

**A Global Dialogue on Federalism**  
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**DIALOGUES ON DISTRIBUTION OF POWERS AND RESPONSIBILITIES  
IN FEDERAL COUNTRIES**



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## Comparative Reflections

RONALD L. WATTS

A constitutional distribution of legislative and executive authority and finances among the general and constituent unit governments has constituted a fundamental, indeed defining, aspect in the design and operation of these federations. But while a constitutional distribution of authority, responsibilities and finances among the orders of government has been a fundamental feature common to them, there has been an enormous variation in the constitutional form and scope and in the operation of the distribution of powers in different federations.

Different geographic, historical, economic, security, demographic, linguistic, cultural, intellectual and international factors have affected the strength of the common interests and of diversity peculiar to each federation. Consequently, the specific distribution of authority and the degree of noncentralization has varied among federations.

Among differences in the *form* of the constitutional distribution of authority the are:

- § the extent to which the exclusivity or concurrent jurisdiction of governments has been emphasized,
- § the assignment of state or provincial powers by a specific listing of jurisdiction or by a general allocation of residual authority,
- § the extent to which the assignment of executive responsibilities coincides with or is differentiated from legislative jurisdiction,
- § the symmetry or asymmetry in the powers assigned to different constituent units,
- § the formal constitutional recognition or not of local governments as a third constitutional order of government guaranteed their own self-government, and
- § the extent of federal overriding and emergency powers.

In terms of the *scope* of constitutional powers, there have been considerable differences in the relative roles of government in different policy areas. The financial arrangements and the degree of reliance upon intergovernmental financial transfers have also varied. As a result, there has been substantial variation the degrees of centralization and non-centralization and of intergovernmental cooperation or competition among governments within different federations.

Within each federation there has in practice been considerable difference between the constitutional form and the operational reality of the distribution of powers. In most cases political practice and processes have transformed the way the constitution has operated. A key factor here has been the impact of political party and interest group activities affecting political bargaining and compromises.

While in each federation there has been a constitutional allocation of specific powers to each government, overlaps and intergovernmental interdependence have proved inevitable and unavoidable in every federation. As a result, this has usually required a variety of processes and institutions to facilitate intergovernmental collaboration. But here too there has been considerable variation among federations in the degree and character of intergovernmental collaboration and in the balance struck between the independence and interdependence of

governments. For instance, Germany and Mexico are marked by closely interlocked relationships while Canada and Belgium in comparative terms lean to the other extreme.

Federations have not been static organizations and over time the distribution of powers in each has had to adapt and evolve to respond to changing needs and circumstances and to the development of new issues and policy areas. In seeking a balance between rigidity to protect regional and minority interests, on the one hand, and the need to respond effectively to changing circumstances, on the other, a number of processes have played an important role, although in varying degrees in different federations. These have included formal constitutional amendments, judicial interpretation and review, intergovernmental financial adjustments, and intergovernmental collaboration and agreements. The evolution of the distribution of powers in response to changing conditions has over time in some instances, such as the United States, Australia, Germany, Brazil, Mexico and Nigeria, displayed a general trend to the reinforcement and expansion of federal powers. But this has not been a universal trend. Canada, India, and Belgium have instead over time experienced a trend to greater decentralization reflecting the strength of the diverse communities composing them.

Virtually all contemporary federations are currently experiencing pressures and debates for adjustments to their distribution of powers in order to meet changing and new conditions. The present context of globalization and regional integration, of membership of federations in such supra-federal organizations as the European Union or NAFTA, of emphasis upon market economies and the benefits of economic decentralization, and of concerns about security from terrorism, are all requiring a rebalancing of centralization and noncentralization and of collaborative and competitive federalism. With this has gone recognition that federations and the distribution of responsibilities in them should not be conceived as rigid structures but as evolving processes enabling the continuous reconciliation of internal diversity within their overarching federal frameworks. In this respect the distribution of powers and responsibilities within all these federations and the balance between “shared rule” through common institutions on the one hand and “self-rule” for the constituent units on the other may be typified in the words of Richard Simeon’s chapter as a continuing “work in progress.”

## Canada: Competition within cooperative federalism

RICHARD SIMEON

You will only get a partial picture of “who does what” if you read the Canadian Constitution Act of 1867. The text of sections 91 and 92 of the Act defines the division of powers and responsibilities in Canada, but gives only a partial picture of the real balance of powers. The division of powers is constantly in flux. The weight of influence has swung from federal dominance, to classical dualist federalism, to a reassertion of federal influence, to the present, in which two powerful orders of government use many jurisdictional, bureaucratic, financial and political levers to shape policy over broad areas. As new policy concerns such as the environment have arisen, both have the will and means to become involved. **“Watertight compartments” have been supplanted by overlapping, sharing, and interdependence.** Central to the Canadian policy-making process is a complex mixture of cooperation and competition among governments.

Amendment remains rare and difficult, but judicial decisions, intergovernmental agreements, and financial transfers have allowed the Constitution to adapt to new needs. Major changes were made in 1982, when a Charter of Rights was adopted and authority for amending the Constitution was “patriated” from Great Britain, so Canada no longer had to ask the UK parliament at Westminster for official constitutional amendments. Two subsequent attempts to bring in significant amendments both failed.

Many factors explain the changing patterns of Canadian federalism. First is demographic change. The Canada of 1867 with four provinces and just 3.5 million people is now a country of 32 million, ten provinces, and three territories, touching on three oceans. A once largely rural country is now one of the world’s most urbanized. A society originally made up almost entirely of people of French and British descent (together with the largely displaced Aboriginal inhabitants) is now among the world’s most diverse and multicultural. A second major factor is the importance of international agreements and trade. Canada is economically integrated into the North American market. This change has had enormous impacts on policy agendas and citizen expectations. A third set of factors has involved regional differences over concepts of citizenship, identity, and society. The fundamental division is language. French-speaking Canadians, concentrated in Quebec, have a strong sense of national identity and a distinct approach to the role of the state. Quebec has resisted increased federal power and today it is a powerful advocate for “asymmetry.” Other provinces also have strong identities, distinctive policy concerns, and strong provincial governments. A single country-wide policy is often inappropriate and unworkable.

The interaction of these forces, which often pull in different directions, makes it difficult to characterize the division of powers in simple terms. Ottawa is largely responsible for international affairs, security, macroeconomic policy, immigration and citizenship. However, provinces also have an important voice in these areas. They are largely responsible for education, health care, welfare, economic development, and regulation of industry. However, Ottawa is also involved in these areas through transfers to provincial governments, and through its program for equalization, designed to ensure that poorer provinces are able to meet their

responsibilities without undue levels of taxation. This has led to “collaborative federalism” with several intergovernmental accords respecting economic and social issues, health care and the environment.

But who does what is never a fully settled issue, and a number of important questions confront citizens and governments today.

First among these is the concern about fiscal imbalance. Provinces assert that there is a mismatch between their responsibilities and the revenues available to them. The federal government stresses its own fiscal needs and the provincial ability to raise taxes.

Another debate involves “national standards” as opposed to provincial variation. National citizenship implies that common standards should apply to all Canadians, while federalism is predicated on policy variation. How to find the balance in areas such as health care?

A relatively new issue is participation in the global and North American economies. Are provinces and local governments best placed to adapt to global imperatives, or is a stronger federal hand necessary to ensure that Canada speaks with one voice abroad?

The Constitution assigns the same responsibilities to all provinces, but would “asymmetry” better reflect the reality of the country? In law and practice, considerable divergence among provinces has developed. Would increased asymmetry strengthen or weaken the federation?

Canada wavers between competitive and collaborative federalism. Some argue that effective policy requires joint decision making, given the extensive overlap in responsibilities. Others suggest that governments should compete in an adversarial process, to ensure policy innovation and responsiveness.

External shocks – oil prices, natural catastrophes, and health emergencies, such as the outbreak of SARS – have recently hit Canada and many other countries. Divided responsibility and intergovernmental rivalries have undermined effective policy responses to them. Canadian governments need to improve their capacity to respond to future shocks.

Local governments are under provincial jurisdiction with no independent constitutional status. Yet, they provide a wide range of services to Canadians. There have been recent moves to enhance the autonomy and financial base of municipalities, and to give them a place in Canadian multilevel governance.

Aboriginal peoples have asserted their right to constitute a “third order” of government in Canada. Their claims to land rights and self-government have received strong support from the courts. It is critical for Canada to design models of self-governments, to meet the needs of Aboriginal citizens, most of who now live in urban areas.

The division of powers in Canada today remains a work in progress, its future to be determined as in the past by pragmatic accommodation, within the context of the Constitution and the broad

contextual factors noted above. As Canadians work through these issues, they will both learn from and contribute to the experience of others.

## Germany: Länder Implementing Federal Legislation

HANS-PETER SCHNEIDER

Germany's federal system is characterized by the principle of "strict separation" of responsibilities between the federation and the *Länder* (i.e., the constituent states). Each order is accountable for its own decisions, even when a federal law delegates power to *Land* parliaments. To enforce this principle, the Federal Constitutional Court (FCC) has prohibited mixed administration and mixed financing. However, the German federation is not based on two completely distinct and separate columns of federal and *Land* powers with no connections. Instead there is a concentration of legislative functions in the federal government and of administrative powers in the *Länder*. The *Länder* actually implement a large part of federal legislation, as well as their own laws.

Germany's constitution, the Basic Law, makes a distinction between three types of federal powers: exclusive, concurrent, and framework jurisdictions. The exclusive powers of the Federation read very much like the list of congressional powers in the United States Constitution: foreign affairs, defence, citizenship, movement of goods and persons, communications, and federal taxes. The list of concurrent legislative powers is very extensive. It includes most of the authority over economic and social matters, including welfare, social insurance, labour law, economic regulation, agriculture, and the protection of environment. Finally, there are framework laws, which lay down basic principles and leave their elaboration to the *Länder*. The list of possible subjects of framework legislation is relatively brief, but it also includes much of what are attributed to the *Länder* expressly: higher education, the press and film industry, land reform, and regional planning. The fundamental requirement of framework legislation, the Federal Constitutional Court has specified, is that it leave significant leeway to the *Länder* implementing its provisions.

One of the most surprising aspects of the German administrative system is that most federal laws are carried out by the *Länder*. The basic principle is that the *Länder* shall implement federal legislation as matters of their own concern, as long as the Basic Law does not provide otherwise. The opposite is strictly forbidden; the federation is not allowed to carry out any state law. Therefore, direct federal executive powers are very limited and provided for only in areas in which unified administration is considered to be essential.

However the federal government still has the means to influence the *Länder* in their execution of federal laws. It may regulate *Land* agencies that administer federal laws. It may also confine *Land* administrative discretion by issuing administrative guidelines, and may issue by-laws that bind third parties as well. There may be federal supervision to ensure that the *Länder* carry out federal laws, and federal observers can be dispatched to state agencies for this purpose. Finally, there can be an intermediate form of administration in which the *Länder* enforce federal laws as "agents" of the federation, subject to binding federal instructions.

In fact, the political scope for a *Land* to take action has been considerably reduced in the past fifty years, and the high degree of intertwining of policy-making has reduced the transparency and public control of the decision-making process. These developments in recent decades have

actually led to a concentration of powers at both governmental levels, at the level of the federal government on the one hand, and among the entirety of the *Länder* on the other hand, with power and also finances approximately equally distributed. However, these power blocks – having a deleterious effect on political accountability – are so closely linked with each other that hardly anything can be moved politically. **The federal government and the *Länder* agree on the diagnosis of immobility, but do not agree on the proper therapy for it.**

This immobility can be traced to the 1980s and 1990s when the political decision-making process in Germany became increasingly cumbersome. In fact there was a growing social awareness of the need for fundamental reforms. This awareness met, however, with little response in political practice. The legislative process was blocked as a result of different majorities in the *Bundestag* and the *Bundesrat*, the lower and upper houses of the legislature. The legislative authority of the federal government has grown continually while, correspondingly, the *Länder* have less and less legislative authority and are now virtually only responsible for the administration and the implementation of legislation. In the meantime the framework conditions for this distribution of responsibilities have certainly been fundamentally altered by German unification and by the progress of the European integration process. Thus, in the long term the current arrangement threatens to weaken the political capacity for action.

The processes of European integration and economic globalization have also fundamentally altered the basic conditions for political management in federal countries. These processes point to the need to strengthen the legislative authority of the *Land* level of government. The integration of international markets demands ever-greater specialisation from businesses in countries with high production costs. As a consequence, sectoral and regional differentiation is becoming increasingly important in the competition between locations. In countries like Germany this is leading to a growing importance of the *Länder* as economic policy actors. These changing fundamental conditions for German federalism are already sufficient to make clear that a review of the German constitution has become a pressing political issue. At the core of the issue lies the question of the distribution and disentangling of federal and *Länder* responsibilities, as well as a reform of the financial constitution.

The “fossilised” federal structures of the constitution hardly allow for flexible reactions to modern societal changes. While market forces and their systems of distribution demand a more flexible capacity for reaction from the political system, the constitutional reality in Germany, as a result of joint tasks and joint taxes, the integrated system of tax revenue redistribution (“equalization scheme”), and the continual extension of legislation requiring *Bundesrat* consent, have left the political system even less flexible.

## India: Continuity and Change in the Federal Union

GEORGE MATHEW

For more than a decade, India has been experiencing pressures for decentralization, with the states demanding greater say in, and control over economic development. Subnational units in India are expected to contribute to the strength of the country as a whole, but recently the states have been protesting any political interference from the central government in New Delhi. The states have also taken exception to the accumulation of taxation powers by the national government, which has left them financially weakened. **These new political pressures are a reversal of the previous trend, which has seen a gradual centralization of powers and responsibilities.**

India's complex federal structure was established in the immediate aftermath of Independence in 1949-50. India is a Union of states which consists of 28 full-fledged states, six Union Territories (governed directly by the federal government), one National Capital Territory, and more than a dozen self-governing sub-state units like autonomous regional and district councils. All these structures of governance, along with local governments, draw their authority from the Constitution of India (except Jammu and Kashmir, which has its own constitution). The Constitution distributes powers both symmetrically--for example, the 7<sup>th</sup> schedule makes distribution of powers symmetric between federal and state governments--and asymmetrically, through several articles like those dealing exclusively with tribal communities, ethnic minorities, and protective development of select regional and sub-regional people. This structure of power distribution and power-sharing arrangements produces a highly complex form of federalism.

Within India, there are both centralizing and decentralizing political pressures. On one hand are the imperatives of maintaining national unity and integrity. On the other are the varying requirements of economic development across regions, class, caste, and other geographical and ethnological differences. Although the federal Union consists of a complex network of authority, institutions, and political bodies, each unit of governance is expected to serve and add to the strength of the Union, besides maintaining its own respective identity and integrity.

The Constitution builds the federal Union from local bodies to the states to regional bodies, with a Union government (national government) to coordinate the various structures of shared rule. The central authority has regulatory powers over a fairly large number of subjects. But matters of local import have been devolved to the subnational units. The Constitution does acknowledge the supremacy of the jurisdiction of each federal unit. However, there also exists "differential loading" – some units having more functional responsibilities than the others – within different or similar subject areas. Thus while states' authority over primary education is by and large established, the same does not hold true for higher education, where it has to share its jurisdiction with the central government.

Broadly, the Union government has been assigned the three important roles of: upholding national unity and integrity, maintaining constitutional and political order in the constituent units, and planning of national economic development. States hardly question the constitutional intent and sanction of these powers of the Union government, but they frequently seek procedural

transparency and participation in the decision-making process of the Union government, especially regarding the exercise of authority over the second and third roles. They insist on minimal interference from the Union government in the affairs of the states, particularly when it is on the pretext of maintaining constitutional political order within the units. In this regard, they particularly object to the exercise of emergency powers by the Union government under Article 356, which allows for the deployment of military forces, reserving state bills for presidential consideration and approval by the Governor. The common refrain is that the Union government has accumulated and brought within its domain a large number of developmental items, on the pretext of serving larger national and public interests, which could otherwise have belonged to the states. This has resulted in the concentration of high yielding revenue items in the hands of the Union government, and the consequential narrowing of the revenue generating capacity of the states.

For these reasons, the states have been demanding that the authority of the Union government be dramatically reduced. Many high-level commissions have been set up to study the question. All of them, except one, have found the Constitution not only sound but also flexible enough to decentralize powers and authority from the Union government to the regions. They have suggested many functional modifications in the working of Union -state relations. One such Commission on Union -state relations was headed by Justice R. S. Sarkaria which advanced far-reaching recommendations.

In 1990, the government of India set up the Inter-State Council (ISC) to implement the recommendations of the “Sarkaria Commission” and to promote harmonization of inter-state and Union-state relations and policy coordination. The ISC works to seek consensus on the possible changes in the structure and process of inter-state relationships. The ISC has succeeded in developing some agreement on repairing crucial areas of federal relationships. Other councils have been established to build stronger inter-state relations. However, apart from the North-Eastern Council, the other councils are either defunct or riddled with mutual antipathy.

The most recent changes to Indian federalism have been designed to ensure good governance, by enabling private and public partnership at all orders of governance. The good governance agenda is leading to the widening of state autonomy, particularly in the area of economic development. The states are permitted to introduce competitive economic reforms through various forms of political and administrative decentralization. Now the states are able to invite direct foreign investment on their own. They are allowed to introduce reforms and innovations in the state economy, and to decentralize powers according to the individual needs of the concerned states. The federal system has shown enough resilience to adapt, accommodating both the imperatives of national unity and a liberalized market economy of the twenty-first century.

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