certain political structures and practices, typically – or at least sometimes – called "federal", may contribute.

FROM A "CONSTITUTION FOR EUROPE", TO THE LISBON TREATY

The European Union already has something very like a constitution: it predates the aborted Constitution for Europe. This "constitution-equivalent", if I may use that term, consists of three basic treaties, together with nine supplementing or amending treaties and five accession treaties – 17 in all, comprising 2800 pages of text (Piris 2006, 56-57). The basic treaties are the Treaty Establishing the European Community ("TEC", often referred to as the Treaty of Rome, 1957), the Treaty Establishing the European Atomic Energy Community (also signed in Rome in 1957), and the Treaty on European Union ("TEU", signed in Maastricht, 1992).[3] The TEC and the TEU are the main ones. Together, they: (a) set out the structure of the Union's institutions, (b) confer upon them certain powers or competences, and mandate a set of objectives and even certain policies for the Union, (c) establish rules for the passing and enforcement of European law, and, by implication, (d) limit the powers of the member states. The treaties have been ruled by the European Court of Justice to override national law in the event of conflict, a principle that has consistently been upheld by national courts.

The more ambitious of the proponents of a European Union were disappointed with the TEU or "Maastricht Treaty". They had been aiming for a form of political union capable of fulfilling a substantial policy role across a

[3]The first of the founding treaties was the Treaty Establishing the European Coal and Steel Community, also known as the Treaty of Paris, 1951. That treaty is now absorbed into the TEC.

wide range of subject-areas, embedding the member states within a European-level system. They wanted to have all matters of common interest dealt with through a unified institutional structure. However, as negotiations among the member states proceeded, it became evident that agreement could be reached only on a more fragmented system. The outcome was a structure with three "pillars", each dealing with a particular set of subjects, and involving the institutions of the EU in different ways. Only the first pillar – the one operating in accordance with provisions set out in the TEC – created institutions with the power to create and enforce legislation that is paramount over national law. This pillar covered economic affairs and a set of policy fields arguably related to (or difficult ultimately to distinguish from) the economy. The other two pillars envisioned cooperation among the member states, with a less potent role for EU institutions, especially the Commission: these were the pillars aiming for a Common Foreign and Security Policy (CFSP), and for enhancing Police and Judicial Cooperation (a field later described as "Justice and Home Affairs", or JHA). These two pillars were clearly not as sturdy as the first one, and did not elevate their respective subject-matters to the same (or a comparable) plane.

Thus, in the view of the most strongly committed "Europeans", there were several so-called "leftovers" from the Maastricht negotiations – they hoped for the fashioning of more effective central institutions, with wider powers than the Maastricht treaty conferred. These items acquired substantial urgency very shortly afterwards. In 1993, at a "European Summit" in Copenhagen, the presidents and prime ministers of the EU member states committed the Union to a process of enlargement, or new accessions covering much of eastern Europe, the remnants of the Soviet empire. At this meeting there was apparent consensus that institutional change would be necessary to equip the Union to operate effectively with a larger membership (there are now 27 members, where in 1993 there were 12). However, subsequent efforts at institutional renewal, notably in the Treaty of Amsterdam (1997) and the Treaty of Nice (2000), both of which amended the earlier treaties, did not succeed in adequately strengthening the Union, in the view of the more ambitious reformers. This group aimed for a robust, more democratic structure, with fewer opportunities for the more nationally-minded states to block action at the EU level. In fact, in this regard the Treaty of Nice marked, for its critics, a step backwards. Rules for the passage of European legislation became more cumbersome than before. There was a recognized problem, but no consensual solution to it was in sight. The "pillar" structure remained a target of criticism, especially for those envisioning the creation of a Union with capacity to act across a wider part of the policy spectrum.

In view of the evident lack of consensus on these matters, in December 2001 the European Council, or "European summit" – the Heads of State and Government of the EU – set up a European Convention headed by former French President Valéry Giscard d'Estaing. The Convention had a mandate to define goals appropriate to the Union, and to draft a new treaty to replace the earlier ones (or, failing agreement, to identify issues relating to the institutional future of the EU, that would have to be resolved). Contrary to the expectations of many, the Convention did succeed in reaching agreement, and in July 2003, it presented the draft of a "Constitution for Europe" to the European Council. A

period of negotiation among the member states ensued, and certain clauses were amended. In October 2004, the 27 members of the European Council signed a new *Constitutional Treaty*.[4] While retaining the main institutional features of the EU, the new Constitution, had it gone into effect, would have:

- replaced the 17 existing treaties, in effect codifying and simplifying them, and reducing 2800 pages of text to about 400;
- included a (not entirely new) statement on the fundamental values of the EU, stipulating that applicants for membership must adhere to them, and providing for possible sanctions (including suspension of voting rights) against existing member states in cases of a "serious and persistent" breach of those values;
- adopted some symbols (flag, anthem, motto); and
- somewhat altered the EU's institutional structure (a thumbnail sketch of the present structure is provided in the Appendix), providing for a smaller Commission and creating two new offices: that of President of the European Council, and that of Union Minister for Foreign Affairs, who would also be Vice-President of the Commission.

The powers of the Union (and implicitly, restrictions on the powers of the member states) would have been little changed. However, the new Constitution did make some institutional changes designed to strengthen the Union's performance in relation to Justice and Home Affairs, and in relation to the EU's Common Foreign and Security Policy. It also created a new and more explicit legal basis for some of the existing activities of the Union.

The Constitution would not have been the instrument of any wholesale redesign of the European Union. Still, it would have been a high-profile innovation, and was intended to have considerable symbolic significance. Although no reference was made to federalism, or to a federal goal for Europe – the United Kingdom made sure of this – the Constitution raised fears that the powers of the member states would be crimped, or their policy role narrowed. Opponents saw it as preparing the ground for expansion of the powers of Brussels institutions, especially the Commission, at the expense of the member states.

As a treaty, though with constitutional status, the draft adopted by the European Council could only be ratified on the basis of unanimous agreement of the national parliaments of its 27 member states. Several of the states were required, by their national constitutions, to hold a referendum on it, and several others made a political decision to proceed by referendum. The voters of France and The Netherlands rejected the proposed Constitution (2005), after which several other member states, notably the United Kingdom, decided to suspend the ratification process. At first the European Council rebuffed the notion that the Constitution was dead, but effectively it was. Behind-the-scenes negotiation

[4]Its provisions are comprehensively set out by Jean-Claude Piris, in *The Constitution for Europe: A Legal Analysis* (2006), a work I have drawn on heavily in this essay. I wish here to acknowledge my intellectual debt to Piris.

on a less high-profile project, to amend the founding treaties, began. The outlines of a new "Reform Treaty" were already in place, unofficially, when the European Council acknowledged (June 2007) that the Constitution could not be proceeded with, and mandated instead the holding of a formal Intergovernmental Conference to negotiate and propose a new treaty. A scant four months later (October 2007), the European Council approved the text of a new Reform Treaty.[5] Minor changes in wording were made during the next two months, and in December the formal signing of the Lisbon Treaty, as the Reform Treaty is now known, took place.

With the Lisbon Treaty, the word "Constitution" has been banished from the official lexicon of the EU. More significantly, the European Council has largely annulled the monumental work of cleaning up and codifying the founding treaties of the European Union. If the Lisbon Treaty is ratified by all 27 member states it will amend the two main treaties (TEC, TEU). It will insert many of the key institutional innovations of the Constitution for Europe into the present texts, and will rename the TEC as the *Treaty on the Functioning of the European Union* (TFEU). Since the Lisbon Treaty is being presented as a relatively modest revision of the treaties already in place,[6] the need for referendums to ratify it will, in most of the member states, be obviated. However, in Ireland the constitution requires a referendum, and in June 2008 the voters of Ireland rejected the treaty, potentially throwing the ratification process into a tailspin.

Even if the Lisbon Treaty is ratified, there will be no "Constitution for Europe", at least not for the foreseeable future. However, the forces that lay behind this project, or the rationale for it, are still as powerful as before. Its proponents are chastised, but are still convinced of the necessity of institutional changes along the same lines they earlier envisioned. While the dreams of the early 1950s, to create a "United States of Europe" that would embed existing national states into a larger structure, have long been abandoned, it remains the case that part of the inspiration of the "Giscard constitution" was explicitly

[5]The text of the draft Reform Treaty has been consolidated with the TEU and the TEC in a web-published monumental work by Steve Peers (2006), University of Essex, under the aegis of Statewatch, 6 August 2006. In a series of "Statewatch Analyses", Peers reproduces the old text of the treaties, with strike-throughs for those parts to be removed or amended, incorporates into the treaties all new or amended text as contained in the draft Reform Treaty, and intersperses the consolidated text with helpful and insightful commentary. I have drawn heavily on Peers' work in this essay, and am glad to record my debt to him.

[6]The drafters of the Lisbon Treaty had to accomplish two antithetical objectives. One was to convince the "Europeans" that the new treaty marked an important advance. The other objective was to assuage the concerns of the "Euroskeptics", that it would strengthen Brussels at the expense of the member states. It is the second message that has been the more prominently put forward – perhaps not entirely convincingly, as there remains not a single clause of the TEU that has not been either abolished or amended by the Lisbon Treaty, which also introduces into the TEC (now TFEU) a large number of institutional changes (which, while providing a more explicit legal basis for some of the EU's existing activities, does not extend existing EU competences or powers).

federal, or federalist. Giscard himself described the Convention, perhaps unwisely, as "Europe's Philadelphia". In any case, it is clear that the rejection, most strongly in the United Kingdom, of anything that smacked of federalism, contributed powerfully to mobilizing opposition to the Constitution for Europe.

What now? The question calls for reappraisal of the achievements and the limitations of the EU as a governmental structure. However, I believe that one learns little from arguments about "the nature of the beast" – is the EU federal? Partially federal? Confederal or non-federal? A hybrid? *Sui generis*? A federation of nation-states? A Union but not a State? A neo-medieval polity or a post-modern one, or both at once? More important than such pigeon-holing is to concentrate on underlying values and objectives that gave significance to the project of developing a Constitution for Europe. In this context, it is necessary to take account of quite concrete challenges that face the EU and its member states, the larger Europe beyond its borders, and the world as a whole. It is in this broad setting, quite apart from what it seems appropriate to call the EU, that the idea of federalism, or the federal ideal, arguably comes into play.

SCENARIOS: ALTERNATIVE EUROPEAN FUTURES

Any attempt to consider "alternative European futures" must take, as its starting-point, the existing range of functions, and the institutional structure, of the European Union.

Functionally speaking, the EU is a quite fully developed economic union, with significant powers to control and even in some respects to supplant the activities of its member states in economic affairs domestically and internationally. (In my own comparisons between the EU and the economic side of the Canadian federal system, I have been struck that as an economic union the EU has gone further in removing internal barriers than Canada has.) Although taxation (unlike the collection of customs duties) remains national, and any EU fiscal measures can only be adopted on the basis of unanimity (27 potential vetoes), the member states have gone a long way towards coordinating their tax systems, especially as regards the imposition of a value-added tax (VAT). Of particular note is that 15 of the member states have entered into a monetary union, adopting the euro in place of their former national currencies. In so doing, they have, at least nominally, accepted EU control over their macroeconomic policies, ensuring a degree of fiscal orthodoxy (notably, deficits normally not to outrun 3% of GDP).

While economic union remains its functional core or essence, the EU has by no means limited itself to developing policies relating to the economy.

- Its role in economic governance has "spilled over" into related fields, such as the environment, labour market aspects of social policy, consumer protection, health and safety in the workplace, and aspects of education policy; there are also sectoral policies (agriculture, fisheries, transportation, and energy).
- Through the Treaty of Amsterdam, 1997, the EU has put into place important measures in the fields of immigration and asylum, police

cooperation, and internal security – a set of subjects grouped under the heading of Justice and Home Affairs (JHA), also described creating an Area of Freedom, Security, and Justice.

- The EU has also made some progress in the direction of establishing a Common Foreign and Security Policy (CFSP), and within it, a European Security and Defence Policy (ESDP); none the less, the member states remain the key actors in security and defence, and indeed generally in foreign policy (except in trade, cross-border investment, and related areas).
- At the Nice Summit in 2000, the EU adopted a Fundamental Charter of Human Rights applying to the activities of EU institutions, and to the member states when acting in fulfillment of EU directives.

Of significance is the fact that the EU has grown enormously not only in terms of function, but in size or membership: from "the Six" of 1957 to the present 27. From a western-European core, and very largely on the basis of its power of economic attraction (access to its markets) it has extended its influence to other European states, in part on the basis of a promise of future membership for many of them. Furthermore, its influence extends far beyond the economic, deep into the functioning of their political systems and the field of human rights. Candidates for accession have had to meet certain tests, indicating adherence to liberal-democratic norms (the principle of "conditionality"), as well as having a functioning market economy. In addition, the EU has adopted a "neighbourhood policy", a policy linked to the EU's "pre-accession strategy", and supporting security, political stability, economic stabilization, and democratization in countries in eastern Europe and the Mediterranean region (Lippert 2007; European Commission 2007). Further, in terms of economic policy, even non-members such as Norway and Switzerland – both of which have considered and rejected membership – are subject to significant EU controls, in the sense that they must conform to certain EU directives on the same basis as if they were member states.

With the prospect of a major "Eastern enlargement" after the collapse of the Soviet Union, the political leaders of the EU states, as earlier noted, felt that it would be necessary to revise or re-make the institutional structure of the Union, giving it a far stronger policy capacity in a number of fields where it was (and even today remains) rather weak. The presidents and prime ministers recognized that an essential complement to, or even precondition of, developing a more rounded-out political union was to build public support for "Europe", for example by creating a "European citizenship". The most famous statement of this set of goals was that of the then foreign minister of Germany, Joschka Fischer, in 2000. For Fischer, the bringing-together of western and eastern Europe, separated from each other throughout the Cold War, was a historic opportunity and obligation: the re-uniting of Europe was the goal that underlay attempts to rebuild and reform the EU, specifically along federalist lines. That was the challenge taken up by the European Convention under Giscard d'Estaing.

Given that the project for adopting the "Giscard Constitution" has been abandoned, and the prospects for ratifying the Lisbon Treaty now look rather shaky, it is important to take stock of the present situation, and to look ahead.

What is the significance of the failure to put in place a new Constitution for Europe? Will the Lisbon Treaty do just as well? And what if the Lisbon Treaty itself turns out to be still-born? These questions emphasize the fact that there is no way of knowing whether the impasse of the period 2004-2007 is now close to resolution, or will stretch out indefinitely. No one can tell whether we have been witnessing a mere blip on the radar-screen of European history, or a fundamental turning-point. Acknowledging such uncertainties, I attempt in the remainder of this section to sketch out a set of five "alternative futures" for the EU and, more broadly, for Europe as a whole.[7] Here, then, is the list.

First Scenario: A Merely Temporary Setback

The Lisbon Treaty lacks the symbolism of the Constitution for Europe, but this change is a deliberate one – the negotiation of the Treaty implicitly recognizes the fact that a "Constitution" made the EU appear too state-like for several of the national governments, or for public opinion – even in France and The Netherlands – to accept. The Lisbon Treaty will not labour under this disability. A first scenario, then, posits that the Lisbon Treaty will be ratified by all 27 member states, and accomplishes *in substance* pretty much what the Constitution for Europe would have accomplished, had it been ratified. The symbolism will be gone, and the gambit to reduce complexity will be acknowledged to have failed, but the specific changes will, for the most part, be preserved. Our first scenario, then, affirms that the symbolic changes introduced by the Constitution really did not matter. Admittedly, retention of the two main treaties, modified in certain ways by the Lisbon Treaty (as earlier, by the Treaties of Amsterdam and Nice), ensures that the legal foundations of the EU will remain inaccessible to the public: a tangle of mysteries only lawyers can penetrate. In adopting the Lisbon Treaty, EU leaders implicitly treated these objectives as unimportant; instead, they were – and are – able to claim that in various ways the Treaty will strengthen the EU and equip it to continue the process of enlargement. Prospective new members might include Turkey (the perennial candidate), some of the Balkans, and possibly a set of countries currently linked – too closely for their own liking – to Russia.

The key question is whether the Lisbon Treaty, assuming its ratification, will actually have these hoped-for effects. To form a well-grounded opinion on this, it would be necessary to look in some detail at its contents, but there is no space here to do more than refer to some of its major elements:

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[7]The scenarios I consider may of course be too few, in the sense that there may be possibilities that I have not thought of. In a way, that is inevitable: each of my imagined futures indicates merely a possible direction of movement, there being lots of room for variations within each of them. Classification is always a task of lumping or splitting, and in that sense the choices involved are inescapably arbitrary. A much more serious problem would be if there are hybrids – combinations of different items on my list. The reason that would be serious, is that my intent has been to conjure up truly *alternative* futures, in the sense that each of them is a denial of the other four. If that is not so, then the list is not merely incomplete, but is wrongly conceived. I hope not….

- *Changes in EU institutions:* Simpler voting rules in the Council; appointment of a full-time President of the European Council (holding office alongside the President of the Commission, and the President of the European Parliament), with a view to strengthening the political leadership of the EU; reduction (as of 2014) of the size of the Commission in order to enhance the Commission as a working body; merging of the offices of the external relations Commissioner and the High Representative of the EU for Foreign Affairs, to create a vice-president of the Commission with a mandate for conducting its external relations.
- *A more comprehensive statement of values, objectives, principles, and rights*: EU values are now to include "respect for human dignity" and of "the rights of persons belonging to minorities"; enhancing EU values (including the classic fundamental freedoms) is now a priority for the EU, not just an add-on to stated economic goals or objectives.
- *A more democratic EU*: Greater openness of legislative proceedings, strengthening of the European Parliament, and a larger role for national parliaments in EU affairs; in addition, the European Council is enjoined to take account of the results of an election to the European Parliament when it proposes a candidate for President of the Commission (moving the Commission one step closer to becoming a political executive,[8] subject to parliamentary control).
- *Extending the EU's policy role:* While the Lisbon Treaty does not enable the EU to become active in any subject-areas that have been, hitherto, the exclusive preserve of the member states (the same was true of the draft Constitution), various changes in EU institutions and processes may considerably strengthen the policy role of the EU in two broad fields not originally within the scope of the European Communities: external relations (foreign policy, security, defence, and international development), and Justice and Home Affairs (JHA).

Overall, the Lisbon Treaty aims to pave the way for a stronger or more powerful Union, one that will develop over time, as changing political circumstances make this desirable and possible. Accordingly, it is plausible to argue – this is the essence of our first ("temporary setback") scenario – that the Lisbon Treaty will enable the EU to go on growing in size, functions, and policy capacity, while the member states retain, in respects essential to them, their national sovereignty.

[8]A political executive may be defined as a person or a body that takes office following an election and in accordance with electoral results, and thereafter (either for a fixed period of years or until an electoral defeat) exercises legislative leadership and, within limits prescribed by law, controls the conduct of public affairs both internally and in the international realm.

Second Scenario: A "Constitutional" Impasse, But of Little Consequence

A second scenario envisions non-ratification of the Lisbon Treaty, and thus posits indefinite postponement of the project for treaty revision. The Irish voters' rejection of the Treaty increases the likelihood of this outcome. However, the scenario presumes that non-ratification would not matter much.[9] It suggests that muddling through can, without damage to the future of the EU, remain the order of the day. The EU can still move forward, hesitant but not crippled.

This is the most complacent of our five scenarios. Implicitly, it assumes that the institutional structures of the EU that were built up between 1958 and 2000 are adequate to the tasks they need to perform, both now and in a more-or-less indefinite future. The changes that would have been made through the Lisbon Treaty, as referred to in the first scenario, are assumed under the "Constitutional impasse" scenario to not really matter. This second scenario holds that, while the adoption of a new Constitution for Europe would indeed have been necessary to transform the EU into a "superstate" or a state on the Westphalian model (but federal in structure), that idea was never in prospect anyway. From this perspective, the hypothesized defeat of the Lisbon Treaty merely confirms the remoteness of the "superstate" conception.

In support of the view that a continuing impasse on the subject of treaty reform would not negatively affect the future of the EU, it could be pointed out that the blockbuster enlargement of 2004 (ten new member states) took place on the basis of the existing treaties, and was followed by the adhesion of Bulgaria and Romania in 2007. The EU has not ground to a halt with the admission of 12 new members. These states joined a Union that had already made substantial progress towards creating both a European citizenship and a zone of "freedom, security, and justice", and had succeeded in extending its international role, in part through developing a common foreign and security policy on the basis of inter-state cooperation. Further progress along these lines is still in prospect, or so it is possible to argue, because the welfare and the peaceful ambitions of the member states will demand further joint action. The building of the EU has, from the beginning, involved the creation of institutions that reconcile capacity for collective decision-making with preservation of the essential features of national sovereignty.

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[9]Without renegotiating the Treaty, the European Council might "clarify" its terms through a political declaration aimed at assuaging the concerns of some of the Irish "No" leaders (for example, pointing out that the treaties, as amended by Lisbon, would not allow the EU to adopt policies on abortion, or to create a conscript army). Such a declaration would be analogous to the "Edinburgh Declaration" adopted by the European Council after Denmark's rejection of the Maastricht Treaty. That Declaration paved the way for a second Danish referendum, approving the Maastricht Treaty. However, the prospects for a repeat performance, this time directed to the Irish voters to gain their adherence to the Lisbon Treaty, may be poor. For example, the President of Poland has said he would veto such a declaration, if the matter came up in the European Council.

This second scenario, then, envisions long-term impasse, but suggests that the consequences of impasse will be negligible, or actually beneficial. The scenario is notable for its implied rejection of the view of European leaders, first officially expressed at the Copenhagen summit of 1993, that to equip the Union for enlargement, far-reaching institutional reform would be needed. Changes introduced by the Amsterdam and Nice treaties have extended the policy role of the Union without much institutional re-design. Moreover, the present institutional structures seem not to have impeded effective action by the EU in supporting the transformation of the wider Europe, beyond its borders. Non-ratification of Lisbon would, arguably, leave the EU still able to accomplish what it needs to, while barring the way to reckless expansion of its role, powers, or functions.

Third Scenario: A "Frozen" EU

A third scenario envisions stasis. It treats the failure of the Constitution for Europe as a serious event, even if the Lisbon Treaty is ratified, and of course, even more so if it is not. A "frozen" EU is one that is unable to move forward in terms of its functions or activities, or towards new accessions. In other words, this scenario posits that the process of European integration cannot continue to advance except on the basis of institutional reform and, alongside this, the deepening of a "European" political identity. In relation to the latter, the Constitution would have permitted or encouraged a significant step forward, so its failure is an important setback. If the Lisbon Treaty too fails, needed structural change cannot occur – a serious blockage to further advances in the process of European integration. Without either the Constitution or the Lisbon Treaty, the hope for further "deepening" of the Union is not a realistic one. On the other hand, under this third scenario, the degree of integration reached so far, both functionally and territorially, is presumed not to be in jeopardy.

What makes this scenario a plausible one is a particular view of the integration process, as a process driven by governments and to some extent by elite opinion outside the ranks of government (especially the demands of business leaders). It is broadly accurate to suggest that wider publics have not participated in the process and have not actively supported it, but they have tolerated it. They have acquiesced. However, one might argue, if a time comes when European publics, identifying far more with their respective national states than with a concept or an entity as broad and remote as the EU, say "Enough!" the integration process will stop. The failure of the Giscard constitution will contribute to that (or so, under the "frozen" scenario, it is presumed): the whole purpose of drafting a Constitution for Europe was to bring the EU closer to citizens, and to enhance its legitimacy, especially within the older and wealthier member states. These are states in which the viability of liberal-democratic institutions has not been in jeopardy, where the "interference" of "Brussels bureaucrats" is most resented, and where support for additional accessions is tepid or non-existent: having more members makes the EU more cumbersome, more remote, and (because of EU expenditure to support economic development in its newer member states) more expensive.

For this combination of reasons, one must take seriously a scenario that envisions strong public resistance – obviously stronger in some states than in others – to taking any new steps towards integration.

Fourth Scenario: From Monnet to Mitrany

Another alternative future for Europe incorporates the reasoning that underlies the hypothesized "freezing" of the integration process, as under the previous scenario, but posits more radical consequences. In a nutshell, this new scenario envisions a movement away from the strategy for integration that prevailed from the early 1950s to the present. It imagines a partial reversion to the "functionalist" strategy expounded in 1943 by David Mitrany in a political tract of considerable renown, *A Working Peace System*. Migrant counseled against continental unions or federations, on the grounds that were they to come into existence (unlikely as that seemed) they would merely reproduce at a higher level the conflicts among national states that had resulted in two world wars. He avoided the glamour of any grand design for phasing out the nationalism and aggressiveness that had characterized the behaviour of the nation-states of Europe (though that was part of his goal), but advocated instead the creation of a complex set of international organizations, each with its own *raison d'être,* or practical task, or function. Individual states would belong to, or participate in, a variety of such organizations, some of them with a regional focus or vocation, according to felt need, and could withdraw if they chose. Thus membership of various organizations would overlap, but no state would be committed to any overall project for international cooperation or integration. Globally, there would emerge a "working peace system", a term implying not merely the suppression of conflict, but the active cooperation of states on a set of practical objectives, to their mutual advantage. States would participate in such functional cooperation to the extent that, individually, they desired. But their cooperation would require no grand design, and a world with several integrated regional groupings of states was neither envisioned nor hoped for.

By contrast, the founding of the European Communities was part of a deliberate strategy, most prominently associated with the career and advocacy of France's Jean Monnet, of regional integration. Monnet and his counterparts in several other western European countries envisioned a process under which a specific set of states – in the event, six of them – would enter at first into a relatively modest project of economic integration. The prospect and hope was, that successes in this field would induce the same group of states to expand their cooperation across a growing range of subject-areas. This might lead eventually to some form of federal or quasi-federal arrangement, but there would be no commitment, at the outset, to creating a multi-faceted organization that would progressively take over a range of functions traditionally within the purview of national governments. Theorists of international integration have dubbed this strategy "neo-functionalist", seeing it as an adaptation or revision of Mitrany's functionalism, even though Monnet's objectives and those of Mitrany were fundamentally at odds. The neo-functionalist strategy has been, in Europe, powerful and effective, leading onwards from the founding of the European

Communities on the basis of the three founding treaties of the 1950s, to their subsequent incorporation within a broader European Union.

Our fourth scenario, like the third (a "frozen EU"), posits the further development of the European Union being blocked by a number of factors flowing from, or having led to, the non-ratification of the Constitution for Europe (and may result also in non-ratification of the Lisbon Treaty). However, a Europe that develops according to this fourth scenario would be one that does not freeze the integration process, but rather, finds other instruments for it.

One variant is the development of a more asymmetrical EU. This is an old idea, given expression in terms such as a "Europe of concentric circles", a "multi-speed EU", or a "Europe of variable geometry".[10] More radically, the EU could be partially eclipsed by other vehicles of international cooperation, with a mainly European focus, if new organizations were set up outside the framework of the EU.[11] Membership in such organizations could include both EU member states, and some non-members. Whether through increased asymmetry among the EU members, or through differentiation of structures (the creation of new organizations alongside the EU), there would emerge a Europe of fuzzy borders in which the EU and non-EU dichotomy breaks down. Mitrany's vision would thus turn out (ironically) to be more realistic and practical than Monnet's, even if Mitrany thought in global rather than specifically regional terms. The

[10]The most dramatic case of asymmetry in the EU today relates to the 15-member monetary union, with the euro as its currency. Some of the states recently admitted to EU membership will presumably adopt the euro when they are allowed to do so (they must meet various criteria of fiscal orthodoxy), but the United Kingdom, Denmark, and Sweden have chosen, so far at least, to retain their traditional national currencies.

Asymmetry, however, is not limited to adoption or non-adoption of the euro. In present-day Europe, the Schengen agreements on freeing-up border controls relating to the movement of persons illustrate the potential for "different-membership organizations". Schengen is generally thought of as an EU agreement, but it was not negotiated under the auspices of the EU. Not all EU states participate, while some non-EU states have signed on. More generally, since the Treaty of Amsterdam (1997), the growth of an increasingly asymmetrical EU is contemplated and provided for through the device of "enhanced cooperation" among some of the member states in certain subject-areas. The main feature of enhanced cooperation, leading to asymmetry, is that EU institutions are used to accomplish objectives undesired by some of the member states, or for which the publics of the more Euroskeptic ("Euro-reluctant"?) states are not ready. The provisions for "enhanced cooperation" have so far remained unused, but could become of substantial importance in a "non-Lisbon" EU.

[11]At the extreme, states not ratifying the Lisbon Treaty could be left out of new institutional arrangements created to meet its objectives, or those of the Giscard constitution, by a group of states wanting to go forward with deeper integration, under a separate treaty. A new, more intense but less broadly encompassing form of union, presumably under a different name, would be created. This might place the Lisbon Treaty's non-ratifiers in political limbo, perhaps ultimately forcing them to apply for membership in the new European Super-Union, or "Federation", created by the states more fully committed to political and social unity among themselves, and playing a larger role in relations with other countries, and in international agreements.

organizational pluralism favoured by Mitrany underlies the deliberate anachronism of the name I give this scenario: *From Monnet to Mitrany*.

Regression and Entropy

European Union leaders have often suggested that failure to move forward along the road to deeper integration could lead not just to a stalling of the engine, but to a partial undoing of earlier successes. They have believed, or at least have said (perhaps deliberately raising the stakes with European publics), that an EU that does not go on building "an ever closer union of the peoples of Europe" – the phrase is taken from the Treaty of Rome – will end up going backwards. Under this scenario, much of the progress already made towards economic and political integration will be undone, and the EU will regress to something like the original common market design. Why so? The argument is, that in the absence of a commitment to a more "European" future, states might find it too tempting to cheat on the rules of a multi-faceted economic union, not to mention withholding contributions to the EU budget, holding up the work of the European Council and/or the Council of Ministers, refusing to meet earlier commitments, and challenging the work or authority of the Commission. There seems to be a theory here, that mere stasis is impossible, so that either there is progress or there is back-sliding. Organizational entropy can take over at any time. Here, the folkloric *bicycle theory of integration* (actually, a metaphor) applies: a bicycle that does not keep moving forward, falls to the ground – and thus it is imagined to be, as well, with schemes of international integration.

THE UNBEARABLE HEAVINESS OF THINKING FEDERALLY

In sketching out five "alternative futures" for Europe and the EU, I have sought to demonstrate how little can be taken for granted about where Europe may be headed. The first two scenarios would take Europe towards a future in which the national states are embedded ever more deeply in a supranational framework. Whether or not terms such as "federal" and "federation" are used to describe such an imagined future matters less than the fact that under our first two scenarios, the EU will continue to develop along established trajectories, and the autonomy of the EU member states (and indeed of some non-members) will become progressively narrower, or more illusory. However, the other three scenarios envision outcomes deeply disappointing to those most strongly committed to further integration in Europe: perhaps a freezing of the integration process, perhaps increased differentiation among various groups of states, perhaps a partial undoing of past achievements. It may well be that the more the leaders of the EU strive for structural innovations that are said to be federal, or appear to be of federal inspiration, the more likely it is that one of these three scenarios will be the one to actually play out. Using the language of federalism reinforces that possibility. This is the thought that will lead me, below, to argue

that there is unbearable heaviness in "thinking federally" or perhaps in "speaking federally" about the EU and Europe as a whole.

To begin with, we should note that there are quite striking structural similarities between the EU and the German Federal Republic. Germany is a parliamentary federation in which the legislature consists of a popularly elected lower house, the *Bundestag*, and an upper chamber, the *Bundesrat*, comprised of ministerial delegates of the states or *Länder*. All legislation must pass the *Bundestag*, and those items of legislation that are to be administered by the *Länder* – this means most legislation – require also approval of the *Bundesrat*. As for the EU, its Parliament is, like the *Bundestag*, a legislative chamber directly elected by citizens, and in the many subject-areas where co-decision applies, proposed legislation requires its consent. Moreover, the Council of the EU, like the *Bundesrat*, is a legislative body composed of ministerial delegates of the constituent governments, the member states. (Often, in practice, the business of the Council, as of the *Bundesrat*, is conducted by officials speaking for the minister.) Both in the German Federal Republic, and in the EU, most legislation is administered by the constituent governments. A further point of comparison lies in the role played by the European Court of Justice and, in Germany, the Constitutional Court. In all these respects the EU has a formal structure that parallels the structure of the German federation.

In several important respects, however, any analogy between the EU and the German federation – or indeed any federation – breaks down.

Political leadership. Political leadership in the EU is, and under any credible scenario will remain, exceptionally fragmented. Overall political direction is provided by the European Council, that is, by the presidents and prime ministers of the member states. Since on almost all matters, the European Council acts by consensus, the governments of the member states are thus in a controlling position, certainly collectively and even, in relation to some matters, individually (in the sense of holding a de facto veto power).

Financial arrangements. The Union does not possess its own fiscal base, but rather, depends on contributions negotiated among the member states through the European Council. A very high percentage of the Union's "Own Resources" is actually a formula-based contribution from the member states. The formula is renegotiated every five years. This situation gives the governments of the member states extensive control not only over the sources of funds, but over the spending policies and priorities of the Union.

Absence of an EU-level coercive apparatus. The Union lacks a coercive apparatus (police, courts of criminal justice, armed forces) that is a hallmark of every state, including federal ones. There is substantial police cooperation among the member states, extended under the terms of the Amsterdam Treaty. One of the factors contributing in a major way to such cooperation has been the removal of most internal border controls, and, in consequence, the development of common policies on immigration and asylum. However, the mechanism is intergovernmental rather than supranational; as with the subjects of foreign

policy, security, and defence, the member states, not the Union, are in charge. The key point is that they retain control of all instruments for the use of force.

A lop-sided political entity. Over the course of half a century, the European Council/European Union has succeeded in creating a very powerful economic union, creating an integrated economic space "without internal frontiers", or with internal frontiers of vastly diminished economic significance. The governance of the economic union is, to an important degree, supranational. Moreover, the EU has used its economic power, often in conjunction with the promise of accession, to assist in the transformation of other European states, notably those that formerly lay within the economic and political orbit of the Soviet Union. In those states it has actively supported the extension or development of the market system, and it has played an important role in the implantation or entrenchment of fundamental political rights and democratic practices. In global-scale economic organizations, such as the WTO, the EU has also become an important player, significant both as a partner of and a counterweight to the United States. These are major achievements. They are, however, complemented only weakly by the development of a social union, the creation of a European citizenship, or the emergence of a substantial role in foreign policy and international security. All are present as features of the EU, but along none of these dimensions has the EU gone very far. In all of them the role of the member states is dominant. This is what I mean when I describe the EU as a lop-sided political entity, heavily skewed toward the economic.

Community: Political identities and loyalties. An issue of fundamental importance for the EU is whether the institutions and processes that have been built up are adequately supported by public opinion within the member states. A theme in some of the scholarly writing on the Union is that there does not exist – or there exists only in the thinnest possible sense – a European people: a "demos" or a political community at the European level to anchor the institutions in communal or personal identities. Is it necessary to have, or develop, a European demos? The question is a difficult one, because (whether in the context of the EU or otherwise) legitimacy is widely regarded as the foundation of public authority and political loyalties – and yet, historically, most of the states in the world today have been constructed through highly coercive processes, involving violence and repression, or conquest, or revolution. The repulsion of enemies or an imperial power has, in many of the classic cases, been integral to the building-up of national identities, a process supported or complemented by the assiduous fabrication of national myth. In the case of federations, scholars have tended to focus on bargains and mutually advantageous accommodations among the entities (states, colonies …) that became their constituent units, but several federations – classically, Switzerland and the United States – have been established or consolidated through civil war. Boundaries and institutions have come first, whether forged in a crucible of conflict, or created through peaceful decolonization; legitimacy, identities, and loyalties have been, in "successful" federations, built up afterwards. It would be absolutely wrong to suggest that community, as a social and cultural reality, has typically preceded the establishment of political authority, or has been a

precondition of it. Perhaps it will be the same with the European Union: institution-building has gone forward as an elite process, now with a 50-year history, and the emergence of a European identity and sense of community may come about over time. At present, however, and for the foreseeable future, identities, community, and political loyalties are overwhelmingly *national* and *local*, and only very weakly *European*. This has, seemingly, been a major factor behind "Euroskepticism" and the mobilization of "No" votes in various national referendums on proposed treaty revisions (most recently, in Ireland).

The various features of the EU as a political system to which I have referred – the thinness of a European-level political leadership, distinct from that of the member states; fiscal dependency on the member states; the absence of a coercive apparatus; functional lop-sidedness; and the weakness of political identities and loyalties or attachments at the European level – would appear to be closely inter-related. All of them, together, distinguish the EU from modern federations; but of the five, it seems to me that the last – the question of identities and loyalties – is the most important, and the least amenable to change, even over the longer run, through treaty reform.

In distinguishing federal from non-federal forms of political organization, it is conventional to place primary emphasis on structural characteristics: things like the allocation of legislative powers and fiscal resources to different orders of government, devices for involving the constituent units in decision-making at the centre, the role of courts in upholding and adapting the constitution, procedures for constitutional amendment, and devices permitting or facilitating the re-definition of policy roles of different governments, without formal constitutional amendment.[12] These are important matters. However, no list of "federal" characteristics can establish, without argument, whether a given system is federal or not: too many exceptions and variations exist, standing in the way of defining federations in structural terms. A basic problem is that political arrangements that meet most of the conventional "tests" of being federal, in some countries may operate in ways that arguably violate federal norms: federalism may be a sham, a veneer that covers over practices that distort or undermine it.

More than fifty years ago, W.S. Livingston (1956, 1, 4, 6, 9), famously proclaiming that "Federalism is a function not of constitutions but of societies", put it this way:

> The essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces – economic, social, political, cultural – that have made the outward forms of federalism necessary.
> . . .
> We are too prone to say that federal constitutions must contain a certain five or eight or ten characteristics and that all constitutions lacking any of these are not federal. Such a set of criteria ignores the fundamental fact that institutions are not the same things in different social and cultural environments.
> . . .

[12]For a masterly comparative review, see Watts (2008).

> Federal government is a form of political and constitutional organization that unites into a single polity a number of diversified groups or component polities so that the personality and individuality of the component parts are largely preserved while creating in the new totality a separate and distinct political and constitutional unit. But the instrumentalities of federal government, like the diversities they serve, vary tremendously…. The problem of federalism is to make the instrumentalities fit the society beneath.

There could not be a clearer statement that society comes first, and institutions and practices must be adapted to social realities. Thus, Livingston was concerned that in the absence of a "federal society", regionally diverse in composition, supposedly federal institutional arrangements would end up operating in a unitary manner. Over time, attitudes and practices would subvert them, bringing about steady centralization.

In the case of the EU, the problem that preoccupied Livingston does not exist. In fact, the political challenges that the EU faces are the opposite of Livingston's concern: they arise from the thinness of an EU-level political community, one that embraces and brings together the populations of the member states. That is, I believe, the fundamental, very practical problem that faces those who (as I have put it) "think federally" about the EU. I mean: those who consider the EU to be a federation in the making, and are committed to building up a set of institutions and practices that will make it increasingly federal over time.

But what is meant by this? How can we describe *the federal idea*? I think we should follow Livingston in affirming that institutions commonly found in federations are not of the essence, but we should re-state his position to take account of the fact that thinness of community at the level of the "totality" is just as problematical as lack of diversity; and we should also take account, more than he does, of the fact that institutions can work on or re-shape social structures over time. Accordingly, what I propose is that we take federalism to be, in essence, *a set of political arrangements* ("instrumentalities", to use Livingston's expression) *that support a compound or multi-layered political community, or set of interlocking communities*.

Community is inescapably subjective; it involves feelings of belonging. In a multi-layered, or federal, political community, identities – what Charles Taylor (1989) calls, in a richly evocative phrase, "sources of the self", are multiple; and political loyalties sit alongside each other and support each other. Under such a conception, any set of institutions and any allocation of governmental responsibilities among different governments in the system is "federal" if it contributes to the building or sustaining of a multi-layered political community. This means that federalism is an idea and an ideal, that constantly evolves, along with changing conceptions of community and of what it takes to support, nourish, and protect it.

In making this suggestion, I am consciously adapting an idea put forward more than 50 years ago by T.H. Marshall, writing on the concept of citizenship in its various dimensions (civil, political, and social). Marshall (1973 [1949]) argued that "citizenship" means full-status membership in a community. The combination of rights and duties that this entails cannot be considered fixed or permanent, a benchmark to be applied across societies and over time; rather,

such rights and duties change as notions of community themselves evolve. Citizenship – like democracy, one might add – is thus an ideal, constantly worked towards, never achieved in any definitive way. This is essentially the thought that I am putting forward about federalism, as a set of political arrangements that recognize, accommodate, and foster multiple, overlapping communities. As with citizenship and democracy, federalism is an idea and an ideal, something to be aimed for even though never finally accomplished. So described or defined, "federalism" is attributed a very high moral content, which from a liberal and democratic perspective it should indeed have: the federal idea amounts to an affirmation that self-aware communities (the term "self-aware" here is actually redundant) *ought* to be in important respects self-governing, and ought also to be tolerant of, indeed supportive towards, the self-governance of other communities sharing a political space, or existing within a compound system.

If one conceives of federalism in this way, then "thinking federally" about the EU involves a commitment to bringing Europe, or that part of it that is comprised in the EU, closer to the federal ideal. On what possible grounds might I then suggest that there is *unbearable heaviness* in thinking federally about the EU?

The answer involves two steps. The first is to recognize that there is a huge distance yet to go, *institutionally*, in building a federal Europe, and that enlargement has worked against it. Why so? Because increasing diversity – economically, politically, and culturally – makes it more difficult to foster the emergence of a political community embracing the whole of the EU. As I have emphasized, the setting of priorities for the EU, its finances, and its overall direction, rests with the leaders of the member states through the European Council. The Commission, the Parliament, and the Court are all important, but they are not agenda-setters in the way that the European Council is. The Commission often proposes, and the Parliament exercises in many matters a veto power, but the central, directing bodies are the Council of Ministers and the European Council. Their members are answerable to national parliaments and national electorates. The diversity within a 27-member Union, which also contemplates further accessions, makes it most unlikely that national political leaders will, in the foreseeable future, cede their central directing role to institutions that they do not ultimately control. For this reason, it seems more accurate to describe the EU as, institutionally, *confederal* rather than *federal*. I do not think that calling the EU partially federal, or a federal-confederal hybrid, adds clarity or precision.

However, I have argued, following Livingston, that institutional structures are not decisive when it comes to thinking federally about the EU or any other entity. What matters is the idea and the ideal of sustaining a set of self-governing, interlocking communities, or a multi-layered political community; and if that is what is aimed for, the institutions that work in that direction will reflect society and culture: time, circumstances, and place. In the European context, embracing such a goal can only be regarded as ennobling and uplifting, a challenge but a worthy one, especially in light of the conflicts and the political horrors that have characterized the era of the national state, especially in the twentieth century. "*Unbearable heaviness?*" – not at all!

Then why would I use such a phrase? Simply this (and here I come to the second step of my argument): I believe the *political risk* involved in embracing the federal ideal for Europe, and highlighted in the last two of the five scenarios I have sketched out, is greater than the prospective achievements. Political risk may be defined as *the danger that past political achievements may be jeopardized through the pursuit of new and overly ambitious political goals*. In the case of the EU, the achievements in question are partly summed up in the concept of the *acquis communautaire* – a body of established law and policy – but even more fundamental than the *acquis*, are the structures through which substantive laws and policies come into being, and are made effective. Indeed, of prime importance in any political system are the patterns of governance through which a common interest is defined and pursued, and differences among the players are resolved. Such processes are typically created over a long period of time, and perhaps are too frequently taken for granted. *Risk*, then, lies in the possibility that established processes may unravel, disintegrate, or collapse – a consequence of over-building the institutional framework relative to the extent of public support for it. Arguably, the defeat of the Constitution for Europe, and potentially of the Lisbon Treaty, occurred because of fear, among certain national publics, that their political leaders were attempting to create "too strong" a set of institutions at the EU level. The general point is that in cases of institutional over-building, capacity to provide a variety of social and public goods deteriorates, as public resistance builds up. Physical security and public order, a reasonably efficient and tolerably just economic system, the extension and protection of individual liberties, respect for the environment, and (in this and other ways) attention to the needs of future generations: it is these that are at stake.

APPENDIX

EU INSTITUTIONS AND LAW

European Law

A body of European law, most fully developed in the economic sphere, has been created. It has several sources, and comes into effect in different ways:

- A few general principles are enunciated in the founding treaties themselves.
- On some subjects there are "regulations", laws of general application, binding on all residents and legal persons.
- On other subjects there are "directives", issued to the member states (usually all of them), to achieve a stated result (e.g. application of standards relating to the quality of drinking water, or the load-capacity of bridges and highways), in whatever way seems most suitable to national governments.

The more important of the regulations and directives come into existence through a complex legislative process. To explain that process, requires a sketch of the institutional structure of the EU.

Institutions of the EU

The Council, and the European Council. The Council, often known as the Council of Ministers, consists of delegates of the member states (different ministers, according to the subject-matter at hand). The Council is the locus of virtually constant negotiation among the member states, the key feature of the political process within the Union. The Council usually takes decisions by "qualified majority", or a form of super-majority: this decision-rule means that it is possible for one or more of the member states to be out-voted, in which case they are bound by laws to which they did not assent. However, the most politically sensitive matters require unanimity within the Council or are dealt with by another body, the European Council. It consists of the prime ministers and presidents, or "heads of state and government", of the member states, and is situated at the apex of the system of negotiation among the member states. It normally meets three times a year, and almost always acts by consensus (each state possesses a potential veto). It has been said that within the EU, nothing of importance gets done, or no policy can be long sustained, if it does not have the support – or at least the acquiescence – of the European Council. One reason for this is that the Union is financially dependent on contributions from the member states, which means in practice that the European Council must assent to the formula for fiscal contributions. The European Council and the Council of Ministers are supported by a secretariat, in effect a body of political advisers.

The Commission. The Commission, or European Commission, has a President who is appointed by the European Council with the assent of the European Parliament (below). At present, there is one Commissioner from each of the member states; these are, in practice, named by their national governments. However, the Commissioners are under oath not to take instructions from any government or outside body. The Commission is sometimes described as "the guardian of the treaties" because it supervises the activities of the member states, to see that they fulfill the obligations they have assumed under the treaties – these obligations include faithful implementation of directives. In those relatively few subject-areas that are administered directly by EU officials (as opposed to by the national administrations of the member states), it is the Commission that does the job. But the Commission is far more than a policy-implementation and treaty-enforcement body. It is the chief planner within the EU, on subjects ranging from the admission of new member states, to setting the legislative agenda for the Council (though in this, the Council Secretariat is a rival), to the formulation of objectives and policies for external action (the Common Foreign and Security Policy, and international trade negotiations). Especially important is the fact that no legislative proposal can come onto the Council's agenda, except by action of the Commission ("sole right of initiative"): this gives the Commission enormous bargaining power vis-à-vis the member states, not least because a proposal that has been amended in a way unacceptable to the Commission may be withdrawn. The treaties also confer upon the Commission authority to pass regulations and directives in certain policy areas, without reference to the Council. It is thus, in several different ways, integral to the legislative process of the EU. The President of the Commission participates in meetings of the European Council, as a non-voting member.

The European Parliament (EP). Member states are represented in the EP proportionately to their size, though with extra weighting for the smaller ones. Members of the European Parliament (MEPs) have been directly elected since 1979. Most legislation passed by the Council must receive the assent of the EP ("co-decision"). In addition, the EP must approve the annual budget of the EU; it must concur in the nomination of Commissioners, and may vote non-confidence in the Commission, forcing its resignation; and it must approve new accessions (admission of new member states). It thus exercises considerable bargaining power within the EU, often acting as ally of the Commission vis-à-vis the member states in pressing forward the pace of European integration.

The Court of Justice. The European Court of Justice (ECJ) rules on the interpretation of European law. Litigation in national courts may give rise to requests by the national courts for a "preliminary ruling", in effect a request for authoritative guidance on the relevance of European law to the case at hand. Pending the ECJ's issuance of its preliminary ruling, argument before national courts will be suspended; this gives the national courts sufficient time to incorporate decisions of the Court into national law. By contrast, there is no right of appeal from national courts to the ECJ. The ECJ also rules on alleged violations of the treaties. In these cases, complaints may be lodged by one state

against another, but litigation is routinely taken over by the Commission. The Commission also, on its own initiative, may lay a charge against the government of a member state for allegedly having failed to live up to treaty obligations, for example by not faithfully applying a directive. It can also happen that the Commission, or the Parliament, may lay a charge against the Council, for having neglected to come forward with a policy to which a commitment was made under some clause in one of the treaties. In the case of member states, the ECJ has authority to impose fines for non-compliance.

The Presidency. Up until the present, at least, it has been the practice for each of the member states to preside, in six-month rotation, over the European Council and, in its various forms (subject-specializations), the Council. For those six months, the prime minister or president of the member state concerned becomes President of the European Council (but not actually of the EU: there is no such office); he or she gains substantial control over the agenda of the European Council, and speaks for the EU abroad.

Legislative Process

Each of the clauses of the treaties that confer some power, or competence, on the EU stipulates the procedure by which decisions on those particular matters will be made, or laws enacted. There are several different procedures. All involve some action by the Commission, which in some cases has authority to enact legislation (regulations or directives) on its own, and in others has authority to place a proposal on the agenda of the Council, or (as the case may be) of the European Council. In fact, as indicated above, the Commission has sole right of legislative initiative. All proposed legislation to be passed by the Council must also be referred to the European Parliament, occasionally for its advice (as is the case, usually, when the Council acts by unanimity), but normally for actual approval, or assent. In these cases, there is said to be "co-decision", as if in a bicameral legislature – the two chambers being the European Parliament and (analogously to the German *Bundesrat*) the Council.

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23

German Federalism in the Context of the European Union

Rudolf Hrbek

Cet article traite des répercussions sur les relations intergouvernementales de l'adhésion de l'Allemagne à l'UE et de l'équilibre entre les deux ordres du gouvernement allemand. Il recense brièvement les défis auxquels l'intégration européenne expose le fédéralisme allemand et la réaction des Länder au début de années 1990 face au Traité de Maastricht (1992-1993). Il examine ensuite l'évolution récente du pays en lien avec la réforme du fédéralisme allemand (2006) et la signature du Traité de Lisbonne (2007), détaillant les nouvelles règles (1) issues de cette réforme et (2) retraçant le parcours qui a mené au printemps 2008 à la ratification du traité en Allemagne. On voit ainsi comment le fédéralisme allemand s'est modifié dans la foulée du processus d'intégration de l'UE, son modèle ayant fait l'objet d'adaptations qu'on pourrait considérer comme un cas d'européanisation. Les Länder a en effet obtenu de nouveaux droits et moyens procéduraux qui ont renforcé sa position au sein du fédéralisme allemand vis-à-vis du gouvernement fédéral, mais ces deux niveaux restent étroitement liés et interdépendants. Le terme de « fédéralisme coopératif » reste donc adéquat pour caractériser le régime fédéral allemand. Et si de nouvelles dispositions sont venues clarifier les responsabilités respectives du gouvernement fédéral et des Länder, elles n'élimineront pas tous les différends, de sorte qu'il restera à chacune des parties de trouver un juste équilibre au sein de ce modèle de fédéralisme coopératif.

In the recently published third edition (2008) of his book *Comparing Federal Systems*, Ronald L. Watts deals with the European Union (EU), not as a state, but as one example of a federation. In the second chapter, which provides an "Overview of Contemporary Federations", he lists the EU in the special category of "Confederal-Federal Hybrids" (Watts 2008, 56-58). In Chapter Nine, on "Multilevel Federal Systems", he draws the attention of the reader to "the membership of a number of federations within wider federal

This article relies in several places on prior work undertaken by the author, in particular Hrbek (1999, 2003 and 2007).

organizations", noting "one particular example is the membership of Germany, Belgium, Austria and Spain in the EU" (ibid., 131). Watts underlines that this membership "has had implications for the internal relationships" within the respective EU member-states (ibid., 131), amongst them, most notably, Germany.

This article intends to elaborate the implications of Germany's EU membership for intergovernmental relations and the balance between the two orders of government in Germany, an interesting case in this respect for the following reasons. First, the constituent units of the federal system (the Länder) possess exclusive legislative powers in some policy fields and they fully participate in the formulation of federal legislation; the (legislative) activities of the EU might interfere with these Länder powers and, in consequence, affect the federal-regional balance of German federalism. Second, the Länder are responsible for implementing federal legislation in their own right, and since large parts of European law have to be incorporated in national legislative acts in the EU member states, the federation is dependent on the Länder for implementing European law.

"German Federalism in the Context of the EU", the subject of this article, is not a new issue. For approximately two decades it has been subjected to descriptive analyses and reflections on the challenges of European integration for Germany's federal system, and especially on the responses from the German Länder.[1] This article, therefore, will in the first part explain briefly the challenges stemming from the project and process of European integration for German federalism, particularly for the Länder, and give a brief survey on how the German Länder have tried to adapt to the new challenging situation and how intergovernmental relations have developed. The article will show that, as a result of the establishment of new rules and practices, the Länder successfully managed not to lose ground vis-à-vis the federation when dealing with EU matters.

The second part of this article will focus on recent developments in this issue: first, in the framework of efforts from 2003 to 2006 towards a modernization of German federalism via a comprehensive reform, and, second, in relation to the Treaty of Lisbon of December 2007, which had not yet entered into force by the end of 2008, due to a troublesome and time-consuming ratification process. Here, the article will show that the Länder again managed successfully to maintain and even strengthen their position.

[1]In June 1986 the Deutsche Vereinigung für Parlamentsfragen held a symposium dealing with the issue. The proceedings of the symposium have been published; see Hrbek and Thaysen (1986); the introductory contribution is Hrbek (1986).

THE BASIC SETTING IN THE NINETIES (TREATY OF MAASTRICHT)[2]

A major feature of the European integration process has been that the European Council/European Union (EC/EU) has, from the beginning in the fifties, continuously extended the spectrum of its tasks and functions. This extension did not consist of a simple and schematic transfer of competences from member-states to EC/EU, but rather the acquisition by the EU of co-responsibility and of possibilities of co-determination with the member-states in ever more policy areas. The activities of the EU range from establishing law, to projects and measures supported largely by the EU budget, and to encouragement of more cooperation and coordination of member-state policies. Since the Treaty of Maastricht (1992/93), the Treaties of Amsterdam (1996/97) and Nice (2000/01) have confirmed and strengthened this trend – there is scarcely a policy area that is not, at least in part, dealt with in the framework of the EU.

The Challenge of European Integration for German Federalism

This intrusion of EC/EU has been perceived by the Länder – which are not merely subordinate administrative units but claim to have the quality of autonomous statehood – as a severe challenge in several respects:

- The first challenge arises from the fact that a number of these policy areas are ones reserved to the Länder in the internal allocation of competences in Germany. Activity by the EU in these fields and the inclusion of the Länder in this wider supranational framework appreciably constrain the autonomy of the Länder to structure politics and policy within their territories.
- The second challenge has arisen from the modalities of decision-making in EU affairs. The most important decision-making and legislative body has always been – and still is – the Council of Ministers, in which Germany is represented by the federal government. The federal government has therefore participated in decisions in fields that not only impinged on Länder concerns but, also, in part their exclusive competences. While the federal government possesses no internal decision-making competence in such fields, it has the possibility and duty externally to participate in decision-making processes under the terms of Community law.
- A third challenge follows automatically. Within the German federal system, the Länder have extensive powers of implementation and their right of participation in the formulation of federal legislation gives them the possibility of co-determining implementation rules. Although they are also responsible for the implementation of European law, they have lacked the possibility of participating in legislation and have, therefore, come under a

[2]This section follows in parts the article of the author, published in 1997 in German and 1999 in an English translation produced by C. Jeffery (see Hrbek 1999).

much stronger degree of control by the federal government, which is responsible to the EU institutions for ensuring proper implementation of European legislation.

The Response of the German Länder

The Länder were concerned about losing ground vis-à-vis the federation and about the potential negative impact on the federal balance in German federalism. The Länder attempted to respond to these challenges and pursued a series of strategies that aimed toward extending and a strengthening of possibilities of participation at domestic and EU levels, toward acquiring the role of an autonomous actor in the Brussels arena, and toward limiting activities of the EU and the introduction of Community measures via the inclusion of the Principle of Subsidiarity in the treaties and its strict observance.

- In regard of the formal rights of participation at the domestic level when EU matters are on the agenda, the new Article 23 Basic Law (BGBl I (1992), 2086) − introduced into the constitution in the context of the ratification process of the Treaty of Maastricht − contains a set of provisions relating to this participation, namely the duty of the federal government to provide information on EU issues as a basis for the Länder to formulate opinions in the Bundesrat. The provisions set out a graded obligation on the part of the federal government to observe such Bundesrat opinions when negotiating in EU bodies.
- As concerns direct participation in the decision-making process at EU level, the Länder were the driving forces within the "club" of regions in demanding the establishment of a special new institution with representatives of regional and local entities as members. Such an institution, the Committee of the Regions (CoR), was established in the Treaty of Maastricht (Hrbek 2000a). Germany has 24 members in the CoR, 21 were representatives of the Länder; the remaining three are representatives of the local level. This new institution did, however, fulfil only very imperfectly the demands of the Länder. The CoR is restricted to merely advisory functions and the heterogeneity in its composition – there are not only "regions" which differ quite considerably in terms of legal status and political quality and strength, but also local entities – contributes greatly to its weakness.
- Much more important for the German Länder, therefore, was the right that a Länder representative would sit in the Council and play a leading role when issues that fall into the exclusive competence of the Länder were on the agenda. Such a right is established under Article 23, par. 6 Basic Law, which provides as follows: "When legislative powers exclusive to the Länder are primarily affected, the exercise of the rights belonging to the Federal Republic of Germany as a member state of the EU shall be delegated to a representative of the Länder designated by the Bundesrat. These rights shall be exercised with the participation and concurrence of the

Federal Government; their exercise shall be consistent with the responsibility of the Federation for the nation as a whole."

- The German Länder had criticized the European Commission for taking action with its initiatives in many cases without a sufficient legal basis, or without observing the proportionality of such measures, or without examining and considering carefully whether there is a need for Community action. The inclusion of the Principle of Subsidiarity in the treaties (Hrbek 2000b), as demanded by the Länder in the preparation of the Maastricht Treaty, should improve things in favour of the Länder. The provisions in Article 3b of the Maastricht Treaty (now Article 5 EC Treaty) on the principles of limited individual empowerment and of proportionality of Community measures met Länder demands; furthermore the Commission had to justify in detail its initiatives. But as concerns the Principle of Subsidiarity in its narrow sense, the Länder could only be disappointed: the criteria for Community action (the objectives of the proposed action cannot be sufficiently achieved by the member states and can be better achieved by the Community) are legally unclear and are open to interpretation and dispute; second, the provision only relates to the relationship between the Community and the member states (as a whole) and does not take into account – or mention – regions (in the German case: the Länder). Guidelines on how to apply the Principle of Subsidiarity established in 1992 by the European Council in Edinburgh and included in 1997 in a Protocol in the Treaty of Amsterdam, should help in applying the principle with concrete cases, but they have proved to be insufficient in practice.
- The Länder established and developed autonomous activities at the EU level, (in Brussels), not as a group or collective actor, but each Land for itself. From 1985-87 the (then Western) Länder established information offices in Brussels, with the Eastern Länder later following their example. The functions of these offices, which became upgraded and are now called "Representation", are diverse (Grosse Hüttmann and Knodt 2006): they secure and transfer information to and from their Land (government); they are involved in the economic promotion of their Land and assist firms or other bodies in the development of projects in which EU institutions play a role and for which financial means of the EU budget are available; they act as representatives of their Land; and they represent an important forum for discussion. From a functional point of view, the Länder – especially via their Representations – have acquired the role of lobbyers and are recognized as co-players in the large arena of Brussels.
- The Länder was actively involved in efforts to build up transnational links with "regions" of other EU member-states. In the meantime, there exist networks such as the Assembly of the European Regions (AER) (Schmitt-Egner 2000, 471-505) or REGLEG (Kiefer 2004) which acts as a "club" assembling regions with legislative powers, among them German Länder.

All these strategies, which the Länder pursued successfully, have had an impact on German federalism, in that they enhanced the weight and role of the Länder vis-à-vis the federation. The provisions of Article 23 Basic Law (and the supplementary provisions in the Law on Cooperation in EU matters between

federation and Länder; and in a special Agreement) gave the Länder a say when EU matters would be dealt with at the domestic level, and to a certain extent, made the federal government dependent on the Länder.

Activities of the Länder at the EU level and their networking and lobbying efforts made them more self-conscious, independent and, on the whole, stronger. In conclusion, the federation-Länder pendulum has been moving in favour of and in the direction of the Länder.

RECENT DEVELOPMENTS RELATED TO THE REFORM OF GERMAN FEDERALISM (2006) AND THE TREATY OF LISBON (2007)

New Rules Through the Reform of German Federalism[3]

In the period since the mid nineties, whenever the reform of German federalism returned to the political agenda, the overall intention has been to replace the pattern of interlocking relationships between the federal and Länder governments by structures providing both levels with greater autonomy and less mutual dependency. Always at the forefront of such discussions were concerns over the consequences of European integration for German federalism. Experiences with role and activities of the Länder, described above, were subject to debate in these reform efforts.

An issue of particular interest on the agenda for reforming German federalism was the participation of the Länder in the decision-making process on EU matters at the national and Union levels. The new Article 23 of the Basic Law (the former Article 23 had become obsolete with German reunification), the so-called "Europe-Article" (supplemented by the "Law on the co-operation of Federation and Länder in affairs of the European Union" and the subsequently concluded Agreement between the federal and Länder governments) strengthens, as explained above, the position and role of the Länder in dealing with EU matters.

At the domestic level, the Länder have the right via the Bundesrat – after having been informed "comprehensively and at the earliest possible time" by the federal government – to give opinions. These detailed and complex provisions set out a graded obligation on the part of the federal government to respect Bundesrat opinions. If the EU measure concerned falls within Länder competence, the federal government is obliged to take the Bundesrat opinion "decisively" into account.

At the EU level, the Länder have the right to participate in negotiations in EU bodies. Länder representatives (nominated by the Bundesrat) form part of the German delegation. If the issue concerned "centrally affects exclusive legislative competences of the Länder", the Länder claim that their concerns must be taken into account in a proper manner.

[3]This section follows in parts the article of the author; see Hrbek (2007).

The federal government argued that this involvement and participation of the Länder would have a negative effect on the ability to successfully pursue German interests and concerns (Hrbek 2005). The government, therefore, demanded that Germany's representation in Brussels had to be the sole responsibility of the federal government, which would mean that only members of the federal government would be authorized to negotiate in EU bodies. Co-ordination with the Länder would have to take place and be managed internally (at the domestic level) in advance. Procedural provisions in Article 23 of the Basic Law should, therefore, be removed.

The Länder argued that they have the right to legislate in the areas of their exclusive competence and that they have the right to participate in passing Federal legislation. Moreover, if these functions have been transferred to the EU, the Länder argued that they must have the right to participate in particular. Länder insisted that their participation has never been the reason that Germany has experienced disadvantages. The Länder, therefore, argued in favour of maintaining Article 23 and strengthening their position, particularly in areas of their exclusive competences. Both sides, Federation and Länder, agreed that a solution must be found for sharing costs created by a violation of international or European commitments.

In 2003, the two major stakeholders – the Länder and the federal government – declared their willingness and determination to launch concrete reform measures (Hrbek and Eppler 2003). They agreed to elaborate on their respective positions by the spring of 2003 for further negotiations in a joint working group. In March of 2003, the Länder Prime Ministers formulated their "guidelines for negotiations with the federal government" on the modernization of the federal system. In April 2003, the federal government formulated its position. Both sides agreed in principle on loosening their interlocking relationship and competences as well as financial responsibilities, but their positions differed in certain respects on what this would and should amount to.

In November 2003, the Bundestag and the Bundesrat established a joint Commission (BR-Dr 750/03, 17 October 2003). The goal was for this Commission to elaborate on proposals for the modernization of German federalism. The Commission was composed of (1) 32 members of the Bundestag and Bundesrat (16 each) with voting right; (2) four members from the federal government, with only the right to speak and propose a motion, but not to vote; (3) six members from Länder parliaments and three members chosen to be representatives of the local entities, with only the right to speak and propose a motion, but not to vote. Furthermore, there were 12 experts (academics, nominated by the Commission on the basis of proposals made by the Bundestag party groups according to their proportional strength), who participated with only the right to speak in the considerations.

The establishment of the Commission, after the protracted discussion that had preceded it, was taken as an indication that a decision on the reform was both possible and probable. Both sides had put themselves under pressure. There were, on the other hand, severe doubts that a solution that would receive the necessary two-thirds majority support in both the Bundestag and Bundesrat could be achieved. The basic positions and guidelines of both sides remained too

far removed from each other, and, secondly, controversial debates were to be expected once details were discussed.

During the Commission's work, agreement on a number of issues had been reached. There were, however, still dissenting opinions concerning substantial questions. After one year of intense debates and considerations, the two co-chairpersons, Bavarian Prime Minister Stoiber (CSU), representing the Länder, and the chairman of the SPD party group in the Bundestag, Müntefering, announced in December 2004 that the Commission was unable to submit a proposal that both parties could agree on. It became clear that there were various major issues where it had been impossible to overcome dissent. These issues pertained to competences in the fields of environmental law, internal security and, in particular, education. In addition, the extent of Länder participation in dealing with EU matters was also a problem, with the role of the Länder in Council negotiations as the crucial issue.

The failure of the Commission was a disappointment, since there had been high expectations from the moment of its establishment. Attempts to explain the failure referred to disparities and differences between the interests of the Länder, to party-political differences, to institutional self-interests of Länder Prime Ministers (who have always used the Bundesrat as a framework and a basis for playing a strong role at the federal level) and the federal government (which pushed to the curb Länder participation in EU matters). Last but not least, the lack of a jointly agreed upon concept and understanding of the basics of the federal system existed, particularly concerning the extent of the differences that would be recognized as acceptable in a federal entity. There were, however, many voices demanding new efforts to achieve reform.

One can identify the different steps and factors that finally resulted in the constitutional reform on German federalism decided upon during the summer of 2006. One of them had to do with the participation of the Länder in EU matters. It was evident that a solution would have to take into account provisions in the EU Constitutional Treaty that affected the Länder. When the EU Constitutional Treaty was before Parliament in May 2005, the Länder gave their approval via the Bundesrat (BR-Dr 340/05 and 339/05 Beschluss); but, as in previous cases (e.g., the Treaty of Maastricht in 1992), this was only possible on the basis of an agreement between the Länder and the federal government in which the latter made some concessions to the Länder, strengthening their role and position.

- One concession was that whenever national parliaments would become involved directly in EU decision-making, the Bundesrat would have the right to exploit all new legal and procedural opportunities. This would relate particularly to the detailed procedural rules on how to apply the Principle of Subsidiarity, and to set up a political early warning system, giving national parliaments (both chambers in case of bicameral parliaments) the possibility to object to Commission initiatives. Furthermore, national parliaments would have the right, finally, to bring such an issue before the European Court of Justice. The new rules would apply to the Bundesrat.
- Another agreement concerned the application of Article IV-444 of the EU Constitutional Treaty that contained a clause allowing the governments to make particular issues subject to qualified majority decisions and no longer

to unanimity (the so-called "Passerelle Clause")[4]. The Länder were concerned with having a provision that would oblige the federal government to respect a Bundesrat veto in such cases. This was also agreed upon in the framework of the ratification.

- Furthermore, it was agreed that the Länder via the Bundesrat could participate in the appointment of the German members (Judge and Advocate General) to the European Court of Justice. Until this new provision, it was the sole responsibility of the federal government to nominate candidates for these offices.
- Finally, it was agreed that the Bundesrat would not only participate with respect to the legislative acts of the EU but to as well Commission recommendations.

On the whole, therefore, the Länder could strengthen their position and this could be taken as an indication that both sides were ready and willing to reach consensus.

In spring 2006, the legislative process towards modernizing and reforming German federalism was completed successfully. With 25 articles of the Basic Law reviewed, the reform package was a very comprehensive one. It included new rules with respect to the implications and consequences of European integration and German membership in the EU, for both German federalism and the relationship between the federation and the Länder.

First, there were new rules for the participation of the Länder in dealing with EU matters. The crucial point in question was the right of the Länder to participate in deliberations (and decisions) of EU bodies (Council and formation of the Council) according to Article 23, par. 6 Basic Law. The Federal government was in favour of deleting this paragraph, since it argued that transferring the leading role in such Council negotiations to Länder representatives would raise problems. The Länder have argued that their design as states requires that, in cases where EU matters centrally affect exclusive legislative competences of the Länder, they must take on the role of representing Germany in the respective EU body. The solution found specifies that such a delegation to Länder representatives shall be restricted to three policy fields: school education, culture and broadcasting.

Second, there are new provisions concerning some aspects and details of financial relations – cost-sharing – between federation and the Länder.

- There is a new paragraph (6) in Article 104a Basic Law dealing with the internal cost sharing between the Federation and the Länder in case of violations of international or European commitments: "In cases of financial corrections by the EU with effect transcending one specific *Land*, the

[4]Provisions allowing amendments to the treaties via simplified procedural rules (without ratification in all member-states as in the cases of ordinary treaty reforms). The European Council can decide by unanimous vote (and with the explicit assent of the European Parliament) that the Council may decide with qualified majority in cases where the treaty stipulates a unanimous decision. This clause has been included in the Treaty of Lisbon (Article 48 TEU) as well.

Federation and the Länder shall bear such costs at a ratio of 15 to 85. In such cases, the Länder as a whole shall be responsible in solidarity for 35 percent of the total burden according to a general formula; 50 percent of the total burden shall be borne by those Länder which have caused the encumbrance, adjusted to the size of the amount of the financial means received."[5]

- Another case of cost sharing is dealt with in a new paragraph (5) of Article 109 Basic Law. It relates to the obligation for fiscal and budgetary discipline in the framework of the EU (Monetary Union). The new clause declares that the Federation and Länder are jointly responsible for adhering to these convergence criteria: "Sanctions imposed by the European Community shall be borne by the Federation and the Länder at a ratio of 65 to 35 percent. In solidarity, the Länder as a whole shall bear 35 percent of the charges incumbent on the Länder according to the number of their inhabitants; 65 percent of the charges incumbent on the Länder shall be borne by the Länder according to their degree of causation."[6]

New Rules Accompanying the Treasy of Lisbon[7]

The Treaty of Lisbon[8] strengthens regions and local entities in general (Article 4 TEU obliges the Union to respect the national identity of the member states "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self government") and, in particular, Article 5 TEU on the Principle of Subsidiarity now explicitly stipulates as one condition for Community action, namely that "the objectives of the proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level". This upgrading of subnational territorial entities would necessarily affect relations between the federal government and the Länder as concerns the latter's participation in decision-making on EU matters. From the point of view of the Länder, priority should be given to further developing the practical cooperation with the federal government. This has been achieved in connection with the ratification of the Treaty of Lisbon, which was approved by the Bundestag on 24 April 2008 and by the Bundesrat on 23 May 2008.

The Law accompanying this Ratification Act provides for the following:

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[5]www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf

[6]See footnote 5.

[7]This section on most recent developments, in spring/summer 2008, is based on the informative overview given by Zoller (2008).

[8] The Treaty of Lisbon has two parts: The Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union. Attached to the treaty are several Protocols (amongst them the Protocol on the Application of the Principle of Subsidiarity); see *Official Journal of the European Union*, C 115 (9 May 2008).

- With respect to the right of national parliaments to object to initiatives of the European Commission – the early warning system – the majority of the Bundesrat may ring the alarm bell, but the Länder Prime Ministers agreed in 2005 that the Bundesrat would support the respective initiative of an individual Land. It is, therefore, de facto a minority right, as it is in the Bundestag, where 25 percent of its members may object.
- The position and rights of the Länder have already been strengthened in connection with the ratification of the Constitutional Treaty in other respects, as mentioned above, i.e., the Bundesrat can veto the use of the "Passerelle Clause"; the Bundesrat participates in the appointment of German members to the European Court of Justice; and the Länder nominate their members for the CoR.
- With respect to the participation of the Länder in deliberations and decisions of the Council, the right of the Länder to take the lead role – for Germany as EU member state – in the Council has been restricted to three policy fields: school education, culture and broadcasting, as was stipulated in Article 23, par. 6, amended in 2006. The Law on the Cooperation between federal government and the Länder in EU matters, complementing that constitutional amendment, provides for the right of the Bundesrat to nominate members of Länder governments who may attend Council meetings, including the right to make statements, albeit in close coordination and understanding with the representative of the federal government. And one should not forget that the federal government representative, possessing the lead role, remains obliged to strictly observe the Bundesrat opinion in cases in which the Länder have exclusive competences.

The Agreement between the federal government and the Länder on their cooperation in EU matters, amended in connection with the ratification of the Treaty of Lisbon, strengthens the Länder in further respects:

- The obligation of the federal government to inform the Länder as comprehensively and as early as possible applies not only to legislative initiatives of the Commission, but to other Commission dossiers as well, such as White Books, Green Books, Action Programmes, Communications, and Recommendations that are designed to prepare legislative initiatives. Of particular importance for the Länder are Commission Communications related to the new instrument of the Open Method of Coordination (OMC), e.g., in the fields of culture and education (Zoller 2008, 578-579). The Länder are concerned that the OMC would be used to tacitly extend Community competences, without any legal basis, to the detriment of the Länder.
- Furthermore, the federal government is obliged to inform the Länder on the opening of negotiations with third countries on EU membership and on the development of these negotiations. The accession of new member states to the EU requires the explicit approval of the Bundesrat (and the Bundestag), but the Länder have argued that they are interested in influencing the

content of an accession treaty in the course of negotiations and not only to exercise the right of assent to the outcome of such negotiations.

- There shall be a new and formalized procedure to resolve conflicts between the federal government and the Länder on whether or not an issue would interfere with and centrally affect key competences of the Länder and, therefore, would oblige the federal government to strict observation of the Bundesrat opinion. Whereas the federal government until now has, in case of dissenting views, just refused to comply with the view of the Bundesrat, the new rule provides that the federal government will invite Länder representatives and confer with them about the matter, with the goal to find a consensus. The Länder expect that the outcome from these deliberations, dominated by administrative experts, would most probably be in line with Länder interests.
- Similarly, this procedure of having quasi-obligatory deliberations would apply in cases that fall in the category of reversed concurrent legislative powers of the Länder, introduced as an innovative element in the reform of German federalism in 2006.

CONCLUSION

Our overview has shown that German federalism has undergone some changes in the context of the EU. There have been adaptations of the pattern of German federalism, parallel to the ongoing integration process in the EU, which justify speaking of Europeanization. The two orders of government, federation and the Länder, had to redefine their relationship. The Länder, which perceived the situation in the mid eighties as being threatened by the ongoing ("deepening") integration process, were successful in acquiring new rights and procedural means that have even strengthened their position within German federalism vis-à-vis the federal government, and they were successful in (at least) maintaining a certain degree of autonomy. Multilevel Governance in the EU has not been to the disadvantage of subnational entities. Indeed, they might even strengthen their freedom of manoeuvre. This applies, as could be shown, not only for Germany, but as well for other EU member states (e.g., Spain, the United Kingdom, Italy, let alone Belgium).

Both levels continue to be closely linked and interrelated; they have to cooperate and communicate intensely with each other. "Cooperative Federalism" continues, therefore, to be the proper label for characterizing the German federal system, at least as concerns its Europeanization. Here the provisions governing the relationship of the two sides in dealing with EU matters had the goal and, to a certain extent, the effect of bringing about a clarification of the respective responsibilities. The set of provisions will certainly not rule out disagreement in all cases. Therefore, it will remain a challenge and task for the two sides to find a proper balance within the pattern

of cooperative federalism that characterizes intergovernmental relations in Germany.[9]

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[9]This conclusion is identical with the one in the country-report of the author on Germany, see Hrbek (2009).

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Section Ten

Devolution and Fiscal Federalism

24

Mind the Gap: Reflections on Fiscal Balance in Decentralized Federations

Robin Boadway

La question du déséquilibre fiscal occupe l'avant-scène du débat public canadien depuis que le rapport de la Commission sur le déséquilibre fiscal du Québec en a popularisé le terme. Elle a ainsi fait l'objet de rapports du Groupe d'experts sur la péréquation et la formule de financement des territoires du gouvernement fédéral, du Comité consultatif du Conseil de la fédération sur le déséquilibre fiscal, du Comité permanent des finances de la Chambres des communes et du Comité sénatorial permanent des finances nationales. Bien que le problème concerne toutes les fédérations, son importance était passée relativement inaperçue avant qu'Ottawa n'adopte au milieu des années 1990 d'audacieuses mesures en matière de budget. Mais en dépit de toute l'attention qu'elle suscite, la notion d'équilibre budgétaire reste mal définie. Certains observateurs prétendent même qu'elle ne peut s'appliquer à une fédération décentralisée comme le Canada. Ce texte vise à éclaircir la notion proprement dite mais aussi à déterminer l'importance de l'équilibre budgétaire dans une fédération et son rapport avec l'étendue de la décentralisation. S'appuyant pour ce faire sur de récentes études en matière d'économie politique et de fédéralisme fiscal, il en tire des leçons de gestion économique qui pourraient être utiles à toutes les fédérations décentralisées.

INTRODUCTION

Concern with fiscal balance (or imbalance) has been at the forefront of the Canadian policy debate since the concept was popularized by the Commission on Fiscal Imbalance (2002), hereafter the Séguin Commission. The issue has spawned special reports by the federal government's Expert Panel on Equalization and Territorial Formula Financing (2006) and the Council of the Federation's Advisory Panel on Fiscal Imbalance (2006), as well as the House of Commons Standing Committee on Finance and the Senate Standing Committee on National Finance. In the most recent federal election, resolving the fiscal imbalance was one of the priorities of the Conservative Party platform. Although the problem of fiscal balance is germane to all federations, its importance had gone relatively unnoticed until the federal government altered the balance with its bold fiscal policy initiatives of the mid-1990s, which included a sizable reduction in transfers to the provinces. Despite the publicity, the concept of fiscal balance remains ill-defined and not widely understood. Some commentators, such as *Globe and Mail* columnist Jeffrey Simpson, even suggest that there can be no such thing as a fiscal imbalance in a decentralized federation such as Canada. This paper aims to make sense of the notion and importance of fiscal balance in federations, and how it is related to the extent of decentralization. Recent work on political economy and fiscal federalism will be used to illuminate the concept of fiscal balance, and to draw some lessons for the economic management of a federation that might be relevant for all decentralized federations.

The natural place to start is with the better-known concept of the *fiscal gap*, which is largely an accounting concept. A fiscal gap exists to the extent that expenditures at lower levels of government are financed by transfers from upper levels rather than by own-source revenues. The size of the fiscal gap is simply the level of transfers. A fiscal gap is a common feature of virtually all multi-level systems of government. It applies between central and provincial levels of government and between provincial and local levels of government in federations, as well as between central and local levels of government in unitary nations. The size of the fiscal gap varies widely among countries, with much of the difference being accounted for by differences in revenue-raising responsibilities at lower levels of government rather than expenditure responsibilities (Watts 1999). Indeed, the extent of expenditure decentralization to provinces is remarkably similar across federations and the same applies for local governments in unitary nations. Similarly, the form of the transfers used to fill the fiscal gap varies considerably, although some common features typically apply. For example, in most cases, transfers perform an important equalizing role and serve to support important social program expenditures that have been decentralized. What differs considerably is the extent to which strings are attached to the transfers by the central government, although the use of strings is not necessarily a good indication of the influence exercised over provincial and local program design.

While the fiscal gap can be thought of as an accounting entity, its role in a federal system has been a staple of fiscal federalism theory and policy. In that literature, the fiscal gap arises as a natural counterpart to the assignment of

functions between levels of government, it being argued that the case for decentralizing expenditure responsibilities is more compelling than for decentralizing revenue-raising. But, it also serves positive functions in its own right as a device for equalization and for the achievement of central policy objectives. These arguments are taken up further below. Suffice it to say for now that, although there are fairly strongly held views among different camps of observers, no consensus exists among economists about the most suitable (or "optimal") size of the fiscal gap for any given nation, which is certainly consistent with the above-mentioned fact that its size varies widely across countries.

Despite the lack of consensus, evolving circumstances in the past few decades have changed the way many fiscal federalism specialists have viewed both the role and structure of the fiscal gap. The forces of globalization have imposed new constraints on government and have competed down the role of government. The emphasis on efficiency in government has led to a greater emphasis on promoting governance and accountability. More generally, the expansive role that government assumed in the early postwar period as the welfare state was being firmly established has been called into question, especially in the wake of the massive debts that were built up in the 1970s and 1980s and the demographic challenges that confront many OECD countries today. One hears as much about public sector failure as about market failure nowadays, and retrenchment of government has been the consequence. These prevailing views have in turn led to more decentralist views about fiscal federalism, with much more emphasis being put on reducing the fiscal gap to improve accountability and to foster competitive federalism. Among economists, policy-makers and advisors, the decentralists have taken centre stage.

Recently, the more loaded concept of fiscal imbalance − as distinct from the fiscal gap − has entered the lexicon. While the notion of a fiscal gap connotes little more than a measurable shortfall of revenues relative to expenditures, an imbalance suggests that there may be a more fundamental disequilibrium between the size of the transfers (the fiscal gap) and the underlying ability of provinces and the federal government to meet their fiscal obligations under the existing structure of taxes and expenditure programs. The meaning of fiscal imbalance and its relation to the fiscal gap is rarely carefully spelled out, and this may be because of the inherent ambiguity of the notion of fiscal imbalance (Boadway 2005a). The Séguin Commission was exceptional in this regard. They unabashedly suggested a) that there was a distinction between the fiscal imbalance and the fiscal gap, b) that the fiscal imbalance in the Canadian case of the 1990s was manifested in a shortfall of federal transfers given the relative amounts of tax room occupied by the federal government and the provinces relative to their expenditure responsibilities, and c) the fiscal imbalance was accompanied by an excessive fiscal gap. Implicitly, there is a suggestion that the excessive fiscal gap is intimately related to the fiscal imbalance.

This paper is an attempt to address these issues systematically. It can be thought of as a speculative exploration of how the fiscal gap has evolved in our thinking and in practice, how recent changes may require a fundamental rethinking of the fiscal gap we should aim for, and how the fiscal gap and fiscal

imbalance may be connected. The federal model for thinking about these issues is the Canadian case, but the issues extend to other federations and decentralized unitary nations as well.

The perspective I take is that of an economist, which has a number of limitations. The emphasis is on the economic dimension of policy choices, which is limiting given the scope of things that governments do. The fiscal federalism literature has tended to apply economics modes of reasoning to decision-making and interaction in a federation, often emphasizing the role of incentives to the exclusion of other considerations. Recently, economists have increasingly been drawn to a "political economy" perspective, with its emphasis on relatively abstract and simplistic models of political decision-making. Whether this will serve to illuminate or obscure federal outcomes is an open question. The approach I take here is unabashedly normative in its orientation, but even in that context there are many caveats to emphasize. First, one's view about the most desirable level of decentralization will necessarily be influenced by the extent to which one views government as a benevolent as opposed to a self-serving institution. More generally, the perceived quality of governance at various levels of government is an important factor in determining the appropriate fiscal gap. Second, the optimal fiscal gap will be influenced by the weight put on equity/solidarity/social citizenship as opposed to efficiency. The consensus view on this will vary from country to country. Finally, the effects of decentralization depend on the responsiveness of economic agents to government policy (e.g., what is the actual trade-off between equity and efficiency), and the empirical evidence on that is far from reliable.

THE TRADITIONAL VIEW OF THE FISCAL GAP

The traditional arguments for a fiscal gap are well-known. A fiscal gap may simply be a passive consequence of the assignment of spending and taxing responsibilities. The most compelling arguments for decentralizing fiscal responsibilities apply to the expenditure side of the public budget. Lower-level governments are said to be better able to match expenditure programs to the preferences of their constituents. They have better information about their needs as well as about the most suitable ways of delivering public programs. Subnational provision also reduces the number of layers of bureaucracy and reduces so-called agency problems (i.e., problems of monitoring and controlling the bureaucracy). As well, decentralized provision allows more opportunity for innovation and also permits so-called yardstick competition, or benchmarking, to inform citizens of what might be expected in terms of quality and costs of services. These sorts of considerations apply particularly to public services delivered to citizens as well as transfer and social insurance programs that are targeted and delivered outside the income tax system. At the same time, efficiency and equity criteria would support a more centralized system of tax collection. On these grounds alone, one might expect a sizable fiscal gap, with the provinces delivering programs of a purely local nature as well as major public services and targeted transfers, and obtaining a substantial share of financing from federal transfers.

Such a passive argument for the fiscal gap, even if it led to a fairly determinate view of the size of the gap, is unsatisfying on various grounds. For one thing, the suggestion that one can decouple expenditure responsibilities from revenue-raising is said to compromise accountability: governments might not be trusted to spend efficiently if they do not at the same time have responsibility for funding that spending. I return to that argument below. A further observation is that the fiscal gap − or at least the transfers used to finance it − may serve an important function in their own right. Perhaps most important is the equalizing role of fiscal transfers that arises given that decentralizing spending and revenue-raising responsibilities inevitably give rise to fiscal disparities. Since this is especially so in the case of revenue decentralization, that suggests that some, possibly substantial, minimal fiscal gap is needed simply in order to allow for levels of equalization that in most countries undertake and in some cases are constitutionally mandated.

Two other pro-active arguments for a fiscal gap are relevant. For one, fiscal harmonization both on the tax and expenditure side is almost certainly facilitated by a fiscal gap. Tax harmonization is certainly much easier to achieve if the central government dominates the relevant tax bases. Such harmonization of public services as one may deem desirable on either efficiency or equity grounds is also facilitated by a system of fiscal transfers. More generally, to the extent that one views the spending power as an important policy instrument by which the federal government can address national objectives, and this is obviously contentious, protecting the fiscal gap is a necessity.

These traditional arguments must be conditioned by other considerations. Some would argue that federal fiscal clout is not needed to achieve the desired amount of fiscal harmonization: provinces could come to cooperative agreements among themselves. Scant evidence exists to support this view, and there are *a priori* arguments against it. Thus, free-rider problems make unanimous agreement difficult and virtually impossible when there are gainers and losers.

Perhaps the most important caveat to the traditional view is the potential lack of consensus concerning the use of the spending power. Even though one might convincingly argue that the spending power is the only effective instrument that the federal government has to discharge its national responsibilities, given that provincial fiscal programs undoubtedly have national consequences, detractors from the spending power can live with that. The question then becomes what role remains for the fiscal gap in the absence of spending power considerations. To put it more prosaically, can the division of responsibilities − what one might call the "responsibility gap" − be calibrated separately from the fiscal gap? If one can maintain a fiscal gap large enough to allow for equalization and tax harmonization without compromising resistance to the spending power, such an outcome might satisfy everyone. The Séguin Commission clearly thought that was not possible. I return to that below.

EVOLVING INFLUENCES ON THE FISCAL GAP

The traditional arguments for the fiscal gap go back to the seminal literature on the assignment problem in fiscal federalism as early as Musgrave (1959) and Oates (1972). Their arguments were based on the notion that redistribution could be hived off as a federal responsibility, and the assignment problem then involved which level of government should provide which public goods. Our understanding of the role of government has evolved considerably since then, and that has an impact of how the assignment of functions and the fiscal gap should be viewed. It is now widely recognized that governments are largely institutions for redistribution. Thus, government expenditures are increasingly dominated by the provision of public services to people, transfers and social insurance. It is precisely these sorts of expenditure programs that can be delivered most efficiently at the provincial level, and that accounts for the fact that provincial and state expenditure levels are now surpassing those at the central level in many federations. At the same time, these programs also serve legitimate national interests or objectives, such as equality of opportunity, equity, social citizenship, and efficiency in the internal economic union. The benefits of decentralization of public services and targeted transfers have been highly touted based on reasonable arguments, but how to reconcile these benefits with the national interest remains a key issue in fiscal federalism, and one that affects the case for a fiscal gap.

Another important expenditure area where the advantages of decentralized delivery cannot be separated from national interests is that of infrastructure. Infrastructure spending has an obvious local dimension, but at the same time, by influencing the regional pattern of economic development and diversification, it has implications for the national economy. This has become a potentially very important issue in Canada, where access to huge sums of money from natural resources has provided some provinces with the wherewithal to invest in province-building and thereby tilt national development toward resource-rich provinces, largely at the expense of other provinces. There is no particular reason on economic geography grounds that the locus of economic development should be in provinces that fortuitously sit on large endowments of natural resource wealth. On the contrary, these provinces may suffer from a locational disadvantage from the point of view of strategic development. (For a further discussion of this, see Boadway 2007.)

While provincial responsibilities on the expenditure side have been rising rapidly, revenue-raising has undergone a change in the past few decades as well, and many of these changes have favoured more centralized tax structures. Governments are increasingly relying on value-added taxes (VATs) for their revenues, and these are undoubtedly more efficiently administered centrally. Pressures of competitiveness have induced many countries to change their income taxes in various ways, such as by flattening their rate structures, reducing capital income tax rates both at the corporate and personal levels by, for example, adopting dual income taxes that apply different schedules to capital and labour income, implementing refundable tax credit systems, and more generally harmonizing income taxes. Achievement of all these objectives is more readily accomplished by federal dominance in the income tax fields. In

many countries, horizontal revenue-raising disparities are increasing, which also reduces the case for revenue decentralization.

Finally, increasing urbanization has led to the growing importance of cities as providers of services and infrastructure. Of all orders of government, cities are perhaps the least able to raise large amounts of revenues efficiently, and have traditionally relied heavily on transfers from upper orders of government. This too has reinforced the general case for an increasing fiscal gap.

Against these recent arguments for a significant fiscal gap are two influential ones, accountability and distaste for the spending power. Arguments for accountability have been particularly forceful, given the recent emphasis on governance in the political economy literature. Accountability itself is an elusive concept, and is often invoked with little explanation. In the fiscal federalism context, economists have argued that accountability is negatively related to the size of the fiscal gap, the notion being that spending that is not financed out of own source revenues will somehow be done less responsibly or efficiently. The idea is that money transferred by the federal government will somehow be spent less attentively than money that comes from own tax sources. This is disputable. In fact, revenues obtained from major own-source taxes are as exogenous as revenues obtained from transfers, perhaps more so. Formula-based transfers represent a predictable injection of funds into general revenues the amounts of which provinces have little control. This is just as true of revenues obtained from sales or income taxes, although they are even less predictable. For example, provinces rarely fine-tune their own revenues by changing their tax rates. It is hard to understand why that part of general revenues that comes from federal transfers would be spent any less responsibly than that coming from own tax sources. Indeed, perhaps the greatest windfall source of revenues that might be spent irresponsibly is revenue from natural resources, and few people suggest this source of own revenues leads to accountability problems. More generally, as blasphemous as it might sound, I would argue that the effect of incentives in government decision-making, which is the source of the economist's worry about accountability, is overstated. There is very little evidence that government behaviour is much affected by even significant economic incentives, like tax-back rates on natural resources. Government decision-making is rather more complicated than that of private sector economic agents.

Concerns about the misuse of the spending power are better founded. It is conceivable that a large fiscal gap by itself might lead to an intrusive use of the spending power if no safeguards are put in place. This is not the place to argue about the definition of the optimal boundaries of the spending power. Given that it is impossible for the division of responsibilities to be defined in watertight compartments, provincial spending programs will always have an effect on national interests. Whether the federal government ought to use the spending power to pursue what it perceives to be its interests, including those that are defined in the nation's constitution, is something on which agreement will never be reached. For our purposes, the question is whether it is possible in principle to achieve a fiscal gap that is consistent with efficient revenue raising and efficient expenditure decentralization, while at the same time proscribing the spending power to the extent desirable. That is, can the fiscal gap be decoupled from the responsibility gap? As I suggest later, the answer should be a qualified

yes, and on those grounds I would argue that fiscal decentralization may have gone too far. However, before addressing that issue, let us first turn to a parallel issue that arises with a fiscal gap, and that is the relation between the fiscal gap and fiscal imbalance independent of whether the fiscal gap and/or imbalance is accompanied by an abuse of the spending power.

FISCAL GAP VS. FISCAL IMBALANCE

As mentioned, the existence or otherwise of a fiscal imbalance has until recently been a highly charged issue in Canada, precipitated by the substantial cutbacks in federal-provincial transfers in 1995 as a part of the federal government's debt reduction program. The provinces argued that the federal government was simply passing on its deficit to the provinces, putting the provinces in an untenable long-run fiscal position given the projected rise in their expenditure responsibilities in areas like health and other social programs. The arguments coalesced in the Séguin Commission's report of 2002. The Commission estimated the magnitude of the fiscal imbalance for the province of Québec by computing the shortfall of transfers that would be required to finance projected expenditure requirements given the current division of tax room between the federal government and the provinces. Moreover, they argued that even if the fiscal imbalance were corrected by an increase in transfers, the fiscal gap would still be too large. Their argument was that the fiscal gap should be no more than is required for the federal government to fulfill their equalization obligations. Any more would inevitably result in the federal government using the extra transfers as a means of interfering with provincial spending responsibilities, that is, as a source of spending power abuse. Their remedy was for the federal government to turn over the entire federal GST to the provinces, which in their view would both eliminate the fiscal imbalance and adjust the fiscal gap to the desired level.

This view that the fiscal gap should be calibrated so as to eliminate any possibility of the federal use of the spending power implies that other arguments for the fiscal gap − such as those based on fiscal harmonization − are trumped by spending power concerns. In other words, the assumption is that it is impossible to separate the fiscal gap from the responsibility gap. This would lead to an unfortunate outcome since it could virtually rule out the possibility of a rational harmonized tax system. We return below to the question of whether it is possible to maintain a sizable fiscal gap while safeguarding the provinces from an excessively intrusive use of the federal spending power. For now, let us explore further the notion of the vertical fiscal imbalance and its relation to the fiscal gap.

The concept of a vertical fiscal imbalance as distinct from the fiscal gap is a conceptually meaningful one, albeit also ambiguous. The conceptual distinction can be characterized as follows (Boadway 2005a). In principle, one can define an optimal fiscal gap as the consequence of one's views about the optimal levels of federal and provincial expenditures and the optimal level of revenue-raising by each of the two levels of government. The optimal fiscal gap would be the level of transfers that is consistent with this optimal division of responsibilities.

The actual fiscal gap may differ from one's idea of the optimal gap if, for example, the balance between own-source revenues and transfers differs from the optimal: transfers are too high and own source revenues too low, or vice versa. On the other hand, fiscal imbalance occurs for the reason suggested by the Séguin Commission: given the division of expenditure responsibilities, the level of transfers is not consistent with the division of tax room between the provinces and the federal government. Fiscal imbalance in this sense can occur whether the fiscal gap is large or small relative to the optimum. Obviously, the definition of fiscal imbalance is bound to be imprecise. Among other things, the two levels of government can have different debt service responsibilities.

Apart from these ambiguities in measuring the size of the fiscal imbalance, it is clear that in the long run, a fiscal imbalance cannot persist in a well-functioning federation. As long as the provinces have fiscal discretion, as is the case in Canada, any fiscal imbalance will be met with an adjustment of revenue-raising, expenditures and/or transfers by the two levels of government over time. In that sense, observers like Jeffrey Simpson, mentioned above, are perfectly correct: the concept of fiscal imbalance is a transient one. Indeed, in the Canadian case, the fiscal imbalance resulting from the 1995 federal budget was largely undone in the following decade, mainly by an increase in federal transfers to the provinces.

In the short run, fiscal imbalance can arise from sudden changes in fiscal policies in response to economic shocks or stresses imposed by the accumulation of past events. The imbalance can be precipitated by either the provinces or by the federal government depending on the circumstances, and different federations might be prone to one type versus the other. It is useful to distinguish between the two cases, and especially to consider whether the fiscal gap plays a role in determining the type of fiscal imbalance that might arise.

FISCAL IMBALANCE I: THE SOFT BUDGET CONSTRAINT

Perhaps the most common form of fiscal imbalance is that which is initiated by provinces or local governments. It arises when these governments spend or borrow beyond their prudent limits in anticipation that the imbalance created will be met by federal government assistance. This is conventionally called the *soft budget constraint*, sometimes also referred to as the *bailout problem*.[1] The problem will apply when there is reasonable expectation that the federal government will, in fact, intervene in the event of a solvency problem by lower-level governments. It may be reasonable for the federal government to bail out a provincial or local government if the latter is hit by a shock that leads to

[1]The term soft budget constraint goes back at least as far as Kornai (1986), and originally referred to governments bailing out state-owned enterprises. See also Kornai, Maskin, and Roland (2003). For recent references to the soft budget constraint in the context of federations, see Rodden, Eskeland, and Litvack (2003), Wildasin (2004) and Vigneault (2007).

insolvency for reasons beyond the affected government's control. The problem is that it is typically impossible to disaggregate sub-national government misfortune into that which is exogenous and that which is exacerbated by excessive spending or borrowing. Moreover, the concept of insolvency is itself not readily defined, especially when provincial governments have discretion over the revenues they raise and the expenditures they undertake. Thus, the conditions under which an upper-level government might be reasonable to come to the aid of lower-level governments who are facing some financial distress is bound to be ambiguous, implying that fiscal imbalance of this sort is as well.

Nonetheless, we can identify the sorts of considerations that might lead to soft budget constraint problems. The most fundamental source of soft budget constraint is the inability of the federal government to commit not to bail out provinces or local governments that over-spend or over-borrow. Establishing such commitment is not an easy matter, and relies at least in part on reputations of governments built up over a period of time. Such reputations can be fragile, especially if particular governments engage in bailout-type behaviour precipitously. A good example of this might be the recent bilateral financial deal between the federal government and the government of Newfoundland and Labrador. This effectively allowed the province to reap the benefits of offshore oil and gas revenues without jeopardizing their equalization entitlements. (A similar agreement was reached with Nova Scotia.) Part of the argument given for this agreement was that the province had a relatively high level of debt per capita and so needed the funds to protect its ability to provide public services. Whatever the general merits of this argument at the time, it did represent a precedent that could be potentially worrisome to the extent that it leads to an expectation that provinces who accumulate large debts will obtain additional funding from the federal government.

More generally, one can speculate on other potential sources of soft budget constraints, bearing in mind that the degree of "softness" can vary. To the extent that provinces or local governments lack fiscal discretion, they might reasonably be thought less able to deal with financial stringency on a timely basis. Similarly, if the level of accountability of sub-national governments is low, they may be more likely to overspend. Excessive federal controls of sub-national government financial decision-making (e.g., strict control over borrowing) might also induce bailout problems. That is, to the extent that sub-national governments are forced to face constraints imposed by capital markets rather than being shielded from them by an upper-level government, they will behave more financially responsibly. With respect to the federal government, its ability to commit not to bailing out sub-national governments will be greater to the extent that the transfer system is formula-based as opposed to discretionary.

The most relevant consideration for our purposes is the size of the fiscal gap. Although it is difficult to be categorical, one might expect that if the fiscal gap is large so that provincial and local governments rely heavily on fiscal transfers, soft budget constraints are more likely. Among other things, a large fiscal gap leaves less discretion to the provinces to deal with their own fiscal contingencies.

FISCAL IMBALANCE II: TIGHTENING THE BUDGET CONSTRAINT

The term fiscal imbalance in the Canadian context is associated not with a soft budget constraint initiated by provincial/local government over-spending, but with its opposite. The federal government might initiate a fiscal imbalance if, starting from an initially balanced situation, it precipitously reduces transfers to the provinces. It may come in response to some external shock that suddenly puts financial pressure on the federal government, or it may be the result of fiscal pressures that have built up over a longer period of time. In either case, the effect is for the federal government to transfer some of those pressures to provincial and local governments by reducing its transfers to them, even if the latter also face their own extraordinary fiscal pressures as arguably was the Canadian case. As I have emphasized, identifying the extent of the fiscal imbalance may be difficult, especially when the provinces might face similar shocks as the federal government. Moreover, the effect will be transient, since both levels of government will necessarily react to undo a fiscal imbalance that might suddenly be affected. Nonetheless, the basic facts that led to a temporary imbalance can be readily observed. In the Canadian case, the federal government reduced its cash transfers to the provinces by something of the order of 25 percent in a single budget as part of its deficit-reduction strategy. It can hardly be denied that at the time that happened, the provinces were faced with a fiscal imbalance that needed to be addressed, and was addressed, in the coming years. The episode had a lasting impact, however, and led to a vigorous debate about the relevance of the fiscal gap in generating the episode.

What sorts of factors might contribute to a fiscal imbalance initiated by the federal government? A precondition seems to be some fiscal pressure on the federal government that precipitated the action, for example, a growing debt-to-GDP ratio or a decline in tax revenues. However, this in itself is not sufficient: the federal government could always take other fiscal actions that over the medium term would address the issue. There are a number of other factors that might work in favour of the federal government relying disproportionately on cuts in transfers to the provinces as a way to relieve federal fiscal pressures. Among these might be political factors, such as differences in ideology between the federal government and the provinces, animosity, distrust and so on. Others are much better equipped to judge the importance of those. One economic factor is the extent to which the federal-provincial transfer system is formula-driven versus discretionary. In the Canadian case, while the equalization system was largely discretionary, the level of social transfers (although not their distribution) was largely a matter of federal discretion. Even in the case of formula-driven transfers, unexpected increases in their size − such as the growing burden of equalization transfers resulting from a building horizontal imbalance from such things as provincial natural resource revenues − might induce the federal government to tighten transfers. As well, the greater the ability of provincial governments is to raise their own revenues, the less reluctant the federal government might be about passing on fiscal problems to them. Similarly, to the extent that federal versus provincial responsibilities for

financing major programs such as health, education and welfare are ill-defined, the federal government may be less reluctant to unilaterally adjust its share downward. Finally, growing demands for more provincial accountability and autonomy will also make the federal government content to reduce its transfers to the provinces, especially since there is little accountability to it for how the transfers are used.

Unlike the case of a soft budget constraint where the federal government reacts to fiscal contingencies of the provinces and their municipalities that are self-inflicted, a fiscal gap that is too low might contribute to fickleness and unpredictability of transfers from the federal government, that is, a fiscal imbalance in the second sense. According to this view, which is obviously judgmental, the optimal fiscal gap should be neither too little nor too large to discourage imbalances being initiated by either the provinces and municipalities or the federal government. This prescription accords well with other arguments for the fiscal gap. The issue is how to achieve it.

SEEKING SOME BALANCE IN THE FISCAL GAP

The choice of a fiscal gap involves more than just determining its size. How the fiscal gap is achieved through the full system of federal-provincial fiscal arrangements is equally important. The underlying issue in choosing the set of fiscal arrangement is how to combine benefits of decentralizing public services and targeted transfers with an efficient harmonized tax system, horizontal balance and a balanced response to fiscal shocks. On the one hand, the economic (and constitutional) case for decentralizing the provision of expenditure programs, and for doing so in a way that retains all the benefits of provincial discretion, is compelling. Where many observers will differ is in the extent to which provincial discretion should be constrained to take account of national interests, both those involving efficiency in the economic union and those involving redistributive equity and equality of opportunity. That is, what should be the responsibility gap? Ideally, one would like to design the fiscal gap to be consistent with varying degrees of the responsibility gap, ranging from the total absence of federal intrusion through the spending power as advocated by the Séguin Commission to more liberal use of the spending power to achieve the kinds of obligations that are set out in Section 36 of the Canadian Constitution,[2] albeit in a reasonably non-intrusive way.

At the same time, on the revenue side, the case for significant federal presence is compelling. Harmonization of broad-based taxes is important for the efficient functioning of the internal economic union, as well as for some minimum standards of redistributive equity in the tax-transfer system. Regarding

[2]These include the federal obligation for equalization to ensure the provinces provide reasonably comparable levels of public services at reasonably comparable levels of taxation. They also include the joint federal and provincial responsibility to provide suitable levels of public services, to equalize opportunities for all Canadians, and to pursue economic development.

sales taxation, the case for the form of tax to be a VAT is overwhelming. It is apparent that a harmonized VAT is unnecessarily difficult to achieve in a decentralized federal system.[3] Moreover, piggybacking by the provinces onto a federal VAT would be practically difficult as well.

Income tax harmonization, however, does not require as uniform a system. A system like the current one − in which the federal government and the provinces agree to a common income tax base and a single tax-collecting authority, while the provinces have some discretion − is feasible. Even here, though, significant federal tax room is necessary both for maintaining the harmonized system based ultimately on the federal tax base, and for ensuring that the federal government is able to achieve some suitable amount of nationally defined redistributive equity in the federal tax-transfer system. This should not detract from the provinces having sufficient discretion to vary the amount of revenues that they raise for their own purposes on a year-to-year basis. The revenue-raising discretion of the provinces can be supplemented by other taxes where harmonization is less of an issue, such as payroll taxes and specific excise taxes.

One final tax area where in the future federal presence is likely to be important is that of environmental taxes. Though not a substantial revenue source now, among economists there is likely a strong consensus that carbon taxation is the most reasonable response to the environmental problem that is at hand. If it were embraced wholeheartedly as a corrective mechanism, it would generate significant amounts of revenue that could be used to reduce revenue requirements from other sources: the so-called double dividend of environmental policy whereby both environmental objectives are achieved and "free" revenue is made available for other purposes. For carbon taxation to be effective, it seems reasonable to insist that it be a federal tax. Of course, there are various alternative scenarios that could intrude on the double dividend benefits of carbon taxation. To the extent that the government chooses to internalize environmental costs by subsidizing various devices for reducing emissions, the double dividend would be lost. It would also be lost by a cap-and-trade system that simply allocated caps without selling or auctioning them. And, if the introduction of a carbon tax were made politically palatable by a revenue-neutral mechanism such as an accompanying income transfer to citizens, as some in the United States are advocating, the double dividend would be squandered. However, this is a digression.

What would be the elements of a federal-provincial fiscal arrangements system that could achieve the joint objectives of retaining a decentralized system of expenditures with provincial discretion while at the same time generating the fiscal gap that allowed sufficient provincial revenue raising, harmonization of sales and income taxes, allowed the federal government sufficient funding to

[3]In the Canadian case, a harmonized VAT system operates bilaterally between the federal government and Quebec. It would be very difficult to extend that system to several provinces each one choosing its tax rate independently. Should a harmonized VAT system be introduced in Canada, a parallel decentralized system confined to Quebec could be accommodated, albeit at some administrative cost. For a further discussion of VAT harmonization in a federation, see Boadway (2006).

achieve its equalization and redistributive objectives, minimized the possibility of fiscal imbalance induced at the initiative of either the provinces of the federal government, and was flexible with respect to the use of the spending power so the responsibility gap could be defined separately from the fiscal gap? In my view, the following items would be on the list for the Canadian case:

- Continued decentralized provision of public services and targeted transfers
- Sufficient federal dominance in the income tax fields to ensure that the existing harmonized income tax system is maintained, though with some major reforms to the direct tax system
  - The replacement of the current income tax system with a dual tax system whereby capital income is taxed at a flat rate, while labour and transfer income is taxed progressively.[4] Ideally, the capital income tax would be federal, while the labour income tax would be shared
  - More aggressive use of refundable tax credits by the federal government to achieve its redistributive objectives
  - More reliance by the provinces on labour income taxation, including payroll taxes
  - Continued discretion by the provinces to set their tax rates
- A national GST accompanied by a federal-provincial revenue-sharing agreement in which a guaranteed share goes to the provinces, is unconditional and is equalized (like the Australian system)
- A reduction in the discretion with which the federal government can change the level of transfers to the provinces on a year-to-year basis
- The use of an advisory institution like those used in Australia, South Africa and India, but adopted to the Canadian setting, that can serve as a body for enunciating longer term changes to the fiscal arrangements in a more open and transparent way, while at the same time respecting the role of legislatures to enact budgetary laws
- The optimal use of the spending power is an open question, and can be determined independently of the fiscal gap
- Asymmetric arrangements could be made with Quebec without jeopardizing the integrity of the system for the other provinces, though there are obviously political obstacles. Asymmetry might have the following features:
  - It could apply to the GST, if limited to Quebec
  - It could apply to the use of the spending power by some form of opting out mechanism

Such a system is flexible enough to support varying configurations of the responsibility gap, while at the same time ensuring that the integrity of the internal economic union is protected as well as the ability of the federal

[4]This is the system used in some European countries, and has been advocated for others, including the United States and Japan. For a discussion of this system, see Boadway (2005b).

government to pursue its legitimate objectives. For that, at least some reasonable fiscal gap is necessary.

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25

Problems of Territorial Finance: UK Devolution in Perspective

Charlie Jeffery

Les accords financiers territoriaux sont d'une importance fondamentale s'agissant d'établir les conditions du pouvoir et de la légitimité des régimes politiques décentralisés. Ils déterminent en effet ce que peuvent faire et ne pas faire les gouvernements, qu'il s'agisse de les doter directement des ressources nécessaires à l'exécution de leurs fonctions ou, plus indirectement, d'influer sur une conjoncture économique qui justifie – ou limite – l'usage des fonds publics. Ces accords contribuent aussi à façonner l'opinion publique en ce qui touche la légitimité des régimes fédéraux. Leur très grande portée peut susciter de vifs débats sur l'usage équitable de « nos fonds » et l'équilibre des ressources entre « eux » et « nous ». L'ampleur du débat en cours sur le financement territorial dans le Royaume-Uni de l'après-dévolution témoigne du profond retentissement de ces questions de pouvoir et de légitimité. Les rapports de force décisifs se jouent entre une Écosse en régime de dévolution et les gouvernements centraux du Royaume-Uni. Depuis deux ou trois ans, un intense débat sur les relations financières entre l'Écosse et le reste du Royaume-Uni condense ainsi les enjeux plus vastes entourant la place de l'Écosse au sein ou – en tant qu'État indépendant – à l'extérieur du Royaume-Uni.

INTRODUCTION

Ron Watts, Comparison and Territorial Finance

Ron Watts's work on comparative federalism, including territorial finance, has two defining features. The first is his method, which specifies the properties of one federal political system in its relation to others. The effect is to strip places, and scholarship about those places, of their self-referential tendencies, and to build classification schemes that help the rest of us understand the pattern and significance of similarity and difference. The second defining feature of Watts's work is its basis in evidence. His work has little space for the abstractions that often accompany efforts to construct "parsimonious" theory. He lets the cases

speak for themselves, building up theory – and who else has contributed so much to the generalizable understanding of the properties of federal systems? – on a carefully constructed edifice of evidence.

This approach – comparison though classification of the concrete features of federal institutions – marks out Watts's work on both territorial finance and the United Kingdom (UK). Though adept in the economic theory that underlies much of the scholarly debate on territorial finance, and conversant with the often fiendish level of detail of schemes of fiscal equalization and fiscal autonomy, Watts cuts to the chase: above all it is "political setting" (Watts 2003, 2) that matters. Territorial financial arrangements in federal systems "cannot be considered purely analytically and technically in isolation from the social fragmentation and diversity and the political institutions with which they interact" (Watts 2000, 372). They are rather, and "inevitably", the "result of political compromises" (Watts 2003, 2).

Those compromises are about two fundamentals of politics: power and legitimacy. Territorial financial arrangements shape what governments can or cannot do, both directly in equipping them with the resources to carry out (or not) their allotted functions, and indirectly in their significance for shaping the economic conditions that generate – or limit – the yield of the public purse. In these ways territorial financial arrangements shape the relationships of power between central and regional government, and among regional governments.

Territorial financial arrangements are also important in shaping public views on the legitimacy of federal political systems. They "shape public attitudes about the costs and benefits of the activities of different governments" (ibid., 2). They have enormous scope for prompting vivid debates about fairness in the uses of "our" money and the balance of resources available to "us" and "them". If general public consent in one or more jurisdictions about the pattern of costs and benefits between centre and regions, or among regions, is eroded, there may be consequences for the legitimacy and stability of the wider political system.

Classifying Idiosyncracy: The UK as Devolved Union and *Unitary State*

Post-devolution UK exemplifies the importance of political setting, and of questions of power and legitimacy in the relationships of central and devolved governments. The pivotal relationship is that between the devolved Scottish and UK central governments. Over the last two or three years an intensive discussion about the fiscal relationship of Scotland and the rest of the UK has unfolded. That debate exemplifies wider contentions about Scotland's place within the UK union or outside it as an independent state. It has an institutional expression in the increasingly fractious debate over the distribution of resources between the [at the time of writing] minority government in Scotland run by the Scottish National Party (SNP), first elected in 2007, and [again, at the time of writing] a unionist UK Labour government now headed by the Scottish MP Gordon Brown. It also has a popular expression in patterns of public opinion in both

Scotland and England, which suggests that the current set of territorial financial arrangements is neither appropriate nor fair.

The wider contentions in which these disputes over resources are nested reflect the state of disequilibrium of the UK's political system a decade or so after the introduction of devolution. To understand that disequilibrium, the idiosyncracies of the UK need to be spelled out. The UK does not fit conventional classification schemes well. It is in part what Watts classes as a "devolved union", in which Scotland, Wales and Northern Ireland remain subject in principle to the ultimate authority of the UK central government, but have in practice varying levels of substantial and protected autonomy (though that protection arises from popular endorsement by referendum rather than constitutional entrenchment). But the UK in part – and in its by far largest part, England – has the features of a classic unitary state in which "authority is concentrated completely in central government" (Watts 2007, 242). That mix of unitarism and devolution demarcates the UK from other devolved unions – Italy, Japan and Spain – which have a *general* pattern of devolution across the state, albeit in Italy and Spain with some asymmetries.

Rokkan and Urwin's (1982) terminology of the "union state" has been conscripted to describe this mix of partial autonomy and general unitarism. The UK's core territory is England. Over a period of several centuries England accumulated unions with its neighbouring nations: Wales in 1536, Scotland in 1707, and Ireland in 1800 (reduced to the six counties of Northern Ireland in 1922). This sequence of unions evolved in piecemeal manner. While UK central government has always governed England directly and, over time, increasingly uniformly, the terms of union with Scotland, Wales and (Northern) Ireland have always provided for three distinctive sets of territorial administrative arrangements. These arrangements have been periodically reshaped in nation-by-nation, rather than general, processes of territorial accommodation. Prior to 1999, they had come to be carried out by territorial departments of the UK government. The directly elected devolved institutions introduced in 1999 represent the latest attempt at accommodating distinctive Northern Irish, Scottish and Welsh political communities alongside the numerically and economically dominant English in a single state structure. The UK pre- and post-devolution has been, in other words, not one union, but three unions focused on an English common denominator; it is more accurately a "state of unions" (Mitchell 2006) than a union state.

This "state of unions" has a "double asymmetry" (Watts 2006, 222) not just of distinct institutional arrangements in the UK nations outside England, but also of the size of those nations vis-à-vis England. England has 85 percent or so of the UK's population and economic heft. It dwarfs Scotland, Wales and Northern Ireland. This double asymmetry creates – to follow Watts's (1999, 108-115) terminology about the disintegrative dynamics of federal political systems in some political settings – a peculiar "pathology" that compromises the ability of the UK's political actors, central or devolved, to develop a pan-territorial, state-wide approach to government in the UK. Because the government of the UK is simultaneously the government of England, its UK-wide and England-specific roles are easily confused, and because England is so big, its interests can easily capture and dominate UK-wide government. And because this "Anglo-UK" has

piecemeal relationships with devolved governments in Scotland, Wales and Northern Ireland, UK-devolved issues are dealt with mainly in three sets of disconnected bilateral relationships rather than in a coordinated, pan-UK approach.

The net result is an absence both of an overt, overarching rationale for UK-wide union to which all actors subscribe, and of institutional mechanisms capable of expressing common purposes between UK and devolved government and across the component nations of the UK. This under-institutionalization of UK-wide union broadly worked before devolution when territorial interests were accommodated through negotiations within a single UK-wide government. It initially worked after devolution, even though the UK now had several different governments accountable to distinct electorates. But it worked largely because the Labour Party was the leading party of government both at Westminster and in Edinburgh and Cardiff during the first two terms of devolved government from 1999-2007 (Northern Irish devolution was largely suspended during that period). Now that the UK has different governments with increasingly diverse party-political composition – the SNP leading government in Scotland, the nationalist Plaid Cymru in coalition with Labour in Wales, and a functioning and increasingly assertive multi-party coalition in Northern Ireland – the legacy of under-institutionalization of union appears unfit for the purpose of identifying and reconciling union-wide and territorial interests.[1]

THE "BARNETT" SYSTEM

This lack of contemporary fitness for purpose of inherited approaches to territorial accommodation is exemplified in the UK's territorial financial arrangements, aptly described by Watts (2007, 257) as "one of the least well developed aspects of the devolution arrangements". The UK's territorial financial arrangements routinely bear the name of Lord (then Joel) Barnett, the Labour deputy minister in the UK Treasury from 1974-79. They were codified by Barnett in the context of the proposed, but unsuccessful, devolution reforms introduced by that Labour government, and were designed to replace annual rounds of negotiations for territorial spending between the Treasury and the UK government's territorial departments for Scotland, Wales and Northern Ireland. There were three components to Barnett's "system" that applied initially to Scotland and Wales and were later extended to Northern Ireland. With only minor modifications these three components still shape the territorial financial arrangements used after devolution:

1. The first was to establish "baseline" block grants to fund territorial spending outside England. These baselines were set at higher levels of per capita spending than in England. Though an assessment of territorial spending needs was undertaken in the late 1970s, the baselines did not closely reflect

[1]For a fuller discussion of the pathology of the post-devolution political system see Jeffery (2008).

this. They were instead essentially the "frozen" historical product of previous annual negotiations, and reflected much more the negotiating skill of successive territorial Secretaries of State than differential needs. There has been no subsequent needs-assessment process.

2. Annual adjustments to the baseline grants are driven by decisions of the UK government on spending in England on programs comparable to the areas administered differentially by the territorial Secretaries of State before devolution and which fall under the responsibility of the devolved institutions now. The territorial blocks are adjusted in accordance with that spending, relative to population size. Annual adjustments are therefore, in principle, at the same levels per capita outside England as in England (though in practice there are elements of "bypass" of the population key). In the long term, annual adjustments at equal per capita levels should erode the per capita spending premium outside England inherited from the baseline grants in the late 1970s. This is the so-called "convergence effect" of the Barnett system which should, over time, reduce per capita funding outside England irrespective of any differential spending needs compared to those in England.
3. The territorial Secretaries of State – and later the devolved governments – had/have in principle complete discretion on how the block grant was/is spent. There are no elements of conditional or joint funding in the grant arrangements.

These, in comparative terms, are unusual arrangements. Table 1 – adapted from one of Watts's (2007, 255) classification schemes – illustrates how, using the example of Scotland (though the other devolved nations are not significantly different). While the Scottish Parliament accounts for a proportion of overall public spending in Scotland comparable with that of constituent units in other federal-type systems, it is an outlier in three other respects: there is no direct account of territorial spending needs in the calculation of that grant; the Scottish Parliament raises only a small proportion of what it spends with the lion's share provided by Westminster's block grant; and it has almost complete discretion over how that grant is spent.

In these latter three categories Scotland (and Wales and Northern Ireland) is an outlier. Logically enough, the debate about the fitness for purpose of the Barnett system focuses on these outlier issues:

1. The absence of contemporary needs criteria raises concerns about equity in the territorial distribution of public funding, or "territorial justice".
2. Minimal responsibility for raising funds over which there is unfettered spending discretion raises concerns about accountability and incentives.

These issues have each prompted significant debate about alternative territorial financial arrangements, in particular in Scotland. That debate has opened up twin perspectives on reform. These perspectives are discussed in turn below, with particular reference to the positions in the more intense Scottish (or, better: Scottish-English) debate (Jeffery and Scott 2007). The final section of the

Table 1: Scottish Territorial Finance in Comparative Perspective

Features of Territorial Finance	*Position in Scotland*	*Position of Scotland Comparatively*
% public spending in Scotland by Scottish Parliament	56	In mid-range of federal-type systems
Consideration of need in calculation of central government grant	At best indirect and based on calculations from 1970s	Outlier
% Scottish Parliament spending covered by own revenue	Minimal: overwhelming majority provided by UK block grant	Near the bottom of the table
% spending under full discretion of Scottish parliament	Almost total, UK block grant unconditional	At the top of the table

chapter then contextualizes these positions in a discussion of "political setting", that is, the constitutional debate – driven by questions of power and legitimacy – onto which the twin reform debates about territorial finance map. In key respects the territorial finance debate is a microcosm of that wider constitutional debate.

UK DEBATES ON TERRITORIAL FINANCE

Problems of Equity and Need

Questions of equity – understood as the responsiveness of the territorial finance system to different territorial needs – have been central to the UK debate, though in a number of ways that rest on different kinds of assumption and are, in part, mutually incompatible. There are three main themes:

1. The per capita spending premium outside of England which is inherited from the baseline block grants is unfair to the English, with the Scottish premium most controversial (even though the Northern Irish premium is significantly higher) because Scotland is now one of the more prosperous regions of the UK (McLean and McMillan 2003). Measured against comparable spending programs in England, devolved spending per capita in Scotland is at about 120 percent of the UK average, with England ranked below the average. This apparent inequity has prompted two distinctive concerns:

a) One, pursued largely in conservative media outlets, in part in the Conservative Party, in fringe organizations of English nationalism like the Campaign for an English Parliament, and generally in southern and rural/suburban England, is that England as a whole is being treated unjustly.
b) The other is mainly focused in parts of northern England facing structural economic adjustment, was prominent in the failed campaign to introduce elected regional government in the north, and is still being pursued by northern Labour MPs (and Lord Barnett!). The concern here is that some parts of England – in the old industrial north in particular – are disadvantaged both in levels of public spending compared to Scotland and by the absence of a needs-based allocation system which might disaggregate within England between a largely affluent south and a north still beset by the consequences of the decline of heavy industry.

2. One variant on this theme of Anglo-Scottish comparison, and focused in conservative debate in Scotland, is that the Scottish public spending premium is not just unfair in comparison across UK nations, but also economically disadvantageous for the Scots (Mackay and Bell 2006). In particular the Scottish premium sustains too big a public sector share of economic activity in Scotland which "crowds out" more productive private sector activity.[2] In this view a rebalancing of territorial spending which reduced the Scottish block grant is important not just for equity concerns but, more importantly, for the competitiveness and dynamism of Scotland's economy.
3. A third equity argument arises from the convergence properties of the Barnett system. That convergence effect should lead, in the long term, to territorial spending across the UK converging on the English baseline and eroding the Scottish, Welsh and Northern Irish premiums. Innovative "half-life" modelling by David Heald and Alasdair McLeod (2002, 159-161) has shown that significant convergence can occur in much shorter time frames assuming (as was the case from 1999-2007) high overall rates of growth of public spending. There has been no general pattern of erosion of devolved spending premiums over England since 1999, though in some high cost areas (health and education) devolved spending appears to have lagged behind England, and spending per capita in Wales appears more generally to have dropped noticeably relative to England (Adams and Schmuecker 2005, 35-42). That impact in Wales has prompted a debate there – and a plan to establish a Finance Commission as part of a wider review of the devolution arrangements – on the relationship of spending levels and needs in a part of the UK which, if anything, has lagged further behind in economic performance since 1999.

These different equity concerns have prompted (as yet still modest) thinking about new approaches to territorial finance that might rebalance territorial

[2]Economic analysis is split in Scotland as to whether, and how far, these crowding out effects actually occur. See Marsh and Zuleeg (2006).

spending, either to head off incipient Anglo-Scottish tensions, to rebalance the public and private sectors in Scotland, or to protect the relative position of Wales. These are all, significantly, partial agendas; few have sought to articulate equity concerns which have a union-wide rationale. The Steel Commission, which was established by the Liberal Democrats in late 2003 and reported in March 2006, was a notable exception (though, reflecting the political weight of the Liberal Democrats, had little impact). The Steel Commission set out an agenda which forefronted (inter alia) risk-sharing and solidarity between the component parts of the Union as a means of giving substance to the Union, arguing that "a rejuvenated and modern United Kingdom requires more sophisticated partnership arrangements with its component parts", and that these arrangements would need to be based, in part, "on an equitable distribution of resources between different parts of the country based on their respective needs" (Steel Commission 2006, 92, 95).

How an assessment of needs might be carried out, and how that assessment might drive territorial spending allocations in some form of fiscal equalization is not clear. Both the UK Treasury (McLean 2003) and the Scottish Government[3] have pursued a number of data improvements that establish a better basis of understanding of current territorial spending. But the UK government has not (at least publicly) led any work on needs-assessment methodology. Some scholarly work has proposed what are still fairly crude indicators of need, which might be ranged against spending patterns and used as a basis for adjustments in spending allocations, including social security spending (Bell and Christie 2001, 142) and GDP per capita (McLean and McMillan 2003, 64-69). There have also been expressions of admiration for the work of the Australian Commonwealth Grants Commission in producing a needs-based formula that, amid grumbling in some Australian states, appears to be independent and robust enough to command widespread consent (ibid., 62-63; Jeffery and Scott 2007, 17). The Steel Commission's proposed Finance Commission of the Nations and Regions (2006, 107) bears some resemblance to the Australian Commission.

There appears, in scholarly analysis at least, to be agreement that any UK-wide needs-assessment process should, alongside consideration of needs and spending in Scotland, Wales and Northern Ireland, also disaggregate England into the nine regional units commonly used in delivering English policies, notably in economic development. Such an approach could lead to a significant rebalancing of public spending within England – and notably away from London (McLean and McMillan 2003, 6) – reflecting how some of the regional economic disparities within England are rather wider than those between England as a whole and the devolved nations. There appears, though, following the overwhelming rejection of regional government in North East England in 2004, to be no appetite for the regional decentralization of decision-making within England that such a disaggregated approach might imply. Any adjustments to territorial financial arrangements in the foreseeable future are

[3]Via improvements to its annual report on Government Expenditures and Revenues in Scotland.

likely, as a result, to be as between England corporately and the devolved nations.

Problems of Block Funding

The second track of the reform debate suggests, in addition, that any adjustments are likely to be made on a case-by-case basis rather than in a general union-wide reform. That is because this second track – which has to do with the system of block funding – is, so far at least, largely a Scotland-only concern and likely to produce Scotland-specific outcomes.

The Barnett system of allocating large territorial block grants and allowing full spending discretion has prompted two kinds of concern in Scotland. The first is that spending the block grant without having to raise funds through Scottish-level decision-making weakens the Scottish government's account-ability for spending decisions and may encourage profligacy and/or log-rolling. There has been no systematic analysis so far to underline that concern, though plenty of partial and anecdotal evidence that spending decisions have not (always) been accompanied by rigorous cost-benefit methodologies and/or have responded to territorial constituencies of particular parties in Scotland (most notably on commitments to improving transport infrastructure).

A second concern about spending money without having responsibility for levying the taxes that raise that money is that the Scottish government's incentives for economic growth may be compromised; if a government does not get direct benefit from the tax proceeds of growth, why should it bother to stimulate growth? It is not clear how much grip this argument has in practice. Governments probably do have an incentive to improve economic performance given that economic competence is a major determinant of voting behaviour and, therefore, a prerequisite for re-election. This aside, there appears, more generally, to be no clear pattern of evidence from comparative analysis that winning or having greater tax-raising powers necessarily or systematically brings greater discipline into spending, or is beneficial to economic development (Darby, Muscatelli, and Roy 2002; cf. Rodriguez-Pose and Gill 2005). What is clear is that there is a strong case in economic theory that these effects should happen (cf. Jeffery and Scott 2007, 35-37) if regional governments have a sufficient level of fiscal autonomy, so long as they raise a significant proportion of what they spend.

Debate on fiscal autonomy is highly distinctive to Scotland. Fiscal autonomy is not on the radar at all in Wales, and in Northern Ireland only to the extent that cross-border differences in corporation tax compared with the Republic of Ireland shape debates about the competitiveness of Northern Ireland as a location for business and inward investment. But in Scotland, fiscal autonomy is a dominant theme in discussions about reform to the current system of territorial finance (though, ironically, the current autonomy to vary the standard rate of UK income tax by ±3 percent has not been used). There are three broad variations in the debate:

a) Assigning revenues from UK taxes raised in Scotland to the Scottish budget. This would, according to its proponents, bring fuller incentives for the Scottish government to grow the Scottish economy and bank the additional proceeds from assigned taxes (Hallward and MacDonald 2004) and/or reduce the level of block grant from Westminster and take some of the sting out of English concerns about perceived over-funding of Scotland from the UK exchequer (Alexander 2008).
b) Widen the scope for the Scottish Parliament to vary Scottish tax rates and perhaps tax bases from those defined for UK-wide purposes at Westminster. This too would bring growth incentives while adding a more direct sense of accountability between devolved government and taxpayer-voters in Scotland which might be expected to bring tighter discipline in spending (Hallward and MacDonald 2004) and, in some views, reduce the size (or at least constrain the growth) of the public sector. Others have, alongside economic and accountability benefits, also highlighted the potential for autonomy on environmental taxes to change environmental behaviour (Steel Commission 2006, 103).
c) Establish full fiscal autonomy, i.e., a situation in which Westminster would no longer raise revenues in Scotland and in which the Scottish Parliament itself would raise all revenues in Scotland (and, in particular, revenues from oil and gas production in the North Sea off Scotland). Hallward and MacDonald (2006) have set out the most comprehensive argument for full fiscal autonomy, which they conceive as possible both within the UK (in which case payment for services delivered in Scotland by UK government would be remitted to Westminster), and as a logical feature of an independent Scottish state outside the UK.

POLITICAL SETTING: TERRITORIAL FINANCE AND DEBATES ON THE FUTURE OF THE UNION

The coda to the title of Hallward and MacDonald's 2006 contribution on fiscal autonomy is significant: "An economic case for fiscal autonomy – *with or without independence*". That coda highlights the interconnection of arguments about territorial finance that are grounded in economic theory with what Watts called "political setting". Though many of the often sophisticated arguments advanced in the UK/Scottish debate have been put forward by economists, they are easily used (and/or directly intended) as leverage for partisan political positions that, in turn, reflect wider positions in the UK's constitutional politics.

Significantly, Scotland currently has two rival forums designed to build recommendations on further constitutional change: the "National Conversation" launched by the nationalist SNP minority government in August 2007, and the Scottish Constitutional Commission announced by the unionist parties in the Scottish Parliament in December 2007, and launched as a cross-border, Scottish-Westminster body in April 2008. The National Conversation is designed to foster debate on both the SNP's preference for Scottish independence as well as the further-reaching devolution favoured by others. The Constitutional

Commission explicitly excludes the option of independence, shares common ground with the National Conversation in considering further-reaching devolution, but also has a distinct focus in exploring steps to underpin the union in the context of devolution.

In both forums territorial finance is one of the main subjects for debate. The Scottish Government White Paper that launched the National Conversation focuses on fiscal autonomy – in line with the economic incentives arguments discussed above – as a prerequisite for "a wealthier Scotland" (Scottish Executive 2007, 10). And territorial finance was singled out as a "key issue" in the speech by the leader of the Labour Party in Scotland, Wendy Alexander, which first floated the idea of the Constitutional Commission in November 2007. Alexander's (2007, 13-14) focus was on using (a limited measure of) fiscal autonomy to enhance the accountability of devolved government in Scotland while also endorsing "principles of resource, revenue and risk sharing" that might "underpin the partnership that is the UK". Alexander's position is clear enough. But it is not clear that it is shared either with the other unionist parties in Scotland, or among those parties at Westminster. The UK Labour government in Westminster in particular appears at best lukewarm on any move from the status quo.

Table 2 is an attempt to map onto party politics the main themes that have emerged in the (Anglo-)Scottish debate on territorial finance. That mapping is in part based on published documents, in part (especially for the Conservatives) on reading between the lines of the few official statements on territorial finance. There are a number of points that emerge from the table. The central one is that each of the first five options is from a spectrum of opinion that is concerned with some aspect of the UK union; only the last option, that of the SNP, has a different rationale, focused on Scottish independence (or, at least, taking steps in that direction). Strikingly, only the Liberal Democrats among the unionist parties have a single, UK-wide view endorsed by both its Scottish and UK-level components. The Conservatives have different, if largely reconcilable views in England and Scotland, both focused, for different reasons, on reducing the level of central government block grant to Scotland. Labour appears deeply divided. Scottish Labour, and in particular Wendy Alexander, have endorsed a need for change, though with a complex position focused in part on defusing charges of inequity from England, enhancing accountability of decision-making in Scotland, and using fiscal equalization as an expression of solidarity across the UK union. Northern English Labour MPs have a narrow focus on apparent inequities in public spending in their regions, as compared with Scotland (and not, generally, as compared with parts of England, notably London, that have high spending levels). And the UK government under Gordon Brown cleaves to the status quo, fearful of opening up debates about territorial equity (especially under a Scottish Prime Minister dependent on maintaining Labour's strength in England to win the next election), and generally distrustful for similar reasons of the differences in policy outputs that have resulted from devolution, and might be expected to multiply if significant fiscal autonomy were won by the Scottish Parliament.

These are all views on the distribution of *power* in the UK. Echoing Roger Wilkins's advice to German constitutional reformers agonizing over territorial

Table 2: The Party Politics of Territorial Finance in the UK

Preference	*Party Political Support*	*Rationale*
Status Quo	UK Labour Government	Costs of change too high; suspicion of autonomy qua difference
Fiscal Equalization	Conservatives (England) and some Labour (England)	Reduce "inequitable" subsidy to Scotland
Fiscal Equalization *or* Fiscal Autonomy	Conservatives (Scotland)	Discipline on public spending, rebalance public and private sectors
Fiscal Equalization *and* Fiscal Autonomy (tax variation)	Liberal Democrats UK-wide	Incentivize economic growth, change environmental behaviour while affirming union
Fiscal Equalization *and* Fiscal Autonomy (tax assignment)	Labour (Scotland)	Reduce Scottish grant to mollify the English, tax assignment provides incentives for growth, equalization to affirm union
Fiscal Autonomy	SNP	Scottish independence, or enhanced autonomy as stepping stone on the way

finance, Ron Watts (2006, 223) pithily argues that: "Money is power. Unless money relations are sorted out, power relations will not be sorted out". The rather complex map of unionist preferences on power relations in Table 2 suggest that there is no obvious unionist consensus on what the power relations in the union – between central and devolved governments, and between the component nations of the UK – should be. There is a mix of territorial difference both between and within parties (the Liberal Democrats excepted), between UK and devolved levels, and between different rationales of equity and autonomy. The contrast with the clarity of position of the SNP, focused on maximizing fiscal autonomy as part of a strategy of moving towards independence, is striking.

These alternative and competing views on how best, through territorial finance, to structure power relations in the UK raise questions about what the public thinks and whether either the current arrangements or the possible future

ones outlined above command *legitimacy*. There is some evidence of public dissatisfaction with current arrangements. Scottish public opinion has been consistently in favour of further-reaching devolution since the Scottish Parliament was established, and that sentiment is strongest among those (consistently more than 50 percent) who favour the Scottish Parliament raising its own income through Scottish taxes (Curtice 2006, 106-107). The latter view is shared, but held more strongly in England. While 51 percent of Scots agreed in a 2003 survey that the Scottish Parliament "should pay for its services out of taxes collected in Scotland", 74 percent of English respondents were of the same view. There are similar differences on a number of other relational issues between England and Scotland post-devolution:

- Twenty percent or so of the English think that Scotland gets more than a fair share of government spending in the UK, as opposed to around 10 percent of Scots. Almost 50 percent of Scots think they get less than their fair share, a view shared by only 10 percent or so of the English (ibid., 106).
- Around 30 percent of Scots think that "England's economy benefits more from having Scotland in the UK" while only just over five percent of the English think the same; around 40 percent of the English think that "Scotland benefits more from being part of the UK" while less than 25 percent of Scots share that view.[4]

These indicators of Anglo-Scottish territorial cleavage over questions of equity are echoed in other matters, including the famed "West Lothian Question" (the inability of English MPs to vote on matters like health which are now devolved to Scotland while Scottish MPs can still vote at Westminster on matters like health in England). Neither the Scots nor the English think that Scottish MPs should now be voting on English legislation, but the English think it more: around 70 percent of them compared to 50 percent of Scots (ibid., 106). There appears, in other words, to be a pattern of opinion in both Scotland and England, but stronger in England, that favours a disentangling of Anglo-Scottish relationships with this reflected in terms of territorial finance in greater fiscal autonomy and responsibility in Scotland.

Those views are in part qualified by other features of public opinion which appear to favour a more uniform approach to government across the UK. People in both Scotland and England appear to share similar views on values of social solidarity and the balance of market and state, and similar views on some of the issues in health and education policy, where new and marked territorial policy differences have opened up between England and Scotland since devolution. And there is some rather more limited evidence that people across the UK dislike territorial policy differences (Jeffery 2006). This data might suggest, even indirectly, support for some form of fiscal equalization based on enabling different jurisdictions to provide similar levels of publicly funded services.

[4]Data provided by David McCrone from the Scottish Social Attitudes Survey.

OUTLOOK

These various public attitudes data are indicative of a labile situation in which competing values are jostling for position. They are indicators of waning consensus about current arrangements, of disequilibrium. The same applies, in a wider sense, to the debate on alternative approaches to territorial finance and their broader connections to different views on how power relations should be structured between the UK union and its component parts, and in particular between (Anglo-)UK and Scotland. These wider debates are fundamental ones: about recasting the union to renew the relationship of Scotland and the UK; or about Scotland loosening, and/or leaving the union. They again indicate waning consensus and growing disequilibrium. What is especially striking in the territorial finance debate, as summarized in Table 2, is the absence of a clear view among professed supporters of union of how the union might be recast and renewed. There is no single, nor, therefore, compelling, vision of union.

And that in turn reflects the peculiar pathology of the UK's territorial politics. The territorial finance debate is partly a self-referenced debate about Scotland, and partly about the relationship between England and Scotland. Wales and Northern Ireland are at best marginal in those debates, as is any sense of union-wide recasting and renewal. In other words, the territorial finance debate is, at heart, about just one of the UK's three unions. It has a piecemeal logic. It is not in any sustained or systematic sense about the articulation of common, union-wide interests and devising mechanisms to give effect to such interests. It does not address the pathology of double asymmetry which compartmentalizes, and hinders the integration of, thinking about each of the UK's three unions. Increasingly the sense emerges, in the absence of some general case for UK union, that pursuing piecemeal change in a structurally fragmented state opens up an inexorable drift towards further autonomy. That sense is enhanced by the clarity of the SNP's strategy of pursuing any and all roads, including any measures of further fiscal autonomy that move Scotland further on a road towards independence. If the UK now has an overarching logic it is one of gradual disintegration.

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26

The United Kingdom: The Second Phase of Devolution

Alan Trench

Les élections de 2007 au Parlement d'Écosse, à l'Assemblée du pays de Galles et à l'Assemblée d'Irlande du Nord ont marqué un tournant majeur dans le processus de dévolution du Royaume-Uni. Le Parti travailliste a été évincé du gouvernement écossais pour y être remplacé par le gouvernement minoritaire du Scottish Nationalist Party tandis qu'au pays de Galles, le parti nationaliste Plaid Cymru est entré pour la première fois au gouvernement grâce à une coalition avec le Parti travailliste. Ce tournant a induit des changements considérables dans le fonctionnement global de la dévolution en envenimant les relations intergouvernementales, en accentuant l'importance des questions financières et en ouvrant une série de débats constitutionnels. Il a aussi soulevé de sérieux problèmes pour les partis politiques de toute la Grande-Bretagne, notamment pour le Parti travailliste, en répartissant leurs différents intérêts à l'échelle du pays. Aussi peut-on avancer que la dévolution est entrée dans une deuxième phase dont les enjeux seront très différents de ceux de ses huit premières années d'existence. Entre-temps, des questions plus vastes soulevées par la dévolution – que faire avec l'Angleterre, par exemple – restent en suspens.

INTRODUCTION

2007 marked the 10th anniversary of the referendums that approved the new Labour government's plans for devolution in Scotland and Wales, and the tercentenary of the union of the parliaments of England and Scotland that created the "United Kingdom" (UK). It has also proved to be a significant turning-point in the development of devolution, and in the UK's territorial politics. This is due principally to the elections in Scotland and Wales in May, which have put nationalist parties in office in both nations, and had far-reaching consequences for territorial politics across the UK – though the restoration of devolved government in Northern Ireland has also played a part. The result is that that the UK, already a complex state, has become yet more complex.

This paper will try to explain what has changed over the last year or so and briefly set out where these changes take the UK. It will first describe briefly how devolution functioned between 1999 and 2007 – what I will call "phase 1 devolution". It will then discuss the May 2007 elections in Scotland and Wales, and the March 2007 elections in Northern Ireland – the campaigns, election results and outcomes. It will then try to assess how things have changed since the new governments took office, what the shape of territorial politics in the UK now is, and conclude by looking at some of the broader problems that exist.

By way of a final introductory comment, it is worth emphasizing Ron Watts's role in helping us in the UK understand the significance of the changes underway here, and the very significant differences between the UK and federal systems. Ron has been a regular visitor here, helped partly perhaps by his and his wife Donna's Anglophilia. He has been closely involved in academic work on devolution, as a member of the advisory board for the Economic and Social Research Council's research program on Devolution and Constitutional Change, his presence at numerous conferences and events organized in conjunction with that program, and an extended visit in 2003 to the Constitution Unit as a "visiting scholar" which that program kindly funded. Through these contributions, Ron's wise, friendly and hugely knowledgeable presence has helped show us how the UK was coming to resemble federal systems, and – just as important – how it was not. This has been carried through in his writings, notably Watts (2005 and 2007). In the latter, he concluded that the systems most resembling the UK are Italy and Japan, comparisons that certainly have not occurred to anyone in the UK before but which are made credible by Ron's compendious knowledge of so many systems around the world.

PHASE I DEVOLUTION: 1999-2007

The first phase of devolution – the first two four-year terms of the Scottish Parliament and National Assembly for Wales – was marked foremost by the dominance of the Labour Party. In office in London throughout this period, Labour was the dominant partner in coalition administrations in Scotland, and was continually in office in Wales, sometimes alone and sometimes in coalition with the Liberal Democrats. This took much of the tension out of intergovernmental politics – not because of internal party unity, but because all three governments had a broadly similar ideological outlook and a common interest in Labour's electoral success. There were clearly differences between the governments, and differentiating Labour in Scotland and even more so in Wales from Labour in London was an advantage, but the glue of common electoral interest was a powerful cohesive factor. One result of this was highly informal intergovernmental relations with little use of the formal framework of summits and other intergovernmental meetings put in place in 1999 (described now in Memorandum of Understanding 2001, and discussed in Trench 2007, especially chapter 3). Another was the lack of involvement of the courts and litigation (Trench 2007, chapter 8). Using Stefan Dupré's models of "functional", "financial" and "constitutional" intergovernmental relations in Canada, the UK scarcely even approached the "functional" one (Dupré 1987).

Rather, the best way of understanding the post-devolution UK was to look at the sorts of political and administrative practices that had grown up before devolution, to manage inter-departmental relations between the Scottish and Welsh Offices and other parts of the UK Government.

On the institutional level, this approach to devolution has reflected the UK's profound asymmetry. Devolution is "exceptional": only Scotland, Wales and Northern Ireland have devolved elected legislatures.[1] In each case, it responds to distinct local circumstances and political demands, deriving from the multinational nature of the UK – but each is an exception to some (undefined) norm. In England, Greater London (with a population nearly as large as that of Scotland and Wales combined) has elected regional government, itself a response to issues of urban management rather than regionalism in the more conventional sense.[2] Moves to establish elected regional assemblies in other parts of England were halted when proposals to do this in the North East were rejected in October 2004. The UK Parliament at Westminster has retained its formal sovereignty. It is the sole legislature for England, while also legislating for other parts of the UK for non-devolved or reserved matters, and (with their consent) sometimes for devolved ones too. The organization of the UK Government has changed only minimally since 1999, with little central apparatus for managing devolution questions or relations with the devolved institutions, and formal "mainstreaming" of devolution in service departments more a way of saying the issue had been dealt with than an administrative reality.

During this phase, devolution has had a curious impact on policy. At the level of policy making, change has been marked in some sectors; at one extreme (health), it has been sufficient for one observer to suggest that there are effectively four different national health services in the UK, each operating under the banner of the National Health Service (Greer 2004). But this has varied from sector to sector, partly because the factors shaping policy vary between sectors, and partly because of the way devolved and non-devolved functions remain entangled with each other, with a consequent need to take interactions between the functions of each level of government in making policy. Looked at more broadly, devolution has so far produced only limited differences in what governments actually do. Differences have tended to be variations on a UK theme, rather than a wholly different tune. Different levels of funding to support university students or in providing personal care for the elderly are significant for those affected, but looked at in a wider perspective are limited deviations from a UK "norm" that has been largely determined by what happened in England.

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[1]However, the National Assembly for Wales has only started to acquire meaningful legislative power since May 2007, while the Northern Ireland Assembly was suspended from October 2002 to May 2007.

[2]In any case, the area of Greater London is only part of the broader London conurbation, which has a total population of about 20 million people and extends into the Eastern and South Eastern regions as well.

Underpinning all this is a financial system unique among federal or decentralized states. The devolved institutions had, and have, minimal tax-raising powers,[3] and very limited borrowing powers. They depend instead on a grant from the UK Government, with no formal constitutional safeguards, calculated using the formula previously used for the budgets of the Scottish, Welsh and Northern Ireland Offices when they were part of UK Government. This formula uses a historic baseline, adjusted according to changes in spending on "comparable functions" in England (HM Treasury 2007; Heald and McLeod 2002; Trench 2007, chapter 5). The grants therefore do not relate to any form of need, or address issues of equalization or fiscal capacity. To the extent they achieve goals of equalization; they do so by accident not design, and in a rough and ready way. There is good reason to believe that Scotland does well from this arrangement, and Wales does badly (that is, that Scotland receives more than needs would justify and Wales less), though whether this is the case is a matter of considerable political contention, and available statistics are far from conclusive. However, this set of arrangements has had two important benefits for the devolved administrations: it has given them very extensive spending autonomy, as the grant is unconditional, and it gives them generally stable funding from year to year. These benefits are, however, to be understood against a backdrop of the devolved institutions being essentially spending agencies, not fully-fledged governments in their own right as understood in federal systems.

The 2007 Elections

The UK's cycle of elections started on 7 March, with elections to the Northern Ireland Assembly. These reinforced a long-standing trend of being, in effect, two simultaneous communal elections, one for the Protestant/unionist community, and one for the Catholic/nationalist community (Wilford and Wilson 2008). In each case, the more extreme of the major parties representing that community profited and the more moderate one suffered; thus the Democratic Unionist party (led by Rev. Ian Paisley) and Sinn Fein (led by Gerry Adams) were bolstered, at the expense of the Ulster Unionists (now led by Sir Reg Empey) and the SDLP (led by Mark Durkan).

As the Belfast Agreement of 1998 creates a "compulsory coalition" of the largest parties in the Assembly, there was little doubt about the composition of a new devolved government if one was re-established. (As well as the First and Deputy First Ministers, the DUP got four seats, Sinn Fein three, the UUP two and SDLP one.) The question was, rather, whether the parties would agree to share office with each other. After protracted negotiations brokered mainly by the UK Prime Minister, in which the issue of devolving powers over policing and criminal justice was key, the DUP and Sinn Fein were able to reach

[3]The Scottish Parliament has the power to vary the standard rate of income tax by up to three percent, but this would raise about £1.1 billion a year if used to the full. This is not a lot in the context of an overall budget of about £30 billion, especially given the political pain such use would involve.

Table 1: Northern Ireland Assembly Election Results, March 2007

Party	*Total No. of Seats*	*Change from 2003*	*% Vote*[4]
DUP	36	+6	30.1
Sinn Fein	28	+4	26.2
UUP	18	-9	14.9
SDLP	16	-2	15.2
Alliance	7	+1	5.2
Green	1	+1	1.7
PUP	1	0	0.6
Others†	1	0	3.2

Notes: DUP – Democratic Unionist Party. UUP – Ulster Unionist Party. SDLP – Social Democratic and Labour Party. PUP – Progressive Unionist Party.
Data from BBC Election website: news.bbc.co.uk/1/shared/vote2007/nielection/html/main.stm.

agreement about entering into office together by the deadline of 26 March, and the new Executive assumed its functions on 8 May.

In Britain, the 2007 elections for the Scottish Parliament and National Assembly for Wales on 3 May were always going to be difficult for the Labour Party. Tony Blair's leadership at the UK level was clearly coming to an end, and his increasing personal unpopularity was also likely to have an effect. The relatively lacklustre performances of a Labour minority administration in Wales and a Labour-dominated coalition (with the Liberal Democrats) in Scotland were unlikely to help. In each country, Labour's campaigning was essentially negative. In Wales, it suggested that a vote for Plaid Cymru would be a vote for the Conservatives, Welsh Labour regarding the Tories as utterly beyond the pale. In Scotland, the message was that a vote for the Scottish National Party (SNP) was a vote to break up the Union, which would be catastrophic – but without being able to offer convincing explanations of why that would be catastrophic, or what the ongoing meaning of the Union was. Not surprisingly, in each country Labour lost a significant number of votes – in fact, the surprise may be that it did not do worse.

In Scotland, what really damaged Labour was the growth of the SNP's vote, not the collapse of its own. In 2003, the electorate had voted in significant numbers for "other" candidates: the Greens, a left-wing party called the Scottish Socialists, and other candidates including maverick independents, a pensioners' rights candidate and a hospital's campaigner. Support for those parties largely collapsed (helped by the SSP's implosion), and the SNP picked up their seats

[4]This is the percentage of first preference votes – Northern Ireland Assembly elections use the single transferable vote system.

Table 2: Scottish Parliament Election Results, May 2007

Party	*Total No. of Seats*	*Constituency Seats*	*Regional List Seats*	*Overall Change from 2003*	*Percentage Vote (Regional List)*[5]
Labour	46	37	9	-4	29.2
SNP	47	21	26	+20	31.0
Conservative	17	4	13	-1	13.9
Liberal Democrat	16	11	5	-1	11.3
Green	2	0	2	-5	4.8
Others†	1	0	1	-9	
Total	129	73	56		

Notes: † Includes 6 MSPs from the Scottish Socialist Party in 2003, which split during the 2003-07 Parliament and did not contest the 2007 election in that name.
Data from BBC Election website: news.bbc.co.uk/1/shared/vote2007/scottish_parliment/html/scoreboard_99999.stm.

instead. This was aided by a well-funded and well-organized campaign, using the latest computer software to deliver carefully-crafted messages to targeted voters, and the dynamic and effective electoral campaigning of the party under its leader Alex Salmond.

In Wales, Labour's loss of support appears to have benefitted Plaid Cymru directly. Conservative performance improved somewhat as well, as the "scare" tactics in the campaign failed to pay any dividend. Yet the psychological impact of Labour's small electoral reverse was very great, partly because of Labour's belief that it should dominate Wales, and partly because of expectations, or at least hopes, that it would do better than it had in 2003. However, Plaid failed to make the sort of major breakthrough for which it might have hoped in such adverse circumstances for Labour (Wyn Jones and Scully 2008).

What was perhaps most interesting was what followed the elections. In Scotland, having fallen behind the SNP by a single seat, Labour decided it could not stay in government. The initiative therefore fell to the SNP. But attempts to form a coalition with the Liberal Democrats quickly foundered. This had partly to do with a mood in the party that its experiences in coalition had been unhappy and it wished to regroup from the backbenches, but mostly due to its objections to sharing office with the SNP. Central to this was the question of a referendum on independence for Scotland, a key manifesto commitment of the SNP's, but

[5]The electoral system used is a version of the "additional member system" used in Germany. I have used the regional list vote to indicate general levels of popular support, but any serious analysis of the electoral result would need to take into account the constituency vote as well. Details of that are given on the BBC website at the URL stated. In general, the list vote tends to be higher for smaller parties, lower for the larger ones.

Table 3: National Assembly for Wales Election Results, May 2007

Party	*Total No. of Seats*	*Constituency Seats*	*Regional List Seats*	*Overall Change from 2003*	*Percentage Vote (Regional List)*[6]
Labour	26	24	2	-4	29.6
Plaid Cymru	15	7	8	+3	21.0
Conservative	12	5	7	+ 1	21.4
Liberal Democrat	6	3	3	(none)	11.7
Other	1	1	0	*	
Total	60	40	20		

Notes: * The "other" elected was Trish Law as an independent for Blaenau Gwent. She did not stand in 2003. The independent elected then, John Marek, lost his seat to Labour in 2007.
Data from BBC Election website: news.bbc.co.uk/1/shared/vote2007/welshasssembly_english/html/scoreboard_99999.stm.

which the Liberal Democrats felt was unacceptable. (Reputedly there was pressure on the Scottish party about this from the UK leadership in London.) The SNP was therefore left to form a minority administration, and the Conservatives – who before the election had indicated that they would not form a government with any party, but would consider each issue or vote on its merits – moved from looking isolated and irrelevant to being central to Scottish politics.

In Wales, what followed was very odd but explicable if one understands both the culture shock for Labour of the result and the political choices open to Plaid Cymru. Initially, Labour refused to countenance a coalition (its leader described the two main options, of the Liberal Democrats and Plaid, as "inedible or unpalatable"). When Labour did turn to a coalition with the Liberal-Democrats, it was effectively too late. Rhodri Morgan was re-elected as a minority First Minister, effectively on an interim basis, while talks went on. The three opposition parties – Plaid, the Lib Dems and the Conservatives – reached agreement on a coalition, called "the All-Wales Accord", but Plaid wavered about signing it. It re-opened negotiations with Labour, reached an agreement embodied in the "One Wales Agreement", which was endorsed by extraordinary meetings of both parties – with reluctance on Labour's part.

To form this coalition, both parties took decisions that will have major long-term implications, grounded in careful consideration of the party's interests.[7] For

[6]See note 4.

[7]Osmond (2007) presents a detailed and informed account of the coalition negotiations, on which this draws heavily.

Labour, the choice was whether to be in government or out, knowing that if it were out, and the "rainbow coalition" worked, it would be likely to stay out for a generation. Labour's choice was therefore essentially defensive. For Plaid, three factors were important: first, the party's internal divisions and self-perception, which made coalition with the Conservatives an uncomfortable prospect; second, a coalition with Labour would offer stability in government, since it would not need to rely on the fractious Liberal Democrats; and third and most importantly, the realistic calculation that coalition with Labour would be best to achieve Plaid's goals. It would offer the prospect of increasing the Assembly's powers in the short term and getting primary legislative powers for the National Assembly in the longer term. This has been a long-standing dream of Welsh nationalists.[8] To get primary legislative powers, however, a referendum will have to be won. A key clause of the coalition agreement commits both parties "in good faith to campaign for a successful outcome" to a referendum on primary legislative powers (One Wales Agreement, quoted in Osmond 2007, p. 98). Thus Labour is committed to the rapid development of the Assembly's powers, despite internal divisions on the point, while Plaid made the realistic choice of preferring a more junior role in a government that achieves what it really wants to the trappings of office at the price of Labour obstructing its longer-term ambitions. In other words, Welsh politics grew up dramatically during a major crisis.

In addition to these changes, in June 2007, Tony Blair was succeeded as UK Prime Minister by his Chancellor of the Exchequer, Gordon Brown, while the Welsh coalition negotiations were still underway. Brown promised new approaches to the conduct of government and an end to the informal "sofa government" practiced by Blair, and substantially changed the composition of the Cabinet at his reshuffle.[9] Consequently, all of the UK's four governments were substantially different to their predecessors a year before.

PHASE II DEVOLUTION: 2007 ONWARD

Although it is still early to judge, we can start to see what the main features of the second phase of devolution are likely to be. These differ substantially from phase 1 – and not just in obvious ways, like the absence of broad political

[8]This is due to the complicated working of the *Government of Wales Act 2006*, Part 3 of which creates an ingenious mechanism to extend the Assembly's legislative powers in the short term by means of orders in council involving short debates at Westminster, but not the detailed and time-consuming arrangements needed for an Act of Parliament. Part 4 of the Act would allow the Assembly, after a referendum, to exercise "primary legislative powers" over 20 defined areas of policy. For a general discussion of the Act, see Trench 2006.

[9]One of the few ministers to remain in post was Peter Hain, who combined the post of Secretary of State for Wales with the Work and Pensions portfolio. The Secretary of State for Scotland, Des Browne, was doubling up that post with Defence; Northern Ireland had a full-time, if junior, Secretary of State in Shaun Woodward.

consensus and goodwill that derive from Labour dominance of so many governments.

Nationalist Parties Seek to Establish Themselves as Parties of Government

It is hardly surprising that parties that have never held office but know they need to be in government to achieve their goals, seek to establish themselves as effective governing parties. What has been intriguing is the extent to which this has shaped what ministers like Plaid Cymru or the SNP do when they move into office, and the degree to which they have sought not to rock the boat but to steer a steady course. While both now espouse "gradualist" policies (a major shift in the case of the SNP), adapting to the new situation is a considerable challenge. In each case, they appear to be acting more strategically than tactically – to shape both the day-to-day policy agenda and the wider constitutional and intergovernmental agenda to serve their long-term goals (building electoral support, showing their effectiveness in office, and the value of increasing self-government).

The Importance of Party Ties and the Problems They Create for the Britain-Wide Parties

The three Britain-wide (and unionist) parties – Labour, Conservative and Liberal Democrat – also face serious challenges in this new environment, with which they are trying to grapple.[10] Their dilemma is how to maintain party unity, a consistent policy platform, and image across the whole party, while also allowing their Scottish and Welsh branches sufficient room for manoeuvre to develop distinctive policies and adapt to the requirements of a different political environment and different electoral systems. So far, the Conservatives have coped with this best, partly because Scotland and Wales are electorally peripheral for them in Westminster elections, so any gains in devolved elections are bonuses. Nonetheless, there are persistent anti-devolution grumblings, particularly from the Welsh Tory MPs. The Liberal Democrats, with a federal constitution and aspiration for a federal Britain, have also responded with relative ease to this challenge, though the reluctance of the party in Scotland or Wales to enter office after the 2007 elections, and the divisions and disorganization revealed particularly in Wales, will have done it few favours.

The problems are most acute for Labour, which is the only party to be unionist by electoral interest as well as by ideology. Without winning significant numbers of seats from Scotland and Wales, Labour cannot hope to form a

[10]There are no UK-wide parties. The Labour, Conservatives and Liberal Democrat parties do not campaign in Northern Ireland elections but operate only in Great Britain, while the Northern Ireland parties do not contest elections outside Ireland, and only Sinn Fein contests them in both Northern Ireland and the Republic of Ireland.

government at Westminster. As the party has never fully resolved whether it is in favour of ensuring equality and uniformity of living conditions across the country or ensuring significant autonomy for Scotland and Wales (or the English regions), it has to deal with a significant internal division, and great reluctance of many in senior positions at UK level to see the party in Scotland or Wales pursue a different course. The political environment creates a strong impetus for difference, however; Labour can be outflanked to its left by the nationalist parties in Scotland or Wales, in a way it cannot be in England. To this must be added the pressures that come from the different electoral system in devolved elections, which mean that Labour can expect never to win a majority in Holyrood elections and only exceptionally in Cardiff Bay contests. Coalition or minority is therefore a fact of life, although it has been hard for a party that regards itself as the political expression of the Scottish and Welsh working class to accept that.

How Labour resolves this remains to be seen, but it will be a major issue for the coming few years. The solution will have vital ramifications not just for the UK's territorial politics, but also for the UK party system more generally and perhaps even for whether the UK survives as a single state.

More Contentious Intergovernmental Relations, But a Slow Response from the UK Government

It is scarcely news that the lack of political consensus between governments, and the emergence onto the intergovernmental agenda of a number of difficult fundamental issues, have led to more strained intergovernmental relations. This has, if anything, been more manifest on the level of day-to-day politics. There are a number of examples, including an early June 2007 row between the Scottish Executive (as it still was) and the UK Government over a "memorandum of understanding" with Libya about which the Scottish Executive had not consulted,[11] an argument about gun-control powers between Scotland and UK following the death of a child by a pellet fired from an air rifle, the obstruction by the Scottish Government of the building of new nuclear power stations in Scotland,[12] or a row between Wales and UK about health

[11]This was controversial as it would provide for the transfer of convicted Libyan prisoners to serve their sentences at home – controversial as the most high-profile such prisoner was Abdelbaset Al-Meghrahi, convicted in a Scottish court sitting in the Netherlands of the 1989 Lockerbie (Pan Am flight 103) bombing, and serving a sentence in a Scotland prison.

[12]Nuclear power is a reserved matter, but planning is devolved. While the UK could use the reservation to extend the pro-nuclear policy across Britain, it would need to overcome the planning powers of the Scottish Government to do so, and that would be time-consuming, politically highly controversial – and probably not produce any more nuclear power stations, because these will need to be built by commercial companies which may well decide that the political risk is excessive. The UK therefore yielded for understandable practical reasons, but not constitutional ones.

policies in March 2008. What is surprising is how few and how mild such disputes have been, not how many or how acrimonious. Ministers as well as officials from all administrations have been keen to emphasize the consensus between them and their desire to carry on with day-to-day business. Thus the junior UK Government minister responsible for relations with Scotland wrote in January 2008:

> The truth is that the business of government is built on daily, weekly, monthly co-operation, consultation and joint working…. The people of Scotland have given ministers north and south of the border the responsibility of working to make Scotland a better place, and they do not want partisan wrangling to get in the way of this task. (Cairns 2008)

Indeed, Scottish Executive/Government officials were instructed early on in the SNP's tenure to continue to be open, frank and helpful to their counterparts at Westminster, not to create difficulties unless there was good reason. This is perfectly comprehensible in the light of the SNP's desire to ensure government continued to work well, as part of its plan to establish itself as an effective party of government, but it clearly came as a surprise to many outsiders, particularly in the media.

Another surprise to the changing political and environment has been the slow and limited (or, to put it more favourably, calm and measured) response of the UK Government. Immediately on taking office, Alex Salmond asked the UK Prime Minister (still Tony Blair) to re-convene the plenary Joint Ministerial Committee (JMC). Blair and Brown failed to do so or even respond to Salmond's request, which was repeated several times in public. While the British-Irish Council met in June 2007, this was largely symbolic and designed to reassure the Northern Ireland unionist parties ahead of a meeting of the North-South Ministerial Conference the following day.[13] Nine months later, in March 2008, the re-establishment of the JMC was announced, but with no immediate date for a meeting. It was to be chaired by the new Secretary of State for Wales, Paul Murphy, not the UK Prime Minister. Similarly, while administrative arrangements in Whitehall were beefed up somewhat, this took some time to happen and resulted in the appointment of fewer than half a dozen new officials (two of them senior ones), and very limited organizational changes. While the capacity at the centre of government to develop policy and co-ordinate it across government has been heightened (via a cabinet committee focussing on devolution and territorial issues, and officials with a remit to improve policy co-ordination), it remains limited.

[13]The British-Irish Council brings together all the governments of the Atlantic archipelago – whether sovereign states (the UK and the Republic of Ireland), devolved administrations (from Scotland, Wales or Northern Ireland) or UK Crown Dependencies (Guernsey, Jersey and the Isle of Man). It was set up under Strand 3 of the 1998 Belfast, or Good Friday, Agreement. The North-South Ministerial Conference was set up under Strand 2 of the Agreement and brings together the governments of Northern Ireland and the Republic of Ireland.

It is inevitable that there will be minor spats and disagreements between governments (like the Wales health issue), and more serious far-reaching disagreements as well. The UK has become relatively poor at managing such differences in recent decades; how the UK as a whole adapts to increasing sources of difference in policy within the state remains a key issue.

An Active Role for Parliaments and Legislatures

One surprising aspect of how the UK works is the active role of the various parliaments and legislatures. This has less to do with the "Westminster tradition" and more to do with how political tensions between and within parties manifest themselves. In Scotland, the minority government – and the fact that the opposition parties are united in their support of the Union and hostility to independence – has two consequences. The first is that what happens in Parliament is inherently uncertain (as it depends on the SNP striking a deal with at least one other party, and often two, to get its business through). Although the position of the SNP as the Scottish Government does give it considerable authority, it still cannot assume it has a clear mandate to "speak for Scotland". That, in turn, adds to the drama of political life, and the impact the legislature has. The second consequence is that the Parliament itself becomes an actor in politics, and particularly intergovernmental politics, acting differently, opposition, to the government, most notably in relation to the constitutional debate (and the Parliament's decision to set up a constitutional commission).

The existence of a stable majority and effective party discipline make this much less obvious in Wales. But at Westminster, issues of the extent of devolution to Wales will also require extensive parliamentary consideration, and may expose divisions within Labour about devolution.

New Constitutional Politics

The most important implication of the second phase is the way it puts constitutional issues back on the political agenda. The unwritten constitution of the UK means that this is easier than in many other systems. This has been most obvious and dramatic in Scotland – but also at its most dysfunctional. With the white paper *Choosing Scotland's Future*, the Scottish Government launched its "national conversation". The conversation was meant to develop the intellectual and political case for independence, and for extending devolution considerably on a path to that. However, a lack of funding and structure means this has been more a theme for ministerial speeches and a website more than anything purposeful. The refusal of the unionist parties, which together hold a majority in the Scottish Parliament, to take part has made it all the worse. The Unionist parties, following a lead from the Labour leader Wendy Alexander, have responded by resolving through the Parliament to establish a "Scottish Constitutional Commission" to review devolution ten years on, in a UK context (explained more fully in Alexander 2007). Thus, independence was expressly excluded from the remit of the Commission, which was to look at extending the

scope of devolved powers but also potentially reducing them, in the interest of improving the governance of the UK as a whole. In February 2007, in an interview with BBC TV, Gordon Brown announced that this would in fact take the form of a London-led "review" of devolution. There had still been no formal parliamentary announcement of this by March 2008.

In Wales, the constitutional debate cannot be avoided. While the *Government of Wales Act, 2006* may be a carefully-crafted political compromise, it involves an unending constitutional debate: first, about the devolution of specific "matters" to the National Assembly; second, about whether and when there should be a referendum to bring in provisions of the Act conferring much broader "primary legislative powers" on the National Assembly; and third, about whether those powers are in fact enough.[14] Part of this process – about legislative powers over specific "matters" – takes place between the Welsh Assembly Government and UK Government, and the National Assembly and UK Parliament. Part of it is broader, with the "All Wales Convention" being formed to consider issues relating to a referendum on primary legislative powers, chaired by a former UK Ambassador to the United Nations and aiming to involve a broad swathe of civil society. Again, this debate will continue for some time to come.

Three things are notable about the constitutional debate. First, it has been possible to separate this from debates about day-to-day policy and intergovernmental relations, although the unwritten constitution creates conditions in which it is easy for the one to influence the other (and the way the Scottish Government's white paper was framed suggests that was their intention). Second, it remains a series of bilateral debates, with the lead taken by Scotland or Wales, not the UK. There is no attempt to think through the territorial constitution of the UK from a continental point of view, let alone explain what the UK is "for" as a whole. Even in the UK-led review responding to the proposed Scottish Constitutional Commission, UK-wide issues appear to be something of an afterthought, raised chiefly to deflect the SNP's desire to conduct the debate purely bilaterally, or as a by-product of other issues. While Northern Ireland remains exceptional, and widely accepted as such, the issues presented by Wales remain the most striking omission from such discussions. Third, the debate is being conducted in highly partisan terms. There is more jockeying for party-political advantage than development of a new broader consensus. Clearly, the UK has got out of the habit of practicing constitutional politics as it is understood in most federal or decentralized systems, and approaches it as just another form of ordinary politics.

The UK Government has tried to keep this debate fragmented across the various parts of the UK, and therefore to maintain its power through control of the centre. This has facilitated the partisan nature of the debate, but also minimized its overall impact. In particular, it helps the UK Government avoid any debate about what the UK as a state is now for, in ways that would be

[14]There is a good deal of "unfinished business" which the Act deliberately does not resolve, as part of that careful political compromise.

uncomfortable in the short term, if providing a more sustainable basis for devolution (and the UK as a whole) in the longer term.

The Black Hole of England

England remains, of course, outside the devolution arrangements. However, the problems this creates are starting to become a focus of political and constitutional debate. The debate remains somewhat disjointed, however. There is no agreement on what "the English question" is, let alone how it might be resolved. One side of the debate relates to the Westminster agenda, and the anomaly of the "West Lothian Question" – the ability of MPs for constituencies in Scotland or Wales to vote on matters like health or education for England, but not for Scotland. This has led to some controversial policies being passed in England on Scottish and Welsh MPs' votes, and Paun (2008) suggests that MPs who lack an electoral interest in such matters are much more subservient to party discipline than English MPs, who have to balance party and constituency interest. This has led to further debates about limiting voting on purely English matters to English MPs, favoured in various forms particularly by the Conservatives (who have little electoral interest in Scotland or Wales for Westminster elections, thanks to the first past the post system). The other approach has been to strengthen local or regional government (or both), which has been more favoured by Labour interests – but which runs up against barriers of bureaucratic and public scepticism or hostility. There is agreement that "something needs to be done", but none on what that should be. While this debate ambles on, however, there are signs of a developing discontent about what devolution means, particularly financially.

The Emergent Importance of Finance

It is scarcely a surprise that the territorial distribution of finance, and the nature of fiscal powers, should be areas of difficulty in a decentralized system. Again, what is intriguing is the extent to which this has *not* been an issue in the UK up to now. Yet it is clear that, over the next few years, finance will be a major issue. The pressures largely stem from the devolved administrations, which have different interests in the outcome but a common interest in a review. Wales has announced, but not yet set up, a commission to consider the Barnett formula, taxing and borrowing powers. The Scottish Government included demands for "fiscal autonomy" in *Choosing Scotland's Future*, and Labour's Wendy Alexander has mooted the principle of devolving some fiscal powers in the context of a UK-wide mixed system of finance involving an equalization grant, devolved taxes and assigned taxes, with the revenue but not control of rates passed to the devolved administrations (Alexander 2007). Meanwhile, Northern Ireland has sought control of corporation tax, although that is legally problematic, and was rejected on policy grounds by HM Treasury, following Varney (2007). And there are grumblings from England about the funding that goes in particular to Scotland, and its alleged "unfairness".

Labour has sought to minimize the scope of financial debates since 1999, but with limited success. This is partly because of the UK's desire not to open up the difficult political issues involved (which cannot be settled without coming to a clearer conception of the relationship between the UK as a state and its constituent units), partly because of the politically unpopular consequences of such a move (since any change would reduce Scotland's funding from the centre), and partly because of the technical difficulty of resolving the issues involved. The fact that each of the devolved territories wants to revisit the financial arrangements for devolution, at the same time as pressure for some sort of change mounts within England, means that this will become an increasingly significant issue over the next few years, probably taking centre stage by the time of the 2011 elections.

What all this points to is a complex pattern of territorial politics, different from the previous pattern in significant ways – but still a far cry from the sort of pattern that can be seen in federal systems, even multinational ones like Canada, or asymmetric ones like Spain or Belgium. The central government does not even understand the questions, let alone have a coherent strategy to answer them, largely because it has failed to grasp the nature of the changes that have already taken place. It hopes to be able to contain differences by a variety of tactics that have worked in the UK in the past, in very different circumstances, but they are unlikely to be effective now. This is not a recipe for orderly territorial politics.

CONCLUSION

The UK has always been a territorially complex state. The early years of devolution have been relatively quiet, and helped conceal that complexity, largely because of the implications of extended Labour dominance. A number of those interested in devolution have long thought that it would become interesting when Labour lost an election somewhere. That is what happened in 2007, but it occurred in a remarkably interesting way. It has led to nationalist parties (not merely non-Labour parties) entering government for the first time in both Scotland and Wales. Moreover, the fact that Labour in Wales chose to share power means that the party as a whole has to address questions of how it relates to other parties and political forces in its bid to seek power, rather than simply waiting in opposition for things to go wrong for the governing parties. While the UK understands this new situation raises a set of difficult and serious problems, it has shown no willingness to undertake the sort of sustained long-term work needed to resolve those problems. Whatever the institutional development of the UK, the way it conducts politics and government remain very different to those usual in federal systems.

Devolution has constituted not just recognition of the UK's territorial complexity, but also of the political failure of other approaches. It acknowledges that the traditional idea of the Union Parliament serving as the setting for UK-wide politics is no longer viable, given the difficulty of administrative and procedural arrangements delivering adequate territorial variation. One could argue that this is because a former skill of compromise disappeared during the

political and ideological conflicts of the 1970s and 1980s. However, devolution is, in a sense, a response to old problems, not new ones. It may prevent a repetition of the sort of Conservative rule of Scotland or Wales without an electoral mandate, which was the objection of the 1980s and 1990s, but that does not constitute a broader agenda for the future. In particular, what is the United Kingdom for in the twenty-first century? Devolution means that a large part of the welfare state is now administered by devolved institutions, but key elements, including taxation and redistribution through welfare benefits, are not. This raises the question of what the UK is now for in terms of social citizenship (Wincott 2006).[15] So far, the UK Government has shown no enthusiasm for taking on the territorial implications of this issue, but instead has developed a rhetoric of "Britishness". The big long-term issue arising from devolution is not so much about Scotland, Wales or Northern Ireland, but about the UK as a whole. How the UK responds to the increasing territorial challenges it faces will be the big question for the coming years.

Predictions of the future are always risky. But one can predict, with a degree of confidence that the second phase of devolution will continue to be more complicated, more challenging for policy makers, and more interesting for students than the first phase.

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[15]This question is addressed in more detail in Greer (2009).

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Section Eleven

Shared and Self-Rule: Federal Case Studies

27

Co-operative and Coercive Models of Intergovernmental Relations: A South African Case Study

Nico Steytler

Il existe au moins deux modèles de relations intergouvernementales (RIG). Le premier, les RIG coopératives, part d'un principe d'égalité entre le gouvernement fédéral et ses unités sous-nationales. Le second, les RIG coercitives, repose sur la notion d'hiérarchie entre les deux ordres de gouvernement. Celui des deux modèles qui s'impose dans la pratique traduira la culture politique qui domine le fonctionnement du régime fédéral. Le modèle coercitif pourra ainsi prévaloir même si le cadre constitutionnel prévoit la souplesse nécessaire au développement du modèle coopératif. À cet égard, la situation de l'Afrique du Sud est particulièrement instructive puisque les deux modèles y sont établis en nette opposition. Or, Ronald Watts a élaboré pour ce pays un modèle coopératif clair et détaillé qui s'intégrerait bien à son mandat constitutionnel. C'est pourtant le modèle coercitif qui s'est imposé, comme le traduisent les lois du pays, ce qui était inévitable étant donné la réticence du premier parti d'Afrique du Sud à l'égard d'un gouvernement de type fédéral et de la culture politique qui en découle. Mais on ne peut exclure que la pratique des RIG nécessite à terme de passer de la coercition à une conception et à une application plus coopératives. Car l'évolution de toute culture politique dépend des forces plus vastes qui façonnent le régime d'un pays donné.

INTRODUCTION

Intergovernmental relations (IGR) are perhaps the aspect of a federal system that is the least shaped by constitutional instruments. IGR occupies the spaces between the hard rules of the division of functions and the allocation of revenue powers between orders of government. It is seldom regulated in a constitution and is thus primarily practice driven. In as much as there is a rich variety in federal or federal-type polities, the practice of IGR also differs from country to country. There are at least two models of IGR that can readily be discerned. The first, co-operative IGR, operates from the premise that the relation between the federal government and the subnational constituents is one of equality, while the second, coercive IGR, is infused by notions of hierarchy between the two orders of government. It is argued that the model that emerges from practice is reflective of the predominant political culture that animates the functioning of a federal system. A coercive model may then prevail over a more co-operative one despite the fact that the constitutional framework allows space for the latter to develop.

In this chapter, I examine the elements of the two competing models of IGR in the context of the evolving practice of IGR in South Africa. The South African experience is instructive because the two models of IGR are starkly posed against each other. Ronald Watts had articulated a clear and comprehensive co-operative model for the country that would fit in with its constitutional mandate. In contrast, a more coercive model of IGR emerged which, quite uniquely, has been expressed in legislation. The articulation of IGR in legal rules presents, in clear terms, an opposing model to the co-operative model Watts proposed. South Africa, then, presents a good case study to explore why the one model emerged as the dominant one and not the other. Given the reluctant embrace of a federal type of government by the dominant party and the political culture that underpins that, it was inevitable. Examining these questions also highlights the seminal role that Ronald Watts has played in both the theoretical and practice debates on federalism in South Africa.[1] This chapter is

[1]Ronald Watts first visited South Africa in April 1993 as guest of the Centre for Constitutional Analysis at the Human Sciences Research Council (HSRC), to participate in a workshop on regional government in South Africa. The participation at this conference led to the publication *Regionalism: Problems and Prospects*, edited by Bertus de Villiers and Jabu Sindani to which Watts contributed two chapters (Watts 1993a; Watts 1993b). In August 1993, Watts was back in South Africa, this time as president of the IACFS for the joint IACFS-IPSA Research Committee Conference at KwaMaritane. In his conference paper, Watts gave a broad comparative overview of federalism in its many manifestations. Carefully he pointed out that federalism was merely a practical device in terms of which diversity could be accommodated (Watts 1994c). During the drafting of the 1996 Constitution, Watts visited South Africa twice. In May 1995, he served as consultant for the constitutional deliberations and from February to March 1996, he was a visiting fellow at the Centre for Constitutional Analysis at the HSRC, availing himself as consultant to the parties involved in the constitutional deliberations. This period saw an intense schedule of meetings with various politicians as well as some lectures at a number of universities. He also assisted in preparing a catalogue of international constitutional precedents. As a result of this visit, he prepared a monograph

thus also a tribute to him for the intellectual input, time, care and commitment that he bestowed on so many countries emerging from conflict and seeking a federal way forward.

SOUTH AFRICAN CONTEXT

South Africa's journey down the decentralized government pathway has been the product of an extensive negotiated process by parties with diametrically opposing views on federalism. With the end of apartheid and the normalization of politics in the early 1990s, it was a divided nation in search of a governance model. The battle lines had been drawn between the incumbent apartheid government and its cohorts in the discredited Bantustans, who argued for strong federal provinces that would render the centre weak. They not only sought to give some accommodation to ethnic interests, fostered by decades of apartheid rule, but also feared the transformative power of the African National Congress (ANC) that was set to win the first democratic election. For the ANC, this was precisely why they did not like any talk of federalism; surely it must be aimed at perpetuating apartheid if the apartheid government and its lackeys were punting it that hard. The ANC's aim was nation-building, uniting a nation divided by race and ethnicity. Moreover, imbedded in a strong tradition of centralized control, the prize of the liberation struggle was to seize the levers of power in order to transform a society rooted in inequality and injustice.

The 1993 interim Constitution produced a federation of sorts. Nine provinces were established, each with a legislature and an executive. No exclusive powers were given to the provinces, but a list of concurrent competencies was compiled, with a national override only if certain qualitative criteria were met. Minimal taxing powers were bestowed on the provinces. When Watts was invited to comment on the "big question" – whether the interim Constitution was federal or unitary[2] – his point of departure was that the emphasis in assessing the Constitution should be on whether it may provide practical solutions on specific South African issues "rather than on emotive labels and theoretical purity".[3] At the same time he warned against the logical and eventual political contradictions that would arise from muddled conceptual

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on Canadian federalism as volume 2 of the HSRC series on Federalism: Theory and Practice (Watts 1997). In 1997, Professor Watts's advice was specifically asked by the then national Department of Constitutional Development on an approach to intergovernmental relations.

[2]Published in 1994 (Watts 1994a) along with a further paper on second chambers (Watts 1994b).

[3]Watts (1994a, 76). Despite this good advice, the question remained a bone of contention. Even five years later, Watts, rather exasperated, restated that the debates whether or not South Africa is federal are "fruitless". The only question is whether the hybrid form of federalism "makes possible effective governance and policy-making to meet the needs of the South African people and whether modifications would help to meet these objectives" (Watts 1999b, 15).

thinking. Watts rephrased the "big question" to read: does the South African Constitution establish a "federal political system" and if so, whether the system falls within the category of a "federation".[4] For Watts, the South African system was certainly a federal political system since it established two orders of government, each responding to its own constituency. The more difficult question was whether it was a fully-fledged federation, given the strong position of the national government vis-a-vis the provinces. Many aspects of a federation were present, but the distribution of powers between the national and provincial governments and specifically, the limited financial powers of provinces were more typical of "regionalized unitary systems" (Watts 1994a, 85). In summary, the Constitution created "a hybrid system that contained many of the characteristics of a federation, but combined these with some features more typical of a unitary system with constitutional regionalization" (ibid., 86). For Watts, the real question was not about the label but "whether the new political framework can reduce the sense of insecurity or suppression within the regional communities and thereby win their loyalty and support for nation-building in South Africa" (ibid., 86).

The negotiated settlement was that the new Parliament, elected in terms of the interim Constitution, would draft a final constitution within two years, a constitution that had to comply with a set of constitutional principles agreed upon at the pre-1994 negotiating table. Although the final Constitution, adopted in 1996, somewhat watered down the position of provinces by increasing the status of local government, it contained, rather uniquely, a chapter on co-operative government, setting out the basic principles of intergovernmental relations and co-operative government. It provided, inter alia, that all spheres of government "must co-operate with one another in mutual trust and good faith by:

- fostering friendly relations;
- assisting and supporting one another;
- informing one another of, and consulting one another on, matters of common interest;
- co-ordinating their actions and legislation with one another;
- adhering to agreed procedures; and
- avoiding legal proceedings against one another" (*Constitution* s. 41(1)(g)).

The Constitution also required national legislation to establish or provide for structures and procedures to promote and facilitate intergovernmental relations as well as mechanisms and procedures for the settlement of intergovernmental disputes by non-litigious means (*Constitution 1996*, s. 41(2)). Watts wrote that the 1996 Constitution "represents an innovative hybrid combining some federal features with some constitutionally decentralized unitary features" (Watts 1997, 2). Again his argument was, the issue is not what

[4]On the distinction between federalism, federal political systems and federations, see Watts (1998).

classification is appropriate but making the multi-sphere system work effectively through co-operative intergovernmental relations.

One of the questions that flowed from the Constitution's ambivalence about federalism was the nature of IGR that would permeate the working of the Constitution. Will the IGR give effect to the federal elements in the Constitution based on equality of parties and secure the co-operative government emphasis of Chapter 3 of the Constitution? Or, will the new system emphasize the unitary elements, constructing a coercive system of IGR, based on hierarchy where the hierarchy shapes outcomes. Given the hybrid nature of the Constitution, the choice was not merely one or the other, but where the emphasis would lie.

The contours of the choice were shaped in part by Watts. He was asked to provide technical assistance to the Department of Constitutional Development and Provincial Affairs (later renamed the Department of Provincial and Local Government (DPLG)) in its development of a White Paper on Intergovernmental Relations which would then lead to legislation mandated in the Constitution. In May 1997, with the 1996 Constitution barely four months old, he conducted a study tour, and produced a report, later published by the Department, in which a model for intergovernmental relations was put forward along with specific recommendations on how to approach the required legislation (Watts 1999a).

CO-OPERATIVE MODEL OF IGR

The model that Watts proposed was designed to fit into the South African constitutional framework. Yet, this model, drawn from the wide canvass of federal practice across federations, presents a clear and coherent articulation of the central features of a co-operative model of IGR and is thus, as such, of broader application and interest.

General Approach to Intergovernmental Relations

The point of departure is that intergovernmental relations are not an end in themselves but merely a means to an end; they are to enhance objectives such as nation-building. As this is the end-goal, the critical ingredient is the political culture and orientation supporting co-operative government for that is to be the very foundation for effective intergovernmental relations. Given its political basis, excessive structural rigidity should be thus avoided. Watts thus favoured a system that provided room for evolution; the system had to be flexible and adaptable. The emphasis on flexibility and adaptability responds directly to Watts's point of departure; federal arrangements are practical arrangements to meet identified problems. Thus, the possibility of meeting old and new problems must be built into the system by eschewing rigidity of preordained solutions. As the system is based on politics, the system should also provide incentives for co-operating. Given its political nature, intergovernmental relations are bound to be messy. Seeking neatness and tidiness, Watts wrote, was only significant in terms

of whether or not it contributes to the achievement of more fundamental objectives (Watts 1999a, 2).

Specific Proposals

Turning to specific proposals, the first issue was how to respond to the constitutional mandate requiring national legislation to establish or provide for structures and procedures to promote and facilitate intergovernmental relations required by section 41(2) of the Constitution. His advice was not to concentrate on appropriate structures and processes, but to focus on expounding the importance and content of the principles of co-operative government contained in Chapter 3 of the Constitution (ibid., 3). This advice is premised on the need to develop a common understanding between politicians, officials, the media and the public about the significance and implications of co-operative government. Enhancing an understanding of the role and responsibilities of spheres of government and how they interact with one another would be of greater value than focusing on regularizing the informal IGR structures that have sprung up.

In addressing the question of the form of the mandated legislation, Watts again stressed the importance of avoiding excessive structural rigidity in any system of intergovernmental relations. Because the Constitution does not set out any timetable when the legislation should be passed, the system should be given room to evolve in order to allow for flexibility and adaptability. Thus, seen in the context of international experience where the overwhelming pattern has been to leave most IGR structures to be developed by practice, when the legislation is enacted, detailed regulation of structures and process should be avoided. Instead the aim should be a minimal framework establishing only the most basic structures with the focus on a framework that provides incentives for co-operation, leaving room for later legislation to take account of evolutionary developments (ibid., 6).

Addressing the issue of whether there should be multiple structures and processes of intergovernmental relations or whether these should be integrated into a single coherent set of structures and processes, Watts cautioned to be wary of oversimplification. Furthermore, an integrated structure of IGR should also not undermine the democratic accountability of each sphere of government to its own constituency or impose the rigidity of requiring joint decisions on most matters (ibid., 8). International experience also showed that multiple channels of structures and processes have been found to be desirable in the interest of flexibility and adaptability. The dangers of the joint-decision trap also loomed large. While multiple channels may be more complex, they produce a more effective response to problems and thus contribute to long-term stability. Given this complexity, Watts warned against an emphasis "upon neatness and tidiness" as it may cripple effective intergovernmental relations (Watts 1999a, 9). His advice was to avoid a hierarchical, integrated structure for IGR, but rather to recognize the benefits of multiple channels, and identify key processes that may overcome current problems.

The danger of the South African system with three orders of government, Watts observed, was that due to the interconnectedness of the three orders at the

executive, legislative and financial domains, no decision can be taken without being linked to a host of others. Effort should thus be made to simplify the practice of IGR into more distinct legislative, executive and financial channels, to reduce the sense that every decision must be considered by everyone, thereby increasing the possibility of decision-making gridlock (ibid., 10-11). International experience has shown that keeping the channels distinct, can reduce the inevitable complexity of IGR. The advice given emphasized the pragmatic; the value of distinct legislative, executive and financial channels should be emphasized but provision should be made for specific points of interrelation between them (see also Watts 2001, 24).

On the functioning of inter-governmental structures, the advice was that "less frequent meetings with significant agendas and extensive prior preparation at the level of officials are likely to contribute to effectiveness" (Watts 1999a, 12). All effort should not be placed on formal meetings; the frequent informal communications are often underestimated in developing mutual trust and respect, an essential ingredient in effective IGR.

Effective inter-governmental relations are also dependent on appropriate intra-governmental relations within each sphere of government. There should be co-ordination within each sphere to ensure that line departments do not work at cross purposes with each other. At the national level, the coordinating body should be the Department of Constitutional Development (currently DPLG), with the question being raised who the responsible minister should be – an own minister or an office holder in the Presidency. Both have advantages, but if an own minister is responsible, the latter should work closely with the Presidency. At the provincial level, internal co-ordination of IGR is best carried out through the Premier's Office.

The overall advice was that the White Paper should set forth general principles and guidelines that would facilitate intergovernmental executive relations, but avoiding a set of structures that might hamper flexibility and adaptation.

The recognition of local government as a sphere of government alongside the national and provincial spheres, has introduced greater complexity than the usual dual system where local government falls under the domain of the state/province; instead of one set of relationships, there are three: national-provincial, national-local and provincial-local, giving them "a triangular rather than hierarchical character" (Watts 2001, 25). The level of complexity is further compounded by the diversity of local institutions, ranging from major metropolitan municipalities to small rural communities. From a comparative perspective it is widely recognized the important role that local government plays in democratic process and economic development. The advice proffered was that the White Paper should include a special chapter on the implications for IGR of a third sphere of government, set out general principles for the role of local government in IGR and emphasize the need for enhancing the capacity of local government to perform their responsibilities. What should be avoided, Watts cautioned, was to set out detailed arrangements and procedures relating to the participation of local government in IGR (Watts 1999a, 20).

Watts's point of departure is that essential for effective IGR are two fundamental prerequisites, which are far more important than legal structures

and procedures. The first is the establishment of a political culture of co-operation, mutual respect and trust. Such trust requires "tolerance towards diversity and autonomous experimentation, and a willingness to consult and take account of the concerns of other governments before taking action" (ibid., 21). Such a culture recognizes "the need for intergovernmental consultation and interaction in a political partnership that emphasizes mutual assistance and support, regular exchange of information and consultation, co-operation and co-ordination in areas of overlapping and complementary jurisdiction, following regular accepted procedures, and maintaining friendly relations" (ibid., 21). However, in later advice, Watts argued that it is important to be "wary of idealizing intergovernmental relations as a means of 'eliminating' intergovernmental competition and conflict" (Watts 2001, 26). As eliminating competition is not a realistic practical objective, more feasible is merely to "manage" competition and conflict through processes that encourage co-operation (ibid., 26).

The second prerequisite focuses on the practical: each sphere of government must have the capacity in terms of educated personnel, financial resources, and technological facilities that would enable them to engage effectively in IGR. This entails both having the hardware for frequent informal communications as well as the training of a core of civil servants versed in the philosophy and practice of IGR.

Finally, an effective IGR system should not result in the undermining of democratic accountability of each sphere to its own electorate, allowing innovations and experimentation. IGR should not impose undue rigidities through requirements of joint decisions. In sum, Watts suggested that "[t]he fundamental focus should not be on extensive legal requirements governing intergovernmental interactions but on facilitating and encouraging the conditions of mutual trust and co-operation, which are fundamental for establishing and sustaining effective intergovernmental relations" (Watts 1999a, 40).

The key elements of the Watts model for IGR are, then, a system based on a political culture of co-operation, mutual respect and trust, based on non-hierarchical relations between equals, where each within its own domain has scope for innovation and experimentation. Given the political foundations that seek practical outcomes to problems, the structures and procedures of IGR should be flexible and adaptable.

COERCIVE MODEL OF IGR

The Watts model of IGR did not find immediate receptivity. The process of developing a White Paper on Intergovernmental Relations was abandoned but, eventually, the Department of Provincial and Local Government, after a lengthy consultation process, secured the passing of the *Intergovernmental Relations Framework Act* (*IRFA*) in August 2005. This legislative footprint produced a different model than the co-operative model articulated by Watts. While the Act does not constitute the sum total of intergovernmental relations, having

excluding the fiscal side,[5] it nevertheless, as an articulation of an IGR vision, represents a model that can be juxtaposed to a co-operative one. It represents a model that is more coercive in nature because it is premised on a hierarchy between the orders of government and that hierarchy predicts outcomes. This model was a close reflection of the practice that emerged during the preceding decade of intergovernmental relations.

The first element of this model is setting a hierarchy in objects for intergovernmental relations. Although the stated overall object of the Act is to facilitate co-ordination in the implementation of policy and legislation, some of the more detailed objects suggest a narrower focus. The detailed objects stipulated in the Act are:

(a) coherent government;
(b) effective provision of services;
(c) monitoring implementation of policy and legislation; and
(d) realization of national priorities (*IRFA* s. 4).

While the object of providing "coherent government" may seem a neutral goal, the coherence is, however, premised on the "realization of national priorities". With provinces and local government the principal implementers of national legislation and policies, representing a system typical of administrative federalism (Leuprecht and Lazar, 2007, 9), these two spheres are then responsible for the "effective provision of services". Given that the nature and extent of these services are prescribed in national policies and legislation, the focus then shifts to "monitoring implementation" of those policies and legislation. In terms of this IGR model, provinces and local government become the object of monitoring. This focus on the "realization of national priorities" by provinces and local government, then, renders the national IGR forums important monitoring rather than consultative forums.

The second element of the model is that the focus is on structures rather than general principles of co-operative government. The lengthiest chapter in the Act contains an array of intergovernmental structures. At the pinnacle is the President's Co-ordinating Council, consisting of the President, the deputy president and four additional ministers, the nine premiers and a representative of organized local government. At the national level, any cabinet minister may establish a forum with his or her counterparts in the provinces, the so-called MinMECs (the Minister with Members of the [provincial] Executive Council (MECs)). At provincial level, every premier must establish a Premier's Intergovernmental Forum, consisting of the premier, a number of provincial cabinet members, the mayors of metropolitan and district municipalities, and a

[5]The *Intergovernmental Fiscal Relations Act* of 1997 reflects a bifurcated approach between governance issues and fiscal matters, proceeding along separate pathways. The Act established the first statutory intergovernmental forums, the Budget Council and the Budget Forum, the former composed of the Minster of Finance meeting with provincial counterparts, while the latter forum included organized local government. The main business of the forums was consulting on the vertical division of revenue raised nationally as well as slicing the cake horizontally.

representative of organized local government in the province. Finally, at the municipal level, there must be a district intergovernmental forum comprising the mayors of the district and local municipalities. The chapter prescribes the compositions of the forums, a framework for their rules of procedure and their functions.

The third element is embedding hierarchy in the IGR structures. Consistent with the point of departure of the Act, the national IGR forums are slanted towards a hierarchical relationship between the national and provincial governments. The underlying organizing principle is that of a peak IGR forum, the President's Co-ordinating Council (PCC), whose influence cascades throughout the entire system. Moreover, the forum itself is hierarchical in structure and functioning. First, the PCC is conceived as a consultative forum "*for* the President" (*IRFA* s. 6, emphasis added). It is not a forum of both the President and premiers operating as equals. Consequently, the President determines the agenda for the meetings of the PPC (*IRFA* s. 8(1)(a)). However, the premiers need not be passive recipients; they may submit suggestions for inclusion on the agenda, but then only through the Minister responsible for provincial and local government and then only in terms of a framework determined by the President (*IRFA* s. 8(2)). Second, the PCC also aims to give effect to the hierarchically slanted objects of IGR − monitoring the implementation of policy and legislation and the realization of national priorities (*IRFA* s. 4). In addition to the PPC being a forum for consultation with the provinces on matters of national interest, the President may use the forum "to discuss performance in the provision of services in order to detect failures and to initiate preventive and corrective action when necessary" (*IRFA* s. 7(c)). To this end, the President may use the forum to consider reports "dealing with the performance of provinces and municipalities" (*IRFA* s. 7(d)(ii)). Instead of focusing on common issues, the focus shifts to monitoring the performance of provinces and their problems.

The same approached is followed with regard to MinMECs; their role is described as "a consultative forum *for* the Cabinet member responsible for the functional area" (*IRFA* s. 11, emphasis added). Again, the national cabinet minister determines the agenda, with the proviso that an MEC may suggest agenda items in terms of a framework determined by the minister (*IRFA* s. 13(1)(b)). As a forum of consultation for the minister, the MinMEC is to be used for co-ordination and alignment within the sector of strategic and performance plans as well as to discuss performance in the provision of services in the sector (*IRFA* s. 11(a) and (c)). Third, the linkages between PCC and the MinMECs also give effect to the top down hierarchy. The PCC may refer matters to MinMECs who must then report back to the PCC. The possibility of communication upwards is more complex. A cabinet minister may refer a matter to the PCC only in consultation with the President, that is, with the agreement of the President (*IRFA* s. 12(2)).

In sharp contrast to the national-provincial hierarchy is the more equalitarian approach to provincial-local relations. The role of the Premier's Intergovernmental Forum is "a consultative forum for the Premier of a province *and* local government in the province" (*IRFA* s. 18, emphasis added). The same inclusive approach is followed with district intergovernmental forums: "The role

of a district intergovernmental forum is to serve as a consultative forum for the district municipality *and* the local municipalities in the district to discuss and consult each other on matters of mutual interest" (*IRFA* s. 24(1), emphasis added).

The fourth element is the dominance of the national government in regulating and steering IGR. In the dispute resolution provisions of the Act, the hierarchy of authority is also evident. The Minister of Provincial and Local Government is to play a role in providing assistance in the resolution of disputes between the national government and provinces or between provinces. The Act also gives the Minister the power to issue regulations or guidelines for the effective implementation of the Act, including a framework for co-ordinating and aligning development priorities and objectives between the three spheres of government. IGR then appears not to be a collaborative enterprise but one shaped from the centre.

The final element is that hierarchical relations are defined and captured in detailed rules. Unlike its name, the Act goes well beyond providing "a minimal framework aimed at establishing the most basic structures" (Watts 1999a, 4). There are detailed rules on the membership of each structure, their functions fully defined, instruments for joint action are prescribed, and the dispute resolution mechanism also contains detailed procedures.

In sum, the model underpinning the IRFA is the pursuit of national priorities as defined by the national government. As provinces and local government are implementers of those national priorities, the function of IGR is to ensure that this object is achieved. The focus is then on the IGR structures through which this object can be realized. Those IGR structures, too, are hierarchical in conception and functioning, operating in terms of a set of pre-ordained rules. The end product thus reflects the traditional public administration model of government – hierarchical and rule-bound structures and procedures − rather than a decentralized system of government (see Schmidt 2008).

POLITICAL CULTURE ANIMATING THE FEDERAL SYSTEM

Why was the choice made to shy away from a co-operative model of IGR – the promise of which is contained in Chapter 3 of the Constitution − to one soaked in hierarchy? The answer lies in the very nature of IGR. The critical ingredient in the functioning of an IGR system is, as Watts pointed out, the political culture and orientation of the actors. In the case of South Africa that political culture is formed by the dominance of the ANC, its own strong hierarchical functioning, and the absence of players of equal power or weight.

The IGR Framework Act has, in the main, captured the practice of intergovernmental relations that have developed over the previous decade, reflecting the political culture of the time. The formulated functions of the PCC are little different from its functions up to 2005; the dominant political culture was given statutory form.

Ever since 1999, in terms of the ANC deployment policy, the President and the party bosses determine who should be the ANC nominees for the positions of premier in the provinces (Hawker 2000; Steytler 2004). The provincial legislatures then duly elect the premier whether or not he or she is the ANC leader in the province. Thus, since the 2004 election where the ANC won all the provinces, all the premiers have de facto been centrally appointed. In a number of cases the premiers were not the party's provincial leaders. In the case of the Western Cape when the provincial party ousted the premier as party leader in 2006, strongly against the wishes of the national party hierarchy, Premier Rasool did not loose his premiership. The PCC thus comprised literally of the president's men and women until the ousting of Thabo Mbeki, first as president of the ANC in December 2007, and then as president of the country in September 2008. Their allegiance was to the president and not primarily to the provinces they served. Their function was to report how they were managing the mandate they derived from the president.

The dominant mode of interaction in the MinMECs was also top-down; the meetings have been described as information sessions given by national departments to provinces. In the MinMECs, the provincial MECs were sometime jokingly referred to as the national minister's deputy ministers. The IGR system was increasingly seen as a method in terms of which the central state governed provinces. Monitoring became an important focus; the object was the implementation of national priorities in key service delivery areas.

As described above, the coercive model does not run consistently throughout the Act. At a semantic level a more egalitarian approach to the relations between provinces and local government was adopted – despite its appellation, the Premier's Intergovernmental Forum was presented as a consultative forum for both the province and local government. This dichotomy reflects the wider skepticism within government over provinces and a preference for local government as implementer of national programs.

The slant to coercive IGR is not only a product of the dominant party's ideology on state formation, or reflective of its own internal functioning. The ideology is also informed by the practice of decentralized government. There is a strong sense that the majority of provinces are not executing their mandate of service delivery (ANC 2007a). The decentralized system of government is not able to effect social transformation through the distribution of social goods and services because the implementers – provinces and local government − are weak. There is, indeed, an enormous capacity deficit in the state. Skills are very unevenly distributed. In many provinces a sound administrative foundation is missing and corruption is a problem. This raises the question whether a co-operative model can be effective in a system where the basics of a government that can govern effectively and efficiently are not in place. The reaction by the national government to perceptions of poor and inadequate service delivery is to argue for a stronger, more centralized, state that is capable of decisive action. Already, the distribution of social grants – a concurrent competence of the national government and provinces − have been taken away from provinces because of poor service delivery and located in a central agency, the South African Social Security Agency. If the one side of the partnership is not able to govern effectively and efficiently, but whose administrations are marred by

ineptitude and corruption, how can a relationship of equality emerge? The fundamentals for such a relationship are missing.

The co-operative model of IGR − one built a political culture of co-operation, mutual respect and trust, based on a notion of equality of partners − has not become the dominant paradigm in South Africa. Instead, South African political culture has produced a system that leans towards a hierarchical rules-based approach.

CONCLUDING REMARKS

It is argued that South Africa provides an instructive case study on the relationship between the dominant model of intergovernmental relations and the underpinning political culture. As the product of interaction in the usually unregulated constitutional spaces, IGR is by its very nature prone to the ebb and flow of the prevailing political culture. It is the product of the political culture of the time. It is how power is actually distributed, that changes from time to time. The evolving political culture in South Africa is also illustrative of this truism.

At the recent ANC National Conference, held in December 2007, not only was the incumbent president of the party, Thabo Mbeki, ousted by Jacob Zuma, but also, the prerogative of the president of the ANC to nominate candidates for premierships in the provinces was scrapped. In its place came a new system in which the provincial executive committees (PECs) play a much stronger role. The PEC compiles a list of not more than three names in order of priority, for submission to the party's 60 member national executive committee (NEC), which makes the final choice (ANC 2007b, Resolution 57). Once a premier has been anointed by the NEC, the PEC is not yet out of the picture. With regard to the provincial cabinet, previously the prerogative of the premier (and ultimately the president of the ANC), the PEC must "be afforded space to make an input on the deployment of MECs". In contrast to the past, where premiers were yes-men and -women of the president, provincial interest may more acutely be represented in the President's Co-ordinating Council. Moreover, the MECs, approved by the PECs, would act less like "deputy ministers" of the national minister and become more provincially orientated.

Outside the ANC, the political landscape may also change as there are real prospects that at least one (if not more) provinces may be captured by opposition political parties in the forthcoming elections in 2009. The hierarchy embedded in the IGR Framework Act may thus be challenged by a shift in the political firmament. This is already evident in the application of the Act at provincial level. As outlined above, a premier's intergovernmental forum comprises the premier and the mayors of the district municipalities. Local municipalities were excluded on the basis that the district mayor would represent all the local municipalities in the district. The political reality looks, however, very different. In a province with strong local municipalities (the so-called secondary cities), districts are very weak and are in no way an effective or legitimate representative or communication channel of the strong secondary cities. Premiers, confronted by this reality, had but little choice to ignore both the letter

and the spirit of the IGR Framework Act, and include all local mayors in the premier's forum (Steytler and Fessha 2006).

The practice of intergovernmental relations may thus shift from a coercive one to one that is more co-operative in conception and execution. How the political culture changes, is dependent on larger forces shaping the polity of a particular country. What is important in this process of change, is a clear and coherent model of co-operative IGR. This is where the value of Ronald Watts's work comes to the fore. It provides a powerful tool to assess the nature of intergovernmental relations at a given moment in time, as well as providing direction should a polity want to move towards a more co-operative mode of governance.

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28

Nigeria: The Decentralization Debate in Nigeria's Federation

J. Isawa Elaigwu

Extrêmement hétérogène, le Nigéria totalise plus de 400 groupes linguistico-culturels. Il compte aussi trois principales religions : les cultes traditionnels africains, le christianisme et l'islam. En 1954, le pays adoptait officiellement le fédéralisme, qui est forcément devenu un mode de gestion des conflits provoqués par sa grande diversité. Au fil du temps, la fédération a maintes fois modifié sa structure, ses institutions et ses procédures, en particulier sous les différents gouvernements militaires qu'elle a connus. Depuis le retrait de l'armée de l'échiquier politique survenu en mai 1999, on a tenté d'apporter à la fédération nigériane une série d'améliorations relatives aux questions suivantes : juste équilibre entre centralisation et décentralisation ; homogénéisation ; déficit démocratique ; répartition des ressources et prestation des services ; minorités et citoyenneté ; stabilité macroéconomique et développement national. Le passage du gouvernement Obasanjo à celui de Yar'Adua a suscité de nouveaux espoirs, et le Nigéria semble aujourd'hui s'orienter vers un régime fédéral démocratique. Certains signes montrent en effet que fédéralisme, démocratie et gouvernance pourraient gagner en force grâce à l'action des dirigeants du pays en faveur d'une culture fédérale de soutien fondée sur les valeurs d'accommodement, de compromis, d'impartialité, de justice et d'équité. Les relations fédérales-État paraissent plus fructueuses et la perspective de relations intergouvernementales plus coopératives laisse entrevoir une amélioration des services et un développement économique plus durable.

> There is no single ideal federal form. Many variations are possible in the application of the federal idea in general or even within the more specific category of full-fledged federation…. Ultimately, federalism is a *pragmatic, prudential* technique whose applicability may well depend upon the particular form in which it is adopted or adapted or even upon the development of *new innovations* in its application. (Watts 2000, 10-11)

INTRODUCTION

Nigeria is the most populous African country with a population of over 140 million. The country has a total landmass of about 923,768 km^2 and a coastline bounded by the Atlantic Ocean. Nigeria's territorial waters extend into the oil-rich Gulf of Guinea. The Nigerian export economy is heavily dependent on a single industry, with crude oil accounting for more than 70 percent of foreign income. However, the agricultural sector contributes more than any other sector to the total GDP. This sector contributed 42.2 percent in 2007, while the Oil and Gas sector contributed only 19.35 percent. The contribution of manufacturing (4.02 percent) is reflective of the daunting economic challenges while those of Finance and Insurance (3.86 percent) and Telecommunication/Postal Services (2.31 percent) reflect the fast growing sub-sectors. There are quite a number of other mineral resources but the contribution of the solid mineral sub-sector (0.29 percent) shows the underutilization of the available resources.

Nigeria is highly heterogeneous with over 400 lingo-cultural groups spread across the country. The dominant groups − those with population spreading across five or more states − are the Hausa/Fulani, Igbo and Yoruba. Other groups such as Tiv, Ijaw, Kanuri and Gbagi are considered minorities yet they have population that spread across more than one state and/or constitute a majority in at least one state. There are 3 major religions: Christianity, Islam and African Traditional Religions. Each of these religious groups has it sects and dominations. Federalism inevitably became a technique for managing conflicts related to Nigeria's diversity.

Nigeria formally adopted federalism at the termination of the colonial period in 1954. This was preceded by a period of quasi-federalism in which more powers and responsibilities were devolved to the sub-national governments. At independence in 1960, Nigeria was a federation with three powerful regions. The structure of the federation changed over the years as a reflection of the dynamism of the federalization process. At present, the federation comprises 36 states, a Federal Capital Territory, Abuja, and 774 local government councils. The power pendulum has, however, swung in favour of the centre as the number of subnational units increased. The changing structure of the federation is indicative of contemporary challenges in the federation.

Since the exit of the military from the political scene in May 1999, there have been new attempts to carry out desirable adjustments in the Nigerian federation. What are the challenges to the Nigerian federation today?

It is our suggestion that:

- the first eight years of Nigeria's federation in a democratic setting witnessed intense traction or friction between the demands of states for autonomy and the federal centre for control; the demands of the people for greater freedom and expansion of democratic space; and the pressure by the Obasanjo government for "guided" or "controlled" democracy;
- there are some basic challenges of federalism that call for urgent responses and appropriate adjustments;

- since May 2007, there seems to be some hope for the expansion of the democratic space and accommodation of the basic principles of federalism; and
- as in all polities, the human dimension is important in adjustments in a federation and this includes the quality of leadership.

THE STATE OF THE FEDERATION: MAY 1999 – MAY 2007

In the first eight years of democratic rule since 1999, the state of the federation showed severe signs of stresses and strains. As new governors tried to express their newly acquired autonomy in a democratic context, Obasanjo tried to re-enact the old military scenario of governors as prefects appointed by the Commander-in-Chief. This led to a number of severe strains in the relations between the President and State governors. For example, President Obasanjo's unilateral announcement of a minimum wage for federal and state public servants was resisted by the governors. The governors felt that only state governments could negotiate and fix minimum wages for their public services. Similarly, the President's announcement of the Universal Basic Education (UBE) program took governors by surprise. Angry that they were expected to implement a political program, which they knew nothing about, the governors protested. The same difficulty was experienced by state governors with the president's Poverty Alleviation Program (PAP), and, later, National Poverty Eradication Program (NAPEP). Governors had their poverty reduction programs and did not like the new federal imposition.

In terms of the maintenance of law and order, there is only one Nigeria Police Force (NPF) which is in the federal exclusive list. While some state governors (such as Tinubu of Lagos State) called for the establishment of a state police force, others (such as Dariye of Plateau State) opposed it because of limitations of funds. Furthermore, governors claimed that while they were the Chief Security Officers of their states, the Commissioners of Police in their states were responsible to the Inspector-General of Police. This apparently made the governors impotent in dealings with security challenges facing them. It was the excuse of Governor Dariye's inability to handle communal violence in Plateau State that had led to the declaration of a state of emergency in the state for six months.

Nor were the governors happy about the regular calls by the presidency for meetings which kept them away from their work in their states. They believed that this was a hangover of military rule that they disliked. President Obasanjo's exhibition of messianic arrogance and residual militarism did not help matters. His style was abrasive, arrogant and crude.

The result of all these difficulties was that opportunities for intergovernmental relations for the delivery of necessary services were not often utilized. In the eight years of Obasanjo government, intergovernmental relations were at their lowest ebb.

There were also frictions between states and local governments. Local government chairmen complained of governors cramping them out of operation by not making available to them, as and when due, their funds from statutory allocations that pass through the States/Local Government Joint Account. Thus, federal-state-local government relations were often strained.

In the democratic arena, Obasanjo did not believe in the "rule of law". He selected which court orders to obey, and even then, had his Attorney-General interpret court orders before his government could obey them. A very popular illustration was the federal government's stoppage of statutory allocation to Lagos State Local Government Councils because the state had created new Local Government Areas. The Supreme Court declared the federal government's action illegal, but President Obasanjo defied the Supreme Court until he left office on May 29, 2007. There were many other cases.[1]

What are the current challenges of the Nigerian Federation?

CURRENT CHALLENGES OF THE NIGERIAN FEDERATION

The current state of the Nigerian federation indicates many challenges that beg for appropriate responses. These challenges include:

Centralization / Decentralization

Since decentralization is an administrative technique for participation and development, governance becomes more legitimate if the people are involved in the decision-making process, especially to determine their priorities and development goals. In Nigeria, the decentralization of powers between the federal centre and states may not be legally feasible. However, the delegation of authority, decongestion of federal offices, and the establishment of (formal and informal) frameworks for intergovernmental relations, provide new opportunities.

In the last decade, the debate over the state of the Nigerian Federation has always swung, like a pendulum, between those for whom the ideal federation is described in K.C. Wheare's classic book (1964), and those who feel that post-World War II has created a welfare state in which variations in models of federal

[1]To declare a state of emergency in Plateau State, President Obasanjo suspended the operations of the State House of Assembly while it was holding meetings and transacting business. The constitution under Section 305 did not authorize him to remove a democratically elected Governor from office and suspend the operations of the State House of Assembly. The President also used the awesome powers of the Economic and Financial Crimes Commission (EFCC) to arrest members of Bayelsa State House of Assembly and coerce them to impeach the state governor. Lastly, the President, suspecting that the Governor of Oyo State, Senator Rasheed Ladoja, was not enamored about his bid to remain in office in perpetuity, engineered a crisis in Oyo State and eventually used his cronies to illegally and unconstitutionally remove him from office.

systems have become inevitable. As an apparent response to the centralization of power by over three decades of military rule, some Nigerians have called for a return to *true federalism.* By this they refer to the old autonomy exhibited by the regions, in which the regions were more powerful than the centre. As often described, the Nigerian federation between October 1, 1960, and January 15, 1966, witnessed a situation in which regional tails wagged the federal dog. Of course, this reaction against years of centralization under military regimes came across powerfully in the 1995 Draft Constitution submitted to government by the Constituent Assembly. In its report, the Assembly described its recommended new Nigerian federalism:

> It should be *true federalism* with clear demarcations of powers and functions among the levels of government. In the exercise of those powers and functions assigned by the Constitution, each level of government should be autonomous. (Federal Government of Nigeria 1995, 61)

The 1995 Draft Constitution was never adopted. But it signified the dissatisfaction of some Nigerians to the high unitary streaks in the Nigerian federation.

On the other hand, there are many Nigerians who believe that a centralized Nigerian federation is good for the country, given its descent into the civil war of 1967-70. These observers believe that a "loose federation" like that of the 1960s would lead to another civil war, one from which the country may never recover. In their opinion, the centre should be strong politically and financially in order to play interventionist roles in Nigeria for purposes of security, development and desirable equalization programs.

Yet another school of thought believes that, while a strong federal centre is desirable, there should be a review of legislative lists in favour of states in order to prevent the current apparently suffocating stranglehold by the centre. In other words, this group recommends a strong centre, but with emphasis on greater autonomy for states and more intergovernmental relations for more efficient delivery of services.

There are many variants of these debates in the Nigerian polity today. Increasingly, Nigerians are beginning to realize that there is "no single ideal federal form", and that federalism is essentially a "pragmatic, prudential technique whose applicability" may well depend on the kinds of problems it is designed to cope with or resolve in the Nigerian polity.

As Nigeria embarks on a new constitutional review, she can revisit the division of powers set forth in the legislative lists. While one agrees that, in the light of past experiences, there should be a fairly strong federal centre, the Exclusive List of the federal government seems nonetheless to be overloaded. Issues to be reviewed (both in the exclusive and concurrent lists) may include agriculture, water, tourism, mining, Nigeria Police Force, and power generation, transmission and distribution. Perhaps the federal government should handle matters that no single state can handle effectively. While the federal government may make policies for agriculture, health, education and others, is there any need for a Ministry of Agriculture and/or Water? A unit or department responsible for agricultural policies, for example, can provide for federal

intervention in policy, research, capacity-building and funding. This should be enough. The state should deal with the details.

There is a general demand for the revision of the legislative lists in favour of states and local governments. As the National Assembly gets set for a constitutional review, some analysts are worried about the number of proposed amendments. At the 2005 National Political Reform Conference, there were proposed amendments to 110 clauses of the 1999 Constitution. Some Nigerians felt that this was tantamount to writing a new constitution. They are worried that such "mega" constitutional change could lead to "mega" political instability. It is not clear whether the protagonists of additional powers to subnational government are responding to bad governance at the central level or genuinely to the need for greater autonomy and functional utility of subnational governments.

As some centrifugal forces take a toll on the Nigerian federation, outcries of marginalization, unfairness, injustice, even threat of annihilation, exploitation and others rend the airspace. For some Nigerian groups, the solution to marginalization and other fears could only be found in a far weaker centre than we now have. These groups feel that the centralization of power and resources has made the federal government titanic. A return to the loose federation of 1960-65, with very strong regions, would provide the subnational autonomy to protect their interest and carry out their development programs, they argue. For others, the problem revolves around "resource control" by subnational units. Yet some others believe that an intricate process of fiscal equalization (vertical and horizontal) among the component units would help to shore up mutual confidence in the federation. The process of constitutional review promises to be very interesting.

Pressures for Uniformity

Federalism presupposes "unity and diversity" and "diversity in unity". However, almost 30 years of military rule with its hierarchical command structure has given the impression that a typical federation must be homogenous. It is our contention that some federally desirable homogeneity is an imperative in every federal system. However, federalism also provides that subnational units can and should be separate in other ways, including the protection of their identities. Local governance in the federation must be sensitive to the local peculiarities of various areas. The priorities and mode of administration of a state or local government in the riverine areas of Niger-Delta may not be the same as those of an arid Northern zone such as Kano State. Nor would the fiscal capacities of two states or local governments be the same. Nor should any two local governments necessarily be expected to pay the same salaries to their workers. What is the desirable level of homogenization in the Nigerian federation and what are the implications for state and local governance?

These are some of the problems that should be addressed in the constitution review. Our federal system has come to be centralized and homogenized to an extent undesirable in a federation. Why should the Revenue Mobilization, Allocation and Fiscal Commission (RMAFC) fix salaries for all public officers

in the three tiers of government, irrespective of the revenue bases of these component units of the Nigerian federation? It may make more sense that each state should fix its own salaries. A mechanism (the States Planning Commission) should be put in place at the state level to look at the financial outlook of each local government council and the state. It should then recommend such salaries for public officers at state and local government levels to the State House of Assembly and each local government council.

The State House of Assembly and each local government council then can debate these recommendations and approve the salaries of public offices they can afford. There is no reason why Etio-sa Local Government Council in Lagos cannot decide to pay its Chairman more salary than that earned by Governor of Yobe or Nasarawa State, for example. The State Planning Commission is more likely to pay attention to the detailed indices of financial outlook of each state or local government than the federal outfit. The national body should deal with federal matters and issues of fiscal equalization among the three tiers of government (horizontally and vertically).

In essence, one of the challenges of Nigerian federalism today derives from her history of military rule. How does one strike a compromise between the need to be alike and yet to be different? States and local governments in Nigeria have uniform structure, processes and functions. The protection of local identities, without necessarily undercutting the process of nation-building is important in Nigeria's federation. The greater challenge is how to roll back the impact of decades of policies aimed at homogenization of activities at all tiers of government.

Federalism and Democracy

Federalism operates best in a democratic setting that enables the people to determine who leads them and in what direction. While Nigerians have found the federal grid a conducive mechanism for managing conflicts arising from their heterogeneity, the record of democratic structures is poor. Out of its 47 years of independent existence, thirty of those years were under military rule. Over the years, there have been frictions between the federal grid and Nigeria's democratic soil. Often the Nigerian "federation" had to operate without any democratic base. Of course, this generated its own kinds of problems that we cannot discuss here.

When the federal grid coincides with the democratic polity, new forms of conflicts emerge. Thus, one of the greatest problems of Nigerian federalism is how to make democracy durable or sustainable in the Nigerian polity. Nigeria's experience since 1999 indicates that much more work has to be done and commitment demonstrated, to make democracy durable.

Political leaders have had difficulties transforming themselves from soap box politicians to statesmen in the State House. Many of the politicians behave as *political contractors* in search of what dividends they can harvest from their investment in party politics. The culture of tolerance of opposition (even within the same political party) has not been appropriately imbibed. The electoral process has been crises-ridden since 1999.

Part of the problem of election crises is that instruments of violence have been democratized. Unemployed young men have joined the informal army of thugs that politicians deploy against their political enemies. The assassinations of Chief Bola Ige (former Minister of Justice), Marshall Harry, the PDP Chairman in Kogi State, Funsho Williams and Chief Daramola, are only a few examples of political homicides committed between 2003 and 2007. There have been more than 65 cases of political violence that claimed lives and property in the same period.

Unless the electoral process is drastically reformed, this source of crises will continue to create problems for the federation. The current Independent National Electoral Commission (INEC) under Professor Maurice Iwu, is generally perceived as neither independent nor legitimate. Its dissolution may be a major part of electoral reforms in Nigeria.

In addition, the Obasanjo regime trivialized and bastardized the impeachment provisions in the constitution. Using security agencies available to the federal centre, President Obasanjo moved against his perceived political enemies. He pushed for the impeachment of the Governors of Bayelsa, Anambra, Plateau, Oyo and Ekiti States. In many cases, the Economic and Financial Crimes Commission (EFCC) would arrest and move assembly men to hotels out of the state; they would then be herded back to impeach and remove their governors. Given the federal setting, each House of Assembly should take actions to make their chief executive accountable, with no prompting from the centre. It is instructive that the impeachment of the governors of Plateau, Oyo, Anambra and Ekiti states were reversed by courts.

Basically, to become a stable federation, Nigeria needs to build a stable, democratic polity. While it is true that the post-military period has been too short for the establishment of a stable democracy, it is necessary that Nigerian politicians should demonstrate more commitment to democracy as an end and should embrace essential values of democracy.

Resource Distribution, Equality and Development

Resource distribution includes both symbolic and material resources. In fact, it includes the distribution of all scarce but allocable resources. The location of government projects as well as the pattern of recruitment into political offices and the public services are also yardsticks for measuring the fairness of leaders in the distribution process in Nigeria.

In order to ensure relative fairness in the appointment of people from various groups into the Federal Public Service, the Constitution provides for the establishment of the *Federal Character Commission,* to monitor the pattern of appointment into all the public services of Federal, State and Local Governments, in order to give Nigerians a sense of belonging to a nation. Cries of discrimination and marginalization by groups have not abated since the establishment of this commission. But at least, there is an office to which complaints can now be addressed for redress.

The 1999 Constitution provides in Section 162 (2) that the RMAFC has the function of tabling before the National Assembly a draft revenue allocation

formula. The National Assembly shall then deliberate on this document, taking into account the principles of "population, equality of states, internal revenue generation, land mass, terrain as well as population density". The National Assembly shall note that the principles of derivation, applied on all proceeds from all natural resources, will apply to not be less than 13 percent of such revenues. Since the advent of the new democratic polity, state Governors have argued that a new allocation formula should be put in place giving the states at least 40 percent.

Generally, given the centralization of political power under the military, the centre became a financial titan, as military rulers altered the revenue formula as they deemed fit.[2] They did not need to debate the formula in any legislative forum, except at the Armed Forces Ruling Council (AFRC) or the Provisional Ruling Council (PRC).

On the horizontal level, there has been a crisis of "marginalization" by all groups. The oil producing states of Niger-Delta are angry that the dividends of oil produced in their area go to other parts of the country, without adequate concern for their own interests. Basically while oil accounts for over 80 percent of the country's annual revenue, it has not changed the lives of the Niger-Delta people. While the Constitution provides for 13 percent of such revenue (on the principle of derivation) to the oil producing area, the governors of these states argue that the federal government only agreed to pay these funds to the oil-producing states from January 2000, and has failed to do so between May 29 and December 1999. In response, the governors of the South-South Zone decided to demand 100 percent control of its resources. As Governor Ibori of Delta State put it:

> …the Federal Government has not, and we believe does not intend to resolve that very provision of the constitution, so we are not asking for 13 percent any more, what we are taking now is everything, the 100 percent control. (*This Day*, July 28, 2007, p. 7)

In response to the complaints of neglect in the Niger-Delta, a new body *the Niger-Delta Development Commission* (NDDC) has been established, to replace the old Oil Mineral Producing Area Development Commission (OMPADEC). The NDDC is designed to alleviate poverty in the Delta area and embark on development projects aimed at improving the quality of lives of the average Niger-Delta person.

Similarly, states with solid minerals also complain that, in spite of environmental degradation as a result of mining activities in their areas, they have not been adequately compensated. They are therefore calling for the

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[2]There had been Revenue Commissions in the past: (i) Philipson Commission (1946); (ii) Hick-Philipson Commission (1951); (iii) Chicks Commission (1953); (iv) Raisman Commission (1958); (v) Binns Commission (1964); (vi) Dina Committee (1969); (vii) the Military Government issued decrees in 1967, 1970 1971 and 1975 on revenue matters; (viii) Aboyade Commission (1978); and Okigbo Commission (1980). The Okigbo Commission formula was amended by subsequent military regimes, as they deemed fit (see Danjuma 1994).

establishment of the *Solid Minerals Producing Area Development Commission* (SOMPADEC). Interestingly, all the states from which hydro-electric power is generated have also called for the establishment of *Hydro Power Producing Areas Development Commission* (HYPPADEC) to compensate them for the consequences of any environmental damages caused by the activities associated with the generation of hydro-related energy.

Since the current quarrels are over the nature of distribution and not over the recognition of claims by contending parties, compromises will continue to be found. While the federal government went to court to seek the definition of the on-shore and off-shore minerals (or oil) in the context of resource distribution, there were pressures for a political, rather than a legal solution of the matter. This was done when a law was passed merging the off-shore and on-shore dichotomy in revenue sharing. Since then, however, some Northern states have gone to court to challenge the law. In addition, the politicians are likely to strike compromises over the percentage of resources in the Federation Account that should be allocated on the basis of derivation. Currently, all mineral resources belong to the federation, with 13 percent of the proceeds returned to the state of origin of such minerals (including petroleum). Given the centrifugal pulls in the federation, the percentage of the derivation principles may go up gradually over the decade.[3] As Nigerian groups struggle to ensure greater equality among themselves, the federal government is likely to experience more pressures for intervention in the process of fiscal equalization. Similarly, there are pressures for a review of tax powers in favour of states and local governments. It has been variously argued that the federal centre has all the lucrative sources of taxes. The argument is that unless some of these sources are given to states and local governments, they would not be able to cope with the challenges of development not to mention carrying out of their functions. There are other opinions that strongly express dissatisfaction with the imprudence in the management of resources at state and local government levels, and argue that these levels should not be allocated additional funds.

The Maintenance of Law and Order

Since 1999, an atmosphere of insecurity has enveloped the polity. Initially, one thought that the removal of the tight lid under military rule had led to a new sense of freedom, one in which freedom has been turned into licence. Over the last four years, there have been at least 160 cases of violence – communal and others.[4] Armed robbery has virtually become part of normal life. Political and other homicides have become rampant in the system – even worse than the situation under the military.

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[3]After all, between 1964 and 1969, the percentage of mineral rents and royalties which went back to the States was 45 percent. It may go up again beyond the current 13 percent.

[4]See Elaigwu (2005) for the list of 100 selected cases of communal violence as of December 2004. The list has been updated by IGSR to more than 160 cases.

Democracy presupposes responsibility. It presupposes that political leaders would be responsible enough to be crisis dampners rather than crisis escalators. It also means that government should effectively maintain law and order to encourage the "rule of law" and prevent the aggrieved from taking the law into their own hands. Unfortunately, the Nigeria Police Force seems overwhelmed, while the constant use of the military for police duties is dangerous for everyone.

The failure of the police to perform up to expectation has led some state governments to establish vigilante groups. Besides, the way the police is used/misused has prompted many to recommend the establishment of State Police. In the case of the Anambra saga, the police were found to have acted as the arrow head for the apparent "coup" against Governor Chris Ngige, given the role played by AIG Ige. With the Anambra example, in which the President was reported to have ordered the withdrawal of the NPF protection from the Governor, the call for the establishment of State police became louder. The impeachment cases in Ekiti, Oyo, Plateau, Anambra and Bayelsa, could easily be carried out because of the centre's control of the police and other security agencies.

One had argued in the past that, based on our past experience of misuse of state or local police, the time was not ripe for that change in control. The persistence of brazen misuse of the Nigeria Police by the presidency has, however, caused us to revisit this argument. We now strongly suggest that policing should be decentralized, such that it can operate efficiently in each State. The Commissioner of police in each state should be responsible to the Governor of the state with regard to the security of life and the maintenance of law and order. Each state should be free to establish State Police, given constitutionally delineated guidelines. It also means that policing should become a concurrent matter.

Intergovernmental Relations and Delivery of Services

In all federations, the need for intergovernmental relations has become even more pressing, as many issues of governance transcend a single tier of government. Unfortunately, in the dynamics of Nigeria's federation, intergovernmental relations have been unsatisfactory.

The big question is how to establish intergovernmental relations to cut out duplications and wastage, and to ensure greater efficiency in the delivery of services. The signals from the administration of Yar'Adua have shown that there is a determination to establish a new framework for intergovernmental relations, especially between federal and state governments. The National Economic Council has provided a forum for federal and state leaders to discuss the framework for new intergovernmental relations in the delivery of services. There should be enhanced intergovernmental relations between state and local governments for effective service delivery. The challenge is to ensure a more efficient delivery of services aimed at poverty alleviation.

Minorities, Citizenship and Independent Issue

Any federation that does not adequately protect its minority groups, but gives leverage to the majority group, is bound to have incessant communal violence and instability. In Nigeria, the minority question has been made more complex because of the nature and content of diversity. While it is very easy to identify Hausa-Fulani, Yoruba and Igbo as the three major ethnic groups at the national level, the majority-minority divide is also visible at State and local levels. This is the manifestation of the problem of accommodating over 250 ethnic groups in the few subnational units. Over the years, states and local governments were created as a means of minimizing the majority-minority conflicts. But the various policies have created *new majorities* and *new minorities* at the subnational levels.

Similarly, the issue of citizenship and indignity is related to the problem of the majority-minority divide. Reconciling the diverse ethnic groups that make up Nigeria is no doubt a Herculean task. The Nigerian Constitutions from 1960 to 1999 recognized the citizenship of every Nigerian. All Nigerians supposedly have the right to settle down anywhere in the country to pursue their legitimate businesses and are expected to have equal rights everywhere. But this is not true. In reality there is a contradiction. The citizenship rights of indigenous groups are still not well-defined and accepted. Many states and communities recognize their indigenous groups and can easily isolate settlers, and treat them as such, no matter how long they have lived in the area.

In the political process this has become very controversial and has generated many violent crises. In some cases the spill-over or hang-over of these issues have led to electoral violence, because of the importance of who is elected – indigene or settler. The Jos North violence, the Wase case, the Tiv-Jukun and similar cases of violence, illustrate the explosive nature of this issue in the polity and in the electoral process. State governments may want to enact laws stating the residency requirements for those who have lived for a long time in a local area. A state may even enact law for a 25-year residency requirement for citizenship. Unlike the United States, the situation is complicated by the coincidence of ancestral land or territory with individual and group identity.

Economies and Federalism

Nigeria's economy is still in bad shape – the exchange rate of the naira is about ₦127 to one U.S. dollar; inflation still haunts the citizen's hope for good take-home pay; some banks have collapsed; the manufacturing sector has experienced closures; there are cries that the privatization process appears to be tantamount to appropriation of national assets by the leaders of the Obasanjo's government. There seems to be greater invasion of Nigeria's market by external factors other than investment; infrastructures are dilapidated; the educational system is collapsing; and the health sector is in severe pain. With all these problems, one is tempted to ask whether the bloated economic reforms of the Obasanjo government were not really causing economic distortions?

Political leaders must address these issues urgently because they relate to the sustenance of Nigeria's democracy, the federation and the nation. Nigeria needs to diversify her monocultural economy. Her deregulation and privatization policies must be pursued with all sense of patriotism and sincerity, transparency and accountability. President Yar'Adua is trying to ensure that this is done, given the background of the exercise in the past.

One must not forget that democratic culture and stability cannot thrive in a society where there is abject poverty. The federal government's poverty eradication programs have so far failed to tackle the problem. Nigeria needs to work seriously on the economy to save her democracy. With her abundant human and natural resources, we strongly believe that poverty is related to ineptitude and inefficiency in governance. President Yar'Adua has made the economy his priority. This is good news even though the direction of his reforms is not yet clear.

So far, the federal government seems to have so much money that it dabbles into any area it fancies. Candidly, housing, water, agriculture, primary school and rural development should be devolved to state and local governments, which should have enough resources to carry out these functions. With regard to the adequacy of fiscal or tax powers, it is clear that all tiers of government have been complacent about generating needed revenues. The over-dependence on the Federation Account by all governments is not conducive to the fiscal autonomy and accountability of the component governments of the Nigerian federation. One wonders if reversing the tax powers would make any difference if the appropriate authorities do not show any determination to collect these taxes. Internally generated revenues and accountability are an essential part of federal autonomy.

The 1999 Constitution grants considerable autonomy to subnational governments. State and local governments can design and implement their economic development policies using different budget regimes and expenditure patterns independent of the federal government. The implication of this is the difficulty in managing national development policies. Coordinating the various policies and programs of subnational governments in a way that will ensure macroeconomic stability and national development has therefore become a challenge to the federal government, given its leading role in national development, particularly in the face of challenges posed by globalization. In response to this challenge, the federal government has initiated a Fiscal Responsibility Act that seeks to strengthen and streamline the development efforts of subnational governments by imposing budget discipline, reducing arbitrariness in planning and implementation, and improving internal generation of revenue. With this legislation, governments at federal, state, and local levels must summon the courage and will to reverse their current complacency with the economic prosperity of the people.

POST-MAY 2007 AND NEW HOPES

The elections of 2007 were really non-elections. They were manipulated from the beginning by President Obasanjo who saw the elections as a "do-or-die"

affair. He used the EFCC and INEC to exclude those he saw as his political "enemies" at the federal and state levels through allegations of corruption. His successor, an amiable, quiet and unassuming man, inherited a government drowned in the vortex of a crisis of legitimacy arising from the disputed elections. In addition, they found themselves laden with booby-traps from their predecessor, to the surprise of everyone. President Yar'Adua assumed office under the most inauspicious circumstances. He had to grapple with the crises of legitimacy following the elections, and had to cope with almost a week-long strike that paralyzed activities all over the country. Yar'Adua had to revert the VAT to 5 percent and reduce the petrol price to ₦70 per litre, while promising to revisit the sale of the two refineries hurriedly sold to Obasanjo's friends in the last days of that regime. The federal government has now cancelled the sale of these two refineries.

There are signs that federalism and democracy may have their due respect under President Yar'Adua. He asserted at his inauguration that, though the elections were flawed, he would still have won if the elections were free and fair. However, he promised that he would embark on electoral reforms. He has set up an Electoral Reform Committee under former Justice Muhammadu Uwais. Unlike his predecessor, he has declared that his government would operate within the limits of democratic principles. He, therefore announced, *the rule of law* as a cardinal principle of his administration. No court order was to be disobeyed by the federal government. In practice, he affirmed this when the Supreme Court ruled that Mr. Obi was the legitimate Governor of Anambra State. He has also curbed the excesses of security agencies, especially the EFCC, and has ordered the Attorney General to coordinate the cases of prosecution from all relevant agencies such as the EFCC, the Independent Corrupt Practices Commission (ICPC) and the Code of Conduct Bureau and Tribunal.

President Yar'Adua, has thus far respected the legislature and the judiciary, and, unlike his predecessor, seems to be working cordially with both these arms of government. As an illustration, he has refused to be dragged into the scandal at the House of Representatives over allegations of corrupt practices against the speaker of the House. He resolved not to interfere in the internal affairs of each arm of government. General Obasanjo was believed to have sponsored the removal of Senate Presidents.

The new government has also taken a number of actions that indicate its respect for the principles of federalism. A former state governor himself, Yar'Adua pledged to respect the autonomy of states. He, therefore, released funds of Lagos State local government councils being held by the federal government illegally. When local and state governments complained that the federal government was illegally making deductions from local government funds for the building of Primary Health Care Centres, he ordered that the deductions be stopped.

Furthermore, he inaugurated the National Economic Council, a constitutional intergovernmental agency, and promised to encourage more intense intergovernmental relations among (and between) tiers of government, to promote greater efficiency in service delivery. President Yar'Adua seems to enjoy consulting with stakeholders. Given the complex nature of the Lagos

megacity, Yar'Adua and the Lagos State Governor, Chief Fashola, have pledged to co-operate when handling problems of the megacity. While the federal government has respected the autonomy of states, it has also appealed to state governments to respect the constitutionally guaranteed autonomy of local government councils.

Generally, not only has there been a sigh of relief over Yar'Adua's style of administration and his adherence to the principles of the rule of law, the misuse of security agencies to prosecute political opponents also seems to have receded to the background. Federal-state relations seem more cordial, and the prospects of intergovernmental relations seem higher.

Many Nigerians are impressed by the difference made by leadership and leadership styles in a federal and democratic setting. Perhaps, the picture of the real Yar'Adua as a leader will become clearer after the courts rule on challenges to his election. For now, however, Nigeria seems to be on the threshold of a new democratic and federal polity.

As in all politics, the human dimension is important in effecting adjustments in a federation. The quality of leadership is important in the nature of these adjustments. After all, no matter what laws and structures are established, the system has to be operated by human beings. The values of accommodation or tolerance, fairness, justice, and equity are human values that only human beings can actualize.

CONCLUSION

In this paper, we have argued that the first eight years of Nigeria's federation in a democratic setting witnessed intense frictions between the competing demands of the states for autonomy and the federal centre for control on the one hand, and the demands of the people for greater freedom and expansion of democratic space and the pressure by the Obasanjo government for "guided" or "controlled" democracy on the other. We also argued that there are basic challenges of federalism that need urgent responses and appropriate adjustments. It is our contention that since May 2007, there are new hopes for the expansion of the democratic space and accommodation of the basic principles of federalism. In this regard, we argued that the quality and style of leadership is very important. After all, regardless of which laws are available as guidelines, the human values of accommodation, tolerance, fairness, justice and equality can only be actualized by human beings.

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29

The Federal Idea in Putin's Russia

Alexei Trochev

La Russie est-elle encore une fédération ? Ce texte soutient que le fédéralisme russe n'a pas dit son dernier mot puisque les défis à relever pour gouverner un territoire national aussi vaste nécessitent une collaboration entre l'autorité centrale et les autorités locales, celles-ci disposant dès lors d'une certaine autonomie politique. Le système de survie de l'idée fédérale s'alimente à deux sources : un cadre juridique et l'initiative privée. Depuis la Constitution fédérale jusqu'aux ordonnances municipales, la législation russe repose sur une vision hautement centralisée du régime fédéral. De son côté, l'initiative privée préserve l'idée fédérale par la noble voie du droit de suffrage mais aussi du fait de la cupidité des fonctionnaires de tous les ordres de gouvernement. Pour gagner des élections et s'enrichir, les élus fédéraux et locaux doivent ainsi se soumettre à des marchandages et a des compromis. Soit, en somme, partager le pouvoir.

Can Russia still be considered a federation? Ronald L. Watts has repeatedly asked me this question over the past few years. Indeed, some argue that the federal centre in Putin's Russia "has become so powerful once again that it is questionable whether Russia should even be labeled a federal system" (Figueiredo, McFaul, and Weingast 2007, 178). This, despite the fact that only a few years ago, scholars insisted that the federal centre in Yeltsin's Russia was so feeble that the country was "a federation without federalism" (Smith 1995; Ross 2002, 7).[1] Did these swings in the pendulum of the centre-periphery relations, Russian-style, kill the federal idea?

This chapter tries to answer this question. As we shall see, the federal idea in Russia is slowly dying but it is not yet completely buried. It is dying because its implementation in practice is too complicated. But federalism is not dead yet because the challenges of governing Russia's vast landmass requires the federal centre to co-operate with the local authorities, thus leaving them with some degree of policy autonomy. The stifling of the federal idea in Russia is not a

[1]The same label has been applied to Australia (Saunders 2002), Austria (Erk 2004) and India (Singh and Dua 2003).

result of natural causes, such as the historical inability of Russia's rulers to share power, the Soviet legacy of the indivisibility of power and "democratic centralism", the flawed design of the 1993 Russian Constitution, or the prevalence of anti-federalist values among Russians. Federalism in Russia is dying because of the conscious policies and active experimentation with the federal idea at the federal level. This is not to say that former President Putin has a grand long-term strategy of weakening federalism and that all his attempts at doing this have been successful. On the contrary, many of Putin's federal reforms pursued short-term goals of concentrating political power at the centre, changed their essence as a result of compromises with regional leaders, proceeded slowly or were delayed due to regional resistance.

The dynamics of "real" federalism in Yeltsin's Russia left a very bad impression on his successors. To them, implementing federalism in practice was too complicated because it required them to share power, functions and responsibilities with the regional authorities. These complications of governing a "real" federation had political, financial and administrative aspects.

POWER CONCENTRATION, ELECTIONS, AND THE FEDERAL IDEA

Politically, the Kremlin leaders view federalism as a road leading to the territorial disintegration of the country either in a peaceful manner (as between Czechs and Slovaks), through war (as in the former Yugoslavia), or through something in-between (as in the USSR). This is not just a view of Russia's leaders. Rulers in Turkey, Ukraine, Georgia, and Moldova do not want to federalize their countries for the same reasons. But in Russia this perception is greatly strengthened by the domination of the military, security services and the law-enforcement personnel in the ruling establishment (Kryshtanovskaya and White 2003; Renz 2006). They consistently repeat the idea that too much political decentralization empowers certain regions to secede from the Russian Federation. This is because, they insist, regional elites are weak, corrupt, irresponsible or incompetent. President Putin, for example, used the September 2004 Beslan hostage crisis as a pretext to justify the abolition of direct elections of regional governors and the introduction of his own powers to nominate regional governors for approval by the regional legislatures and to dismiss governors at his pleasure. The idea of abolishing gubernatorial elections had circulated in the Kremlin since 2000, but the timing of its implementation clearly illustrates the perception that only a stronger federal centre (supported by the security services) could save Russia from terrorists, who demanded independence for Chechnya, which, in turn, threatened to tear apart the rest of the country. Indeed, the majority of Russians did not believe that the abolition of gubernatorial elections would improve democracy and the fight against terrorism. Moreover, throughout the decade, the public opinion surveys indicated that at least two out of three Russians preferred direct elections of regional governors (Levinson 2004; Titkov 2007).

Regional governors liked the idea: instead of facing the electorate and term limits, all they needed to do was to convince Putin's team that they were loyal, and capable of both delivering votes to the pro-presidential party and maintaining stability in their regions. The centre also had sufficient resources to distribute among the governors in exchange for the power to control regional spending. This bargain is likely to last as long as the centre enjoys unlimited resources from high oil prices. By October 2007, governors in 71 regions were appointed according to the new procedure.[2] In 54 regions, incumbent governors retained their posts with 15 of them staying for the fourth consecutive term in office. Appointing new governors is a difficult task, as the Kremlin slowly runs out of the potential nominees and faces resistance from the regional legislatures (Titkov 2007; Chebankova 2006). Each new appointee demands more freedom of action and more money from the centre as a condition for filling the governor's seat. The new appointee would have to share the federal funding received with the circles inside the Kremlin, who lobbied for his or her nomination (Petrov and Ryabov 2007, 80).

This, in turn, entrenches bilateral bargaining between the centre and the regions even further. Almost all of 42 bilateral treaties between the centre and 46 regions were repealed under Putin's presidency. But President Putin renewed two such treaties in 2002 (with Sakha-Yakutia) and 2007 (with Tatarstan), and refused to sign two other treaties with Chechnya and Bashkortostan in exchange for granting greater informal policy autonomy to these regions and for sending earmarked federal transfers to these regions. To stabilize the situation in Chechnya, the Kremlin was forced to live with more autonomy in this Republic than in other regions. In other republics, where the centre appointed or helped to "elect" successful businessmen to the governorship, the Kremlin was forced to provide preferential treatment to their businesses in other regions of Russia (ibid., 81). In short, bilateral and asymmetrical federalism from Yeltsin's era is alive in Putin's Russia: it is less formal and takes place behind the closed doors. For example, when Putin fired three governors or refused to nominate another dozen, he did not give clear reasons for doing so to the public: few believed that the criminal charges against the governors or their cronies were the real reasons for the President's dissatisfaction.

Further, President Putin approved the law that banned regionally-based political parties and religion-based political parties (despite the criticism of the Russian Orthodox Church).[3] Such parties were deemed to threaten the territorial integrity of the Russian Federation, and coincidentally, the federal centre would not have to spend the resources to monitor local political parties. The latest elections to the 450-seat State Duma, the lower house of the Russian parliament, were held in December 2007 for the first time according to the proportional

[2]In a 16-2 vote, the Russian Constitutional Court approved the procedure (*Decision 13-P of 21 December 2005*).

[3]The Russian Constitutional Court upheld the constitutionality of this move on a "temporary" basis (*Decision 18-P of 15 December 2004; decision 1-P of 1 February 2005*).

party-list electoral system with a seven percent barrier.[4] Observers predicted that the least populated regions would not be represented in the Duma at all. But it makes the job of monitoring political parties by the centre easier – all party leaders live in Moscow. Prior to that, each region would have at least one representative in the Duma: Russia used a mixed member-proportional electoral system (with a five percent hurdle) with 225 seats filled on the party-list basis and 225 seats filled by means of single-member plurality. For the same reason of simplifying matters, the federal centre passed a law on the voting days in regional legislative elections: voters are allowed to cast their ballots only in March and October (and in March only in the year of the federal elections).

But, at the same time, the Kremlin needs governors to deliver the votes for the ruling "United Russia" party.[5] Although Vladimir Putin enjoys enviable public trust, the "United Russia's" approval ratings are about 40 percent. Without gubernatorial support, it is unlikely to win the majority of seats either in the State Duma or in regional legislatures. This is why the centre is willing to tolerate recalcitrant governors in exchange for their capacity to hoard votes for the "United Russia" in every regional legislature, which is in charge of approving Putin's nominees for the governorships, and in the State Duma, which is in charge of passing federal laws coming from Putin's administration. Therefore, electoral politics provide a sort of the life-support system for the federal idea in today's Russia.

Moreover, President Putin blocked the proposed abolition of the mayoral elections. In 2006, his chief of staff Sergei Sobianin, a former governor, actively lobbied for the bill that would empower regional governors to appoint de facto city mayors. Regional governors again liked the idea: they could not stand directly elected, and, therefore, autonomous mayors. In some regions, the governors always appointed city mayors. In others, they were directly elected and quite often in tight electoral races. The Kremlin itself was divided on this idea, city mayors vigorously opposed it, as did the Council of Europe. Following criticism of the bill by the pro-Putin "United Russia" party in December 2007. Again, elections appear to slow down the complete eradication of the federal idea in Russia (Makarkin 2007).

The upper house of the federal parliament, the Federation Council, was designed as an institution of "intra-state federalism" that would represent regional interests at the federal level. Under the 1993 Constitution, the Federation Council consists of two representatives from each region and has important legislative and appointment powers. During Yeltsin's era, regional governors and heads of regional legislatures sat in the Federation Council and made this body a real political force in the country that frequently opposed Yeltsin's initiatives and vetoed the bills approved by the Duma (Slider 2005). Naturally, they resisted the calls to make the Council directly elected. Immediately upon winning the presidency, Vladimir Putin reformed the composition of the Council. Now, regional governors and speakers no longer sit

[4]Justice Boris Ebzeev of the Russian Constitutional Court criticized this move as alienating the society from the state (Khamraev 2006).

[5]On the rise of the "United Russia" party, see Konitzer and Wegren (2006).

there; instead, they appoint their representatives to the Federation Council. These representatives, in turn, are vetted by Putin's administration – a mixture of businessmen, law-enforcement officials, and former regional governors. As a result, the Federation Council lost its political weight: it rarely vetoes bills, even more rarely sponsors new bills and never disagrees with President Putin's nominees to the top courts, the Central Elections Commission, the Audit Chamber and the Attorney General (Ryzhkov 2007, 60-62). The idea of having the Federation Council elected directly resurfaces periodically: various federal politicians close to Putin support this but the President does not. Indeed, elections are complicated: they are costly, noisy and unpredictable. It is much easier both for the Kremlin and for regional bosses to fill the seats in secret: to pick loyal candidates, sell the seats or distribute the spoils to cronies.

Finally, President Putin gave a go-ahead to mergering regions, an idea that had circulated among Russian economists since the mid-1990s (Wilson 2003; Goode 2004). Governing 89 regions with their enormous socio-economic disparities is complicated. Russia now has 83 regions. Between 2003 and 2007, following regional referenda on the mergers, six small and poor regions joined with neighbouring regional powerhouses. The Kremlin allowed referenda to take place only when it had strong assurances that the local voters would approve the merger. The rationale for the merger was pure economic efficiency and ease of governing, which had nothing to do with the federal idea. The six smaller regions, which were incorporated were ethnically-based – now their leaders cannot play the ethnic card when bargaining with the federal centre. Meanwhile, the centre sends the same amount of federal transfers to the enlarged region, which means fewer resources for the incorporated region because it has to go through the coffers of the enlarged region. For public officials in the enlarged region, the addition of a poorer territory was an additional headache. The quality of public governance in the incorporated regions barely improved if not worsened, as mid-level bureaucrats simply did not know their new bosses and their responsibilities in the enlarged regions (Sidorenko 2007). Still, the federal centre views regional mergers as a success story, and various regional governors publicly voiced ideas about adding adjacent regions to their own. As a rule, governors of prosperous regions insisted neighbouring weaker should join with them on the road to economic growth. Various Moscow-based think tanks produced programs of dividing Russia in forty regions or in twenty-eight regions, effectively eliminating the ethnic republics and territories (Granberg, Kistanov, and Adamesku 2003). However, by the mid-2007, the Kremlin put the process on hold facing the Duma elections in December 2007 and the presidential elections in March 2008. Vocal resistance from smaller ethnic regions, which some Kremlin officials wished to merge with larger territories, prompted this delay. Again, electoral uncertainty (however small) protected the federal idea.

As soon as this uncertainty was reduced to a minimum in the wake of the victory of the "United Russia" party in the December 2007 parliamentary elections, the Kremlin announced a new federalism-reform agenda. In January 2008, Minister of Regional Development Dmitrii Kozak, who authored Putin's federalism reforms, proposed to divide Russia in seven to ten macro-regions, in part, returning to the USSR's model of economic development. He argued that

such division would bring an era of "competitive federalism" to Russia: each macro-region would have its own investment priorities, would receive up to 4 billion rubles ($160 million US) in new funding from the federal investment fund, and would be accountable for its economic performance to the federal centre. According to Kozak, the centre would delegate more policy autonomy in the socioeconomic sphere to more prosperous macro-regions without granting any additional taxing powers to them. In short, his plan calls for more decentralization in spending and attracting investment without any political decentralization at the regional level (Petrov 2008). Indeed, the Kremlin has to do something radical to reduce the gap between the poor and rich regions, which continued to deepen and widen throughout Vladimir Putin's presidency. But this measure is half-hearted since it imposes more conditions on the regions without enhancing fiscal powers.

FISCAL FEDERALISM IN RUSSIA: IS IT STILL ALIVE?

Financial difficulties of governing a true federation are also paramount. The principle of subsidiarity posits, first, divided roles and responsibilities of each order of government, and, second, sufficient resources for each order of government to perform its roles and functions. But how to ensure that each level of government performs its roles properly, not shirk its responsibilities, and avoids blaming the other level of government for policy failures while eschewing credit for all policy successes? Putin's team, many members of which worked in the St. Petersburg Governor's office, had first-hand knowledge of how much leeway regions had in using these issues to their advantage. So, when they occupied the Kremlin, they decided that the solution to these questions lay in transforming the fiscal house of Russia into a unitary system. The federal level centralized the revenue raising through while the consolidating budgeting process. It is more expedient to collect all monies and then distribute them among the regions rather than to allow regions to collect their own taxes. Politically, this is also beneficial: the centre can use financial resources to keep the regions in line, to reinforce patronage, and to ensure that regions are accountable to the Kremlin.

As a result, the bilateralism and asymmetries in fiscal relations between the centre and the regions remained well entrenched in Putin's Russia (Solomon 2005, 45-68; Andrusenko 2007). The regions mastered the way of providing the centre with conditional political backing for important reforms in exchange for various financial and political benefits. Russia's Finance Minister Alexei Kudrin openly admitted that the centre could not have conducted the regional plans unilaterally and "purchased" the loyalty of many key regions during the early stages of federalism reform. The conditionality of the existing centre-regional financial hierarchy has been particularly visible in accelerated "shadow" negotiations. In this system, regional leaders establish "special relationships" within important economic ministries to receive grants and political concessions. Indeed, by 2007, the level of federal subsidies to the regions redistributed on the

basis of a transparent formula comprised only 39 percent of all the existing transfers. In the name of political expedience as many as 60 percent of all grants had been transferred on the basis of ad hoc bilateral agreements between the centre and the particular region (Chebankova 2007b).

The functional division of powers between the centre and the regions has been based on fiscal considerations: the available financial resources left by the centre to the regions largely determine the scope of authority of regions. The centre achieved this division of powers by passing federal laws that delineated the spheres of jurisdiction, and by minimizing the use of the bilateral agreements with regions. Regions submitted their ideas of dividing powers but their proposals were largely ignored by the mastermind of the reform, the so-called Kozak Commission, a task force consisting of federal officials in charge of taking inventory of all federal, regional, and municipal responsibilities.[6] In 2006, two of the Russian Constitutional Court justices publicly condemned this way of dividing the powers between the centre and the regions. Justice Gadis Gadzhiev lambasted the federal centre for usurping the rights of the regions and disregarding the constitutional division of powers. At the same time Justice Nikolai Bondar criticized the centre for depriving the regions of their own revenue base (RIA Novyi Region 2006).

Indeed, changes in the scale and shape of the division of powers that took place between 2000 and 2007 were prompted not by the federal idea or by the Russian Constitution, but by the drive to strengthen executive power at the federal level and to increase its administrative and financial resources. The authors of this drive believed that changing and clarifying the division of powers through law would eliminate tensions and conflicts in federal relations. At the same time, the architects of reform ignored the fact that every sphere of joint jurisdiction had federal, regional and municipal components, and that the centre could not unilaterally impose a legitimate distribution of roles to engage in joint actions. President Putin's welfare reform, which was implemented through Federal law No. 122 of 22 August 2004, attempted to "streamline" the division of powers between the centre and the regions (*Federalnyi zakon No. 122…*). As a result, many powers, including a sizeable part of revenues, property and rights to natural resources, were transferred to the federal centre (Leksin 2007, 144-145).

This "streamlining" phase of federalism reform, however, did not erase the tension between the centre and the regions. A few months after the passage of the Federal law No. 122, and following the decision to abolish the gubernatorial elections, the Russian President invited the regions to submit proposals to redistribute once again selected powers among federal, regional, and municipal governments. This time, the Kremlin indicated that certain federal powers were to be transferred to the regional level, while certain regional powers were to be delegated to the municipal level. This initiative was based on the new status of the regional governors: As they were now nominated by President Putin, they would be closer to the centre and would implement the will of the centre. The authors of this initiative believed that the very fact of Putin's nomination would

[6]On the work of the Kozak Commission, see Solomon (2004).

automatically improve the capacity of regional leaders to implement public policy. The interests of the centre dominated the process of including any regional proposals in the reform. Predictably, the centre chose only those that did not alter central power and access to fiscal resources significantly. At the same time, federal authorities consistently rejected proposals important to regions, such as any expansion of the rights of the regions to control the use of natural resources, water management, land property, and education. The final product of this one-way process of federal reform, Federal law No. 199 of 31 December 2005, changed the framework of the division of powers in the spheres of joint federal-regional jurisdiction, expanded the list of regional tasks financed by regional budgets, and outlined the procedures of transferring powers between the centre and the regions (*Federalnyi zakon No. 199.*…). Under this law, all powers exercised by the regions with respect to spheres of joint jurisdiction are now considered to be delegated powers of the Russian Federation, transferred to the regional level. As of October 2007, there were 907 such powers delegated in 102 federal statutes. Some of these powers are mandatory and financed from either federal or regional budgets. Others are voluntary and financed by the regions or with the help of subventions. Fortunately for the federal idea, this law mentions that there are regional powers established by the regional laws. But these powers are limited to the voluntary implementation of additional measures of social assistance for certain sections of society. As of October 2007, government experts counted 68 such powers (Actual Issues of … 2007, 17-18). Clearly, this reflects the desire of federal politicians to share the responsibility with the regions for social policy. Yet it is unclear whether the centre is prepared to allow such regional powers in all other areas of joint jurisdiction (Leksin 2007, 145-149). Further, under Federal law No. 258 of 29 December 2006, the federal centre has complete control over delegated powers of the Russian Federation, transferred to the regional level, by directing the activity of regional government agencies in charge of carrying out these delegated powers. In practice, this means that regional government agencies are now responsible to both regional governments and to federal ministries (*Federalnyi zakon No. 258.*…). Federal law No. 230 of 18 October 2007 further strengthened this subordination and changed the scope of functions of local governments (*Federalnyi zakon No. 230.*…). In October 2007, Minister of Regional Development Dmitrii Kozak admitted that this streamlining brought about the proliferation of federal government bureaucracy in the regions. In other words, the centre can no longer blame the regions for ineffective public governance if, on average, three federal officials work in parallel with one regional or municipal official in every region (Stenogramma 2007). As a result, Russia entered 2008 with yet another round of discussions over clarifying the division of roles and responsibilities among the centre, regions, and municipalities.

The regions (and the municipalities) found an unlikely ally, the Russian Constitutional Court (RCC), in protecting their fiscal autonomy from this federal power grab. It is an unexpected ally insofar as the Court has consistently protected the centralized federation. Russian regions used RCC more actively under Putin's centralizing regime (147 petitions between 2000 and 2005) than under Yeltsin's presidency (113 petitions between 1995 and 1999). In 2006 alone, regions sent 22 petitions to the Constitutional Court. And they did so

despite the fact that pro-Putin's party, "United Russia", controlled both federal Parliament and most regional legislatures and governorships (Trochev 2008). Under Putin's presidency, the Constitutional Court chose to balance fiscal federalism in a creative way and allowed certain regional autonomy. For example, the RCC upheld the right of regions to set up extra-budgetary funds and to determine their own revenue bases, even though the Federal Budget Code did not assign this power to the regions and the Russian Supreme Court had earlier ruled that the creation of regional extra-budgetary funds violated federal law (*Decision 228-O of 6 December 2001*). In another decision, the Russian Constitutional Court refused to hear a petition by the federal Cabinet and reiterated that the delimitation of state property ownership between the federation and its parts should be achieved by balancing federal and regional economic interests through the federal legislative process (*Decision 112-O of 14 May 2002*). The federal centre cannot, in the view of the Court, transfer regional or municipal property without reaching an agreement with the owner and without adequate compensation. In fact, the Court applied these requirements of consent and adequate compensation to property disputes between the regions and local self-governments (*Decision 14-P of 22 November 2000; Decision 8-P of 30 June 2006; Decision 540-O of 2 November 2006; Decision 542-O of 7 December 2006*).

More importantly, the RCC has begun to accept petitions from local self-government units in a clear move to oversee the constitutionality of local government reforms undertaken by President Putin.[7] Neither the 1993 Russian constitution nor any other federal statute grants municipalities the right to petition the Constitutional Court. Until 2002, the Court had denied all complaints from the municipalities: the rivalries among power-holders or viable electoral market during Yeltsin's era did not encourage the expansion of the jurisdiction of the Court. In the 1990s, the RCC had consistently protected the autonomy of local self-government.[8] And Justices could continue doing their job without accepting the complaints of municipalities. But the Constitutional Court chose to expand its jurisdiction precisely when the Kremlin moved to concentrate political power both by gaining control of the federal legislature and by strengthening its grip over the regions. For example, the Court repeatedly ruled that the federal centre had to compensate municipalities in full for the cost of providing housing for federal judges, police officers and prison guards (*Decision 132-O of 9 April 2003; Decision 303-O of 8 July 2004; Decision 58-O of 15 February 2005; Decision 224-O of 9 June 2005; Decision 485-O of 17 October 2006*). These judgments, if implemented, are likely to strengthen both the judicial protection and financial base of the local self-government, given that President Putin's judicial reform involved the hiring of several thousand federal judges during his first term. Finally, in May 2006, the Court ruled that federal

[7]For the overview of the local government reforms in Russia, see Lankina (2004) and Young and Wilson (2007).

[8]Since early 1997, the Court has repeatedly overruled regional laws that abolished the elected local self-government bodies or empowered the governors to nominate and dismiss the heads of municipalities (Karpovich 2002, 93-94).

and regional governments had to reimburse municipalities for subsidizing the cost of universal childcare (*Decision 5-P of 15 May 2006*). Clearly, the Court wants to stop the practice of "unfunded mandates" and to become the forum for protecting local self-government, a sure loser in the race to strengthen governance in Russia under Putin.[9] However, it is far from certain whether the federal centre will comply with this judicial protection of feeble federalism in the fiscal realm.

GOVERNING CAPACITY OF THE CENTRE AND THE REGIONS

Governing a true federation is also complicated from the point of view of public administration, and, predictably, Putin's administration chose to simplify the practice of federal governance. Under Yeltsin, the centre engaged into constant bargaining with the regions and important city mayors, and in many cases federal officials were weaker partners in these negotiations. But many federal government officials went local, were co-opted by regional elites and became lobbyists for regional interests in the federal centre (Stoner-Weiss 2006). It is much easier to commandeer the sub-national governments and to impose uniform policy solutions for all of them. It is also simpler to commandeer sub-national governments and to impose uniform policy solutions for all of them. It is also simpler to appoint federal officials in the field directly without the consent of the regions. Yeltsin's administration oversaw the theft of much of the federal transfers to the regions, which was stolen by colluding federal and local officials, or was spent by governors on other priorities. Providing incentives for them to spend federal monies properly is too complicated. It is much simpler to task federal officials with monitoring how federal funds were being spent and how federal laws and presidential orders were enforced in the regions. Even if such monitoring does not describe reality accurately, this simplification could help the Russian bureaucracy to display its superior qualities of compiling and fudging government statistics.

Putin's team tried all of these simplification measures with varying degrees of success. He appointed his envoys to seven federal districts to co-ordinate the activities of federal agencies in the field and to monitor how regions spent federal subventions and carried out federal policies. Putin's envoys faced silent noncompliance and pursuit of regional policies against the wishes of the federal centre. This has become an important manifestation of adaptive regional drives towards autonomy. The centre, for example, has turned a blind eye to the fact that in 2005 one-fifth of Russia's regions decided against implementing President Putin's welfare-benefits reform. Among the most defiant territories

[9]On fiscal independence of local self-governments, see *Decision 16-P of 11 November 2003.*

were Russia's richest regions: Moscow City, Tatarstan, Khanty-Mansi Autonomous Okrug, Krasnoyarsk Krai, as well as the Kemerovo and Sverdlovsk Oblasts. More importantly, these regions found quiet ways of doing so by simultaneously redistributing federal grants and maintaining the ongoing benefits system (Chebankova 2007b). At the same time, the Kremlin always appears prepared to resort to military action when it needs to get things done in the ethnic republics in the North Caucasus.

At the time of writing, Putin's envoys were monitoring how regional leaders deliver votes to the Kremlin in federal elections and restrain inflation through price controls on food staples – the very policies many regions used during Yeltsin's era. And even here, some regions managed to resist the Kremlin's orders. For example, the Komi Republic openly announced that it would not have food price controls despite President Putin's order to that effect to boost the electoral success of his party and his successor (Lenta.Ru 2008). In short, the Kremlin expects that the regions will meet any federalism reforms (that do not involve more money from the centre) with quiet sabotage, not compliance.

The latest experiments with governing from the centre involve the introduction of indicators of regional performance, according to which the Russian President would evaluate the performance of the governors. Prior to this experiment, certain regional governors were invited to the Federal Cabinet meeting to report on their performance but such invited speeches proved ineffective. Similarly, various intergovernmental commissions, the State Council, an advisory assembly of all regional governors, and the Council of Legislators, an advisory assembly of all speakers of regional legislators, fostered debate among the experts instead of generating influential and useful policy advice (Chebankova 2007a).

In December 2006, federal legislation was amended to require regional governors to provide an annual report with these indicators to the President. And in June 2007, President Putin signed a decree which required regional governors to deliver annual reports with results on 43 indicators by 1 September 2007 (*Decree No. 825 of 28 June 2007*). A month later, Putin's team added an additional 39 indicators of regional performances to that list. Socio-economic assessment figures (GDP and investment per capita, regional debt, energy consumption, spending on agriculture, housing, education, healthcare) prevail among the 82 indicators. The Federal Statistics Service collects this data and sends it to the Kremlin anyway. Another group of indicators are figures from the public opinion surveys (the proportion of those satisfied with public health services, public education, and government services). The centre can also obtain these on a regular basis by polling public opinion. According to many experts, a few governors will actually be evaluated on the basis of these criteria: lobbying capacity and capacity to maintain political stability will remain the most important factors in gubernatorial nominations (Guseva 2007). Instead, these 82 indicators will provide an additional basis for the Kremlin in whether to keep or replace the regional executive. According to one official in the presidential administration, the centre will use these indicators to improve the quality of public administration in the regions (Prikhodko 2007). On top of this indicator-based monitoring, each federal agency has its own monitoring department in

charge of tracking how regional governments perfom. This is in addition to the federal law-enforcement agencies and monitoring divisions of regional governments.

This top-down subordination in each government agency does not automatically translate into the co-ordination of policies among different ministries, agencies, and government departments. Rivalries among different federal agencies flourish, just as before, as each agency has its own priorities and goals. Minister Kozak insisted that the federal centre make up its mind on its approach to federal reform. He believes that "in public administration, it is better to have the wrong decision carried out in full than to have the correct one carried out in part" (Gorodetskaia 2008). To his credit, he repeatedly admitted errors in both the design and the implementation of federalism reforms. Meanwhile, the proliferation of federal agencies in the field undermined the capacity of the centre to prevent them from going local and to prevent the duplication of functions with analogous regional and local agencies. Moreover, the enlargement of the unmonitored government sector provided opportunities for both federal and local officials to enrich themselves personally and to shirk their responsibility to administer public policies.

The importance of the last two factors is hard to exaggerate. Under Putin, both the size of the federal bureaucracy and the scale of government corruption have grown. The increasing role of state-owned corporations in the economy exacerbates the phenomenon of "administrative entrepreneurship", a practice of using public office for personal enrichment. In most cases, public officials carry out orders from the top promptly provided they do not hurt their own business profits made through the abuse of public office. With the growth of the public spending under Putin, the scale of these profits has been on the rise (Petrov and Ryabov 2007, 79-80). This prevalence of personal motives of officials and their networks weakens the capacity of the federal centre to govern and to transform Russia into a unitary state: some reforms are delayed on the ground, others proceed faster in some regions and slower in others, and so on.

And the public still is confused which level of government is responsible for which area of public policy. In 2006, when asked "What do you mean when you say the word 'public power'?", 30 percent of Russians said that they meant "local authorities or local officials". This is up from 25 percent surveyed in 2001. Only the Russian President and the Federal Cabinet were ahead of the local authorities with 64 and 36 percent respectively in 2006. So, if anything, Putin's reform of Russia's governance appears to have strengthened public perception about the might of the local level of government and street-level bureaucrats. Throughout the same period, Russians tended to attribute the same levels of blame for the rising cost of living to the federal Cabinet and local authorities (Gudkov and Dubin 2007, 48-49). In short, the federal idea survives in everyday public administration because of the domination of mercantile interests of local bureaucrats and their business partners in the private sector.

CONCLUSION

Prospects for the survival of federal idea in today's Russia are dim. While Russia's leaders repeatedly insist that they decentralized government functions, the federal idea is dying due to active policies of the central government to increase its own power. Every year, the federal centre adopts laws through which it unilaterally changes its own responsibilities and those of the regions without much public discussion and without attention to regional identities. These policies, however, are not strong enough to eradicate bilateral bargaining between the centre and the regions or to reduce asymmetries in centre-periphery relations. In fact, the centralization of fiscal powers at the federal level failed to reduce inter-regional disparities. The regions no longer represent a viable opposition to the centre that enjoys wealth, highly popular President with obedient parliament and the growing federal bureaucracy. True, the centre still needs regional governors to get things done but federal state-owned corporations, like Gazprom, can also get things done. The life support system for the federal idea lies in the private initiative: whether it is voters nobly casting their ballots or the greed of the public officials. Taken together, the peaceful clash among the citizens at the ballot box and the profit-driven business activities of the bureaucrats and politicians help ensure that the federal idea, however feeble, is still alive in today's Russia.

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30

"Shared-Rule and Self-Rule" in the Working of Indian Federalism

Akhtar Majeed

Selon sa Constitution, l'Inde est formée d'un ensemble d'États dont l'unité est par nature indestructible. C'est ainsi que l'ambition de fixer certains buts et objectifs communs, mais aussi d'établir une légitimité politique doublée d'une obligation de rendre compte, est devenue dans ce pays le fondement du statut de nation. On y estime en effet que le pouvoir sera d'autant moins menacé qu'il est judicieusement partagé et que les différents intérêts sont aménagés en conséquence. Et le mécanisme fédéral indien a justement pour but d'assurer qu'il en soit ainsi. En vertu de la Constitution, la planification et l'application aussi bien décentralisées que locales sont définies comme des caractéristiques d'une gouvernance partagée, ce qui traduit en retour une image juste de la gouvernance fédérale. Le fédéralisme social ne peut donc être délaissé au nom du fédéralisme politique.

Writing about the distribution of responsibilities in federal polities, Ronald Watts (Majeed, Watts, and Brown 2006) maintains that the actual operation of federations should be categorized not in terms of rigid structures for the division of powers, but as involving a process that enables reconciliation of internal diversity within their federal frameworks. In a plural society, federalism is a method of good governance in which political accommodation and understanding become a sound practice for governance in the midst of conflicting ideologies, disparate groups and seemingly irreconcilable positions. Power-sharing, co-operation and accommodation are more effective, cheaper and lasting methods of accommodation for the developing plural societies. They become a meeting point for antagonistic groups and seemingly irreconcilable positions. Watts has quoted the argument (Breton 1985) that, just as in the economic realm, competition produces superior benefits compared to monopolies or oligopolies, so competition between governments serving the same citizens is likely to provide those citizens with better service.

Many authors (Guibernau and Hutchinson 2001; Hutchinson 1994; Moore 2001; and Smith 1995) have maintained that in the post-colonial era, the state in

a plural and multi-cultural society continued with the colonial technique of intervention or non-intervention in the affairs of diverse social groups when it suited the ruling elite. The power of such a nation-state derived from nationalist mobilization. In a majoritarian democracy, the national elite get to dominate all spheres of social life, of all sections of society, all domains with an acquired legitimacy. And it is easy to charge any group with betrayal if this legitimacy is questioned. Because the "nation" as such creates an illusion, a perception, of consensus and uniformity, there is hardly any scope for the society distinct from the state. As the society in India is plural, whereas the nation-state is uniform and polity is federal, potentialities of strife and frictions are all too obvious. The guarantee for the sustenance of a plural society has been provided by the Constitution of India in a self-equilibrating system, which does not allow one group or one party or one interest any enduring dominance. The Constitution describes India as "a Union of States" and this implies the indestructible nature of its unity. The Indian system does not treat plural diversity as a threat to integration for the nation, though in some countries it has become a fertile ground for the same as the political system was not accommodative enough to let the articulation of diversities be manifest. In India, the desire to identify some common goals and purposes, and to establish not just political legitimacy but political accountability, has become the basis of nationhood. If power is properly shared and varied interests are accommodated, there need not be any threat to power. The Indian federal mechanism is intended to provide precisely this.

In the above context, the Indian federal Union was formed by reconciling various visions, diversities, ideologies and influences. From this, emerged a synthesis that became the base of Indian Constitution, the pillars being: universal adult franchise, democratic liberal-federal republicanism, secularism, universal and fundamental rights, State intervention against inherited inequalities, positive discrimination to support the disadvantaged, and social justice. The federal Union was formed with some basic objectives to (i) put in place a mechanism of federal governance with a strong parliamentary centre, (ii) guarantee cultural autonomy to regions with strong linguistic, religious, tribal, and/or territorial identities, (iii) create a mixed economy with sectors demarcated for state and private enterprise, and (iv) reduce regional and economic disparities through fiscal federalism and planning.

STATES AND DISTRIBUTION OF POWERS

The nationalist movement, before independence, was so strong that the sub-nationalist identities were not even adequately realized. It was much later on that it was realized that federalism could be a good device for solving the problems based on ethnicity, language and other differences if these ethnicities are territorially identifiable. In view of the historical traditions of centralization of power and authority, the operative principle in the making of India's Constitution was that a government was best when it was able to bring about social transformation. Hence, the framers of the Constitution and the subsequent law-makers consciously ensured that the overwhelming majority of powers and

authority was kept with the union government, with the result that there is "blood pressure at the Centre and anemia at the periphery", resulting in morbidity and inefficiency. Equally important, the country's diversity and socio-economic conditions, coupled with the ideological influences of socialism, drove the Constitution toward a kind of organically unitary federalism in the name of justice, equality, and rights protection.

However, the wide powers given to the Union, and limited powers given to the States must not be seen in terms of the either-or-federalism of the past, which rested on a dichotomy between the Centre and the States. The two should not be seen as competing centres of power but as co-partners in the task of nation-building. The Union has been assigned the duty of nation-building, maintenance of unity, protection of the territorial integrity of the country and the maintenance of constitutional-political order throughout the country. The States are to cooperate with the Union in the performance of these functions and in discharging their own constitutional duties with regard to subjects that are local. But as soon as any subject ceases to be "local", the Union would intervene to legislate on that subject.

The Indian Constitution would seem, in the end, to create a "co-operative union" of States rather than a dual polity. What is being observed now is federal restructuring through politically developed rules and conventions, without disturbing the basic scheme of the Constitution. The actual working of co-operative federalism in India has entailed the Union's exercising its influence rather than its constitutional authority. Exigencies of coalition politics have forced the Union and state governments to share power. The Union has more often played the role of a facilitator in interstate disputes than that of an arbitrator. A redistribution of powers – through decentralization and the devolution of authority from the Union to the States and from the States to the local bodies and municipalities – is serving to facilitate the attainment of the objectives of the Constitution: unity, social justice, and democracy. Any federal system is a device of shared-governance, and the Constitution of India envisages a "creative balance" between the need for an effective Union and effectively-empowered States (Austin 1999). A healthy sign is the growing realization that inter-governmental relations need to focus more on the needs of the citizens – particularly in welfare policy areas – rather than on questions of turf and jurisdiction. For power sharing, a sense of accommodation has to be there, and a paradigm shift is needed, one in which democracy need not be just representative but also participatory, and that is the direction towards which Indian federalism is now moving.

The practical importance of the concurrent list, (when adopted in any federation) lies in the fact that the vesting of the same type of power in two parallel agencies carries, within it, the seeds of a possible conflict. This implies that the Constitution (of the country concerned) should provide, in advance, a mechanism for resolving such conflict. In India, article 254 of the Constitution primarily seeks to incorporate such a mechanism:

(a) The co-existence of Central and State laws in particular can give rise to litigation. Such problems arise, either because the Union or a State may

illegally encroach upon the province of the other (parallel) legislature, or they may arise because the two laws clash with each other.

(b) The two situations are, strictly speaking, different from each other; and they must be judged by two different tests. Where the subject-matter of the legislation in question falls within either the Union list or the State list only, then the question is to be decided with reference to legislative competence. One of the two laws must necessarily be void, because (leaving aside matters in the Concurrent List), the Indian Constitution confers exclusive jurisdiction upon Parliament for matters in the Union List and upon a State Legislature for matters in the State List. The Union is not empowered to interfere in any matter pertaining to the exclusive concern of a State (Supreme Court of India 1994). The correct doctrine applicable in such cases is that of ultra vires. Since one of the two laws must be void, the question of inconsistency between the two has no relevance. Only one law will survive; and the other law will not survive, because ex hypothesi, it has no life.

(c) In contrast, where the legislation passed by the Union and the State is on a subject matter included in the Concurrent List, then the matter cannot be determined by applying the test of ultra vires because the hypothesis is that both the laws are (apart from repugnancy), constitutionally valid. In such a case, the test to be adopted will be that of repugnancy, under article 254(2), of the Constitution.

It is obvious that where either the Union or the State legislature proposes to enact a law, it must, in the first place, decide whether it has legislative competence with reference to the subject matter of the law.

FEATURES OF FISCAL SHARING

Sharing among regions is not unique to federations. In unitary States, it occurs virtually automatically and with little fanfare. Unitary state governments typically design tax systems on a nation-wide basis such that persons in similar circumstance are treated comparably regardless of where they reside. And, public services are usually provided at uniform levels to individuals everywhere in the nation. The consequence is that there is considerable implicit redistribution from high-income to low-income regions. By the same token, within regions, persons in different localities are treated comparably, implying possibly significant implicit intra-regional redistribution. What makes a federation different is not the fact of inter-regional redistribution per se, but the fact that it is explicit. Indeed, the analog between inter-regional sharing within a federation and that within a unitary state in part accounts for the use of the financial arrangements of the unitary state as a benchmark for judging inter-regional sharing in a federation. Inter-regional fiscal sharing schemes take different forms in different federations, depending especially on the nature and extent of the fiscal responsibilities assumed by the regions. In some federations, regions have significant expenditure responsibilities, but rely on the central

government for their finances. Financing can be formula-based or it can have significant discretionary elements in it.

Intergovernmental fiscal sharing schemes essentially complement policies implemented by the various levels of government and apply intact regardless of the extent of vertical redistribution pursued by governments. They can be looked at as policies that facilitate the decentralization of fiscal responsibilities, ensuring that the benefits of decentralization are achieved without compromising national objectives of efficiency and equity.

An important feature of India's fiscal federalism is revenue sharing between the Union and the States. Finally, Parliament is empowered to make such grants as it deems necessary to providing financial assistance for any state in need. Such grants can be block grants or specific categorical grants. There is a clear vertical imbalance between (1) the powers of taxation assigned to the Union and the States and (2) the social and economic responsibilities assigned to the States. That is, the States' responsibilities exceed their own-source revenues. But, the Finance Commission, the Planning Commission, and the National Development Council provide mechanisms for periodically correcting this imbalance and for allowing the States to better discharge their responsibilities. These forums cater to the grievances of the States, which they redress to the extent possible.

The Constitution provides that the distribution between the Union and the States of the net proceeds of taxes that are to be divided between them, and the allocation between States of the respective shares of such proceeds, shall be done on the recommendations of a *Finance Commission* that is appointed by the president every five years. The Commission also recommends the principles that should govern grants-in-aid to the States. The grants are both a means to assist development schemes in States lacking adequate financial resources and an instrument to exercise control and co-ordination over the States' welfare schemes.

The following provisions of the Constitution are noteworthy in this connection:

(1) There are duties levied by the Union but collected and appropriated by the States, such as stamp duties and excise duties on medicine and toilet preparations.
(2) There are taxes levied and collected by the Union but assigned wholly to the States, for example, succession duties, estate duty, terminal taxes, taxes on railway fares and freights etc.
(3) There are taxes levied and collected by the Union and distributed between the Union and the States. This is the position of taxes on income other than agricultural income.
(4) There are taxes and duties that are levied and collected by the Union and may be distributed between the Union and the States if Parliament by law so provides. This is the position of excise duties other than duties on medicinal and toilet preparations.

Parliament is empowered to make such grants as it may deem necessary to give financial assistance to any State which is in need of such assistance. Such grants may either be block grants or specific grants.

It appears as if there is a clear vertical imbalance between (1) the powers of taxation assigned to the Union and the States and (2) the social and economic responsibilities assigned to the States. That is, the States' responsibilities exceed their own-source revenues. This arrangement is intended to permit each order of government to do what it is thought to do best; that is, it recognizes that the Centre is perhaps in the best position to collect certain kinds of taxes and to expend and redistribute tax revenues for equitable purposes nationwide, while States and their local governments are in the best position to manage developmental programs and to deliver most services because they are closest to the people.

Resource transfers authorized (under Art. 275) on the recommendations of the Finance Commission are known as statutory grants; those authorized (under Art. 282) on the recommendations of the Planning Commission are known as discretionary grants. When grants to the States are recommended by the Finance Commission − which is a statutory body − the Union government is constitutionally obligated to authorize the grants; hence the Union's authority with respect to grants does not add to its powers. But discretionary grants recommended by the Planning Commission − which is not a statutory body − are at the discretion of the Union government and thus political in nature. As such, they are criticized for causing the States' abject dependence on the Union − a dependence that is said to further enable the Union government to discriminate between States. Plan grants, provided for under Article 282, are 50-50 matching grants, which mean that the Union government issues a grant equal to the sum that the State has raised through its own resources. It also means that States have to fall in line with Union policies, priorities, and preferences in issuing matching grants and also dovetail their own funds to Union allocations.

STATES' REORGANIZATION AND ITS EFFICACY FOR SELF-RULE

From a federal point of view, "State" is an exercise into creation of "unit of self rule" through which autonomy of the society (in terms of maintenance of identity and assured development) gets operationalized. People having distinct socio-cultural identity, concentrated in a few contiguous districts within the existing state-systems, seek a separate state in order to preserve, protect and promote their identity. It is argued that a separate state would provide them a political identity and a constitutionally documented institutional space for interest articulation and protection within the broader territorial state. In India, the unit of "self rule" may be: (i) a full-fledged state; (ii) an autonomous region or regional councils with adequate legislative and executive powers within the existing States in which they are included; (iii) a district development council with adequate authority over local planning for the people located in "ethnic enclaves" of an otherwise composite state; and (iv) result from a granting of Union Territory status to city regions, strategically important region or sub-region and to those areas which are extremely backward. Statehood may be granted to those regional communities that satisfy the three-point criteria of: "(i)

administrative and political manageability involving closer contact between the people and their elected representatives; (ii) techno-economic viability; and (iii) socio-cultural homogeneity (in terms of tribes/jatis, language/dialect, belief system/religious communities and ethnic identities)". In order to promote federal stability at the macro level, the institutions of shared rule such as Zonal Councils, Inter-State Councils, etc., need to be activated. These institutions are advisory or recommendatory bodies, facilitating inter-state co-operation and co-ordination in the areas of national and regional planning and development.

During the first half a century of India's independence, there were two opposing views regarding the formation and re-organization of States. One, held by the Union, was that States should be economically viable and administratively convenient. The other, held by emerging groups, was that where there was a sense of community, or consciousness of a separate identity, then, if feasible, that community should form a separate state. Arguments in favour of the formation or re-organization of States, among others, have been geographical proximity, a common language, similar usages and customs, comparable socio-economic and political stages of development, common historical traditions and experiences, a common way of living, administrative expediency, and, more than anything else, a widely prevalent sentiment of "togetherness", that is, a sense of identity.

The two views clashed but, over time, the second view prevailed. Then, the States' Reorganization Commission 1955 (SRC) laid down four principles for determining and demarcating the boundary of a state. They were: "(i) the preservation and strengthening of the unity and security of India; (ii) the linguistic and cultural homogeneity; (iii) financial, economic and administrative considerations; and (iv) successful working of a national plan".

That reorganization was "half-hearted" in the sense that it was almost forced upon a reluctant Union, and the re-organization was also not complete because all the linguistic areas were not given territorial recognition. These regions were often not treated as politically coherent units reflecting the aspirations of their inhabitants to manage their own affairs. In this competition for resources, the regions used several benchmarks to establish their identity. They were language, culture, economic advancement, administrative coherence, and even the socio-economic backwardness of the region (due to its being part of a bigger regional unit). Regional movements sparked demands for the formation of new States, and for the re-organization of existing States. These demands did not usually go beyond claiming resource-sharing within the broader national context. In this, language was often the symbol giving expression to these aspirations. Generally speaking, the national leadership never anticipated the evolution of social, economic and historical imbalances between historically defined regions in a state.

Parts of India are inhabited by "tribals" and so-called "hill people" who often are not part of the "mainstream". They may live in particular regions of specific States. Such regions have demanded a separate state if they have felt discriminated against and deprived of development, and also if they feel that through resource-transfers others are prospering at their expense. This is what happened to regions such as Marathawada, Vidarbha, and Konkam (in Maharashtra), Jharkhand (in Bihar), and Chhattisgarh (in Madhya Pradesh). The

demands for statehood by tribal people in Jharkand, and by hill people in Uttaranchal, were based on the perception that they were victims of an internal colonialism by other regional and cultural groups. Then, there are other parts of India that are quite prosperous. Here a relatively rich region (in terms of resources or agricultural and industrial output) may resent having to support one that is backward. An example of such a region is one in the more developed western part of the State of Uttar Pradesh, one that calls itself "Harit Pradesh".

A close scrutiny of state-formation in India would reveal that, together with languages, many variable and critical factors like ethnic-cum-economic consideration (Nagaland, Meghalaya, Manipur and Tripura); religion, script and sentiments (Haryana and Punjab); language-cum-culture (Maharashtra and Gujarat); historical and political factors (Uttar Pradesh and Bihar); integration of Princely states and the need for viable groupings (Madhya Pradesh and Rajasthan); and, of course, language-cum-social distinctiveness (Tamilnadu, Kerala, Mysore, Andhra Pradesh, Assam, Bengal and Orissa) have played a decisive role in the composition of the Indian federation.

It is a fact that most of the demands for constituting new states have been primarily based on allegedly unfair and unequal distribution of development benefits and expenditures in multi-lingual States. If people have to live within the territory of the others, they may feel dominated. The success of their demands is related to the success of the elite in marketing the perception of deprivation and in making an "imagined community" into a natural one. Because numbers count in a democratic process, the forging of several identities into a common identity is politically expedient.

A successful working of India's federal nation would involve administrative sub-division of larger states on the principles of regional autonomy and regional identity. The large, composite states face problems of governance, and their very size may hamper economic development. Today's Uttar Pradesh, Bihar, Madhya Pradesh, and Rajasthan provide examples of states with such problems. When the people are made partners in governance, the nation as such is strengthened. Comparable development is possible elsewhere with the decentralization of power, and may lessen the demands for separate states. One should not rush to assume that granting more administrative and fiscal powers to the states, or creating a large number of states, will increasingly weaken the country.

LOCAL-LEVEL GOVERNANCE

There is a third-tier of the Indian federal structure comprised of Local-governing bodies. Part IX of the Constitution outlines the framework of institutions of rural self-government: a three-tier system of units known, in ascending order, as the village, intermediate, and district *panchayats*. The Panchayati Raj system came into existence with two basic objectives: (a) democratic decentralization and (b) local participation in planned programs.

Part IXA of the Constitution sets forth the framework of urban local government. Three types of institutions of local self-government have been provided for urban areas, namely *nagar panchayats* for transitional areas (i.e., areas that are being transformed from rural to urban), municipal councils for

small urban areas, and municipal corporations for large urban areas. Every state is obliged to constitute such units. Local government remains an exclusive state subject. The Seventy-Third and Seventy-Fourth Amendments outline the scheme by which the States can bring their laws on local government into conformity with these amendments. The Constitution provides for direct election of local bodies, in urban and rural areas, every five years. The other notable provisions are:

(i) reservation of seats for women and for scheduled castes and tribes;
(ii) a State Finance Commission to ensure financial viability of these institutions; and
(iii) devolution of powers and responsibilities to the local bodies with respect to:
    (a) preparation of plans and implementation of schemes for economic development and social justice;
    (b) devolution of financial powers to the local bodies; and
    (c) endowment of these institutions with powers, authority and responsibility to prepare plans for economic development and community welfare programs for revenue-raising responsibilities.

Panchayats have now been given powers and responsibilities to plan and execute economic development programs, making plans for economic development, social justice and the implementation of schemes listed in the Eleventh Schedule. These activities include: anti-poverty programs, such as the Integrated Rural Development Program, land improvement, minor irrigation, social of forestry, small scale and cottage industry; primary and secondary schools, non-formal education, and technical training; health and sanitation and family welfare; social welfare, welfare of weaker sections, public distribution system and women and child development; and roads, housing, drinking water, markets, electrification, maintenance of community assets etc. However, much of what has been constitutionally provided to the local-governing bodies has been eroded due to compulsions of power-play. Nobody, who has power, wants to surrender it voluntarily and nobody is willing to empower another at its own cost. The growth of local-level leadership is perceived as a threat by the entrenched national and state elites. Yet, we talk of local-level governments as instruments of empowerment and governance. In this talk of empowerment, what is overlooked is our own competence to empower "the lower, the third tier". It is a condescending approach that assumes that power rightfully belongs only to the Union and the States and they, in their abundant wisdom, have devolved power on the "third tier", empowering the local-level governments. The system can work if we accept that power rightly belongs to the people who give it to the next tier upward. In practice, the so-called empowerment of the local-level governments, the power actually gets transferred from one set of elite to another. In the Indian rural power-structure, so much of inequality exists that this empowerment may actually contribute to inequality and oppression.

Co-operative federalism can succeed only if a fair balance is maintained between the claims of diversity and the requirements of unity. If that is absent, whatever mechanisms of inter-governmental relations are devised would remain non-functional and ineffective. The constitutional provisions stipulate that the

state shall determine the resource-transfers to local bodies. Any transfer mechanism increases the dependence of the local level units. Local units are expected to collect taxes because they are "self-governing units", but the system works on the principle of "you collect and will transfer". But the cordial principle of governance is that the government should meet its own expenditure or, at least, revenue on core services should come from its own resources. This should be by right and not through benevolence of any other government. What needs to be transferred is a power to collect resources, to garner resources, and the power to tax. Unless that is in place, local units remain locally dependent units, not local self-governing units.

Decentralized and grass-root planning and implementation are features of shared governance; and this, in turn, reflects the correct image of federal governance. Social federalism cannot be sidelined in the name of political federalism.

CO-OPERATIVE FEDERALISM

After the *States Reorganisation Act, 1956*, five zonal councils were set up: the development ministers and chief secretaries of these States, and a member of the Planning Commission; each composed of the chief ministers of the States in a council's zone, and each headed by the Union's home minister. The zonal councils are intended to foster the psychological integration of the country by mitigating regional consciousness; helping the Union and State governments to evolve uniform social and economic policies; assisting with effective implementation of development projects; and evolving a degree of political equilibrium among the regions of the country. Regarding the Autonomous District Councils, the National Commission to Review the Working of the Constitution had observed that: "The subjects given under the Sixth Schedule and those mentioned in the Eleventh Schedule could be entrusted to the Autonomous District Councils (ADCs). The system of in-built safeguards in the Sixth Schedule should be maintained and strengthened for the minority and micro-minority groups while empowering them with greater responsibilities and opportunities, for example, through the process of central funding for plan expenditure instead of routing all funds through the State Governments. The North-Eastern Council can play a central role here by developing a process of public education on the proposed changes, which would assure communities about protection of their traditions and also bring in gender representation and give voice to other ethnic groups.

Union-State co-operation, as worded in Part XI of the Constitution, leaves ample scope for *conflict* over interpretation of definitional phrases such as "national interest" and "Union's direction". Article 263, therefore, allows the president to establish an *Inter-State Council* (ISC) to work out modalities for continuing co-operation and to forge procedures for coordination between the Union and the States as well as among the states themselves. The text of Article 263 is so phrased as to allow the council to discuss, debate, and recommend suitable policy measures on any subject, whether characterized as "national" or as "public". There is scope for enlarging the ambit of the council, as it would be

lawful for a presidential order "to define the nature of the duties to be performed by it and its organisation and procedure". As an advisory body, the council may inquire into disputes that "have arisen between States"; investigate and discuss subjects "in which some or all of the States, or the Union and one or more of the States, have a common interest"; or recommend better coordination of policy and action on any subject necessitating interaction between the Union and the States. For smooth running of federal relations, the starting point has to be adding to the competence of the Inter State Council (ISC). Since the ISC is an advisory body, it is difficult to assess the efficacy of its policy performance. And, for the same reason, its cost-effectiveness also cannot be determined. A solid institutional structure for inter-governmental co-operation has not emerged. The ISC needs to be included in the process of central legislation over matters in state list. In such cases, not only informal consultations between the Union and the States should be there, but also the central government should place the proposal before the ISC before such legislation is introduced. The jurisdictional competence of the ISC needs to be extended so as to enable it to review every bill of national importance or likely to affect the interests of one or more States before it is introduced in the Parliament or a State Assembly. There should be no limitation on the ISC that it can consider only political issues. The Union's directions to a State government, under any of the Articles, ought to be issued in consultation with, and with the approval of, the Inter-State Council. Since the purpose of the setting up of the ISC was to facilitate the Union in its co-ordination activities, it cannot discharge its function without being a body for securing co-operation between two levels of government as well.

Because the Union grants are routed through central ministries to their counterparts in the States, each Union ministry is in a position to use the strings of financial power to superintend, direct, and control the corresponding state department. In this way, besides the territorial or horizontal federation set up by the Constitution, a sort of vertical federation has come into being. Various ministries of the government of India issue grants to corresponding ministries of State governments and, in this way, they are in a position to dictate and supervise departments of State governments. A vertical federation has resulted in which, through matching grants, the departments of Central and State governments on the same subject form a unit for the purposes of programs and expenditure on the same. Yet, the State level bodies are not merely implementing bodies. Under the Constitution, the relationship between the Union and the States is that of the whole and its parts, not between the centre and its periphery; otherwise the image created would be that the centre of authority is in New Delhi and the States are at the periphery. Yet, there is kind of subsidiary element in different units of the constituent federal system. The mechanism of intergovernmental relations in India are tilted in favour of the Central government. There are inter-governmental institutions meant to exercise some uniformity in administrative relations, but these mechanisms have not been made use of in improving the system of governance. The Supreme Court has on occasions put pressure on the State governments to follow certain principles in respect of governance or the welfare of the people and this does not, in any way, take away the rights of the States to improve their own system of administration. The hegemony or the dominance of the Union governmental institutions over the State governments is

meant to bring about some kind of uniformity of standards in administrative procedures. In some respects, States have also acquired certain say in matters which used to be traditionally the domain of the Union. One reason is the regional parties sharing political power at the Union. In terms of foreign affairs, States that have economically performed well, and have attracted Foreign Direct Investment and have influenced the foreign economic policy of the Union. States are now more conscious of their role in foreign affairs with neighbouring countries as well as international organizations like WTO, World Bank, ADB etc. Thus, intergovernmental relations reflect both the tendencies of conflict and co-operation, and they keep changing.

There are both formal institutional and informal political arrangements for Centre-state coordination. Among the formal mechanisms are the Planning Commission, Finance Commission, National Development Council, Inter-State Council, National Integration Council, zonal councils, tribunals for adjudicating specific disputes, and various commissions and committees to look into specific aspects of Union-state relations. The informal mechanisms include ministerial and departmental meetings, conferences of constitutional functionaries and of political executives, and the governors' and chief ministers' conferences that are convened by the president and the prime minister. These informal arrangements are aimed at laying down procedural norms of conduct, particularly over such issues as the sharing of central taxes and the Union's intervention in States' affairs, and at evolving a common policy on such trans-governmental issues as the environment, communications, and health. Similarly, such informal mechanisms evolve conventions of governance on questions of States' rights, interstate trade and commerce, sharing of river waters, interstate communications, and other matters.

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Section Twelve
Second Chambers

31

The Senate of Canada and the Conundrum of Reform

David E. Smith

Les propositions de réforme du Sénat canadien se sont multipliées au cours du dernier siècle. D'où cette question centrale : pourquoi aucune d'entre elles n'a été mise en œuvre ? L'énigme repose en fait sur l'incapacité de reconnaître qu'un Sénat non élu est la clé de voûte de la structure de représentation du Canada. Pour réussir, tout projet de réforme devra passer par un dédale de compromis, d'échanges et d'accords, sans parler d'une solide compréhension de cette architecture.

The Preamble to the *Constitution Act, 1867*, states that the uniting provinces desire "a Constitution similar in Principle to that of the United Kingdom". The meaning of the phrase is open to dispute, although a persuasive case may be made that it encompasses, for instance, the principles of responsible government and an independent judiciary. Still, additional attributions presumably exist, and it is to one of these that my initial comments on the Senate of Canada and the conundrum of reform are addressed.

There was a time when Canadian commentators on the Senate saw it as an imperfect representation of the House of Lords. Appointment for life was not the same thing as hereditary membership, but the inference critics drew was that the

composition of both bodies constrained expression of the popular will in their respective Commons.[1] Nonetheless, despite similarities in form the chambers were not identical, while the function of each was in significant respects distinct. This became clear most recently, when in March 2007, the House of Commons at Westminster voted in support of an elected House of Lords, and the question was asked in Canada: "If such reform is possible in the Mother of Parliaments, why not here?"

One would have thought that the answer was obvious: however similar "in Principle" the two constitutions, with regard to upper chambers they are far from being the same. The House of Lords is a vestigial institution of historic lineage; the Senate of Canada is neither. It is original, tailor-made − in other words statutorily prescribed − to fit the conditions of a new federal union. That contrast alone should make Canadians wary of following the British example when contemplating reform of the upper chamber. A case in point is the proposal by now retired Senator Dan Hays that, among other actions, "the Senate of Canada should emulate the U.K. example and encourage the government of the day to appoint a royal commission on Senate reform" (Hays 2007, 23).[2]

Arguably, whether the subject is institutions (such as Parliament), or politics (the Cooperative Commonwealth Federation and socialism), or economic doctrine (Social Credit and social credit), British models have always been strongly entertained in Canada. This was true in 1867, when "an essentially atypical second chamber, the House of Lords, [was taken to] represen[t] a basic element of a stable constitution" (Jackson 1972, ix). Yet this was a curious claim when seen through British eyes. The year of Confederation was the year of Great Britain's second reform bill, which further expanded the franchise and confirmed the moral of the 1832 reform bill − that is, the House of Commons was to be Parliament's pre-eminent legislative chamber. Paradoxically, at the very time the Senate of Canada appeared set to follow the British model, a House of Lords problem had begun to appear, and would remain unresolved for some decades − what role was the Lords to have and, depending upon the answer to that question, what was to be its relationship to the House of Commons?

If this seems an indirect way to launch a discussion of the conundrum of Senate reform, I apologize. The point I wish to emphasize is that the Senate − like the House of Lords − was conceived as a legislative body, one chamber of a bicameral Parliament, not a Bundesrat-like assembly of bureaucrats, or an advisory body of provincially selected politicians. If the phrase "a Constitution similar in Principle to that of the United Kingdom" meant anything, it meant this − supreme legislative authority was to reside in two chambers.

Nor was the subject of legislatures and their number of chambers confined to the Parliament of Canada. Embedded within the *Constitution Act, 1867*, are

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[1]In twentieth century Great Britain, life peerages were introduced in 1958, while most hereditary peers ceased to be eligible to sit in the Lords in 1999; in Canada, life appointment to the Senate was replaced by mandatory retirement at age 75 in 1965.

[2]The British royal commission is Royal Commission on the Reform of the House of Lords (2000). For an analysis, see Smith (2000); for a personal critique, see Cook (2003).

the provincial constitutions of Ontario and Quebec, wherein Ontario is given a legislative assembly and Quebec a legislative assembly and a legislative council. It is relevant to the topic of this paper that Ontario, the largest colony of settlement in the British Empire, and loyal to the core, should opt for a unitary legislature and that Quebec should seek a bicameral legislature, with an upper chamber of appointed members each drawn from one of the province's twenty-four electoral divisions. Those divisions were the same ones from which Quebec's twenty-four Senators were to be selected for appointment by the governor general.

As Garth Stevenson has shown in his research on the anglophone minority in Quebec, the requirement that appointments be made from the individual divisions had as its purpose the protection of the religious and linguistic rights of the province's minorities (Stevenson 1997). In one respect that is an obvious conclusion to draw, although it does not detract from the contrast it poses between the Canadian Senate and the House of Lords. At no time, until the report of the Royal Commission on the Reform of the House of Lords (chaired by Lord Wakeham) made it one of its recommendations, did the House of Lords have sectional or minority interests as part of its responsibilities. By contrast, from Confederation onward, protection of these interests was a primary function of the Canadian Senate.

How well the Senate actually performed the task is secondary to the point being made here, which is about legislative structure, in particular bicameralism at the centre and unicameralism in the parts. Quebec retained its upper chamber until 1968, but the other provinces that had upper chambers (Manitoba, New Brunswick, Prince Edward Island and Nova Scotia) abolished them decades earlier, partly on grounds of economy but also on the theoretical grounds that they were redundant.[3] At the Quebec conference, George Brown argued for provincial unicameralism, because the new Senate would "extinguish or largely diminish the Local Legislative Councils" (Pope 1895, 76-77). Almost a century later, Senator Norman Lambert reiterated the point: "Equal representation in the Senate was to be the collective equivalent of the original Legislative Councils of the provinces" (Lambert 1950, 19).

Canada is unusual among federations for the asymmetrical composition of its national and provincial legislatures. It is a contrast that has seldom elicited scholarly comment, although one academic who did reflect on its significance was Harold Innis: "The governmental machinery of the provinces has been strengthened in struggles with the federal government by the gradual extinction of legislative councils" (Innis 1946, 132). Another observation would be that

[3]One of the first occasions for a discussion of Senate reform was the Interprovincial Conference of 1887, called by Honore Mercier, premier of Quebec, and attended by five of the then seven provincial premiers (British Columbia and Prince Edward Island absented themselves). Among the Resolutions passed was one (number 4) that recommended the provinces be permitted to choose one half of their senatorial allocation. Another Resolution (number 12) advocated the abolition of provincial second chambers because "experience … shows that, under Responsible Government and with the safeguards provided by the *British North America Act*, a second chamber is unnecessary" (Canada 1951a, Minutes Interprovincial Conference, 1887).

provincial politicians today have no experience of second chambers, and thus neither understanding nor sympathy for their place in the legislative process. The exception to that generalization is where provinces recognize the value of the Senate as a forum for opposing policies of the federal government. A recent example saw a majority of provinces present position papers to the Standing Senate Committee on Legal and Constitutional Affairs, which either rejected or expressed concern at the Harper Government's Bill S-4, "An Act to Amend the Constitution Act, 1867 (Senate Tenure)". In the words of the New Brunswick presentation, term limits (the subject of S-4) would "dilute the independence [of Senators]" and it "would lead to a further marginalization of small Provinces at the federal level" (New Brunswick 2007, 7).

Membership in Canada's upper house is by senatorial region, of which there are four − Ontario, Quebec, the Maritime provinces and the four western provinces (Newfoundland and Labrador and the northern territories are treated as exceptions), each with twenty-four Senators. A familiar complaint about this arrangement is that a province such as British Columbia, with close to four million inhabitants, has six Senators, while PEI, with a population of less than 150,000, has four.

Standing grievance or not, the inequity has an explanation, and one important to understanding the place of the Senate in the federation. The guarantee of equal (regional but not provincial) representation with the more populous provinces of Ontario and Quebec was responsible for the entry of the Maritime provinces (Nova Scotia and New Brunswick). According to George Brown: "On no other condition could we have advanced a step" (Canada 1951b, *Parliamentary Debates on Confederation* 1865, 88). Regional equity was *essential* to concluding the Confederation bargain; no other issue took so long to resolve.

In consequence of that agreement, it was possible for some decades after 1867 to think of the young Dominion as Christopher Dunkin, minister in charge of Canada's first census, described it in the House of Commons, that is, as "the three kingdoms" (HOC Debates 8 March 1870, 280). The allusion was to the United Kingdom, which encompassed England, Scotland and Ireland, along with the Principality of Wales, and notwithstanding whose diversity appeared to the Fathers of Confederation the paradigm of a successful nation.

What was missing in this analogy was federalism. Despite talk late in the nineteenth century of imperial federation and of federal solutions to the Irish Question, Great Britain was not a federal system. Canada was a federal union, although on the part of its principal politicians there was little discussion of the theory of federalism. For instance, the Macdonald government had no vision as to how the federation would be expanded, but rather was forced into a response following the rebellion at Red River. When introducing the *Manitoba Act* in 1870, the prime minister told the House that "it was not a matter of great importance whether the province was called a province or a territory. We have Provinces of all sizes, shapes and constitutions … so that there could not be anything determined by the use of the word" (HOC Debates 2 May 1870, 1287). The postage stamp province of Manitoba that resulted − with its bicameral legislature, official bilingualism and denominational schools − conformed to no blueprint past or future. In the words of David Mills, Liberal journalist and later

minister in the Mackenzie government, Parliament but more particularly the Conservatives had failed to do what "the theory of their system required"(HOC Debates 25 April 1870, 1178). It should be said, however, that an anemic federal idea was not to be confused with weak national purpose, as the National Policy bore witness.

When it came to the Senate, however, the Liberals were no different. In this regard, the Liberal inter-regnum of 1873-78 is a puzzle. Why did the government of Alexander Mackenzie − who created the Supreme Court of Canada, secured a revised commission and set of instructions for the governor general, proposed ending appeals to the JCPC, and who allowed an expanded provincial franchise to determine the federal franchise − apparently never contemplate reform of the Senate? A perverse explanation for Liberal inactivity on the Senate front is this: more than the Conservatives, the Liberals were provincially minded; more than the Conservatives, they favoured a local and broadened franchise (even in federal elections). Uniting these two proclivities in aid of a reformed (most likely, an elected) Senate would probably have led to the demand for representation by population in the upper house as well as the lower. And this result would strike at the very roots of the Confederation compromise.

Canadians like to contrast their history with that of Americans as evolution versus revolution. This perspective locates the pre-Confederation past on a continuum leading to the post-Confederation era. Here, in George Etienne Cartier's words, was one justification for equal treatment of the Maritime provinces with Ontario and Quebec when it came to Senate membership:

> It might be thought that Nova Scotia and New Brunswick got more than their share in the originally adopted distribution, but it must be recollected that they had been independent provinces, and the count of heads must not always be permitted to out-weigh every other consideration. (HOC Debates 3 April 1868, 455)

No longer independent colonies, Nova Scotia and New Brunswick had become provinces of a much larger colony. For this reason as much as for any other, the heavy hand of Maritime history, evident in the original Confederation settlement as regards the Senate, has continued into the present in a remarkably extensive way.

The story begins in 1912, when Parliament added portions of the Northwest Territories to the adjoining provinces of Ontario, Quebec and Manitoba. Why territory was added to existing provinces rather than creating new provinces, as the Northwest Ordinance (1787) had required for expansion of the United States, is a mystery. Nonetheless, it did have the effect of keeping the Senate formula stable. Ultimately, it led to its constitutional entrenchment.

In 1915, a half century after Confederation and following a debate in which no member of Parliament dissented from the principle of senatorial regions, an act of Parliament (*Constitution Act, 1915*) recognized the four provinces of western Canada as the fourth such region. In a "Memorandum on Representation of the Maritime Provinces", the Maritime provinces expressed disquiet at the prospect of these developments and their eventual effect on the composition of

Parliament: "Representation by population while accepted as a guiding principle in fixing the representation of each province in the Dominion parliament, was intended to be made subservient to the right of each colony to *adequate* representation in view of its surrender of a large measure of self-government" (Memorandum 1913, ital. in orig.). Echoing Cartier's rationale of fifty years before, the Memorandum continued: "A self-governing colony was something more than the number of its inhabitants".

Sacrifice as well as history was invoked: "[The Maritime provinces] gave their sons and daughters to the west. From Manitoba to the Pacific coast the Maritime Provinces people form an important element of the population who have played no small part in the development of these new lands." Justice too: "[The Maritime Provinces] had as good a right to share in the public demesne of Canada as had those provinces upon which it was bestowed"; and, finally, future prospects: "[The territory added to the three provinces] will increase to a limit not now possible of calculation the representation of these provinces in the federal Parliament." The concern of the Memorandum was to restore the "representation of the Maritime Provinces in the House of Commons … to the number allowed upon entering confederation upon terms that the same may not in future be subject to reduction below that number".

The federal government responded sympathetically to this request but in a manner not anticipated in the Memorandum. The *Constitution Act, 1915* amended the 1867 Act by the addition of section 51A, which read: "Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province." The nexus thus created between a province's Commons and Senate seat allocations has had at least two long-term implications for federal-provincial relations. First, it has fixed the attention of small provinces in particular upon the guarantee the nexus provides and strengthened their resolve to resist any change that might threaten it. Secondly, and in company with another amendment to the Constitution's representation provisions, adopted in 1952, which said (S51.5) that "there shall be no reduction in the representation of any province as a result of which that province would have a smaller number of members than any other province that according to the results of the then last decennial census did not have a larger population", it has given ammunition to Senate critics who seek equality of provincial representation in the upper chamber comparable to that found in the United States and Australia.[4]

The desire of the Maritime Provinces in 1913 for predictability as to their numbers in Parliament achieved a level of unimagined certainty decades later in the *Constitution Act, 1982* (s. 44), when one of the four specified matters requiring unanimous consent for their amendment − the Crown, the Supreme Court of Canada, the use of English or the French language were the others − was the guarantee that no province should have fewer members of the House of Commons than it had Senators.

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[4]The story of the politics surrounding this provision is well told by Norman Ward (1953).

Here is a Herculean obstacle to any proposed Senate reform that touches upon the subject of membership numbers. It is also one to whose history reformers would be advised to pay close attention. None of the impediments to reform listed in the preceding paragraphs were original to the *Constitution Act, 1867*. They occurred because of territorial and demographic expansion, and took the form of compensation, largely by the central government, to those who did not expect to grow. (There are parallels here to the history of another fundamental component to Canadian federalism, and now constitutional guarantee − equalization.)

In addition to the representational nexus between the two chambers of Parliament, there is a further parliamentary dimension to the conundrum of Senate reform: Canada is a constitutional monarchy in a system of responsible (cabinet) government. These are important features in a discussion of the Senate. To begin with, constitutional monarchy makes explicable − if not acceptable to some − appointment of senators by the Crown on advice of the prime minister. There is no need to rehearse the arguments against an appointed upper house. They are well known. What can be said is that constitutional monarchy offered a practicable method of selecting senators to the upper chamber at a time when there were few alternatives. Election was not popular in United Canada after the experiment initiated in the mid-1850s, while selection by provincial legislatures of delegates from among their numbers to sit at the centre, as was done in nineteenth-century United States, violated the common sense of Parliament as the supreme legislative power (as in the United Kingdom) and the belief British North Americans held that the creation of a national parliament marked an important step to constitutional maturity.

Senate critics have fixed on patronage and partisanship as twin scourges that come from political domination of the appointment process. Political life in Canada after 1867 could not have been predicted from colonial experience. Party discipline and long periods of single party domination of government (and thus a monopoly on patronage) had been unknown in the colonies. Now politics in the Dominion worked to centralize power in the political executive, that is, the cabinet. The reason why lay in the development of national political parties through the constituencies, a practice that produced local party notables, who in turn personified the provincial party at the centre. These people became cabinet ministers in Ottawa because of a second practice which was quickly treated as a convention of the constitution − the federalization of the cabinet. Other influences were at work as well, such as the custom governments of United Canada had had of including within their ranks representatives of significant groups, be they religious, or linguistic, or regional.

The extent to which the cabinet was federalized deprived the Senate from playing a similar, integrative role. The late American scholar Martin Landau wrote about federalism in the United States as a system of redundancies (Landau 1973). One example would be the presidential power shared with the Senate to confirm treaties and key executive and judicial appointments. Such sharing was never possible in a constitutional monarchical system where treaties and appointments are the prerogative of the Crown and made on advice of a single (first) minister. Significantly, for those who look to the Australian Senate as a model for a reformed Canadian Senate, these are not part of its powers either.

Nonetheless, the intrastate argument − that federations require a legislative mechanism to integrate the parts at the centre − remains alive in Canada, where the Senate does not perform this role. Just how well the upper chambers of Australia and the United States fulfil it is another matter. In *Platypus and Parliament: The Australian Senate in Theory and Practice*, Stanley Bach makes clear that the Australian Senate is more accurately described as a house of state parties rather than a house of the states (Bach 2003).

Dunkin's 1868 metaphor of the three kingdoms to describe the original Union was artistic in its historical allusion to the mother country but artfully simplistic in its treatment of the new Dominion's vast geography. Two years later, with the acquisition of Rupert's Land and the North-Western Territory, the physical frame for the "novel" constitution (the adjective was Lord Monck's in the first Speech from the Throne, 1868) quadrupled, creating a challenge for the Canadian federation it has yet to meet. The reason why is part of the conundrum of Senate reform.

Essentially, there are two reasons for experimenting with federal systems: to recognize cultural difference and to incorporate territory. Canada's is a double federation in that both imperatives are present. The *Constitution Act, 1867* is largely about realizing the first, by recognizing French Canada's distinctiveness through its own set of institutions. Note that it was French Canada's and not Quebec's distinctiveness that was at issue, as was confirmed in 1870 by the almost identical terms found in the *Manitoba Act*. But as all who know their Canadian history know, the *Manitoba Act* foundered in the face of the other, "transcontinental" imperative. Because of massive immigration of non-French farmers, French-Canadians were to have negligible influence on the future of West, at least for a century, until appointment of the Royal Commission on Bilingualism and Biculturalism, passage of the *Official Languages Act* and entrenchment of the *Canadian Charter of Rights and Freedoms* (Behiels 2004). At the same time, geographic scale and colonial experience delayed realization of the second federal imperative. Instead, the West was seen as another empire, whose constitutional development would recapitulate that of central Canada and the Maritime provinces, that is, it would pass by stages from representative, to responsible, to eventual provincial government. Absent from this imperial persuasion was the federal idea.

Beginning in 1887 and until the present day, territories not yet provinces are represented in Parliament by MPs and Senators. What does this membership signify? The *Constitution Act, 1915*, which created the western Senatorial Division also provided that when Newfoundland entered Confederation, it "shall be entitled to be represented in the Senate by six members". According to the 1911 census, Saskatchewan had a population of 492,432; Newfoundland had less than half that number (242,619). What larger reasoning dictated this future allocation? Whatever the answer, it helps explain, perhaps, the comment by Canada's high commissioner to Newfoundland almost 30 years later that Newfoundlanders "really [do not] appreciate or understand the workings of the

Federal system of Government" (Canada. External Affairs 1984, 16 November 1943, 87).[5]

The central government's view of the prairie West as its empire, as testified to in its retention of the natural resources of Manitoba, Saskatchewan and Alberta until 1930 and in the use of these resources as in the case of land for national purposes, such as building the transcontinental railroads, contributed to a sense of regional grievance that no amount of good fortune afterward appeared able to moderate. Twenty-five years after the addition of section 92A to the *Constitution Act, 1867*, intended to affirm the provinces' jurisdiction over the exploration, development and transportation of non-renewable natural resources, distrust of the centre on this matter continued. Consider Peter Lougheed's prediction in a speech to the Canadian Bar Association in August 2007 that federal environmental and provincial resource development policies are on a collision course and that the discord will be "ten times greater" than in the past (Makin 2007).

The tension between the centre and the parts, particularly the western part of the country, is evident in both cultural and economic spheres. The questions of denominational schools and of language have roiled relations for over a century. This happened by making those subjects, which had been at the core of the original Confederation settlement, matters that were seen to trespass on provincial rights (Lingard 1946, 154). The effect was to slow down the rounding out of Confederation. The same tension, but cast in economic terms − the tariff, freight rates, the National Energy Policy, the Canadian Wheat Board are examples − goes a long way toward explaining the regional decline of national parties on the prairies and the rise and perpetuation of third-party opposition from the West in Ottawa. Here is another factor that contributes to Canada's Senate being different from its counterparts in Australia and the United States. Many, maybe most, of the best known politicians of western Canada have been from neither of the major national parties. Even if it were the ambition of reformers to make the Canadian Senate like Australia's − using Bach's language, a house of provincial parties − how could this be done, given the manner of senatorial selection and the condition of national parties, in some instances almost vestigial, in the provinces?

The effect of the frontier was to increase federal power. Since acquisition of the Rupert's Land and the North-Western Territory in 1870, this has been evident in economic matters. If, however, frontier is more liberally construed to mean the new and the unknown, as with the Charter and its interpretation by the courts, it applies as well to the Constitution, law and rights. This is a subject

[5]If there was a shallow understanding of federalism one reason might be inadequate preparatory information. Despite its title, "Some Notes on the Constitution and Government of Canada and on the Canadian Federal System" (A Reference Paper Prepared for the Information of a Delegation from the National Convention of Newfoundland), prepared in Ottawa in June 1947, four (of 43) paragraphs dealt with "division of powers as laid down in the *B.N.A. Act*", while five described "provincial governments" in terms of their legislatures (unicameral), adult franchise and office of lieutenant governor. Parties and inter-governmental relations receive no mention (NAC 1947).

where the Senate has a claim to some expertise and experience. Its great advantage is that it has nothing to do with numbers, either equal or fixed. There is a Canadian penchant for using fixed numbers to offer protection: 65 MLAs each for Canada East and Canada West after 1840; 65 MPs from Quebec after 1867, all other representation to be proportionate; an irreducible 75 MPs today; and, as already noted, s. 41 of the *Constitution Act, 1982*, which guarantees that no province shall have fewer senators than it has members of Parliament.

The belief that more means better is not borne out in Senate experience. The Senate is a chamber of the people but it is not a representative body. A motion by Senators Lowell Murray and Jack Austin in 2006, to create a fifth Senatorial Division comprised solely of the province of British Columbia, with 12 Senators, presupposed otherwise (Senate of Canada 2006). (The same motion envisioned a new prairie region with twenty-four seats − seven each for Saskatchewan and Manitoba, and ten for Alberta.) Implicit in the motion is the assumption that the Senate is deficient as an institution of intrastate federalism and that increasing the number of senators from a particular region, as well as the total number (in this case from 105 to 117), will begin to remedy that condition. Whether British Columbia is a "region" distinct from the Prairie provinces is open to debate. For instance, such designation runs counter to intra-regional developments in western Canada in the last twenty-five years that treat the four western provinces as an entity with common but not identical economic and regulatory interests in its relations with the federal government. Even if British Columbia has distinct public policy interests in its relations with the federal government, it begs the question whether the Senate is the forum and senators the voice for their effective expression.

Increasing numbers in one region does not deal with the criticism of inequity elsewhere, a reality the federal government confronted also in the House of Commons in 2007 with its Bill C-56, "An Act to Amend the Constitution Act, 1867 [Democratic Representation]". In part this is the other, or Commons, side of the "senatorial floor" guarantee adopted as a constitutional amendment in 1915. The upper house ceiling on Commons representation for a province amounts to a continuing distortion to the principle of rep-by-pop. John Courtney, who is the authority on this matter, has shown that, for example, " if on the basis of the 2001 census Ontario had been awarded one seat for every 33,824 people (as was the case for Prince Edward Island), it would send 337 MPs to Ottawa − a larger delegation than the current House of Commons" (Courtney 2006, 11). The Harper Government's way of dealing with this matter is the way of past governments − to increase the total size of the chamber. That would be the outcome of the Murray/Austin motion for the Senate too. To guarantee protection, Canadian politicians favour fixed numbers for representation; to recognize growth, they opt for additional seats. As a result, no province loses. Thus the distortion of the principle of rep-by-pop mounts, and the quest for equality proves fruitless and without historical justification.

Although elected politicians took the decisions, it was the unelected Senate which provided the keystone for modern Canada's structure of representation. A maze of compromises, deals and agreements, its architecture is central to the conundrum of Senate reform. Central but inadequately acknowledged, since debate seldom strays from the tried and true. Should the Senate be appointed or

elected, and, in either case, should this be done at the centre (nationally) or in the parts (provincially)? Should the tenure of senators be limited to terms, of whatever length, as opposed to a mandatory retirement age? When it comes to function, should the Senate be limited to a delaying or suspensive veto only, like its Westminster counterpart, or should weighted voting be introduced for measures in specific categories (for example, use of the federal spending power), or double-majority voting on measures of "special linguistic significance", or should the Senate be given power to approve order-in-council appointments as well as consent to treaties?

Proposed reforms come and go, and come again, but always with the same outcome − no change. Why is institutional and constitutional change in the matter of Canada's upper chamber − whether major, in the form of the Meech Lake and Charlottetown Accords, or minor in the form of the Harper Government's Senate Tenure Bill, which the government described as incremental, so difficult to achieve? Is stasis in this matter any different from the half-century search for a constitutional amendment formula in Canada or the eighty-eight year hiatus in Great Britain between the introduction of the suspensive veto in 1911, as a first step to Lords reform, and the next, the severing of the hereditary peers from membership in the Lords, in 1999?

Part of the explanation lies in the longevity of senators − appointed for life until 1965 and until age seventy-five since then. Although that provision may lead to extraordinarily long tenure, generally it does not: the average length of office is almost 12 years (Smith 2003). Still, this is far longer than the parliamentary career of most MPs, and, more particularly, of cabinet ministers who pilot reform through Parliament. Moreover, the overlap of generations in the Senate is more pronounced than in the Commons.[6] Nor is it immaterial that senators are at the end of their political careers. There is no political uncertainty or calculation as to their future. Time is on their side.

Part of it lies in the composition of the Senate, where despite specified senatorial divisions senators are allocated among the provinces. In the eyes of each province, their senators − or better still, their number of senators − belongs to them. Proposed reforms that would affect the numbers or the function of senators are carefully scrutinized by the provinces (as in the case of Bill S-4, noted above). Thus, the Senate never stands alone. The Senate has allies who, regardless of party complexion, usually come to its aid.

Another part of the explanation can be found in the constitutional indeterminacy of the Senate's role and function. One reason there are so many different proposals for its reform is that there is great latitude, even ambiguity, about what the chamber might be expected to do. Although it may be a factually incorrect statement, almost everyone agrees that the job of the House of Commons is "to make laws that are acceptable to the public". In a bicameral Parliament, the Senate is a legislative chamber but with one important limitation on its activities: Section 53 of the *Constitution Act, 1867*, states that appropriation measures must originate in the House of Commons. Otherwise,

[6]On the matter of overlap and, more generally, temporality in politics, see Pierson (2004) and Smith (2005).

the Senate's powers are those of the Commons, with the conventional limitation that it shall not act in a manner to thwart the will of the people as expressed by their elected representatives. Here is "the space", if you will, for sober second thought, even sober first thought − the Senate as an investigative and deliberative chamber, bringing to bear on public policy the weight of long experience and broad knowledge.

In 1980, the Supreme Court of Canada was asked by the federal government to give its opinion on the authority of Parliament to amend the constitution unilaterally as regards the Senate (Supreme Court of Canada 1980). At issue was the Trudeau government's constitutional reform package of 1978 − Bill C-60, the Constitutional Amendment Bill, which among other matters provided for a House of the Provinces, in place of the Senate, with members indirectly elected by provincial legislative assemblies and the House of Commons. The details of that proposed reform of thirty years ago are immaterial, except for the long reach of the Court's opinion in two respects. First, it said that "it is clear that the intention [of the Fathers of Confederation] was to make the Senate a thoroughly independent body which could canvass dispassionately the measures of the House of Commons" (p. 77). Further, it stated that "the Senate has a vital role as an institution forming part of the federal system … Thus, the body which has been created as a means of protecting sectional and provincial interests was made a participant of the legislative process" (p. 56).

"Thoroughly independent", and "an institution forming part of the federal system ... [as well as] a participant in the legislative process". These phrases have come to severely test proposals for Senate reform. Unlike the general procedure for amending the constitution, as set down in s. 42 (that is, support from seven provinces with 50 percent of the population) and which applies to the powers of the Senate, the method of selecting senators and the numbers of senators to which a province is entitled, threats to independence are less easy to calculate, although not to imagine. At the same time, the 1982 advisory opinion made clear that the Senate was already a part of the federal system and an actor in the legislative process. Schemes to alter the upper chamber in a manner that could be said to weaken these judicially ascribed characteristics face informed opposition from their outset. For instance, would Triple E (Equal, Elected and Effective) with its emphasis on representation undermine the dispassionate contemplative role envisioned for the Senate by the Supreme Court? Or again, are senatorial terms compatible with "thorough independen[ce]"?

Senators may hold office until age 75; with the hereditaries gone, members of the Lords (for the time being) are appointed for life. What conclusion is to be drawn from these facts? That Canada is not a democracy? That Great Britain has never been a democracy? If the questions sound extreme, they are meant to, for they underline an essential aspect of the conundrum of Senate (and Lords) reform: there is no popular will, no popular movement to make it happen, because there is insufficient discontent with the status quo. Attempts at Senate reform have no staying power. Triple E, which had some claim to a popular component, although regionally concentrated, appears to be fading.

Everybody, when asked, will dismiss an appointed Senate, but nobody, when left alone, will do anything about changing the Senate. Senate reform is a preoccupation of academics and bureaucrats. Of 24 relatively recent proposals

on the subject, 15 are the product of governments, royal commissions or legislatures. Three others come from political parties. Concern about strengthening the mechanisms of intra-state federalism or institutionalizing intergovernmental relations through a recast Senate have no popular appeal, or understanding. It is an incomprehension proponents of such schemes do little to dispel (Canada. Library of Parliament. Stilborn 1999).

Increasingly, debate about Senate reform has less to do with maintaining the tapestry of federalism (the focus of reform activity in the last quarter of the last century), than it has with an evolving sense of constitutionalism which, as the Supreme Court of Canada opinion of 1980 demonstrates, preceded the adoption of the *Canadian Charter of Rights and Freedoms* but which has been reinforced by it. Proponents of term limits for senators or of advisory elections to determine the nominee for appointment by the governor-in-council find the debate that results from this change in register conducted at a level of constitutional abstraction distant from the object they seek. Thus the frustration evident in Mr. Harper's remark to the Australian Senate − that Canadians suffer from "[Australian] Senate envy" (Galloway 2007).

The irony of recent debates on Senate reform is hardly subtle − that the unelected, retirement-at-75 upper house might have a role to play redressing the "democratic deficit" attributed to all-powerful prime ministers, and that any reform that would politicize its members and make them more subject to partisan direction is to be avoided.

Far easier in Great Britain, one might think − no nexus to bind the distribution of members in one chamber to the distribution in the other; no federation of provinces and territories who look to the upper house to articulate regional, sectional, and minority interests; no double federation, of cultures and provinces; no federalized cabinet; no written constitution with a difficult amending formula to discourage formal change − and yet the same outcome. Robin Cook, Leader of the House of Commons at Westminster between 2001 and 2003, was in charge of the Blair Government's initiatives on reform of the House of Lords. He supported the elective principle, his leader (when pressed) the appointive principle. Cook makes clear that Tony Blair's indecisiveness was a crucial, but not determinative, factor in explaining lack of movement on Lords reform. Everyone had a view of what a future Lords should look like. More important, however, everyone had a priority of legislative objectives, and for many on the government side Lords reform was not their most paramount concern.

The object of reform should not be confused with a priority for reform. In this last respect, the Blair Government was exceptional for introducing a period of constitutional inquiry not seen in Great Britain for nearly a century. The same might be said of the initiatives of the Trudeau Government in Canada, which led to bargaining with the provinces that culminated in the *Constitution Act, 1982*, except that for most of the twentieth century Canada had been preoccupied with constitutional questions, either as it sought autonomy in its relations with the imperial power or as it confronted sovereigntist sentiment within its boundaries after 1960. Yet despite the promising and accommodative language, in neither country did upper chamber improvement have the same political or popular bite

as, for instance, devolution and local government reform in Britain or the advent of the Charter in Canada.

In part, the conundrum of Senate reform is that it has had more popular competitors. More fundamental still, is that reform of the Senate in terms of the selection of its members, or in the redistribution of their number among the provinces, according to some standard of equity, have immediate implications for the other two parts of Parliament − the senatorial floor to provincial representation in the Commons and the prerogative power of appointment possessed by the Crown. The unity of the Crown-in-Parliament and the theory that sustains it − that there is no constituent power outside of that tripartite institution − acts as an original and powerful disincentive to articulating and initiating reform of the Senate, and then carrying it through to a successful conclusion.

The OED gives as one definition of conundrum the following: "a riddle, especially one with a pun in its answer". (A second definition is: "a hard or puzzling question".) In the context of the subject of this paper, any attempt to follow this injunction will not equal Churchill's memorable description of the Soviet Union − a riddle wrapped in a mystery inside an enigma. A best effort results in something more prosaic − a phonetic anagram of the word itself, "cum round"; and that, admittedly, is an approximation. This is a strained way of saying that the answer to the conundrum of Senate reform lies not in myriad prescriptions for change but in understanding that agreement on the structure of the Senate was the principle on which the Confederation accord rested. Central to that accord was the idea of balance − "the three kingdoms". With the arrival of a new transcontinental federation, balance gave way to concern for protection, achieved not through the Senate alone but by creating a senatorial floor for representation of the provinces in the Commons. Over time that guarantee became constitutionally entrenched. The last step in that development occurred with adoption of the *Constitution Act, 1982*. The 1980s and succeeding decades witnessed a constitutionalization of federalism far beyond old concerns about the division of powers. It is a re-constitution of federalism according to norms distinct from those evoked by the preambular phrase, "a Constitution similar in Principle to that of the United Kingdom", that further deepens the conundrum of Senate reform.

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32

Ron Watts and Second Chambers: Some Reflections on the Bundesrat

Uwe Leonardy

Ce chapitre fait valoir que la réforme du Sénat canadien constitue le premier motif d'intérêt de Ronald Watts pour les secondes chambres fédérales parmi ses nombreux champs de recherche et ses travaux sur le fédéralisme comparé. Ces travaux y sont classés en trois groupes, à savoir ses publications analytiques, descriptives et consultatives. Parmi ses approches et catégories analytiques sont soulignées les finalités des secondes chambres, la distinction faite par Watts entre fédéralisme dual et interdépendant, la différenciation qu'il établit entre fédérations pluralistes et parlementaires, les avantages et inconvénients du classement des secondes chambres « fortes » et « utiles » établi par lord Campion, la composition et les effectifs de ces chambres dans les régimes fédéraux ainsi que leur rôle dans les relations intergouvernementales. « Le bicaméralisme est l'allié naturel du fédéralisme », conclut cette section du chapitre. S'appuyant sur ces analyses, l'auteur met ensuite en évidence les évaluations et recommandations prudemment énoncées de Ronald Watts sur les secondes chambres fédérales. Il tente aussi de démontrer que Watts a toujours privilégié le modèle du Bundesrat allemand en vue d'une éventuelle réforme du Sénat canadien, même s'il s'en est subtilement distancé depuis les années 1990. Selon l'échelle comparative générale, l'auteur résume son point de vue en reprenant cette phrase de Watts : « Les secondes chambres fédérales contribuent à protéger les individus et les minorités contre les abus. »

INTRODUCTION

As Ron Watts has noted, "of the some 24 current federations ... [only] five do not have bicameral legislatures: these are the United Arab Emirates, Venezuela, the island federations of Comoros, Micronesia, and St. Kitts and Nevis" (Watts 2008a). It is not surprising, therefore, that he has devoted much research and analytical attention to federal second chambers (see references).

Bicameralism is, of course, not a peculiarity of federal structures. Unitary systems have second chambers as well. Their antecedent is the British House of Lords (on which, strangely enough, and although established in a federal

constitution, the Canadian Senate was modelled). So the question is: What purposes do second chambers in unitary and in federal systems have in common? Ron Watts offers two answers: first, that "bicameral systems add an element of deliberate 'redundancy' into the legislative processes" (Watts 2003, 68), which means that they offer a chance for second thought, which "is particularly important where legislative proposals may have been prepared in haste and passed in the first house under strict party discipline" (ibid.). Second, "depending upon the membership of the second chamber, such a body may also provide an opportunity to bring particular types of expertise to bear on the debate of an issue before parliament finally confirms its decisions" (ibid., 69).

In federal systems, as Ron Watts has observed, second chambers have two additional functions: They act "as a device to check the power of majoritarian elements that might otherwise dominate the governmental process and … to ensure adequate representation of regional and minority interests and view points" (ibid.). In his studies of second chambers in federal systems, Watts has categorized three types: The first consists of those in nonparliamentary federations such as the United States, Switzerland, and the Latin American federations, the second comprises the parliamentary federations in a number of Commonwealth (including Canada) and European federations; and the third is exemplified by Germany and – although up to now only quasi-federal – the Republic of South Africa where the second chambers include delegates of the constituent unit executives. Russia he considers to be a special hybrid case between the first and the second group (ibid., 72-74).

Dual vs. Interdependent Federalism

Before we can turn to this grouping we must consider Watts's discussion of the concepts of dual versus interdependent federations. His point of departure is the definition of the federal principle as given by K.C. Wheare (1963), Ron Watts's mentor as quoted by Watts, Wheare defined the federal principle as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent" (Watts 1970, 322). This traditional theory of "dual federalism" presupposes that there are "dual sets of government … each separate in its water-tight compartment and within its own sphere independent of the other" (ibid.). Although admitting that this concept "has the advantage of clarity", Ron Watts rightly observes that it "has a fatal flaw" because in practice "the isolation from each other of the activities of the other levels of government has simply proved impracticable". It is "too legalistic" and furthermore "logically unsound" in assuming "that if one government were dependent on another, the former necessarily would be subordinate" (ibid., 323, 325). For these reasons, he contrasts it with the concept of "interdependent federalism" involving mutual dependence. It is at this point that a second chamber comes into play "as one of a number of interacting elements within a single political system which embraces both levels of government" (ibid., 326).

With this as a backdrop, Watts distinguishes three fundamental aspects of the inner workings of a federal system. First, there is "the distribution of functions and responsibilities between the levels of government". Second, "the

activities of the two levels of government interpenetrate both administratively and politically. Intergovernmental relations, therefore are a … fundamental aspect of any federal system". Third, since federal systems represent "a form of partnership, an especially crucial aspect is the process through which the diverse sectional or cultural groups participate in reaching a federation-wide consensus". From this Watts concludes that "it is as an institution contributing to these processes that a federal second chamber performs its prime function" (ibid.). Thus a second chamber has "not merely a negative function of protecting the interests of sectional and cultural minorities from the permanent majority, but the positive one of resolving conflicts of interests and of widening the area and extent of agreement and accommodation between them" (ibid., 327).

Pluralist and Parliamentary Federations

Ron Watts distinguished between pluralist federations exemplified by the United States and Switzerland, and parliamentary federations including Canada, the other Commonwealth federations, and some European federations. In the former, the view prevails that "political authority should be dispersed among multiple centres of power: not simply between central and state institutions, but also among a variety of central institutions". In the latter, power within each level is concentrated with the fusion of the legislature and the executive and consequently the style of political interaction is radically different, and the role a second chamber can play within such a system is affected. Specifically, "the responsibility of the cabinet to the majority in the popularly elected first chamber" has restricted the role which the second chamber might play in effectively influencing central policies on behalf of provincial or minority interests" (ibid.). Thus in these "parliamentary federations the major responsibility for performing this function has usually fallen upon the political party or parties constituting the majority in the popular house, rather than upon the interaction of different central institutions, including the second chamber, checking and balancing each other".

Although Germany is a parliamentary federation, the Bundesrat is a special case by virtue of its composition (composed of representatives of the Land executives) and powers including its absolute veto over all legislation affecting the rights of the constituent units, the Länder. These make it a strong watchdog of regional interests.

"Strong" vs. "Useful" Second Chambers

In the debates on reforming the British House of Lords, it has been said that second chambers are either "strong" or they are "useful". Ron Watts takes up this distinction of Lord Campion by referring to a "strong" second chamber as "one which is able to stand up to the popularly elected house on an equal footing", while a "useful" one is a second chamber "which maintains some degree of influence over legislation but only within the limits of restricted powers" (ibid., 334). As a general rule, Watts attributes the "strong" type to

pluralist federations, and as far as one can see there is apparently no exception to that rule.

Nonetheless, the distinction between pluralist and parliamentary federations does not fully correspond to that between "strong" and "useful" second chambers in federal systems. While one will have to agree with Ron Watts that in most parliamentary federations second chambers are generally to be counted as belonging to the "useful" group, there is an exemption to this rule, and – as noted already – this exemption is the German Bundesrat. Ron Watts apparently agrees with this when he notes a number of features that have made the Bundesrat a more influential and significant body than the second chamber in any of the parliamentary federations in the Commonwealth (ibid., 339). While I have elsewhere (Leonardy, 1999a) focussed on the powers of the Bundesrat, it can be noted here that a large proportion of federal legislation in Germany is based on so-called consent bills, which means that without the consent of the Bundesrat they cannot become statutes. Although their number has been somewhat diminished by recent reforms (see Holtschneider and Schön 2007), the fact remains that – in Watts's words – "the Bundesrat (is) in a powerful position to influence federal legislative policy" (Watts 1970, 340). Indeed, in a lecture given in Bonn in 1994 (which I am proud to have "provoked" him into giving) Ron Watts went as far as to state that "in functional terms (the Bundesrat) is undoubtedly the most powerful of the second chambers to be found in any parliamentary federation". This fact, however, has its roots not only in its legislative position but also in other factors such as its composition and membership.

Composition and Membership of Second Chambers

The composition of second chambers and the methods for the selection of their members are, indeed, no less important than their powers and functions, and there is a close relation between the two. Both composition and the method of selection of members are highly relevant for the relationship between the two chambers in unitary and in federal systems alike. For federal second chambers the methods for selecting members clearly reflect the extent to which the constituent units can influence decision-making in the federation. Thus Ron Watts devoted a substantial part of his research and writing to these issues.

In relation to the composition of second chambers affecting the power-relationship between the two chambers in both unitary and federal structures, there is one rule that would seem to be of paramount significance, to which Ron Watts, however, refers only rather rarely and indirectly. Specifically, he quotes the statement of Meg Russell, probably the most profound researcher in contemporary efforts at British House of Lords reform (Russell 2000) that "first, the second chamber must have a composition distinct from the first chamber" (Watts 2003, 86). Meg Russell wrote that bringing elements of direct election partly or even totally into the composition of the House of Lords, would result in the unwanted situation of partisan political rivalry between the Lords and the Commons (Russell 2000, 254-257, 315-336). That would apply not only to unitary but also to federal second chambers. One might have expected that Ron

Watts would have emphasized this effect more emphatically than merely by quoting another researcher. The reason would seem to lie in the history of the efforts for Canadian Senate reform. Although other models had been clearly in the foreground until the end of the 1970s, the concept of a "Triple E Senate" (meaning above all an elected one) then dominated the debate, so that "there was a clear preference in public opinion surveys for a reform of the Senate that would give it electoral legitimacy" (Watts 1991, 37). Ron Watts was (and apparently still is) a clear supporter of the non-elected models discussed prior to that, but he obviously shied away from those models after the swing in public opinion in favour of electoral legitimacy for a new Senate.

Be that as it may, it would seem to be indisputable that if both chambers are equally based on direct and nation-wide election there are bound to be conflicts between them over their relative political legitimacy. The example of the Australian Senate, which is popularly elected (proportional representation) would seem to prove that. Moreover, in such a system there is in practice no distinct representation of regional interests, which is after all the rationale for federal second chambers. For example, U.S. Senators have increasingly come to consider their states as merely electoral constituencies for issues of national policy and national party politics rather than as bases for a representation of regional interests. The growth of a multitude of state-co-ordinating organizations taking the place of the Senate as lobbyists for state interests provides evidence of that tendency ever since Senators have no longer been elected by the state legislatures, as they were until 1913.

Thus numerous federal states have developed other methods for the selection of the members of their second chambers. They range from indirect election by the legislative assemblies of the constituent units to appointment ex-officio by state governments and to mixed models as well as to devices of weighted state voting. All of these different methods cannot and, indeed, need not be enumerated here, since they have all been carefully documented by Ron Watts (1999; 2008a: 4 and 5, and 2008b). Given the multitude of variations, he has rightly remarked at a rather early stage of his research in comparative federalism that "(t)he appeal of the bicameral solution has lain in the compromises in regional representation and in the methods of selection that it makes possible" (Watts 1970, 332).

Role of the Second Chamber in Intergovernmental Relations

A particular merit of Ron Watts's studies on federal bicameralism has been his emphasis on the fact that the second chamber in federal states can play an important role in the intergovernmental relations between the executives both on the regional level horizontally and in federal/regional relations vertically. In this respect he has on numerous occasions pointed to the German Bundesrat, composed of members of the regional (Länder) governments themselves, so that "by contrast with the others, the German Bundesrat performs an additional and equally important role of serving as an institution to facilitate intergovernmental co-operation and collaboration. It is able to do this because, unlike the other federal second chambers, … it is composed of instructed delegates of the Land

governments … " (Watts 1999, 97 and 2008a, 10). That, indeed, gives the Bundesrat a strong role in intergovernmental relations, although it should be noted that constitutionally this applies more to the vertical federal/regional relations since the Bundesrat is a federal organ concerned with matters within federal competence and thus not directly with the horizontal coordination among the Länder themselves (Leonardy 1999b, 7-10). In practice, however, there are numerous overlaps of these areas. These are most visibly reflected in the fact that the respective federal ministers are always represented in the interdepartmental conferences of the Länder ministries, on whose agendas numerous items of both federal and Länder competences and concerns are frequently negotiated. Irrespective of these differentiations the most remarkable effect of the actual work of the Bundesrat, particularly in its committees and the public always documents about it, lies in the fact that it contributes substantially to transparency in intergovernmental relations. By doing so it practically serves as "a window into intergovernmental relations" (Scottish Affairs Committee 1998, 40). Ron Watts has also drawn attention to the influence, which this model has had on the creation of the European Union's Council (Watts 2008a, 11) and in 1996 of the South African National Council of Provinces (Watts 1999, 77; 2003, 78; and 2008a, 10). However, it needs to be said in this context that under the influence of more recent and very strong centralizing tendencies, the South African National Council of the Provinces has, unfortunately, not proved to be very successful, because the opportunity to facilitate intergovernmental relations – with provincial executive members as "special delegates" in the provincial delegations – have not really been used effectively. As a result, a contemporary observer has even come to call the National Council of the Provinces a "National Council of Pointlessness" (Dawes 2007). That is certainly a regrettable development, but it does not minimize the role which an organ like the Bundesrat can have in intergovernmental relations as a federal second chamber.

Conclusion of Ron Watts's Analyses

To try to give a comprehensive summary of Ron Watts's analyses and observations of federal second chambers would appear to be almost impossible. A statement coming closest to the nucleus of such a summarizing conclusion would perhaps be to quote the words of another scholar of comparative federalism (Campbell Sharman) whom Watts quotes himself: "Bicameralism is the natural ally of federalism: both imply a preference for incremental rather than radical change, for negotiated rather than coerced solutions, and for responsiveness to a range of political preferences rather than the artificial simplicity of dichotomous choice" (Sharman 1988, 96; Watts 2003, 70).

EVALUATIONS AND RECOMMENDATIONS

Ron Watts's style of argumentation, both orally and in writing, is always very cautious, never pressing, and on issues of political relevance even almost diplomatic. This helpful politeness in style even vis-à-vis adversaries, is one of the characteristics which make him so likeable personally and also so convincing in his publications. He never tires in emphasizing that what is good and reasonable in one constitutional setting and particularly in one federal system is not necessarily good for another one, because the differences in history, structures, and beliefs must always be considered. That would seem to be the essence of what makes him such a respected comparative scholar. At the same time, however, that is what sometimes does not make it easy to discover evaluations, let alone recommendations in the results of his research.

Nevertheless, in his comparative work about federal second chambers he is very clear in his formulations concerning the "assessment of effectiveness" (Watts 2003, 85-86). In a review of relevant contemporary political science literature – that of Lijphart (1984), Tsebelis and Money (1997), Patterson (1999), Russell (2000), Sharman (1988) and himself (2003) – it takes him five rather voluminous paragraphs on two pages to define the criteria for such an assessment determined by the other authors, but only one sentence to define his own. He suggests "that to obtain the confidence of the citizens in the different units, the shared institutions of the federal governments and legislature must meet two criteria: genuine representativeness of the internal diversity within the federation and effectiveness in federal government decision-making" (Watts 2003, 86). His most often occurring test-case in the ensuing contexts of evaluating and recommending is, of course, the suitability of any particular model for Canadian Senate reform, and this would seem to be only natural.

The German Bundesrat as a Potential Model for Canadian Senate Reform

For a German author there is, of course, the danger of being suspected of propagating one's own country's second chamber as a model for another country. This would, however, be completely out of place, and besides that it would run straight against Watts's own scientific, if not ethical, standards for comparative work. But I note that he himself did and does, indeed, consider the Bundesrat model as one which at least deserves specific attention in the long-lasting and ongoing debate about the reform of the Canadian Senate.

Support for this view can be found in his early essay of 1970 about "Second Chambers in Federal Political Systems" (Watts 1970). Referring to the fact that members of the Länder governments appointed by their cabinets are the members of the Bundesrat, he states that "a Senate on this pattern would certainly perform a distinctive and useful function in the political process of the Canadian federal system" (ibid., 354). In awareness of the fact that "Canadians may not be in a habit of looking to the Germans for lessons in the art of self-government" he gives several reasons for taking the Bundesrat as a serious

model. Some key-words are significant: the ability of the members "to speak with real authority for provincial interests, since they would be responsible to democratically elected governments in the provinces"; the protection against "any tendencies for provincial functions to gravitate into the hands of the central authorities"; the enabling of "provincial governments, including Québec, to contribute to the making of federal policy"; the encouragement of co-operation between the two levels of government by the participation of federal cabinet ministers in the deliberations of the chamber, and – last but not least – the facilitation of co-operation among the provinces (ibid.).

Besides these institutional factors Ron Watts also clearly emphasizes those with an impact on the party system. He does so strongly on the basis that:

> There are four aspects of political parties that may particularly affect their operation within a federation: (1) the organizational relationship between the party organizations at the federal level and provincial or state party levels, (2) the degree of symmetry or asymmetry between federal and provincial or state party alignments, (3) the impact of party discipline upon the representation of interests within each level, and (4) the prevailing pattern for progression of political careers. (Watts 2008a, 11)

In Watts's evaluation, a Canadian Senate along the lines of a Bundesrat "would reduce, to some extent, the independence of provincial political parties but will encourage federal parties to give even more attention to the reconciliation of different provincial points of view" (Watts 1970, 354). He also emphasizes that "by serving as a permanent meeting ground for the federal and state governments and their bureaucracies, (the Bundesrat) has become the major institution for intergovernmental negotiation and co-operation" (Watts 1970, 340).

In his more recent writings, Ron Watts gives a detailed account of the support for these ideas particularly in the 1970s and of their later (and final?) decline in the 1980s. He reports that in the late 1970s, numerous Provinces and in particular British Columbia and Ontario, the Québec Liberal Party, the Canadian Bar Association and last but not least, the Task Force on Canadian Unity (the Pepin-Robarts Commission, on which he served himself) each "advanced proposals to convert the Canadian Senate into a House or Council of the Provinces along lines heavily influenced by the model of the German Bundesrat" (Watts 1994, 65). Then, however, and apparently under the impact of their rejection by the MacDonald Commission "such proposals went out of fashion" (Watts 1991, 37; also 2003, 92-93). During the 1980s and early 1990s, public debate tended to focus upon the idea of a directly elected so-called "Triple-E Senate" (Elected, Equal representation of each province, and Effective), shaped on the Australian model (for details see Watts 1990, 164-166). This is not the place to recapitulate the history of Canadian Senate reform in any more detail and by doing so – as we say in the German language – "to carry owls to Athens" – in a Canadian publication. But it would seem appropriate to emphasize that Ron Watts never really gave up his support for the relevance of the Bundesrat model, though with variations, for the Canadian Senate reform debate. This is shown by a publication of his as recently as 2003, in which he says that the fears levied against the German model (giving

"provincial governments too large a voice and introduce a divisive element in federal deliberations") "were clearly based on a failure to understand the actual operation of the German Bundesrat" (Watts 2003, 93).

Nonetheless – and Ron Watts would not be himself were he not to add the caution – he also raises "some valid reasons for caution about applying the German model to Canada" (ibid.). He sees them mainly in the "very different form of the Canadian distribution of powers" placing "much more emphasis upon the exclusive jurisdiction and autonomy of each order of government, whereas in Germany the emphasis is upon the interdependence of the federal-state-local governments" (ibid.). Moreover, he points to the fact that the introduction of the Bundesrat model or anything like it "would require a major constitutional amendment" and that such a proposal would "unlikely to be a practical prospect in the current conditions in Canada" (ibid., 94). However, he does not forget to add that this would apply to other devices for Senate reform, too, such as a reformed appointment process for senators in the present structure (ibid., 98-100).

SUMMARY

As I have noted already at an earlier stage, there is no realizable chance of summing up Ron Watts's contributions on federal second chambers in any substantiated, let alone any comprehensive detail. Perhaps they can be best summarized by the statement (which he takes from the *Federalist Papers,* No. 9*)* that "by emphasizing the value of checks and balances and dispersing authority to limit the potential tyranny of the majority, federal second chambers contribute to the protection of individuals and minorities against abuses" (Watts 2008a, 15).

What is left and required to be said, however, is that his analyses, his descriptions, his evaluations and his recommendations display a vast reservoir of scholarly investigation and comparative experience, grounded in political science and in practice-related application of constitutional research. Not only his publications, but also his strong involvement both in the founding and in the practice of the Forum of Federations have helped substantially to disseminate the contents of this reservoir to all who want to learn and, by doing so, to profit from it.

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33

The Senate in Australia and Canada: Mr. Harper's "Senate Envy" and the Intra vs. Interstate Debate

Douglas Brown, Herman Bakvis, and Gerald Baier

Le concept opposant fédéralisme interétatique et intra-étatique a exercé une énorme influence sur l'étude du fédéralisme canadien et continue de peser directement sur l'actuel débat entourant la réforme du Sénat. C'est aussi un concept sur lequel Ronald Watts a beaucoup écrit. Les auteurs de ce chapitre y font appel pour établir entre les Sénats canadien et australien une comparaison visant à déterminer si une adaptation du modèle australien ferait évoluer le Canada vers une « chambre des partis » à l'australienne ou une « chambre des provinces ». Comme c'est le cas de toutes les adaptations transnationales, tout dépend en grande partie des contingences, notamment du choix du système électoral. Mais selon l'hypothèse des auteurs, l'adoption au Canada d'un Sénat élu de type australien permettrait à des partis provinciaux comme le Bloc québécois ou le Parti conservateur de l'Alberta de remporter un succès considérable aux élections sénatoriales. Les auteurs s'intéressent enfin à la capacité d'un Sénat élu d'accroître la représentativité du gouvernement fédéral et de réguler le pouvoir exécutif.

INTRODUCTION

Among the many contributions made by Ronald L. Watts to academic and public life is a volume, co-authored with the late Donald Smiley, entitled *Intrastate Federalism in Canada* (1985), published in the research studies series of the Royal Commission on Economic Union and Development Prospects for Canada (commonly referred to as the Macdonald Commission). Intrastate federalism, or more precisely, the intra- vs. interstate federalism distinction, has been an enormously influential concept in the study of Canadian federalism and bears directly on the current debate over Senate reform. *Intrastate Federalism in Canada* represents the most definitive exploration of this distinction, featuring not only a careful examination of the Canadian debate but also an extensive

comparative analysis. Along with Alan Cairns (1979), these two scholars are mostly responsible for its addition to the Canadian federalism lexicon.

It is our intention here to contribute further to this debate through a comparison of the Australian and Canadian Senates. The latter is undergoing more than normal scrutiny by the federal government led by Stephen Harper, in particular through proposed reform with term limits and non-binding elections. The former is often cited by Canadians as a viable model for reform of the Senate in Canada. However, Canadian consideration of the Australian model often hinges on whether it is indeed a "states' house" or a "parties' house". The latter might actually be preferable to some Canadians. On the other hand, transplanted institutions often have a habit of taking off in quite a different direction, resonating with political forces and tendencies not present in the originating country. In our paper we will suggest that the Australian Senate may well be more attuned to regional/state interests than has been acknowledged, which may well have implications for adapting it to the Canadian context. In our analysis we will be relying on data gathered through interviews conducted in Australia in 2005 with officials and elected officials and through two full-day focus group sessions, one held in Canberra and the other in Melbourne in June of 2005 involving former and current officials, appointed and elected, journalists and selected Australian academics from a variety of disciplines.[1]

Note that in the opening paragraph we say the *Canadian* federalism lexicon, not simply *the* federalism lexicon. This phrasing is quite deliberate on our part, for the intra-interstate distinction is of importance primarily to Canada and, for a variety of reasons, appears to have little resonance outside of it. Essentially, intrastate federalism refers to something that other federations have and Canada mostly lacks: the representation of regional and local interests or governments directly in central institutions, typically in the form of a second chamber with representatives from the constituent units, directly elected as in Australia and the United States, or appointed by the governments or legislatures of the constituent units, as in Germany and in the United States prior to 1913.

As is well known, Canada has only a very weak second chamber for regional representation, one to which representatives are appointed by the central government and where representation strongly favours the original four provinces thereby undermining any semblance of equality, either on the basis of population or territory. Demands for a Triple E Senate (equal, effective and elected) became prominent during the 1980s, especially in Western Canada, under the slogan "the West wants in" and at a time when the western based Reform party was beginning to gain political momentum. Subsequent developments, such as the failure of the Meech Lake and Charlottetown attempts to amend the constitution, underscored the difficulties of obtaining the

[1]This research was made possible through the Social Sciences and Humanities Research Council of Canada (SSHRCC) under the federalism and the federations program. Data from the focus groups is referenced in the text as FG Canberra and FG Melbourne. In addition to financial support from SSHRCC, we would also like to acknowledge the exceptional help received from Penny Frearson and Brian Galligan of Melbourne University and Carmel McCauley and John Warhurst of Australian National University in organizing the two focus group sessions.

unanimous consent necessary for constitutional change, something that would certainly be required to change the allocation of seats among the regions and provinces. However, the issue of Senate reform has remained a live concern, particularly in the province of Alberta, where there are still a number of "elected senators in waiting".

The slogan "the West wants in" points to an important consideration in the design and governance of federations. According to Preston King (1982, 405), the extent to which a federation's "central government incorporates regional units into its decision procedure on some constitutionally entrenched basis" is a crucial feature demarcating federalism from other forms of governance and crucial as well to the functioning of the federal enterprise as a whole. As Smiley and Watts (1985, 38) note:

> No matter how much a federal system allows for the expression of regional differences through autonomous state or provincial governments, the federal solution is bound to disintegrate without some positive consensus among its component groups. And it is upon the structure and processes of the central institutions that the ability to generate such a consensus exists.

According to Smiley and Watts, the German *Bundesrat* is the ideal example of an intrastate federal institution. Conflict between state and central governments, it is argued, is much reduced by virtue of having state governments, and the regional interests that they represent, directly involved in central decision-making. In the United States and Australia, senators are elected by the voters of the state rather than appointed by state governments, but the effect is largely similar: senators in these federations have the opportunity and the capacity to inject state interests and values directly into central government deliberations.

It has been suggested that in Canada intrastate elements are not altogether absent. Thus regional representation is an important consideration in appointing ministers to the federal cabinet so that each province, with the possible exception of PEI, is guaranteed at least one seat at the cabinet table (Bakvis 1991). Christopher Dunkin, during the Confederation Debates in Quebec City in 1865, stated, "I think I may defy them [the government] to shew that the Cabinet can be formed on any other principle than that of a representation of the several provinces in that Cabinet … The cabinet here must discharge all that kind of function, which in the United States is performed, in the Federal sense, by the Senate" (quoted in Bakvis 1991, vi). However, this practice of regional appointments to the cabinet is based exclusively on convention. Further, it represents what Cairns (1979) has referred to the "centralist" variant of intrastate federalism, primarily because, like appointments to the Senate, it is the federal government, not the provincial governments or citizens, who control the selection process. Furthermore, while in earlier eras "regional ministers" did exercise considerable clout within the federal cabinet, in more recent decades that role has been much reduced, restricted more to the regional allocation of porkbarrel type projects and party favours than the representation of broad regional interests. Much like the parliamentary caucuses, this role also lacks visibility and transparency.

By default, then, the Canadian federation is primarily an *inter*state federation, one in which the interests of regions and provinces are brokered and represented primarily not through or *within* the central government but *between* governments with the provincial governments acting as the primary intermediary. Political scientists by and large have been critical of the interstate model, mainly because it appears to help foster conflict between Ottawa and the provinces and among the provinces themselves. There is also strong public opinion favouring either outright abolition of the Senate or its direct election. Among provincial governments, sentiment varies. While the West still favours an elected Senate, especially in Alberta, Quebec and to a somewhat lesser degree Atlantic Canada are inclined toward abolition (Angus Reid 2010). It is reasonably clear that an elected Senate is something over which provinces would have little control, quite likely taking away their influence over, and their claim to, the representation of provincial and regional interests to Ottawa. On the whole, sentiment appears to favour a reformed Senate (*Globe and Mail* 2006), a body that is more regionally balanced and elected. Primarily because, as King (1982) has pointed out, most other federations are blessed with a proper federal second chamber, and have no wish to alter it or do away with it, the intra-interstate distinction is of little relevance to them, which is why, as alluded to at the outset, this distinction and the associated debate is largely unique to Canada.

In the event, the current Canadian Senate with its obvious representational defects and lack of legitimacy, coupled with the election of the Harper Conservative government in 2006, has once again placed Senate reform on the political agenda. The Conservative government introduced legislation placing a term limit of eight years for all senators and put forward a proposal of requiring non-binding elections − referred to as "consultations with electors" − for all newly appointed senators, where a prime minister would use his or her prerogative power to appoint winners to the Senate.[2] And in September of 2007, in a joint address to the Australian parliament, Prime Minister Harper confessed to a distinct case of "Senate envy" when looking at Australia (*Globe and Mail* 2007a). As the debate over these proposals has proceeded, Canadians have grappled with the fundamental question of the purpose of the Senate, now in the 21st century as compared with the 1860s. As David Smith has ably demonstrated, federal and representational roles are obviously key to the Senate's purpose, but so too are its roles in legislation and responsible government (Smith 2003). In any case, a fresh comparison with Australian design and experience may illuminate such considerations.

[2]For the current version of the proposals see House of Commons of Canada, *Bill C-10, An Act to amend the Constitution Act, 1867 (Senate term limits)*; and Senate of Canada, *Bill S-8: An Act respecting the Selection of Senators.*

The Australian Senate

For those casting envious glances at the Australian Senate, a number of points ought to be kept in mind: the Senate in that country has never really been seen as a states' house, the aspirations of some of the founding fathers notwithstanding. It has variously been seen as a parties' house, a house of review and a check on executive power. Its relatively rapid development as a parties' house became evident within a decade of its founding, with the partisan composition of the Senate roughly approximating that of the House of Representatives, the lower house. The electoral system used until 1949 – where senators were elected on a state-wide basis using a "winners take all" system so that a majority of votes for a party meant that all Senate seats at stake would go to that party – contributed to the role of the Senate as an arena for exercising short term partisan advantage (Sharman 1987). The "winners take all" system also had a "wind screen wiper" effect so that even a relatively minor shift in the vote in the next election could mean that half the senators from the incumbent party could be wiped out. It meant, among other things, that for politicians, aspiring or otherwise, a seat in the Senate was less attractive than one in the lower house, with the consequence that members of the Senate were generally considered to be of lower caliber. It also meant that the Senate's role, either as a house of review or a check on executive power was seen as relatively weak. That role began to change, however, with the arrival of a new electoral system – proportional representation (PR) using a single transferable vote (STV) – for the Senate in 1949.

At first, the change seemed innocuous enough. While senatorial tenures lengthened somewhat, partisan composition remained roughly the same. Differences appeared after 1960, however, with the split in the Australian Labor party; the new Democratic Labor Party was able to gain seats in the Senate under STV but not the lower house. As Sharman notes, by the late 1960s, Democratic Labor and independent senators held the balance of power. "By the early 1970s [the Senate] had an established system of standing and special-purpose committees backed by the willingness of the chamber to modify or block any government legislation of which it did not approve" (1987, 95). Subsequently, other parties gained entry to the Senate, including the Australian Democrats, Australian Greens and the National Party of Australia, of which the former two parties by and large failed to gain entry to the lower house. In brief, meaningful bicameralism, that is, a system where the two main parliamentary institutions are in different hands, has been a prominent feature of the Australian polity for more than four decades. Only in the Senate term of July 1, 2005-July 1, 2008, following the October 2004 election, did the Senate slip back into a majority situation in favour of the incumbent government, albeit a very slim majority.

Throughout its history, therefore, the Australian Senate has seldom been seen as a federal institution in the sense of providing representation to the states or where state interests were voiced or promoted. We argue below that the Senate in Australia does operate according to federal values, but in more indirect ways. Still, the fact that the Senate is not directly a "states house" does not provide much comfort to those promoting Senate reform in Canada, at least to those who think that an elected Senate, with representation weighted towards the

smaller provinces, would allow provinces a greater say over the policies of the federal government. However, there are three further points to keep in mind. First, the Australian Senate still occupies a position of "inherent structural ambivalence", to use Campbell Sharman's terminology, that is, "the inconsistency between its structure and the constitutional framework to which it is intimately connected" (1987, 92). In this case, the inconsistency lies between American congressional style bicameralism and British-style parliamentary government. One implication of this ambiguity is that even minor changes in the political context, such as the introduction of proportional representation election in 1949, can have an effect of significant change in its institutional role, tilting from one style of bicameralism to another. The critical point here is that while all political institutions are contingent upon their political context, a hybrid body such as the Australian Senate is *highly* contingent upon political context, a point to which we will return in the conclusion. It could be, therefore, that in a political context where regionalism and regional politics are more pronounced, a "platypus" (Bach 2003) type body such as the Australian Senate could well evolve in quite a different direction – regional blocks or state based parties gaining entry through PR-STV, for example.

A second point worth making is that the characterization of the Australian Senate as *not* serving as a states' or federal house – a characterization made primarily by Australians themselves – may be at least somewhat misleading and may be based on an unduly rigid definition of what constitutes a "federal house". For most Australian observers, for the Senate to be labeled a federal house requires the direct representation of Australian state governments – a pure intrastate model in other words, of which the German *Bundesrat* is the best example. Anything less, simply doesn't cut it.

Other observers, however, ourselves included, would argue that there is much more federalism in the composition and operation of the Australian Senate than meets the eye. First, there is the over representation of less populous states or provinces. Second, there is the fact that senators may be more sensitive to regional or local interests, even if elected from the ranks of the government party. Third, federal theory suggests that representation from the population of the states, elected at large, still provides a qualitatively different form of representation than the representation of the national population in the lower house of parliament. The interests and values of the state populations, if not of the State governments as institutions, are thereby reflected in the national parliament. We return to these points in our concluding section.

INTRASTATE REFORM PRESSURE IN CANADA: SENATE REFORM BACK ON THE AGENDA?

Intrastate Reform Pressure in Canada

The desire for Senate reform in Canada is something of a two-headed beast. The Senate's design has always meant that it has been a poor regional counterweight to the lower house, but its lack of democratic legitimacy often makes its

contemporary form the object of scorn and ridicule. Two strains of reform, one for function and the other for form, coexist and to some extent compete, but no proposals for reform have seriously contemplated changes to one strain and not the other. If the Senate's true calling is to serve as a provinces' house, or even as a more modest or moderate regional check on the lower house, its democratic pedigree, it is assumed, will have to be improved. Likewise if the Senate is given a more legitimate ground of representation it is assumed that its original function as a site for the protection of property interests will have to change.

Even within the two reform traditions there are varying strains. For those like Smiley and Watts who have been struck by the potential of intrastate institutions to help alleviate tensions in federations, the reformist impulse is to make the Canadian Senate a site for accommodating provincial diversity into national decision making. In this respect, a reformed Senate would have a better public profile and more transparent processes than executive federalism. Other federalism minded reformers look at the Senate as a site for inputs into federal decision-making, but as an alternative to the population dominated lower house which necessarily gives a greater voice to Canada's two largest provinces. Reformers (both small and large r) in Western Canada often claimed that decisions made by the national parliament that proved unpopular in the West, be it the National Energy Program or the CF-18 maintenance contract, would never have made it past the increased regional scrutiny that a more effectively regional Senate would provide. For westerners, the Senate's potential has been attractive because other forums of intrastate representation have proven somewhat unsatisfying. Political parties and the cabinet have not been uniformly successful in delivering the overt regional representation that westerners seem to crave. Recall that the Reform Party's western alienation lament reached its peak during a period when, ironically, the federal cabinet under Prime Minister Mulroney had top positions occupied by a trio of powerful ministers from Alberta.

Intrastate federalism pressures in Canada then have been of two kinds, centralizing and decentralizing. The accommodating notion of intrastate federalism basically accords legitimacy to the decisions of the national legislature and thereby further legitimizes the notion of central power in a federation. The representation that Alberta and other Senate reformers have envisioned has likely been more decentralizing. With adequate representation of the provinces in the central government, their hope is that the federal level will be restricted in the kinds of activities it undertakes. As our Australian evidence suggests, most intrastate representation has served to strengthen the central government. American experience also suggests as much. William Riker, one of the premier students of American federalism, noted that the national government in that country benefited from the fact that the Senate did not actually work the way that the founders thought it would (Riker 1955). Aggressive intrastate representation in the Senate, the kind that was presumed would come from State appointment of senators, was designed as a peripheralizing or decentralizing form of representation. Senators were meant to serve as a check on the expansion of federal power by having a share of the national legislative power as well as important checks on elements of the executive power, especially the President's power of appointment. For Riker, the failure of the American Senate to peripheralize American federalism was the unintended master stroke of the

founding fathers. American federalism, Riker argues, has endured in part because the Senate is a centralizing rather than a peripheralizing institution. The Senate has legitimized the exercise of national power by nominally representing states in the decision to expand federal power and by creating competition for State governors as representatives of state interests.

The equality of representation, despite its appeal to Canadian reformers, is not the main characteristic that makes the American Senate effective in its intrastate role. Rather, it is the combined representational role that senators must play. They must adopt something of a state centred attitude about their representative role or they will pay an electoral price, yet they are socialized to national perspectives and priorities, either through their own national political ambitions, or by the length of their service in national politics. Decentralists routinely suggest that American senators are ineffective regional representatives and that the only institution really protecting federalism in the central government is the Supreme Court (Scalia 2000). However, Supreme Court justices have been strongly divided on whether or not that is indeed their role in the federation. In *Garcia v San Antonio Metropolitan Transit Authority* in 1985, a majority of the Court essentially abandoned the patrolling of Congressional activities for their violations of the federal spirit.[3] They left the task to political safeguards or the regular protections provided for state interests by state representation in the national political process. Some observers recommended a reconsideration of the judicial role in the interpretation of the federal elements of the American constitution given the democratic superiority of political safeguards.

Senate Reform Then and Now

Senate reform in Canada has been only modestly realized. The life tenure of senators was removed and appointments limited to age 75 with a constitutional amendment in 1965. That has been the single significant change to the institution since Confederation. Earnest attempts to overhaul the institution since the 1970s have resulted in 28 formal proposals by one count (Stillborn 2003), again with very little to show for the effort. Senate reform in the 1980s was very much driven by the agendas of provincial governments in Western Canada. Since it was provincial governments that actively campaigned for constitutional change to the institutions of the central government, the reform strain was clearly of the federalism rather than the democratic variety. BC premier Bill Bennett's early proposal for a "house of the provinces" maintained appointment as the method of selection, but turned the power of selection over to the provinces rather than the national government. The Alberta suggestions for reform brought direct election into the formula for Senate change. The provincialist model was favoured by the Meech Lake Accord, as the federal government agreed to appoint senators from provincially selected rosters. Genuine Senate reform was also a significant part of the Charlottetown Accord

[3] *Garcia v San Antonio Metropolitan Transit Authority* 469 U.S. 528 (1985).

package of constitutional amendments, which, if realized would have come much closer to the Triple E model than any other proposal to that point. Since the failure of the Charlottetown Accord, the issue of Senate reform has not had much of a place on the national political agenda, despite staying alive in the programs of the Reform/Alliance and now Conservative parties.

The Harper government's recent efforts to reform the Senate have brought back the question of whether function or form is the main priority for Senate reform. Given the Prime Minister's partisan background, one would expect a preference for provincialist or decentralizing intrastate federalism in his design for the upper house. However, given the challenges of constitutional change, strategic considerations about the achievability of reform have intervened and the government's reform package apparently leaves aside the kinds of changes that will address the long standing concerns about the basis of the Senate's representation.[4]

The Harper government introduced legislation in its first parliamentary session to limit future senatorial terms to eight years rather than the present tenure to age 75, and to provide for consultative elections within provinces when senatorial vacancies come up.[5] The consultative elections would be used to recommend senators to the prime minister who would continue to hold the appointment power. The government claims that both categories of reform are possible without invoking the constitutional amendment procedures that involve the provinces. While a number of senators questioned the constitutionality of this approach and recommended a reference to the Supreme Court for clarity, a number of constitutional experts agreed that the contemplated changes were within the rights of Parliament alone to make.[6] The Prime Minister took the unprecedented step of appearing before a Senate committee to endorse his government's legislation and to demand that the Senate, which still has a Liberal party majority, not hold up the government's reform agenda (CTV 2006). The Senate committees in charge of examining the bill held hearings in late 2006 and into 2007. In the summer of 2007, the Constitutional and Legal Affairs committee heard provincial opposition to the changes, again on the question of whether or not Parliament has the constitutional authority to proceed with even the modest changes it has proposed (Bryden 2007). When the parliamentary session ended, the Senate reform bills died with them. The government has reintroduced the reform bills in April 2010.

The Harper Senate reform package has left the representational basis of the institution unaddressed. A change in the number of senators for each province or

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[4]In October 2007 Canadian Senator Hugh Segal proposed that there be a national referendum on Senate abolition. Presumably such a vote would call the abolitionists' bluff. If abolition was rejected, the existing Senate would suddenly gain a measure of democratic legitimacy, and such a result may also pave the way for more substantial, constitutional reform. See *Globe and Mail* (2007b and 2007c).

[5]See details in footnote 2, above.

[6]For a summary of views of constitutional experts appearing before the Special Senate Committee to review Bill S-4, see Senate of Canada (2006). See also Smith (2010).

region would require the use of an amending formula that involves the provinces. The senators charged with reviewing the recent legislation took note of this missing piece of the puzzle. Senators Jack Austin and Lowell Murray introduced an amendment to the term-limits package seeking to immediately add representation for the two most aggrieved provinces under the current formula, British Columbia and Alberta. Their amendment led to some discussion in the committee hearings and Senate debates about the function of the Senate and the necessity for equality in future Senate reform. The Prime Minister has promised to address these representational concerns once the democratic credentials of senators are improved.

Under the existing proposals, present senators would not be obliged to leave office, but new vacancies would be filled with "elected" and term limited senators. Many observers suspect that by creating two classes of senators in the existing institution it will quickly become dysfunctional enough to demonstrate a need for more fundamental reform. That need might bring provinces around to the necessary constitutional change without all the other constitutional baggage that provinces might insist upon being addressed were the federal government to begin with the constitutional route. However, it should be noted, at least four Canadian provincial governments have recently stated their preference for abolishing the Senate.[7] In short, the democratic imperative is of more concern to the present government than the issue of intrastate representation, but there is some chance that more comprehensive change will remain on the national agenda. In this context, we return to examine more closely recent Australian experience with their elected Senate, before drawing more certain conclusions for Canada.

RECENT AUSTRALIAN EXPERIENCE

Electoral Democracy and the Strengthening Role of the Senate

The Australian Senate is elected according to the formula of an equal number of seats for each constituent unit – since 1984, there have been 12 seats for each State in the Federation, plus two for each of the two most populous territories, the Northern Territory and the Australian Capital Territory, for a total of 76. The Senate's total strength is just over one-half of the number of members in the lower house, the House of Representatives, where there are 150. Thus Tasmania, with a population in 2006 of 476,000 gets the same number of Senate seats as the most populous State of New South Wales, at 6.5 million. Senators are elected for 6 year fixed terms,[8] with one-half of the seats coming up for election every three years. Senators are elected in state-wide multi-members districts, unlike the House of Representatives (HR) members elected by single member

[7]The four provinces are British Columbia, Saskatchewan, Manitoba and Ontario (*Globe and Mail* 2007b; 2010).

[8]The exception is that Territorial Senators must contest their seats at every general election for the House of Representatives.

electoral districts. And while Senate elections are held at the same time as House of Representatives elections, senators do not take up their seats until the following first of July. (Thus the Rudd ALP government elected in November 2007 faced a majority of conservative senators until the newly-elected members took their seats in July 2008.)

As noted earlier, votes for senators were cast in a majority system until 1949, when a proportional representation system (with a single transferable vote) was adopted. While for 60 years two parties have dominated both houses of parliament: the Australian Labor Party and the Liberal Party, the latter has also, since the 1950s, contested elections in a pre-electoral coalition with the National Party (formerly the Country Party). Since 1949, all federal governments have been formed from either the ALP or from the more conservative Coalition. In recent years, minor parties and independents have had some fleeting success in the HR, but in the Senate, the PR electoral system has delivered only a minority for the governing party about 80 percent of the time since 1949. Starting in the 1960s with the Democratic Labor Party (a short-lived splinter group from the ALP), and later with the Australian Democrats and the Green parties, minor parties and independents have prevented the ALP or the Coalition from having a majority in both houses most of the time. Most recently, from 2005 to 2007, the John Howard-led coalition enjoyed a rare majority in both houses. The Howard government lost the November 2007 election to the ALP led by Kevin Rudd, who has faced the more common pattern in recent years of a Senate in which no party has a majority. As discussed below, the 2005-07 temporary return to a government majority had some interesting and possibly significant consequences for the Senate's role.

As discussed above, much has been made of the fact that the Senate has become a parties' house rather than the states' house which early commentators on the constitution claim is what the framers had intended.[9] The proportional representation system for the Senate does nothing but reinforce this tendency, albeit in a more electorally accurate way than does the single member majority system of election to the HR. And the adoption in 1983 of an option for voters to cast their vote "above the line" on the ballot paper, in other words for the party only (and automatically adopting the party's official list preferences) rather than for specific individuals listed "below the line", further reinforces a culture of strong party adherence among the voters and of party discipline in the upper house. The growing phenomenon of "vote splitting" or strategic voting where voters will choose one party for their first choice for the Senate and another for their second choice and so on, further reinforces a competitive, multiple and minority party system (Uhr 1995; Sharman 1999; Thompson 1999).

The addition of the minor party strength in the Senate, especially with the Australian Democrats after 1977, contributed to the evolution of the Senate's role. This role has not been a threat to responsible government and the confidence of the HR, as some had feared. Indeed since the famous episode of 1975, when the Senate forced a showdown with the Whitlam government over

[9]Galligan (1995, 65-69) contends that the "states' house" notion is based on a fundamental misunderstanding and misreading of the federal role of the Senate.

the voting of supply, the potential clash between a strong Senate and the principle of responsible government has not been tested.[10] However, the Senate has evolved into a powerful house of review, able to scrutinize and challenge federal legislation and policy. The minor parties have embraced this role as their way of challenging the bipartisan (ALP/Coalition) consensus that often prevails among governing contenders. Thus they introduce perspectives and issues that would not otherwise see the light of day, such as opposition to prevailing economic orthodoxy (FG Canberra 2005).[11] The minor parties and independents took the lead in developing this role precisely because they were not sufficiently competitive to form government. The two leading parliamentary contenders, the ALP and Liberal-National coalition, have been participants in this development as well, but in a more moderated way, gradually adopting a tacit policy of restraint. When in opposition, the ALP or the conservative coalition have limited the extent of their obstruction (Bach 2003; Stone 2007). Neither of the two "great battalions" want to create a parliamentary pattern of dysfunction that they would themselves face once they resumed power.

In practice, the vast majority of federal legislation originating in the HR passes the Senate without amendment (Bach 2003, chapter 7), often with the support of the two main parties. However, bills are routinely negotiated between the government caucus and either the main opposition party or, more frequently, one of the minor parties or with independent senators (Mulgan 1996). These negotiations are often conducted for the governing side by members of the cabinet drawn from the Senate, who comprise as much as a third of the members of the ministry, often with very important portfolios. Of course for the opposition parties in the Senate, the tactical and strategic choices of which bills to oppose outright, which to let slide by, and which to put major effort into possible negotiation, vary according to political opportunity, ideological position, and extra-parliamentary support. So too, of course, do government decisions as to how much flexibility they can adopt in HR-Senate negotiations. That Senate perspectives are incorporated into bills through negotiation rather than the amendment and redrafting of the House makes the representational role of the Senate a little less transparent. Much like regional input into Cabinet deliberations in Canada, the effectiveness of representation at getting compromises might not be readily obvious to voters because input was provided behind the scenes.

Part of the negotiation process is also seen in the extensive and powerful committee process. Since 1970, the Senate has adopted standing committees with powers to review specific legislation and to inquire into government policy. Reference committees, established in 1994, have non-governing majorities and chairs. These committees have developed into significant accountability

[10]The role of the Senate and more particularly that of the Governor-General in that constitutional crisis has been strongly debated. See discussion in Galligan (1995, chapter 3); Kelly (1995); and Coper (1987, chapter 6).

[11]To a much lesser degree the same phenomenon has occurred in the House of Representatives, such as in the election in 1996 of Pauline Hanson of the One Nation party.

mechanisms for the federal executive and administration, particularly in the context of strong party discipline in the HR. For example, only the Senate has committees for reviewing government spending estimates. Party discipline is not as severe in the Senate but it does operate to divide committees along party lines, including the production of dissenting reports, when partisan advantage is most obvious (Stone 2007, 5; FG Melbourne 2005).

Federalism, State Representation and Intergovernmental Relations

As one of the present authors argued in 1994, the intrastate dimension of Australian federalism is underestimated and undervalued (Bakvis 1994, 273). The Senate contributes to broad federal values in a number of ways. Its representation scheme weighted to the smaller states potentially protects their interests in national deliberation. Its strong bicameral role provides a check on majoritarian democracy as expressed in the HR; and overlapping determination of national consensus provides for competitive redundancy, another value of federalism. The Senate electoral system promotes minority parties (if not minorities in the sociological sense) and thus promotes a greater degree of pluralism. In recent years, constitutional analysts in Australia have recognized this federal feature of the Senate and noted its implied, even "unconscious" significance to the political system (see for example discussions in Galligan 1995; Evans 1997; Saunders 1998 and 2000). Two other federal institutions exhibit strong features of intrastate federalism: the federal cabinet and the integrated federal party system. The interaction of these institutions with the Senate is discussed below.

The Senate in operation as a parties' house, and not a "states' house", is undoubtedly an apt description. Senators as a whole divide along party lines and never along State lines. This characteristic is reinforced by the integrated nature of the party system in Australia, at least with respect to the chief contenders, the ALP, and the Liberals and the National Party. The national parties are in essence very tight federations of the state parties, in which federal and state organizations are one and the same. Candidates for federal elections to either the HR or the Senate are selected by the state-based party machines and reflect state-dominated factions and interests. Thus local and national issues are organically combined and naturally integrated, similar to the party system in the United States and Germany but unlike the pattern in Canada. The senators and the HR members alike are socialized to the concerns of local and state politics through their state party organizations (Focus Groups (FG), Canberra and Melbourne 2005).

The dominance of party nonetheless requires a few caveats. First, senators speak freely about specific state perspectives, issues and values in the national party caucus. This is said to be especially so for the senators from the outlying states of Tasmania, Western Australia and Queensland where regional identity and alienation is felt more strongly. The additional representation of smaller states gets reflected in the "party room" atmosphere, including in the joint caucus sessions of HR and Senate (FGs Canberra and Melbourne 2005). It provides these representatives and the political communities of their states with

greater confidence in the federation, and enables the voices from these regions to carry more weight, presumably reducing alienation as a result. Regional interests get accommodated, according to one prominent authority on the Senate, in indirect and non-public ways such as the party faction system, regional "horse trading", "logrolling", and internal cabinet debate (FG Canberra 2005). However, as noted above with respect to bicameral negotiation, this accommodation is generally behind closed doors, away from full media and public scrutiny. Some regional debate will leak out, but sensitive intra-party differences may not and party solidarity is maintained (Swenden 2004).

Second, the dominance of parties begs the question about the minor parties and the independents. Campbell Sharman argues that these smaller entities are naturally more open to expressing specific regional preferences and the placing of regional issues on the agenda (1999, 360). There is as yet no minor party that is explicitly state or regionally based. The National party could be said to represent "regional" Australia,[12] but of course its support is drawn from several states. In 1990-98, a Green Party based in WA did gain a seat or two, but has been absorbed by the Australian Greens. Otherwise, the Australian Greens and the Democrats have drawn support and elected senators from all states.

The most famous Senate independent in recent years has been Senator Brian Harradine of Tasmania (Costar and Curtin 2004, 44-56). He has been the only senator actually elected initially as an independent and was re-elected as such five times, thus holding office for 30 years. As the smallest state, Tasmania has the lowest threshold of votes required to elect a senator, making running as an independent easier to do in a system otherwise biased towards organized parties. As Brian Costar and Jennifer Curtin write, Harradine "has been extremely effective in carving out a niche in an unusually fertile political landscape" (ibid., 53), championing a set of both regional and ideological concerns. He took socially conservative views on issues such as the traditional family, abortion and euthanasia, and was an advocate not only for Tasmanian social and economic issues but also for "regional Australia" more broadly. Arguably his greatest achievement in the latter respect was to negotiate significant changes to the government bill aiming to partially privatize the national telephone provider "Telstra" in 1996. Exercising leverage in a divided Senate where his vote held the balance of power, Harradine succeeded in getting a strengthened obligation for the privatized entity to maintain services in regional Australia as well as a $150 million side-deal of federal expenditure commitments to Tasmania. However, these circumstances of one senator alone determining the fate of federal legislation are rare, and depend at the least on the two major parties being divided on the issue.

Third, there are the mavericks within the mainstream parties, those senators who break free from party constraints from the beginning, or more typically, at the end of their Senate career, to perform a role as a state or local advocate. Recent examples include Mal Coulston, a former ALP senator from Queensland, and Shayne Murphy, a former ALP senator from Tasmania, both of whom quit

[12]Note that in Australia the expression "regional Australia" refers to the small towns, farming and rural districts and the outback, which extends across the hinterland of every State and the Northern Territory.

their party caucuses to sit as independents, partly to better represent state interests. Barnaby Joyce, a National Party senator from Queensland, taking his seat in July 2005, had strong support from the Queensland Nationals and made it clear that he would be voting for Queensland interests ahead of those of the Howard government (FGs Canberra and Melbourne 2005). There is also the case – again from Queensland – of Senator Tamblin who lost his party's pre-selection as a candidate for re-election when the state party machine deemed he had voted against the state's interests.

In sum, are the mavericks and independents merely the exceptions that prove the rule? It seems that most senators do not normally concern themselves primarily with state or regional issues. In fact it is argued that their state-wide constituency frees them from being judged on local concerns and allows them to think nationally to a greater degree than do the HR members (FG Canberra 2005). Still, the mavericks may only be doing openly and deliberately what mainline party senators do quietly and unobtrusively.

One can now move on to examine the role of the Senate in the interstate dimension of Australian federalism. These are the relations between the orders of government in the federation, and can be described in two separate but overlapping roles, first the receptivity of the Senate to direct representation from state and territorial governments, and second, the influence of the Senate on the conduct and outcomes of executive federalism (i.e., intergovernmental relations among government executives).

In general the direct relations of state government officials (elected or not) with the Senate is not an overwhelming phenomenon. As Ronald Watts has well established, in parliamentary federations intergovernmental relations are naturally dominated by the executive, in this case the federal cabinet and departmental bureaucracy, and not by ordinary legislators as such (Watts 1989). Still there are many opportunities for state premiers and ministers to meet informally with senators from their own state and party. Seeking out meetings with senators from the governing party when your own party is in federal opposition would be rarer, but it seems this is also a practice, especially in Western Australia and Queensland (FG Canberra 2005). And in the Australian Capital Territory (ACT), the two senators representing the territory meet with the ACT government continually. Our focus group in Melbourne also reported that the Victoria government under Premier Jeff Kennett had attempted more systematic meetings of state ministers with Victoria's contingent of senators and MPs in the federal parliament, but gave up on the effort when it did not appear to be affecting policy outcomes (FG Melbourne 2005). Obviously a degree of private lobbying by state officials continues, but is hard to trace.

State politicians and bureaucrats also appear formally before Senate committees, as they do HR committees. They have been active in the Joint [HR and Senate] Standing Committee on Treaties, as well as the Senate's own Select Committee on the proposed free trade agreement with the United States, meeting in 2004. Also in 2004, all the state health ministers accepted invitations to appear before a Senate committee inquiry into health care. Not coincidentally the hearing took place in the months leading up to the federal election late that year. In that year all the state governments were ALP; senators from the ALP and the minor parties hoped to embarrass the Coalition on this issue. Once the

election was over and another Senate committee sought to inquire into aged care, none of the state governments showed up (FG Canberra 2005).

On the other hand, and to be expected, executive federalism is alive and well. Substantial reforms of the institutions and process achieved in the early 1990s have stood the test of time and mark the Australian system as having considerably more formalized and effective institutions compared with Canada (Brown 2002). The chief outcomes of the reform may be summarized as:

- The formal establishment of a Council of Australian Governments (COAG)[13] meeting once or twice a year;
- A parallel Leaders Forum of state and territorial first ministers (in 2006 revived and renamed as the Council for the Australian Federation);
- A rationalized and streamlined set of Ministerial Councils (MCs), under the scrutiny of COAG, if not always reporting directly to it;
- MCs that can take binding decisions, backed up by uniform Commonwealth and state legislation;
- Voting rules in these MCs, that allow the councils to take decisions by majority or qualified majority vote;
- Several new joint national agencies in fields such as environment, food standards, road transport, training, and competition policy; and
- Coordination through noncentralized devices such as the mutual recognition of standards, and negative integration through such policies as national competition.

The tenor and pace of the COAG-led institutions are still crucially dependent on the direction and commitment of the federal prime minister. These were enthusiastically provided by the ALP Prime Ministers Hawke and Keating in 1991-95. After some initial hesitation and occasional periods of tension, the Howard governments in office from 1995 to 2007, achieved significant policy achievements through COAG, in particular major agreements on the Goods and Services Tax (GST), water reform, the mutual recognition of regulations, and gun control and anti-terrorism measures. The system continues with even more vigour under Prime Minister Kevin Rudd's leadership.[14]

The Senate does not participate directly in the COAG process. And it was not especially scrutinizing of the legislation brought forward in the 1990s to put in place new joint regulatory processes, perhaps due to the strong support of the major parties for these intergovernmental reforms. However, it did play an important role in the introduction of a national GST in 1998-99. The Howard government designed the GST to replace several inefficient business transfer taxes at the state level with a single national tax applied and collected by the federal government, but with the entire proceeds transferred to the states. The

[13]COAG membership is restricted to the Commonwealth Prime Minister, the 6 State Premiers, the 2 Territories' Chief Ministers, and the President of the Australian Local Government Association.

[14]As a senior bureaucrat in the Queensland government in the early 1990s, Kevin Rudd played an important role in establishing intergovernmental reform.

intergovernmental agreement was innovative in its co-decision mechanisms, including on the tax rate and base, but had to be renegotiated to get the federal bill through the Senate when the Australian Democrats sought a narrower tax base to appeal to their supporters. The Democrats held the balance of power on the issue because the ALP opposed the GST in general (FG Melbourne 2005).

If the GST debate in the Senate hinged on party advantage and ideological concerns, other Senate deliberations have been more explicitly about federalism. For example, the Senate played a role in rejecting the Northern Territory's bid for statehood, reflecting the hostility of the state governments. On the other hand, when the NT legislature passed a euthanasia bill in 1996, the Howard government was obliged to use its parliamentary authority to override the territory's legislation and prevent euthanasia from being legalized. In a free vote on the issue, some senators cited "states rights" as their rationale to oppose the federal legislation (FG Canberra 2005).

In sum, these latter examples may seem thin gruel to Canadians who are used to a broader palette of the Canadian Senate's debate and deliberation on federal-provincial relations. However, some Australian observers predict that broader federalism concerns, such as a need to rein in federal intrusions to states' jurisdiction in social programs among others, will become more prominent in the future (FG Canberra 2005). For now, one notes the modest interest and involvement by the Senate on issues involving federalism as such and federal-state relations.

The Australian Senate 2005-07

In the elections of 2004, the composition of the Senate changed, not significantly in numerical terms at least, but for the first time in more than 20 years, the government of the day enjoyed a double majority in both the HR and the Senate, though to be sure in the case of the latter it was an extremely thin majority. Thus with the start of the new session in July of 2005, there was the prospect of the John Howard government being able to get some major pieces of legislation through without having to compromise with either the opposition party or the smaller parties or independents in the Senate. For federalism observers it also represented an opportunity to see what issues arise in the presence of a government majority that could be deemed ones where the states would have an interest that might have led to changes in the Senate through compromise.

First, some background on the Liberal-National coalition government under John Howard is necessary. Traditionally both coalition parties have always been seen as much more state friendly than the Labor party. The latter historically has, until relatively recently, been opposed to the very idea of federalism, arguing that unitary government was much more suitable. The Howard government, however, has stood those traditions on its head. Initially after first being elected in 1996, the Howard government cut back on certain programs, in the area of regional development and infrastructure support, for example, arguing that these were areas for which the states held primary responsibility. Fairly quickly, however, Howard and his government began pursuing a

distinctly centralist agenda. In most areas of significance – health care and specifically hospitals, schools, including both primary, secondary and post-secondary education, water management, transport and the environment – the Howard government has effectively inserted itself into state management of these fields, or, where the Commonwealth government already played a major role, constitutional jurisdiction notwithstanding, simply taking them over altogether, as happened with universities and hospitals.

The most interesting test case, from our perspective, was the *Work Place Relations Act* of 2006, which, while it can be seen as an extension of industrial relations reforms launched originally by the Labor party in the 1980s, went much further and effectively precluded the states from having a role in this area. State industrial tribunals, for example, were abolished. The legislation allowed employers to negotiate work place agreements with either unions or individuals in both state and Commonwealth regulated industries. It was highly controversial legislation, opposed by the Labor party, all state governments (all of which were under Labor rule) and trade unions. From a federalist perspective what is interesting is the suggestion that if the government did not have a majority in the Senate, it would very likely have negotiated a compromise with either the opposition, other parties such as the Democrats, or independents. Instead the legislation passed through the Senate untouched.

To be sure, the issue is very much a partisan one between Labor and the Coalition, and in debate generally framed in those terms; but there are also state interests in the form of formal state jurisdiction and state administrative infrastructure. It could be argued that the states are merely conduits for partisan interests, noting the fact that in late 2008, all six state governments were in Labor hands. However, it can also be argued, as William Riker did many years ago, that this is precisely the function of federalism – allowing citizens and parties opportunities to pursue their interests in a variety of arenas rather than just a single national one, all part and parcel of a system of checks and balances.

If the government had lacked a majority in the Senate and the industrial relations bill had been extensively debated and then modified in the Senate, we concede it is likely that the issue would have been seen as a national-sectoral political issue, having little to do with the states. However, it can also be seen as part of the genius of the Australian Senate that issues having possible ramifications for the states or with distinct regional overtones are effectively transformed into national or sectoral issues whereas in Canada comparable issues would have ended up in federal-provincial arenas as seen as a conflict between the different orders of government.

DRAWING CONCLUSIONS ON THE FEASIBILITY AND POTENTIAL EFFECT OF THE AUSTRALIAN MODEL IN CANADA

This paper is an exercise not so much in comparing political systems as in comparing one actual system with one potential one. There is thus more than the usual amount of difficulty inherent in any exercise of comparing federal systems

– although that difficulty has not prevented academics and practitioners alike, around the world, from engaging in the practice. However, as Ronald Watts so often warns us, one cannot just uproot one institution in a federal system and attempt to replant it in another without considering the environment in which it is placed. In these comments we seek to draw some concluding points about the Australian and Canadian environments in positing how an Australian-style Senate might work in Canada, but with the firm knowledge that from its very inception such a transplant would soon grow to differ from the original. Another goal here is to reduce the risk of unintended consequences of institutional reform, particularly for those whose envy of others institutions may blind them to those consequences.

One way of evaluating any representational institution is to judge how it achieves accommodation among differing interests and values, particularly for particular groups or units whose interests and or values differ from those of the country as a whole or, as is often the case in a territorial context, of an outlying region from those of the centre. The degree of regional alienation (or alternatively gender alienation, minority alienation and so on) depends both on the degree of interest and values differential that exists in the first place, and in the degree of accommodation of that difference that occurs within national representative institutions. Over an historic time frame in a federation, it seems sensible to claim that there is also a vital feedback loop at play. If representation at the centre achieves accommodation, then the national political integration is enhanced and political alienation that feeds separate political identity is reduced. On the other hand, if representation fails to adequately accommodate differences, the feedback loop serves to reduce the effect of integration, while identity based in experience of alienation grows.

As we noted in this paper, regional alienation in particular in Canada has and continues to place strains on national unity and to hinder effective federal integration. This is because regional differences in interests and values are significant in Canada, and also that federal political institutions – intrastate federalism to be exact, operate suboptimally. In Australia it seems the opposite is true. Regional socio-economic differences and social and political cultural values seem to be much less regionally strong than in Canada, but intrastate federalism works better to accommodate, contain and to channel those differences. One may also see, in the history of these federations, the positive feedback loop occurring in Australia whereby national integration reduces regional alienation over time; in Canada a negative feedback loop exists whereby the failures of national integration exacerbate regional alienation. There are of course, many factors at play here, but we think it reasonable to conclude that Senate design is one of them.

For those who conceive of an Australian-style Senate as an entity that allows for the full expression state/provincial interests, we repeat the standard caution that in Australia at least the Senate functions primarily as a parties' rather than a states' house. Furthermore, as we have argued, a number of demands or interests that could be termed state interests in Australia are generally transformed into national or partisan interests. In brief, there is good evidence to suggest that the Senate in Australia has had a nationalizing and

integrative effect. In short, party may well trump region in the operation of an elected Senate.

On the other hand, Australian experience indicates that the point of gravity in the party system is at the state level. Transplanted to Canada, this would likely mean provincially based parties, such as the Bloc Québécois, an Alberta Conservative party and the like, would have considerable success in contesting Senate elections. To be sure, as Graham White (2007) has noted, the electoral regime will be fundamental to how the Senate works, though at the same time one suspects that the Bloc in Quebec and the Conservatives in Alberta would be successful no matter what kind of electoral system were used. It would take very careful design, especially in the light of the disintegrated nature of the existing Canadian party system, to avoid Senate elections from being dominated by regional or provincial parties, with no certain prospect of success. In short, there is a good possibility that a Canadian Senate would become, not a "House of the Provinces" (i.e., such as the Bundesrat in Germany) but a house of provincially or regionally-based parties. And, it should be noted, such a house, by virtue of being elected, would have legitimacy.

Another way of viewing the effect of an Australian-type Senate in Canada is to realize that federalism is in large part about seeking equilibrium between regional autonomy and decentralization on the one hand, and national integration and decision-making on the other. Turning to Stephen Harper's federal philosophy, his "open federalism" seems to be weighted towards both classical federalism (no federal intrusions) and somewhat more fiscal autonomy for the provinces (Banting *et al.* 2006). What would an elected Senate do to that vision? Conceivably it could make the federal parliament *more interventionist*, exercising a greater confidence that it knew the national will, as is clearly the case in both the Australian parliament and the U.S. Congress. It seems doubtful that this consideration plays a role in Mr. Harper's envy of the Australian model, but a future Liberal government in Canada might welcome a reformed Senate's role in buttressing a more interventionist federal government. Nonetheless, if one wishes to subdue the provinces and have the Senate serve as an intrastate forum, the Australian Senate offers a useful model.

That said, it does seem that one should not really attempt Senate reform if the goal is merely to supplant executive federalism. It will not replace it, nor is it likely to intersect much with it, as we have learned from the Australian experience. Thus the practice of "legislative federalism" is not likely to take hold in Canada, except to a limited extent – and then tied into partisan calculations of advantage. Legislative federalism really only works in systems with separated powers. Moreover, the strength of executive federalism arises more from the norms of Westminster parliament and responsible government (Baier, Bakvis, and Brown 2005). It is in how a democratically elected and legitimate Senate changes the norms (if at all) of responsible government and executive dominance within the federal government where it would have an indirect impact on the conduct of intergovernmental relations. Senate reform may have been proposed in the 1970s by some, usually centralists, to tame executive federalism, but now the rationale may be to tame the PMO (Kent 2003).

Finally, what Senate reform for elected senators on the Australian model would likely do is to improve the representative capacity of the federal government, and to improve the capacity for building national consensus at the federal level. As emphasized in this chapter, the nature of representation in the Australian Senate *is* federal in three important respects. First, there is the over representation of less populous states or provinces. Second, there is the fact that senators may be more sensitive to regional or local interests, even if elected from the ranks of the government party. Third, senators elected by the people of a state even if not representing the governments of the state, do not make them any less representative. The unknown factor for Canadians would be in just how much obstruction and how much political capital would have to be spent to engage in the necessary bicameral negotiation that comes with the Australian model. Once a bicameral deal is done, however, the legitimacy of the federal government to act in the national interest would be enhanced.

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A LIFE DEDICATED TO PUBLIC SERVICE

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Ronald L. Watts, is Principal Emeritus and Professor Emeritus of Political Studies at Queen's University where he has been a member of the academic staff since 1955 and was Principal and Vice-Chancellor 1974-84. He is currently a Fellow and is a former Director of the Institute of Intergovernmental Relations at Queen's University. He was President of the International Association of Centres for Federal Studies 1991-98, was a founding board member of the international Forum of Federations 2000-06 and is currently a Fellow. He is a former Board Member and chairman of the Research Committee of the Institute for Research on Public Policy. On several occasions he has been a consultant to the Government of Canada during constitutional deliberations, most notably as a member of the Task Force on Canadian Unity (Pepin-Roberts) 1978-79, as consultant to the Federal-Provincial Relations Office in 1980-81, and as Assistant Secretary to the Cabinet for Constitutional Development (Federal-Provincial Relations Office) 1991-92. He has also been an advisor to governments in several other countries including Uganda, Papua New Guinea, South Africa, and more recently Switzerland, Kenya, Cyprus, Yugoslavia, Pakistan, the Philippines and India. As a political scientist he has worked for over forty-eight years on the comparative study of federal systems and on Canadian federalism, and has written or edited over twenty-five books, monographs and reports and over ninety articles and chapters in books. His most recent book is *Comparing Federal Systems* of which the second edition was published in 1999. A French edition appeared in 2002, a Spanish edition appeared in 2006 and a version was translated into Arabic in 2006. A third edition was published in 2008. He has received five honourary degrees. He became an Officer of the Order of Canada in 1979 and was promoted to Companion of the Order of Canada in 2000.

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2007-present: Life-long Fellow of the Institute for Research on Public Policy (Canada).
2006-present: Fellow of the International Forum of Federations.
2006-07: Academic Advisor to the Organizing Committee, Government of India, for the Fourth International Conference on Federalism, New Delhi, November 2007.
2004 and 2006: Faculty member, Summer University on Federalism, Institut du Fédéralisme à l'université de Fribourg, Switzerland.
2003: Visiting Senior Research Fellow at the Constitution Unit, School of Public Policy, University College London, United Kingdom.
2002-06: Member of Advisory Board on Devolution Studies of Economic and Social Research Council, United Kingdom.
2002-present: Member of Editorial Sub-committee for Global Dialogue Project (joint IACFS/Forum of Federations Project).
2002: Consultant to the National Reconstruction Bureau of the Government of Pakistan regarding constitutional reform.
2001-02: Academic Advisor to Board of Directors, International Federalism Conference 2002, sponsored by the Federal and Cantonal Governments, Switzerland.
2001and 2002: Consultant to the Constitution of Kenya Reform Commission, regarding devolution.
2001: Member of delegation of Canadian Centre for Foreign Policy Development, Department of Foreign Affairs and International

	Trade to the Republic of Cyprus and the Turkish Republic of North Cyprus (June).
2001:	Speaker at New South Wales Centenary of Australian Federalism Forum, Sydney (July).
2001:	Member of expert group of three academics (from Canada, Germany and Switzerland) to advise the President of Yugoslavia and the governments of Serbia and Montenegro on the restructuring of the Federation of Yugoslavia (October-November).
2000-06:	Member of the Board, International Forum of Federations and Chairman of its Program Committee.
2000-present:	Member of Editorial Advisory Board of *African Journal of Federal Studies.*
2000-present:	Member of Editorial Advisory Board of *Indian Journal of Federal Studies*.
2000-01:	Editorial Advisor for *International Social Science Journal* vol. 167, special issue on federalism.
2000-08:	Member of Research Committee, Institute for Research on Public Policy.
2000 :	Faculty member, Summer University on Federalism, Institut du Fédéralisme de l'Université de Fribourg.
1999:	Associate Editor: *Publius: The Journal of Federalism,* Annual Global Review.
1998-present:	Chairman of the Scientific Council of the International Research and Consulting Centre of the Institut du Fédéralisme de l'Université de Fribourg, Switzerland.
1998-99:	Member of the Board, Committee for a Forum of Federations.
1997:	Consultant on intergovernmental relations to the Department of Provincial Affairs and Constitutional Development, South Africa, sponsored by the National Democratic Institute for International Affairs.
1996 (Mar-Apr):	Member of Team of Experts for Component V (Federalism: Structures and Practices) of Canada-Russia Collaborative Federalism Project, March: Ottawa, April: Novgorod.
1996 (Feb-Mar):	Visiting Fellow, Centre for Constitutional Analysis, Human Sciences Research Council, Pretoria, South Africa (as consultant for constitutional negotiations).
1995:	Faculty member, Summer University on Federalism, Institut du Fédéralisme de l'université de Fribourg, Switzerland.
1994-95:	Visiting Professor of Canadian Studies, Kwansei Gakuin University, Nishinomiya, Japan.
1993 (Sept-Oct):	Member of Canadian Mission visiting Russia to plan Canada-Russia Collaborative Federalism Project.
1993:	Organizer of International Seminar Course on Federalism for Salzburg Seminars, Austria.
1991 (Apr) - 1992 (Sept):	Assistant Secretary to the Cabinet for Constitutional Development, (Federal-Provincial Relations Office), Government of Canada.
1991-98:	President, International Association of Centres for the Study of Federalism (IACFS).
1991-93:	President, Canadian Association of Rhodes Scholars.
1990-93:	Member of Executive Council of American Political Science Association Organized Section on Federalism and Intergovernmental Relations.

1990 (June):	Member of team of advisors to Premier Peterson (Ontario) for constitutional deliberations regarding ratification of the Meech Lake Accord.
1989-96:	Member of Advisory Council, Centre for Federal Studies, Leicester University, U.K.
1989-91, and 1992-2000:	Board Member and Chairman of the Research Committee, Institute for Research on Public Policy (Canada).
1988-present:	Member, Advisory Council, *Publius: The Journal of Federalism.*
1987-89:	Chairman of Council, Institute for Research on Public Policy (Canada).
1987-91:	Board Member, Canadian Educational Standards Institute.
1987:	Member of Steering Committee and Theme Secretary, National Forum on Post-Secondary Education.
1986-87:	Chairman, New Zealand Universities Review Committee.
1986-87:	Member, Commonwealth Secretariat Advisory Committee on Distance Education.
1986-91:	Member, Selection Committee for Ontario Rhodes Scholarships.
1985-93:	Board Member, Advisory Board of Canadian Studies Program, University of California, Berkeley.
1985-present:	Member, International Political Science Association Research Committee on Comparative Federalism and Federation.
1985:	Visitor, Institute of Governmental Studies and Centre for Studies in Higher Education, U. of California, Berkeley (Jan. - May).
1985:	Visitor, Nuffield College, Oxford (May - Dec.).
1983-87:	Board Member, Canadian Association of Rhodes Scholars.
1983-84:	Commissioner, Commission on Future Development of Universities of Ontario (Bovey).
1982-84:	Council Member, Association of Commonwealth Universities.
1981:	Member of Committee on the Future Role of Universities in Ontario (Fisher).
1980-90:	Executive Committee, Council for Canadian Unity; President 1983.
1980-88:	Board Member, Donner Canadian Foundation.
1980-81:	Consultant, Federal-Provincial Relations Office, Government of Canada, for federal-provincial constitutional negotiations.
1978-79:	Commissioner, Task Force on Canadian Unity (Pepin-Robarts).
1974-84:	Member (Chairman 1979-81), Council of Ontario Universities.
1974-84:	Member of Executive Committee, Association of Universities and Colleges of Canada.
1974 and 75:	Consultant, Constitutional Planning Committee, Papua New Guinea.
1970-74:	Consultant, Dept. of Secretary of State, Government of Canada, regarding citizenship arrangements.
1969:	Ford Foundation Visiting Professor at University of Ife, Nigeria.
1968:	Exchange Scholar, Australian National University, Canberra.
1963:	Consultant for Uganda Government, on East African Federation.
1955-58:	Member: Selection Committee for Ontario Rhodes Scholarships.

Honours:

1952	Rhodes Scholar for Ontario (Oriel College, Oxford).
1959-61	Canada Council Doctoral Fellowship (Nuffield College, Oxford).
1967-68	Canada Council Leave Fellowship.
1979	Officer of the Order of Canada.

1983	Queen's University Montreal Alumni: The Montreal Medal for "Makers of Queen's".
1984	Hon. LL.D., Trent University.
1984	Hon. LL.D., Queen's University.
1984	Queen's University: Distinguished Service Award.
1984	Queen's University Toronto Alumni: John Orr Award.
1986	Hon. LL.D., Royal Military College.
1987	Hon. LL.D., University of Western Ontario.
1992	125th Anniversary of Canada Commemorative Medal.
1993	Distinguished Educators Award, Ontario Institute for Studies in Education.
1994	Hon. LL.D., Kwansei Gakuin University, Japan.
1997	Distinguished Scholar Award of the American Political Science Association Section on Federalism and Intergovernmental Relations.
1997	Fellow of the Royal Society of Canada.
2000	Promotion to Companion of the Order of Canada.
2003	Queen Elizabeth II Jubilee Commemorative Medal.
2003	First recipient of the Distinguished Federalism Scholar Award of the International Political Science Association Research Committee on Comparative Federalism and Federation.
2007	Conference in Honour of Ronald L. Watts, "The Federal Idea", Institute of Intergovernmental Relations, Queen's University, Kingston, Ontario, October 18-20, 2007.
2007	Citation presented by President of India for role in establishment of the Forum of Federations and the International Conferences on Federalism.
2009	Martha Derthick Book Award of the American Political Science Association for the best book on federalism and intergovernmental relations published at least ten years previously that has made a lasting contribution to the study of federalism and intergovernmental relations.

PUBLICATIONS:

A. Books, Monographs and Reports

New Federations: Experiments in the Commonwealth (Clarendon Press, Oxford, 1966, reprinted 1968 with revisions), pp. 417. Translated into Malay and published as *Negara-Negara Persekutuan Yang Baharu Percubaan Dalam Komanwel* (Kuala Lumpur, 1979), pp. 588.

Multicultural Societies and Federalism (Study No. 8 published by the Royal Commission on Bilingualism and Biculturalism, Ottawa, 1970), pp. 203. (Also published in French translation.)

Administration in Federal Systems (Hutchinson Educational, London, 1970), pp. 150.

Profile of a Decade: Queen's University 1974-84 (Kingston: Queen's University), pp.52 and 21.

With Donald V. Smiley, *Intrastate Federalism in Canada* (University of Toronto Press, Toronto, 1985, Volume 39 of published research studies of Royal Commission on the Economic Union and Development Prospects for Canada), pp. 170. (Also published in French translation as *Le fédéralisme intr-étatique au Canada* (Ottawa: Ministre des Approvisionnements et Services Canada 1986), pp. 188).

The Challenges and Opportunities Facing Post-Secondary Education in Canada (National Forum on Post-Secondary Education, Ottawa, 1987), pp. 12. (French translation, pp. 13).

With Peter M. Leslie, ed., *Canada: The State of the Federation 1987-88* (Kingston, Institute of Intergovernmental Relations, Queen's University, 1988), pp. 249.

With Douglas M. Brown, ed. *Canada: The State of the Federation 1989* (Kingston, Institute of Intergovernmental Relations, Queen's University, 1989), pp. 284.

Executive Federalism: A Comparative Analysis: Research Paper 26 (Kingston, Institute of Intergovernmental Relations, Queen's University, 1989), pp. 24.

With Darrel R. Reid and Dwight Herperger, *Parallel Accords: The American Precedent*, (Kingston, Institute of Intergovernmental Relations Queen's University, 1990), pp. 70.

With Dwight Herperger, *Looking Forward, Looking Back: Constitutional Proposals of the Past and their Relevance in the Post-Meech Era* (Montreal: Council for Canadian Unity, 1990), pp. 27.

With Jeff Greenberg, ed., *Post-Secondary Education: Preparation for the World of Work*, (Dartmouth, N.S., The Institute for Research on Public Policy, 1990).

With Peter Russell, Richard Simeon, Jeremy Webber and Wade MacLauchlan, *Meech Lake: Setting the Record Straight* (Ottawa: Canadians for a Unifying Constitution, 1990), pp. 27.

With Douglas M. Brown, ed., *Canada: The State of the Federation 1990* (Kingston, Institute of Intergovernmental Relations, Queen's University, 1990), pp. 289.

Options for a New Canada, edited with Douglas M. Brown, (Toronto: University of Toronto Press, 1991), three printings, pp. 341.

With Douglas M. Brown, ed., *Canada: The State of the Federation 1993* (Kingston, Institute of Intergovernmental Relations, Queen's University, 1993), pp. 256.

The Institutions of a Federal State: Federalism and democracy as fundamental counterweighing principles (Fribourg: Institute of Federalism, Euroregions, vol. 6, cahier 1, 1996), pp. 36.

Federalism: The Canadian Experience (Pretoria: Human Sciences Research Council: Federalism Theory and Application, Vol. 2, 1997), pp. 123.

Comparing Federal Systems in the 1990s (Kingston: Institute of Intergovernmental Relations and McGill-Queen's University Press, 1996, released in 1997, pp. xv, 126) published in French as *Comparaisan des Régimes Fédéraux des Années 1990*, pp. xv, 130.

Intergovernmental Relations (Pretoria: Department of Constitutional Development, 1997) (a report for the Dept. of Constitutional Development, Government of South Africa), pp. 28.

The Spending Power in Federal Systems: A Comparative Study (Kingston: Institute of Intergovernmental Relations and McGill-Queen's University Press, 1999), pp. ix, 78. Also published in French as "Étude Comparative du Pouvoir de Dépenser dans d'autres Régimes Fédéraux (Institut des relations intergouvernementales, 1999).

Comparing Federal Systems second edition (Montreal and Kingston, London, Ithaca: McGill-Queen's University Press, 1999), pp. xvii, 138. Also published in French as *Comparaison des Régimes Fédéraux*, deuxième édition (Montreal and Kingston, London, Ithaca: McGill-Queen's University Press, pp. xvii, 142). Also published in Spanish as *Sistemas federales comparados* (translation and introduction by Ester Seijas villadanos), (Madrid: Marcial Pons, Ediciones Jurídicus, Y Souàles, S.A. Politopías, 2006, pp. 265).

Federal Systems (published in Ukranian in Democratic Education Series) (Xapkib: UEHTP OCBITHIX IHIUIATEB, 2002), pp. 187.

With Harvey Lazar and Hamish Telford, ed., *The Impact of Global and Regional Integration on Federal Systems: A Comparative Analysis* (Kingston: Institute of Intergovernmental Relations and McGill-Queen's University Press, 2003), pp. viii, 373.

With Akhtar Majeed and Douglas M. Brown, eds., *The Distribution of Powers and Responsibilities in Federal Countries, A Global Dialogue on Federalism*, Volume 2, (Montreal and Kingston: McGill-Queen's University Press, 2006, pp. xi, 373).

Federal Systems (published in Arabic) (Ottawa: Forum of Federations, 2006) 186 pp., adaptation in Arabic of *Comparing Federal Systems*, 2nd ed. 1999. Also published in Kurdish.

Comparing Federal Systems, third edition (Montreal and Kingston: McGill-Queen's University Press, 2008, pp. xvi, 205).

With Rupak Chattopadhyay, ed., *Building and Accommodating Diversities: Unity in Diversity, Learning from Each Other, Vol. 1* (New Delhi: Viva Books, 2008).

With Rupak Chattopadhyay, ed., *Emerging Issues in Fiscal Federalism: Unity in Diversity, Learning from Each Other, Vol. 2* (New Delhi: Viva Books, 2008).

Federalism and the Constitution of Nepal: 30 Questions and Answers (Ottawa: Forum of Federations, 2011).

B. Published Special Lectures

Shaping Canada's Future (Canadian Ambassador's Lecture, Washington, D.C., 24 February 1992).

Canada after the Referendum (The Asale E. and Maydell C. Palmer Lectures, Brigham Young University, Provo, Utah, March 9 & 10, 1993).

The Contemporary Relevance of the Federal Idea (Centre for Federal Studies Annual Lecture, University of Kent, Canterbury, England, 12 October 2006).

The Federal Idea and its Contemporary Relevance (Institute of Intergovernmental Relations, Queen's University, Conference on "The Federal Idea", 18-20 October 2007).

C. Reports of Commissions Served on

The Task Force on Canadian Unity (Pepin-Robarts), *A Future Together: Observations and Recommendations* (Ottawa: Minister of Supply and Services, Canada, January, 1979).

The Task Force on Canadian Unity (Pepin-Robarts), *Coming to Terms: The Words of the Debate* (Ottawa: Minister of Supply and Services, Canada, February, 1979).

The Task Force on Canadian Unity (Pepin-Robarts), *A Time to Speak: The Views of the Public* (Ottawa: Minister of Supply and Services, Canada, March, 1979).

Committee on the Future Role of Universities in Ontario (Fisher), *The Report of the Committee on the Future Role of Universities in Ontario* (Toronto: Ministry of Colleges and Universities, Ontario, 1981).

Commission on the Future Development of the Universities of Ontario (Bovey), *Ontario Universities 1984: Issues and Alternatives* (Toronto: Government of Ontario, June, 1984).

Commission on the Future Development of the Universities of Ontario (Bovey), *Ontario Universities: Options and Futures* (Toronto: Government of Ontario, December, 1984).

New Zealand Universities Review Committee (Watts), *New Zealand's Universities: Partners in National Development* (Report) (Wellington, N.Z.: New Zealand Vice-Chancellor's Committee, 1987), pp.165.

Report of the Expert Group (with Thomas Fleiner and Hans-Peter Schneider), *Constitutional Regoranization of the Federal Republic of Yugoslavia* (Belgrade: Center for Liberal-Democratic Studies, 2002), pp. 91 (also published in Serbian).

D. Chapters in Books

"Intergovernmental Financial Relations in New Federations: Comment" in U.K. Hicks et. al., eds., *Federalism and Economic Growth in Underdeveloped Countries* (London: George Allen and Unwin Ltd., 1961) pp. 137-146.

"Recent Trends in Federal Economic Policy and Finance in the Commonwealth" in J.D. Montgomery and A. Smithies, eds., *Public Policy*, vol. xiv (Cambridge, MA: Harvard University Press, 1965), pp. 380-402.

"Second Chambers in Federal Political Systems" in *Background Papers and Reports*, the Ontario Advisory Committee on Confederation (Toronto, 1970), Vol. II, pp. 315-355.

"The Survival or Disintegration of Federations" in R.M. Burns, ed., *One Country of Two?* (McGill-Queen's University Press, Montreal and London, 1971). pp. 41-72.

"Survival or Disintegration" in Richard Simeon, ed., *Must Canada Fail?* (McGill-Queen's University Press, Montreal and London, 1977), pp. 42-60.

"Federalism, Regionalism and Political Integration" in David Cameron, ed., *Regionalism and Supranationalism*, Institute for Research on Public Policy, Montreal, and Policy Studies Institute, London, 1981, pp. 3-19.

"The Historical Development of Canadian Federalism" in R.L. Mathews, ed., *Public Policies in Two Federal Countries: Canada and Australia*, Centre for Research on Federal Financial Relations, Australian National University, Canberra, 1982, pp. 13-26.

"Financing Post-Secondary Education and Research" in Peter M. Leslie, ed., *Canada: The State of the Federation, 1986* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1987), pp. 167-188.

"The Framework for Managing and Financing Post-Secondary Education" in National Forum on Post-Secondary Education, *Proceedings* (Halifax: Institute for Research in Public Policy, 1987), pp. 73-79, 99-109.

"Divergence and Convergence: Canadian and U.S. Federalism" in Harry N. Scheiber, ed., *Perspectives on Federalism: Proceedings of the 1986 Berkeley Seminar on Federalism* (Institute of Governmental Studies, U. of California, Berkeley, 1987), pp. 179-213.

"The American Constitution in Comparative Perspective: A Comparison of Federalism in the United States and Canada" in D. Thelen, ed., *The Constitution and American Life* (Ithaca: Cornell University Press, 1988), pp.109-131.

"Executive Federalism: The Comparative Context" in R. Whitaker and D. Sugarman, eds., *Federalism and Political Community: Essays in Honour of Donald Smiley*, (Toronto, Broadview Press Ltd., 1989), pp. 439-460.

"The Macdonald Commission and Canadian Federalism" in Michael Burgess, ed., *Canadian Federalism: Past, Present and Future*, (Leicester University Press, Leicester, United Kingdom, 1990), pp. 155-175.

"Canadian Federalism and Pluralism: Implications of the Meech Lake Accord and the Canada-U.S. Trade Agreement" in Harry N. Scheiber and Malcolm M. Freeley, eds., *Power Divided: Essays on the Theory and Practice of Federalism* (Institute of Governmental Studies, University of California, Berkeley, 1989), pp. 123-128.

"Asymmetrical Federalism" in Richard Simeon and Mary Janigan, eds., *Toolkits and Building Blocks: Constructing a New Canada* (Toronto, C.D. Howe Institute, 1991), pp. 133-138.

"An Overview" in R.L. Watts and D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991), ch. 1, pp. 3-12.

"Canada's Constitutional Options: An Outline" in R.L. Watts and D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991), ch. 2, pp. 15-30.

"The Federative Superstructure" in R.L. Watts and D.M. Brown, eds., *Options for a New Canada* (Toronto: University of Toronto Press, 1991), ch. 16, pp. 309-336.

"West German Federalism: Comparative Perspectives" in C. Jeffery and P. Savigear, eds., *German Federalism Today* (Leicester: Leicester University Press, 1991), pp. 23-39.

"The Soviet Federal System and the Nationality Question in Comparative Perspective" in A. McAuley, ed., *Soviet Federalism: Nationalism and Economic Decentralization* (Leicester, Leicester University Press, 1991), pp. 196-207.

"The Federal Context for Higher Education" in D. Brown, P. Cazalis and G. Jasmin, eds., *Higher Education in Federal Systems* (Kingston: Institute of Intergovernmental Relations, Queen's University 1992), pp. 3-21.

"The Reform of Federal Institutions" in K. McRoberts and P. Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada*, Toronto: University of Toronto Press, 1993, pp. 17-36.

"Representation in North American Federations: A Comparative Perspective" in David M. Olson and C.E.S. Franks, eds., *Representation and Policy Formation in Federal Systems* (Berkeley: Institute of Governmental Studies Press, University of California, Berkeley, 1993), pp. 291-321.

"Regional Representation in National Institutions" and "Final Comments" in Bertus de Villiers and Jabu Sindane, eds., *Regionalism: Problems and Prospects* (Pretoria: Human Sciences Research Council, 1993), pp. 155-170, 192-198.

"Overview" in R.L. Watts and D.M. Brown, *Canada: The State of the Federation, 1993* (Kingston: Institute of Intergovernmental Relations, 1993), pp. 3-15.

"The Value of Comparative Perspectives" in K.G. Banting, D.M. Brown and R.J. Courchene, eds., *The Future of Fiscal Federalism* (Kingston: School of Policy Studies, 1994), pp. 323-328.

"El proceso de la reforma constitucional canadiense 1990-1992" in Teresa Gutiérrez H. and Monica Verea C., eds., *Canadá en Transición* (Mexico: Centre de Investigaciones sobre America de Norte, Universitat National Autónoma de México, 1994), pp. 51-78.

"Is the New South African Constitution Federal or Unitary?" in B. de Villiers, ed., *Birth of a Constitution* (Cape Town: Juta and Company Ltd., 1994), pp. 75-88.

"Provincial Representation in the Senate" in B. de Villiers. ed., *Birth of a Constitution* (Cape Town: Juta and Company Ltd., 1994), pp. 125-143.

"Contemporary Views on Federalism" in B. de Villiers, ed., *Evaluating Federal Systems* (Cape Town and Amsterdam: Juta Legal and Academic Publishers and Martinus Nijhoff, 1994), pp. 1-29.

"Characteristics of Canadian Federalism and Their Implications for European Integration" in C. Lloyd Brown-John, ed., *Federal-Type Solutions and European Integration* (University Press of America, 1995), pp. 223-263.

"The Organization of Legislative and Executive Institutions: The Comparative Relevance for Europe of Canadian Experience" in Thomas Fleiner and Nicolas Schmitt, eds., *Vers une Constitution européenne L'Europe et les expériences fédérales* (Fribourg: Institut du Fédéralisme, 1996), pp. 155-184.

"Examples of Partnership" in Roger Gibbins and Guy Laforest, eds., *Beyond the Impasse: Toward Reconciliation* (Montreal: Institute for Research on Public Policy (IRPP), 1998), pp. 359-93.

"German Federalism in Comparative Perspective" in C. Jeffery, ed., *Recasting German Federalism: the Legacies of Unification* (London: Pinter, 1999) pp. 265-284.

"Federalism in Fragmented Societies" in Jutta Kramer/Hans Peter Schneider, eds., *Federalism and Civil Societies* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), pp. 145-163.

"The Theoretical and Practical Implications of Asymmetrical Federalism" in Robert Agranoff, ed., *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), pp.24-42.

"The Canadian Experience with Asymmetrical Federalism" in Robert Agranoff, ed., *Accommodating Diversity: Asymmetry in Federal States* (Baden-Baden: Nomos Verlagsgesellschaft, 1999), pp. 118-136.

"Der deutsche Föderalismus:ein Modell?" in *50 Jahre Harenchiemseer Verfessungskonvent –Zur Struktur des deutschen Föderalismus* (Bonn: vom Bundesrat, 1999), pp. 256-262.

"The Division of Competences in the Canadian and Russian Federations" in Council of Europe, *Second International Conference on Federalism, Moscow, 16-17 December 1997: Proceedings* (Strasbourg, Council of Europe, 1999), pp. 101-108.

"Challenges to Federalism: Territory, Function and Power in a Globalizing World: Comment" in R. Young, ed., *Stretching the Federation* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1999), pp. 28-34.

"Presenté y Futuro Del Federalismo En las Américas" in *Cuadernos de Federalismo IV: Federalismo en las Amé*ricas: *Encuentro de Gobernadores y Ex Gobernadores* (Mexico: Institute Cultural Ludwig von Mises, 1999), pp. 37-49.

"Islands in Comparative Constitutional Perspective" in G. Baldacchino and D. Milne, eds., *Lessons from the Political Economy of Small Islands: The Resourcefulness of Jurisdiction* (London: Macmillan Press Ltd., 2000), pp.17-37.

"Federal Financial Relations: A Comparative Perspective" in H. Lazar, ed., *Canada: The State of the Federation: Toward a New Mission Statement for Canadian Fiscal Federalism* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2000), pp.371-388.

"Federalism and Diversity in Canada" in Yash Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Oakley, Victoria: Cambridge University Press, 2000), pp.29-52.

"Federalism in Asia: The Potential and the Limits" in Lidija R. Basta Fleiner, Harihar Bhattacharyya, Thomas Fleiner, and Subrata K. Mitra, eds., *Rule of Law and Organization of the State in Asia: The Multicultural Challenge* (Bâle: Helbing and Lichtenhahn, 2000), pp. 1-4.

"Sources for Learning From a Comparison of International Federal Structures" in Bertelsmann-Kommission "Verfassungespolitik and regierungsfähigkeit", *Redistribution of Powers Between the Federal Level and the States* (Gütersloh: Verlag Bertelsmann Stiftung, 2001), pp. 23-32.

"Intergovernmental Relations: Conceptual Issues" in N. Levy and C. Tapscott, eds., *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (Cape Town: IDASA and School of Government, University of Western Cape, 2001) pp.22-42.

"The Dynamics of Decentralization" in R. Bird, T. Stauffer, eds., *Intergovernmental Fiscal Relations in Fragmented Societies* (Institut du Fédéralisme, Fribourg Swisse) (Bâle-Genève-Munich: Helbing and Lichtenhahn, 2001), pp. 15-39.

"The Distribution of Powers, Responsibilities and Resources in Federations" in A.L. Griffiths, ed., *The Handbook of Federal Countries, 2002* (Montreal and Kingston: McGill-Queen's University Press, 2002), pp. 448-71.

"New Meanings, New Uses for the Federal Idea" in Elaine Thompson, ed., *Keeping the Show Together: The 'Federalism Forums' 2001* (Sydney: NSW Centenary of Federation Committee 2001, 2002), pp. 5-8.

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"Managing Interdependence in a Federal Political System" in Thomas J. Courchene and Donald J. Savore, eds., *Governance in a World Without Frontiers* (Montreal: Institute for Research on Public Policy, 2003), pp. 121-151.

"Bicameralism in Federal Parliamentary Systems" in Serge Joyal, ed., *Protecting Canadian Democracy* (Montreal and Kingston: McGill-Queen's University Press, 2003), pp. 67-104.

"Processes for Adjusting Federal Financial Relations: Examples from Australia and Canada" in Paul Boothe, ed., *Fiscal Relations in Federal Countries: Four Essays* (Ottawa: Forum of Federations, 2003), pp. 17-40.

"Law and the Division of Responsibilities: Canadian Experience in Comparative Context" in Peter H. Solomon, Jr. ed., *Making Federalism through Law: Canadian Experience and Russian Reform under Putin* (Toronto: Centre for Russian and East European Studies, University of Toronto, 2003), pp. 75-85.

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"The Interaction of Political Parties and Federal Institutions" in Rudolph Herbek, ed., *Political Parties and Federalism* (Baden-Baden: Nomos Verlagsgesellschaft, 2004), pp. 203-207.

"Participation of Federated Entities in Federal Policy-making" in Third International Conference on Federalism (F. Geerkens, ed.), *Speeches, Contributions and Conclusions: Federalism: Turning Diversity into Harmony, Sharing Best Practices* (Brussels: Federal Public Service Foreign Affairs, Foreign Trade and Development Corporation, 2005), pp. 464-478.

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"Comparative Conclusions" in Akhtar Majeed, Ronald L. Watts and Douglas M. Brown, eds., *Distribution of Powers and Responsibilities in Federal Countries*, A Global Dialogue on Federalism, Volume 2 (Montreal and Kingston: McGill-Queen's University Press, 2006), pp. 322-349.

"Multinational Federations in Comparative Perspective" in M. Burgess, ed., *Multinational Federations* (London and New York: Routledge, 2007), pp. 225-247.

"The United Kingdom as a Federalized or Regionalized Union" in A Trench, ed., *Devolution and Power in the United Kingdom* (Manchester: Manchester University Press, 2007), pp. 239-268.

"Basic Issues of the Federal State: Competitive Federalism vs Cooperative Federalism" in R. Thomas, R. Blindenbacher, U. Karpen, eds., *Competition vs. Cooperation: German Federalism in Need of Reform – Comparative Perspective* (Baden-Baden: Nomos Verlagsgesellschaft, 2007), pp. 85-91.

"Federal Co-existence in the Near East: General Introduction" in Thomas Fleiner, ed., *Federalism a Tool for Conflict Management in Multicultural Societies with Regard to Conflicts in the Near East: A la memoire de Jean Nordmann* (Fribourg: Institute of Federalism, 2008), pp. 1-17.

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