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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*

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),

to the civil-law tradition. Given this, he concludes that the relationship of 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

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 concerne

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 stat3 Ir3(st)3.8tdtralistdtral05 Twant()3.8(l t8ers813Tc2750 13Tc2144 460.6.00m0 TD-09 stthns of thre(nee)8e(nee)r.8(pal)33.e tdAgainsnvernee aWes.(t)3.e tlhs4r9oda ioiohneeveraloteimo

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.

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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.

model for Senate Reform in Canada, even though, since the 1990s, he has

Section Two

The Federal Idea

2

The Federal Idea and its Contemporary Relevance

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

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

- 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 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 legw.2(e)rrae

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

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

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

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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 fu

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. In1.3(i(pr)5.6n.e)4.3(o5)rt for the Europn-1.6()5.se ary90 -1i.00

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.

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 po8(atio)-4.8(cEels s4.1(o)- fasccal in1-4.8al in1-g.8.2( )]TJ00011 0026)1.Tj/TT6 .00f

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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

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

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

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

processes in government, both robustly democratic or less so. In my view, it is

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

acuity of either policy competence or service delivery. Many federations world wide, including and especi

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

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

> 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

On the other hand, I could offer you another reason for Ron's love of travel:

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

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 comp*

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*

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, Preap5eha3a1p5e(.4(-3.)-4.1a3a1p5e)-4.1(lis-4.1(th-0.(en)-4.ing)-4.1(th T

there appears to be an urgent need to im

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

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.,

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

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

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 appr4 Tli8inp1(d(o)4 T)(h)-o(o)4 Tces.2()-h(o)4 TTi7.2(dly, re)7.2(je)7.0.8(te.)95as p

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

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

— 1991. "The Federative Superstructure", in R.L. Watts and D. Brown (eds.), *Options for a New Canada*. Toronto: University of Toronto Press, 309-336.
— 1998a. "Examples of Partnership", in R. Gibbins and G. Laforest (eds.), *Beyond the Impasse: Toward Reconciliation*

8

Definitions, Typologies and Catalogues: Ronald Watts on Federalism

Jennifer Smith

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

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

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

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

Canada and the Meech Lake Accord

In the midst of the impasse in Canada

persuaded their opponents that they could be trusted to keep the promise. In

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

units; asymmetrical arrangements in the assignment of jurisdiction to some

Section Four
Constitutional Perspectives

9

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

Jeremy Clarke and Janet L. Hiebert

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

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

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 agréb ss-1-1-1dr7ec

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

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).

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 [.2(i)1.2(us-6(6)5(-24(e5nter u6fo)-4.8r.002 Tce89n)4.2c0.us-6(6)5(-2).5(der)sed4(eTD07(

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

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

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,

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

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.

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 Canadi
even most of the key Anglophone players in the early debates over federalism

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

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

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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*

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 fo

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.

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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

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

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

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 ju

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.

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

Independence of the judiciary

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

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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

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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

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).

here with the broad field of fiscal federalism, except to the extent to which it can

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

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,

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

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*

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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

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

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 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.

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 expTJT*ndehn(o)4.9(g3.1(dehn0 6s6 0 0 6.48 32

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

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

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

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 pict

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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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

their studies on the legitimacy of judicial interpretation and whether or not the

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*

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

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

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

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

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

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]

practice of federalism. Nevertheless, Laskin emphasizes the need to place more

> 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 unilate4.3(d)5.1(a)3.4.3(d)5.Sec7(Tw5d(t)5.1(i)11.1r(e)]TJ/TT6 1 T

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.

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

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 secu

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

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

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).

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.,

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 Fi

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

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.

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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

ASYMMETRIES IN AMERICAN FEDERALISM: BASIC THEMES

The analysis of asymmetries in American

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.

provide guidance for and perhaps persuasive influence on the exercise of congressional discretion.

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

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

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

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

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

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 bette 023 Tc(v.)T8(vcs0es in)(voedC)3.9(o)4.6(7ei-3.4(e

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

United States

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.

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 invocat

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 cas

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

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

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 abo-5.5y4.8(t)9.9(3-5.9(3)9.9(o-5.n8(al) t)u(o-5.n)8.2(y9(3)9.9(3-5.y(o-5. 9

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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-

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 .1(r s-rg0.00a0b1b. It is( )]TJ)6.0963 0 TD0.0057 Tc0.0293 Tw[(am)119(portat)7.2nat oe lo
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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, how0.0012 Tc0.1141 1 Tf1eir

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

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*

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

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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

larger prerequisites do not exist; and that

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*

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 federal panacea

With regard to internal divisions, Watts, like many other specialists 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 off

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depend greatly on the willingness of citizens in the wealthier regions to consider

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

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 1c77 TD0 Tc5smd clso(ers o)-5de .4(in)-4l0.3for v-0.7(l)6(fedlop-0.7(l)6(fedd-4

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 bu97 TD36

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

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

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.

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

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"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 pe, g2(o)4.850.70( )5.6(perca)8.5(n)-1.(t)

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	

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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	2r4	1.1467	TDh7orth Ce9: TDh7or’d

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:

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 po

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 ... politi

Table 7: Responses to the Federalism Culture Questions and to the "Scale of Federal Attitudes", 2004

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.)

	Mexico (%)	United States (%)	Canada (%)

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

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

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,

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

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 provin

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

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

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 underes

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

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

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

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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 8-0.0e(has.5(e)-4w[(ine7.2(ra.)-3e w[ono)]TJ68868683 0 TD0.0013 T2150.078 T2.9)5tncngesdsot

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,

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

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 federaliz focemz fstrc0.0792:e 1h8.067d9scy-.li

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

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

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 tak 14.6(r)5TJ0 -1.1497 TD155376 Tw

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

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

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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, mêmea7n d'appliquer

place before an incident occurs therefore is crucial to managing the tension between the normal pace of intergovernmental relations and the requirements for

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

Canada is the most decentralized of the four federations. Its provinces rely

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 Ozr.4()-5es

communities to prepare their plans for their areas of responsibility (United States 2005). The Secretary of Health and Human Resources (HHS) followed up

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

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

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

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-Ha3o,wɬdsh*

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			

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 gov

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 Commonwealthn-7

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

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	

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

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

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 5 .

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

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

What else i[(W)-4497 TDr1437 TDe cona9.7(op)-4.5()-15(a)2.-4.jo 5.1(y)sddplWodda9.ai[(W)- activ

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

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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*

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 evid

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,
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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 Lishs.-5.5eo

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

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 component [illegible]

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

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 Parliame ne5010.0012 Tc0.0c010.00010.0012 Tc0CTT9 9u0.0012 7J0 -1.14

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

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

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

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

organizational pluralism favoured by Mitrany underlies the deliberate anachronism of the name I give this scenario: *From Monnet to Mitrany*.

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

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.

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

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

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 gove[illegible] na8wah2(h)-1.2.practi08 Tmveae

against another, but litigation is routinely taken over by the Commission. The

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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.

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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

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

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

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

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

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

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,owheoo cerationo(and)4d.9(i)3erati,9thtetULäo c

> 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]

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

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

of cooperative federalism that characterizes intergovernmental relations in Germany.[9]

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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 fillr6.9(r7uoa42s is rem)10.3(a)-0fh by o0.6(sfery5(ve)(h)-5c3i9(un)c1(u)-(pe)y(itary n0016 Tc0.4909 Tw[go)4.6(v

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

imbalance may be connected. The federal model for thinking about these issues is the Canadian case, but the issues exte

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

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 federa

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

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

FISCAL IMBALANCE II: TIGHTENING THE BUDGET CONSTRAINT

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 fick4.2(fte o3pt6cco)-4.che f8ge.4(cf8ge1Tc0.2t

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

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

government to pursue its legitimate objectives. For that, at least some reasonable fiscal gap is necessary.

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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

piecemeal relationships with devolved governments in Scotland, Wales and Northern Ireland, UK-devolved issues are dealt with mainly in three sets of

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

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

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:

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

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

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

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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

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

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]

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

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.

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 s (a icies a icies (wB)5(h)-r c ce o th)icea

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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

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 th

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

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

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

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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

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. ine two competing models of IGR in the context of the evolving practice of IGR in South Africa. The South e 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

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

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 insecurit5.1(a)-4.5(.2(h)-10.6r.6(titu(2(g(e)-22il(37(m)9.9(at)3.6(t)3.h(n)-1.8(i)3

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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-

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

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

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

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" (

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

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.

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

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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

INTRODUCTION

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 Cour

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

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

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

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

formula. The National Assembly shall then deliberate on this document, taking

Minorities, Citizenship and Independent Issue

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

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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

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]

there; instead, they appoint their representatives to the Federation Council.

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

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 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 Rus( )6()TJ-1l

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

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

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“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

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

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

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

It appears as if there is a clear verti

administrative and political manageability involving closer contact between 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.

small urban areas, and municipal corporations for large urban areas. Every state

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 membe969 Tw[T(4a.9(t)3.4072 0 n5)-3.9.4073001

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

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

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

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 subjecsn(6u)9.f8(ees)7-3(5(4)3(5(thesub)4ulecsn(d "2(e)8d2(o)-1.2(i)4lecsn(u5(n)-1.

Parliament: “Representatio

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,

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

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

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 agreemen

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

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

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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 poi

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

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 intergovernt it, aShattis-4.5(e Affairs Cf t47 Tw[(it)8.81(m)4(d1(rn)-d1(r with)-4.4(in)]

"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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The Senate in Australia and Canada: Mr. Harper's "Senate Envy" and the Intra vs. Interstate Debate

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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

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

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

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

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

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

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

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

greater confidence in the federation, and enables the voices from these regions to carry more weight, presumably reducing alienation as a result. Regional

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 th97 Toe5s wiehameetinmeeo

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:

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 thtiliw01(t)1.h(v)-4.1(e)5.6ax

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 betth

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

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A LIFE DEDICATED TO PUBLIC SERVICE

RONALD L. WATTS,

Current Appointment:

	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.

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.

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The following publications are available from the Institute of Intergovernmental Relations, Queen's University, iigr@queensu.ca

The Role of the Policy Advisor: An Insider's Look, Nadia Verrelli (ed.), 2008
ISBN 978-1-55339-193-7

Open Federalism, Interpretations Significance, collection of essays by Keith G. Banting, Roger Gibbins, Peter M. Leslie, Alain Noël, Richard Simeon, and Robert Young, 2006
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Paper ISBN 978-1-55339-273-6 Cloth ISBN 978-1-55339-274-3

Data Data Everywhere: Access and Accountability? Colleen M. Flood (ed.), 2011
Paper ISBN 978-1-55339-236-1

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