A Global Dialogue on Federalism

Volume 3

LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES

EDITED BY KATY LE ROY AND CHERYL SAUNDERS

LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES

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EDITED BY KATY LE ROY
AND CHERYL SAUNDERS

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Contents

Preface vii

Introduction CHERYL SAUNDERS 3

Republic of Argentina ANTONIO M. HERNANDEZ 7

Commonwealth of Australia CHERYL SAUNDERS/KATY LE ROY 37

Republic of Austria ANNA GAMPER 71

Canada THOMAS O. HUEGLIN 101

Federal Republic of Germany STEFAN OETER 135

Republic of India RAJEEV DHAVAN/REKHA SAXENA 165

Federal Republic of Nigeria EBERE OSIEKE 198

Russian Federation ALEXANDER N. DOMRIN 224

Republic of South Africa CHRISTINA MURRAY 258

Swiss Confederation WOLF LINDER/ISABELLE STEFFEN 289

United States of America JOHN DINAN 316

Comparative Conclusions CHERYL SAUNDERS 344

Contributors 385

Participating Experts 389

Index 395

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LEGISLATIVE, EXECUTIVE, AND JUDICIAL GOVERNANCE IN FEDERAL COUNTRIES

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Introduction

CHERYL SAUNDERS AND KATY LE ROY

A federal system of government is necessarily given effect through institutions of various kinds. In a federation, as in other forms of constitutional government in the twenty-first century, the presumptive framework for the organization of these institutions, however imperfect, is the allocation of public power between three branches of government: the legislature, the executive, and the judiciary.[1] Each of the branches serves a particular, if broad, purpose to which its structure, powers, and mode of operation are adapted. The detail of the institutions and the relationship between them varies substantially between governing systems. Within each system, however, the goal now is much the same: to provide democratic and effective government within a rule of law.

The prototypes of contemporary legislatures, executives, and courts originated in unitary systems in which a single sphere of national government is supreme. A federal system of government, by contrast, involves at least two spheres of government within the same polity, each with a direct relationship with the people or a segment of them and each with a degree of constitutional autonomy. This has consequences for the structure and operation of institutions, as traditionally understood. First, it may involve some interdependence of the institutions of the respective spheres, while at the same time insisting on the accountability and responsiveness of each sphere to the people whom it serves. Second, for reasons of both practicality and principle, the federal character of the polity is likely to be reflected in the institutions of the national government, typically in a federal chamber of the national legislature but often in other ways as well. Third, the demands of federalism often necessitate the creation of new and innovative institutions to monitor aspects of the federal arrangements or to facilitate coordination and cooperation between jurisdictions. These variations make institutional design in federal systems a distinctive subject in its own right.

This third volume in the Global Dialogue series examines the institutions of government in eleven federations: Argentina, Australia, Austria, Canada, Germany, India, Nigeria, Russia, South Africa, Switzerland, and the United States of America. These federations differ from each other in a variety of ways. Most relevant for present purposes are differences in some of the essentials of institutional design. Four of the selected federations have presidential systems; six have parliamentary systems of various kinds; and one, Switzerland, has a mixed form of government, incorporating elements of each. There are other significant variations between these federations as well, which are identified in greater detail in the final chapter to assist comparison. These concern, for example, the legal systems of the respective federations,[2] their electoral arrangements, and their stages of political and economic development. They also include differences relating to the structure of the federal system itself, ranging from the rationale for federation to important aspects of federal design, including the manner of the division of powers and the extent of the autonomy of the constituent units. Readers of this volume who seek to draw insight from it for their own purposes should bear these differences in mind.

These case studies reveal some tension in the design and operation of particular institutions of government in most of the countries concerned, resulting in ongoing adjustment and experimentation. This tension is manifested most obviously in continuing debate about the composition and powers of the second chamber of the national legislature, to which almost every chapter refers, although the United States is a notable exception. It also emerges in other contexts, however. One concerns the extent to which a national government should be able to intervene in the affairs of constituent units, which is an issue in a range of federations. Another is the sacrifice of accountability and transparency for cooperative outcomes in some forms of intergovernmental arrangements.

Tensions of these kinds can be attributed to a variety of factors.[3] In some cases they represent a contested boundary between self-rule and shared rule. In others they reflect the difficulty of accommodating principles and practices of majoritarian democracy within the more complex form of democracy that federalism offers. In yet others, of which forms of cooperation may be an example, the cause may lie in the novelty of institutions and practices that have not yet found a secure niche in the established framework of federal democratic government. Some of these difficulties are transient; others may be a fact of life in federations, as institutions stabilize or as they evolve over time.

Not all of the questions raised about institutions of government in the chapters that follow are peculiar to federations, although, within the context of federal systems, they may take a particular form. Problems of government compliance with law, the independence of courts, the capacity of state

organs, the legitimacy and responsiveness of government, corruption, accountability, and transparency, to take only some examples, are familiar, in varying degrees, in all governing systems. In particular circumstances, they may be exacerbated by federalism; in others, they may be eased. But for the most part, they are merely aspects of any system of government to which attention must be paid. The meaning of democracy itself is the subject of a rich array of theories,[4] given effect through a wide variety of practices to which federal democracy, in its manifold forms, is a substantial addition.

The phenomenon of executive federalism is another, particular, case in point. Executive federalism takes different forms in different federal systems. Wherever it occurs, however, it refers to a process whereby substantive decisions are made by executive bodies in the course of cross-jurisdictional collaboration, presenting legislatures with a fait accompli. Thus understood, the practice is both a product of the executive dominance of legislatures (which is a familiar feature of modern governance in many states) and an extension of it. Practices can be improved within a federal context and attempts to do so are under way. There is an underlying ambiguity, however, about the role of the legislatures, particularly in parliamentary systems, which cannot be overcome so readily.

As in previous volumes in the Global Dialogue series, the country chapters that follow have been written to an agreed template so as to ensure coverage of similar issues and to facilitate comparison. Each chapter thus begins with an introductory section to enable the institutions of government to be understood within their geographic, demographic, historical, and economic context. This part also explains the reasons why a federal form of government was adopted and its significance for the institutional choices made. Thereafter the chapters move to the core purpose of the volume: the description and analysis of the institutions of government, in form and in action. Each chapter deals in sequence with national legislative, executive, and judicial institutions; with the comparable institutions of the constituent units; with local government; and with specifically intergovernmental institutions. A concluding section explores the mutual interaction of federalism and the institutions through which government takes place and suggests possible directions for the future. The final chapter provides a comparative analysis of the experience of all eleven federations and draws conclusions about federal institutions as a whole.

NOTES

1 For the early modern origins of the categorization in Montesquieu's famous depiction of the English Constitution, see Johnson Kent Wright, "A Republican Constitution in Old Regime France," *Republicanism and Constitutionalism in Early Modern*

Europe, ed. Martin van Gelderen and Quentin Skinner (Cambridge: Cambridge University Press, 2002), 1:293–294.

2 This difference is significant, for example, in relation to the involvement of legislatures in intergovernmental agreements. See Johanne Poirier, "Les Ententes Intergouvernementales et la Gouvernance Fédérale: aux Confins du Droit et du Non-Droit," *Le Fédéralisme dans tous ses Etats,* ed. Jean-Francois Gaudreault-DesBiens and Fabien Gélinas (Québec: Editions Yvon Blais, 2005), 442–472.

3 See also John Kincaid, "Comparative Observations," *Constitutional Origins, Structure and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queens University Press, 2005), 410–412.

4 See, for example, Giovanni Sartori, *The Theory of Democracy Revisited*, parts 1 and 2 (Chatham, NJ: Chatham House Publishers, 1987); Jürgen Habermas, "Three Normative Models of Democracy," *The Inclusion of the Other: Studies in Political Theory,* ed. Ciaran Cronin and Pablo De Greiff (Cambridge and Oxford: Polity Press, 2002), 239–252.

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San Luis
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Mendoza
Distrito Federal
Buenos Aires
La Pampa
Neuquén
Río Negro
Chubut
N
Santa Cruz
250
0
250
500
Kilometers
Falkland Islands (Islas Malvinas)
(Claimed by Argentina, controlled by UK)
Tierra del Fuego
Sources:
CIA World Factbook;
ESRI Ltd.; Times Atlas of the World

Republic of Argentina

ANTONIO M. HERNANDEZ

INTRODUCTION

General

Argentina is a federal republic located at the extreme south of the South American continent. It is a large country, with a continental land surface of 2.8 million square kilometres. There is substantial asymmetry in the geographic size of the constituent provinces, ranging from Buenos Aires, with an area of 307,571 square kilometres, to the much smaller provinces of Tucuman and Tierra del Fuego, with surface areas of 22,524 and 21,263 square kilometres, respectively. The autonomous city of Buenos Aires is even smaller, with a land area of only 200 square kilometres. There are also substantial differences in population. Of a total population estimated at 37.5 million in 2005,[1] more than 14 million reside in the province of Buenos Aires, and more than three million people live in each of three other areas: the provinces of Cordoba and Santa Fe and the city of Buenos Aires. By contrast, the population of the province of Tierra del Fuego is just over 100,000 people. In 2004 Argentina's per capita GDP was US$12,000, representing a real growth rate of just over 8 percent for the second successive year, after the disastrous year of 2002, in which the GDP fell by 14.7 percent.[2]

Argentina's population is relatively homogenous, apart from a small proportion of indigenous people[3] whose presence in the land before the creation of the state was recognised in the constitutional changes of 1994, which protected their identity and culture.[4] The area that is now Argentina was colonized by Spain in the sixteenth century. The provinces of the Rio de la Plata declared their independence from Spain in 1816, but the people of Argentina still overwhelmingly use the Spanish language, adhere to the Roman Catholic Church, and share a common culture. Like much of the rest of South America, Argentina has experienced waves of immigration, but

much of it, particularly around the end of the nineteenth century and the beginning of the twentieth century, emanated from Italy and Spain.[5]

The Constitution of Argentina, originally promulgated in 1853, reflects the dominant influence of the Constitution of the United States in the design of both the federal system and the institutions of government, in combination with a legal system rooted in the civil law tradition. The federation now comprises the federal sphere of government, 23 provinces, and the autonomous city of Buenos Aires,[6] which is also the federal capital. The Constitution divides power between these places for federal purposes. Argentina is a federation that was formed by bringing together pre-existing polities; consequently, as is often the case in federations formed in this way, the provinces also have their own constitutions and governing institutions. The institutional structure of government in both spheres involves a separation of powers between the executive, legislative, and judicial branches, with direct election of the federal president, the provincial governors, and the head of government of the autonomous city of Buenos Aires. The Constitution provides procedures for direct democracy as well, through the initiative and referendum, but they are not used.[7]

Despite these formal features of the federal system, throughout its history Argentina has experienced a high degree of concentration of power in the national executive based in the capital of Buenos Aires, which is also the focus of economic and financial power. This phenomenon, in turn, has had implications both for the operation of democratic institutions and for the operation of federalism. Although, in part, the causes of this power concentration lie in problems of institutional design, which might be remedied by legal change, they are mainly attributable to a lack of respect for constitutional principles and the rule of law, for which remedies are less readily available.[8]

As is the case with other countries in Latin America, Argentina has suffered from serious and continuing political instability, manifested most obviously in the series of military coups d'état that took place between 1930 and 1983, disturbing both democracy and the constitutional order.[9] Yet even after Argentina returned to a democratic form of government in 1983, it experienced a succession of political, economic, and social crises,[10] triggering repeated use of the Constitution's emergency provisions.[11] This long history of instability has exacerbated the imbalance of power within each jurisdiction and between the spheres of government. Real political power lies in the hands of the president and the provincial governors (within their respective spheres); at the same time, however, the president and national government dominate the governors and the provinces. The resultant concentration of power in the president, which has been termed "hyperpresidentialism,"[12] militates against both federalism and republicanism, as the latter is understood in Argentina.[13]

History

The first national government was formed in Argentina in 1810, and independence from Spain was declared in 1816. However, Argentina did not become a federation until 1853. The adoption of a federal form of government was the outcome of a series of civil wars fought in Argentina between the *unitarios* and the *federales* from 1820 to 1853. Federalism emerged as the only form of government that might resolve the political, economic, and social conflicts in a country of this geographic size. The *unitarios* advocated a unitary state and were centred in urban areas, particularly the city of Buenos Aires. The *federales* were supported by the masses, or *montoneras*, in the rest of the country and were led by provincial strongmen, or *caudillos*. There is a resemblance between the *caudillos* and some contemporary provincial bosses.

The 14 provinces that predated the establishment of the federal state[14] were created between 1815 and 1834 and arose from the cities founded by the Spanish conquerors. Through interprovincial pacts, these provinces laid the foundations for Argentine federalism, which was formalized in the federal Constitution in 1853 and subsequently amended, in important respects, in 1860. The prior existence of the provinces, and their role in creating the federal state and conferring powers upon it, is still reflected in the preamble to the Constitution: "We the representatives of the people of the Argentine nation, gathered in General Constituent Assembly by the will and election of the Provinces which compose it."[15]

It is possible to identify four main stages in the establishment and evolution of the federal system of Argentina. These are outlined briefly below in order to provide a context for examining the country's institutional arrangements.

The first stage covers the making of the Constitution of 1853 itself. In 1852 General Juan Manuel de Rosas, the governor of the province of Buenos Aires and in whose hands political power had been concentrated for a period of 20 years, was defeated in the battle of Urquiza. A constituent assembly was convened in which 13 provinces were represented by two representatives each, but without, significantly, representation from the province of Buenos Aires. The convention had before it as a model the text of the Constitution of the United States. In the end, however, it departed from that model in some respects, following the ideas of Juan Bautista Alberdi, now recognized as the father of Argentine public law.[16] In the first place, the federation for which the Constitution of 1853 provided was more centralized than was that of the United States. For example, power to enact the principal substantive legislative codes was conferred upon the federal Congress, together with power to review provincial constitutions, to intervene in provincial affairs, and to impeach the governors of the provinces. Drawing on the 1833 Constitution of Chile, Alberdi also envisaged a

somewhat stronger role for the president of Argentina than that enjoyed by the president of the United States.

In other respects, however, the Constitution of Argentina organized power in much the same way as did that of the United States. It established a federal state with distinct spheres of government; allocated particular powers to the federal sphere expressly or by necessary implication, leaving the residue to the provinces; and allowed the provinces substantial autonomy in relation to their institutional, political, financial, and administrative affairs. A senate was established as a core federal organ, in which each province was equally represented by two senators who were appointed by the legislative branch of each province. Despite the absence of its representatives from the Constituent Assembly, the city of Buenos Aires was nominated as the federal capital of Argentina and, as the capital, was accorded equal representation in the Senate.

The beginning of the second stage of Argentinian federalism followed immediately, with the secession of the province of Buenos Aires. In particular, the province was unwilling to surrender to the federation either the authority to collect the valuable customs duties or the port of the city of Buenos Aires from which the duties were derived. Civil war broke out again, culminating in the battle of Cepeda, which was won by General Justo José de Urquiza in 1859 on behalf of the federation. The subsequent Union Pact of San José de Flores, entered into on 11 November 1859, integrated the province of Buenos Aires into the federation and made some changes to the Constitution without, however, settling the questions of the customs duties or of the location of the capital.

The changes were important, nevertheless, contributing to some decentralization of the federal structure. Congress lost the power to review provincial constitutions and to impeach provincial governors. The circumstances in which the federation could unilaterally intervene in the affairs of the provinces were reduced to two: to repel foreign invasions and to guarantee the republican system. Intervention was also possible at the request of authorities of a province on the grounds that it faced sedition or invasion from another province. In a gesture towards the continuing disagreement over the location of the capital, another change to the Constitution extended the principle of territorial integrity that applied to the provinces to the territory of the capital as well, requiring the latter to be established by a law of Congress on territory ceded by the legislature of the province concerned.

These two outstanding questions were resolved over the course of the next 20 years, sometimes described as the period of national organization. Continuing conflict between Buenos Aires and the rest of the country culminated in 1862 in the battle of Pavón. The victor, General Bartolome Mitre of Buenos Aires, became president of Argentina, sponsoring a further

constitutional change in 1866, transferring customs duties to the federal sphere. Finally, in 1880, Buenos Aires was established as the federal capital, following agreement by the legislature of the province of Buenos Aires, which was once more defeated in battle.

For more than 50 years, from 1930 to 1983, Argentina experienced a series of dictatorships of various kinds, interspersed with occasional periods of electoral democracy.[17] These are not conditions in which the federal principle thrives, and, self-evidently, some of the institutional problems of Argentinian government were exacerbated at this time.[18] With hindsight, however, it is possible to see that this period marked a transition in the long-term character of Argentinian federalism, from "dual" or "competitive" federalism to one that is, in practice, more "cooperative."[19] This third stage in the evolution of Argentinian federalism was characterized by a greater willingness to take advantage of the constitutional authority to "enter into partial agreements aimed at the administration of justice, economic interests and to work in pursuit of their common interests, with notification being filed with the Federal Congress."[20] The movement began hesitantly in 1948, but recourse to cooperation became increasingly marked during the decade of the 1950s to deal with interprovincial problems, including the distribution of water from interprovincial river systems. In a sense, it involved reversion to the practice of interprovincial treaties that had been familiar before federation but had fallen into disuse. Interprovincial cooperation of this kind remains a characteristic of the Argentine federation today.

The beginning of the fourth stage was marked by changes to the Constitution that followed the meeting of a National Constitutional Convention in 1994. While the initial impetus for this round of constitutional change was to enable the re-election of President Carlos Menem for a second, successive term, one of the principal goals that emerged from the convention was to strengthen decentralization as a counter to the concentration of power in the country.[21] To that end, the Constitution was changed to recognise the autonomy of municipal governments[22] and the autonomous status of the city of Buenos Aires[23] and to authorise the provinces to "create regions for economic and social development."[24] In the wake of these changes, it is possible to identify four spheres of government of the Argentine federation: federal, provincial, municipal, and the government of the autonomous city of Buenos Aires, each with its corresponding responsibilities and with considerable constitutional autonomy.[25] Significant alterations were also made to the respective powers of the spheres of government, including recognition of the authority of the provinces to enter into international agreements;[26] allocation to the provinces of "original dominion" over the natural resources within their territory;[27] affirmation of the concurrent authority of the provinces to "continue with their own

social security entities for civil servants and professionals; and … [to] promote economic progress, human development, creation of jobs, education, science, knowledge and culture";[28] and the imposition on Congress of a requirement, in exercising its powers over education and culture, to respect local diversity and pluralism in various ways.[29]

Despite these changes, however, Argentina remains profoundly centralized, revealing a gulf between the formal constitution and political reality. It has been suggested that the explanation is threefold. First, the various encroachments by federal institutions into the provincial sphere have met with inadequate resistance from the provinces for reasons that, in part, reflect the provinces' financial dependence on the national government, but which are also attributable to the institutional structure of government, the concentration of power in the executive branch, and the relationship between the president and the provincial governors. Second, the Constitution incorporates some centralizing tendencies in its distribution of powers and the potential for federal intervention in provincial governance. Third, the concentration of social, economic, and political power in the metropolitan area of Buenos Aires occurs to the detriment of the provinces and the balanced development of the rest of the country.[30]

FEDERAL LEGISLATURE

General

Argentina has a republican, presidential form of government with a bicameral legislature called the Congress, comprising a chamber of deputies and a senate. As the principal representative body, Congress is responsible for expressing the will of the people and is the focal point of the democratic system. The main functions of Congress[31] include the enactment of the civil, penal, commercial, and labour codes and of other legislation necessary for the effective exercise of the extensive range of matters assigned to the federal government by Article 75 of the Constitution. In addition, Congress imposes taxation, approves the budget, approves treaties, authorizes declarations of war and peace, initiates a process of constitutional reform,[32] exercises some political control over the other two branches of government (including through impeachment proceedings), and orders or revokes federal intervention in the provinces.

As in any presidential system, the Congress is elected independently of the executive branch for fixed terms of four years in the case of deputies and six years in the case of senators. As in other presidential systems, however, some of the powers exercised by the president impinge on the authority and operation of Congress. Thus the president of Argentina attends the opening of sessions of Congress to report on the state of the

nation. The president may extend the period of ordinary sessions and call for extraordinary sessions as well. The execution and promulgation of legislation necessarily lie with the president.

The president also shares in the exercise of legislative power. Most obviously, bills passed by Congress must be approved by the president before they become law. The president thus has a power of veto, which Congress can override with a two-thirds majority vote of both houses. More significantly still, the president may, in “exceptional cases,” exercise legislative power by decree, albeit within both procedural and substantive limits now prescribed by Article 99(3), which also authorizes Congress to enact a law to provide for its own participation in such a process. Despite a general rule that legislative power shall not be delegated to the executive, an exception is made in Article 76 for delegation of power in relation to administration and public emergencies, albeit for a specific term and in accordance with any conditions that Congress may prescribe.

In fact, although the importance of Congress and of the responsibility vested in it are clear on the face of the Constitution, the centre of gravity of public power lies with the executive branch. The explanation lies in a range of interconnected factors. The interruptions in the constitutional order, to which reference has already been made, have sometimes caused Congress to be closed down altogether. This was the case, for example, in the coups d’état of 1930, 1943, 1955, 1966, and 1976. During such periods, the executive branch inevitably assumes the leadership role in the political process. Even in more ostensibly normal times the succession of other political, economic, and social emergencies that have occurred has facilitated the concentration of power in the executive branch, diminishing the role of Congress.[33] Thus, during the two terms of President Menem (1989–99), for example, approximately 500 presidential decrees of necessity and urgency were made by reference to emergencies and other special needs. These decrees intruded into the legislative sphere. However, Congress has been compliant in this process. It has failed to enact the laws envisaged by Article 99(3) of the Constitution, which authorizes Congress to structure the procedure for scrutinizing executive decrees made on grounds of necessity and emergency following deliberation by the Joint Standing Committee of Congress.[34] Congress has been all too ready to delegate its authority to the president, effectively waiving its responsibilities in the face of an executive prepared to rule by decree. The citizens, for their part, are distrustful of politicians, and this has created a crisis of political representation that affects the prestige of Congress.[35]

The Chamber of Deputies

The Chamber of Deputies is designed to represent the people of Argentina as a whole by reference to population. According to Article 45 the chamber

is “formed by representatives elected directly by the people.” Like most such houses, it has exclusive power to initiate bills imposing taxation. In addition, bills for recruiting troops must be initiated in the Chamber of Deputies, which is also where impeachment proceedings begin.[36]

Nevertheless, the federal system exerts a notable influence on the composition of the Chamber of Deputies, both legally and politically. Each province and the city of Buenos Aires constitutes a single electoral district, from which deputies are elected, using a system of proportional representation involving closed party lists. Deputies must have lived for at least two years in the province from which they are elected, and elections to fill a vacancy are called by the government of the relevant province. The number of deputies to which each district is entitled depends on the size of its population, with two qualifications: first, each province is entitled by law to a minimum of five deputies; second, apportionment depends on action by Congress, following a census. There is no compulsion on Congress to act, and the present distribution is based on the census of 1980, despite the fact that more recent census results are available from 1991 and 2001. Not surprisingly, in these circumstances, the most populous provinces are significantly underrepresented in the Chamber of Deputies, and there are disparities in the entitlements of all provinces. At least ten times as many votes are necessary to be elected deputy in the provinces of, for example, Buenos Aires, Córdoba, and Santa Fé as are needed to be elected in Tierra del Fuego and Santa Cruz. Even so, the number of deputies from the largest three provinces and the city of Buenos Aires outnumber deputies from the other provinces in the house.

Members of the Chamber of Deputies serve for four years, and there is no restriction on re-election. Half of the chamber faces election every two years. A closed list system of proportional representation facilitates control of choice of candidates by the political parties. Provincial governors can effectively determine the list of candidates for their party from the province and thus have extensive influence on the voting behaviour of their members in the Congress. In practice, though, most political decisions are taken by the president with the support of provincial governors, who, due to tax-sharing arrangements, are economically dependent upon the federal government. The effect of this particular manifestation of hyperpresidentialism is to subordinate Congress to the executive branch as well as to subordinate the provinces to the centre, thus weakening both the separation of powers and federalism.

The Senate

The Senate is designed as a federal chamber, representing the constituent units of the federation. This is evidenced by a variety of features. As with the Chamber of Deputies, senators must have resided in their province for at

least two years, and provincial governments initiate elections to fill vacancies. Most significantly, however, each province and the city of Buenos Aires is equally represented in the Senate, irrespective of population size, by three senators, again using the province as a single electorate, as for the Chamber of Deputies.[37] The political party that secures the majority of votes takes two Senate seats in each province; the party that secures the next highest vote takes the third seat. Each senator has one vote. The equality of votes is maintained by conferring the presidency of the Senate on the vice-president of Argentina, who has no right to vote unless the votes of senators are tied.[38] Senators serve six-year terms, and there are no restrictions on re-election. One-third of the Senate is renewed every two years.

The current composition of the Senate is the result of substantial changes made in 1994. Before this time, each province was entitled to only two senators, elected by the legislature of the province concerned. In 1994, however, the number of senators for each province was increased to three, with senators being elected by the citizens of each province directly. This latter change mirrors the Seventeenth Amendment to the Constitution of the United States, ratified in 1913, and is regarded as being consistent with the principles of democracy and popular sovereignty. Despite the change, however, some provincial constitutions, including those of San Juan, Córdoba, La Rioja, and Tierra del Fuego, still authorize the provincial legislature to instruct federal senators on matters related to their particular interests. In addition, the legislatures in the latter two provinces can request the Senate to remove senators who do not follow those instructions. Objections have been raised as to the constitutionality of these provisions on the grounds that they limit the authority and immunities of the legislative branch. However, no provincial legislature has attempted to use this procedure.

According to the Constitution, the Senate is a powerful chamber. It must approve all legislation. It has functions of great institutional importance, including the trial of officials impeached by the Chamber of Deputies, authorization of a presidential declaration of a state of siege, and consent to the appointment of a range of officials, including justices of the Supreme Court, ambassadors, and high officers of the armed forces. In addition, since 1994 the Senate has had the sole authority to initiate two forms of legislation with particular potential significance for the federal system: the tax-sharing or co-participation agreements envisaged by Article 75(2) of the Constitution and laws providing for balanced development of the country, enacted pursuant to Article 75(19).

In practice, however, the Senate is inhibited in the exercise of its authority by the same hyperpresidentialism that affects the Chamber of Deputies. In consequence, it does not fulfill a federal role of the kind suggested for it by the Constitution, despite the changes to its composition introduced in

1994. Its failure to do so has been manifested in a range of contexts. Despite the promise of a mutually agreed upon and transparent legal framework for tax-sharing, for example, no law has been enacted, despite a constitutionally prescribed deadline which was passed at the end of 1996. These critical decisions therefore continue to be made in private negotiations between the president and the governors, which avoids a public and transparent debate in the Senate, with the participation of the elected representatives of the provinces.

NATIONAL EXECUTIVE BRANCH

The president is "the supreme head of the Nation, head of the government and ... politically responsible for the general administration of the country."[39] Both the president and the vice-president are directly elected, using the entire country as a single constituency, with a second round of voting if required. The president is elected for a fixed four-year term and may be re-elected only once for a consecutive term.

Prior to the constitutional changes of 1994 the president was elected indirectly, through an electoral college. As in the case of senators, the changes that were made in 1994 were designed to better accord with principles of democracy and popular sovereignty. However, some scholars take the view that the new arrangements have had a detrimental effect, diminishing the influence that the smaller provinces were able to exert through the electoral college and thus increasing the potential for presidential elections to be decided by only four or five large provinces. Others prefer the current system on the grounds that it is more democratic than the one it has replaced.

The point was made earlier that the presidency of Argentina was modelled on the Constitution of the United States but that, under the influence of Alberdi, the role of the president was strengthened in some respects. The president has extensive formal constitutional powers, which are both maximized and further extended by political practice. The categories of presidential power granted by the Constitution include co-legislative and regulatory powers; powers to appoint and remove senior public servants; oversight of financial management; commander in chief of the armed forces; and authority to represent Argentina in foreign affairs. In addition, as noted in the earlier discussion of Congress, the presidency has assumed a significant part of the legislative authority of Argentina through delegations of power from Congress by which the procedures allowing executive decrees in cases of emergency have been abused, thus making Congress a contributing partner in violations of the separation of powers.

The president appoints the chief of the ministerial cabinet and the ministers. There is no established practice of taking ministers from different

provinces. The ministers countersign and thus give legal effect to the actions of the president[40] and take responsibility for administering government departments. Ministers are not members of Congress, although they may attend meetings, may be summoned by either house, and must submit reports to Congress annually. They are individually liable for their own decisions and collectively liable for joint ones.

The position of chief of the ministerial cabinet is relatively new. This change was also made in 1994, with a view to limiting the power of the president.[41] The functions of the office, as described in Article 100 of the Constitution, include the general administration of the country; appointment of most administrative employees; preparation of cabinet meetings; submission of certain categories of bills to Congress; and collection of taxes and implementation of the budget. The chief of cabinet has special responsibilities in relation to emergency decrees. He or she must countersign them together with other ministers and must personally submit such decrees to the Joint Standing Committee of Congress within ten days of their promulgation.

Unlike ministers, the chief of cabinet is politically answerable to Congress, attending sessions once a month and alternating between houses in order to inform Congress about government progress. The chief of cabinet can be censured by Congress and may be removed from office by a majority vote of members of each house. In these respects, the position seems to be similar to that of prime minister in a parliamentary system. The similarity is superficial, however. In reality, the position of chief of cabinet is that of a coordinating minister in an essentially presidential system, which has been designed to impose greater discipline on the exercise of presidential power without changing the nature of the system. The chief of cabinet answers to the president, who makes the initial appointment and may terminate it as well. Similar arrangements, with similar objectives, have been put in place in other presidential systems in Latin America, including Uruguay and Peru. Despite the original intentions, however, ten years after the introduction of the position of chief of cabinet, it seems to have had no significant effect on diminishing the strength of the presidency.

FEDERAL ADMINISTRATION

As head of the government, the president is politically responsible for the administration. The chief of cabinet, as head of the administration, answers directly to the president. Congress also exercises some control by virtue of its authority in budgetary matters and through its relationship with the chief of cabinet. In performing this function, Congress is assisted by the General Audit Office, established by Article 85 of the Constitution as

an advisory body to Congress. The chairperson of the audit office is appointed on the recommendation of the opposition party with the largest number of members in the Congress.

The federal government administers its own legislation. For the most part, the federal administration is concentrated in the capital. It thus contributes to centralizing the country as a whole around the metropolitan area of Buenos Aires. Thanks to this concentration of activity, less than 1 percent of the territory of Argentina hosts almost 35 percent of the population, and almost 80 percent of Argentine production originates in an area bounded by a radius of 500 kilometres around Buenos Aires. Some national institutions can be found in other parts of the country, however. These include courts, universities, military bases, national banks, and the federal administration of public revenue.

The 1994 constitutional changes foreshadowed the establishment of some other institutions that would be more distinctly federal in character. The provinces are represented on some national regulatory bodies that monitor public services such as gas, electricity, and airports, pursuant to a constitutional provision that authorizes their involvement in the activities of bodies monitoring consumers' rights.[42] The provision dealing with the constitutionalization of the tax-sharing or co-participation arrangements also provides for a federal fiscal commission to control and monitor the arrangements, in effect taking over the current functions of the statutory Federal Tax Commission. The Constitution mandates the representation of all the provinces and of the city of Buenos Aires on the Federal Fiscal Commission. The commission has not been established, however, nor have steps been taken to provide for the participation of the provinces on the board of directors of the central bank, as envisaged by the Constituent Assembly.[43]

FEDERAL JUDICIARY

There is both a federal judiciary and a judiciary for each province[44] as well as distinct concepts of federal and state jurisdiction. Federal jurisdiction is exercised by federal courts below the level of the Supreme Court of Justice and cannot be exercised by provincial courts. The Supreme Court has original jurisdiction only in matters involving diplomatic representatives and cases involving a province as a party, as in the United States. Otherwise, the Supreme Court has appellate jurisdiction over all other matters falling within the federal judicial power.

Federal jurisdiction extends to cases involving diplomatic representatives; relating to navy and maritime jurisdiction; involving the nation as a party; and arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different

provinces, or between a province (or the inhabitants of a province) and a foreign state or citizen.[45] It also includes matters arising under the Constitution and under national laws, with the important exception of the legislative codes enacted pursuant to Article 75(12). Jurisdiction under the codes is apportioned between federal and provincial courts depending on their "respective jurisdictions for persons or things." Various mechanisms are available to preclude the emergence of different interpretations of a federal code between different jurisdictions. These include an approach to the Supreme Court of Justice to obtain an authoritative interpretation by extraordinary appeal, which is available only in federal cases, unless the sentence of the provincial court is considered arbitrary; plenary meetings of provincial courts of appeal; or, in the case of the criminal code, a determination of the National Penal Cassation Court. These mechanisms are not comprehensive, however, and there is some incentive to forum shop.

Both federal and provincial courts interpret and apply the national Constitution to cases otherwise falling within their respective jurisdictions. As in the United States, all courts thus have a responsibility to apply the Constitution; unlike in the United States, however, there is no formal doctrine of *stare decisis*. The final arbiter of the meaning of the Constitution is the Supreme Court. To this end, it has an extraordinary appellate jurisdiction from provincial courts. There is an extensive jurisprudence of the Supreme Court exercising its jurisdiction on extraordinary appeal.

The Supreme Court of Justice is recognised by Article 108 of the Constitution, which also authorizes the creation of other federal courts. The tenure and remuneration of federal judges is protected under Article 110 in the interests of securing judicial independence. In 1994 a council of the magistracy was established with the aim of safeguarding the independence of the federal judiciary. The council comprises a mixture of representatives of the executive branch, members of Congress, judges, academics, and lawyers and is chaired by the chief justice of the Supreme Court. Its functions are to nominate three candidates to the president for appointment to the lower federal courts, following a public, competitive process; to administer the budget of the courts; to take responsibility for disciplinary proceedings; and to make the rules for judicial organization.

Judicial appointments are made by the president, with the consent of the Senate, in a public meeting. For present purposes, it is necessary to distinguish between appointments to the Supreme Court and to other lower federal judicial positions. In the former case, the consent of two-thirds of the members of the Senate who are present is required by the Constitution. In the latter case, an appointment is based on a short list of candidates submitted by the Council of the Magistracy, and only a simple majority of votes of the present members of the Senate is required. In practice, the will of the president always prevails.

The vast majority of justices of the Supreme Court, moreover, come from the federal capital; very few are drawn from the provinces. In 2005, for example, there were only two justices from the provinces on the Supreme Court. Although the goal of establishing the Council of the Magistracy was to diminish political influence over the judges, it is difficult to eliminate political influence from a procedure that involves appointment by the president and the consent of the Senate. Proposals to reduce the size of the Council of the Magistracy from 20 to 13 members would further enhance the influence of the president on its decisions.

Lack of independence of the judiciary remains a problem for governance in Argentina and for the working of both the federal and the provincial institutions of government. In particular, presidents have intervened markedly and repeatedly in the make-up of the Supreme Court. In 1947, for example, during the first presidency of Juan Domingo Perón, four members of the Supreme Court were impeached and replaced by judges more sympathetic to the regime. Similar exercises designed to influence the composition of the Court through impeachment of judges and appointment of new ones took place in 1955, 1958, 1973, 1976, and 1983. President Menem increased the number of members of the Court from five to nine, thus enabling the appointment of four new judges. President Néstor Kirchner, who took office in 2003, promoted the impeachment of all four of Menem's appointments, two of whom resigned before the proceedings were complete. By 2005 Kirchner had already appointed four members to the Supreme Court and was expected soon to be in a position to appoint two more.

Not surprisingly, in these circumstances, the Supreme Court has not played a significant role as the guarantor of federalism. In most cases of conflict between the spheres of government, it has favoured the power of the federal sphere over that of the provinces and municipalities. In particular, the Supreme Court has taken a broad view of federal power under the commerce clause, following U.S. jurisprudence. It has also declined to determine the constitutionality of federal interventions in the affairs of the provinces under Article 6 of the Constitution, on the grounds that these are political questions. There have been more than 175 such interventions in the history of Argentina, most resulting in the removal of provincial authorities, despite the constitutional guarantees of provincial autonomy and the ostensibly limited nature of the federal power to intervene.

THE PROVINCES AND THEIR INSTITUTIONS

Provincial Constitutions and Provincial Autonomy

The provinces have considerable autonomy in relation to their institutional, political, administrative, and financial arrangements. Each province

exercises the right to change its own constitution from time to time, consistent with the national Constitution. The relative constitutional autonomy is reflected in Article 5 of the national Constitution, which requires each province to make its own constitution within the parameters laid down in the article. A provincial constitution must be made "under the representative republican system," must be "in accordance with the principles, declarations and guarantees contained in the federal constitution," and must ensure "its administration of justice, its municipal regime and primary education." The federal government, for its part, guarantees that the provinces can enjoy the exercise of their institutions.

The fourteen provinces that predated the federal state enacted their own constitutions before 1853. These constitutions, together with the interprovincial pacts and the attempts to organize the country from 1810, provide the institutional and historical background to the federal Constitution of 1853. With the enactment of the 1853 federal Constitution, the provinces introduced new provincial constitutions to adapt them to the new federal text. All were revised and approved by Congress, as then required by the federal Constitution. After 1860, however, the task of reviewing the constitutions of the provinces fell to the Supreme Court as part of its responsibility to finally interpret and apply the Constitution.

The provinces have continued to adapt their constitutions from time to time, in response to changes in the federal text. In some cases, changes to provincial constitutions have anticipated federal constitutional change. Thus several provincial constitutions led the way in social constitutionalism in Argentina by recognizing the rights of workers and giving votes to women before corresponding changes were made in the federal sphere.[46] Similarly, at least three provincial constitutions gave effect to human rights treaties before these were recognized in the national Constitution in 1994.[47] An important stimulus to the process of constitutional innovation in the provincial sphere was the creation of new provinces from what previously had been territories in the 1950s, at a time when interest in social constitutionalism was at a high.[48]

Normally, changes to a provincial constitution are made by a constitutional convention. After the legislature's declaration of the need of constitutional reform, the people of the province elect the members of the convention. In some provinces, however, an alternative mechanism is used, whereby the provincial legislature enacts changes to the constitution that are then submitted to referendum for final approval.[49]

PROVINCIAL LEGISLATURES

The structure of the legislative and executive branches and the relationship between them is broadly the same in the provinces and the city of

Buenos Aires as it is in the national sphere. In other words, each province essentially has a presidential system of government under which a governor is responsible for the executive branch and the legislature is independently elected and has a distinct existence, exercising functions broadly comparable to those of Congress.

Fifteen provinces[50] and the city of Buenos Aires have unicameral legislatures; the remaining eight provinces have bicameral legislatures.[51] Generally, the former are the smaller and less populous provinces, with the exception of Cordoba, which abolished its second chamber, the Senate, in 2001, largely for reasons of cost. Provinces with a bicameral system tend, conversely, to be the more populous provinces. In such provinces the lower house, generally called the house of deputies, is constituted so as to represent the people by reference to population size, while the provincial upper house, or senate, represents the various geographic departments of the province. The arguments in favour of bicameralism typically refer to the usefulness of two houses for scrutinizing draft legislation, better representing the different parts of the province, and providing more effective control of the executive branch.

A mixture of electoral systems is used for provincial elections. The majority of the provinces and the city of Buenos Aires use the same closed list and proportional electoral system for the house of deputies or its equivalent that is used for the national Chamber of Deputies. As to the provincial senates, generally one senator is elected for each department, or administrative unit, of the province. Some provinces with a unicameral legislature, however, use a mixed or combined electoral system, in which some members are elected from departments of the province and others from a list (for the province as a whole) in order to achieve proportional representation. Other provinces use a system in which one member is elected from each department or electoral district, without additional recourse to a list. There is thus a multiplicity of electoral systems in the provinces and the autonomous city of Buenos Aires.

Typically, the qualifications for election as senator are more stringent than are those for the lower house, on the grounds that, as with Congress, a provincial senate has greater powers in relation to, for example, the approval of the appointment of judges. This is a hangover from former conservative times, but in fact senates, where they exist, are politically more important than is the houses of deputies.

The provincial legislatures have an important federal role, in addition to their responsibilities in relation to general provincial legislation and scrutiny of administration. In particular, they must approve any fiscal co-participation agreement, interprovincial agreement, and agreement with the federal government or with other spheres of government. Such agreements are an important means of involving the provinces in the process of national and supranational integration within the framework of the globalized world. For

instance, the provinces of Córdoba, Santa Fé, and Entre Ríos created the central economic region in 1998–99 by interprovincial agreement for the purpose of enhancing its social and economic development, using the procedures available in Article 124 of the federal Constitution. In such a case, the provincial governors first sign the interprovincial treaty or agreement, which must subsequently be approved by the legislatures.[52]

Nevertheless, the provincial governors, like the president, dominate the legislatures – and for similar reasons. Governors have extensive formal constitutional powers, and the political practices associated with hyperpresidentialism are also at work in the provinces. In some provinces, governors use executive decrees and exercise their own emergency powers. As in the federal sphere, these practices weaken the system of checks and balances, with particular implications for the role and operation of the legislatures.

THE PROVINCIAL EXECUTIVE

A governor is the provincial head of state; the head of government of the city of Buenos Aires is in a comparable position. The governors also preside over the government and the provincial administration. They have powers similar to those of the president, including co-legislative and regulatory powers, powers to appoint and remove public officers of various kinds, budgetary responsibilities, and authority to represent the province within a variety of contexts. Each governor appoints ministers and assigns competences to them, in accordance with provincial law. Ministers are subject to impeachment in the legislature but can also be removed by the governor. Ministers countersign decisions of the governor in relation to their areas of responsibility and are required to report annually to the provincial legislature on the affairs of their ministries.

The governors are the focus of political power in the provinces. They are elected by a simple majority of votes in all jurisdictions, except in Corrientes and Tucuman and in the city of Buenos Aires, where a second round of voting is used when necessary. All provinces also have vice-governors, who are directly elected with the governor on a joint ticket and who replace the governor in the event of his or her absence. In addition, as in the national sphere, vice-governors preside over the provincial legislatures in unicameral systems or the provincial senate in bicameral systems.

All governors hold office for four years. Some provincial constitutions forbid re-election for a consecutive term,[53] but a majority allows re-election for one consecutive term.[54] In six provinces[55] the constitution allows the re-election of the governor indefinitely. These provisions appear to entrench incumbents in power, to the detriment of republicanism. Governors have been repeatedly re-elected in almost all of these provinces, consolidating political hegemony in another illustration of the political and democratic difficulties faced by Argentina. For example, in Santiago del Estero, the

same person, Carlos Juárez, was elected as governor for five consecutive periods, after which, in 2003, he was succeeded as governor by his wife. This episode was ended by federal law in 2004, in consequence of federal intervention in the affairs of the province under Article 6 of the national Constitution on the grounds that the arrangement violated the republican system. But there were, and are, other situations like this one.

Together with the president, provincial governors exercise the real political power in Argentina. They are the leaders of their political parties, and they define the list of provincial candidates for the provincial legislatures and the Congress. On the face of the constitutions, provincial governors also have important functions in relation to the federal system, although, for the most part, they do not do much to defend provincial autonomy against federal inroads. In general, the governors follow the political directives of the president and of the federal political parties, to the detriment of provincial interests and powers. In the dynamic between the president and the governors, the political and economic power of the federal government dominates, and governors do not act together to press the president. This is not new: it is the product, in part, of the long-standing economic dependence of the provinces on the national government, and it underscores the need for enactment of the tax co-participation law.

PROVINCIAL ADMINISTRATION

Each province has its own administration. As head of the provincial government, the governor is politically responsible for the provincial administration. The provincial legislatures also exercise some control, by virtue of their authority in budgetary matters.

The provinces do not administer federal legislation. Oddly, in these circumstances, Article 128 of the national Constitution describes the governors as "natural agents" for the enforcement of national laws, a provision to which governors sometimes point when sponsoring provincial legislation that complies with federal law. The federal government also points to this provision, from time to time, to indicate the duty of a province to comply with federal law. Otherwise the provision has little effect. Structurally, Argentina is a dual federation. Specific intergovernmental arrangements aside, there are no formal links between federal and provincial bureaucracies.

The core unit of the provincial administration is the ministry, headed by a minister appointed by the governor. The number and denomination of the ministries vary between provinces. Some administrative reform is under way in the provinces, although it is slow. Cordoba is one of the leaders. The provincial constitution lays out the objectives and principles of provincial administration, in terms of effectiveness, efficiency, economy, and equality of opportunity. Efforts are also under way to achieve decentralization in the interests of responsiveness and greater efficiency.

PROVINCIAL JUDICIARY

Article 5 of the national Constitution obliges the provinces to ensure the administration of justice and of the republican regime, but it does not imply any specific organization and structure for the provincial judiciary. The provinces thus have broad discretion to institute the system that each deems suitable for the adequate exercise of the judicial function. There is a hierarchy of courts in each province, with a superior tribunal of justice or supreme court of justice at its apex and a series of lower courts below. The constitution of each province provides a framework for the judiciary. Typically, the constitution refers at least to the higher courts; the remainder may be left to establishment by ordinary law.

The provincial constitution also prescribes the jurisdiction of the courts and aspects of judicial procedure. Each province has its own code of procedure, although there are no significant differences between them. The provincial judiciary has exclusive authority to exercise judicial power, although jury trial is available in some lower courts.

Provincial courts exercise the function of constitutional control and may declare the unconstitutionality of any rule or act of the legislature or executive of the province. In the first instance, they apply the provincial constitution, but they must also apply the federal Constitution. In addition, as noted several times already, they must apply the federal codes in circumstances that fall within their jurisdiction.

Approximately half of the provincial constitutions provide for a council of the magistracy, constituted by representatives of lawyers, judges, the provincial legislature, and the provincial executive. The council has responsibility for selecting judicial officers for appointment to the lower courts through a system of public competition, in much the same way as the comparable council operates in the federal sphere following the changes of 1994. As in the federal sphere, a provincial council presents a list of three candidates to the executive branch from which the latter must, with legislative agreement, select the new judge. The council also deals with the initiation of disciplinary proceedings against judicial officers. Other provinces continue to use the traditional mechanism for appointment of judges by the governor with the approval of the legislature.

LOCAL GOVERNMENT[56]

Provision for municipalities was included in Article 5 of the federal Constitution of 1853 as one of the features for which provincial constitutions were obliged to provide. After extensive discussion of its legal implications, the changes to the federal Constitution in 1994 added a further acknowledgment of municipal autonomy, in Article 123, in the following terms: "Each province enacts its own constitution ... ensuring municipal autonomy and

regulating its scope and content in relation to institutional, political, administrative, economic and financial affairs." The obligations thus placed on the provinces to ensure municipal autonomy extend, in the case of larger municipalities, to authorizing enactment of a municipal charter. More than 110 municipal charters had been enacted by 2005. Where charters exist, they represent a third sphere of constitutional power.[57] Pursuant to the constitutional requirement, the provinces must also provide for the popular election of local authorities; assign administrative functions to them, which are not dependent on another sphere of government, in relation to utilities and other services; and allow them to collect and invest local revenues.

All municipal authorities are elected by the people of the municipality. Typically, there is an executive body, under the charge of the mayor, or *Intendente*, and a deliberative organ, the municipal council, or the *Concejo Deliberante*. In some provinces, of which Cordoba is an example, there is also a tribunal of accounts (*Tribunal de Cuentas*), which is an organ of control, also elected by the people.

For the most part, municipalities are subject to control only on the grounds of legality, as exercised through the courts. Only in really exceptional situations, provided by the provincial constitution, may a province intervene in the affairs of a municipality. Typically, intervention requires a law passed by the provincial legislature with a higher-than-usual quorum. Municipalities may challenge laws or actions of either the federation or a province in order to protect their own autonomy. Generally, a challenge to the action of a province must begin in a provincial court but may reach the Supreme Court of Justice, either through an extraordinary appeal or through an *amparo* action against the province, invoking the original, exclusive jurisdiction of the Supreme Court.

It is clear from what has been said already that the obligation to establish and structure municipalities in accordance with the Constitution lies on the provinces. But the power of the provinces must be exercised within the constraints imposed by the federal Constitution; in particular, it must provide for the autonomy of municipalities in the four respects to which the Constitution refers. Failure to comply with the Constitution in this respect may lead to federal intervention. Thus, while there is no direct relationship between the federal sphere of government and the municipalities, there is an indirect relationship. In any event, the dominant political, economic, and financial power of the federal sphere gives it significant influence in local life.

There are no intermediate entities between the municipalities and the provincial governments. But the idea of "intermunicipal relationships" is growing. These involve the creation of institutions or bodies to achieve shared goals. Examples include associations of municipalities and intermunicipal regulatory or service-delivery bodies. For the moment, these exist only in some provinces. Entities of this kind are created by the municipalities without the involvement of the provincial government. Appointments are

made by decision of the participating municipalities, represented through an appropriate officer, who is usually the mayor. It follows that there is no popular election for the leadership of such intermunicipal entities.

The powers of municipalities are established by the provincial constitution and by municipal charters, where these have been enacted. In general, the provincial constitutions authorize not only intermunicipal cooperation but also interjurisdictional relationships, encouraging local government to interrelate increasingly with the other spheres.[58]

Notwithstanding the greater measure of constitutional protection accorded to municipalities since 1994, in this as in other respects there is a notable distance between the rule and reality, detracting from the autonomy of local self-government. At one level, the cause is the economic dependence of the municipalities on the provinces. At another level, however, it can be ascribed more generally to the political and legal culture of Argentina, manifested in continuing violations of the constitutional order.

INTERGOVERNMENTAL RELATIONS

From the outset, in the versions of the federal Constitution of both 1853 and 1860, the provinces were authorized to enter into domestic treaties with each other. The potential of this procedure began to be realized from the middle of the twentieth century, as Argentina evolved from a dual federation to one characterized to a greater degree by cooperation and consensus, in what was described earlier as the third stage of the history of the Argentine federation. The initial catalyst for the development of interjurisdictional cooperation was public works. Prominent examples include the construction of bridges, the interprovincial tunnel under the Parana River, the common management of interprovincial river basins, and the creation of hydroelectric committees.[59] Federal councils were created afterwards, involving participation by representatives of the federal government and all provincial governments.

One intergovernmental body of particular importance is the Federal Investment Council.[60] The council was created in response to a federal pact signed in 1959 between the provinces of Argentina, the municipality of the city of Buenos Aires, and the then national territories of Tierra del Fuego, the Antarctic, and the islands of the south Atlantic. It is a research, coordination, and advisory body responsible for advising on national investment in order to achieve development based on decentralization. Each province is represented on the assembly of the council by a minister. The assembly is the highest governing body, which appoints a secretary-general who is in charge of the technical and administrative running of the council. The costs of the council are shared proportionately between the federal government and the participating provinces.

The objectives of intergovernmental agreements now vary greatly, however. Federal councils, comprising ministers, exist in relation to a range of matters of common concern, including public works, energy, roads, education, and the environment. There is no need for federal authorization of such councils. Nevertheless, some councils have been established by laws passed by Congress. The Federal Council of Interior Security is an example.

The constitutional reform of 1994 took a number of important initiatives that are relevant to interjurisdictional relations. These included the provision for legislative agreement on tax co-participation and the associated establishment of the federal fiscal institution, about which much has been said already;[61] authorization of the establishment of economic regions;[62] the provision for a federal bank, which was intended to enable representation of the provinces, although the measure has not yet been put into effect;[63] and provision for provincial participation in public service regulatory institutions, also only partially complied with in practice.[64] In the wake of these changes, the text of the Constitution suggests that the federation of Argentina is cooperative in character. Failure to comply with many of the most significant of these constitutional provisions, however, means that the reality is somewhat different.[65] Something is needed to break this cycle. One possibility is that the creation of a forum of governors, as in the United States and Mexico, would help to create a different dynamic in relations between the federation and the provinces and, in particular, in relations between the president and the governors.

ANALYSIS AND CONCLUSIONS

Constitutional framework

In Argentina, as in general across Latin America, there is a large gap between legal standards and political practice, reflecting historical and continuing difficulties with the enforcement of constitutions and the rule of law. Dramatic violations of the institutional order in the form of coups d'etat have been further compounded by a state of almost constant political, economic, and social emergency, undermining the stability of government and respect for human rights.

The shortfall in respect for and compliance with constitutional principles has been attributed to "anomia": the violation of moral, social, and juridical norms.[66] For present purposes, it has a detrimental effect on both the institutions of government in Argentina and its federal system. Although the national Constitution establishes a federal form of government, for most of the 150 years of national government the country has been marked by profound centralization focused on the metropolitan area of Buenos Aires and dominated by the national government. Although the Constitution establishes

a separation of powers, in practice pre-eminent authority lies with the executive branch, which persistently exceeds the limits on its power vis-à-vis the legislative branch without adequate check from the judiciary.

Federal interventions in provincial affairs offer a particular manifestation of these difficulties. There have been more than 150 such interventions in the history of Argentina. Initially, in the first decades after the enactment of the Constitution of 1853, the president appointed a federal commissioner, or *interventor federal,* to mediate between the groups in conflict in order to resolve the immediate problem. Later, however, the federal *interventor* took the place of the governor in the exercise of provincial executive power. A federal *interventor* also had some legislative competences because a federal intervention usually affected the provincial legislature as well as the judicial power of the province. In time, the period for which the intervention lasted started lengthening, and more powers were conferred on the commissioners. Federal interventions came to be used by presidents to pursue the political unity of the country rather than as a constitutional means for dealing with exceptional emergency situations in order to secure the principles of the federal system.

Thus was consolidated a process whereby the provinces became politically, economically, and socially dependent on the national government. This problem was further exacerbated by repeated emergencies, with the result that emergency became a virtually permanent state.

Hopeful signs of improvement nevertheless appeared with the reestablishment of democracy in 1983. Provincial and municipal autonomy was enhanced, and the constitutional system was modernized through reforms to provincial constitutions and the enactment of municipal charters. Key changes to the national Constitution were introduced in 1994, with apparent relevance to both institutions of government and federalism. However, in part because of failure of implementation, these changes have not been effective. The country continues to be marked by a high degree of centralization and by considerable asymmetry in regional and provincial development, and this contributes to problems of social disintegration, poverty, and social injustice.[67]

There is some question as to what the solutions might be. Possibilities include the effective execution of the principles of the federal system, as prescribed in the national Constitution; dispersion of the concentration of political, economic, demographic, and cultural power that exists in the metropolitan area of Buenos Aires, through some kind of new territorial ordering of the country, possibly involving the transfer of the capital; realization of the roles that both the Senate and the Supreme Court might play in the operation of the federal system; further development of the mechanisms of intergovernmental cooperation for a range of purposes, including national development; strengthening provincial and municipal autonomy, giving

them a greater role in national and supranational integration; greater use of regions for economic and social development; and inculcation of federal principles into the doctrine and organization of political parties.

None of these necessarily requires constitutional change; rather, what is required to deal with the political and institutional problems that are endemic in Argentina is the implementation of the existing Constitution.

Interaction between federalism and representative institutions

There is, or should be, a convergence of objectives between representative institutions and federalism so as to ensure freedom and human rights and to limit power. One feature of a republican system is its acknowledgment of the freedom and the equality of persons, secured in part through the horizontal separation of the powers of the state. Federalism is another form of decentralization of power, secured in Argentina through a vertical distribution, which can be given full effect only under a democratic political regime that gives power to the citizens in both spheres.[68] The quality of government in the provincial and municipal spheres, and their capacity to act as either a check on or a partner with the federal sphere, presuppose an active participation on the part of the citizens in the respective jurisdictions.

Unfortunately, neither the republican institutions nor the federal system operate effectively in Argentina. The central problem is the concentration of power in the executive branch in both spheres, compounded by the domination of the provinces by the centre. The institutional design of the Argentine federation is reasonably apt to achieve the goals of both republicanism and federalism. In practice, however, in the manner and with the effects already described, there is a shortfall in constitutional compliance. To this extent, the solution is obvious, although the manner of achieving it is not. Given the institutional history of Argentina and the scale of its current problems, it is somewhat difficult to imagine the future.

NOTES

1 <http://www.cia.gov/cia/publications/factbook/geos/ar.html#People>, viewed 1 January 2006.
2 Index Mundi, Argentina GDP, <http://www.indexmundi.com/argentina/gdp.html>, viewed 28 January 2006.
3 The precise proportion is disputed, but it is less than 3 percent: <http://www.cia.gov/cia/publications/factbook/geos/ar.html#People>, viewed 1 January 2006.
4 See Constitution of Argentina, Article 75(17).
5 Andrés Solimano *Development Cycles, Political Regimes and International Migration,* World Institute for Development Economics Research, discussion paper no. 2003/

29, 1–30, p. 3. <http://www.wider.unu.edu/publications/dps/dps2003/dp2003–29.pdf>, viewed 28 January 2006.

6 In hierarchical terms, the status of the autonomous city of Buenos Aires is similar but not the same as that of the provinces.

7 Constitution, Articles 39, 40. The initiative enables a proportion of the voters to require Congress to consider particular measures within a period of 12 months. The procedure does not apply to bills dealing with constitutional change, international treaties, taxation, budgetary matters, and criminal law. In addition, Congress may submit a bill to referendum, which, if passed, automatically becomes law.

8 I have argued elsewhere, following Carlos Santiago Nino, that Argentina is an anomic society in the sense that it is characterized by failure to adequately observe legal norms. See Carlos S. Nino, *Un país al margen de la ley* [A Country at the Margins of the Law] (Buenos Aires: Emecé, 1992); Antonio M. Hernández, Daniel Zovatto, and Manuel Mora y Araujo, *Encuesta de Cultura Constitucional: Argentina – una sociedad anómica* [Survey on Constitutional Cultures: Argentina – an Anomic Society] (Mexico: Universidad Nacional Autónoma de Méjico, 2005). This book analyzes the result of a survey in which, to take a few indices as examples, 77 percent of 1,000 people polled declared a total or partial lack of knowledge of the Constitution, 86 percent thought that Argentina lives most of the time on the edge of legality, and 88 percent thought that Argentine people lack respect for the law and disregard it.

9 In addition to the coups d'état Argentina has experienced 52 states of siege, more than 150 federal interventions in the affairs of the provinces, and more than 80 years of economic emergencies.

10 Antonio M. Hernandez, *Las emergencias y el orden constitucional* [Emergencies and the Constitutional Order], 2nd. ed. (Mexico: Institute of Juridical Investigations of the National Autonomous University of Mexico and Rubinzal-Culzoni, 2003).

11 See in particular Article 76, authorizing Congress to delegate power to the executive branch in a case of "public emergency"; Article 99(3), authorizing the president to issue decrees of a legislative character on grounds of "necessity and urgency"; and Article 6, authorizing limited federal intervention in the affairs of a province "to guarantee the republican form of government."

12 The descriptor is common in Argentina. See, for example, Philippe Faucher and Leslie Elliott Armijo, "Currency Crises and Decisionmaking Frameworks: The Politics of Bouncing Back in Argentina and Brazil," <http://www.mindspring.com/~leslie.armijo/03currencycrises.pdf>, 17, viewed 3 January 2006.

13 Important principles of the republican form of government include the sovereignty of the people, the separation of powers, regular elections, the accountability of public officials, the public nature of acts of government, and the freedom of the press: Néstor Pedro Sagüés, *Elementos de derecho constitucional* [Elements of Constitutional Law], vol. 1, 2nd. ed. (Buenos Aires: Astrea, 1997), 277–280; Mario Midón, *Manual de Derecho Constitucional argentino* [Handbook of Argentinian Constitutional Law], 2nd ed. (Buenos Aires: La Ley, 2004), 78–84; Pedro J. Frías y otros, *Derecho público provincial,* [Public Provincial Law] (Buenos Aires: Depalma, 1987), 64.

14 Buenos Aires, Córdoba, Santa Fe, Entre Ríos, Corrientes, Mendoza, San Luis, San Juan, Santiago del Estero, La Rioja, Catamarca, Tucumán, Salta, and Jujuy
15 See also Article 121: "The Provinces reserve to themselves all powers not delegated to the Federal Government by this Constitution, as well as those powers expressly reserved to themselves by special pacts at the time of their incorporation."
16 *Bases y Puntos de Partida para la Organización de la Confederación Argentina* [Foundations and Starting Points for the Organization of the Argentine Confederation] (Buenos Aires: ed. Estrada, 1959).
17 Guido Pincione, "Constitutional Government and Liberal Freedoms: Lessons from Argentina", 2002, <http://www.utdt.edu/departmentos/derecho/publiciones/rtj1/pdf/pincione.pdf>, 1–7, viewed 28 January 2006.
18 In 1949, during the dictatorship of Juan Domingo Perón, constitutional changes were made via a procedure that, arguably, was unconstitutional. The changes were rescinded in 1956 and the previous constitutional order restored: Pincione, "Constitutional Government," 4.
19 Frias, Berardo, Cordeiro Pinto, Hernández, Iturrez, Vergara, Zarza Mensaque, *Derecho Publico Provincial* [Provincial Public Law] (Buenos Aires: Depalma, 1985), 389.
20 See Article 125 (formerly, Article 107).
21 The author had the honour of participating in this initiative as vice-president of the Drafting Committee of the National Convention. See generally Antonio M. Hernandez, *Federalismo, autonomia municipal y ciudad de Buenos Aires en la reforma constitutional de 1994s* [Federalism, Municipal Autonomy, and the City of Buenos Aires, under the Constitutional Reform of 1994] (Buenos Aires: Depalma, 1997); Susana Albanese, Alberto R. Dalla Via, Roberto Gargarella, Antonio M. Hernández, and Daniel Sabsay, *Derecho Constitucional* [Constitutional Law] (Buenos Aires: Editorial Universidad, 2004); Enric Argullol Murgadas, ed., *Federalismo y autonomía* [Federalism and Autonomy], (Barcelona: Editorial Ariel, 2004); Antonio M. Hernandez, *Reforma Constitucional de 1994* [Constitutional Reform of 1994] (Buenos Aires: Imprenta del Congreso de la Nación, 1995).
22 Although without disturbing the exclusive relationship between the provinces and municipal government: Article 123.
23 Article 129.
24 Article 124.
25 The regions do not constitute a further sphere of political government because they are created by the provinces and limited to the purposes of economic and social development.
26 Article 124 (1), empowering the provinces and the city of Buenos Aires "with the knowledge of Congress, to enter into international agreements provided they are consistent with the national foreign policy and do not affect the powers delegated to the Federal Government or the public credit of the Nation." The authority is particularly useful in relation to the development of binational frontier subregions, within the framework of Mercosur. See generally Antonio M. Hernandez, *Integracion y globalizacion: rol de las regiones, provincias y municipios* [Integration and Globalization:

The Role of Regions, Provinces and Municipalities] (Buenos Aires: Depalma, 2000). For an analysis of the role of the provinces under this authority see Néstor Pedro Saguës, "Los tratados internacionales en la reforma constitucional de 1994" [International Treaties under the 1994 Constitutional Reform], *La Ley*, 11 March 1994.

27 Article 124(2).

28 Article 125 (2).

29 Article 75(19).

30 Pedro José Frías, *Introducción al derecho público provincial* (Buenos Aires, Depalma, 1980), 6–8.

31 For a more detailed classification of the various roles of Congress, see Daniel Sabsay, "Legislative Power," in Susana Albanese, Alberto R. Dalla Via, Roberto Gargarella, Antonio M. Hernandez, and Daniel Sabsay, *Derecho Constitucional* [Constitutional Law] (Buenos Aires, Editorial Universidad, 2004), 562.

32 Article 30. A 2/3 majority of each house, voting separately, is required to declare the need for reform and a National Convention is convened to carry out the reform.

33 See Hernandez, *Las emergencias y el orden constitucional*, for an analysis of the effect of more or less permanent emergencies on constitutional principles, through the aggrandisement of the executive branch and the decline of Congress, with insufficient control on the part of the judiciary. This work also studies the economic emergency declared in 2002, the effects of which are still felt. The most serious consequence was the imposition of a financial and banking *corralito,* freezing $70,000 million dollars in the bank deposits of several million savers, who were gradually given back part of this money in pesos and bonds at a value that was not that of the dollar in the free market, with severe damage to the right of property and other constitutional rights.

34 Hernández,*Las emergencias y el orden constitucional*, 29–37; Ferreira Rubio Delia y Matteo Goretti, "Gobierno por decreto en Argentina," *El Derecho* 158 (1994): 748; Midón Mario, *Decretos de necesidad y urgencia en la Constitución Nacional y en los ordenamientos provinciales* [Decrees of Necessity and Urgency in the National Constitution and the Provincial Order] (Buenos Aires: La Ley, 2001), 59–69; and "Controles sobre los decretos de necesidad y urgencia" [Control over the Decrees of Necessity and Urgency], *La Ley*, 14 February 2000, 3–10.

35 See Hernández et al., *Encuesta de cultura constitucional: Argentina – una sociedad anómica* [Survey on Constitutional Cultures: Argentina – an Anomic Society] noting the results of a poll in which 45 percent of respondents expressed trust in the president, 14 percent in the National Supreme Court of Justice, 12 percent in Congress, and only 4 percent in the political parties (64, 74). Likewise, 63 percent expressed little or no interest in the discussions in Congress, and 93 percent consider that decisions are taken in Congress without concern for the people (74).

36 The officers subject to impeachment under Article 53 are the president, vice-president, chief of the ministerial cabinet, ministers, and justices of the supreme court.

37 Article 54.

38 Article 57.

39 Article 99(1).
40 In this respect, the Constitution of Argentina was influenced by that of France.
41 Other measures to this effect include the establishment of the Council of the Magistracy and conferral of autonomy on the city of Buenos Aires, resulting in the election of the mayor by the people of the city rather than in the appointment of the mayor by the president.
42 Article 42.
43 See, for example, the speech to the Constituent Assembly by Juan Carlos Maqueda, Member of the Drafting Commission. See also Antonio María Hernández, *Federalismo, autonomía municipal y ciudad de Buenos Aires en la reforma constitucional de 1994* [Federalism, Municipal Autonomy, and the City of Buenos Aires under the Constitutional Reform of 1994] (Buenos Aires: Depalma, 1997), 73–75.
44 Article 5 requires each province to enact its own constitution "ensuring the administration of justice."
45 Article 116.
46 Mendoza (1916); San Juan (1927); Entre Rios (1933); Buenos Aires (1934). The federal changes were first introduced in 1949 and finally incorporated into the National Constitution by the constitutional reforms of 1957 and 1994.
47 Neuquén (1957); San Juan (1986) and Córdoba (1987).
48 Chaco (1951); La Pampa (1951); Misiones (1953); Neuquén; (1955); Rio Negro (1955); Chubut (1955); Santa Cruz (1955); Formosa (1955). Tierra del Fuego became a province in 1990.
49 The provinces of Buenos Aires, Chaco, Chubut, Mendoza, Misiones and Neuquén use this procedure, although generally for the amendment of only one or two articles.
50 Córdoba, Chaco, Chubut, Formosa, Jujuy, La Pampa, La Rioja, Misiones, Neuquén, Rio Negro, San Juan, Santa Cruz, Santiago del Estero, Tierra del Fuego, and Tucumán.
51 Buenos Aires, Catamarca, Corrientes, Entre Rios, Mendoza, Salta, Santa Fe, and San Luis.
52 See Antonio María Hernández, *Integración y globalización: rol de las regiones, provincias y municipios* [Integration and Globalization: Role of the Regions, Provinces and Municipalities] (Buenos Aires: Depalma, 2000). The author served as adviser to the government of Córdoba at that time and drafted the interprovincial treaty.
53 Entre Rios, Mendoza, Santa Fe, and Tucumán
54 Buenos Aires, Cordoba, Catamarca, Chaco, Chubut, Jujuy, Neuquen, Rio Negro, San Juan, Tierra del Fuego, and the city of Buenos Aires
55 Formosa, La Pampa, La Rioja, Santa Cruz, Salta, San Luis, and Santiago del Estero
56 See, in general, Antonio María Hernández, *Derecho Municipal* [Municipal Law], 2nd ed. (Buenos Aires: Depalma, 1997); also *Derecho Municipal-Parte General* (Méjico: Universidad Nacional Autónoma de Méjico, 2003)
57 Hernández, *Derecho Municipal Parte General* [Municipal Law General Part], 140, where the subject of municipal charters is analyzed, and it is argued that they are true local constitutions, constituting a third level of constitutional power.

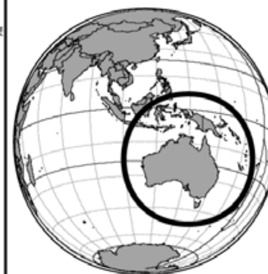
58 Antonio María Hernández, “Relaciones del municipio con otros municipios, la Provincia y la Región” [Relationship of the Local Government with Other Local Governments, the Province, and the Region], *Revista de Derecho Público* 2004–2 Derecho Municipal, Buenos Aires, Rubinzal-Culzoni Editores, 25–50.
59 Pedro José Frías, *Derecho Público Provincial* [Public Provincial Law] (Buenos Aires: Depalma, 1985), 104–113.
60 For the Web site of the council, see <http://www.cfired.org.ar/ingles/indices/f_cfi.htm>, viewed 31 January 2006.
61 Article 75(2).
62 Article 124. Regions already established include Gran Norte Argentino, Nuevo Cuyo, Patagonia, and Centre; they are, however, barely operational in practice.
63 Article 75(6).
64 Article 42.
65 Antonio María Hernández, “El federalismo a diez años de la reforma constitucional de 1994” [Federalism Ten Years after the Constitutional Reform of 1994] *A una década de la reforma constitucional* [A Decade after the Constitutional Reform of 1994] (Buenos Aires: Germán J. Bidart Campos-Andrés Gil Domínguez-Coordinadores, Ediar, 2004), 263–298.
66 Carlos S. Nino, *Un país al margen de la ley* [A Country at the Margins of the Law] (Buenos Aires: Emecé, 1992). See also Antonio María Hernández, Daniel Zovatto, and Manuel Mora y Araujo, *Encuesta nacional sobre cultura constitucional: Argentina – una sociedad anómica* [Survey on Constitutional Culture: Argentina – An Anomic Society] (Mexico: Universidad Nacional Autónoma de Mexico, 2005).
67 See Antonio María Hernández, “El. Fracaso del proyecto centralista” [The Failure of the Centralist Project] *La Nación*, 8 January 2003, analyzing an index of human development produced under the auspices of the United Nations in 2000, showing that the development index in the city of Buenos Aires, at 0.867 points, was six times higher than that in the province of Formosa, at 0.15 points.
68 Thomas Fleiner, Walter Kalin, Wolf Linder, and Cheryl Saunders, “Federalism, Decentralization and Conflict Management in Multicultural Societies,” *Federalism in a Changing World: Learning from Each Other*, ed. Raoul Blindenbacher and Arnold Koller (Ottawa: Forum of Federations, 2002), 197.

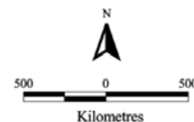
INDONESIA
PAPUA NEW GUINEA
SOLOMON ISLANDS
Indian Ocean
Great Barrier Reef
Northern Territory
Western Australia
Queensland
South Australia
New South Wales
NEW CALEDONIA (FR.)
Tasman Sea
GREAT AUSTRALIAN BIGHT
Canberra
Australian Capital Territory
Victoria
Indian Ocean
Tasmania

Australia

Capital: Canberra
Population: 20 Million
(2004 est.)

Boundaries and place names are representative only and do not imply any official endorsement.





Sources: CIA World Factbook; ESRI Ltd.; Times Atlas of the World

Commonwealth of Australia

CHERYL SAUNDERS AND KATY LE ROY

INTRODUCTION

As in any federation, the structure and operation of the institutions of government in Australia affect and are affected by the federal character of the polity. Three themes run through the following account of this relationship and assist us in understanding the particular form taken by Australian federal democracy.

The first theme concerns the underlying institutional dualism of Australia's system of government. Both the national sphere of government, the Commonwealth, and the six constituent units (or states) have an almost complete set of government institutions, through which each is accountable to its own voters for its own actions. Inevitably, shared rule makes its mark on this formal institutional structure. Most notably, the second chamber of the Commonwealth Parliament, the Senate, operates as a federal house, at least to the extent that it represents the people of all states equally. In addition, the High Court of Australia provides a court of final appeal from state as well as federal courts. Even so, dualism remains a significant feature of the system, affecting both the creation of new institutions and the adaptation of old ones and complicating the conduct of intergovernmental cooperation.

The second theme concerns the nature of the institutions that have been established in each sphere. The representative institutions of both the Commonwealth and the states take the form of parliamentary responsible government. Typically, this is a system of government that tends to concentrate power, encouraging an attitude towards governing that is antithetical to the acceptance of power-sharing normally required by federalism, aggravating the tension between majoritarian democracy and federalism.

The third theme concerns the manner in which the Australian federation now operates in practice. Despite its formal institutional structure, Australia's

system of government has for some time been characterized by an extensive and complex range of intergovernmental cooperative arrangements affecting most aspects of government and penetrating deep into the operation of the institutions themselves. Cooperation is facilitated both by the executive control of the various legislatures, which is a hallmark of many parliamentary systems, and by the relatively small number of Australian states. The degree of reliance on intergovernmental cooperation brings another dynamic to the system of government, necessitating negotiation between governments in intergovernmental forums and giving the states a voice of a different kind in national policy making. At the same time, however, such intergovernmental cooperation cuts across traditional mechanisms for ensuring the accountability of governments through their own legislatures and other institutional arrangements. In recent years, doubts about the constitutional validity of certain forms of cooperation have been raised by decisions of the High Court, leading to some changes in the design of intergovernmental arrangements that have eased, without eliminating, the accountability problem.

The structure and operation of federal democracy in Australia is in large part the product of history and circumstance. The Australian federation brought together six colonial polities that already had parliamentary systems. Dualism was a natural response to this, although it is also consistent with the vertical federal division of powers, in which each government is responsible for both making and implementing laws within its area of constitutional authority. Over time, the complexity of government made coordinate federalism unsustainable; the text of the Constitution, however, has proved largely resistant to change. Commonwealth power has been expanded through judicial interpretation. Otherwise, however, the changes that have occurred in the practice of federalism have been informal, taking place through unilateral government action or through intergovernmental cooperation, creating some tension with the formal institutional structure and, in some cases, with the constitutional text.

History

From the end of the eighteenth century, six British colonies were established around the coast of the Australian continent and on the island of Tasmania.[1] During the course of the nineteenth century, the colonies successively achieved self-government,[2] under their own constitutions and with their own governing institutions, which broadly followed the British tradition. Before the end of the century each colony thus had its own bicameral legislature, from which an executive government was drawn in accordance with the principles and practices of parliamentary government; a governor, representing the crown, who acted as local head of state but also

performed functions on behalf of the still sovereign imperial power; and a court system, culminating within each colony in a supreme court, from which appeals went to the Privy Council in London.

As the colonies moved towards self-government, parallel consideration was given to a form of union that would bring the colonies together for some purposes.[3] At first, the process was desultory; by the last decade of the nineteenth century, however, it had become more serious, driven by considerations of economic development, defence, and immigration policy. Two constitutional conventions were held, in 1891 and 1897–98, respectively, in which representatives of the colonies agreed on a draft federal constitution, which was eventually approved at referendum and enacted by the British Parliament.[4] Federation took effect on 1 January 1901, with the six colonies being the original, constituent states. The states retained their own constitutions and governing institutions, subject to the overriding Constitution of the Commonwealth of Australia.[5]

That Constitution had essentially two purposes: to create the framework for a federal system of government and to establish the institutions of government for the Commonwealth. Commonwealth institutions were also, for the most part, modelled along the lines of British parliamentary government, although with a somewhat more democratic cast. Thus, the Constitution provided for a bicameral parliament, both houses of which are elected; an executive government drawn from and depending on the confidence of the House of Representatives; a governor general, representing the Queen and performing locally the functions of a head of state; and a federal judicature, including the High Court of Australia as a final local court of appeal in matters of state as well as federal jurisdiction.

In other respects, however, the framers of the Australian Constitution drew inspiration from the Constitution of the United States. The Australian Constitution divides legislative, executive, and judicial powers between the Commonwealth and the states much in the manner of the United States instrument. It established a senate as a powerful federal legislative chamber in which the original states are equally represented, though this aspect of the combination of federalism and responsible government caused the framers some apprehension.[6] The terms and structure of the first three chapters of the Constitution, dealing with the legislature, the executive, and the judicature respectively, followed the Constitution of the United States so closely that, ultimately, they were held to create a constitutional separation of powers, albeit one that is peculiarly Australian:[7] weak between the legislature and the executive but strong with regard to the judiciary.

The procedure for changing the Constitution, by contrast, was loosely modelled on that of Switzerland. A proposal for constitutional change must first be passed by the Commonwealth Parliament and then approved at referendum by a national majority and by majorities in a majority of the

states.[8] Use of the referendum in this way broadly mirrors the process by which the Constitution was adopted in the first place.[9] It has proved relatively difficult, however, to secure change by this means. Only eight referenda to change the Constitution have been accepted over a period of more than 100 years, and at least half of those changes have been relatively minor.[10] The very substantial changes that have in fact taken place in the operation of Australian federalism over this period are thus attributable to political practice, including intergovernmental cooperation and judicial interpretation, rather than to alteration of the text of the Constitution.

The land and the people

Australia had an estimated population of 20.3 million in June 2005,[11] spread over a landmass of 7.7 million square kilometres.[12] The country is prosperous, with a GDP of US$30,480 per capita in 2004.[13] The Australian mainland, plus the island of Tasmania, is divided into the original six states and two self-governing mainland territories, which in public policy (if not in constitutional terms) are generally treated as state equivalents.[14] One of these, the Northern Territory, may eventually be admitted to statehood.[15] The other, the Australian Capital Territory, is the seat of the Commonwealth government.

The constitutional treatment of the original states is essentially symmetrical, although in reality the states vary significantly in many ways. New South Wales is the most populous, with 6.8 million people; Western Australia is geographically huge, with a land area of 2.5 million square kilometres; Tasmania is an island with a population of only 485,000 and a land area of 68,400 square kilometres; wealth and natural resources are distributed unequally among the states and territories.[16] Despite differences in capacity, however, each jurisdiction has sufficient land territory, population, and economic potential to function as a mini-government in its own right and as an effective partner in the federation.

European settlement from the end of the eighteenth century displaced and diminished the pre-existing Aboriginal population. In the 2001 census indigenous Australians constituted only 2.4 percent of the population. While they are dispersed throughout the country, they are proportionately more numerous in the north, and especially in the Northern Territory, where they constitute 29 percent of the total population.

The original settler population was predominantly Anglo-Celtic, but subsequent waves of immigration from countries in central and eastern Europe, Asia, Africa, and the Middle East made the population significantly more diverse, particularly in the major urban centres in the southeast. The dominant culture remains Anglo-Celtic, however, and the assumed common language is English. Most relevantly for present purposes, the composition

of the population does not provide a rationale for the boundaries or even the existence of the federated units. Although it is possible to detect some cultural differences between states, these are minor by comparison with federations elsewhere.

If anything, the relative homogeneity of Australia's population affects the dynamic of federalism in another way. In reality, many Australians have multiple ties of loyalty: to their city, state or territory, and country. In law, Australians have citizenship ties to both spheres of government, through participation in both democratic processes.[17] A sense of belonging at the subnational level may also be reinforced by the federalization of many institutions, including the legal and other professions, trade unions, and political parties. Generally, however, regional ties are weakening[18] – a phenomenon that is accentuated by the homogeneity and the mobility of the population, fuelling questions in some quarters about whether federalism in its current form is the most appropriate system of government for the country.[19]

THE COMMONWEALTH LEGISLATURE

General

The constitution and operation of the Commonwealth Parliament is influenced by the tension between majoritarian democracy, delivered through a system of responsible government based in the House of Representatives, and federalism, centred largely, although not wholly, in the Senate.

The Parliament performs the traditional role of a legislature in a common-law parliamentary system. It enacts legislation, generally on the initiative of the government; initiates proposals for constitutional change; authorizes taxation and expenditure; constitutes the government and holds it to account; and plays a constitutional role in the removal of judges. These functions are necessarily modified by the fact of federalism: that is, the law-making power is exercised only within areas of Commonwealth competence; Parliament authorizes only Commonwealth taxation and expenditure (which includes, significantly, general and conditional payments to the states); and the scrutiny function of Parliament extends only to the Commonwealth government and administration, including some intergovernmental bodies set up under Commonwealth auspices. There is no constitutional requirement for parliamentary involvement in areas that lie solely within the responsibility of the executive branch, including the appointment of judges and other public officers and the making and ratifying of treaties. Within the last decade, nevertheless, a process has been established to enable Parliament to contribute to the treaty-making process through a joint standing committee on treaties.[20]

As in most parliamentary systems in which one house, at least, is controlled by the executive branch of government, opinion varies about the extent to which Parliament can and should deliberate on proposed legislation and the performance of government. It is extremely rare for the majority in the chamber of the House of Representatives to act in a manner contrary to the wishes of the government (although the government-party room may be more lively), and, in the Senate, non-government majorities have been the norm since the introduction of proportional representation in 1949. A parliamentary committee system in both houses now offers parliamentarians a greater role in policy development, often with government approval.[21]

Australia has a strong two-party system, which tends to be the product of constituency-based elections to a Westminster-style parliament. There are also some smaller political parties, which typically win seats in the Senate but not in the House, although independent members of the House are occasionally elected. The parties are national parties but are organized along federal lines. There is some movement of politicians between Commonwealth, state, and local government; more usually, however, an aspiring politician seeks election in a particular sphere and remains there until voluntary or forced retirement. Under Commonwealth law,[22] voting is compulsory for both houses of the Commonwealth Parliament.

House of Representatives

The House of Representatives is constituted largely by reference to population numbers and is the chamber upon whose confidence the government principally depends. It has the sole power to initiate and amend taxation and key appropriation bills.[23] Invariably, the prime minister, the treasurer, and a majority of ministers are members of the House, although in practice some ministers are always drawn from the Senate as well. Each House of Representatives is elected for three years but may be dissolved earlier by the governor general,[24] who, for this purpose, almost always acts on the prime minister's advice. In practice, elections for the House are usually synchronized with the tri-yearly elections for half the Senate; on three occasions a proposal to amend the Constitution to require these elections to be held at the same time has been rejected. There is a long-running debate concerning whether to extend the term of the House to four years.[25] This would make simultaneous elections a rarity, however, unless the terms of senators were shortened to four years or lengthened to eight, both of which are regarded as unpalatable. For the moment, change seems unlikely.[26]

The Constitution requires the number of members of the House to equal "as nearly as practicable" twice the number of senators,[27] in a measure designed to maintain the numerical strength of senators in Parliament vis-à-vis the members of the House. As there are presently 12 senators

for each of the six original states, approximately 144 members of the House are elected from the states, from single-member constituencies, through a system of preferential voting. Despite its national character, federalism has some impact on the composition of the House. Apart from the "nexus" requirement to which attention has already been drawn, this total number of members of the House is allocated between the states in proportion to their respective population numbers, before constituency boundaries are drawn;[28] no electorate may straddle a state border;[29] each original state is guaranteed at least five members in the House, regardless of population;[30] and in the absence of valid electoral boundaries, the total number of members to which a state is entitled must be elected from the state as a single electorate.[31] Alteration of the Constitution to change the proportionate representation of a state in either House requires passage at referendum by majorities in all states concerned.[32]

Senate

The constitution and powers of the Senate are the result of a compromise at the time of federation between the more populous states of New South Wales and Victoria and the four smaller states. Like the House, the Senate is directly elected, in a deliberate departure from U.S. practice before 1913, pursuant to which U.S. Senate members were selected by state legislatures.[33] In other respects, however, the Senate is obviously constituted as a federal chamber. All original states are entitled to an equal number of senators, regardless of population size.[34] Initially, each had six, but the number has now doubled to 12, thanks to the nexus between the sizes of the two houses. The states have a constitutional role in determining the time and place of Senate elections,[35] issuing writs for Senate elections,[36] and filling casual Senate vacancies.[37] Voting procedures in the Senate confer on the president of the Senate a deliberative vote to ensure that each state maintains the equality of its voting strength.[38]

The Senate is a powerful chamber, thanks again to pressure from the smaller states. With the exception of taxation and key appropriation bills, which the Senate can reject but not initiate or amend, it has equal power with the House of Representatives in relation to all proposed laws.[39] On one famous occasion in 1975 the Senate's power to block budget bills led to the governor general's dismissing a government that had a majority in the House of Representatives.[40] While the events of 1975 were extraordinary and are unlikely to be repeated they have modified for Australia the assumption that a government with the confidence of the House of Representatives is secure until the next election.

The Senate was also designed as a chamber of review. This role is reflected in the relatively long, fixed, six-year term of senators and in the system of rotating membership, under which one-half of the senators for

each state face election every three years.[41] The review role of the Senate has been further enhanced by various aspects of the electoral arrangements. Each state is a single electorate for the purposes of Senate elections, although this could be altered by legislation if the government in Parliament so chose.[42] Since 1949 senators have been elected on the basis of a form of proportional representation.[43] The combined result of these features is that, usually, neither of the major parties (i.e., the Labour party and the Liberal party) has a Senate majority, so that the balance of power is held by minor parties or independent senators. The unusual sometimes happens, however. The half-Senate elections held in October 2004 gave the government a Senate majority for at least three years from July 2005.[44]

The composition of the Senate is key to the performance of both its constitutional roles. Its federal role is achieved through the equal representation of the original states, which increases the number of members of the Commonwealth Parliament from the smaller states, thus giving them a greater voice in national issues and providing a larger pool of small-state parliamentarians from which committee members and ministers can be drawn.[45] Given direct election to the Senate, however, it is unrealistic to expect it to provide more substantive protection either for federal principles or for the interests of individual states. The review role of the Senate, by contrast, depends on whether the party affiliation of a majority of senators enables them to take a position independently of the government in relation to proposed legislation and scrutiny of executive action.

Over the course of the twentieth century the Senate assumed an increasingly national, as opposed to federal, character. Typically, senators vote on party lines. In practice, the states normally exercise their authority to determine the time and place of Senate elections in accordance with a timetable prescribed by the Commonwealth to enable elections for the two houses of the Commonwealth Parliament to be held at the same time.[46] After the introduction of proportional representation, a further practice developed whereby states would exercise their power to fill casual Senate vacancies by appointing a member of the same political party as that of the retiring senator. When this practice broke down, in the heady constitutional atmosphere of 1975, the Constitution was amended to formalize it.[47] Even the character of the Senate as a body exclusively made up of senators for the states changed in 1975, when Commonwealth legislation made provision for the election of senators from the territories on terms and conditions controlled by Commonwealth law rather than by the constitutional framework of the Senate.[48] The validity of the legislation was challenged, but the challenge was twice dismissed by the High Court in a decision that preferred representation to federal principle.[49]

Unlike the U.S. Constitution, the Australian Constitution provides a formal procedure to resolve deadlocks over legislation between the two houses. This procedure is a minor victory for majoritarian democracy. The

actual procedure, however, recognizes the legitimate role of both houses and is designed to allow time for reflection in each. In brief, it comes into play when the Senate has twice rejected bills passed by the House, within prescribed time intervals. The procedure involves a double dissolution of both houses, followed by an election and a joint sitting of the members of both houses if the deadlock persists.[50] This mechanism is too slow to resolve deadlocks over general appropriation bills that are needed to authorize ongoing government expenditures. In effect, therefore, there is no specific procedure for resolving deadlocks of this kind. It is also cumbersome and costly, financially and politically, as a means for resolving deadlocks over bills of other kinds. As a result, the deadlock mechanism tends to be used for tactical political purposes, when it suits a government to have an election and, thus, the prospect of dissolving the whole Senate is attractive, rather than for dealing with disputes over particular legislative measures.[51] A proposal to simplify the procedure, to make it more likely that the will of the House of Representatives would prevail, was the subject of consultation in 2004; however, the proposal met a spectrum of reactions, from opposition to indifference, and was subsequently abandoned.[52]

A variation of the deadlock procedure for ordinary bills allows constitution alteration bills that have been rejected by one House twice, consistently with prescribed time intervals, to be put to referendum by the governor general.[53] In this, as in most other matters, the governor general is expected to act on government advice, making it unlikely that this procedure can be used for proposals accepted by the Senate but rejected by the House. This deadlock mechanism has also proven to be relatively unimportant, if only because a proposed alteration of the Constitution that is rejected by either house is unlikely to attract the broad support necessary for approval by the voters at referendum.

THE COMMONWEALTH EXECUTIVE

General

Parliamentary responsible government, as it applies in Australia, has two dimensions. The first dimension concerns the selection and operation of the government itself. The political party or coalition of parties with a majority in the House of Representatives forms the government, which thereafter depends on the continued confidence of the House (and the self-restraint of the Senate) to remain in office. The second dimension concerns the constitutional monarchy. The Constitution confers the executive power of the Commonwealth on the Queen but makes it "exercisable" by the governor general.[54] In practice, both the Queen and the governor general act on the advice of the government, which in turn draws its legitimacy

from the support of the House of Representatives. In highly exceptional circumstances, the monarch or her representative may be able to act without advice, exercising discretionary or "reserve" powers, the very existence of which is contested and controversial.[55]

These aspects of the Australian Constitution are notoriously opaque. The text of the Constitution reflects the formal, outer, institutional shell of constitutional monarchy. The real operations of the executive branch of government, including the institutions of prime minister and cabinet, depend on unwritten conventions and practices that modify and amplify the written text.

The Commonwealth executive develops and implements policy, administers the ongoing business of government, and generally exercises the "executive power of the Commonwealth."[56] The concept of executive power itself is largely informed by common-law principles, as developed within the context of the Australian Constitution. It includes, for example, the authority to sign and ratify treaties, to declare war and to make peace, to appoint judges and other public officers, to enter into contracts and to spend money, and to make agreements with other Australian governments. Policies that involve action of a legislative character (e.g., tax reform, telecommunications regulation, search of private premises, and censorship) require implementation by Parliament. The constitutional doctrine of separation of powers prevents the executive branch from exercising powers that are judicial in character.[57] The executive power of the Commonwealth is also limited by the federal division of power, which assumes that some executive powers fall within the authority of the states. The Constitution provides little guidance with regard to the lines of this division. It has been held, however, that the executive power of the Commonwealth is co-extensive with the subjects of Commonwealth legislative power and also includes power "deduced from the existence and character of the Commonwealth as a national government."[58]

Constitution of the political executive

The political executive comprises up to 30 ministers of state,[59] assisted by up to 12 parliamentary secretaries, and headed by a prime minister. Typically, only the senior ministers are members of cabinet, which is the principal deliberative body,[60] although other ministers may participate in cabinet discussions on matters relevant to their portfolio responsibilities. All ministers must be members of one or other house of the Commonwealth Parliament within three months of their appointment.[61] Appointment of a minister who is not already a member is almost unheard of.[62]

A new government is formed after each election. The governor general appoints as prime minister the parliamentary leader of the party that is

able to form a majority in the House of Representatives and appoints the ministers on the advice of the prime minister. There is no constitutional or legislative requirement for considerations of federalism to be taken into account in allocating ministerial portfolios, but in practice it is customary for each state to have at least one minister in cabinet. There are no other constitutional rules for the selection of the executive, although each political party has rules of its own.[63]

Head of State

Formally, Queen Elizabeth II is Australia's head of state, under complex arrangements that reflect the evolutionary process by which Australia achieved independence over the course of the twentieth century.[64] In relation to Australia, the Queen carries the style and title of Queen of Australia.[65] She is represented in the Commonwealth sphere by a governor general, whom she appoints on the advice of the Australian prime minister, for a period that usually lasts about five years and who now, invariably, is an Australian. All the functions of head of state are exercised by the governor general rather than by the Queen, and many of these are conferred on her/him directly by the Constitution. The governor general also carries out a range of ceremonial, civic, and community functions. A former governor general, seeking "a touch of healing" in the wake of the dismissal of the government in 1975, suggested that the office involved "interpreting the nation to itself"[66] – a view that has been endorsed by his successors. Government "advice" to the governor general is conveyed either by the prime minister or a line minister or, more usually, at a meeting of the Federal Executive Council by two or three ministers or parliamentary secretaries.[67]

The institution of the monarchy may have more significance for federalism than would appear to be the case at first sight. The Queen is a figurehead, owned by no single Australian jurisdiction. She is represented in Australia by a governor general and six state governors in an arrangement that reflects both unity and diversity. As representatives of the same monarch, state governors are regularly commissioned to play the role of governor general if the latter is unavailable.[68] On the other hand, the various representatives of the Queen do not have a subordinate relationship to each other. Actions by the Queen or her representatives in the various jurisdictions are clearly distinguished, using the terminology of "the Queen in right of" the jurisdiction in question.

These features of the present system present a minor challenge for the design of an Australian republic. The proposal to establish a republic that was unsuccessfully put to referendum in 1999 made no provision for state involvement in choosing the president and stipulated that, as a default position, the most senior state governor would act as president if the office

was temporarily vacant.[69] This was consistent with the then prevailing view that the republican model should make as few changes as possible to existing arrangements. It did not recognize, or at least acknowledge, the relevance of any federal considerations to the design of the new office of president. There are presently no signs that federalism will be a factor in designing the office if and when another attempt is made to sever Australia's links to the Crown.[70] It might, however, be a useful addition to a debate that has long since become polarized between two extreme options for selecting a president: by direct popular vote or by prime ministerial appointment. The failure to perceive that there is a federalist dimension to the office of national president in an Australian republic itself offers insight into attitudes about institutional design in the contemporary Australian federation.

Administration

In contrast to Germany, Austria, and, to a lesser extent, Switzerland, the assumptions on which the design of the Australian federation is based are that each jurisdiction will administer its own policies and legislation and that ministers will be responsible to the parliaments from which they are drawn for the conduct of the business of government.

The Commonwealth therefore has a complete bureaucracy, which is at least co-extensive with Commonwealth legislative responsibilities under the Constitution. In a few cases, of which tertiary education is an example, a Commonwealth agency administers direct Commonwealth spending in areas that are not obviously within Commonwealth legislative power.[71] In addition, other Commonwealth departments and agencies correspond to areas that are principally the responsibility of the states, including education, housing, and health, reflecting the extent to which the exercise of these state functions now depends on conditional grants from the Commonwealth, the administration of which require policy development and supervision. Overlapping responsibilities and shared interests of this kind mean that, even though each jurisdiction has its own administration, there is considerable interaction between them.

Each Commonwealth department of state is headed by a minister who is drawn from Parliament and is responsible to Parliament for the administration of his or her "portfolio." Traditionally, departmental officers were apolitical and were shielded from the political process by the doctrine of individual ministerial responsibility. There has been some erosion of this traditional model in recent decades, however, in Australia as elsewhere.[72] The most senior ranks of the bureaucracy now frequently change with a change of government. Ministers have offices of their own, which include political advisers responsible to them alone, through whom much of the

regular interaction with the department is conducted. Ministers are now less likely to accept political responsibility for administrative errors, unless they are personally involved in some way. Other mechanisms for accountability have emerged. Thus both ministers and public officials appear before parliamentary committees, including Senate estimates committees, which examine the proposed spending estimates for government departments. All Commonwealth departments and statutory bodies also prepare annual reports that are tabled in Parliament after being presented to ministers.

For the first 25 years after federation, the Commonwealth government was based in Melbourne, pending a move to a national capital. While the administration is now concentrated in the Australian Commonwealth Territory that territory is relatively small and is a considerable distance from all states except New South Wales, in which it is located. Many departments have a presence in some or all states because their responsibilities require sustained contact with the public. Political pressure ensures that capital spending by the Commonwealth takes place more or less equitably around the country.

Other institutions

In addition to the departments of state, each jurisdiction has a range of regulatory, supervisory, and other agencies. For present purposes, these other Commonwealth institutions may be categorized as follows.

First, there is a range of statutory authorities – with a greater degree of management and/or financial autonomy than is typically found in a department – created to administer particular Commonwealth programs. Bodies of this kind include the Australian Trade Commission, the Australian Broadcasting Corporation, and the Health Insurance Commission. Their structure and operation do not necessarily reflect the federal character of the polity in any way.

A second group of institutions plays a role in relation to federalism itself. One has constitutional status: the Interstate Commission (ISC), which is designed as part of the framers' original conception of constitutionally protected freedom of interstate trade.[73] Ironically, the ISC never played a significant role in the development of Australian federalism and is no longer in operation. On the other hand, the Commonwealth Grants Commission (CGC) is a major federal institution. The CGC is an independent statutory body that advises the Commonwealth on the allocation of general-revenue funds among states in accordance with the principle of fiscal equalization.[74] Members of the CGC are appointed in consultation with the states, which also participate in regular reviews of the methodology employed by the commission.

Institutions in the third category are intergovernmental in character. Typically, they are established by the Commonwealth to perform advisory

or regulatory functions. An example of the former is the National Competition Council (NCC), which oversees implementation of the national competition policy and which is responsible to the Council of Australian Governments (COAG).[75] Regulatory bodies of this kind exercise powers derived from the states as well as from the Commonwealth, either directly (through the conferral of authority by state parliaments) or indirectly (through a reference of state power to the Commonwealth Parliament), using the distinctively Australian procedure found in section 51 (xxxvii) of the Constitution.[76] The Australian Securities and Investment Commission (ASIC) is perhaps the most famous example. As with ASIC, in relation to such bodies, an intergovernmental agreement may provide for state involvement in appointments and aspects of the operation of the legislation,[77] although the Commonwealth government and Parliament generally assume primary responsibility for them. Further consideration of bodies of this kind is postponed until the later section on intergovernmental institutions.

The Federal Judicature

The Australian judicature has the usual characteristics of a common law judicature. General courts deal with questions about the lawfulness of government action as well as with disputes between private parties and criminal prosecutions. Given the status of the Constitution as fundamental law, the judiciary may also find acts of either the Commonwealth or a state parliament to be invalid on constitutional grounds.

Chapter III of the Constitution provides for the establishment of a specifically federal court system. The independence of the federal courts is protected by the constitutional separation of powers, which has been held to prohibit federal courts from exercising non-judicial power and to prohibit bodies other than courts from exercising federal judicial power.[78] The original justification for this strict understanding of the separation of judicial power was the need for an independent court system to apply the Constitution impartially between the spheres of government in a federation.[79]

Consistent with the Australian model for the federal division of power, jurisdiction is divided between the Commonwealth and the states. Federal jurisdiction encompasses disputes that arise under Commonwealth laws and, in that sense, is co-extensive with legislative power. In addition, it includes matters arising under, or involving the interpretation of, the Australian Constitution; suits against the Commonwealth or its officers; interstate disputes; and other matters considered by the framers to have national significance.[80]

The federal and state court systems are integrated to a much greater degree than are the other two branches. Two features are particularly important in this regard. First, the High Court is the final court of appeal from

federal and state courts as well as, potentially, a court of first instance in relation to all areas of original federal jurisdiction. Even though leave is now required to appeal to the High Court,[81] the effect of this arrangement is that the High Court can declare the common law for the whole of Australia. The notion that there is a single Australian common law, although diverse statutory regimes, has a homogenising effect in Australian federalism.

It should be noted, nevertheless, that, as far as the Constitution is concerned, the High Court is a federal court, to which appointments are made by the Commonwealth executive branch. Since 1978 the Commonwealth has been required to consult with state attorneys-general in making High Court appointments[82] – a somewhat loose obligation that may not require much more than an exchange of views. There is no practice of ensuring that justices of the High Court are drawn from different states. In 2005 all of the seven justices came from the eastern states and a majority of four came from New South Wales.

The capacity of the Commonwealth Parliament to confer federal jurisdiction on state courts contributes further to the integration of the Australian judiciary.[83] This device was used extensively in the decades following federation. By the 1970s, however, the Commonwealth began seriously to develop its own court hierarchy to adjudicate disputes under key Commonwealth statutes as well as disputes involving the Commonwealth itself. By 2005 the federal court hierarchy was complete, comprising the general Federal Court of Australia, the federal magistracy, and the specialist Family Court. Federal courts have registries in each state and self-governing territory. While their members may sit in different parts of the country, in general federal judges are drawn from the state in which most of their work takes place.

The development of the federal court system reflects the symbiotic relationship of common law courts with the other branches of government and is consistent with dualist assumptions. From the perspective of litigants involved in disputes raising questions in both federal and state jurisdiction, however, the development was inconvenient. In 1987, therefore, a cooperative statutory scheme was enacted, whereby the Commonwealth, all states, and the two self-governing territories conferred enough of their jurisdiction on the superior courts in all parts of Australia to enable such courts to dispose of the whole of a dispute brought before them.[84] In so far as this "cross-vesting" scheme involved the conferral of state jurisdiction on federal courts, it was held invalid by the High Court in 1999 on the grounds that it breached the constitutional separation of powers and that the Commonwealth Parliament lacked the power to consent to such a conferral.[85] This finding prompted further questions about Commonwealth power to consent to the conferral of state authority on other Commonwealth bodies – questions that are not yet fully resolved.[86]

INSTITUTIONAL ARRANGEMENTS IN THE STATES

General

The Australian Constitution was superimposed on the governing systems of the colonies. Its immediate impact was limited because the Constitution said relatively little about the institutions of government of the states. Over time, however, the significance of federation for state institutions has become increasingly apparent. In a variety of ways described below, the authority of state institutions is eroded to a greater degree by intergovernmental activity than by activities of the Commonwealth. In addition, the Australian Constitution has proved to have greater significance for state institutions than might initially have been perceived.

Several examples may be given. Section 106 of the Constitution was designed to preserve state constitutions but, in doing so, raised a question – still unanswered – about whether it is now the source of authority for the constitutions of the states.[87] The reference in the Constitution to the supreme courts of the states, in the context of conferring broad appellate jurisdiction on the High Court, raises an inference that the Constitution requires the states to have such courts.[88] The role of state courts in the partly integrated judicature has led to the conclusion that there are constitutional limits on the extent to which the states can treat their own courts in ways that are "incompatible" with their national role.[89] The constitutional freedom of political communication, implied from the establishment of Commonwealth representative institutions, protects criticism of state as well as commonwealth institutions.[90]

The Constitution refers to other state institutions as well. State parliaments fill casual Senate vacancies, for example, and state governors issue writs for Senate elections. It is not clear what, if any, constraints such references impose on state institutional design. That the states retain very considerable discretion, however, is undoubted. It has been held that the implied constitutional constraints on unfair Commonwealth electoral boundaries (such as they are) have no impact on unfair state electoral boundaries.[91] Both Commonwealth and state institutions also enjoy some implied constitutional protection from each other, rationalized by reference to federal principle.[92]

State legislatures

The role of the legislatures in the states and territories and their relations with the executive branch are broadly the same as in the Commonwealth sphere. Constitutionally, these legislatures have the same powers as does

any common-law parliament in relation to law making, taxation, and appropriation, and they have the same responsibility to form a government and to hold it to account. In practice, their role is diminished in various ways by intergovernmental arrangements. Thus, on average, about one-half of the revenue spent by state governments comes as transfers from the Commonwealth rather than as taxes raised under the authority of state parliaments (although much of it is subject to appropriation by state parliaments before it is spent). Schemes to secure uniformity of legislation and administration also affect the power and authority of state parliaments.

The legislatures in all states except Queensland are bicameral.[93] The more recently established legislatures of the Northern Territory and the Australian Capital Territory are unicameral as well. In colonial times, the second legislative chamber was a conservative check on the more democratically elected chambers.[94] The second chamber was either appointed[95] or elected on a restrictive property franchise.[96] Over the course of the twentieth century the struggle over the undemocratic character of these second chambers, called legislative councils, led to unicameralism in Queensland and constitutional entrenchment of the council in other states, where supporters of bicameralism prevailed. In these states legislative council reform has been an ongoing project. Some councils have lost their authority over money bills.[97] All have an electoral system that is acceptably democratic. Four states now use a system of proportional representation for election to the legislative council.[98] State assemblies, by contrast, are typically elected on the basis of a preferential voting system, which is more likely to produce a clear majority to form a government.

The reason usually advanced for the retention of the legislative councils is their potential to perform a more deliberative review role in a parliamentary system that otherwise involves a considerable fusion of legislative and executive power.[99] The effectiveness of the council for this purpose varies between jurisdictions, however, with the traditions of the legislature and with the patterns of party representation in the other house. In Queensland, where problems of government corruption that culminated in the 1980s were attributed in part to the absence of bicameralism, a series of investigatory commissions was established instead, which may in fact be more effective.[100]

The institutional arrangements for state legislatures are independent of the Commonwealth and of each other. States experiment with different constitutional forms and emulate experiments of others that are regarded as successful. Thus, for example, in the last decades of the twentieth century, the terms of the assembly in four states changed from the traditional Australian flexible three-year term to fixed or partly fixed four-year terms.[101] Other states, and even the Commonwealth, may eventually follow suit.

Elections are not synchronized between jurisdictions. States choose their own electoral systems, and each state administers its own electoral arrangements, generally through its own independent electoral commission. As in the Commonwealth, voting is compulsory, although again, this is a choice that has been made by each state. There is a degree of interdependence in relation to electoral registration, and only two states now maintain an electoral roll separate from the Commonwealth roll.[102]

State Executive Branches

The executive branch in the states performs broadly the same constitutional role vis-à-vis the other branches as does the Commonwealth executive, and it is structured in broadly the same way. Following an election, the parliamentary leader of the party or coalition of parties with a majority in the lower house is appointed premier and forms a government. Ministers are members of Parliament, and the government is responsible to Parliament, in accordance with the familiar rules of cabinet government. As in the Commonwealth, state constitutions are remarkably opaque in relation to this aspect of the system, in consequence, probably, of its origin in British constitutionalism, where these rules rest almost entirely on convention. The powers and structure of the executive branch in the states derive from a variety of sources: state constitutions, legislation, conventions, and the common law.

The two mainland territories have a similar executive structure, with minor variations reflecting their constitutional status and the relative modernity of their self-government legislation.[103] The head of government in each of the territories is the chief minister rather than the premier, and formal executive power is held in the Northern Territory by an administrator, appointed by the governor general. There is no equivalent of governor or administrator in the Australian Capital Territory.

In theory, during its term of office a state government has the right and responsibility to carry out policies on the basis of which it was elected and generally to manage the affairs of the state. In practice, the pervasive nature of intergovernmental relations changes the picture considerably. Many state programs are at least partly funded by Commonwealth grants, on conditions prescribed by the Commonwealth that are often the result of negotiation between the respective governments. As a rough estimate, 30 percent of the time of any state minister is likely to be spent on aspects of intergovernmental relations. Decisions taken in intergovernmental ministerial meetings, sometimes by majority vote, influence the action taken by individual state governments. The impact on smaller states is greater still, to the extent that larger states, with greater policy-making capacity, dominate intergovernmental decision making. Party affiliation also affects these

processes, however. Ministers from governments of the same political persuasion may join forces across jurisdictional lines to produce particular policy outcomes. This is not invariably the case, however. In the early 1990s, for example, a spectacularly effective alliance between Labor prime minister Robert Hawke and conservative premier Nick Greiner of New South Wales led to major structural economic change in Australia through decisions made collectively by the heads of Australian government.[104]

The states also operate in accordance with the principles of constitutional monarchy. A governor, representing the Queen, is the formal head of the state. The governor is appointed by the Queen on the advice of the state premier, with no involvement of either the Commonwealth government or the governor general. Executive power is formally vested in the governor, who acts on the advice of the government of the state, except in the exercise of the discretionary reserve powers, the extent and existence of which are as contentious in the state as in the Commonwealth sphere. If and when the debate on an Australian republic revives, it will be necessary to decide whether the link with the Crown will be removed by one national constitutional change (over the validity of which there may be some constitutional dispute) or by each jurisdiction, employing its own processes of constitutional change. Ironically, it is not possible for a state to sever its links with the Crown unilaterally because a probably accidental provision in the Australia Acts, 1986, formalizing the independence of the states from the United Kingdom, appears to entrench the position of the governor as a representative of the Queen, unless altered by all the Australian governments acting collectively.[105] In any event, the detail of the institutional arrangements to be put in place in each state under a republic would likely be a matter for the states themselves.

State Administration

As in the Commonwealth sphere, each state has its own departments and other agencies to administer state legislation and government policies and programs. Each department and agency comes within the portfolio of a minister, drawn from Parliament and accountable to Parliament for the administration of his or her area of responsibility.

As in the Commonwealth sphere, the picture is no longer quite so neat. Some state legislation is administered centrally, for the purposes of an intergovernmental scheme.[106] State administrations also carry out a range of their functions in accordance with the conditions attached to Commonwealth grants.[107] More rarely, a state administration may act on behalf of the Commonwealth if an intergovernmental arrangement involves the conferral of Commonwealth power on state bodies.[108] One instance of this is constitutionally mandated: under section 120 of the Constitution, the

Commonwealth may use state prisons for federal prisoners. Intergovernmental arrangements may mandate coordination of administration across jurisdictions. Policing is a current, topical example.[109] Even in the absence of formal cooperative arrangements, officials often act collaboratively across jurisdictional boundaries as a natural consequence of having comparable responsibilities in neighbouring jurisdictions.

As in other contexts, these arrangements present some challenges to principles and practices of government developed originally in the context of unitary systems. They may affect the application of the principles of administrative law, the comprehensiveness of audit procedures, or the standards of scrutiny of delegated legislation by parliamentary committees. Unusual questions of public policy sometimes are raised. One, from the early 1990s, concerned the use of state prisons for federal prisoners. Should rules about, say, release on parole be applied to all prisoners in the same jail even if, as a result, federal prisoners who are punished for similar offences, but held in prisons of different states, will be subject to different regimes?[110] The question has been resolved in favour of equity between federal prisoners;[111] in a federal system, however, there may be no perfect answer.

State judicatures

The point has already been made that state courts are part of an at least partially integrated Australian judicature, with the High Court of Australia at the apex. Subject to these features of the Commonwealth Constitution, however, and to the limited implications that may be drawn from them, the state constitution and operation of the courts of each state are matters for the state concerned.

Thus the framework for a state judicature is set by the constitution and legislation of the state. There is no constitutional separation of judicial power in the state sphere of the kind that operates federally.[112] States thus have greater freedom to mix judicial and non-judicial power in their courts and to confer at least some state judicial power on bodies that may not be courts. Within each state there is a hierarchy of courts, from a magistrates court at the lowest level to a supreme court (which, in some states, has a distinct appellate division) at the highest. These are typical common-law courts, with a tradition of independence, protected by constitutional rules governing tenure and remuneration and by constitutional convention. Judicial appointments are made by the governor-in-council of each state, and the removal of a judge is a matter for state institutions, acting in accordance with legally prescribed requirements.

State courts exercise state jurisdiction, which constitutionally cannot be conferred on federal courts.[113] State jurisdiction extends to matters in which state governments themselves are parties. State courts also exercise

federal jurisdiction, conferred on them by the Commonwealth Parliament. The general rule is that the Commonwealth cannot dictate how this jurisdiction is exercised but must take state courts as it finds them.[114] Appeals from state courts exercising federal jurisdiction lie to federal rather than to other state courts, with the High Court as the final appellate court, if leave can be secured.

LOCAL GOVERNMENT

The states dominate the structure and functions of local government. Each state parliament prescribes the framework for local government within the state. Typically, each local government area has an elected council, a mayor who may be drawn from the council or elected directly, and a local administration. The administration is subject to direction by the council, but both must act within parameters set by the state. Each state has a minister and a department with responsibility for local government. Elected councils are the norm, but there are modern instances of the administration of local areas by officials appointed by the state government, either to carry out a restructuring of local government or to deal with instances of alleged corruption or maladministration.[115]

Local authorities can make local laws on matters vested in them by state legislation. Typically, however, their powers are more limited than are those in other federations. Common examples are parks and gardens, local roads, traffic and parking, waste disposal, and a limited range of social services. Local authorities also raise some revenue of their own, through property rates, service charges, licence fees of various kinds, and fines. Otherwise, however, local government relies on transfers from the other spheres of government, including general and conditional funds from the Commonwealth, paid directly to local government or indirectly, through the state.

There were 721 local government bodies in Australia in June 2004, varying considerably in geographic and population size and in capacity.[116] There is an association of local governments in each state and a peak Australian local government association, which, effectively, is a federation of the state and territory associations.

The Australian Constitution makes no reference to local government. Referenda to include local government in the Constitution failed in 1974 and 1988, and there are no signs of change, although local government continues to press for Commonwealth constitutional recognition. All state constitutions now provide some protection for local government, although in general terms that could easily be changed in most states.

The Commonwealth has no direct constitutional relationship with local government; nevertheless, important links exist.[117] The Commonwealth

provides some general[118] and conditional[119] financial assistance. The Commonwealth Department of Transport and Regional Services administers programs relevant to local government and provides support for the Local Government and Planning Ministers Council (LGPMC). The Australian Council of Local Government Associations is represented on the Council of Australian Governments (COAG) and on some other ministerial councils, including the LGPMC.

INTERGOVERNMENTAL RELATIONS

Intergovernmental relations affect almost every aspect of government in Australia. There are relatively few signs of this in the Constitution, which assumes that the institutional arrangements for the respective spheres of government are, for the most part, distinct. In fact, however, as earlier parts of this chapter show, collective decision making within the executive branches of government is extensive; it readily triggers collective legislative action; and there is a network of formal and informal connections across jurisdictional lines for purposes that range from mutual support and information exchange to the conduct of joint programs. Key national initiatives have been put in place by this means, including the national competition policy.[120] The somewhat convoluted arrangements whereby the proceeds of the Commonwealth's goods and services tax are paid to the states are supervised through intergovernmental procedures.[121]

Two groups of specifically intergovernmental institutions require particular mention here. The first group is the ministerial councils.[122] At the peak of this network is the Council of Australian Governments (COAG), which is made up of the heads of Australian governments. In addition, there are at least 34 other major councils that deal with specific functions and that are made up of the responsible ministers from all participating jurisdictions. Depending on its subject matter, a council may have other participants as well, with full member or observer status. Typically, such additional members come from the Australian Local Government Association (ALGA), New Zealand, or Papua New Guinea. Each ministerial council is supported by a standing committee of officers, usually comprising heads of the relevant departments; other working groups may be associated with particular councils as well. Each council has a secretariat, usually but not always based in a Commonwealth department and rarely dedicated to the work of the ministerial council alone.

Ministerial councils carry out a range of functions pursuant to formal intergovernmental agreements as well as in accordance with their own, often self-crafted, terms of reference. Thus, for example, a council may approve proposals for amendments to uniform-scheme legislation,[123] agree on appointments to a joint administrative body,[124] contribute to a national

standard-setting process,[125] play a role in setting national standards,[126] or direct programs of collaboration in research.[127] Most decisions require consensus, although some councils use weighted majority-voting procedures, generally for particular purposes.

The ministerial council network developed in an ad hoc fashion over the course of the twentieth century. In recent decades, efforts have been made to provide a more formal structure. Guidelines developed from the 1990s, during a peak period of economic reform in which ministerial councils were heavily involved, consolidated some councils and sought to provide a framework for holding and conducting meetings.[128] At least notionally, there is now a hierarchy of councils, in the sense that matters may be referred by a functional ministerial council to COAG for final endorsement, or by COAG to the relevant ministerial council for development and advice.[129] For all this, however, individual councils retain considerable autonomy in their structure and operations. Most have low public visibility and are only lightly exposed to parliamentary or media scrutiny.

The second, specifically intergovernmental, institution is the joint administrator or regulator, typically established for the purposes of an intergovernmental scheme for which uniform administration is also deemed necessary. One model, which became increasingly popular in the latter decades of the twentieth century, involved an agreement by all participating governments that their legislatures would pass laws to adopt a template law enacted by a host jurisdiction (usually the Commonwealth), as amended from time to time, and that the host would also establish a regulator, upon which the other jurisdictions would confer power to administer their legislation. To ensure absolute uniformity, these arrangements sometimes went further and conferred the authority of all jurisdictions on ancillary institutions of the host jurisdiction as well, including the prosecutor, the attorney-general, and the ombudsman.[130]

At the turn of the twentieth century decisions of the High Court cast doubt on the constitutional validity of some arrangements that confer state authority on Commonwealth bodies.[131] Those doubts are not yet resolved, and template schemes are now used more cautiously. In some cases, including corporations regulation, governments have abandoned use of this format altogether, turning instead to references of power by the states to the Commonwealth to enable the latter to unilaterally enact the necessary legislation.[132] A reference may be accompanied by the familiar trappings of intergovernmental cooperation: an intergovernmental agreement supervised by a ministerial council.[133] Otherwise, however, the procedure is consistent with the dualist assumptions of the Australian federal constitutional system. An exercise of referred power by the Commonwealth has all the characteristics of Commonwealth law and is executed by Commonwealth administrators. Legal disputes arise in Commonwealth jurisdiction and are dealt with accordingly.

ANALYSIS AND CONCLUSIONS

Constitutional Framework

A framework for the basic structure of government is provided in the Australian Constitution and in the constitutions of the respective states. From an institutional point of view, however, it is skeletal. In relation to the executive branch, the focus of the constitutions is on the representatives of the Crown, who hold formal executive power. Ministers and cabinets are barely mentioned, if they are mentioned at all, and the key principles of responsible government are left largely to constitutional convention. Typically, the constitutions deal with the legislatures in greater detail, establishing the houses and providing a framework for their composition and powers and the relations between them. Even here, however, important questions about citizenship, the franchise, the electoral system, the distribution of electoral boundaries, and the conduct of elections are left almost entirely to legislation enacted by the parliaments themselves.

The constitutional framework for the federal judicature strikes a better balance between providing protection for matters of important principle and enshrining unnecessary detail. By contrast, however, the framework for state court systems is slight, leaving all or most rules of a constitutional character to legislation. Finally, to pick up a recurrent theme of this chapter, the institutions and practices of intergovernmental relations, which are so significant to the current operation of Australian federalism and which also affect the operation of representative institutions, receive almost no recognition in the constitutions at all.

The flexibility that this approach offers has had many advantages in Australian circumstances. It enabled Australia to move from quasi-colonial status to independence without formal constitutional change. It enabled steady and perceptible progress in the quality of electoral democracy, through experimentation with new democratic forms. Within the vacuum left by the constitutions, it enabled the institutions and practices of intergovernmental relations to emerge and to evolve into today's highly developed system. The perceived value of flexibility tends to be heightened by consideration of the resistance of the Australian Constitution to formal change.

The Australian approach has disadvantages as well, however. It limits the protection that a constitution can provide for the core features of a system of government upon which democratic institutions depend. The spare constitutional framework for government, which bears increasingly less resemblance to the way in which the system actually works, makes both the Constitution and the system itself more difficult to understand, with accompanying problems for accountability and public engagement. The problems created by intergovernmental arrangements for traditional accountability

mechanisms could be eased by a constitution that recognizes the reality of cooperation and makes specific provision for it.

Finally, there are at least two respects in which the evolution of institutions, upon which Australia generally relies, has run up against the text of the aging Australian Constitution. First, the slow march to Australian independence cannot be consummated by removing the Crown as the last symbol of former colonial status without constitutional change. Change is difficult, however, and not least because Australians are unfamiliar with and apparently resistant to the deliberate, major restructuring of institutions. Second, constitutional limits have manifested themselves within the context of intergovernmental cooperative schemes, when the High Court struck down legislation conferring state jurisdiction on federal courts and cast doubt on the validity of the conferral of some other forms of state authority on Commonwealth bodies. Those decisions were much criticized, both for their outcomes and for depending on a particular conception of federalism that was coordinate rather than cooperative in character.[134] They nevertheless forced a change of direction in intergovernmental relations, the full implications of which are not yet clear.

The Interaction between Federalism and Representative Institutions

The Australian system of government combines parliamentary government in the common-law tradition with federalism. Over a period of more than 100 years, each has shaped the other in a variety of ways, some of which are distinctively Australian, others of which are familiar in other federations as well.

Culturally, parliamentary responsible government and federalism are at odds with one another. The former facilitates the concentration of power in the parliamentary group with majority support and values efficiency; the latter requires sharing and, ideally, negotiation and compromise. It is possible to understand the story of Australian federal democracy as a tussle between these two, in which the attitudes associated with parliamentary government often appear dominant even when the institutions themselves are constrained by the reality of federalism.

Parliamentary institutions have an impact of another kind on federalism in Australia, attributable to the fusion of legislative and executive power that is a characteristic of parliamentary government with a strong two-party system, in the absence of a second chamber with independent views. Bicameralism is significant in Australian constitutional design, but, with the possible and variable exception of the Australian Senate itself, second chambers do not substantially detract from the capacity of governments to achieve their legislative programs. This feature of the Australian system of government, coupled with the relatively small number of constituent units

of the federation, has fuelled particular forms of intergovernmental cooperation, leading to an advanced degree of executive federalism. The purpose of many of these arrangements is to extend or at least to simulate the effect of Commonwealth power. To this extent, they have contributed to the uniformity of law and administration in Australia, but in a manner that requires ongoing negotiation between all Australian governments, creating a new dynamic.

Conversely, federalism has affected the institutions of government in a variety of ways. The division of power for federal purposes has necessarily placed legal limitations on the powers of all institutions. In the Commonwealth sphere, the separation of judicial power was also originally justified by reference to federalism. As earlier parts of this chapter show, the composition of most of the institutions of federal government has been affected in law or practice by the fact of federalism, and the extensive powers of the Senate have caused modification of the principles of responsible government as well. Intergovernmental arrangements are not only facilitated by parliamentary institutions but also have a reciprocal impact on them, strengthening the executive branch at the expense of both legislatures and courts, particularly in the state sphere.

Likely directions for the future include the following. First, intergovernmental activity will continue and, probably, expand. Use of the reference power may become increasingly common, thereby diminishing (but only to a degree) concerns about the transparency and accountability of intergovernmental activity. An alteration of the Constitution may be attempted in order to underpin the capacity of the states to confer power and jurisdiction upon Commonwealth authorities and courts.

Second, government control of the Senate from July 2005, for the first time in more than 25 years, is likely to result in a bolder use of Commonwealth power, with longer-term implications for the respective functions of the Commonwealth and the states, some of which are also likely to be tested in the courts. At the same time, this period of unaccustomed harmony between the House and the Senate may diminish pressure for constitutional and legislative change to the Senate, as threatened from time to time by governments impatient with the difficulty of securing enactment of their policies.

The third development concerns rights protection. Unusually in the world of the twenty-first century, the Australian Constitution has no bill of rights, and only a few of its provisions can be regarded as protecting particular rights.[135] In 2004, however, the ACT enacted a human rights act of its own, broadly following the model of the Human Rights Act, 1998 (UK). Towards the end of 2005, Victoria announced its intention to follow suit.[136] There is some speculation that, in time, other states and, perhaps,

even the Commonwealth may do so as well. Individual state initiatives of this kind highlight the degree of state autonomy in the design of their own institutions and demonstrate the way in which federalism can foster innovation in institutional design.

A final development of potential significance concerns statehood for the Northern Territory. Another movement for statehood is under way, aimed at the thirtieth anniversary of self-government for the territory in 2008.[137] If it succeeds, the Northern Territory will become the first new Australian state. The terms and conditions upon which it is admitted to statehood will test Australia's commitment to symmetry, which the Constitution guarantees only for the original states. A more contemporary state constitution for the Northern Territory could also act as a catalyst for debate on further reform of the aging constitutions of the existing states.

NOTES

1 For further details of the history of the establishment and constitutional development of the Australian colonies, see Helen Irving, ed., *The Centenary Companion to Australian Federation* (Melbourne: Cambridge University Press, 1999).

2 Western Australia was the last colony to do so, in 1889.

3 The debate began as early as 1846. See Irving, *Centenary Companion*, viii.

4 The classic account is J. Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney: Legal Books, 1901 [1976]). For more contemporary accounts, see JA La Nauze, *The Making of the Australian Constitution,* (Melbourne: Melbourne University Press, 1972); Helen Irving, *To Constitute a Nation*, (Melbourne: Cambridge University Press 1997); John Hirst, *The Sentimental Nation* (Melbourne: Oxford University Press, 2000).

5 Australian Constitution, sec. 106.

6 Quick and Garran, *Annotated Constitution*, 166.

7 *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; Cheryl Saunders, "Separation of Powers," *The Australian Federal Judicial System*, ed. Brian Opeskin and Fiona Wheeler (Melbourne: Melbourne University Press, 2000), 3–36.

8 Australian Constitution, sec. 128.

9 Cheryl Saunders, "The Parliament as Partner," *Parliament: The Vision in Hindsight*, ed. G. Lindell and R. Bennett (Annandale, NSW: Federation Press, 2001), 454–485.

10 Ibid.

11 Australian Bureau of Statistics, *Popular Statistics*, <http://www.abs.gov.au/websitedbs/d3310114.nsf/Home/Popular%20Statistics>, viewed 30 December 2005. The remaining population statistics in this part are also taken from this source.

12 Geoscience Australia *Area of Australia, States and Territories,* <http://www.ga.gov.au/education/facts/dimensions/areadime.htm>, viewed 30 December 2005. The remaining estimates of land area in this part are taken from this source.

13 Department of Foreign Affairs and Trade Fact Sheet, <http://www.dfat.gov.au/geo/fs/aust.pdf>, viewed 30 December 2005.
14 The constitutional position of the territories differs from that of the states in many ways that cannot be covered in detail in this chapter.
15 An earlier attempt failed in 1998; another is under way. See Chief Minister Clare Martin, <http://www.cdu.edu.au/cdss2003/presentations/clare.martin.pdf>, viewed 8 May 2005.
16 Equalization transfers moderate these differences to a degree: Commonwealth Grants Commission, *State Finances*, <http://www.cgc.gov.au/>, viewed 30 December 2005.
17 Brian Galligan and Winsome Roberts, *Australian Citizenship* (Melbourne: Melbourne University Press, 2004).
18 See, for example, federal minister for workplace relations Tony Abbott: "Australians' governmental loyalties lie with the nation rather than the state," in "Responsible Federalism." *Sir Norman Cowper Lecture 2003,* <http://www.tonyabbott.com.au/speech/federalism.html>, viewed 30 December 2005.
19 See, for example, Prime Minister John Howard: "If we had our time again, we might have organised ourselves differently ... but they are only thoughts," in "Reflections on Australian Federalism," address to the Menzies Research Centre, 11 April 2005, at <http://www.pm.gov.au/news/speeches/speech1320.html>, viewed 23 May 2005.
20 At the same time, the government undertook to table (most) treaties in Parliament before ratification. For details, see the JSCOT Web page at <http://www.aph.gov.au/house/committee/jsct/>, viewed 23 May 2005. A complementary procedure also provides for consultation on treaties with the states, through the Treaties Council. For a history of the developments leading to these changes, see Anne Twomey, "International Law and the Executive," in *International Law and Australian Federalism*, ed. Brian R. Opeskin and Donald R. Rothwell (Melbourne: Melbourne University Press, 1997), 69–95.
21 For detail, see Margot Kelly and Ian Harris, "Parliamentary Checks on the Executive," 2001, at <www.cdi.anu.edu.au/research_publications/research_downloads/C.S.Kerley&Harris.rtf> ,viewed 23 May 2005.
22 Commonwealth Electoral Act, 1918, sec. 245. The compulsion attaches to attendance at a polling booth: the act of voting itself remains secret.
23 Australian Constitution, sec. 53.
24 Ibid., sec. 28.
25 Scott Bennett, "Four-year Terms for the House of Representatives," Parliamentary Library Research Paper 4 2000–01, at <http://www.aph.gov.au/library/pubs/rp/2000-01/01RP04.htm>, viewed 23 May 2005.
26 Ibid.
27 Australian Constitution, sec. 24.
28 Ibid.
29 Australian Constitution, sec. 29.

30 Ibid., sec. 24.
31 Australian Constitution, sec. 29.
32 Australian Constitution, sec. 128.
33 Quick and Garran, *Annotated Constitution*, 418–419.
34 Australian Constitution, sec. 7. Alteration of this provision also requires special majorities, pursuant to section 128.
35 Australian Constitution, sec. 9.
36 Ibid., sec. 12.
37 Ibid., sec. 15.
38 Ibid., sec. 23. In some legislative chambers in which one of the elected representatives is chosen to preside over the chamber, that person exercises only a casting vote in the event that votes would otherwise be evenly divided. The president of the Senate, however, may exercise his or her vote in the manner of all other senators and is therefore said to have a "deliberative" vote rather than just a "casting" vote.
39 Ibid., sec. 53.
40 See generally Geoffrey Sawer, *Federation under Strain 1962–1975* (Melbourne: Melbourne University Press, 1977).
41 Australian Constitution, secs. 7 and 13.
42 Australian Constitution, sec. 7.
43 John Uhr, "Rules for Representation: Parliament and the Design of the Australian Electoral System," in Lindell and Bennett, *Parliament*, 249, 273–278.
44 Under section 13 of the Constitution, the composition of the Senate does not change after an election until the following 1 July. The October 2004 election, however, gave the government a majority of one seat in the new Senate.
45 Brian Galligan, "Parliament's Development of Federalism," in Lindell and Bennett, *Parliament*, 1, 14–15.
46 Harry Evans, ed., *Odgers' Australian Senate Practice*, 11th ed. (2004), chap. 4, at <www.aph.gov.au/Senate/pubs/odgers/pdf/chap04/pdf>, viewed 23 May 2005.
47 See now Australian Constitution section 15.
48 Commonwealth Electoral Act 1918, pt. III, div. 2.
49 *Western Australia v. Commonwealth* (1975) 134 CLR 201; *Queensland v. Commonwealth* (1977) 139 CLR 585.
50 Australian Constitution, sec. 57.
51 Jack Richardson, "Resolving Deadlocks in the Australian Parliament," in Lindell and Bennett, *Parliament*, 291, 301–311.
52 Commonwealth Government, "Resolving Deadlocks: A Discussion Paper on Section 57 of the Australian Constitution," available on <http://www.pmc.gov.au/conschange/index.cfm>, viewed 23 May 2005.
53 Australian Constitution, sec. 128.
54 Ibid., sec. 61.
55 These powers arguably include the power to refuse an early dissolution to a prime minister who has lost the confidence of the House of Representatives, at least in circumstances under which another government may be able to be formed; power to

dismiss a prime minister who has lost the confidence of the House of Representatives and refuses to resign or, following the events of 1975, is unable to secure supply from the Senate; and appointment of a prime minister after an election when there is no clear majority in the House of Representatives.

56 Australian Constitution, sec. 61.

57 Thus the Human Rights Commission cannot exercise judicial power in carrying out adjudicatory functions: *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

58 *Victoria v. Commonwealth & Hayden* (1975) 134 CLR 338, per Mason J [19].

59 Ministers of State Act, 1952 (Cth) sec. 4.

60 See generally *Cabinet Handbook* (5th ed. 2004): <http://www.dpmc.gov.au/guidelines/docs/cabinet_handbook.pdf>, viewed 13 May 2005.

61 Australian Constitution, sec. 64.

62 The exception is John Gorton, who became prime minister in January 1968 while still a senator and who remained prime minister in February 1968 while contesting a seat in the House of Representatives and was thus not a member of Parliament at all.

63 Part C, rule 3, National Constitution of the ALP, as amended at the 43rd ALP National Conference, 2004.

64 There is a rather silly, possibly tactical, dispute about whether the position of head of state is held instead by the governor general or, perhaps, by both the governor general and the Queen. The Constitution does not use the term: the formal role assigned to the Queen by the Constitution, however, involves functions exercised elsewhere by a non-executive head of state.

65 Royal Style and Titles Act, 1973.

66 Sir Zelman Cowen, "The Role of the Head of State," Williamson Community Leadership Programme Lecture, Melbourne, 31 May 1995 at <http://www.leadershipvictoria.org/speeches/speech_cowen1995.htm>, viewed 23 May 2005.

67 See Federal Executive Council Handbook at <http://www.pmc.gov.au/guidelines/executive_handbook/index.cfm>, viewed 23 May 2005.

68 Deputies are appointed under section 126 of the Constitution and an administrator is appointed under section 4.

69 Constitution Alteration (Establishment of Republic) Bill 1999.

70 Senate Legal and Constitutional References Committee *The Road to a Republic,* chap. 7, <http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002–04/republic03/report/c07.pdf>, viewed 30 December 2005.

71 Higher Education Funding Act, 1988, administered by the Department of Education, Science and Training.

72 Patrick Weller, Herman Bakvis, and R.A.W. Rhodes, *The Hollow Crown: Countervailing Trends in Core Executives* (Basingstoke: MacMillan, 1997).

73 Australian Constitution, secs. 101–104.

74 Commonwealth Grants Commission at <www.cgc.gov.au>, viewed 23 May 2005.

75 <http://www.ncc.gov.au/index.asp>, viewed 30 December 2005.

76 The paragraph confers power on the Commonwealth to make laws with respect to any "matters referred to the Parliament … by the Parliament … of any State … but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law."

77 See Corporations Agreement 2002 at <http://www.treasury.gov.au/documents/495/DOC/corp2002.rtf>, viewed 23 May 2005.

78 *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

79 *Attorney-General of the Commonwealth v. The Queen* (1957) 95 CLR 529, 540.

80 See generally Australian Constitution, secs. 75 and 76.

81 Judiciary Act, 1903, pt. V, div. 1.

82 High Court of Australia Act, 1979, sec. 6.

83 Australian Constitution, sec. 77(iii).

84 Brian Opeskin, "Cross-Vesting of Jurisdiction and the Federal Judicial System," *The Australian Federal Judicial System*, ed. Brian Opeskin and Fiona Wheeler (Melbourne: Melbourne University Press, 2000), 299–334.

85 *Re Wakim; ex parte McNally* (1999) 73 ALJR 839.

86 *R v. Hughes* (2000) 202 CLR 535.

87 For an analysis of the range of views, see Anne Twomey *The Constitution of New South Wales* (Leichhardt, NSW: Federation Press, 2004), chap. 15.

88 *Kable v. DPP* (1996) 189 CLR 1.

89 Ibid; see also *North Australian Aboriginal Legal Aid Service v. Bradley* (2004) 78 ALJR 977; *Fardon v. Attorney-General (Qld)* (2004) 78 ALJR 1519.

90 *Coleman v. Power* (2004) 78 ALJR 1166.

91 *McGinty v. Western Australia* (1996) 186 CLR 140.

92 *Austin v. Commonwealth* (2003) 77 ALJR 491.

93 The Parliament of Queensland became unicameral in 1922.

94 See, for example, the description of the expected roles of the two houses by the Legislative Council of Tasmania during the drafting of the original Tasmanian Constitution: "Tasmanian Parliament" <http://www.parliament.tas.gov.au/tpl/backg/Parliament.htm>, viewed 4 March 2005.

95 In New South Wales, Queensland, and Western Australia members of the Legislative Council were appointed by the governor on the advice of government, although in Western Australia the Legislative Council became an elected body within three years of the Constitution Act, 1890.

96 Tasmania, Victoria, and South Australia restricted the franchise to men of at least 21 years of age who had net assets or income above a prescribed level, usually around 50 pounds sterling. The Constitution Act, 1855 (Tas), sec. VI, for example, restricted the franchise for electing legislative councillors to men 21 or over with net assets of at least 50 pounds sterling, university graduates, and medical practitioners.

97 The NSW Legislative Council has not had the power to block supply since 1932. The power of the Victorian Legislative Council to block supply was removed in 2003.

98 Western Australia (1967), South Australia (1973), New South Wales (1975), and Victoria (2003). The remaining state, Tasmania, uses proportional representation for its lower house and a single-member electorate single transferable vote system for its upper house.

99 See, for example, Bruce Stone, “Bicameralism and Democracy: The Transformation of Australian State Upper Houses,” 37 *Australian Journal of Political Science* 37 (2002): 267.

100 Victorian Constitution Commission, *A House for Our Future* (Melbourne: The Commission, 2002), chap. 6, available on <http://www.dpc.vic.gov.au>,viewed 23 May 2005.

101 Crime and Misconduct Commission, Electoral and Administrative Review Commission, Public Sector Management Commission.

102 For a description of the Joint Roll Arrangements between the Commonwealth, states, and territories, authorized by section 84 of the Commonwealth Electoral Act, 1918, see Australian National Audit Office, *Integrity of the Electoral Roll*, 2002, paras. 1.24–1.29, at <http://www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69BCA256B9E007B5F52>, viewed 23 May 2005.

103 Northern Territory (Self-Government) Act, 1978 (Cth), and Australian Capital Territory (Self-Government) Act, 1988 (Cth).

104 Martin Painter *Collaborative Federalism* (CUP 1998), chap. 1.

105 See Twomey, *Constitution of New South Wales*, 762.

106 For example, aspects of the Competition Code that depend on state constitutional power are administered by the Australian Competition and Consumer Commission (ACCC) and other Commonwealth officers on behalf of the states: see Competition Policy Reform Act, 1995 (Vic), secs. 19, 27, 32.

107 For example, pursuant to the Housing Assistance Act, 1996 (Cth).

108 An example was the tax collection agreements between the Commonwealth and some states in the 1920s: Cheryl Saunders “The Uniform Income Tax Cases,” *Australian Constitutional Landmarks*, ed. H.P. Lee and George Winterton (Cambridge, Port Melbourne: Cambridge University Press, 2003), 62, 65.

109 Pursuant to, for example, the Agreement on Australia’s National Counter-Terrorism Arrangements 2002, accessible through <http://www.nationalsecurity.gov.au/agd/www/nationalsecurityhome.nsf/Page/Protecting_National_Security>, viewed 23 May 2005.

110 *Leeth v. Commonwealth* (1992) 174 CLR 455.

111 Crimes Act, 1914, pt. 1B, div. 4.

112 *Kable v. DPP* (1996) 189 CLR 1.

113 *Re Wakim; ex parte McNally* (1999) 73 ALJR 839.

114 See the discussion in *Fardon v. Attorney-General (Qld)* (2004) 78 ALJR 1519, 1528–1530, per McHugh J.

115 R. Kiss, “Local Government to Local Administration: The New Order,” *The Kennett Revolution: Victorian Politics in the 1990s*, ed. B. Costar. and N. Economou (Sydney: UNSW Press, 1999), 110–121.

116 National Office of Local Government, *Australian Classification of Local Governments 2003–4*, <http://dotars.gov.au/localgovt/publications/national_report/03_04/pdf/appendix_f.pdf>, viewed 30 December 2005.
117 Prime Minister John Howard, "Federal Links with Local Government Will Grow," speech to the National General Assembly of the Australian Council of Local Government Associations, 2004, at <http://www.australianpolitics.com/news/2004/11/04-11-10_local.shtml>, viewed 23 May 2005.
118 Local Government (Financial Assistance) Act, 1995 (Cth).
119 See Budget Paper No.3, *Federal Financial Relations 2005–2006*, Appendix B at <http://www.budget.gov.au/2005–06/bp3/html/index.htm>, viewed 23 May 2005.
120 Commonwealth Parliamentary Library, *Australia's Competition Policy: its Evolution and Operation*, E-Brief June 2003, <http://www.aph.gov.au/library/intguide/econ/ncp_ebrief.htm>, viewed 30 December 2005.
121 Cheryl Saunders, "Federal Fiscal Reform and the GST," *Public Law* Review 11 (2000): 99–105.
122 Department of the Prime Minister and Cabinet, *Ministerial Councils: A Compendium,* April 2005 at <http://www.coag.gov.au/compendium/compendium.doc>, viewed 23 May 2005.
123 For example, Ministerial Council for Corporations.
124 For example, Ministerial Council on the Australian National Training Authority.
125 For example, Australia New Zealand Food Regulation Ministerial Council.
126 For example, Australia New Zealand Food Regulation Ministerial Council.
127 For example, Australia New Zealand Crime Prevention Ministerial Forum.
128 Painter, *Collaborative Federalism,* 103–120; see Department of the Prime Minister and Cabinet, *Ministerial Councils*, sec. 1.
129 Ibid.
130 These arrangements are described in the context of corporation law in Cheryl Saunders, "A New Direction for Intergovernmental Arrangements," *Public Law Review* 12 (2001): 274–287.
131 *Re Wakim; ex parte McNally* (1999) 73 ALJR 839; *R v. Hughes* (2000) 202 CLR 535.
132 See, for example, Corporations (Commonwealth Powers) Act 2001 (Vic).
133 Corporations Agreement 2002.
134 Graeme Hill, "Revisiting *Wakim* and *Hughes*: The Distinct Demands of Federalism," *Public Law Review* 13 (2002): 205.
135 A requirement that property be acquired under Commonwealth law on "just terms" in section 51(xxxi); a (somewhat flawed) guarantee of trial by jury in section 80; some protection for freedom of religion in the Commonwealth sphere in section 116; and a prohibition against discrimination on grounds of state residence in section 117.
136 *The Age*, 21/12/2005, <http://www.theage.com.au/news/national/victoria-to-get-human-rights-charter/2005/12/20/1135032018289.html> viewed 30 December 2005.
137 Speech by Chief Minister Clare Martin, 2003.

CZECH REPUBLIC

GERMANY

Niederösterreich

SLOVAKIA

Wien

(Vienna)

Oberösterreich

Vorarlberg

Liechtenstein

Tirol

Salzburg

Steiermark

Burgenland

SWITZERLAND

Kärnten

HUNGARY

SLOVENIA

CROATIA

ITALY

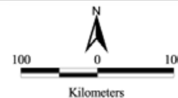
Adriatic

Sea

Republic of Austria

Capital: Wien (Vienna)
Population: 8.2 Million
(2002 est.)

Boundaries and place names are representative only and do not imply official endorsement.



Sources: CIA World Factbook; Times Atlas of the World; ESRI Ltd.

Republic of Austria

ANNA GAMPER

The Republic of Austria, founded in 1918 with the political will of the constituent *Länder* and re-founded in 1945 at the end of the Second World War, belongs to the "old" European federal systems. This small state may, however, be classified among the most centralized federal systems worldwide. This is due to the highly centralized distribution of powers, which confers on the *Länder* both legislative and administrative competences, including residual power and constitutional autonomy, but which gives considerably more power to the centre. The concentration of power at the centre is mitigated to a degree by arrangements whereby many of the laws of the federal legislature are administered by the *Länder,* which exercises both direct and indirect administration, and by a system of financial equalization. The picture is further complicated by the facts that the second chamber of the federal legislature does not represent *Länder* interests sufficiently and that the strong instruments of formal and informal intergovernmental cooperation that have developed over time are only partial compensation for this insufficient representation. Reform of the federal system has been a political topic for decades and was discussed with particular fervour in the context and aftermath of Austria's accession to the European Union in 1995. Reform of the federal system was also deemed crucial by the Constitutional Convention, established in 2003, which, however, failed to effect a compromise. Reform discussion has now been entrusted to a parliamentary select committee, but it is doubtful whether it will be successful.

The Republic of Austria (*Republik Österreich*) covers a territory of approximately 83,870 square kilometres and has 8.2 million inhabitants. It consists of nine constituent states, which are referred to as *Länder* (the singular is *Land*). These are Burgenland, Carinthia (*Kärnten*), Lower Austria (*Niederösterreich*), Salzburg, Styria (*Steiermark*), Tyrol (*Tirol*), Upper Austria (*Oberösterreich*), Vienna (*Wien*), and Vorarlberg. The largest *Land* geographically is Lower Austria, followed by Styria and Upper Austria. The *Land*

with the least territory is Vienna, the capital, which is 45 times smaller than Lower Austria. Despite its small geographical area, Vienna shares with Lower Austria the status of the largest *Land* in terms of population.[1]

The civil-law system that is used in Austria has a hierarchic structure, with the federal Constitution as the supreme norm.[2] The Constitution comprises the federal Constitution itself (*Bundes-Verfassungsgesetz, B-VG*)[3] and some additional federal constitutional laws or provisions of a constitutional kind within ordinary federal laws. There are also several laws dating back to the former Austro-Hungarian monarchy, which ended in 1918. Together with certain international treaties, these also have the status of federal constitutional law. Apart from the period of Austro-fascism (1934–38) and the period of occupation (1938–45), the federal Constitution has been in force since 1920. It was re-enacted after the Second World War in 1945, with the support of the constituent *Länder*.[4]

Constitutional doctrine and jurisprudence recognize certain fundamental constitutional principles: democracy, federalism, the rule of law, republicanism, the separation of powers, and human rights. These principles are even better protected than are the so-called ordinary components of Austrian federal constitutional law. The latter can be amended by a qualified majority of two-thirds of the votes cast, in the presence of at least half of the members. A referendum is compulsory, however, if the fundamental principles are significantly modified or abolished; this is understood as a "total revision" of the Constitution within the terms of Article 44, para. 3, B-VG. Such a referendum took place when Austria joined the European Union in 1995. Membership in the EU necessitated a wide range of modifications to Austria's legal system, including its fundamental principles.

The Austrian population is basically homogenous with regard to ethnicity and culture. There are only very slight differences in relation to language (which is German, although spoken in various dialects) and religion (mainly Roman Catholic). Six small ethnic groups, which mainly live in the south and east of Austria, enjoy particular legal recognition, but this has had no impact on the design of the system of Austrian federalism.[5] The boundaries of the *Länder* do not reflect the grouping of different peoples but, rather, correspond roughly to those of the former German-speaking Crown *Länder* of the Austro-Hungarian monarchy; hence, they are explicable mainly on historical grounds. The historic identity of the *Länder*, which, in most cases, may be traced back to the Middle Ages, is still meaningful to citizens, although a strong sense of identity with one's *Land* is perhaps more typical of *Land* citizens in the west of Austria than of those in the east. Admittedly, in the nineteenth century the monarchy operated rather more as a decentralized unitary state than as a federal state, thus suggesting the source of some of the weak points of contemporary Austrian federalism. Nevertheless, most *Länder* formed part of the integrated framework of the monarchy a long time before the founding of the Republic of Austria.[6]

When the monarchy came to an end in 1918, a process of dual founding took place.[7] The republic was proclaimed by the interim National Assembly in Vienna on behalf of the new central power. Realization of the republic, however, required the cooperation of the *Länder*, which still effectively exercised state power within their respective territories. Following the proclamation of the republic, the *Länder* declared their willingness to join the embryonic federal state. They also participated in the drafting of the B-VG, which, ultimately, was a compromise between the two great political parties – namely, the Social Democrats and the Conservatives.[8] Not all *Länder*, however, joined the republic from its very beginning. Burgenland had a short period of Hungarian occupation following the First World War and did not join Austria until 1921. Vienna was an integral part of the *Land* of Lower Austria until 1922, when it became a *Land* of its own. Finally, Vorarlberg, although it joined the republic prior to the enactment of the federal Constitution, did so only "for the time being," doubting whether it would remain permanently within the federal state (although in fact it has done so).[9]

The southern and eastern borders of Austria, which were drawn after the First World War and were redrawn after the Second World War, separated certain areas that had formerly belonged to the Crown *Länder* (under the monarchy) from the new Austrian *Länder*. One notable example is the South Tyrol, which now belongs to Italy. Friendly relations now exist, however, between those neighbouring regions that, historically, had been one. In the case of the *Europaregion Tirol*, these have politically received a form of transnational status.[10]

FEDERAL INSTITUTIONS

The Federal Legislature

General The federal legislature consists of two houses: the National Council (*Nationalrat*) and the Federal Council (*Bundesrat*). Both houses form the Federal Assembly (*Bundesversammlung*). The Assembly has a few formal functions, most of which have never been exercised. The powers to declare war or to impeach the federal president are examples. The main function of the federal legislature is the enactment of legislation, but it has several administrative functions as well, including appointing certain administrative functionaries or, in certain cases, approving secondary legislation. The legislature is also responsible for the legal, political, and financial control of the executive.

Bills may be introduced into the legislature by the federal government, by a certain number of members of the National Council (five) or of the Federal Council (one-third), or by an initiative supported by a prescribed

number of voters.[11] In practice, however, it is the federal government that introduces draft laws, usually after an informal, non-binding consultation with experts or representatives of those groups or entities that may be affected by a particular proposal. As a rule, a coalition government has a majority in Parliament, which makes it easy to obtain parliamentary consent. From 1945 to 1966, and again from 1986 to 2000, Austria had a coalition government that commanded a constitutional majority, which made it easy to secure the passage of constitutional amendments through both houses. In the 1980s and 1990s, in particular, this was done frequently and gave rise to much criticism.

With few exceptions, bills have to pass both houses, starting with the National Council and passing on to the Federal Council.[12] If both houses give their consent – usually, one-third of the members of each house must be present and the majority must vote for the bill – the bill is passed to the federal chancellor who submits it to the federal president for his/her signature. According to prevailing opinion, the federal president may refuse to sign a bill only if there have been formal irregularities in the legislative procedure; however, in practice, no such refusal has ever been forthcoming. After the federal president signs a bill, it must be counter-signed by the federal chancellor and then published in the federal Law Gazette in order to enter into force.

Special rules apply when the Federal Council withholds its consent to a bill. Usually, the objection may be overruled by the National Council with a qualified quorum of at least one-half of its members.[13] The Federal Council has the right of absolute veto in some matters (e.g., a bill to amend the Constitution that would turn *Länder* competences into federal competences).[14] However, neither the right of veto nor, with very few exceptions, the right of objection have been exercised so far. Typically, the members of the Federal Council are closely linked to their political allies in the National Council, which makes it unlikely that they will withhold consent to a bill that has been approved by a majority of the National Council.

The politics of this are as follows. Traditionally, the Conservative party has held a majority in most of the *Länder* parliaments and, thus, has also enjoyed a relative majority in the Federal Council. In addition, the Conservatives have been part of the governing coalition in the federal government for almost 20 years. It is natural in these circumstances for Conservative delegates in both the National Council and the Federal Council to vote for bills that have been initiated by the federal government. Paradoxically, federalism is a principle that receives particular support from the Conservatives. Far from serving as protector of *Länder* interests, however, these delegates prefer central-party politics, being enabled to do so by a "free mandate" in the sense that they are not bound by the instructions of *Länder* parliaments or governments. There are some

differences in this respect between the delegates of different *Länder*. Usually, for instance, those of Vorarlberg in the very west of Austria are strong advocates of federalism. They carry little suasion, however, as long as the other *Länder*, which have more delegates, fail to join their endeavours. In recent years, coalition pacts have even included a provision to the effect that members of the Federal Council who belong to the political parties that form the government ought not to vote against a resolution passed by the National Council.[15]

Most recently, following *Land* parliament elections of 2005, the Social Democrats and the Greens have achieved a narrow majority in the Federal Council. As both are highly centralist parties, their delegates are not likely to be naturally inclined to fight for *Länder* interests. Nevertheless, since assuming control of the Federal Council, they have obstructed the first chamber to a much greater degree than has been done hitherto. In truth, however, this is not an exercise in serving *Länder* interests but, rather, in opposing the Conservative government, which perverts the role of the Federal Council in another way.

The standing orders of both houses provide detailed rules on how bills are to be handled, the numbers of readings and committee stages, and the parliamentary rights of members or certain groups of members. The standing orders of neither the National Council nor the Federal Council, however, stipulate specific representation of the *Länder* representatives within committees or in relation to the exercise of rights of parliamentary control.

The National Council The National Council consists of 183 members and is chaired by a president and two vice-presidents. According to Article 26 B-VG, elections must be general, free, proportional, secret, personal, equal, and direct. These principles govern the electoral rules of the National Council, which are laid down in a very detailed (ordinary) federal law.[16] The members of the National Council, who must be at least 19 years of age, are elected directly by federal citizens over the age of 18, subject to some exclusions from the franchise. For the purpose of the election, the federal territory is divided into nine *Länder* constituencies, corresponding to the respective *Länder* territories, which are further subdivided into 43 regional election districts. The 183 seats, or mandates, are distributed first among the *Länder* multimember constituencies and then among the regional election districts of each *Land* by reference to citizen population numbers. A by-product of this arrangement is that it tends to over-represent the electorates in constituencies that have a higher proportion of citizens that have not reached the voting age. There is a complicated procedure for counting votes in order to determine the proportional allocation of mandates at the level of regional election districts and *Länder* constituencies and, finally, at the federal level. There are electoral authorities at each level, which

represent the political parties in proportion to their existing representation. The Constitutional Court has jurisdiction to review electoral irregularities.

The rationale for the manner in which the National Council is elected, therefore, concerns the direct representation of the federal citizens and not the representation of the constituent units. One result of the use of the *Länder* as constituencies between which mandates are allocated in proportion to the number of citizens of each *Land* is that *Länder* with larger populations have more seats, with the result that their citizens are represented by a larger number of delegates in the National Council. This offers the *Länder* in question no particular channel of influence, however, because National Council members do not represent their *Länder* but, rather, the federal citizens in general, even though their election districts have a territorial basis.

The National Council is elected for a four-year term. Early termination is possible either on the initiative of the federal president[17] – which, in practice, does not occur – or if the National Council passes a law to dissolve itself.

The Federal Council The Federal Council is constituted quite differently from the National Council.[18] Its members represent the *Länder* and are not elected directly by the federal citizens. Nor are they directly elected by the citizens of the respective *Länder* (which, as worldwide comparison shows, would be a possible way of selecting the second chamber).[19] Instead, the parliament of each *Land* elects its delegates, who do not have to be members of the *Land* parliament but who do have to be eligible to be elected to it. The representatives of each *Land* in the Federal Council, therefore, reflect the proportion of the political parties as represented in the respective *Land* parliament. This linkage between *Land* parliament and Federal Council is the reason for the continuity of the Federal Council, with what, in effect, amounts to a permanent term. After the election of a new *Land* parliament (usually every five or six years, depending on the respective *Land* constitution), the delegates of the *Land* in the Federal Council may change but the council itself continues.

There is a theoretical question concerning whether constituent units should be entitled to equal representation, or arithmetic equality, in a federal chamber or whether allowance should be made for difference in, for example, population size, in order to deliver geometric equality.[20] In Austria, as in many other federal systems, a "geometric" system prevails, so that the number of *Land* representatives in the Federal Council differs according to *Land* population. Article 34 B-VG provides that the *Land* with the largest population is to be represented by 12 members and that the other *Länder* are to be represented by the appropriate ratio of members when their respective populations are compared to that of the most populous *Land*. As population numbers change from time to time, the Constitution

provides that the number of representatives of each *Land* in the Federal Council must be determined by an order of the federal president every ten years, following the national census. Currently, the Federal Council consists of 62 members allocated among the *Länder* as follows: 12 members from Lower Austria, 11 from Vienna, 11 from Upper Austria, 9 from Styria, 5 from the Tyrol, 4 from Carinthia, 4 from Salzburg, 3 from Vorarlberg, and 3 from Burgenland.

With good reason, the question might be asked whether this type of proportional representation does not reflect too closely the composition of the membership of the National Council and whether the principle of federalism would not be better served by a system of equal, or arithmetic, representation. It is inherent in the concept of classical federalism that the constituent units of a federal system are basically equal, irrespective of population size. Similarly, it is the rationale of a federal chamber – in contrast to the national chamber of a federal parliament – that it must represent the constituent units and not the federal citizens. A purely "arithmetic" model is somewhat closer to the concept of confederalism, behind which stands the idea of independent states that must be represented equally, even though they differ significantly in size, population, or in other ways. Within a federal system, however, an arithmetic model must accept the fact that, even if represented by equal numbers of representatives, the members of one constituent unit may be overruled by a majority of the members of other such units.

There is one way in which a geometric system might be compatible with the concept of federal equality. Even though the number of members from the respective *Länder* depends on the population shares of the *Länder*, the rules about voting procedure in the Federal Council can determine whether voting depends on a majority of representatives or on a majority of the *Länder*. The Austrian Federal Constitution seeks to combine the geometric model with the arithmetic equality model in at least one respect. The prevailing model is the geometric one, as the *Länder* are represented by different numbers of delegates and as the outcome of voting usually depends on a majority of representatives, irrespective of the number of *Länder* represented by them. According to Article 35 B-VG, however, the provisions that determine the selection and composition of the Federal Council[21] must not be amended without the consent of the majority of the representatives of at least four *Länder*. In this case, therefore, double majorities are required: a majority of representatives overall and a majority of representatives that are delegates from a certain number of *Länder*. In other words, amendments of this kind need the indirect consent of a certain number of *Länder*, which is given via the *Länder* representatives in the Federal Council.

The direct consent of the *Länder* (usually, the *Länder* governments) is required, in addition to the participation of the Federal Council, for certain federal bills that affect the administrative competences of the *Länder* under the Constitution by authorizing an Independent Administrative Tribunal[22] to hear appeals at second instance or by allocating the task indirectly[23] to a federal agency without explicit authorization in the Federal Constitution. Moreover, most recently Article 14b B-VG imposed a requirement for the direct consent of the *Länder* to all federal procurement laws that regulate procurement matters falling within the *Länder* administration. The governments of the *Länder* decide whether or not to give consent, in accordance with the *Länder* constitutions.

As noted earlier, the Federal Council is usually only entitled to object to a bill that is passed by the National Council, and the council may, in turn, overrule the objection (thus preventing a possible deadlock) in the presence of a quorum of half of its members.[24] In a few cases, however, the Federal Council enjoys the right of absolute veto, which means that the bill cannot be overruled by the National Council and thereby become law without the consent of the Federal Council.[25] The main example of this derives from Article 44, para. 2 B-VG, which requires the consent of the Federal Council (with a quorum of half of its members and a two-thirds majority of the members voting) if legislative or administrative competences of the *Länder* are curtailed by a federal constitutional law. So far, however, the Federal Council has never withheld its consent; in other words, it has never vetoed a bill that reduces *Länder* power. From a constitutional standpoint, no legal instrument could force the Federal Council to approve such a bill – at least not so long as Article 44 remains in force. Politically, however, it is difficult to imagine the Federal Council blocking legislation in this way.

There are other matters over which the Constitution provides the Federal Council with an absolute veto. The council has a veto if *Länder* competences are affected by an international treaty that requires parliamentary consent or if a state treaty reduces *Länder* competences;[26] if a *Land* parliament is to be dissolved by the federal president, pursuant to Article 100 B-VG (although this has never happened); or if a federal framework law obliges the *Länder* to enact implementation laws before the expiry of a period of six months or later than a year.[27] Finally, as noted earlier, Article 35 B-VG entitles the Federal Council to veto a bill that would alter the constitutional rules regarding the selection and composition of the Federal Council itself.[28]

The Federal Council is allowed neither to object to nor to veto bills that concern the federal budget and assets or the standing orders of the National Council. In these cases, the Federal Council's involvement in the

federal law-making procedure is restricted to the right to be informed about those laws. The National Council, for its part, is excluded from determining the standing orders of the Federal Council, which may be done solely by the latter with a qualified quorum and majority.[29]

The federal Constitution nowhere explicitly describes the Federal Council as a "federal house," although, organizationally, Article 34 B-VG provides that the *Länder* are represented in the Federal Council. Given that its members are representatives of the *Länder* parliaments, however, and that its functions are directed towards protecting the *Länder* from various kinds of federal interference (at least to the extent that it has an absolute veto), the Federal Council is clearly a federal house. Or, rather, this is the intention of the Constitution, although, as noted earlier, the practice is rather different.

Politically, therefore, the Federal Council does not operate as a federal house might be supposed to operate. In 2003 a very controversial bill was passed to the Federal Council after approval by the National Council, but there were neither sufficient members to support it nor sufficient members to support the motion to object to it. A dispute[30] arose over whether a bill could become a law under these circumstances. In the end, the Constitutional Court held that it could.[31] The behaviour of the Federal Council, however, gave rise to harsh criticism, and the institution itself was challenged. This is not the first time that the very existence of the Federal Council has been questioned, and the issue was subsequently raised again in the Constitutional Convention.[32] So far, however, there is no agreement. Some people want to abolish the Federal Council because it does not seem to represent *Länder* interests; others want to dispose of it, together with the entire federal system; some want only to replace the method of its selection and composition with one that is more suitable for the representation of *Länder* interests (e.g., by providing that *Länder* governors be members of the Federal Council).

One point at least seems to be clear, however. Unless the *Länder* are compensated with more general rights of direct consent through their parliaments or governments, the federal system must retain a federal house in which the constituent units can be represented in the enactment of federal legislation. Without such a house, the federal system could not be maintained. This would be regarded as a "total revision" of the Constitution and would therefore require a referendum. It is unlikely that such an extreme step will be taken.

The Federal Executive

Federal President and Federal Government From 1920 to 1929 Austria was a parliamentary republic in which the federal president was elected by Parliament. The system was transformed into a moderately presidential form,

however, by the constitutional amendment of 1929.[33] The federal president is invested with a range of important executive powers and is elected directly by the federal citizens.

The federal executive consists not only of the federal president but also of the federal government as a whole and of individual federal ministers and state secretaries, respectively. None is selected in a way that is influenced by federalism.[34] The federal president, who is directly elected by the citizens, appoints the federal chancellor. On the advice of the federal chancellor, the president also appoints the federal ministers and the state secretaries that assist the ministers. In addition, the federal president may dismiss the federal chancellor or the federal government as a whole, although dismissal of an individual member of the government requires the proposal of the federal chancellor. If the National Council were to pass a vote of no confidence in the government or one of its members, Article 74 B-VG would require the government or the member, as the case may be, to be removed from office unless, perhaps, the president were prepared to take the step of dissolving the council. These limitations apart, the president is subject to no formal legal constraints in exercising his or her powers of appointment and dismissal.

In theory, therefore, the federal president has considerable discretionary power, but in practice, appointment of a government is effectively controlled by the results of the elections to the National Council. No president has yet dismissed a government on his or her own account.

The president, in turn, can be removed from office by a referendum, following a decision of the Federal Assembly, although this has never happened.[35] For this purpose, the Federal Assembly would have to be summoned by the federal chancellor on the basis of a proposal from the National Council, proceeding with a qualified quorum and majority. Moreover, the federal president may be accused of violating the federal Constitution before the Constitutional Court. The decision to accuse the federal president – which may lead to his or her dismissal – is taken by the Federal Assembly with a qualified quorum and majority.

Not only has federalism no influence on the design of the executive, but there are no power-sharing or consociational aspects of the system that would require the federal executive to represent the interests of the constituent units as such. If a *Land* government belongs to the same party as does the federal government, this offers it an informal channel of influence. However, it also opens the door to possible further centralization because the *Land* government is not likely to be inclined to oppose the federal government.

Nor does federalism have any influence on the selection or role of the federal president. The citizens vote for the president directly; the candidate who receives an absolute majority of votes becomes president. The

role of the federal president includes a wide range of functions that concern all spheres of government. The president controls the armed forces, represents the state internationally, appoints and dismisses the federal chancellor and the federal government, dissolves the National Council, issues emergency decrees, signs bills, appoints civil servants and other functionaries, grants certain titles, legitimizes illegitimate children, and pardons criminals. Some of these rights resemble those that, in earlier times, were available through the royal prerogative. The exercise of the more substantial powers of the president, however, are restricted either by the requirement for other organs to participate in some way or by the power to impeach the federal president.

For the most part, the powers of the president have no particular significance for federalism. There is one exception, however. Under Article 100 B-VG, the president may dissolve a *Land* parliament. This right has never been exercised; were it to be exercised, however, the dissolution would first have to be proposed by the federal government and approved by the Federal Council, which in this case has an absolute veto, with a qualified quorum and majority. A *Land* parliament must not be dissolved twice for the same reason. In exercising this power, therefore, the federal president is effectively dependent upon the will of other bodies and, to this extent, plays only a minor constitutional role in the dissolution of a *Land* parliament.

Federal Administration It is characteristic of many federal systems that both legislative and administrative powers are shared between the federal sphere and the constituent units. The distribution of competences, as enshrined in the Austrian Federal Constitution,[36] is consistent with this characteristic, although by far the greatest share of competences lies with the federation.

In principle, there are four main types of distribution of powers in Austria. Most commonly, the federation has both legislative and administrative authority over a matter assigned to it.[37] In a smaller range of matters, the federation is responsible for legislation and the *Länder* for administration.[38] A third (minor) category entitles the federation to enact framework laws, leaving the *Länder* responsible for implementing legislation and administration.[39] Finally, the *Länder* are fully competent for both legislation and administration in relation to all matters that are not explicitly enumerated as a federal competence.[40] There are relatively few matters, however, that fall into the residual category of power. Most matters are assigned to the federation and fall within the first category mentioned above.

The federal Constitution compensates the *Länder* for their relative lack of power by providing for a system of "indirect federal administration."[41] A significant proportion of federal administration is carried out by the *Länder* on behalf of the federation, without being thereby transformed into a *Länder* administrative function. Conversely, a significantly smaller proportion of

administration is directly performed by federal authorities. Article 102 B-VG lists the federal competences that could be directly executed by the federation if it so chose. On the other hand, the approval of the *Länder* would be required were the federation to directly execute those of its competences that are not so listed. The *Länder* governors are principally responsible for performing indirect federal administration. In this very special context only, they are subject to federal instructions. District administrative agencies normally deal with administrative matters at first instance, although subject to the *Länder* governors and in compliance with their instructions. Since 2002 in some cases it has been possible for Independent Administrative Senates (*Unabhängige Verwaltungssenate*), rather than *Länder* governors, to deal with second-instance matters in the arena of indirect federal administration.

The scope of federal administration thus mirrors only a portion of federal legislative responsibilities. The *Länder* have administrative responsibility for certain of the federation's legislative obligations. On the other hand, even competences that are allocated entirely to the federation are principally performed by the *Länder*, although they retain their federal character. Conversely, it is only in exceptional circumstances that the federation performs administrative functions on behalf of the *Länder*.

Whatever legislative and administrative competences the *Länder* may have, they do not exercise judicial power. There has been much discussion[42] about whether *Land* administrative courts should be established in order to strengthen *Länder* powers and to relieve the Administrative Court of the burden of dealing with all administrative appeals once the administrative process is completed. An important step in this direction was taken in 1988 when, following a constitutional amendment, the so-called Independent Administrative Senates were established in each *Land*.

These tribunals are not courts, although they satisfy the requirements for tribunals in Article 6 of the European Convention on Human Rights. From an organizational point of view, they are agencies of the *Länder*. They are invested with a number of important functions, including providing a second level of decision making in relation to administrative-penalty procedures and dealing with appeals against administrative compulsion. Since 2002 they have had to deal with appeals against administrative rulings in many areas in which indirect federal administration is carried out by the *Länder*.[43] The *Land* governors had traditionally performed these functions, and there was controversy over whether the Independent Administrative Senates should (even if only partially) replace them.[44] In the end, however, as the *Länder* governors continue to play an important role with regard to indirect federal administration, the law was ultimately assumed to be constitutional. Moreover, the district administrative agencies that issue the rulings against which appeals are launched may object to any substantive

decision of the Independent Administrative Senates other than the mere repeal of a ruling. This procedure gives them, as well as the *Land* governors to whom they are responsible, some influence. If a ruling is repealed, the case is referred back to the district administrative agencies for a new decision, which is to be taken in the light of the reasoning upon which the repeal was based.

Despite these developments, and despite the various proposals that have been made over the years, no real *Land* administrative courts presently exist. Recently, the Constitutional Convention[45] once again recommended their establishment. This is one of the recommendations most likely to be realized in the aftermath of the convention.

All administrative authorities in Austria – be they local authorities, district administrative agencies, agencies responsible for direct federal administration, or even *Länder* governors (in the case of indirect federal administration) – are bound by the instructions of superior administrative authorities. In the last resort, they are subject to the supreme administrative bodies: the *Land* government or the *Land* governor in the *Länder* sphere and the federal government, individual federal ministers, or the federal president in the federal sphere. However, the Independent Administrative Senates and other independent tribunals do not belong to this classical hierarchy; nor are they subject to instructions issued by the supreme administrative bodies.

All administrative authorities, including the independent administrative authorities, are strictly bound to observe the law.[46] With few exceptions, all administrative acts need to be based upon a parliamentary law, which they must not violate. Laws, in their turn, need to be sufficiently precise to predetermine administrative action in a foreseeable way. This standard is to be observed by all parliamentary bodies – namely, the federal Parliament and the nine *Länder* parliaments.

The Federal Judicature

As noted in the previous section, legislative and administrative powers are shared between the federation and the *Länder*. The judicature, however, is reserved to the federation. The *Länder* do not have their own courts, either in the area of administrative or constitutional law or in relation to civil or criminal law.[47] Civil and criminal cases are determined by federal law courts that are located in the *Länder*. Administrative cases are dealt with by the administrative authorities, including the Independent Administrative Senates and other independent collegial bodies. As a last instance, the Supreme Court in Vienna decides civil and criminal law cases. Regarding administrative cases, appellants may lodge a complaint either before the Constitutional Court (*Verfassungsgerichtshof*) or the Administrative Court (*Verwaltungsgerichtshof*) but only after all administrative remedies have been

exhausted. Both courts are supreme courts in their own right, exercising the so-called "public-law jurisdiction." The federal Constitution provides the general framework for the composition and functions of these courts, which are more precisely defined in two ordinary federal laws.[48]

The right to review and repeal laws of both of the federal and the *Länder* legislatures is reserved to the Constitutional Court. Together with the Administrative Court, the Constitutional Court is also responsible for reviewing and repealing administrative acts of the central and *Länder* executives. Neither the "ordinary" civil and criminal law courts nor the Independent Administrative Senates are entitled to review the lawfulness of laws or ordinances. If, in a pending case, an ordinary court (of second instance), the Supreme Court, or an Independent Administrative Senate doubts whether a law is constitutional, the court or tribunal in question must ask the Constitutional Court to review it and will then continue its proceedings after the Constitutional Court has taken a decision.[49] Similarly, all ordinary courts, as well as the Independent Administrative Senates, are obliged to ask the Constitutional Court to review an ordinance if doubts arise in a pending case about whether it is illegal. In this case, also, the proceedings continue after the Constitutional Court has taken the decision.[50]

The Constitutional Court is situated in Vienna and comprises a president, a vice-president, twelve members, and six deputy members. All members must be lawyers and have worked for at least ten years either as judges, administrative officials, or law professors. The president, vice-president, six of the members, and three of the deputy members are appointed by the federal president on the proposal of the federal government. Three more members and two more deputy members are appointed by the federal president on the proposal of the National Council. The final three members and one deputy member are appointed by the federal president on the proposal of the Federal Council. The *Länder* thus have some, although limited, influence on the selection of members of the Constitutional Court. Their position is further strengthened by the requirement for three members and two deputy members to have their permanent residence in any Austrian municipality but Vienna.[51] Although a large majority of the members of the Court may thus be residents of the capital, some attempt is made to require that members be selected on a decentralized basis.

With regard to the Administrative Court, its president, vice-presidents, and all other members are appointed by the federal president on the proposal of the federal government and must be lawyers with at least ten years of professional practice. Article 134 B-VG requires, however, that at least one-quarter of the members have worked in *Länder* administration, which has a slightly decentralizing effect on the selection of the judges. The establishment of administrative courts in the *Länder* would undoubtedly create an entirely new dimension of decentralization.[52]

The Administrative Court is responsible for reviewing and repealing administrative rulings if appellants claim that rights to which they are entitled under the ordinary law have been violated. It does not matter, for this purpose, whether the ruling was issued by a federal or *Land* authority or whether the law that was violated was a federal or a *Land* law. It is also possible for the Administrative Court to decide issues in case of a defaulting administrative authority. Under certain conditions, moreover, federal ministers may lodge a complaint against administrative rulings of *Land* authorities on the grounds of illegality. In exceptional cases, a *Land* government may lodge a complaint against a ruling of a federal minister, also on the grounds of illegality.

The Constitutional Court has a wider range of responsibilities than does the Administrative Court, among which the following should be mentioned as they relate to issues of federalism. As noted earlier, the Court may review federal or *Land* laws that are at issue before an ordinary court or tribunal in a pending procedure. The Court also reviews a *Land* law if the federal government so requests, or a federal law on the application of a *Land* government. In this context, there is symmetry in the treatment of the different spheres of government, which is consistent with the concept of parity in a federal system but which is by no means characteristic of Austrian federalism more generally. Ordinary *Land* laws may be repealed by the Constitutional Court if they violate either the constitution of the respective *Land* or the federal Constitution. The *Länder* constitutions themselves may be repealed if they are in breach of the federal Constitution. Article 140 B-VG also authorizes the *Länder* constitutions to determine whether the political opposition in the *Länder* parliaments should be allowed to lodge an appeal against *Länder* laws that they believe to be unconstitutional. Decrees that were issued by a federal or *Land* administrative authority may be reviewed and repealed by the Constitutional Court not only if an ordinary court or tribunal asks it to do so but also – among other possibilities – if the federal government believes a *Land* decree to be illegal or, conversely, if a *Land* government believes a federal decree to be illegal.[53]

On the application of a private person, the Constitutional Court may also invalidate administrative rulings of federal or *Land* administrative authorities that violate that person's fundamental, constitutionally guaranteed rights.[54] The appeal must be lodged within a period of six weeks after the person receives the ruling. All administrative remedies against the rulings must have been exhausted. If the Court considers that the ruling may be based on a law that itself is unconstitutional, then it may *ex officio* initiate proceedings in order to review the law. Under certain highly restricted conditions, a private person may also lodge a direct appeal against an unconstitutional law before the Court, but these cases are much rarer than are those of complaints against administrative rulings.

The Constitutional Court is also responsible for dealing with competence disputes. Both the federal government and the *Land* governments may ask the Court to decide whether a draft law, to be enacted by their own parliament, would be *ultra vires*.[55] If the law is enacted even though it has been held to be *ultra vires*, it will be held unconstitutional in any post-enactment judicial review. The first decision, which usually includes an interpretation of the concerned federal or *Land* competence, is the "authentic interpretation" and is considered binding.

The Constitutional Court also decides financial disputes[56] between the federation and the *Länder*, unless they fall within the responsibilities of the ordinary law courts or administrative authorities, and disputes[57] arising from intergovernmental concordats concluded under Article 15a B-VG.[58]

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

The Land Legislatures

Because the *Länder* have legislative functions of their own, they also have parliamentary bodies, which are called *Landtage*.[59] The federal Constitution provides the framework for the selection, composition, and role of the *Länder* parliaments but leaves the *Länder* constitutions to regulate them more precisely.[60] The *Länder* parliaments and their relations with the respective *Land* executive branch resemble their counterparts in the federal sphere only in part. Each *Land* constitution differs from the others. Likewise, the federal Constitution does not expect the *Länder* parliaments to be homogeneous copies of the federal Parliament.

The most striking organizational difference between the federal Parliament and the *Länder* parliaments is the lack of a bicameral system in the latter. However, there is a striking similarity in how the members of the *Land* parliaments and the federal Parliament are elected. Elections of the *Land* parliaments are based on the same electoral principles as are those that apply to elections of the National Council, leaving it to each *Land* to determine, through its own electoral rules, whether the entitlements to vote and to stand for election should be more generous than those that apply for election to the National Council.[61] The federal Constitution also expressly applies the provisions concerning the immunity of members of the National Council and the public character of parliamentary meetings to the *Land* parliaments.[62]

Each *Land* constitution contains detailed or supplementary provisions concerning the selection and composition of the *Land* legislature, which must, of course, be in conformity with the federal Constitution. It is usually left to standing orders and electoral rules of the respective *Land* parliaments

to determine these issues even more minutely. Each *Land* may, for example, determine the number of members to be elected to its parliament. The *Länder* may not introduce a bicameral system, however, nor may they provide specific representation for minority groups without a federal constitutional basis (which, so far, has been lacking).[63]

The federal Constitution also provides that the *Länder* parliaments are responsible for law making in the *Länder* and broadly outlines the law-making procedure.[64] A bill must pass the *Land* parliament, must be signed and counter-signed in a manner determined by the *Land* constitution, and be published in the Land Gazette by the *Land* governor. The *Länder* may decide the parliamentary quorum and majority necessary for the passage of ordinary laws, but the federal Constitution stipulates that constitutional legislation requires a quorum of half of the members of the legislature and a two-thirds majority.[65] Even the law-making procedure is not entirely free from federal influence as Article 98 B-VG provides that all bills must be communicated to the Office of the Federal Chancellor before being published in the Federal Gazette. Within eight weeks after the communication is made, the federal government may object to a bill on the ground that it endangers federal interests. In this case, however, it must explain its reasons. If the federal government had been consulted before the *Land* parliament passed the bill, an objection may only be made if the bill is considered to be *ultra vires*. Unless the assistance of federal administrative organs is required by a bill, any federal veto may be overruled by the *Land* parliament with a quorum of half of its members. On the whole, federal supervision[66] is stronger in Austria than in many other federal countries and altogether more typical of regionalized countries.[67]

The federal president does not play any role in the *Land* law-making procedure. As noted earlier, however, he or she may dissolve a *Land* parliament on the proposal of the federal government. This power is restricted, in the sense that a *Land* parliament must not be dissolved more than once for the same reason. Moreover, the consent of the Federal Council, delivered with a qualified quorum and majority, is also required, making dissolution unlikely, even though the representatives of the *Land* concerned are not allowed to vote in this decision.

The federal Constitution does not explicitly provide for direct democracy in the sphere of the *Länder*, but the *Länder* themselves may provide such a system through their constitutions. The constitutions of the *Länder* commonly provide for referenda, citizens' initiatives, public consultation, and petitions both at the *Länder* and local level. According to the Constitutional Court,[68] however, the use of direct democracy must not replace the system of representative democracy, as established by the federal Constitution. The Court applies a very narrow standard of democracy, taking the

limited number of plebiscitary instruments at the federal level as a model that implicitly binds the *Länder* and prevents the creation of a strong system of direct democracy.

The Land Executives

The *Land* government is responsible for *Land* administration.[69] According to Article 101 B-VG, it comprises the *Land* governor, its deputies, and other members. The *Land* governments, including the *Land* governors, are elected by the *Land* parliaments according to either a proportional or a majority election system. The members of the *Land* governments need not themselves be members of the *Land* parliament, but they must be eligible for election to it. The governors preside over the *Land* governments and, before assuming office, render an affirmation to the federal president with respect to the federal Constitution.

The Federal Constitutional Act of 1925, concerning the Principles for the Establishment and Operation of the Offices of the *Land* Governments except Vienna,[70] also applies to the *Land* executives. Accordingly, each *Land* government is assisted by an office of the *Land* government consisting of several groups and departments that have to deal with both indirect federal and *Land* administrative tasks. If the office performs *Land* administration,[71] the officials are directed by the *Land* government or its individual members. If the office is dealing with indirect federal administration,[72] the administration is directed by the *Land* governor. The governor also presides over the office and supervises its director, who is always a lawyer and who is responsible for the internal management of the work of the office.

Within this framework, the *Land* constitution regulates the *Land* executive. Again, however, the basic rules are laid down by the federal Constitution and must not be changed by the *Länder*. Moreover, the Constitutional Court applies a rigorous standard of consistency, drawing not only on rules that are explicitly laid down by the federal Constitution but also on implicit standards that, according to the Court, emanate from constitutional principles and are binding on the *Land* constitutions.[73]

Local Government

In addition to the federation and the *Länder*, local government constitutes the third territorial sphere of government in Austria. Municipalities form the substructure of each state.[74] They are not, however, constituent units of the federal system; they lack sovereignty, statehood, and, more concretely, legislative powers. Nevertheless, they perform a large number of administrative tasks and thus play an important role.[75]

The federal Constitution deals with the establishment of local authorities and with their relations with the federation or the *Länder*.[76] Article 115 B-VG generally entitles, and obliges, the *Länder* to provide a detailed legislative framework for municipalities, in accordance with the principles of the federal Constitution.

Municipalities are not merely administrative units: they are also autonomous bodies with a right to self-administration. Self-administration means that administrative tasks are performed by bodies other than the federation and the constituent *Länder*. It is a characteristic of self-administration that the sphere of government in question has its own autonomous functions as well as those that are delegated to it. When municipalities perform tasks within their own sphere of functions, they cannot be given instructions by federal or *Land* authorities, although they are subject to supervision by them. These principles give the municipalities more liberty of action. If they perform tasks within the sphere of delegated functions, however, they are bound by instructions given by federal or *Land* authorities, as the case may be. The municipalities are also responsible for a wide range of public services involving the provision of infrastructure. These have only a limited statutory framework and are often also performed by privatized companies.

The federal Constitution recognizes three main local bodies: the mayor, the local assembly, and the local board. The local assembly is directly elected by the local citizens, according to the same electoral principles that apply to elections for the National Council and the *Land* parliaments. The local board is a collegial body elected by the local assembly. The federal Constitution provides that the mayor is elected by the local assembly; since 1995,[77] however, it has authorized *Land* constitutions to deviate from this provision.[78] So far, six *Länder* have adopted constitutional provisions that allow for direct election of the mayor.

When they are acting within the area of local government autonomy, local organs are not liable to instruction by federal or *Land* agencies. However, a number of supervisory instruments dealing with, for example, the right to information, the right of repeal of illegal local orders, the right to approve local ordinances in some cases, and even the right to dissolve the local assembly are available to the federation and the *Länder* in order to ensure that municipalities do not violate their laws. The federation is competent to exercise these supervisory rights with regard to the performance of federal administrative tasks that are carried out by the municipalities autonomously. The *Länder* are competent to exercise them with regard to *Land* administrative matters that are carried out by the municipalities autonomously. The *Länder* are, moreover, competent to examine the budgets of municipalities by reference to the criteria of economy, profitability, and expediency.

In principle, the mayor is responsible for performing all tasks delegated to the local sphere. In exercising this responsibility, he or she is subject to

the instructions of either federal or *Land* organs, depending on whether the task in question relates to a federal or a *Land* competence. In the event of illegal behaviour, the mayor may be dismissed by the *Land* government on behalf of the *Land* or by the *Land* governor on behalf of the federation.

It follows that local government does not enjoy a status that is equal to that of the federation and the *Länder.* Lacking their own legislative powers, municipalities must administer federal or *Land* legislation. Even their autonomous tasks derive from either a federal or a *Land* law, although the federation and the *Länder,* in their turn, are constitutionally required to allocate these tasks to the local autonomous sphere, according to the principle of subsidiarity.[79] Thus, the idea of a multilayered federalism is far from being realized. Although it is beyond the scope of this chapter, it might be noted that, within the context of fiscal relations, local government is increasingly emerging as a third partner.

INTERGOVERNMENTAL RELATIONS

Whereas in other federal systems cooperative federalism has been used principally to overcome the strong legal position of the constituent states, thus creating an informal but efficient form of centralism, in Austria the position is otherwise. Cooperative federalism has been a means for uniting the political power of the *Länder* and for coordinating *Länder* policies in order to deflect centralization. In this way, cooperation has developed as a strong political counterpart to the federation's overwhelming legal powers.[80]

Cooperation may take either a legal or a constitutional form, but it may also be informal. Legal cooperation, in its turn, may be based on private law; namely, contracts between the federation and the *Länder.* The capacity of the *Länder* to act under private law is not affected by the distribution of competences.[81] *Länder* contracts thus may concern any subject matter, within the realm of private law. In addition, the federation and the *Länder* conclude concordats under public law, within the terms of Article 15a B-VG. This provision was inserted into the federal Constitution in 1974 and may be regarded as the most far-reaching legal instrument of cooperative federalism.[82] According to this provision, the *Länder* may conclude these concordats either with each other or with the federation, as far as their own competences are concerned. This has proved very useful in dealing with such complex matters as environmental protection, health, and spatial planning. In these areas, the necessary powers are divided between different law-making authorities, and problems cannot be resolved by the legislation of one authority alone without harmonizing with the powers of others.

Concordats are concluded between the federal government or a member of it and, pursuant to the *Länder* constitutions, the *Länder* governors. If the subject matter of a concordat affects the law-making powers of either

the federation or the *Länder*, the parliament affected must give its consent after the concordat is signed, in the course of ratification. Concordats that concern legislative matters must also be implemented by laws on both sides, in another parallel with the implementation of international law.

Two relatively recent and specific concordats should be mentioned in this context: namely, the Concordat on a Consultation Mechanism[83] and the Concordat on an Austrian Stability Pact.[84] Both concordats were concluded not only by the federation and the *Länder* but also by the municipalities (represented by the Austrian Federation of Towns and the Austrian Federation of Municipalities). Article 15a B-VG authorizes the making of concordats only between the federation and the *Länder*; therefore, a constitutional act of authorization[85] had to be passed in order to empower the municipalities to take part. This development may also represent some movement towards a multilayered federalism.[86] However, because the classical concept of federalism does not recognize municipalities as constituent parts of the federal polity, and as long as this new dimension is limited to the question of financial equality, local government will not be an integral element of the federal system as a whole.

The Consultation Mechanism[87] obliges the federation, the *Länder*, and the municipalities to consult each other if a draft law or an ordinance threatens to impose financial burdens on the others. In this case, the matter would be discussed by the consultation committee, which consists of representatives of all three territorial entities. If the committee fails to reach an agreement, the entity that intends to pass the law will be held responsible for any additional costs. This mechanism protects the *Länder* from federal laws that would have an adverse financial impact on them. On the other hand, the *Länder* themselves risk incurring the burden of additional costs if they enact laws against the will of the others.

The concordat on the Austrian Stability Pact 2005 was concluded under the rigorous pressure of the EU convergence criteria.[88] The pact requires the *Länder* to achieve an annual budgetary surplus (even though a limited deficit is possible on the part of the federation) while the municipalities need only balance their budgets. The *Länder* were induced to sign this concordat by a provision in the Tax Equalization Act[89] that threatened them with considerable financial sanctions if they failed to do so. This is an example of an admittedly unusual case in which both political and legal force were employed in the name of "cooperative federalism."

For the purposes of informal cooperation, the *Länder* governors, other members of the *Länder* governments, the presiding officers of the *Länder* parliaments, and senior civil servants meet frequently.[90] Representatives of the federation may be allowed to attend the meetings as observers. These inter-state conferences are regularly organized by the liaison office of the

Länder. This is an informal agency that not only collates all necessary information for the *Länder* but also coordinates joint activities and communicates them to the federation.[91] The most important political body of *Länder* cooperation is the Conference of the *Land* Governors (*Landeshauptmännerkonferenz*), which is usually summoned four times a year but also meets for special purposes.[92]

In Austria cooperative federalism is of great political importance. In practice, all major changes of a legal, political, or financial kind are negotiated. Generally, change is not carried out without consultation with the *Länder* and municipalities. Nevertheless, the predominant role of the federal government and the dependence of all other governments on its planning and policies remain the principal features of Austrian federalism.

ANALYSIS AND CONCLUSIONS

Legislative and executive governance in Austria have a solid written basis in federal constitutional law. These core provisions are elaborated by the *Land* constitutions and ordinary *Land* legislation or, as far as the federal sphere is concerned, by ordinary federal legislation. Due to the codified system of Austrian law, the institutions and functions of the federal system are provided on a relatively precise basis. This does not, however, prevent the Constitutional Court from interpreting constitutional law in a manner that is not always either foreseeable or favourable to the concept of federalism. Convention or practice plays a minor role in the legalistic system of Austrian law. Nevertheless, informal interaction and cooperation are highly important for the practical functioning of Austrian federalism, despite the predominance of the federal sphere of government.

When the B-VG was enacted in 1920, the federal system was not complete. Austrian federalism took its modern shape in several stages. Even now, its future direction is not entirely clear. More than a decade ago it had seemed as though a great reform of the Austrian federal system could be achieved. For political reasons, however, this attempt failed and was replaced by a number of smaller amendments.[93]

In June 2003 a Constitutional Convention, consisting of 70 members (constitutional lawyers, politicians, and lobbyists) and chaired by the former president of the Austrian Court of Auditors, was created as a forum for expert discussion on a new constitution and, in particular, on a new federal system. The convention was expected to develop a constitutional draft by the end of 2004. Due to the very different political approaches of the parties concerned, however, the project did not proceed, although a draft was privately presented by the chairperson.[94] For the moment, therefore, the matter has been referred to a select committee of the National Council

(*Besonderer Ausschuss zur Vorberatung des Berichtes des Österreich-Konvents*), which is considered to be the most democratically legitimate body for dealing with the reform agenda.

Institutional reform seems to be inevitable if federalism is to operate effectively in Austria in the future and if Austrians are to continue to accept it as a legitimate system. Options for change include modifying the composition and functions of the Federal Council in order to make it better suited to representing *Länder* interests, transforming the system of indirect federal administration into direct *Land* administration, introducing *Land* administrative courts, and modifying the allocation of competences. Any reform must also take into account the context of the EU. Although the EU is said to be "blind" with regard to the internal, federal, or unitary structure of its member states, it has had the effect of accelerating the dynamics of "executive federalism," whereby the constituent units implement central policies rather than exercise law-making powers of their own.[95] If the essence of a federal system, in the sense of a dual order of legislative governance, is to be maintained, then the *Land* parliaments, which are the main victims of this phenomenon, must somehow be protected from a further loss of competences.

NOTES

1 Each of these two *Länder* has a population of approximately 1.5 million people. For further statistical data, see <www.statistik.at>.

2 Due to Austrian membership in the European Union (EU), EU law enjoys a higher rank than does domestic constitutional law but not (it is generally thought) a higher rank than the fundamental principles of the Austrian Constitution (as modified by the accession).

3 The B-VG was first enacted in 1920 and republished in an updated form in 1930. It has been amended 93 times.

4 An overview of Austrian constitutional law is given by Robert Walter and Heinz Mayer, *Grundriß des österreichischen Bundesverfassungsrechts*, 9th ed. (Vienna: Manz, 2000); Ludwig K. Adamovich, Bernd-Christian Funk, and Gerhart Holzinger, *Österreichisches Staatsrecht*, 3 vols. (Vienna, New York: Springer, 1997–2003); Theo Öhlinger, *Verfassungsrecht*, 5th ed. (Vienna: WUV, 2003); Peter Pernthaler, *Österreichisches Bundesstaatsrecht* (Vienna: Verlag Österreich, 2004); and Walter Berka, *Lehrbuch Verfassungsrecht* (Vienna/New York: Springer, 2005).

5 According to the nation-wide census of 2001, the Slovenian minority consisted of 17,953 Austrian nationals, the Burgenland Croatian minority of 19,374 nationals, the Hungarian minority of 25,884 nationals, the Roma minority of 4,348 nationals, the Czech minority of 11,035 nationals, and the Slovakian minority of 3,343 nationals. See Anna Gamper, "Austrian Federalism and the Protection of Minorities,"

Federalism, Subnational Constitutions, and Minority Rights, ed. G. Alan Tarr, Robert F. Williams, and Josef Marko (Westport/London: Praeger, 2004), 55–72.

6 See, for example, Felix Ermacora, *Österreichischer Föderalismus: Vom patrimonialen zum kooperativen Bundesstaat* (Vienna: Braumüller, 1976), 25–39 (with further references).

7 See Peter Pernthaler, *Die Staatsgründungsakte der österreichischen Bundesländer* (Vienna: Braumüller, 1979); Karl Weber, "Die Entwicklung des österreichischen Bundesstaates," *Bundesstaat und Bundesrat in Österreich,* ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), 37–65; and Karl W. Edtstadler, "Das Werden des Bundesstaates," *Bundesstaat und Bundesrat in Österreich,* ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), 23–35.

8 See Felix Ermacora, *Die Entstehung der Bundesverfassung 1920,* 4 vols. (Vienna: Braumüller, 1986–90).

9 See Peter Bußjäger, *Landesverfassung und Landespolitik in Vorarlberg – Die Verfassungsgeschichte Vorarlbergs und ihre Auswirkungen auf die Landespolitik 1848 – 2002* (n. p.: W. Neugebauer, 2004). The history of the *Länder* after 1945 is illustrated by Herbert Dachs, ed. *Der Bund und die Länder* (Vienna: Böhlau, 2003).

10 See Peter Pernthaler and Sergio Ortino, *Rechtliche Voraussetzungen und Schranken der Institutionalisierung – Europaregion Tirol* (Bolzano: n.p., 1997).

11 Art. 41, B-VG.

12 The federal law-making procedure is basically regulated by Art. 41 – 49, B-VG.

13 Art. 42, B-VG.

14 Art. 44, para. 2, B-VG.

15 See Pernthaler, *Österreichisches Bundesstaatsrecht,* 435.

16 *Nationalrats-Wahlordnung 1992* (BGBL 1992/471 as amended by BGBL I 2003/90).

17 Art. 29, B-VG. The president may use this power only once for the same reason.

18 Art. 34–37, B-VG. See Robert Walter, "Der Bundesrat," *Föderative Ordnung I: Bundesstaat auf der Waage,* ed. Ernst C. Hellbling, Theo Mayer-Maly, and Herbert Miehsler (Salzburg-Munich: Anton Pustet-Europa Verlag, 1969), 199–290; Irmgard Kathrein, "Der Bundesrat," *Österreichs Parlamentarismus,* ed. Herbert Schambeck (Berlin: Duncker and Humblot, 1986), 337–401; Robert Walter, "Der Bundesrat zwischen Bewährung und Neugestaltung," *Reformbestrebungen im österreichischen Bundesstaatssystem,* ed. Heinz Schäffer and Harald Stolzlechner (Vienna: Braumüller, 1993), 41–50; Heinz Schäffer, "The Austrian Bundesrat: Constitutional Law – Political Reality – Reform Ideas," *Role and Function of the Second Chamber,* ed. Ulrich Karpen (Baden-Baden: Nomos, 1999), 25–55; Herbert Schambeck, "Föderalismus und Parlamentarismus in Österreich," *Die Stellung der Landesparlamente aus deutscher, österreichischer und spanischer Sicht,* ed. Detlef Merten (Berlin: Duncker andHumblot, 1997), 15–32 and Herbert Schambeck, ed. *Bundesstaat und Bundesrat in Österreich* (Vienna: Verlag Österreich, 1997).

19 See Ronald L. Watts, *Comparing Federal Systems,* 2nd ed. (Montreal: McGill-Queen's University Press, 2002), 93; Anna Gamper, "Demokratische Legitimation und gewaltenteilende Funktion Zweiter Kammern in der 'gemischten' Verfassung,"

Reflexionen zum Internationalen Verfassungsrecht, ed. Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger (Vienna: WUV, 2005), 63–86.

20 See Anna Gamper, "'Arithmetische' und 'geometrische' Gleichheit im Bundesstaat," *Festschrift Peter Pernthaler,* ed. Karl Weber and Norbert Wimmer (Vienna, New York: Springer, 2005), 143–166; and Anna Gamper, "A 'Global Theory of Federalism': The Nature and Challenges of a Federal State," *German Law Journal* 6 (2005): 1297–1318 (1315). The distinction between an "arithmetic" and a "geometric" system also touches on the issue of "asymmetric federalism": See Peter Pernthaler, "Asymmetric Federalism as a Comprehensive Framework of Regional Autonomy," *Handbook of Federal Countries, 2002*, ed. Ann L. Griffiths (Montreal: McGill-Queen's University Press, 2002), 472–493. Regarding Austria cf. Peter Pernthaler, *Der differenzierte Bundesstaat* (Vienna: Braumüller, 1993).

21 Arts. 34–35, B-VG.

22 See below.

23 See below.

24 Art. 42, B-VG.

25 See Peter Bußjäger, *Die Zustimmungsrechte des Bundesrates* (Vienna: Braumüller, 2001).

26 Art. 50, paras. 1 and 3, B-VG.

27 Art. 15, para. 6, B-VG.

28 See above.

29 Art. 37, para. 2, B-VG.

30 BGBL I 2003/71. See also Christoph Grabenwarter, "Bundesrat: Wenn Anträge keine Mehrheit finden," *Journal für Rechtspolitik* (2003): 155–160, Theo Öhlinger, "Die Selbstblockade des Bundesrates," *Journal für Rechtspolitik* (2004): 11–12 and Christoph Grabenwarter, "Anträge ohne Mehrheit – keine Selbstblockade des Bundesrates," *Journal für Rechtspolitik* (2004): 13–14.

31 VfSlg 17.173/2004.

32 See below. Future perspectives are shown by Peter Bußjäger and Jürgen Weiss, eds., *Die Zukunft der Mitwirkung der Länder an der Bundesgesetzgebung* (Vienna: Braumüller, 2004).

33 BGBL 1929/392.

34 Art. 70–72, B-VG.

35 Art. 60, para. 6, B-VG.

36 Cf. mainly Art. 10–15, B-VG. See, for example, Bernd-Christian Funk, *Das System der bundesstaatlichen Kompetenzverteilung im Lichte der Verfassungsrechtsprechung* (Vienna: Braumüller, 1980); Josef Werndl, *Die Kompetenzverteilung zwischen Bund und Ländern* (Vienna: Braumüller, 1984); Peter Pernthaler, *Kompetenzverteilung in der Krise* (Vienna: Braumüller, 1989); Pernthaler, *Österreichisches Bundesstaatsrecht,* 313–348; Heinz Schäffer, "Die Kompetenzverteilung im Bundesstaat," *Bundesstaat und Bundesrat in Österreich,* ed. Herbert Schambeck (Vienna: Verlag Österreich, 1997), 65–88; and Anna Gamper, *Die Regionen mit Gesetzgebungshoheit* (Frankfurt: Peter Lang, 2004), 362–404.

37 Art. 10, B-VG.
38 Art. 11, B-VG.
39 Art. 12, B-VG.
40 Art. 15, B-VG.
41 See Karl Weber, *Die mittelbare Bundesverwaltung* (Vienna: Braumüller, 1987); Bernhard Raschauer, "Artikel 102," *Österreichisches Bundesverfassungsrecht*, ed. Karl Korinek and Michael Holoubek (Vienna, New York: Springer, 2001); Peter Bußjäger, "Artikel 102," *Bundesverfassungsrecht*, ed. Heinz Peter Rill and Heinz Schäffer (Vienna: Verlag Österreich, 2002).
42 See, for example, Peter Pernthaler and Irmgard Rath-Kathrein, "Die Einführung von Landesverwaltungsgerichten – eine Alternative zu den ‚unabhängigen Verwaltungssenaten in den Ländern'," *Juristische Blätter* (1989): 609–614; Christoph Grabenwarter, "Auf dem Weg zur Landesverwaltungsgerichtsbarkeit," *Journal für Rechtspolitik* (1998): 269–286; and Christian Martschin, "Der Einbau von Landesverwaltungsgerichten in das System des österreichischen Verwaltungsrechtsschutzes," *Zeitschrift für Verwaltung* (1999): 2–11.
43 BGBL I 2002/65.
44 See, for example, Wolfgang Pesendorfer, "Rechtsschutz im Verwaltungsrecht," *Österreichische Juristen-Zeitung* (2002): 521–531.
45 See below.
46 So-called "principle of legality" (Art. 18, B-VG).
47 Art. 82, para. 1, B-VG.
48 Regarding the Administrative Court, see Art. 130–136, B-VG and the Administrative Court Act (BGBL 1985/10 as amended by BGBL I 2004/89). Regarding the Constitutional Court, see Art. 137–148, B-VG and the Constitutional Court Act (BGBL 1953/85 as amended by BGBL I 2005/165).
49 Art. 89 and Art. 129a, para. 3, B-VG.
50 Ibid.
51 Art. 147, para. 2, B-VG.
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55 Art. 138, para. 2, B-VG.
56 Art. 137, B-VG.
57 Art. 138a, B-VG.
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62 Art. 96, B-VG.
63 Theo Öhlinger and Peter Pernthaler, *Projekt eines Volksgruppenmandats im Kärntner Landtag* (Vienna: Braumüller, 1997).
64 Art. 97, B-VG.
65 Art. 99, para. 2, B-VG.
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73 See above, note 68.
74 Art. 116, para. 1, B-VG
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76 Arts. 115–120, B-VG.
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78 Art. 117, para. 6, B-VG.
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Harald Stolzlechner, "Art 118," *Bundesverfassungsrecht,* ed. Heinz Peter Rill and Heinz Schäffer (Vienna: Verlag Österreich, 2004).

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94 For further information, including the Convention's final report, see <www.konvent.gv.at>. See also Österreichische Juristenkommission, ed. *Der Österreich-Konvent: Zwischenbilanz und Perspektiven* (Vienna, Graz: nwv, 2004), Walter Berka et al., eds. *Verfassungsreform* (Vienna, Graz: nwv, 2004), Peter Bußjäger and Daniela Larch, eds. *Die Neugestaltung des föderalen Systems vor dem Hintergrund des Österreich-Konvents* (Innsbruck: Institut für Föderalismus, 2004), Peter Bußjäger and Rudolf Hrbek, eds. *Projekte der Föderalismusreform – Österreich-Konvent und Föderalismuskommission im Vergleich* (Vienna: Braumüller, 2005), Peter Bußjäger, *Klippen einer Föderalismusreform – Die Inszenierung Österreich-Konvent zwischen Innovationsresistenz und Neojosephinismus* (Innsbruck: Institut für Föderalismus, 2005) and Thomas Olechowski, ed. *Der Wert der Verfassung – Werte in der Verfassung* (Vienna: Manz, 2005).

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ARCTIC OCEAN

KALALLIT NUNAAT (GROENLAND) (DENMARK)

Beaufort Sea

Baffin Bay

ALASKA (USA)

Yukon Territory

Northwest Territories

Nunavut

ATLANTIC OCEAN

Hudson Bay

Newfoundland and Labrador

British Columbia

Alberta

Saskatch-ewan

Manitoba

Quebec

PACIFIC OCEAN

Ontario

Prince Edward Island

Ottawa

Nova Scotia

UNITED STATES OF AMERICA

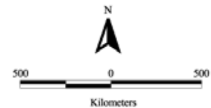
New Brunswick

Canada

Capital: Ottawa
Population: 31.5 Million

Boundaries and place names are representative only and do not imply official endorsement.

The three northern territories, while adminstrative divisions, are not provinces.



Sources: ESRI Ltd.; National Atlas of Canada; Times Atlas of the World

Canada

THOMAS O. HUEGLIN

Geographically, Canada is the second largest country in the world, but it has a population of only 32.8 million people. There are ten provinces; in addition, there are three northern territories, which have more limited self-governing authority than do the provinces. As a federation Canada is a study in asymmetry. Demographically, about two-thirds of Canadians live in the two central provinces, English-speaking Ontario and French-speaking Quebec. Almost equally significant for the country's national fabric is the fact that, all across the country, most Canadians live in close proximity to the southern border with the United States.

While manufacturing is concentrated in central Canada, the four western provinces are the owners of most of the country's most valuable natural resources. Alberta, in particular, sits on some of the largest oil fields in the world. In terms of governance, this means, for example, that a national energy policy is an impossibility, given the desire of the west to maximize oil prices and the desire of central Canada's manufacturing industries to keep domestic energy prices below the world-market level.

By comparison, the four smaller eastern (Atlantic) provinces, once the hub of trade and economic development in the dominions, suffer from the decline of traditional industries and changed trade patterns. In order to provide their citizens with comparable public services at comparable rates of taxation as constitutionally required, provincial governments have come to depend on massive federal transfers.

Canada is a stable federal democracy.[1] The fact that it still acknowledges the Queen of England as its formal sovereign is of little to no political consequence. In both the federal and provincial spheres of government, legislatures follow in the British Westminster parliamentary tradition. The Canadian Senate is a government-appointed oddity among classical federations and therefore lacks legitimacy as a chamber of regional representation. Not least because, due to the lack of a strong second chamber, the federal legislative institutions are poorly equipped to accommodate the

regions, Canadian federalism has developed as a particularly strong case of executive federalism. In other words, major policy initiatives generally require agreement among the country's political leaders – the prime minister and the provincial premiers. The deal-making among first ministers, however, is in turn regarded as lacking transparency and accountability. In one instance, an attempt was made to compensate for this lack of democratic legitimacy by putting a successfully negotiated agreement to a national referendum.[2] The agreement's resounding rejection in that referendum not only demonstrated disapproval of the agreement itself but also popular mistrust of the entire process.

The structure of the court system, the judicial branch, is a two-tiered but essentially unitary pyramid with the provincial court systems at the base and the Supreme Court of Canada at the apex. The constitutional adoption of a charter of rights and freedoms in 1982 gave rise to fears that this belated codified intrusion of individual rights into the English Canadian common-law tradition would jeopardize the country's judicial culture and lead to a judicialization of federalism as in the neighbouring United States. However, while the Charter has been hugely successful in strengthening the multicultural and (relatively) minority-tolerant character of Canadian society, the post-Charter court has generally avoided entanglement in political controversy.[3]

One of the largely unacknowledged issues in Canadian federalism pertains to the role of local government and of large cities in particular. Most Canadians now live in large urban centres; yet municipal government remains caught between the pull of provincial budget cutting and the hope for a more generous exercise of the federal spending power.

Canada, then, would seem to be a particularly difficult if not problematic case of federal governance. Indeed, while federalism appears as a promising strategy for conflict resolution and political accommodation in many parts of the world, Canadians have increasingly been putting the blame for their woes squarely on the federal system itself. They could not be more mistaken. The point to be made about federal governance in Canada is not its alleged lack of both efficiency and accountability, nor the fact that it has been unable to put to rest some of the conflicts accompanying the country since Confederation in 1867; rather, the point is its spectacular success in providing Canadians with political, economic, and social stability despite these conflicts and asymmetries. With a per capita income of US$31,500, Canada is clearly one of the world's richest nations.

BACKGROUND

There are five major regions in Canada, each of which appears closer to its more immediately adjacent neighbours in the United States than to one another. Thus, the Atlantic provinces in the east are separated from the rest of English Canada by the water that surrounds much of them and by

the francophone province of Quebec, which sits as a cultural barrier in between. New England is the natural hinterland. The favourite hockey team in the east is the Boston Bruins, not the Toronto Maple Leafs.

Ontario and Quebec are, in turn, separated from one another by obvious differences of language and culture. Yet both Toronto and Montreal see New York City as their natural cousin rather than Winnipeg or Vancouver. Indeed, Ontario is physically separated from the western provinces by the Canadian Shield, a vast formation of Precambrian rock extending across sparsely populated northwestern Ontario.

The Prairie provinces, more similar to the adjacent Midwest of the United States than to any other part of the country,[4] are separated by the Rocky Mountains from British Columbia, which appears more like a northern extension of the US Pacific Northwest than a western extension of Canada. Even the northern territories show more affinity with Alaska than with the rest of Canada, from which they are separated by enormous distances and outrageous air fares. In many ways then, Canada is not so much a country in the conventional sense as it is the result of a political decision to keep these vastly divergent parts together, and apart from the United States.

Canadians constitute one of the most diverse societies in the world, although this is far less so in rural areas than it is in the large cities. Toronto is also one of the world's most multicultural cities. Recent immigrants are proud Canadians and have little sense of the old battles between English Canada and Quebec. And this is true of westerners more generally. They regard this issue as an out-of-date central Canadian squabble that diverts far too much energy and money from elsewhere in the country.

Quebec's uneasy place in Confederation stems from three interrelated irritations: the 1759 conquest of New France by the British; the perception that Confederation was based on an English-French compact among equal participants that, over time, turned into a numbers game wherein the lone francophone province was pitted against nine anglophone provinces, with the federal government usually on the anglophone side; and fears about the further erosion of a francophone presence in Canadian society – fears that are fuelled by Quebec's low birthrate and the fact that most immigrants seek to join an English-speaking North America.[5]

After two Quebec referendums, in 1980 and 1995, respectively, the issue of separatism is for now on the backburner. While a majority of Quebecers would be in favour of strengthening the autonomy of what already is arguably the most powerful constituent unit government in the world, an influential minority continues to believe that Quebec would ultimately fare better entirely on its own.

Aboriginal peoples, who comprise about 3 percent of the population, can realistically enjoy no such dreams, even though a right to Aboriginal self-government is now enshrined in Canada's Constitution. For a variety of

reasons the accommodation of Aboriginal affairs in Canadian legislative and executive governance remains one of the most morally pressing, yet least satisfactorily addressed, tasks. To begin with, Aboriginal peoples consist of some 300 small nations that are at least as diverse as are, say, the various peoples of Latin America. Add to this the fact that, while Aboriginal affairs are constitutionally assigned to the federal government, more often than not the land and resources at stake lie in the provincial domain. Finally, the majority of Aboriginals, who live off-reserve in urban areas, fall almost entirely through the cracks of government services.[6]

History

Since the cession of New France to the English in 1759, the history of Canada has been shaped by the efforts to accommodate Quebec within a unified – but not unitary – system of governance. In 1867 Confederation was but another attempt at this. At a time when the United States had just been torn apart by a civil war, English Canadians had little love for federalism; yet it was the price that had to be paid in order to reach a settlement with Quebec.[7]

The historical compromise was the usual one among economic modernizers and cultural traditionalists. English Canadians gained the central tools needed to organize a Canada-wide economy, while Quebec retained autonomy over religion, culture, education, and civil law. Probably because the fathers of Confederation were mainly merchants, traders, and rentiers, the provinces were left with the ownership of natural resources. Later, in a country that would never quite overcome its dependence on the export of raw materials, this would turn out to be a real problem for federal economic governance.

At the beginning, the dream of a continental union and economy included only two eastern provinces[8] alongside Ontario and Quebec. The others were added later. Alberta, for example, joined Confederation in 1905, and just as Quebecers would not forget the conquest, Albertans would neither forget nor forgive the fact that they were initially denied what would become their main source of wealth – the ownership of natural resources. The belated entry of the western provinces into Confederation also accounts for why they are discriminated against in the regional formula for Senate appointments.

FEDERAL INSTITUTIONS

The Federal Legislature

Canada is a classical parliamentary federation.[9] In fact, it was the first federation not to follow the presidential and senate model of the United States.[10]

Canadian political institutions were created in loyalty to, rather than in defiance of, British traditions. Federalism was seen as not much more than an irritating if inevitable complication on the road to nationhood.

That road was accompanied by cries for responsible government, and this required an elected parliament to which the prime minister and cabinet would be accountable. Consequently, both prime minister and cabinet members are elected members sitting on the front benches. Governance is controlled by the executive, usually a circle of senior ministers selected by the prime minister. Strict party discipline ensures the passage of bills. Only in rare minority-government situations will serious attention be paid to voices from the other side of the aisle. As in most parliaments, of course, much of the legislative work is conducted in committees that include all parties. However, the will of the majority routinely prevails here as well. Consequently, the upper chamber, or Senate, is not considered equal to the lower house, the House of Commons. While in fact possessing full legislative powers, the government-appointed members of the Senate are expected to serve as no more than an honourary body dedicated to sober second thought. The model is the British House of Lords rather than the US Senate. Only the Australians, some thirty years later, would combine a parliamentary system with a fully functional directly elected senate.

Canada is nominally a constitutional monarchy that acknowledges the British monarch as its sovereign. The representative of the monarch in Canada, the government-appointed governor general, performs a primarily symbolic and ceremonial role. In comparison to the US presidential system, however, the separation of head of state from chief executive does seem to have an advantage; day-to-day politics tends to be kept apart from the personal lives of those embodying the federation.

Lower House Following the classical British model, Canada's House of Commons recruits its members from single-member constituencies by means of a first-past-the-post majoritarian electoral system.[11] As a rule, the parties' riding[12] associations determine which candidates will run for election. In some instances, the prime minister assumes the right to place a candidate of his or her choice in a particular riding. Federalism does not play a significant role in this process. However, some candidates may be recruited or chosen by the contending party in order to appeal to particular regional or provincial sensitivities.

Elections have to be called at least every five years, but the prime minister has the discretion to call an election earlier. This usually happens when the government's majority is slim and the prime minister senses that public opinion is in its favour and might yield the government another and possibly stronger majority, or when a change of prime minister has taken place and the new office-holder must seek electoral affirmation.

The majoritarian electoral process favours the more populous provinces. This is particularly frustrating for the western provinces. Due to the progression of time zones across the continent, and because Ontario alone elects one-third of the members of the House of Commons, election outcomes are typically announced by the media networks before the polling stations have even closed in British Columbia.

An electoral system of this kind tends to work in favour of a few large national parties. In the case of Canada, however, this is not so, or at least appears to no longer be so. One can argue that there is no truly national party left in Canada. The Liberal party, with its inevitable electoral focus on central Canadian issues and concerns, has depleted its support in western Canada. During the 1970s there was a moment when the governing Liberals did not hold a seat west of Winnipeg, which is the geographical centre of the country.

The Conservatives imploded as a federal party precisely because their success at the polls during the 1980s was tailored to central Canadian issues and values. This gave rise to a western right-wing formation that emphasized fundamentalist Christian values and US-friendly economics. All through the 1990s the vote-splitting between the western Reform party (which, after 1998, became the Canadian Alliance party) and the decimated rump of the old Tory party in Ontario left the Liberals in office. Even after a final merger of the two parties on the right, which resulted in a new Conservative party, the outcome of the elections in 2004 and 2006 suggest that the conservative voice of Canadians remains split along regional lines.

In Quebec the sovereigntist Parti Quebecois has been significant in the provincial sphere since the 1970s. Since the 1980s it has been complemented by the Bloc Quebecois, which runs in federal elections and for Quebec seats only. For all practical purposes, then, Canada does not have a federal party system.[13]

A main victim of this has been the small social democratic New Democratic Party (NDP), which routinely suffers from strategic voting and receives fewer seats than it would within a proportional electoral system. It is not entirely clear whether electoral reform (always talked about before elections but never taken on by the winner afterwards) would serve the regionalized nature of the country any better, although proportional seat-distribution might help to absorb, and accommodate, some of the regional voices of discontent within the major parties. On the other hand, it might strengthen such voices and encourage them to proliferate. Governing from the front benches of Parliament would become more complicated.

The situation of the minority governments after the 2004 and 2006 elections notwithstanding, what has been most frustrating under the current set of rules, from a federalist perspective, has been the fact that the governing

majority party can all but ignore dissenting voices. Because they are not able to have a serious impact on decision making and law making, opposition parties have focused far more on the government's alleged corruption than on policy issues and alternatives. Yet again, it is far from clear whether the formation of coalition governments that would be likely to accompany the introduction of proportional voting would enhance federalism. If Germany is any example, governing coalitions function to put a brake on speedy decision making rather than to facilitate federalist accommodation.

The outcome of the January 2006 federal election does not change the overall picture. It resulted in a narrow victory for the Conservatives led by Stephen Harper, who became prime minister of another (probably short-lived) minority government. Harper made some inroads in the province of Quebec, which may be indicative of a new and more flexible approach to federalism. Conservatives traditionally have been more decentralist than Liberals. At the same time, though, a new divide appears to have opened between urban and rural Canada as the Conservatives failed to win a single seat in any of the three largest cities: Montreal, Toronto, and Vancouver.

Upper House Canada's Senate is an oddity for various reasons,[14] one being its government-appointed membership. A total of 105 senators are appointed by the prime minister according to a regional formula. Originally appointed for life, they must now retire at age 75. This peculiar construction of an upper chamber is unique among classical federations, and it makes for an incomplete case of federalism – at least when judged by the standard model.

Another oddity is that the Senate has been given legislative powers that are co-equal with those of the House of Commons, despite the former's obvious lack of legitimacy. However, and this is yet another oddity, senators have wisely chosen to exercise their power only very rarely and only in instances when they can clearly sense that public opinion is on their side.

Going back to the original and hard-fought compromise at Confederation in 1867, the regional formula gives 24 senatorial seats each to Ontario, Quebec, the three eastern provinces (minus Newfoundland, which received six seats when it joined Confederation in 1949), and the four western provinces (which get six each). This is particularly galling for the west, as its four provinces command fewer seats than do the four Atlantic provinces and only half of the tally for the two central provinces. The three northern territories each provide one senator.

Lamentations about this situation ring somewhat hollow, however, because they routinely comes with complaints about the Senate's general lack of legitimacy in the first place. Not so strange, then, are the persistent calls for Senate reform, particularly from western provinces. Typically, such reforms have been discussed in terms of a so-called triple-E senate (Elected

by province, Effective as a second chamber with co-equal legislative powers, and Equal with regard to the number of senators per province). A version of such a senate was part of the package deal contained in the failed 1992 Charlottetown Accord, which also would have accorded distinct-society recognition to Quebec.[15]

Senate reform is still contemplated on occasion; however, few believe there will ever be a triple-E senate. In particular, equality with regard to the number of senators per province is not a realistic option, though it is possible that it might eventually be agreed either to choose senators from a list provided by the provinces or to have senators appointed (or even elected) by the provinces themselves.

The big question is, would institutional tinkering with the Senate yield substantive improvements for governance? In particular, would it reduce the need for intergovernmental bargaining at the executive level? There are at least two causes for scepticism. One is the deeply ingrained parliamentary culture and faith in the sanctity of majority rule. If that culture pervaded a fully functional senate, partisanship would govern it, not regional accommodation, as occurs in Australia. Another comparable example is the German *Bundesrat*, which often functions as a second arena for national party competition rather than as a voice for *Länder* interests. The other reason is the deeply ingrained regional culture and its provincialist manifestations. The result could carry intergovernmental and/or interprovincial conflict into the legislative process itself. As in the United States, with its larger number of states and generally less partisan approach to politics, Canadian senators might turn into spokespersons for provincial government interests. Perhaps, however, these two pressures would cut across and neutralize one another.

The Federal Executive

In a parliamentary system the executive provides leadership in Parliament. Instead of these two government branches being divided, they are fused. As long as the prime minister commands a secure majority, he or she is in fact more powerful than is a US-style president, who is ordinarily constrained by multiple checks and balances.

In Canada, the case can and has been made that governance emanates from a set of concentric circles, with the prime minister and Privy Council Office at the centre, surrounded by a small circle of senior cabinet ministers, followed in rank and influence by the rest of the junior ministers and, finally, by the rest of the pack – the parliamentary backbenchers who are kept in check by the party whip and by the fear of losing their seats should they allow the government to be defeated in an important vote and hence provoke an early election.[16]

Governance in this system is very efficient in the sense that there is a clear chain of command. Parliament mainly serves as a debating club and profile-builder for the opposition. The real decisions are made entirely by the executive and receive formal blessing from the parliamentary majority. The only constraint, albeit an important one, against the folly of one-sided decisions and legislative acts is the interplay of government and opposition. The executive knows that it cannot go too far or its measures will be undone by the next government. However, in general, executive majority governance is characterized by policy swings that are wider than those that occur in proportional and coalition types of governing systems. In this, the principle of parliamentary governance is at odds with those federal principles aimed at mutual accommodation and compromise.

Constitution of the Political Executive Not much need be said about the constitution of the political executive in a parliamentary system. Party politics determines political leadership. Whether the selection and recruitment processes are entirely democratic is another question. Unlike the old-fashioned practice that leadership candidates have to work and prove themselves through the ranks, prominent members of the business or legal community can be brought into a leadership position laterally, first by being assigned a relatively safe riding and then by immediately being supplied with a cabinet posting and portfolio. Also, party loyalty is not a binding condition for executive careers. In the 2004 election, for instance, a former NDP premier from British Columbia, Ujjal Dosanjh, was invited to run for the federal Liberal party and was immediately given an important position in cabinet. And in 2006, the cabinet of the new Conservative government of Prime Minister Stephen Harper included David Emerson, who had run for the Liberals in the preceding election.

Contrary to such federal systems as those of Germany or the United States, however, in Canada national leaders rarely begin their careers in local or provincial government. Since Confederation, for example, only one provincial premier, Sir John Thompson of Nova Scotia, has gone on to become prime minister, and that was in the late nineteenth century. One reason for this is that provincial and federal party organizations are only loosely connected. Another lies in the competitive nature of federal-provincial relations.

Federalism does not really play a direct role in executive-leadership selection; regionalism, however, does. Conventionally, a prime minister will assemble a cabinet that is roughly representative of all regions and provinces, although it was not until the 1970s that the finance portfolio went to a francophone Quebecer. While women remain underrepresented in the executive leadership (as they do in Parliament), they have, over the years, held important portfolios. In the 2004 cabinet there were nine women out

of a total of 39 ministers. Portfolios held by women have included deputy prime minister, president of the Privy Council, and intergovernmental affairs. For a short period, from June to November 1993, Canada had a female prime minister, Kim Campbell.

Head of State The governor general exercises the powers of the Crown on behalf of the formal sovereign, who is the British monarch and the head of the Commonwealth, of which Canada is a member. The governor general is formally appointed by the monarch, albeit on the recommendation of the Canadian prime minister and cabinet. Among the duties of the governor general are the appointment of the prime minister and other ministers, the summoning and dissolving of Parliament, and the usual panoply of ceremonial functions. Tenure is usually five years but can be a few years shorter or longer.

Although none of this has any impact on federalism, the choice of governor general does provide the opportunity for a symbolic expression of diversity. Convention dictates alternating between English- and French-speaking candidates. This does not necessarily mean that every other governor general has to come from Quebec as there has been a francophone governor general, Romeo Leblanc, who was chosen from the Acadian minority in New Brunswick. The current holder of the office is Michaëlle Jean, the third woman governor general, a bilingual Quebec journalist, and a member of a visible minority.[17]

A somewhat unsettled question is whether the governor general can dismiss a government, as happened in Australia in 1975 when gridlock between the House of Representatives and the Senate created a crisis of governance. It is unlikely that this could happen in Canada, if only because Canada's Senate is not an elected body with equal political standing. If, on the other hand, the government of the day lost its majority in the House, or a minority government ceased to receive majority support, parliamentary convention would dictate that the prime minister ask the governor general to dissolve the House.

Administration The federal government employs nearly half a million people, including the military and the Royal Canadian Mounted Police. Some 200,000 of these people constitute the public service in a narrow sense. In order to avoid partisanship, its members are appointed under the supervision of the Public Service Commission. The federal administration consists of the various government departments as well as a number of central agencies such as the Prime Minister's Office (PMO) and the Privy Council Office (PCO), both of which are discussed further below.

Departments are headed by a cabinet minister who is directly accountable to Parliament. Day-to-day governance and public service delivery, however,

are in the hands of deputy ministers who are, in turn, aided by several assistant deputy ministers in charge of branches or bureaus. Because they are considered politically neutral career professionals, senior public servants do not typically suffer a major shake-up when the government changes. However, interdepartmental transfers are quite common, which can create continuity and efficiency problems. On occasion, new cabinet ministers find it difficult to bring about directional changes in general policy formulation. For example, former prime minister Paul Martin's interest in the Tobin tax (a tax on speculative international currency transfers) during his tenure as finance minister was met with such opposition from senior departmental staff that, at one point, he exclaimed in jesting despair: "Almost anybody who has any sense of human understanding and compassion takes views that oppose the views of the Department of Finance."[18] What he meant, of course, was that the intransigence of the department's bureaucratic orthodoxy made any kind of innovative political flexibility almost impossible.

In principle, while each cabinet minister is politically responsible for her or his department, and is individually accountable to Parliament, there is in practice a sense of collective cabinet responsibility under the overall leadership of the prime minister. Interdepartmental coordination is not only generated at the cabinet table, however: it is also greatly influenced by two central agencies, the PMO and the PCO.

Originally comprising not much more than the prime minister's personal support staff, the PMO has assumed paramount importance in the process of federal governance. The transformation dates back to the era of Prime Minister Pierre Trudeau in the late 1960s, when the PMO became a large advisory body, at times consisting of as many as 200 people. Its senior members are appointees who are hand-picked by the prime minister, are often his/her personal friends, and are rarely civil servants. Apart from performing the tasks of interdepartmental coordination and conflict management, the PMO provides the prime minister with the kind of political resources that have resulted in government from the centre, and the concentration of unprecedented political power in the prime minister and a few close advisors, at the expense of the cabinet at large and to the detriment of parliamentary control.

By comparison, the PCO provides policy coordination in a more even-handed and non-partisan manner. Its members are temporarily reassigned senior civil servants who are drawn from a variety of departments. It owes its existence to the original Constitution, the British North America Act, 1867, which established the Queen's Privy Council, now a ceremonial body composed mostly of current and former cabinet ministers but originally designed as an advisory body for the governor general. Technically, the cabinet is a committee of the Queen's Privy Council, and the PCO is the most important federal agency supporting the prime minister and the cabinet in the formulation of overall government policy.

Of particular importance for the federal system is Intergovernmental Affairs, at times an independent government department but currently part of the PCO. Headed by a deputy minister and reporting to the cabinet minister for intergovernmental affairs, it is responsible for provincial, territorial, and Aboriginal relations. Intergovernmental Affairs also plans and prepares for intergovernmental conferences, monitors federal unity issues (particularly with regard to Quebec), and assists the minister responsible for official languages. After the close defeat of the 1995 Quebec referendum on sovereignty, the PCO and Intergovernmental Affairs were instrumental in developing a new strategy of containment that culminated in the Clarity Act, 2000, which set conditions for the secession of a province.

For the first 100 years of its existence, the federal public service was dominated by anglophones. The recommendations of the Royal Commission on Bilingualism and Biculturalism (1963–67) led to enactment of the Official Languages Act, 1969, whereby English and French came to be recognized as the official languages of all federal institutions. At the same time, the Public Service Commission was directed to ensure a more balanced participation of anglophones and francophones in the public service and to assume responsibility for language training. Since then there has been considerable success in recruiting francophones into the public service. According to one seminal study during the 1980s, however, that success came more slowly and reluctantly in the higher echelons of the public service, particularly in departments and portfolios of significant economic relevance.[19] Outside the federal public service in Ottawa, official bilingualism has remained a controversial tool of cultural accommodation.

Another attempt at reflecting the federal nature of the country in the public service has been made through regional decentralization. While most of the policy-making institutions, departments, and central agencies are located in the National Capital Region of Ottawa-Gatineau (formerly Ottawa-Hull), straddling the Ontario-Quebec border, many of the agencies and offices for program delivery and administration are spread among all provinces and regions. The Department of Citizenship and Immigration, for example, has located its processing centres in three different provinces and regions: family sponsorships in Ontario, in-Canada applications for permanent residence and temporary visa extensions in Alberta, and citizenship applications and permanent resident cards in Nova Scotia.

Other Institutions In addition to the departmental institutions and agencies, federal governance in Canada also relies on some 400 additional public, or Crown, agencies. Among these are Crown corporations, regulatory agencies, and advisory bodies. These agencies are typically governed by a management board that reports directly to Parliament through a designated minister, and they are scrutinized in the annual reports of the auditor general.

Crown corporations are semi-autonomous government agencies created to perform those particular tasks that are deemed unfit for market competition. There are essentially three types of these bodies. Some, such as the Bank of Canada, belong to the traditional arsenal of nation-state governance. Others, however, of which the Canadian Broadcasting Corporation and the National Film Board are examples, were created to promote national unity either for the purpose of providing uniform services across regions and provinces and/or aiding domestic industries that are unable to compete with those of the United States. Others again, such as the Canadian Wheat Board, are intended to stabilize Canada's resource industries in volatile international markets.

Within North American market capitalism, the use of Crown corporations has always been controversial, and many of them, such as Air Canada (the national airline) and Petro Canada (a national oil and gas company created to increase control of an otherwise foreign-dominated energy industry), have been privatized in recent years. In the case of Petro Canada, particular opposition to its creation came from the oil-rich province of Alberta, which resented central interference with its most lucrative source of revenue. In the case of Air Canada, the result of privatization has been financial instability. This may be the fate of the deregulated airline industry more generally. A question remains, however, about the extent to which air travel must be considered a public good in a huge country that is thinly and unevenly populated.

Regulatory agencies in Canada, such as the Labour Relations Board and the Canadian Radio-Television and Telecommunications Commission (CRTC), similarly operate on the basis of legislation and are accountable to Parliament through a responsible minister. Along with the provision of public goods, the regulation of private behaviour in the national interest is also a controversial subject in Canada. In the case of the CRTC, which is primarily responsible for Canadian content regulations (e.g., via the conditional licensing of private broadcasters), the question is raised time and again whether such regulations strengthen or weaken national identity and culture.

As the following anecdote illustrates,[20] this question identifies Canada as an exceptional case with regard to cultural identity and unity. During his tenure as CRTC chairperson (1980–83), the prominent Canadian political scientist John Meisel was invited by the East German government to give a talk about Canadian cultural policy. When he asked why East Germany was interested in this topic, he found out that East German communists had done their homework. Like Canada, they argued, East Germany was, in terms of population, a small country next to a much larger one, with which it shared a long and (at least with regard to air waves) open border, a language, and a similar cultural predisposition. The East German apparatchiks wanted to know what Canada was able to do to protect its cultural autonomy. Meisel's answer was: not very much.

This peculiar situation also has repercussions on federal governance as US influence spreads unevenly across regions and provinces. With Quebec adamant about going its own way in most instances, and with at least some western provinces being very open to American market solutions, the federal government all too often finds itself between a rock and a hard place.

One quintessential Canadian way of dealing with conflicts resulting from this situation is through royal commissions. Most prominent in recent years have been the aforementioned Royal Commission on Bilingualism and Biculturalism (1963–67), the Royal Commission on the Economic Union and Development Prospects of Canada (Macdonald Commission, 1982–85), the Royal Commission on Aboriginal Peoples (1991–96), and the Royal Commission on the Future of Health Care (2001–02). Such commissions typically produce enormous amounts of research but, as in the case of other advisory bodies, governments are not bound to follow their recommendations – especially when they cost a lot of money.

Governments may also pick and choose, of course. The Macdonald Commission on Economic Union, for instance, recommended a move towards free trade with the United States but, at the same time, cautioned that the socially disruptive effects of such a move had to be cushioned by the introduction of some kind of guaranteed minimum income for all Canadians.[21] The subsequent Conservative government of Prime Minister Brian Mulroney (1984–93) then concluded the Free Trade Agreement with the United States, but it never considered the latter part of the recommendation.

Notwithstanding the formal division of powers, there is no convenient blueprint for the efficient allocation of governance tasks and the effective generation of national public policy in the Canadian federal system. Social policy, for example, traditionally in the provincial power domain, has been widely regarded as requiring a degree of universality that only the federal government can provide. In an age of globalization, however, trade and commerce, traditionally in the federal power domain, might require more flexible regional policy options. In both instances socioeconomic and ideological differences across regions and provinces compound the difficulties of federal governance.

Such questions and issues obviously can also arise in unitary political systems. Federalism, however, is normatively committed to the accommodation of diversity within a common body politic, and it provides the institutions for doing so in practice. For the most part, the institutions and governing practices of Canadian federalism date back to the nineteenth century. They need to be rethought for the twenty-first century.[22]

The Federal Judicature

Canada's judicial system is rooted in the British common-law tradition. This means that the courts deal with legal disputes before them on the

basis of precedent rather than abstract principle, as in the continental European tradition. An exception is the civil-law code of Quebec, which the province retained after the conquest of 1759.

More important for the federal system is another distinction – that between unlimited and limited judicial review. In the British tradition Parliament is regarded as supreme, and judicial review in Canada was originally limited to the adjudication of questions of federal and provincial jurisdiction. This changed, however, after the constitutional changes of 1982 and the insertion of the Charter of Rights and Freedoms into the Constitution. Since then, the Supreme Court of Canada exercises full powers of constitutional interpretation and, more broadly, can strike down any law, federal or provincial, that appears to be in conflict with the Constitution.

The court system is essentially hierarchical and integrated in design. The Supreme Court was established as a general court of appeal. The Constitution does not provide for any kind of purely federal judicial power.[23] In the provinces, there are two types of courts: provincial courts of first instance and superior/appellate courts. The judges of the latter are appointed and paid by the federal government, even though each province determines for itself how many superior court judges it needs.[24]

In the federal sphere, there are the Federal Court and the Supreme Court of Canada. While the Federal Court exercises original jurisdiction in matters of administrative law, including federal/provincial legal disputes, the Supreme Court of Canada hears appeals from provincial appellate courts as well as from the Federal Court. Of several hundred cases filed each year, it selects about 100 that it considers to be of particular importance with regard to the development of national law. It also has to hear criminal cases that have been overturned by the provincial appellate courts.

Supreme Court judges are appointed by the federal cabinet on the basis of a conventional regional pattern: three judges from Ontario, three from Quebec, two from the West, and one from Atlantic Canada. Appointments are preceded by extensive consultation, and there is little evidence of partisan appointments. Given that the Supreme Court hears appeals from provincial courts in constitutional matters, there have been repeated calls to make the appointment procedure more democratic and regionally responsible. However, there is some fear, not least among the Supreme Court judges themselves, that the introduction of American-style hearings and approval procedures would also bring with them the kind of partisan politicization that has been evidenced in the United States.

Of particular significance for the federal system are constitutional reference cases. The federal government can ask the Supreme Court for an opinion in a particular constitutional matter. Likewise, the provincial governments can bring such cases to the Supreme Court after they have been heard by the provincial court of appeal. A particularly well known provincial case was the 1981 reference concerning the so-called patriation of the Canadian

Constitution.[25] At that time, the Constitution still did not contain an amendment formula, which meant that British institutions remained formally sovereign in Canada in matters of constitutional change.

When, by taking to London a constitutional package that included a charter of rights and freedoms as well as an amendment procedure, Prime Minister Pierre Trudeau (who served from 1968 to 1970 and from 1980 to 1984) threatened to patriate the Constitution without the consent of the provinces, several provinces took the issue to the Supreme Court. The question they asked was whether such consent was required. In what must be its most famous decision, the Supreme Court of Canada ruled, in a 7-2 decision, that unilateral action was legal but contrary to constitutional convention. It suggested, further, that constitutional convention would require substantial but not necessarily unanimous consent. This judgment brought the prime minister back to the bargaining table where, shortly thereafter, a deal was struck with the consent of all provinces except Quebec. The Constitution was formally patriated in 1982.[26]

While this tumultuous episode in Canada's constitutional history may have been the consequence of the anomaly of a missing domestic amendment formula, it does shed light on the general role of the judiciary in Canada's federal system. The Supreme Court carefully avoided making a decision that would have unambiguously condoned one particular course of action. The politicians ultimately had to decide for themselves. In stipulating that constitutional convention requires substantial but not necessarily unanimous consent, however, the Court opened the door to making a decision without Quebec's approval. One might well argue that, in doing so, it ignored a political convention according to which constitutional changes affecting substantive provincial interests have to be based on unanimous agreement. This 1982 ruling is the only instance in recent Canadian constitutional history when a decision was taken without securing unanimity.

An equally famous, and more recent, constitutional reference, this time initiated by the federal government, is the 1998 secession reference. Shocked by the close outcome of the 1995 referendum in Quebec, the federal government asked the Supreme Court under what conditions, if any, the unilateral secession of a province would be legal. In its response, the Court concluded that, in a democracy, the quest for separation is legitimate if it is the result of a clear majority response to a clear question, and that legitimate secession requires "principled negotiation with other participants in Confederation within the existing constitutional framework." On the basis of this judgment,[27] the federal government crafted the Clarity Act, 2000, in which it specified that the federal government would only enter into such negotiations after Parliament had been satisfied with regard to the clarity of both the question and the majority achieved in a referendum. It did not, however, make explicit what it would consider to be a clear majority.[28]

This extraordinary episode in Canada's constitutional history highlights how the Supreme Court seeks to avoid predetermining a fundamentally political decision. Again, the remarkable character of the Court's decision lay in its affirmation of federalism as a process of negotiation rather than merely as a legal framework of rights and obligations. Furthermore, there was a clear recognition of federalism as a system within which sovereignty and governance are shared and that outweighs the democratic principle of majority rule.

This – the balance of powers between judiciary and legislature – is perhaps the most contentious issue in common-law parliamentary federal democracies.[29] In systems based on a codified Roman law tradition, such as Germany, constitutional principle overrides the popular will. The German Constitution even contains some provisions that are immune from constitutional change. In Canada, with its traditional assumption of parliamentary supremacy, the relationship between legislative pre-eminence and judicial review remains more tenuous.

This much was acknowledged in the 1982 constitutional settlement by linking certain portions of the Charter – concerning fundamental freedoms, legal rights, and equality rights – to a so-called notwithstanding clause (section 33). This clause allows a federal or provincial parliament to override Charter provisions for five years, after which the override either lapses or must be renewed. Thus far, it has been used only in one significant instance. In 1988 the Supreme Court had struck down parts of Quebec's controversial language bill (Bill 101), which required shop owners to post commercial signs in French only. The Court held that this was a violation of the Charter's right of freedom of expression. In 1989 the Quebec legislature invoked the notwithstanding clause and later passed a bill that only allowed English signs indoors and then only as long as French predominated: the infamous "inside-outside bill" (Bill 178). This recourse to the notwithstanding clause was not renewed in 1993.[30]

The notwithstanding clause has been vilified as a dangerous erosion of constitutional principles that will open the door to political decisionism. At least one thoughtful observer, however, has praised it as an ingenious solution: "What makes it distinctive, and Canadian, is that it resolves a deep problem in constitutional theory by not stating a principle, but by instituting a practice."[31] The clause does not resolve the tension between democratic rule and fundamental rights but compels both the legislative and judicial branches of government to engage in an ongoing process of deliberation. In doing so, the notwithstanding clause can also be regarded as an innovative constitutional device of last resort for determining the scope and dimension of value plurality in federal systems.

Overall, the Charter has considerably strengthened the rights of explicitly mentioned Charter groups, official language minorities, visible minorities,

people with disabilities, gays and lesbians, and Aboriginal peoples. This might be seen as an ascendancy of judicial power at the expense of provincial powers. With its emphasis on group rights, however, the Charter has not transformed the Canadian federal system into a judicialized regime of individual rights protection. Neither has the notwithstanding clause turned out to be a widely used countervailing weapon of provincial defiance.

Canadians seem to understand this quite well. During the 2004 federal election campaign, members of the Conservative opposition in both the federal and provincial arenas of government played with the idea that they might invoke the notwithstanding clause in order to override the legality of gay marriage under the equality provision of the Charter. This did not appear to enhance their electoral chances.

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS' LEGISLATURES

The original British North America Act, 1867,[32] contained various specifications for provincial legislatures, electoral districts, and the provincial lieutenant governors. Over the years, these were modified or replaced by provincial statutes without, however, breaking with the common British parliamentary tradition. Today, and with only one significant exception, the Canadian provincial institutions of governance are very similar to those of the federal sphere.[33]

The significant difference is the lack of an upper house or senate. In 1867 only Ontario had entered Confederation with a unicameral legislature. Over time, however, second chambers, in the form of government-appointed legislative councils, were abolished or not created in new provinces. They were seen both as too much of a financial burden and as an unnecessary relic of colonial rule. Consequently, all provincial legislatures are now unicameral. The transformation of the legislative councils into legitimate second chambers of intra-provincial regional representation was never an issue even though most of the provinces are as diverse and asymmetrical as is the federation as a whole.

With the sole exception of the four small Atlantic provinces in the East, Canadian provinces are huge territories, some of them several times the size of the large European states. Two sets of differences are significant. First, in most provinces there is the difference between the more populous South and the vast but sparsely populated North. This difference is further exacerbated by very different levels of economic development. Second, there is the difference between urban and rural areas within provinces. Most Canadians live in urban conglomerates. For instance, of the 11.5 million residents of Ontario, 5.1 million live in the greater Toronto area.

Clearly, a majoritarian parliamentary system accommodates these diversities poorly. In Ontario, for instance, while the vast but sparsely populated northern parts of the province are somewhat overrepresented in the provincial legislature (in terms of voters per elected member), they still command only six seats out of a total of 103. In some of the western provinces, this dichotomy between urban and hinterland interests is even more pronounced.

Especially for the smaller provinces, British-style parliamentarism on the basis of a single-member district majoritarian electoral system also poses a functional problem of numbers. With the exception of Ontario and Quebec, with 103 and 125 seats, respectively, provincial legislatures range in size from 32 to 83 seats. As a consequence, cabinets are sometimes larger than the entire opposition. In one instance, in 1987 in New Brunswick, the election outcome did not yield a single seat for the opposition. In order to play the parliamentary game, members of the defeated opposition party were allowed to shout questions from the visitors' gallery. Provinces can determine their own electoral systems, and a few of them are in the process of examining the possibilities of moving towards a more proportional electoral system.

Small size and usually short sitting periods also tend to shift the power balance between Parliament and cabinet/executive in favour of the latter. There are fewer members available for committees, and the resources for staff and services are even more concentrated around the premier and her or his cabinet.

Within Canada's dual system of parliamentary federalism, provincial legislatures, in principle, act independently of the central system of governance. In practice, provincial legislative autonomy is limited by the superior federal spending power and by the existing framework of intergovernmental and cost-sharing agreements. However, with the help of favourable judicial interpretation, and contrary to the founding fathers' original intentions, the provinces have successfully stemmed the tide of legislative centralization typical in most other federations in the twentieth century.

EXECUTIVES

Political Executive

As in the case of prime minister and cabinet in the provisions for the federal government, the Constitution is silent about provincial premiers and cabinets. Their dominant position and power in the system of governance is the result of institutional evolution in the parliamentary tradition. However, there have been some opposing trends as well, particularly during the past thirty years.

While the trend in the federal sphere has been towards "governing from the centre,"[34] with prime ministers holding the essential reins of power

(with the help of greatly expanded office staff) and surrounded by an inner circle of senior cabinet ministers who are set apart from junior ministers and secretaries of state, provincial premiers have recently had to move towards more power-sharing and collective responsibility. Not coincidentally, this happened during a time of "province building,"[35] when some provinces, led most notably by Alberta and Quebec, sought to strengthen their powers at the expense of the federal government.

This meant that provincial governance became more ambitious and complex, which in turn gave a larger role to ministers and even ordinary provincial parliament members at the cabinet table and in committees. It also coincided with a new emphasis on caucus democracy. In Alberta, for instance, Conservative premier Ralph Klein (1992-present) replaced sixteen cabinet and caucus committees by four standing "super-committees" composed of cabinet ministers as well as ordinary members and chaired by backbenchers who also sit at the cabinet table when they represent their committees.[36]

In general, political executives in the provinces have responded to institutionalizing developments in the federal government. For instance, the division of labour between the Prime Minister's Office and the Privy Council Office came to be duplicated in the provinces through the creation or reorganization of two similar types of agencies for the generation and coordination of government programs. Sometimes initiatives also came from the provincial side. Thus it was Quebec that first institutionalized federal-provincial affairs in 1961 (it was renamed "intergovernmental affairs" in 1967) as a government department. The federal government and other provinces followed suit.

Finally, provinces are formally headed by lieutenant governors. These are appointed by the federal government in consultation with provincial premiers and normally serve five-year terms. As in the case of the governor general, their role today is mostly ceremonial.

Other Institutions

Like the federal government, the provinces have, over the years, availed themselves of a plethora of regulatory agencies, such as Crown corporations, boards, and commissions. The creation of most of these has had to do with the provincial ownership of natural resources. Particularly noteworthy are the powerful hydro corporations in Ontario and Quebec as well as corporations focused on oil and gas exploration, investment, insurance, marketing, and research in the West.

The diversity of such institutions in the provinces underscores the asymmetrical nature of Canadian federalism. While most provinces have agricultural marketing boards, liquor commissions, or licensing boards and

the like, other institutions are testimony to distinctive provincial political cultures and opportunity structures. In Alberta, for instance, the so-called Alberta Heritage Savings Trust Fund was created in 1976. It manages a certain percentage of the province's extraordinary oil revenues for the purpose of capital investment in the province. The Heritage Fund has been criticized for lacking accountability because it operates largely under the discretion of the government. In Quebec, there is the *Caisse de dépôt et de placement*, created in 1965 with a mandate to invest funds accumulating under the Quebec Pension Plan, which was created when the province opted out of the newly established Canada Pension Plan. The *Caisse* has been criticized for its aggressive Quebec "nationalist" investment strategies, but there is little if any evidence that investment decisions taken in favour of provincial industries have come at the expense of financial soundness.[37]

Another asymmetry pertains to law enforcement. Only Ontario and Quebec have created their own provincial police forces. In all other provinces, criminal and provincial law enforcement is contracted out to the Royal Canadian Mounted Police (RCMP). The RCMP was created during the settlement period to enforce law throughout the federal territories. It also performs contractual policing services for over a hundred municipalities across the country.

ADMINISTRATION

Following the American model, the Canadian federal system has been built upon the principle of fully divided powers. This means that each order of government is responsible for the execution and administration of its own laws. This so-called legislative federalism is quite different from the so-called administrative (or executive) federalism that is used, for example, in Switzerland and Germany, where the cantons and *Länder* are required to execute and administer a great deal of federal legislation, either on the basis of constitutional provision or by means of legislative delegation.

In practice, this means that Canadian telephone books contain two different sections dealing with government services – one federal and one provincial (plus a third one for municipal services). Canadians, in other words, need to know which order of government they are dealing with before they can look up the appropriate telephone number.[38]

The picture is a bit fuzzier in areas of concurrent jurisdiction, such as immigration and shared policy programs (e.g., health), because one might argue that, in these instances, provinces will inevitably bear the administrative burden of legislation for which the federal government carries at least some, if not paramount, responsibility. However, even in these instances provincial administration is based on provincial legislative acts.

JUDICATURE

Provincial court systems have, over time, developed similar three-level structures.[39] Provincial courts deal with summary and most minor indictable offences as well as with family law (except divorce), offences by young offenders, bail hearings, and small civil-cases. Superior trial courts hear appeals from the provincial courts and deal directly with major indictable offences and civil matters, divorces, and administrative law cases. Given the integrated nature of Canada's judicial system, these superior trial courts deal with all sources of Canadian law: federal, provincial, and municipal. Since 1987 all provinces have had a provincial court of appeal, which is referred to as the Superior, or Supreme, Court.

The appeal courts typically deal with legal rather than with factual issues. Their findings are final and binding for all courts in the province, although some of these judgments end up at the Supreme Court. Provincial courts of appeal also hear constitutional reference cases submitted by provincial governments. Decisions of such references usually have a considerable impact on the judicature, even beyond the boundaries of the province. Again, the Supreme Court of Canada typically will hear appeals against provincial supreme court decisions or provincial references only in cases of particular national interest and/or when appellate courts in different provinces have reached opposing decisions over the same issue.

LOCAL GOVERNMENT

Local governments in Canada are creatures of the provinces;[40] they have no constitutional standing of their own. In practice, provincial municipal acts grant varying degrees of self-administration, including limited possibilities for revenue-raising, mostly in the form of property taxes. One of the most controversial ways in which provinces interfere with local governance has been the amalgamation of various cities or townships into one larger unit – often against the expressed majority will of the affected populations.

Provinces also regulate, to varying degrees, the mode of the election and composition of local administrations. The typical form of government is an elected council with a mayor, who is elected either separately or from among the councillors. Provinces may prescribe the number of councillors allowed for each type of municipality, whether city, town, county, or village, but they leave the division of the municipality into electoral wards to the local administration.

As members of one of the most urbanized societies in the world, most Canadians live in a relatively small number of large cities and metropolitan areas. Among Canadian politicians and academics there is a growing consensus that the lack of constitutionally guaranteed local government autonomy

constitutes a serious problem for the efficient and legitimate functioning of large cities in particular and of Canadian federalism in general.[41]

Despite their primary importance for provincial economies, such megacities as Toronto, Montreal, and Vancouver cannot necessarily rely on provincial government support. After being amalgamated into the Greater Toronto Area (GTA) by the Progressive Conservative government of Mike Harris (1995–2002) in 1998, for example, Toronto, while accounting for nearly 50 percent of Ontario's population, commands only twenty-two seats (20 percent of the whole) in the provincial legislature. Amalgamation, which was opposed by a majority of the voters of Toronto in a nonbinding plebiscite, also came with a massive downloading of provincial service responsibilities to municipalities, even though little to no new revenue was made available.

Federal politics has begun to take political advantage of this situation. In 2005 Prime Minister Paul Martin (2004–06) delivered on an earlier promise by announcing a billion-dollar deal with the province and the Association of Municipalities of Ontario for urban infrastructure and transit improvements. It was this "New Deal in action," as he called it, that may have secured passage of the 2005 federal budget and thus saved his minority government, at least for the moment. Earlier that year, at the annual meeting of the Federation of Canadian Municipalities, Martin had also declared more generally that Canada's underfunded cities could count on more federal support and that "towns and cities" would have a seat at the federal table to decide where the money will go.

From the principled perspective of the federal-provincial division of powers, the federal government's rediscovery of its spending power in relation to urban problems and agendas appears problematic.[42] Under the Constitution municipalities are the legislative responsibility of the provinces. In this particular instance, the deal was struck among all three orders of government. In general, however, provincial governments may be reluctant to welcome federal spending-power intrusions, and such spending may turn out to be episodic; that is, it may not provide cities with a stable source of financial support. The promised inclusion of cities at the federal table, on the other hand, while pointing in the right direction, cannot amount to much without giving them some degree of autonomous standing, which cannot be done without involving the provinces.

Canadian cities are among the world's most multicultural places. They might be characterized as benign spaces of self-ghettoization, giving rise to ethnic neighbourhoods known, for example, as Little Italy, complete with street signs and the usual array of shops and restaurants. This spatial expression of multicultural diversity does not automatically translate into the composition of elected city councils, nor is there an intentional design to encourage such a process through, for example, the zoning of electoral wards.

Nevertheless, while ethnic minorities generally remain underrepresented in municipal councils, such councils operate for the most part on a non-partisan and issue-oriented basis. At least in some cases, their influence on voters and their economic strength give them considerable weight in provincial-local relations.

INTERGOVERNMENTAL RELATIONS

All federal systems rely on intergovernmental relations for purposes of policy coordination. As in other federations, in the Canadian federation hundreds of meetings take place annually between federal and provincial department bureaucrats and policy specialists. This is particularly so in the case of policy areas that have overlapping or concurrent jurisdiction, and even more so in the case of shared-cost programs.

For the most part, these meetings are conducted in an atmosphere of professionalism, and they are rarely reported on the front pages of newspapers. However, various factors related to the fabric of Canadian politics and society have politicized intergovernmental relations. This means that particular policy issues tend to become reformulated as part of a more fundamental political question regarding the distribution and the legitimate exercise of powers in the federation. Policy becomes politics.[43]

Among the main reasons for this is the regionalized nature of the country. This regionalization pertains not only to the obvious bicultural division of society but also to the socioeconomic division between the central manufacturing provinces and the western resource provinces. Because neither the Westminster-style parliamentary system (with its emphasis on majority rule) nor the government-appointed Senate is able to accommodate these divisions, intergovernmental relations are a quintessentially Canadian way of conducting the business of federalism.[44]

Canadians call this "executive federalism" because the most fundamental political questions of the nation can only be resolved by agreement among the executive leaders of both orders of government – the prime minister and the provincial premiers – during so-called First Ministers Conferences. It should be noted in passing that this use of "executive federalism" is different from that in Germany or Switzerland, where the term indicates that the execution of federal legislation is up to the *Länder* or cantons, respectively.

Such First Ministers Conferences have a long tradition in Canada; however, more recently, they have become regular annual or even biannual events. While crucial negotiations and deal making usually take place behind closed doors, results or failures are communicated to the public in the limelight of the national media. Put famously, Canadian intergovernmental relations resemble a process of federal-provincial diplomacy.[45]

Diplomacy refers to a tradition of negotiated agreement among all participants. As already noted, the 1982 patriation of the Constitution without Quebec's consent broke with that tradition, plunging the country into a decade of crisis and uncertainty. It also gave executive federalism a bad name when two subsequent efforts failed to bring Quebec into the constitutional fold: the 1987 Meech Lake Accord and the 1992 Charlottetown Accord. Both of these events were negotiated under the aegis of Conservative prime minister Brian Mulroney. While the Meech Lake Accord died when two provinces failed to ratify it within the prescribed time period, the Charlottetown Accord was rejected by the people in a national referendum. In both instances there was widespread public criticism and mistrust of the process.[46]

Since the 1990s the governments of Canada have returned to the more usual practice of collaborative subconstitutional deal making.[47] Formal First Ministers Conferences have been downgraded to more informal first ministers meetings. Among the more successful recent results is the series of social union and health care agreements concluded at first ministers meetings between 1999 and 2004. For the most part, these contain declarations of intention rather than final policy packages, although the health accord of 2004 at least contains a substantive dollar commitment to future funding by the federal government, in return for provincial compliance with universal health care principles and standards.

The health care accord contains what must by now be regarded as the hallmark of Canadian intergovernmental policy arrangements – asymmetry. While expected to support the overall objectives of the accord, Quebec will be given some leeway in planning and managing its health services according to its own timetable and agenda.

The resort to asymmetrical, or flexible, federalism in intergovernmental relations is not new. When the Canada Pension Plan was introduced in 1966 the deal included an opting-out clause that allowed Quebec to manage its own plan and, consequently, to pursue its own investment strategy for the funds. In principle, such options are available to all provinces; in practice, they mainly serve the distinct political interests of Quebec.

First Ministers Conferences have no base in the Constitution. They are extra-constitutional practices born of the necessity to reach negotiated policy agreements in a federation that remains regionally divided. Older even than the First Ministers Conference is the Annual Premiers Conference, which has been complemented by the Western Premiers Conference and the Council of Atlantic Premiers.

The most recent development is the 2003 establishment of the Council of the Federation.[48] Alongside the provincial premiers, it also includes the leaders of the three northern territories. Similar to the Annual Premiers Conference, the Council of the Federation has established a permanent secretariat and a steering committee headed by senior public servants. Its purpose is to

generate common positions on all matters of national importance, with a particular focus on how they affect provincial/territorial jurisdiction.

Contrary to earlier proposals and suggestions, the Council of the Federation includes neither the federal government nor Aboriginal leaders. However, if it successfully establishes itself as a forum for the generation of common interprovincial policy platforms, those two categories may be included later on. A promising sign is the fact that much of the initiative for the council came from the government of Quebec and its Liberal premier Jean Charest (2003-present). The defeat of the separatist *Parti Quebecois* at the polls in 2003 may be an indication that a majority of Quebecers are now ready to explore a new federalist relationship with the rest of the country.

Regardless of how the formalization of Canadian intergovernmental relations plays itself out, it seems clear that the federation is characterized by a new form of collaborative federalism, which aims at policy-oriented and pragmatic political accommodation that goes beyond what is provided by the traditional constitutional framework and its division of powers. This significant new development is driven, in part, by the perception among all political leaders that Canadian citizens will punish constitutional grandstanding at the ballot box.

There is also a general consensus, among political leaders as well as analysts and observers, that the new collaborative federalism will require a different approach to inclusiveness and openness in order to gain – or regain – legitimacy in the public eye. As evidenced by his promise to grant towns and cities a seat "at the federal table," former Liberal prime minister Martin recognized the public appeal of such an approach. He also delivered on an earlier electoral promise by holding the 2004 first ministers meeting on the future of health care as a daytime event before live television cameras – although the crucial negotiations leading to the eventual agreement took place behind closed doors, as usual.

However, bringing executive federalism out into the open rather than leaving it behind the closed doors of federal-provincial diplomacy may be a two-edged sword.[49] On one hand, it can enhance public acceptance through involvement; on the other hand, it can make existing differences even more pronounced and, ultimately, irreconcilable. Executive federalism in Canada will have to continue to tread a fine line between diplomacy and transparency.

More promising, it seems, is the idea of a formalized and continuing involvement of the civil service in both orders of government, and of civil society more generally. This is, in essence, how the European Union operates. Council of ministers' meetings are prepared by a committee of permanent representatives composed of senior civil servants from the member states, and the decision-making process is aided by consultative input from the Committee of the Regions as well as the Economic and Social

Committee, comprising nationally selected representatives of organized civil society (e.g., employers, unions, farmers, and consumers). If it succeeds in formally engaging the federal government, the newly created Council of the Federation would appear to be the most logical institution for the development of a more inclusive and deliberative form of executive federalism in Canada.

ANALYSIS AND CONCLUSIONS: CONSTITUTIONAL FRAMEWORK

For two main reasons, the Canadian federation comprises a more tenuous relationship between constitutional design and the practice of federal governance than do most other federal polities. The first reason involves its strongly majoritarian parliamentary design, which is at odds with the idea of federalism as an intended system of compounded majoritarianism and the recognition of regional and/or provincial group rights and liberties alongside individual citizenship. The second reason involves Canada's retention of a strongly regionalized political and socioeconomic culture, which further exacerbates the inadequacy of the institutional design.

Over the past forty years, and coinciding with the rise of Quebec nationalism, the emphasis of Canadian politics has been largely on constitutional change. However, all efforts to bring about a constitutional settlement that is satisfactory to all stakeholders have ended in failure. Since the 1990s the emphasis has gradually shifted to policy-oriented subconstitutional agreements. At the heart of this new collaborative trend in intergovernmental relations lies the nearly unanimous realization that the Canadian welfare state is in dire need of reform. Welfare, especially in the form of universal health care, has been recognized as one of the cornerstones of an otherwise brittle pan-Canadian identity.

Originally, social policy was assigned to provincial governments. As in other federations, in the Canadian federation the superior spending power of the federal government has taken the lead in the development of shared programs. More than in other federal systems, however, in the Canadian system the development and delivery of shared social programs remains tied to intergovernmental accommodation.

In some policy fields the federal government has had to abandon its constitutionally assigned leadership role. While energy policy is part of the national economic policy prerogative, natural resources such as oil and natural gas are, for the most part, owned by the provinces. A federally enforced national energy policy, therefore, is not a political possibility, and no federal government has attempted to enforce one since Prime Minister Trudeau's ill-fated National Energy Program at the beginning of the 1980s.[50]

Constitutional conventions generally loom large in a parliamentary federation that emerged from colonial rule, that maintains the institutions of a constitutional monarchy, and that remains rooted in the common-law tradition. Initially, the federal government was given declaratory and disallowance powers by which it could take control of provincial responsibilities and void provincial legislation. These powers are still on the books, but it is now a constitutional convention that they may no longer be used. Never on the books, but a consequence of the established parliamentary tradition, is the gradual concentration of executive power in the hands of the prime minister and cabinet.

Then there is the evolution of the entire system of intergovernmental executive federalism, which has become the linchpin of federal governance in Canada. Even though the Constitution does not provide for these institutions and mechanisms, they are a central feature of the Canadian political system in practice. The newly established Council of the Federation is an acknowledgment of this reality, and it might be difficult for the federal government to refuse to participate should the provinces wish it to do so.

The main weaknesses of this extra-constitutional emphasis on executive federalism are its inherent democratic deficit and the vagaries of success and failure. Governance in Canadian federalism is, to a large extent, rerouted past the primary constitutional source of political legitimacy, the parliamentary process. In sharp contrast to the certitude of constitutional federalism, with its reliance on assigned powers, executive federalism depends on the collaborative disposition of Canada's governments. Herein, however, lies its main strength. Over the years, it seems, Canadians and their governments have learned that the diversity of their regions and societies does not allow for competitive parliamentary absolutism. "Getting along takes precedence over getting it right."[51]

THE INTERACTION BETWEEN FEDERALISM AND REPRESENTATIVE INSTITUTIONS

When the Canadian federation was created in 1867, the US Civil War had ended just two years earlier. Canada's founding fathers intended to create a strong national government in order to avoid what they perceived as the failure of the American federal model. The anglophones among them, at least, misjudged the capacity of such a strong government to tame Quebec's tenacious insistence on a distinct place and status in Confederation. The founding fathers also miscalculated in thinking that industrial modernization would pull the nation together. Not least because of their own merchant mentality, the founding fathers determined that the country's economic fortunes would remain linked to the exploitation of its natural

resources. And, by leaving these in the hands of the provinces, the founders unwittingly prepared the grounds for a regionalist thrust. As a consequence of this decision Canada became – in design, in politics, and in jurisprudence – one of the most decentralized federations in the world. Also as a consequence of this decision, the parliamentary constitutional framework came to be superseded by the intergovernmental mechanisms of executive federalism. This is not to say that the representative institutions of Canada have lost their significance. The constitutional division of powers provides ample opportunity for strong governance in many policy fields, but the essential questions that provide the nation with cohesion and stability routinely require a collaborative spirit of intergovernmental accommodation.

At times, there has been considerable discontent with this state of affairs. Political expediency has led provincial governments to make more of regional differences than constituencies would stand for. Federal governments, in turn, conjured up visions of enforced national unity, which likewise missed the mark.[52] The political grandstanding of prime ministers and provincial premiers on the intergovernmental stage has been facilitated by their unchallenged executive control over parliamentary majorities at home.

Program sharing and cost sharing led to constant finger-pointing and buck-passing with regard to policy and fiscal responsibilities. This, in turn, blurred the lines of accountability that constitute the core value of the parliamentary democratic process. To a certain extent, this appears inevitable in a federal system comprised of divided yet interdependent governance, but it has doubtlessly contributed to political disenchantment and the decline of electoral participation.

However, the unquestionable success of Canada as a prosperous and peaceful nation points to a different assessment. The provinces have served the country well as reservoirs of policy experimentation. Executive federalism – especially since the turn towards a more collaborative disposition among its protagonists[53] – has been successful in bridging the incompatibilities of parliamentary majority rule and regional sensitivity. The main question is not the extent to which this has slowed down or impeded processes of efficient governance; rather, it is the extent to which it has made a regionally asymmetrical and culturally divided country governable at all.

In fact, one can argue that, on occasion, Canadians have been served quite well by their particular brand of federal governance. In 2002, for example, a "high-level conflict in the politics of executive federalism" over the adoption and implementation of the Kyoto Protocol broke out between the federal government and the government of Alberta. It led to widespread public debate and consultation, at the end of which the federal government significantly modified its implementation plans, even though it was in command of a comfortable parliamentary majority and under no constitutional obligation

to defer to provincial demands. The intervention of the government of Alberta, in other words, "injected into the process the competitive element that is required to trigger democratic responsiveness."[54]

At the heart of the Canadian federal experiment lies a commitment to territorial fiscal equalization. As enshrined in the 1982 constitutional settlement, all Canadians are to enjoy "reasonably comparable levels of public service at reasonably comparable levels of taxation."[55] While this is a stipulation in specific reference to Canada's elaborate system of fiscal equalization, which is not the subject of this chapter, it expresses a general predisposition to good-willed cooperation within Canadian federalism. With regard to such cooperation, modern federalism provides two basic models: (1) the direct involvement of the constituent units in national legislation (as in Germany) and (2) intergovernmental bargaining and compromise. Both are complicated under conditions of constitutionally divided parliamentary majority rule. Nevertheless, Canadian federalism has pragmatically resorted to the extra-constitutional practice of executive federalism. Will Canadians ever make lasting peace with this breach of their traditional parliamentary instincts? As the traditional Canadian saying goes: as much as possible, under the circumstances.

NOTES

1 See also Rainer Knopff and Anthony Sayers, "Canada," *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 104–142; and Richard Simeon and Martin Papillon, "Canada," *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown (Montreal and Kingston: McGill-Queen's University Press, 2006), 92–122.

2 The Charlottetown Accord (1992). Constitutional referenda are possible in Canada on the basis of a legislative act, but they have been used only twice previously, 1898 and 1942.

3 See the overview of James B. Kelly, "Guarding the Constitution: Parliamentary and Judicial Roles under the Charter," in *Reconsidering the Institutions of Canadian Federalism*, ed. J. Peter Meekison, Hamish Telford, and Harvey Lazar (Montreal: McGill-Queen's University Press, 2002), 77–110.

4 At least from a socioeconomic perspective; however, the Prairie west also brought forth a political culture of agrarian radicalism that resulted in the eventual formation of the social-democratic National Democratic Party (NDP). See John F. Conway, *The West* (Toronto: Lorimer, 1983).

5 For an overview of Quebec politics, see Claude Jean Galipeau, "Le Contre-Courant Quebecois," in *The Provincial State*, ed. Keith Brownsey and Michael Howlett (Toronto: Copp Clark Pitman, 1992), 113–145; and Luc Bernier, "The Beleaguered

State: Quebec at the End of the 1990s," in *The Provincial State in Canada*, ed. Keith Brownsey and Michael Howlett (Peterborough: Broadview Press, 2001), 139–161.

6 Compare Frances Abele and Michael J. Prince, "Alternative Futures: Aboriginal Peoples and Canadian Federalism," in *Canadian Federalism*, ed. Herman Bakvis and Grace Skogstad (Don Mills: Oxford University Press, 2002), 220–237; and Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000).

7 See Robert C. Vipond, *Liberty and Community* (Albany: State University of New York Press, 1991).

8 New Brunswick and Nova Scotia.

9 Widely used textbook overviews are Rand Dyck, *Canadian Politics* (Toronto: Nelson, 1996); and Robert J. Jackson and Doreen Jackson, *Politics in Canada* (Toronto: Prentice Hall, 2001). Particularly useful is John McMenemy, *The Language of Canadian Politics* (Waterloo: Wilfrid Laurier University Press, 1995).

10 Mexico (1824), Venezuela (1830), and Argentina (1853) all followed the US presidential model; even Switzerland (1848) followed that model in its upper chamber construction.

11 Also known as the single-member plurality (SMP) system.

12 Ridings are the geographical electoral divisions, or units, in Canada.

13 On the transformation of Canada's party system, see Lisa Young and Keith Archer, eds., *Regionalism and Party Politics in Canada* (Don Mills: Oxford University Press, 2002). For a brief account of the latest developments, see Jennifer Smith, *Federalism* (Vancouver: UBC Press, 2004), 115–117.

14 For a more positive assessment, see Serge Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal: McGill-Queen's University Press, 2003).

15 See Kenneth McRoberts, *Misconceiving Canada* (Don Mills: Oxford University Press, 1997), 190–221.

16 Compare Donald Savoie, *Governing from the Centre* (Toronto: University of Toronto Press, 1999).

17 In Canada the term "visible minority" is an official sociological category that refers to persons who are non-Caucasian in race or non-white in colour. However, Aboriginals are not categorized as a visible minority. See Statistics Canada at <http://www.statcan.ca/>.

18 Linda McQuaig, *Selling the Myth of Powerlessness in the Global Economy* (Toronto: Penguin, 1998), 139–144.

19 See Kenneth McRoberts, *Quebec: Social Change and Political Crisis* (Toronto: McClelland and Stewart, 1988).

20 Personal communication.

21 See also Ronald L. Watts, "The Macdonald Commission Report and Canadian Federalism," *Publius: The Journal of Federalism* 16 (Summer 1986): 175–199.

22 See Smith, *Federalism,* as well as Meekison, Telford and Lazar, *Reconsidering.*

23 See Jackson and Jackson, *Politics in Canada,* 186.

24 See Dyck, Canadian Politics, 580.

25 *Reference re Resolution to amend the Constitution* [1981] 1 S.C.R. 753; *Reference re Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 S.C.R. 793.
26 The best account of these events during the era of Prime Minister Pierre Trudeau is Stephen Clarkson and Christina McCall, *Trudeau and Our Times.* Vol. 1: *The Magnificent Obsession* (Toronto: McClelland and Stewart, 1990); see also Peter Meekison, ed., *Constitutional Patriation* (Kingston: Institute of Intergovernmental Relations, 1999).
27 *Reference re Secession of Quebec* [1998], 2 S.C.R. 217. See also Peter Leslie, "Canada: The Supreme Court Sets Rules for Secession of Quebec," *Publius: The Journal of Federalism* 29 (Spring 1999): 135–151.
28 Government of Canada, Clarity Act, 2000, c. 26.
29 Compare Gerald Baier, "Judicial Review and Canadian Federalism," in Bakvis and Skogstad, *Canadian Federalism,* 24–39
30 See McRoberts, *Misconceiving Canada.*
31 Melissa Williams, "Toleration, Canadian-Style: Reflections of a Yankee-Canadian," in *Canadian Political Philosophy,* ed. Ronald Beiner and Wayne Norman (Don Mills: Oxford University Press, 2001), 217.
32 Now renamed Constitution Act, 1867.
33 See Rand Dyck, *Provincial Politics in Canada* (Englewood Cliffs: Prentice-Hall, 1991); and Christopher Dunn, ed., *Provinces* (Peterborough: Broadview Press, 1996).
34 See Savoie, *Governing from the Centre.*
35 See the classic article: Robert A. Young, Philippe Foucher, and Andre Blais, "The Concept of Province-Building: A Critique," *Canadian Journal of Political Science* 17, 4 (1984): 783–818.
36 Christopher Dunn, "Premiers and Cabinets," in Dunn, *Provinces,* 175.
37 See Stephen Brooks and Brian Tanguay, "Quebec's Caisse de dépôt et de placement: Tool of Nationalism?" *Canadian Public Administration* 28 (Spring 1985): 99–119.
38 Telephone books are organized similarly in the United States. More recently, some Canadian telephone books have offered comprehensive lists of federal and provincial services distinguished only by different colours.
39 See Dyck, *Canadian Politics,* 579–583.
40 Compare Andrew Sancton, "Municipalities, Cities, and Globalization: Implications for Canadian Federalism," in Bakvis and Skogstad, *Canadian Federalism,* 261–277.
41 The local dimension in intergovernmental relations was already given prominent exposure in the research papers of the Macdonald Commission. See Richard Simeon, ed., *Intergovernmental Relations* (Toronto: University of Toronto Press, 1985).
42 See Smith, *Federalism,*. 85–87 and 147–148; compare, however, Roger Gibbins, "The Missing Link: Policy Options for Engaging Ottawa in Canada's Urban Centres," in Meekison, Telford, and Lazar, *Reconsidering,* 411–422.
43 See Garth Stevenson, *Unfulfilled Union* (Toronto: Gage, 1989), 221–229.
44 Compare Kathy L. Brock, "The End of Executive Federalism?" in *New Trends in Canadian Federalism,* ed. Francois Rocher and Miriam Smith (Peterborough:

Broadview Press, 1995), 91–108; see also Richard Simeon and David Cameron, "Intergovernmental Relations and Democracy: An Oxymoron if There Ever Was One?" in Bakvis and Skogstad, *Canadian Federalism*, 278–295.

45 Richard Simeon, *Federal-Provincial Diplomacy* (Toronto: University of Toronto Press, 1972).

46 See McRoberts, *Misconceiving Canada*. See also Peter Leslie and Keith Brownsey, "Constitutional Reform and Continental Free Trade: A Review of Issues in Canadian Federalism in 1987," *Publius: The Journal of Federalism* 18 (Summer 1988): 153–174; Roger Gibbins, "Canadian Federalism: The Entanglement of Meech Lake and the Free Trade Agreement," *Publius: The Journal of Federalism* 19 (Summer 1989): 185–198; and Robert C. Vipond, "Seeing Canada through the Referendum: Still a House Divided," *Publius: The Journal of Federalism* 23 (Summer 1993): 39–55.

47 See Simeon and Cameron, "Intergovernmental Relations."

48 See Smith, *Federalism*, 156–157.

49 See similarly, ibid., 128–129.

50 See Conway, *The West*, 204–226. See also Kenneth H. Norrie, "Energy, Canadian Federalism, and the West," *Publius: The Journal of Federalism* 14 (Winter 1984): 79–91; and Bruce G. Pollard, "Canadian Energy Policy in 1985: A Renewed Federalism?" *Publius: The Journal of Federalism* 16 (Summer 1986): 163–174.

51 Williams, "Toleration," 218.

52 See the classic article, Alan C. Cairns, "The Governments and Societies of Canadian Federalism," *Canadian Journal of Political Science* 10, 4 (1977): 695–725.

53 See Richard Simeon and Ian Robinson, *State, Society, and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990).

54 Smith, *Federalism*, 125.

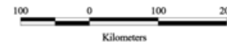
55 Section 36 (2), Constitution Act, 1982, Schedule B.

NORTH SEA
DENMARK
SWEDEN
BALTIC SEA
Schleswig-Holstein
Mecklenburg-Vorpommern
Bremen
Hamburg
Brandenburg
POLAND
Niedersachsen
Sachsen-Anhalt
Berlin
THE NETHERLANDS
Nordrhein-Westfalen
Sachsen
BELGIUM
Hessen
Thüringen
CZECH REPUBLIC
Rheinland-Pfalz
Luxemburg
Saarland
Bayern
Baden-Württemberg
FRANCE
AUSTRIA
SWITZERLAND
ITALY

Germany

Capital: Berlin
Population: 82.5 Million
(September 2003)

Boundaries and place names are representative only and do not imply official endorsement.



Sources: ESRI Ltd.; CIA World Factbook; Times Atlas of the World

Federal Republic of Germany

STEFAN OETER

German federalism offers a striking example of path-dependency. Historically, there were strong reasons why a united German state could be constructed only as a federal polity. Once this was done, however, the federal character of the polity proved difficult to change, even when powerful political forces wished to do so. The same phenomenon is responsible for central features of the institutional structure of the German federation and, in particular, for the constitution of the Federal Council, or *Bundesrat*. Germany has a two-level parliamentary system. In theory, a traditional model of parliamentary government is in use at both levels. However, the particular distribution of competences, which assigns most legislative power to the federation but gives administrative power to the states, makes federal and state politics highly interdependent. The Federal Council embodies this interdependence and is a key institution through which it occurs. Both the strengths and the problems of the institutional structure of the German federation are linked to the constitution of the Federal Council as the centrepiece of German "executive," or "administrative," federalism.

BACKGROUND

In terms of its population and economy, Germany is the biggest country in western and central Europe. In 2004 its per capita GDP was US$28,700. It has a population of 82.4 million people, living on a territory of 357,023 square kilometres. The resulting ratio of 231 people per square kilometre means that the country is quite densely populated in contrast with, for example, France, Poland, or Italy, with corresponding ratios of 109, 124, and 192 people per square kilometre, respectively. Nevertheless, there are large areas in Germany, particularly in the north and the east, in which a relatively small population can be found. In the most densely populated

southern and central parts of Germany, the rather rugged topography tended to favour a fragmented political structure. As a result, southern Germany was governed historically as a series of small principalities. Only in the nineteenth century were some bigger states formed in the region, thanks to the reordering by Napoleon, within the framework of the so-called *Rheinbund*. The plains of northern and eastern Germany, by contrast, were dominated by Prussia from the eighteenth century on.[1]

In the late nineteenth century Prussia controlled two-thirds of the entire German territory. In consequence, the first federal state of 1871 was very asymmetric. After 1945 Prussia was divided into medium-sized states. In the Soviet zone the states, or *Länder*, that were formed wholly or partly out of Prussian territory (Brandenburg, Sachsen-Anhalt, and Mecklenburg) were relatively small, with around two million inhabitants each. In the British zone, two somewhat larger states were formed (Northrhine-Westfalia and Lower Saxony, with 18 million and eight million inhabitants, respectively). Accordingly, the size and importance of the sixteen *Länder* now forming the Federal Republic vary greatly. Three of them have populations of more than ten million and thus, if they were independent, would count as medium-sized European countries. Two other *Länder* have populations of six to eight million people (Lower Saxony and Hesse), and another group has populations of around four million people each (Rhineland-Palatinate, Saxony, and Berlin). Six *Länder* have about two million people each (Schleswig-Holstein, Brandenburg, Sachsen-Anhalt, Thüringen, Mecklenburg-Vorpommern, and Hamburg). The two smallest *Länder* are the Saarland, with some one million people, and Bremen, with 700,000.

Some *Länder* are historic entities with a very long tradition of independent statehood: Bavaria and Saxony in particular, but also the city states of Hamburg and Bremen. Other *Länder* are well established historical centres with a strong pre-existing identity: Schleswig and Holstein, the two former Mecklenburg principalities in the North, Brandenburg and Thüringen in the East, the old Kingdom of Hannover in Lower Saxony, the two former principalities of Hessen, the Palatinate, Baden, and the old Kingdom of Württemberg in the Southwest. Others, however, are purely artificial creations of postwar reconstruction, such as Northrhine-Westfalia and Sachsen-Anhalt.[2] Yet even these *Länder* have developed a strong political identity. The history of territorial restructuring, which has been a prominent issue since the founding of the Federal Republic, is interesting in this regard. Over the entire period of 58 years, there has been only one successful attempt to restructure the *Länder*: the merger of southwestern German states into Baden-Württemberg in the early 1950s. Even this success was due to some manipulation of the terms of the referendum. Under current constitutional rules, experience suggests that proposals for restructuring are doomed to failure.[3]

Both the federation and the *Länder* are republics with democratic traditions going back to 1918 – the year of the democratic revolution, when the monarchies were overthrown. In the two city-states, Hamburg and Bremen, the republican tradition dates back farther still. The system of government may be characterized as a strictly representative form of parliamentary democracy.[4] In the federal arena, there is practically no direct democracy, although some *Länder* constitutions provide for elements of direct democracy.[5]

The government system established by the Basic Law in 1949 has been very stable. Two major parties, the Christian Democrats and the Social Democrats, regularly attract between 30 percent and 45 percent of the total vote. Two smaller parties, the liberal Free Democrats and the Greens, receive between 5 percent and 10 percent; since 1990 a regional leftist party in the former GDR, the Party of Democratic Socialism (PDS), has attracted around 20 percent of the vote in all the eastern *Länder*.[6] Christian Democrats and Social Democrats have alternated in power in the federation as well as in the *Länder*. In the federal sphere, big parties have always needed a smaller party as a coalition partner in order to form a stable government. In *Länder* elections, however, either the Christian Democrats or the Social Democrats sometimes win absolute majorities. In some states majorities have been extremely stable. In Bavaria, for example, the local branch of the Christian Democrats, the Christian Social Union (CSU), has governed for nearly 50 years. Fundamental swings in majorities are rare, and there tend to be long intervals in which majorities are relatively stable.[7]

The institutions of government broadly follow the pattern that is typical in a parliamentary system.[8] The key political personality in the federal government is the chancellor, elected by the majority in Parliament. The main departure from the familiar structure of parliamentarianism is the institution of the Federal Council, or *Bundesrat*. The *Bundesrat* performs the legislative functions of a second chamber. It is not an elected organ, however, but represents *Länder* governments in federal decision making.[9] The *Bundesrat* is an integral component of the model of executive federalism,[10] which has developed in Germany since the late nineteenth century. It is characterized by the substantial interdependence of federal and *Land* politics and, thus, also of the governing coalition in the federal government and the opposition that has often controlled a majority of *Länder* governments. Together with the complex system of distribution of financial resources that binds together federation and *Länder*, the *Bundesrat* has been perceived in recent years as one of the principal obstacles to fundamental structural reform.[11] A bicameral reform commission was established in 2003 to develop proposals to reform the federal system. The negotiations between the major parties and between the federal government and the *Länder* executives failed in late 2004, however, due to severe divergences of opinion on several issues of distribution of competences.[12]

The People

The composition of the German population is not a pressing reason for federation. In comparison to most other European countries, Germany's population is fairly homogeneous. Some 90 percent of the population is German in cultural and linguistic terms. There are some traditional minorities: the Danes along the Danish border in Schleswig-Holstein, the Frisians at the northern (Schleswig) end of the North Sea coast, the Slavic Sorbs in the southeastern corner of Saxony and Brandenburg, the Sinti, and the Roma. These comprise only 0.4 percent of the German population, however, and live mostly in peripheral border regions. Much more important in quantitative terms are the "new minorities" formed by families of migrant workers and refugees.[13] Around 10 percent of the inhabitants of Germany belong to this category. The most important group comprises people of Turkish origin.

Beneath the veneer of national homogeneity, however, even the German people are rather diverse. Historical experiences and traditions are very different in different parts of the country. Linguistically, also, the regional languages assembled under the roof of standard German vary greatly. The Alemannic and Bavarian dialects of the South are unintelligible to northern Germans. Southern Germans find it difficult to understand Lower German.

In terms of religion, also, historically Germany has been a complex puzzle. There are regions in the west and the south that used to be homogeneously Roman Catholic, whereas most of northern and eastern Germany consisted of purely Protestant territories. In other regions, such as the southwest, religious faith varied from village to village, mirroring the political map of the sixteenth and seventeenth centuries, when the territorial compromise was struck between Roman Catholics and Protestants. Religious diversity was one of the principal reasons why Germany had to be organized in a decentralized manner; thus, it is part of the historic background of federalism. Religion today, however, no longer plays a decisive social or political role. As a result of internal migration, there is also a strong tendency for people of different faiths to converge, at least in urban centres.

The boundaries of the constituent units of the federation, the *Länder*, are not drawn deliberately to reflect cultural and religious differences between segments of the population; rather, they are primarily rooted in political history. Some borders may coincide with cultural and religious boundaries. The political changes of the Napoleonic period, however, caused the creation of states that, in the nineteenth century, already had very diverse populations – an experience repeated in the course of the territorial restructurings of 1919 and 1945–49.

Interestingly, this has not led to a significant weakening of regional identities. This is obvious in "historic" states like Bavaria, Saxony, Hamburg,

and Bremen. In other cases, traditional regional identities have sometimes shifted to the new political entities, as in Hesse and Lower Saxony. In the case of the newly formed *Länder* of postwar Germany, regional identification is more complex. In these states traditional identities, linked to historic territories, persist. They coexist, however, with regional identities, which have been created more recently.

History

The starting point of German federalism is the medieval era, when Germany was fragmented into hundreds of quasi-independent feudal territories. Above a host of local rulers, the person of the emperor constituted some kind of (largely symbolic) supreme power. However, when it came to conflict, the emperor proved to be more or less powerless beyond his own (dynastic) territories.[14] Some of the regional dynasties managed to effectively consolidate their territories and ultimately formed "sovereign" states in a long process that continued from the fourteenth century to the seventeenth century. With the Peace of Westphalia of 1648, this complex pattern of semi-sovereign states and autonomous territories was preserved for a further 150 years.

Not until the downfall of the Holy Roman Empire of the German Nation in 1803 was the way free to rationalize the territorial structure.[15] The still relatively complex patchwork of sovereign states of different sizes was organized after 1815 in the German Union (*Deutscher Bund*), a confederation of German states jointly controlled by Austria and Prussia. An attempt to unify Germany in a federal state with a constitutional monarchy failed in 1848.[16] Some two decades later, Prussia's prime minister, Otto von Bismarck, managed to outmanoeuvre Austria and to force the remaining states of northern and central Germany into a union with Prussia. Some years later, in 1871, the four southern German states joined the union, thus forming a new (federal) German Empire with the king of Prussia as emperor.

Unification was possible only on federal terms. At the beginning, there were few federal institutions. The chancellor was appointed by the emperor and, in the absence of responsibility to any parliament, directed a kind of secretariat. There were no regular ministries and no cabinet. A directly elected federal parliament had a decisive say in statutory law making and in budgetary questions but no influence on the executive. As a second chamber Bismarck created a federal council uniting the monarchical executives. Administration remained in the hands of the states as constituent units, most of which were only semi-parliamentary monarchies.[17]

When the monarchical system broke down in the revolution of 1918, important actors in the new democratic polity tried to change the system from a federal arrangement to a more unitary form of governance according to the French model. They succeeded to a large degree, although nominally

Germany remained a federal state. Plans to transform Germany into a centralized state failed because the (now democratic) governments of the constituent states rejected moves towards centralization.[18] When the Weimar Republic became ungovernable in 1930, an authoritarian government drawing on the emergency powers of the president was instituted in the federal sphere. In the states, including Prussia, parliamentary governments remained in power. But when the Nazis took over Germany in 1933, the federal structure was soon abolished.

After 1945 the occupying powers reconstructed democratic governance in the states first. The state governments and parliaments soon acquired a central role in German politics.[19] The Parliamentary Council, which drafted the Basic Law in 1948–49, was composed of delegates of state parliaments. Accordingly, it was impossible to create anything but a federal state – a condition also set explicitly by the allied military governors. During the drafting process, the nature of the second, “federal,” chamber was heavily debated. An important group favoured a senate on the U.S. model, while others advocated the traditional German *Bundesrat* solution. Finally, a deal was struck. The delegates voted in favour of a bicameral system with a *Bundesrat*, or Federal Council, but also opted for a somewhat centralized system of distribution of revenues and financial resources.[20]

The unification of Germany, which technically was construed as an accession of the five East German *Länder* to the Federal Republic, did not significantly change the institutional structure. The numbers of seats and the weighing of votes in the *Bundesrat* were adapted, but the arrangement of “cooperative federalism” that had evolved since 1949 and that closely links federal and *Länder* executives in a kind of consociational arrangement remained largely unaffected. The growing disparity in economic wealth between the different *Länder*, however, has put the system of redistributing financial resources under severe stress.

THE FEDERAL LEGISLATURE

The federal legislature plays an extremely important role in the federal system. Germany has an integrated style of federalism, in which competences, for the most part, are not distributed horizontally between the states and the federation according to subject matter but, rather, are distributed vertically, dividing legislative and executive competence and conferring most of the former on the federation. In consequence, the federal legislature is the main law maker.[21] The legislative competences of the *Länder* are very limited. The major challenge to the traditionally dominant role of the federal legislator comes from the European Union. In an increasing range of areas, the European Union decides on the framework for future legislation, leaving the national parliaments to transform it into statutory law.

The federal legislature is bicameral. A federal parliament, the *Bundestag*, is elected directly by popular vote. A federal chamber, called the *Bundesrat*, represents the constituent units – that is, the *Länder* – or, more precisely, the *Länder* governments. The *Bundestag* and the federal government are closely linked by the strictly parliamentarian design of the governmental system. The *Bundestag*, with its majority, elects the federal chancellor (the prime minister). The chancellor then nominates the members of the cabinet, which finally are appointed by the federal president. Ministers are usually members of the *Bundestag* and, accordingly, sit on the benches of the parliamentary majority. The head of state, the federal president (*Bundespräsident*), does not play any role in the legislative process, apart from signing legislation at the end of the process.

The interplay between the two chambers, the *Bundestag* and the *Bundesrat*, however, significantly modifies a legislative process that otherwise is typically parliamentary in character. Due to voting patterns that developed from the 1970s, the *Bundesrat* tends to be controlled by a majority of *Länder* governments belonging to the opposition parties.[22] The divergence of majorities in the two chambers offers a strong temptation for opposition leaders in the *Bundesrat* to block any significant move of the federal government.[23] This forces both party blocs towards a certain degree of cooperation in law making in order to prevent the legislature from becoming paralyzed. A large dose of (hidden) consociationalism thus characterizes the German system.[24] The decisive deals between political blocs are usually struck in the joint committee of both chambers, the *Vermittlungsausschuss*, where leading politicians of the major parties (from both the federal parliament and the state governments) can negotiate a compromise in sessions held in camera.[25]

Parliament (Bundestag)

The Parliament, or *Bundestag*, is elected in a direct popular vote every four years. The regular number of seats is fixed at 598 by statute, but in practice five to ten seats are usually added because the regional majority party wins more direct seats in some *Länder* than strict proportional representation would generally allow (the so-called *Überhangmandate*).[26] The electoral system is based on the principles of proportional representation, but it also has a majoritarian component. Half of the regular seats (299) are allocated to local districts, where the candidate who has gained a (relative) majority of votes wins the seat. The remaining seats are allocated to party lists drawn up in each state in order to make up the number to which each party is entitled on the basis of proportional representation.[27]

In practice the mixed electoral system means that the representatives of the majority party in a state are mostly (sometimes even all) elected directly

in local districts, whereas the representatives of smaller parties are elected by party lists. Big majority-parties thus find it more difficult to control their members, most of whom owe their seats to support in local districts. The representatives of smaller parties, by contrast, are directly dependent on the party lists drawn up by party organizations in the *Länder.* In neither case, however, does the federal umbrella organization of the relevant party decide the fate of politicians when new elections are due. The net effect of this arrangement is a strong role for state party organizations and relatively weak federal, umbrella party organizations. Members of parliament must campaign mostly at the state level in order to defend their seat, and in this way are linked to state politics and to their colleagues in the state government. From this perspective, the electoral system has a clear federal dimension.

The electoral rules are regulated by the federal legislature in a federal statute. The internal (party) rules on drawing up the party lists and on selecting local district candidates are made in the states, however. The result is that federal politicians have a strong background in state politics. Young politicians often serve first as a member of a state parliament before gaining a district seat or a promising place on a list. Sometimes members of state governments, when going out of office, are elected to the *Bundestag* or become members of the federal government. Sometimes also, however, members of the federal Parliament become party leaders in the states and move to the state Parliament in order to become members (or even leaders) of state governments later (when their party has won an election). When an opposition party in a state wins an election, sections of the new government usually are recruited from the ranks of prominent deputies from the federal government.

In general, gaining a seat in the federal Parliament thus involves a route through state politics. Because most state parliaments are professionalized, with their members fully paid, "professional politicians" are common.[28] The average member of parliament becomes a party member early, is active for a long time in party politics at the local level, and, after finishing her/his academic education, goes into politics as a profession. With regard to their career, these people depend completely on their party. Party leaders thus have strong leverage over members of parliament, most of whom depend for their chosen career on the support and patronage of the party leadership. In consequence, most delicate political issues are decided by small circles of party leaders and are implemented by parliamentary groups, without much discussion.

Federal Council (Bundesrat)

The Federal Council, or *Bundesrat,* is not a parliamentary organ in a strict sense. It is not elected by popular vote but constitutes a "federal" chamber

representing *Länder* governments in the federal legislature. Its model is not the United States Senate but the council (or assembly) of an international organization.[29] The *Bundesrat* has long roots in German constitutional history. It originated in a union of states, the *Deutsche Bund* of the early nineteenth century, and resembles the Council of Ministers of the European Community more closely than does any known second chamber of a federal type.[30] In this, as well as other respects, there is a close analogy between the supranational executive federalism in the European Union and German executive federalism. In both cases, the member states of the federal polity control the administration and implement legislation enacted by the overarching government. The participation of member-state governments in legislation through a council of delegates is entirely rational in such an arrangement because it provides the means for necessary feedback between two spheres of government, one of which is primarily responsible for legislation and the other of which is primarily responsible for implementation.

Members of the *Bundesrat* are delegates of *Land* governments with an imperative mandate. A member of the Federal Council remains in office as long as a *Land* government wants him or her as its delegate. Ordinary members are usually ministers of the state governments. In committees, however, the *Länder* are usually represented by high-level bureaucrats from state ministries. Their vote is not personal: a state must give its votes en bloc.[31] One delegate may cast all the votes of a state if entrusted with this task by the *Land* government. If members of the *Bundesrat* representing a state do not agree on how the state should vote, no valid vote can be cast.[32] The votes are weighted, in the sense that big *Länder* have more votes than do small ones, over a range between three votes for small states to six votes for the largest states. The weighting is of the utmost importance in financial matters because it prevents the emergence of a majority of small states that can outvote the five big ones, which represent two-thirds of Germany's population. Experience shows that it is much easier for a federal government to entice smaller states into a package deal with financial implications than it is to compromise with the larger and, in this sense, more important states.

The power of the *Bundesrat* in relation to legislation varies between two different categories of laws. In the case of ordinary federal legislation, the *Bundesrat* can only lodge a formal objection against a proposed bill. The *Bundestag* may overrule the objection by an absolute majority (*Einspruchsgesetzgebung*), which means that, in this case, the *Bundesrat* has only a suspensive veto.[33] The *Bundesrat* has an absolute veto in relation to the other category of laws, however, the so-called *Zustimmungsgesetze*. Here the active consent of the *Bundesrat* is needed, so that a majority can effectively block

the adoption of a statute. [34] In the basic law, *Zustimmungsgesetze* are treated as an exception, in systematic terms, but in practice they make up more than 50 percent of all statutes adopted by the federal legislature.[35]

The clauses requiring the consent of the *Bundesrat* are scattered throughout the Basic Law. The main examples are statutes that have significant financial implications, changing the distribution of financial resources between the federation and the states, and statutes that prescribe the administrative procedures to be followed when the *Länder* implement a federal law (which is the common case with federal legislation).[36] The latter comprise the overwhelming majority of federal statutes needing the consent of the *Bundesrat*.

This arrangement obviously has a federal purpose. The participation of *Länder* governments in federal legislation ensures that the states do not become completely marginalized over time. It offers leading *Land* politicians a perfect stage to gain attention in the national media and gives them an important voice in federal politics. The use made of this opportunity differs with the subject matter, however.[37] Where legislation has severe financial implications for the *Länder*, it is difficult for parties to control "their" *Land* governments. Alliances between *Länder* with different political majorities but similar interests are not uncommon in such cases. The dynamic is different in relation to legislation of a programmatic-ideological character, suitable for use as an instrument of party politics. Here Christian-Democrat *Länder* and Social-Democrat *Länder* usually form closed blocs. Difficulties might arise where one of the big parties governs in a coalition with a small party generally linked to the other side, or where Social Democrats and Christian Democrats govern a *Land* in a "grand coalition" (as was the case in three *Länder* in 2005). Here *Land* governments usually take refuge in abstention, which makes constructing a majority for consent even more difficult.

When majorities in both houses differ (as was the case in 2005), quite often a deadlock between the houses may occur. The main instrument to overcome such a deadlock is the joint mediation committee (*Vermittlungsausschuss*), comprising an equal number of 16 members of both the *Bundestag* and the *Bundesrat*. Leading members of parliament of both political blocs, together with prominent *Land* leaders, negotiate in the committee in camera in order to find a compromise on disputed legislative projects.[38] The result of such negotiations, often a compromise deal between the leaderships of Social Democrats and Christian Democrats, must then be accepted or rejected as a whole by both houses. This means that neither the mass of representatives in the *Bundestag* nor the *Land* governments that have not participated in the negotiations have a say on the details of the compromise package. Transparency of the legislative process also suffers, but there is no other way to keep the legislature working efficiently.

THE FEDERAL EXECUTIVE

The federal government plays a dominant role in preparing legislative proposals. It also manages those parts of the executive that lie within the competence of the federation, such as the foreign service, the armed forces, the intelligence services, the federal police (*Bundespolizei*) and Federal Bureau of Criminal Investigations (*Bundeskriminalamt*), the customs services, the labour agency, and some semi-autonomous bodies in the field of social security as well as regulatory agencies and federal offices in the field of economic governance.[39] In addition, the ministers of the federal government (*Bundesregierung*) represent Germany in the Council of the European Union and thus determine the positions taken by Germany in negotiations on European issues.

Constitution of the Political Executive

The system of government is purely parliamentary. The head of government, the federal chancellor, or *Bundeskanzler*, is elected by the *Bundestag*. Once elected, the chancellor nominates the candidates for the cabinet (i.e., the federal ministers) for formal appointment by the federal president.[40] Because no party ever wins an absolute majority in federal elections, coalition governments are routine. As a result, the composition of federal governments is a complex issue decided after long negotiations leading to a so-called "coalition agreement." The coalition parties decide on their own terms which candidates to nominate for the ministries allocated to them. This limits the impact of the federal chancellor on the composition of the government.

By its nature, the federal government is an institution with a unitarian orientation. Nevertheless, a federal influence is clearly visible in the personal background of the chancellors and senior ministers. All federal chancellors for the last forty years (with the exception of Angela Merkel, the chancellor elected in autumn 2005) had first been prominent as leading *Land* politicians and, usually, as *Land* prime ministers. In addition, most senior ministers in the federal government have usually had experience as a minister (or sometimes even prime minister) in a *Land*. The explanation for this phenomenon is obvious. For opposition parties at the federal level, *Land* prime ministers and members of *Land* governments are the most likely reservoir of leaders with executive experience. *Land* prime ministers are also natural candidates for party leadership positions in times of opposition because they have the best opportunities to gain media coverage and political profile. When taking office after an election in which the previous government has not been returned, federal governments are usually well linked to *Land* executives. The longer a federal government is in power,

the more it loses this connection, until it is blocked, in its turn, by an opposing majority of *Land* governments and has to enter into more formal consociational arrangements.

Head of State

The separate head of state, the federal president, or *Bundespräsident*, performs mainly ceremonial functions. The president ratifies the formal entry into force of statutes, handles the ratification procedure for international treaties negotiated by the executive and adopted by the legislature, formally appoints all the higher public officials of the federation (mostly on the proposal of the federal government), and represents the state externally and internally.[41] The powers of the president are largely symbolic, and in practice the president plays no part in real political decision making, except in situations of constitutional crisis, where the Basic Law grants the president some "reserve powers." Contrary to most other heads of state, the president has no control over the armed forces, which are placed under the authority of the federal government. The mode of election bears a clearly federal character. The president is elected by the Federal Assembly, a giant institution meeting only once every five years for the sole purpose of electing the federal president. The Assembly comprises members of the *Bundestag* and an equal number of delegates of *Land* parliaments. In principle, an absolute majority is needed to elect the president, but if this is not achieved, a relative majority may suffice, after several rounds of voting.

Administration

The scope of federal administration does not correspond to federal legislative responsibilities. The federation has much greater legislative than administrative power. The normal scheme provides for implementation of federal legislation by *Land* administrations as a matter of *Land* competence (so-called *landeseigene Verwaltung*). In some exceptional cases administration takes a more integrated form, in which the *Land* administrations act under supervision and subject to the orders of the federal government (so-called *Bundesauftragsverwaltung*). This arrangement, however, needs the express authorization of the Constitution, which is given only sparsely and requires the federation to pay a large part of the financial burden of the policy set out in federal legislation, which the federation usually tries to avoid.[42] In the more usual situation, where federal law is administered by the *Länder* in the exercise of their own, direct authority, *Land* executives are legally bound to respect the requirements of the federal law, but the federal executive has no special authority over them. The Basic Law provides for the possibility of

federal control and intervention (the famous *Bundesaufsicht* and *Bundeszwang*). However, this option is so cumbersome in procedural terms – requiring, in particular, the consent of the *Bundesrat* – that it has practically never been used.[43]

The model works well only because *Land* administration is deeply embedded in a culture of legality with long historical roots.[44] If a *Land* is not implementing federal law faithfully, the final sanction for the federal government is to begin judicial proceedings against the disloyal state in a federal court (either the Federal Administrative Court or the Federal Constitutional Court). In most cases of illegal administrative practice, however, proceedings will be commenced by the citizens concerned; there is no act of government exempt from judicial scrutiny by administrative courts. In practice, therefore, there are only a few cases in which the federal government considers it necessary to take the matter to court itself.

In certain specific fields enumerated in the Basic Law the federation uses its own administration. However, there are relatively few circumstances in which the federation conducts its own administration through its own regional and local branches (*bundeseigene Verwaltung*). The foreign service, customs and excises, the armed forces, and the administration of certain means of transport of a national or international character are the only instances specified in the Basic Law. In addition, the Basic Law authorizes the federation to establish certain central police forces and agencies, as well as intelligence services, under its administrative control.

The Basic Law also allows the administration of federal legislation to be transferred to separate federal agencies. This option is not often used, however, for financial reasons. Examples typically are found in the field of economic regulation and governance – for example, the regulatory agency for post and telecommunications, the federal cartel office, the supervisory agency for financial services, the federal office for foreign trade, and the federal office for agriculture implementing the common agricultural policies of the European Community. Such federal offices and agencies are centralized in a specific location and work without decentralized offices or branches. Decisions on the seat of such agencies are an issue of obvious federal importance, which has led to a complex policy, the result of which is the even geographic distribution of such federal institutions throughout Germany. Most of these agencies are located not in Berlin but in places like Bonn, Cologne, Nürnberg, Munich, and the Rhein-Main area with Frankfurt.

Other Institutions

Other central institutions are only indirectly affected by the federal character of the polity. Traditionally, the central bank (*Bundesbank*) had an explicitly federal organizational structure, with regional banks in the *Länder*

(*Landeszentralbanken*) and with the governors of the regional central banks as members of its governing board. As a consequence of the creation of the European Central Bank, however, the structure of the German Central Bank was rationalized. The *Land* central banks were abolished as independent organizational units, becoming regional directorates under the control of the central board of directors. The remaining influence of the *Land* centres upon the composition of the *Bundesbank*'s board of directors; some of its members are still elected by the *Bundesrat.* Some other federal agencies, and in particular regulatory agencies such as the agency for post and telecommunications, have advisory councils, some members of which are elected by the *Bundesrat.*

THE FEDERAL JUDICATURE

The organization of the judiciary follows an integrated model. There are no separate hierarchies of *Land* and federal courts, but there is a horizontal separation. Courts of first and second instance are *Land* courts, whereas the highest courts of the various branches of the judiciary (ordinary, administrative, labour, social security, and tax law courts) are federal courts.[45] All cases, accordingly, start in *Land* courts. These courts apply *Land* law as well as federal law in an integrated fashion. Even administrative cases against the federal authorities are dealt with at first and second instance by *Land* courts, and actions of federal authorities can be declared null and void by these *Land* courts (including executive orders and regulations promulgated by the federal government).

The federal courts serve as supreme courts within their respective branches, controlling the interpretation and application of federal law by the *Land* courts. The control is limited to mere legality; in other words, it is restricted to questions of law. Questions of fact are a prerogative of the *Land* courts of first and second instance. The various federal courts are spread throughout Germany. The Federal Supreme Court (*Bundesgerichtshof*), the highest court in matters of civil and criminal law, sits in Karlsruhe, the Federal Administrative Court (*Bundesverwaltungsgericht*) in Leipzig, the Federal Labour Court in Erfurt, the Federal Social Court in Kassel, and the Federal Financial Court in Munich.

The Federal Constitutional Court, which, like the Supreme Court, is located in Karlsruhe, constitutes a special case. Its predecessor, the *Staatsgerichtshof* of the Weimar Republic, was created specifically for federal disputes. The Federal Constitutional Court continues this tradition, having a broad competence to deal with constitutional disputes between the *Länder* and the federation.[46] It can also deal with constitutional disputes between federal organs. In addition, there are two specific procedures for controlling the constitutionality of parliamentary statutes, plus an individual complaints

procedure that may lead to constitutional control as well. First, on the initiative of the federal or a *Land* government or of the federal Parliament, the Federal Constitutional Court may decide on the constitutionality of statutes of either the federation or the *Länder* and may declare them null and void. Second, on the initiative of an ordinary court, whether *Land* or federal, the Federal Constitutional Court may also examine the legality of a statutory provision. The ordinary courts are obliged to consider the constitutionality of statutes; if they come to the conclusion that a statute is unconstitutional, however, they may not declare it null and void but must refer the case to the Federal Constitutional Court. A statute may be declared null and void by the Federal Constitutional Court following an individual complaint as well, although in this case the procedure is indirect. Any person negatively affected by an action of a public authority of the federation or the *Länder* may, after exhausting ordinary legal remedies, lodge a constitutional complaint with the Federal Constitutional Court. The court may declare the action itself to be null and void, and in the course of doing so, in an implicit control, it may also supervise the constitutionality of the legislation upon which the action was based.[47]

The overtly political relevance of such broad judicial control of the constitutionality of all acts of public authorities is reflected in the openly political nature of the procedure of selecting constitutional court judges. The right to select and appoint Federal Constitutional Court judges is divided between the *Bundestag* and the *Bundesrat*. Both houses appoint half of the bench, which consists of 16 judges altogether (divided into two chambers of eight judges each). In both cases, be it in the electoral committee of the *Bundestag* or the *Bundesrat*, a two-thirds majority is needed, which means that both major political blocs have to agree on candidates. In practice, there is an informal quota system, distributing the right of nominating the candidates between the parties; one bloc, however, may veto another's candidate. The result is to ensure that lawyers of mainstream orientation come to the court and to exclude political appointees with a history of political partisanship that is considered to be too radical. A certain number of the judges must be career judges who come from the bench of the federal courts; the others are mostly law professors, high-level bureaucrats, and politicians. The mandate is limited to one term of twelve years.

Judges of the other federal courts are elected by a committee composed of the federal minister of justice and the 16 ministers of justice of the *Länder*, on one hand, and an equal number of members of the *Bundestag*, on the other.[48] The procedure again bears some traits of consociationalism because a cross-cutting consensus between major parties is needed and gives the *Länder* a decisive influence over the appointment of federal judges. In practice the process is less political than is the election of constitutional court judges because the reservoir for the recruitment of federal

judges is mainly the judiciary of the *Länder*. Practically all federal judges have served for 15 to 20 years as judges on the *Länder* courts, where the judicial service is a life-time career. Thus, such judges are career judges, with long experience in lower courts in the *Länder*.

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

Legislatures

The *Länder* enact their own constitutions upon which the institutions of the *Land* are based. All *Länder* have majoritarian parliamentary systems in which the parliamentary majority dominates political decision making. In a sense, the parliamentary character of the system is even stronger than it is in the federal sphere; this is due to the absence of a second chamber in the *Länder* mediating (and, hence, weakening) the influence of parliamentary majorities.[49] *Land* parliaments are elected according to the principles of proportional representation. In all the bigger *Länder* a mixed system analogous to the election system for the *Bundestag* is used. In other words, half of the seats in these *Länder* are allocated to local districts from which candidates are elected by majority. The remainder comes from party lists, to reflect the proportion of votes gained by a party overall.[50]

Most *Land* parliaments are professional parliaments in which the members are fully paid and work entirely in politics.[51] Only the two city states of Hamburg and Bremen have part-time parliamentarians, working in evening sessions. The high degree of professionalism in parliamentary work in the *Länder* contrasts with the limited importance of *Land* parliaments as legislators. As explained earlier, the overwhelming share of legislative competences lies with the federal legislators. *Land* parliaments have been the big losers during the constitutional evolution of the last decades[52] – a phenomenon exacerbated even further by the growing dominance of European Union legislation in most policy fields.[53] The scope of *Land* legislation now is limited, focusing on schooling and education, internal security and police, cultural affairs, and administrative organization and procedure. *Land* parliaments have few responsibilities in financial matters; they must adopt annual budgets, but they have practically no decision-making power in relation to the revenues of their *Land* because all the important taxes are governed by federal legislation, with the resulting revenues distributed in accordance with fixed quotas.[54] Accordingly, public interest in the work of *Land* parliaments is limited, and this finds its expression in the very poor media coverage of parliamentary work in the *Länder*.

The size of *Land* parliaments differs greatly, mirroring in some degree the diverging sizes of the *Länder* themselves. The smallest *Land* parliament

(Saarland) has 51 members, whereas the two biggest *Länder* of Nordrhein-Westfalen and Bayern have parliaments with 187 and 204 seats respectively. Most *Land* parliaments have between 80 and 130 members. Usually three or four parties are represented in *Land* parliaments. In some *Länder* one of the two major parties manages to gain an absolute majority. In most cases, however, the winning party needs a smaller party as coalition partner, with which it negotiates a common program consolidated in a coalition agreement. In four *Länder* there are "grand coalitions" between Christian Democrats and Social Democrats.[55]

Land parliaments are completely independent of the federation. Their basic structure is regulated in the *Land* constitution, and the electoral system is provided for in *Land* legislation. It is not possible for the federal government or the federal president to dismiss a *Land* government from office or to dissolve a *Land* parliament. The term of office of the *Land* parliament is decided by the *Land* itself, with the consequence that each *Land* has its own electoral cycle, which differs from the federal electoral cycle and that of the other *Länder*. There is a trend towards terms of five years; various attempts to coordinate *Land* parliament elections, however, have failed. The *Land* parliament has no direct influence on the selection of government delegates to the *Bundesrat*, but the *Land* government is responsible to its parliament and might be voted out of office.

State Executives

State parliaments elect the *Land* prime minister (and sometimes also the cabinet ministers) with an absolute majority of members present. Usually this requires forming a coalition between two (or sometimes even three) parties. Cabinet posts are divided in advance between the participating parties. Most of the members of *Land* governments are also members of *Land* parliaments, but personalities from the outside are also sometimes appointed as ministers. As in the federal government, it is difficult for the head of a *Land* government to exercise detailed influence on the actions of ministers; this is because most governments depend on "coalition agreements" and there is risk of a coalition crisis if a prime minister intervenes too much in the daily business of ministers from an allied party. The size, composition, and distribution of portfolios are matters for the coalition agreement. Often the size of cabinet and the distribution of portfolios are readjusted after an election according to the needs of the day (as a matter of "coalition arithmetic"). In principle, each party in a coalition decides independently on the selection of ministers for the positions allocated to it, although usually there is some consultation with the coalition partners. Candidates generally come from the *Land* branch of the party, either from members of the *Land* parliament or from the bench of members of federal

parliament representing the *Land* at the federal level. If suitable candidates for a government position are lacking, however, a prominent party politician from another *Land* is sometimes brought in to form a competent *Land* government. Some such members have even become *Land* prime ministers.

There is no separate head of state in a *Land*. The prime minister is the top representative of the *Land* and, thus, a prominent political figure throughout Germany. *Land* prime ministers are also very influential in the federal sphere; they participate in federal decision making through the *Bundesrat*, and they are usually also members of the party presidium in the federal sphere, playing a decisive role in the internal decision making of the party. When a party is in opposition in the federal sphere, it may be difficult for the federal party leaders to determine the course of opposition politics, while *Land* prime ministers use their power and influence to determine the course of federal politics for themselves.

The role and self-perception of *Land* governments is ambivalent. On one hand, they clearly perceive themselves as trustees of the corporate interests of the *Land* itself. At the same time, they are prominent representatives of a certain party, which means they have to take into consideration the interests of their party on a national level, and they also depend on the good will of the party and their reputation within it. This dependence, however, is once again mitigated by the decentralized structure of parties, whereby decisions that affect a political career are likely to be taken in the *Land* sphere, even for persons who enter federal politics.

Subnational regulatory agencies exist only in a very limited number of cases as most regulatory agencies are the responsibility of the federation. The most important case in the *Länder* is the electronic media sector, for which every *Land* has its own regulatory agency (*Landesmedienanstalt*).[56] This creates some problems, as regulatory competition is used by big media enterprises to play one *Land* executive against the other.

State Administration

Administration is the stronghold of the *Länder*. As explained earlier, the institutional architecture of the Basic Law is based on the systemic principle that federal legislation is carried out administratively by *Land* authorities. Article 83 of the Basic Law explicitly provides for this by declaring that administration by *Länder* is the norm, making all other cases exceptions that require express constitutional authorization.

Administrative organization and procedure is regulated by *Land* legislation,[57] although, if the *Bundesrat* consents, administrative arrangements may also be included in the relevant federal statute. The federal government may issue general directives on the operation of the law and on the use of discretion, but it needs the consent of the *Bundesrat* in order to do

so. Usually it is the *Land* government that issues directives and decrees binding lower administrations in the use of discretion. In certain special cases, it is also possible for federal legislation to reserve to the federal government the right to give direct orders to *Land* authorities, although this again requires the consent of the *Bundesrat*.

State Judicature

The judiciary is largely controlled by the *Länder*. Courts of first and (usually) second instance are always *Land* courts. Only the supreme courts of the various branches of the judiciary are federal institutions. This means that all cases, even cases against federal authorities, start before a *Land* court. Actions of the executive of either the *Land* or the federal executive may be declared invalid by these courts (usually administrative courts are competent in such cases). This jurisdiction extends even to government decrees and regulations. Parliamentary statutes, however, must be submitted to the Federal Constitutional Court for control if another court considers that they are unconstitutional. Statutes of the *Land* legislature are also subject to control by *Land* constitutional courts, which may also declare them to be invalid (15 of the 16 *Länder* have their own constitutional courts).[58]

The federation has no particular influence on the *Land* judicature, except that the basic guidelines of court organization are regulated in federal statutes. The details of court organization are an exclusive matter for the *Land*, however, as is personnel policy. Judges are *Land* officials recruited and paid by the *Land*. The appointment of judges at courts of first and second instance is a matter for the *Land* minister of justice. In some states, the minister of justice is obliged to consult a self-government body elected by the judges. There is strong public pressure to create such bodies and consultation mechanisms as a general scheme in all *Länder*.

LOCAL GOVERNMENT

The structure and organization of local government is regulated by the *Land* legislatures. Historically, there have been quite divergent models of local government in the various parts of Germany.[59] In northern and central Germany mayors used to be elected indirectly by city councils. They had a largely ceremonial role, while the municipal administration was led by an (again indirectly elected) top official (*Oberstadtdirektor*). In southern Germany, mayors were always elected directly in popular elections. They thus combined the ceremonial role of a leading representative of the municipality with the office of a chief of municipal administration. During the last ten years, there has been a significant shift towards this model.

The details of municipal organization still vary considerably from *Land* to *Land*. The most common scheme now, however, is characterized by an

independent municipal executive headed by a directly elected mayor, on one hand, and a municipal council elected in a popular vote based on proportional representation, on the other. The municipal council has rule making and budgetary functions and usually has certain control functions in relation to the administration. Sometimes it also elects the members of the city government heading the various departments of municipal administration. In some states a system of proportional representation is used in the composition of municipal governments. In these cases all the major forces in the local political arena are included in the municipal government.

The rules for the establishment and structure of local government are, as has already been mentioned, fixed in statutes enacted by *Land* parliaments (*Gemeindeordnungen*). Thus, municipalities depend for their organizational structure on the *Land* legislature. This is also true for the main fields of activity of the municipalities which are, generally, regulated either by federal or *Land* legislation. In addition, for budgetary purposes municipalities depend to a large degree on the federation and the *Länder*. Their finances stem (at least in part) from a share in taxes regulated by the federation and collected by *Land* authorities, and there are elaborate schemes to equalize municipal revenues that are regulated by *Land* legislation. In most of the *Länder* legislation also delegates some tasks of the *Land* administration to the organs of municipal administration. These organs thus acquire a hybrid character, providing local self-government as well as performing the functions of a decentralized *Land* administration. In the latter capacity municipal authorities are subject to detailed orders of the hierarchically superior *Land* authorities,[60] which is not the case in self-government matters.

The same is true for the districts, or counties (*Kreise*), which function as local self-government units while also acting as organs of control over the municipalities. These are also hybrids, traditionally serving as the lowest level of regular state administration but also having some genuine self-government competencies.[61] So-called county-free cities (*kreisfreie Städte*), which are usually bigger cities, perform the same function as counties and also serve as a basic unit of state administration.[62] The administrative role of the counties is changing in most *Länder* due to two parallel processes: first, regional authorities are being dissolved, and their responsibilities transferred to the counties; second, at the same time, at the municipal level the responsibilities of counties are being transferred closer to communities.

INTERGOVERNMENTAL RELATIONS

The federal distribution of competences under the German Constitution, with legislation lying mostly with the federation and administration (including the implementation of federal laws) lying with the *Länder*, creates a high degree of interdependence between the federation and the *Länder*,

which requires an extensive network of institutionalized intergovernmental cooperation. The centrepiece of formal cooperation is the *Bundesrat*, which ensures participation of *Land* executives in federal law making. Beyond the *Bundesrat*, however, a labyrinthine structure of joint standing conferences, committees, and working groups brings together the specialized branches and desk-officers of the executives of the various *Länder*, sometimes also including their counterparts from federal ministries.[63] At the apex of this informal structure of intergovernmental cooperation between the *Länder* is the conference of prime ministers, where the heads of government come together regularly in order to coordinate their government activities, as far as they perceive this to be necessary. Below, there is a structure of standing conferences of branch ministers from *Land* governments (with the relevant federal minister often invited as a guest). There is such a conference for each branch of government, in which ministers discuss and coordinate policies between the *Länder* (and often also with the federation). One of these conferences, the conference of the ministers of culture, even has its own secretariat acting as a kind of interstate agency. Further removed still, the various departments and branches of ministries, specializing in the same matters, have their own coordinating committees and working groups. Federal officials participate regularly in these networks. On the other hand, cooperation between the legislatures of the federation and the *Länder* is rare.

The purpose of this extensive network of cooperation institutions is twofold:[64] the federal and *Länder* executives use it to prepare legislation, on the one hand, and to assess the political and technical impact of proposed legislation, on the other. The reactions from the other *Länder* and the federal government are a considerable help in identifying the weak points and the political risks of draft statutes and make it possible to minimize the latter by negotiating a consensual solution. A dense cooperative network is also needed to coordinate administrative activities, with particular reference to the implementation of federal legislation by *Land* administrations. Federal ministries need to understand the problems that occur in the course of implementing legislation in order to improve it. Also, it is often necessary to harmonize the way in which a certain law is implemented in practice in order to obtain the desired effects of the federal legislation. But even where legislative competence lies with the *Länder*, there is a strong need to cooperate in order to avoid negative externalities and unwanted side effects. In consequence, *Länder* legislation is often harmonized to a degree by model statutes drafted in the cooperative institutions.

A new qualitative push has been given to intergovernmental cooperation by the necessities of bringing a *Land* voice to bear in European Union politics. The *Länder* have suffered from the exclusive authority of the federal government to represent Germany in the European arena. They have

complained of being bypassed, even in relation to matters that, internally, fall in the exclusive domain of the *Länder.* In consequence, they sought a right of participation in European Union matters. A new Article 23 was inserted into the Basic Law in 1992, making any future transfers of sovereignty subject to approval by the *Bundesrat*; providing for exchange of comprehensive information between the federal government, the *Bundestag*, and the *Bundesrat*; and giving the *Bundesrat* an opportunity to state its opinion before the federal government participates in the European Union legislative process. In some cases there are even clearly defined rights for *Länder* to participate in the decision-making process. If an exclusive power of the federation is concerned, but the interests of the *Länder* are affected, the federal government must take into account the opinion of the *Bundesrat.* Where autonomous rights of the *Länder* are affected, the opinion of the *Bundesrat* can prevail, although the Basic Law provides that the overall responsibility of the federal government must be preserved. Where the exclusive legislative authority of the *Länder* is involved, however, Germany is represented in the councils of the European Union by a representative of the *Länder*, nominated by the *Bundesrat.* The federal government participates in these cases as well, and, once again, the overall responsibility of the federation is required to be preserved.[65]

ANALYSIS AND CONCLUSIONS

German federalism is highly regulated by law. It depends to a large degree on explicit constitutional arrangements. This is particularly true for the division of powers between the federation and the *Länder*, regulated by the system of distribution of competences. The federal Constitution tries to provide clear and precise rules in this regard. The same is true of the arrangements for the institutions of government. Aspects of this institutional architecture are covered in what is sometimes very detailed form in the Basic Law (regarding federal institutions) and in the *Land* constitutions (regarding *Land* institutions).[66] The major questions of cooperation between the federation and the *Länder* are also regulated in the Basic Law, although much of the detail of such cooperation (and most of its institutions) has evolved as a kind of convention over time.

As far as the administration and the judiciary are concerned, only a framework of rules is provided in the written constitutions. Most of these institutional arrangements are embodied in legislation of either the federation or the *Länder.* Convention plays a significant role only in relation to cooperation arrangements between the federation and the *Länder*, which are often laid down in formal “state treaties.”

The constitutional framework for institutional arrangements has been very stable in recent decades, although the spirit of constitutional thinking

has changed considerably over time. The original institutional framework was very much dominated by the allied powers' insistence on a clear division of powers between federal and *Land* institutions. In the 1960s and 1970s, however, a preference developed for the informal arrangements of cooperative federalism. In the 1990s there was a shift back to a more clear-cut separation of powers between federal and *Land* institutions.[67] In each phase the prevailing paradigm affected the directions of state practice so that the same constitutional provisions have been construed rather differently over time.

The legalistic approach that is characteristic of German federalism must be viewed against the background of the broad competences and important role of the Federal Constitutional Court. German federal politics tends to leave unresolved political problems to adjudication, where ultimately they are decided by the Constitutional Court. This approach has its strengths because it leads to relatively clear and stable legal rules about institutions and their competences, procedures, and responsibilities. Nevertheless, strong reliance on legal mechanisms for dispute resolution often fuels inflexibility in political issues because actors in federal arrangements rely on their legal positions and are not really willing to compromise politically. Federalism, however, is an arrangement that requires a strong dose of pragmatism. A dynamic system of federalism can function only if all governments show a strong interest in keeping the system working, even if this means sacrificing certain legal positions.

The Interaction between Federalism and Representative Institutions

The basic dilemma of German federalism becomes most clearly visible in relation to the role of the *Bundesrat*. The institutionalized interdependence between federal legislation, on one hand, and the administrative implementation of federal legislation by *Länder*, on the other hand – a mutual dependency that finds its most extreme symptom in the quagmire of financial relations between the federation and the *Länder* – makes a body like the *Bundesrat* unavoidable. In such a system the *Land* executives have a strong influence on federal legislation because they know what a certain kind of legislation will mean in practice. At the same time, however, the constitution of such an institution creates a strong incentive to use its influence for the pursuit of particular interests, be they specific regional (or *Land*) interests or interests of the party forming the relevant *Land* governments. This temptation becomes particularly strong at times when the majority in the *Bundesrat* is formed by *Land* governments linked to the parties in opposition in the federal arena. At such times the *Bundesrat* is in danger of becoming transformed into a bulwark of opposition politics. In extreme circumstances this strategic use (or misuse) of the institution can lead to

an almost complete paralysis of federal politics because most of the important legislative projects of the federal government usually need the consent of the *Bundesrat*.

This tendency is not the fault of the constitutional arrangements alone. The drafters of the Basic Law conceived cases of *Zustimmungsbedürftigkeit*, requiring the consent of the *Bundesrat*, as an exception (at least in systemic terms). Responsibility for the way in which these arrangements have evolved lies rather with the increasing tendency of the federal government and legislature to choose to regulate matters of administrative organization and procedure in federal statutes, making *Zustimmungsbedürftigkeit* the norm. In consequence, German federalism forces the major political blocs to govern in a kind of hidden consociationalism. As long as the majority parties are incapable of deciding alone on a particular political course, they must find a basis for agreement with the other side. If this works well, it might lead to pragmatic forms of cooperative decision making. The individual responsibility of the legislative and executive organs is dissipated by such an arrangement, however. It becomes impossible to allocate clear responsibility for a particular decision to a specific organ because no single organ ever decides alone. Major political decisions in such a scheme are always the result of complex negotiations and joint decision making. Political responsibility thus becomes diffuse.

Diffuse political responsibility creates severe problems for the functioning of democracy. Genuine elections require that voters understand what is going on. Without such understanding, voters find it hard to attribute responsibility to political actors. Hence, dysfunctional decisions may lead to a crisis of the political system in general because the public is not capable of attributing wrong decisions to specific institutions.

The reconstruction of clearer lines of responsibility in the institutional arrangements of federalism is one of the major issues in the ongoing debate in Germany on reform of federalism. Public pressure on this issue was so high that the *Bundestag* and *Bundesrat* instituted a joint reform commission in 2003. The "federalism commission" seems to have come close to reaching a consensus. Some important changes to the institutional arrangements were effectively agreed upon, on condition that there be an overall consensus on the entire reform package.[68] In particular, these agreed-upon changes concerned the degree of participation of the *Bundesrat* in federal law making. The *Länder* conceded that, in future, the federal Parliament may legislate on matters of administrative organization and procedure (the main reason why the consent of the *Bundesrat* is required for more than 50 percent of all federal statutes) without the consent of the *Bundesrat*. The federation accepted that, in such cases, the *Länder* may depart from federal legislation to a certain degree if they so wish. Some other minor causes of interdependent decision making were also identified for abolition.

In the end, however, the negotiations failed because of controversy over the distribution of competences.[69] Nevertheless, the reform process will go on. It appears that the grand coalition that was formed in autumn 2005 will take up most of the issues agreed in the federalism commission and will likely amend the Basic Law accordingly. The current level of diffuse responsibility is widely regarded as unsustainable, both by the public and by major forces in the political parties.

NOTES

1 As to the constitutional history of Germany in the nineteenth century, see Arthur B. Gunlicks, *The Länder and German Federalism* (Manchester and New York: Manchester University Press, 2003), 16–26; for a more detailed narrative, see Thomas Nipperdey, *Deutsche Geschichte: 1800–1866* (München: C.H. Beck, 1983), in particular 69–79, 320–357n; and Dietmar Willoweit, *Deutsche Verfassungsgeschichte*, 4th ed. (München: C.H. Beck, 2001), 229–315. In addition, see Jutta Kramer, "Federal Republic of Germany,"*Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 144–178.

2 For the history of *Länder* formation after 1945, see Gunlicks, *The Länder and German Federalism*, 32–41.

3 See more detail in Stefan Oeter, *Integration und Subsidiarität im deutschen Bundesstaatsrecht* (Tübingen: Mohr Siebeck, 1998), 185–191, 398–402; see also Uwe Leonardy, "Territorial Reform of the *Länder*: A Demand of the Basic Law," *German Public Policy and Federalism*, ed. Arthur B. Gunlicks (New York: Berghahn, 2003), 65–90.

4 See Gunlicks, *The Länder and German Federalism*, 1–6.

5 See Susan E. Scarrow, "Party Competition and Institutional Change," *Party Politics* 3 (October 1997): 451–472; Gunlicks, *The Länder and German Federalism*, 149–151.

6 For a general overview of the German party system, see Gerard Braunthal, *Parties and Politics in Modern Germany* (Boulder: Westview Press, 1996); and Geoffrey K. Roberts, *Party Politics in the New Germany* (London: Pinter, 1997). See also *The Transformation of the German Political Party System*, ed. Christopher S. Allen (New York: Berghahn, 1999).

7 As to the institutional system of government, see David P. Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994).

8 See also Gunlicks, *The Länder and German Federalism*, 265–285.

9 From a political science perspective, see Uwe Thaysen, "The Bundesrat, the *Länder* and German Federalism," *German Issues* 13 (Washington, DC: American Institute for Contemporary German Studies, 1993): 5–13; and Gunlicks, *The Länder and German Federalism*, 339–356.

10 See Gisela Färber, *Efficiency Problems of Administrative Federalism* (Speyer: Forschungsinstitut für öffentliche Verwaltung/Research Discussion Paper No 1, 2002).
11 See Christian Hillgruber, “German Federalism – An Outdated Relict?” *German Law Journal* 6 (October 2005):1270–1282, at 1271–1272; and Peter Michael Huber, *Deutschland in der Föderalismusfalle?* (Heidelberg: C.F. Müller, 2003), pp. 21–33.
12 See Udo Margedant, “Ein bürgerfernes Machtspiel ohne Gewinner,” *Aus Politik und Zeitgeschichte 13–14/2000* (29 March 2005): 23–25.
13 Data from *Fischer-Almanach 2004*, p. 269.
14 For detail, see John G. Gagliardo, *Reich and Nation: The Holy Roman Empire as Idea and Reality, 1763–1806* (Bloomington: Indiana University Press, 1980).
15 See Eric Dorn Brose, *German History 1789–1871: From the Holy Roman Empire to the Bismarckian Reich* (Providence and Oxford: Berghahn, 1997), pp. 52–58.
16 See Gunlicks, *The Länder and German Federalism*, pp. 22–24.
17 As to the constitution of the Bismarckian Reich, see Ernst Rudolf Huber, “Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung,” *Handbuch des Staatsrechts*, ed. Josef Isensee and Paul Kirchhof, 3rd ed. (Heidelberg: C.F. Müller, 2003), § 4 paras. 26–51; and Thomas Nipperdey, *Deutsche Geschichte: 1866–1918*, vol. 2 (München: C.H. Beck, 1992), pp. 40–46, 85–109.
18 Oeter, *Integration und Subsidiarität*, pp. 56–66.
19 See Gunlicks, *The Länder and German Federalism*, 32–40; and Michael Stolleis, “Besatzungsherrschaft und Wiederaufbau deutscher Staatlichkeit 1945–1949,” *Handbuch des Staatsrechts*, ed. Josef Isensee and Paul Kirchhof, 3rd ed. (Heidelberg: C.F. Müller, 2003), § 7 paras. 43–114. See also Oeter, *Integration und Subsidiarität*, 96–138.
20 Oeter, *Integration und Subsidiarität*, 127–138.
21 For a more detailed analysis, see Oeter, *Integration und Subsidiarität*, 405–411.
22 See more in detail Gunlicks, *The Länder and German Federalism*, pp. 289–332, in particular pp. 325–330.
23 See Stephen J. Silvia, “Reform Gridlock and the Role of the Bundesrat in German Politics,” *West European Politics* 22 (April 1999): 167–181; see also Christian Hillgruber, “German Federalism – An Outdated Relict?” *German Law Journal* 6 (October 2005): 1270–1282, at 1271–1274.
24 Oeter, *Integration und Subsidiarität*, pp. 321–322. See also the classical study of Gerhard Lehmbruch, *Parteienwettbewerb im Bundesstaat*, 2nd exp. ed. (Opladen: Westdeutscher Verlag, 1998).
25 See Diether Posser, “Der Vermittlungsausschuss,” *Vierzig Jahre Bundesrat*, ed. by the *Bundesrat* (Baden-Baden: Nomos, 1989), 203–211.
26 See Hans Meyer, “Wahlgrundsätze und Wahlverfahren,” *Handbuch des Staatsrechts*, ed. Josef Isensee and Paul Kirchhof, 2nd ed. (Heidelberg: C.F. Müller, 1998), § 37 paras. 25–31.
27 The best explanation of the (complex) electoral system is given by Meyer, “Wahlgrundsätze und Wahlverfahren,” paras. 1–31.
28 See Gunlicks, *The Länder and German Federalism*, pp. 243–261.

29 For more detail, see my analysis in Oeter, *Integration und Subsidiarität*, pp. 465–474.
30 Peter Graf Kielmannsegg, "Vom Bundestag zum Bundesrat: Die Länderkammer in der jüngsten deutschen Verfassungsgeschichte," *Vierzig Jahre Bundesrat*, 43–61.
31 See the decision of the Federal Constitutional Court in the case of the immigration law – Bundesverfassungsgericht, Judgment of 18 December 2002 – 2 BvF 1/02 –, BVerfGE 106, 310, at 330 et seq.
32 Gunlicks, *The Länder and German Federalism*, pp. 343–348.
33 Johannes Masing, "Commentary to Art. 77," *Das Bonner Grundgesetz: Kommentar*, ed. Hermann v. Mangoldt, Friedrich Klein, Christian Starck, 4th ed. (München: Vahlen, 2000), vol. 2, pp. 2695–2696.
34 Peter Lerche, "Zustimmungsgesetze," *Vierzig Jahre Bundesrat*, ed. by the Bundesrat (Baden-Baden: Nomos, 1989), pp. 185–189; and Masing, "Commentary to Art. 77," 2677–2681.
35 Gunlicks, *The Länder and German Federalism*, pp. 349.
36 See Hans Schneider, *Gesetzgebung* (Heidelberg: C.F. Müller, 1982), pp. 86–91.
37 This has led to a debate on the dominance of territorial versus partisan politics in the *Bundesrat*. See Charlie Jeffery, "Party Politics and Territorial Representation in the Federal Republic of Germany," *West European Politics* 22 (April 1999): 159–161.
38 See Masing, "Commentary to Art. 77," pp. 2681–2693; and Gunlicks, *The Länder and German Federalism*, pp. 352–353.
39 Peter Badura, *Staatsrecht*, 2nd ed. (München: C.H. Beck, 1996), pp. 537–552.
40 Ibid. 442.
41 Ibid. 435–439.
42 As to the case of *Bundesauftragsverwaltung*, see Peter Lerche, "Commentary to Art. 85," *Grundgesetz-Kommentar*, ed. Theodor Maunz, Günther Dürig, et al. (München: C.H. Beck, 1987); and Badura, *Staatsrecht*, pp. 531–534.
43 See Oeter, *Integration und Subsidiarität*, pp. 442–443.
44 But see also Philip Blair, "Federalism, Legalism and Political Reality," *Recasting German Federalism: The Legacies of Unification*, ed. Charlie Jeffery (London: Pinter, 1999), pp. 119–154.
45 See Badura, *Staatsrecht*, pp. 576–578; and Gunlicks, *The Länder and German Federalism*, pp. 70–72.
46 As to the importance of these powers for the development of German federalism, see the classic study of Philip Blair, *Federalism and Judicial Review in West Germany* (Oxford: Clarendon, 1981).
47 Concerning the role, organization, and powers of the Federal Constitutional Court, see Badura, *Staatsrecht*, 598–611.
48 Ibid. 579–580.
49 Gunlicks, *The Länder and German Federalism*, pp. 147–152.
50 Ibid. 274–275.
51 Ibid. 246–259.
52 Ibid. 216–239.

53 See Rudolf Hrbek, "The Effects of EU Integration on German Federalism," *Recasting German Federalism: The Legacies of Unification*, ed. Charlie Jeffery (London: Pinter, 1999), pp. 217–233; and Udo Diedrichs, "The German System of EU Policymaking and the Role of the Länder: Fragmentation and Partnership," Gunlicks, *German Public Policy and Federalism*, 165–181.

54 See Gunlicks, *The Länder and German Federalism*, pp. 173–190; and Arthur B. Gunlicks, "Financing the German Federal System: Problems and Prospects," *German Studies Review* 23, 3 (October 2000): 533–555; see also Gisela Färber, "On the Misery of the German Financial Constitution," Gunlicks, *German Public Policy and Federalism*, 47–64.

55 See also the data collected by Gunlicks, *The Länder and German Federalism*, pp. 290–325.

56 Günter Herrmann, *Rundfunkrecht* (München: C.H. Beck, 1994), pp. 410–428.

57 For an overview of the common organization of Land Administration, see Gunlicks, *The Länder and German Federalism*, 85–114.

58 See Badura, *Staatsrecht*, 611–613.

59 Otfried Seewald, "Kommunnalrecht," *Besonderes Verwaltungsrecht*, ed. Udo Steiner, 7th ed. (Heidelberg: C.F. Müller, 2003), pp. 80–108; see also Arthur B. Gunlicks, *Local Government in the German Federal System* (Durham: Duke University Press, 1986).

60 See Gunlicks, *The Länder and German Federalism*, 99–100.

61 Ibid., 94–98.

62 Ibid., 100–102.

63 See Jost Pietzcker, "Zusammenarbeit der Gliedstaaten im Bundesstaat: Landesbericht Bundesrepublik Deutschland," *Zusammenarbeit der Gliedstaaten im Bundesstaat*, ed. Christian Starck (Baden-Baden: Nomos, 1988), 17–76; Walter Rudolf, "Kooperation im Bundesstaat," *Handbuch des Staatsrechts*, ed. Josef Isensee and Paul Kirchhof, vol.4 (Heidelberg: C.F. Müller, 1990), 1091–1132; Oeter, *Integration und Subsidiarität*, 474–480.

64 See more in detail Fritz Scharpf, "Der Bundesrat und die Kooperation auf der 'dritten Ebene'," *Vierzig Jahre Bundesrat*, ed. by the *Bundesrat* (Baden-Baden: Nomos, 1989), pp. 121–162.

65 As to the content and the problems of the relevant article, (Article 23) see Elisabeth Dette-Koch, "German Länder Participation in European Policy through the Bundesrat," *German Public Policy and Federalism*, ed. Arthur B. Gunlicks (New York: Berghahn, 2003), 182–196.

66 Concerning the significance of *Länder* constitutions, see Arthur B. Gunlicks, "State (Land) Constitutions in Germany," *Rutgers Law Journal* 31 (Winter 2000): 971–998.

67 In this regard, see Oeter, *Integration und Subsidiarität*, in particular 143–156, 233–272, 318–329, and 361–376.

68 See Rainer-Olaf Schultze, "Die Föderalismusreform zwischen Anspruch und Wirklichkeit," *Aus Politik und Zeitgeschichte 13–14/2000*, 29 March 2005, 13–19; and

Wolfgang Rentzsch, “Bundesstaatsreform – nach dem Scheitern der KOMBO?” *Die unvollendete Föfderalismus-Reform: Eine Zwischenbilanz nach dem Scheitern der Kommission zur Modernisierung der bundesstaatlichen Ordnung im Dezember 2004*, ed. Rudolf Hrbek and Annegret Eppler (Tübingen: Europäisches Zentrum für Föderalismus-Forschnung, Occasional Papers 31), 11 et seq.; for a detailed documentation, see *Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung*, ed. Deutscher Bundestag and Bundesrat (Berlin: Bundestag/Bundesrat, 2005); and the Web site of the reform commission under <http://www.bundesrat.de>, viewed 16 December 2005.

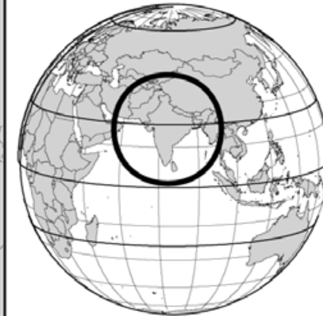
69 See Udo Margedant, “Ein bürgerfernes Machtspiel ohne Gewinner,” *Aus Politik und Zeitgeschichte 13–14/2000*, 29 March 2005, 23–25; and Arthur B. Gunlicks, “German Federalism and Recent Reform Efforts,” *German Law Journal* 6 (October 2005): 1283–1295, 1291–1295, available at <http://www.germanlawjournal.de>, viewed 16 December 2005.

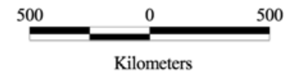
AFGHANISTAN
C H I N A
P A K I S T A N
Jammu and Kashmir
Himachal Pradesh
Punjab
Uttaranchal
Haryana
New Delhi
Delhi
NEPAL
Sikkim
Meghalaya
Arunachal Pradesh
BHUTAN
Rajasthan
Uttar Pradesh
Bihar
Assam
Nagaland
BANGLADESH
Gujarat
Madhya Pradesh
Jharkhand
West Bengal
Chhattisgarh
Orissa
Tripura
MYANMAR
Daman and Diu
Maharashtra
Mizoram
Dadra and Nagar Haveli
Andhra Pradesh
Bay of Bengal
Manipur
THAILAND
Karnataka
Arabian Sea
Goa
Pondicherry
Andaman and Nicobar Islands
Andaman Sea
Tamil Nadu
Lakshadweep
SRI LANKA
Kerala
MALDIVES

India

Capital: New Delhi
Population: 1 Billion
(2002)

Boundaries and place names are representative only and do not imply any official endorsement.





Sources: Times Atlas of the World; ESRI Ltd.; CIA World Factbook

Republic of India

RAJEEV DHAVAN AND REKHA SAXENA

INTRODUCTION

Framed by the Constitution of 1950, Indian federalism serves the second largest population in the world, comprising an unparalleled multiplicity of cultures, religions, languages, and ethnicities. The original federal design of 1950 drew its structure from the British Government of India Act, 1935, and its inspiration from the idea of centralized planned development.[1] But there was a vast difference between administering a colony – albeit the "jewel in the crown"[2] – in a vast sprawling empire and creating a federation to bring diverse peoples together with a vision of social justice for all. Anxious that this new "idea of India"[3] should not fall apart, the 1950 Constitution gave extensive powers to the Union legislature and executive to keep the nation together, underpinning a degree of dominance for the Union government, centred in New Delhi, which went well beyond the imperatives of economic planning.

The division of powers between the Union and states was weighted in favour of the Union. The Union legislature had the power to completely rewrite the physical boundaries of Indian federalism to create new states, including carving them out of existing ones. In turn, if the geography of Indian federalism was not sacrosanct, neither was its democracy. As part of its vast power and influence, the Union executive could impose emergency presidential rule on all or any of the states and suspend their democratic functioning. The early story of Indian federalism thus was one of transition from a focus on revenue and on law and order that had characterized the British governance of India to a constitution designed to enable planned development. The years that followed implementation of the Constitution, however, saw a transition of another kind. India's diversity and politics caught up with the original over-centralized federal structure to create what might be called a "negotiatory federalism" in which there is an increasing – even if inchoate – respect for the states.[4]

When the British left India in 1947, the subcontinent was not only partitioned between the newly independent nations of India and Pakistan but also contained some 572 princely states that owed their allegiance to the British Crown and were free to join India or Pakistan or to remain independent. Had this recipe for disaster been followed, India would have been fragmented. In response, the Indian Constitution created a flexible federation able to absorb both the former British territories as well as accessions by the princely states. The original Constitution differentiated between nine "Part A" states (formerly ruled by the British), nine "Part B" states (hitherto ruled by Indian princes), and ten "Part C" states (lesser territories ruled by the British). This was a makeshift arrangement to accommodate the influx of territories that fell to India's share after partition. In 1956, however, India was reorganized into 15 states and six Union territories, some of which, such as Goa, were later accepted as states. A state is a full-fledged constituent unit of the federation, with independent powers drawn from the Constitution. Such status was denied to territories for strategic and historical reasons. A Union territory is run directly by the Union, and the degree of devolution varies between territories.

The geography of Indian federalism has been constantly redrawn. Linguistic states were created in Andhra, Madras, and Kerala in 1956; Maharashtra and Gujarat in 1960; and Punjab and Haryana in 1967. Additional state entities were established as Sikkim in 1975, the North Eastern states in 1977, Goa in 1987, and Jharkhand and Chattisgarh in 2000.[5] By 2004 India had 28 states and seven Union territories. Demographically, the largest state is Uttar Pradesh, with 166 million people; the smallest state is Sikkim, with a mere 540,493. Geographically, the desert state of Rajasthan encompasses 342,239 square kilometres, while Goa, with 3,702 square kilometres, is the smallest state. Some of the Union territories, such as the Andaman and Nicobar Islands, are even smaller. There are huge social and economic disparities within and across states, with more and more communities staking a claim for some measure of autonomous governance along linguistic, ethnic, tribal, caste, and community lines in ways that will continue to alter Indian federalism.

The people and the challenge

India's population has grown exponentially from 238.4 million in 1901 to 361.1 million in 1951 and to 1.03 billion in 2001.[6] It is characterized by extensive religious and linguistic diversity. In 2001[7] some 81.4 percent of the population was Hindu, 12.4 percent was Muslim (making India the world's second largest Muslim country), 2.3 percent was Christian (larger than the population of many Christian states), 1.9 percent was Sikh, and the remainder were variously Buddhist, Jains, and many others. Hindus themselves are divided into various sects. When this demographic distribution is superimposed on the states, many areas of various states acquire

Sikh, Muslim, or Christian majorities. India also has 22 constitutionally recognized languages, often with different scripts, in addition to Hindi, which is spoken by 40.2 percent of the population, and English, which is becoming increasingly acceptable. Other languages include Bengali (8.3 percent), Telugu (7.9 percent), Marathi (7.4 percent), Tamil (6.3 percent), Urdu (5.2 percent), Gujarati (4.8 percent), Kannada (3.9 percent), Malayalam (3.6 percent), Oriya (3.3 percent), Punjabi (2.8 percent), and Assamese (1.6 percent), with smaller percentages of Sindhi, Manipuri, and Kashmiri. Amidst these are dialects that have outgrown their parent language. If some of the percentages seem small, the actual numbers of people these percentages represent are large. This, then, is the challenge for Indian federalism – to accommodate and give expression to India's unparalleled diversity.

The response of Indian federalism

Indian federalism has devised several answers to the demands confronting it. In the first place, a strong centralized federation gives the Union an armoury of wide, overriding legislative and executive powers. Second, the federation provides for geographic flexibility so that additional states can be created. Within the tribal areas of India, autonomous units of government with their own distinct systems of governance can also be devised. Third, from 1956 India has consciously redefined its federalism along multicultural lines so that each state is projected as a distinct cultural entity with its own linguistic or social and historical identity. Fourth, under the Constitution, while the states may be entitled to equal respect as the constituent units of the federation, they are treated differently in fact, in accordance with a form of weighted and differentiated equality. More particularly, states are not represented equally even in the federal chamber of the Union legislature but, broadly, by reference to population size. The Constitution makes specific provision for Kashmir and other tribal states, however, and where there are designated tribal areas within states, all or any laws of the Union or the state in question may be rendered inapplicable on the orders of the state governor.[8] Fifth, Indian federalism is negotiatory in nature, so that in vital areas of finance, taxation, and revenue distribution, there is room for adjustment and compromise. This has become all the more crucial with the emergence of strong regional parties in various states and the advent of fragile coalitions in the Union government. Finally, since 1992 constitutional amendments have achieved a degree of democratic decentralization, which has compulsorily superimposed various tiers of local government on the federal structure.

Although reflecting on contemporary history is always more challenging than theorizing about the more distant past, it can be said that these characteristics of India's federal governance have taken India from the "benign

centralism" of the Nehru era (1950–64), through the troubled period of "excessive centralism" of Indira Gandhi and her successors (1965–89), to the new negotiatory federalism of the coalition and minority governments' era (1989–present).

UNION LEGISLATURE

General

Pivotal to Indian governance is the Union legislature comprising the House of the People (*Lok Sabha*) and the Council of States (*Rajya Sabha*). The Union legislature provides the forum for accountability and responsibility on the part of the Union executive. Ministers report to both houses of Parliament in response to questions and debates. However, the prime minister and cabinet are collectively responsible only to the *Lok Sabha*. This means that a Union government cannot be formed or continue unless it enjoys majority support in the *Lok Sabha*. If this support is lost, the government must be replaced by another government or seek re-election at the polls.

The second function of the Union legislature is to enact laws on the subjects assigned to it. The Union's exclusive areas of legislation consist of 97 items, including a sprawling residuary power (Schedule VII, List I) in contrast to 66 items on the states' list of exclusive subject areas (Schedule VII, List II). Both the Union and the states can legislate on a concurrent list of a further 47 items, but in the event of conflict, Union legislation prevails (Schedule VII, List III). Within the exclusive state list, there are many areas – such as policing, mining, industry, and sales and other taxes – that are specifically subject to overriding Union legislation. This is a peculiar feature of India's Constitution, which allows the Union to legislate on areas otherwise exclusively assigned to the states. If the governor of a state feels that any state legislation needs federal approval, it may reserve that legislation for approval by the Union executive, whose veto is final. But the Union's legislative powers go farther. If a treaty has been negotiated, the Union legislature may override all the legislative lists to pass implementing legislation. The *Rajya Sabha* can pass a resolution by a two-thirds majority to empower the Union Parliament to enact legislation on all matters in the national interest specified in the resolution, as long as any such legislation is passed within a period of one year from the date of the resolution. Similarly, during an emergency, Parliament may pass legislation on subjects on the state list. In addition, two or more states may request the Union to enact legislation within their exclusive areas of legislative competence, which may be adopted by other states. This makes the Union's already extensive powers even more vast.[9]

The Union executive is responsible to the Union legislature when an "all-India," "state specific," or "other" emergency is declared. Such emergencies must be ratified by both houses of Parliament within one month in order to be continued for periods of six months at a time within the prescribed maximum period of one year.[10] The Union legislature also has unusual powers to alter the territorial boundaries of the states; in this way, the geography of the Indian federation can be redrawn with minimal and formal consultation with[11] the legislatures of the states affected, but not with their people. Finally, the Union Parliament plays a crucial role in amending the Constitution. Some changes can be made by a simple or absolute majority of each house of the Union legislature, without reference to the states. Some changes can be made only by a two-thirds majority of each house, with ratification by one-half of the legislatures of the states. So far there have been 91 amendments to the Constitution.

The effect of these accumulated powers and functions is that the Union legislature has not only passed legislation in all areas of the social and political economy, overriding the discretion of the states, but has also declared all kinds of emergencies, changed the geography of Indian federalism, and substantially altered the Constitution itself. In the face of this last development, the Supreme Court held that not even the plenary power to amend the Constitution can alter the basic structure of the Constitution, which, perforce, includes the federal structure.[12] However, this has not prevented the Union executive and legislature from dominating federal governance.

Election to the Union legislature

India is the world's largest voting democracy. Its people are represented nationally in a bicameral legislature consisting of the *Lok Sabha*, which is elected directly by universal franchise from single-member constituencies on a first-past-the-post voting system, and the *Rajya Sabha*, which is indirectly elected by the legislatures of the states in proportion to the population size of the respective states.[13] Elections to the legislatures of the Union and the states and for the offices of the president and vice-president are conducted by an election commission, which draws its independence and authority from the Constitution but is nominated by the Union executive. The Election Commission has overseen some of the most challenging elections in the world, and its functioning has aroused controversy at times, especially in state elections where the commission has tried its best to keep elections within a secular rule of law. Elections to the 543 constituencies of the *Lok Sabha* are roughly determined on the basis of the population of an area within a state by a delimitation commission created by Parliament.[14]

The process of delimitation has important federal implications in that the more populous states with fast-growing populations have a greater share of the seats in the *Lok Sabha* and a greater say in the election of the *Rajya Sabha* and of the president and vice-president by the legislators of the Union and the states.

This poses a dilemma for Indian federalism. If population becomes the sole criterion for determining representation, the huge states and territories of north and west India will increase their domination of representation in Parliament, with implications for the election of the president and vice-president. Thus the nine northern units hold 245 *Lok Sabha* seats compared with 132 for the four southern units, 88 for the nine east and north-east units, and 78 for the five western units. If the census of 2001 were carried through to the distribution of constituencies, the share of the larger states would increase. The populous North would dominate the less populous South and the even less populous North East. For the present, Parliament has intervened through the 84th Amendment to the Constitution to freeze all constituencies until the year 2026. But this poses a critical problem of another kind for federalism: should Union institutions be designed not only to represent the people but also to provide equal representation for all states – large or small? Population-based democracy and state-based federalism need to yield to each other to find a satisfactory answer.

Independent India had a choice to continue the colonial system of "communal" electorates whereby representation in the *Lok Sabha* would have been along religious and ethnic lines. After much deliberation, the Constituent Assembly, which drafted India's Constitution, decided that communal electorates along purely religious lines constituted a typically British divide-and-rule approach to government, which had been responsible for the dismemberment of the subcontinent into India and Pakistan. Special provision was made in the Constitution, however, for the constituencies of scheduled castes (the former untouchables) and scheduled tribes (the indigenous peoples of India, or tribals), which has been renewed by Parliament every ten years.

Despite the abolition of communal electorates, religion has played an increasingly prominent electoral role since around 1980. New fundamentalist parties have sought a "Hindu" electoral base to successfully form coalition governments in the Union and in some states, including Maharashtra, Uttar Pradesh, Madhya Pradesh, and Rajasthan. The otherwise devout southern states with Hindu populations have not been affected significantly. This development has taken place despite a strong electoral law that prohibits appeals to religion during elections on pain of disqualification of the candidate as well as conviction for a penal offence.[15] The rise of these parties on the platform of *Hindutva* (neo-Hinduism) has exploited

Hindu sensitivities about India's Muslim and Christian past, even to the point of violence and the destruction of mosques and churches. These trends have greatly affected Indian federalism to foreshadow a "Hindu-Secular" divide that is more marked in some states than in others. This goes against the grain of a secular Constitution guaranteeing equal respect and concern for all faiths.[16]

Lok Sabha *(House of the People)*

The states are unequally represented in the *Lok Sabha*. The largest state, Uttar Pradesh, returns 80 members of Parliament (MPs) to the *Lok Sabha*, followed by 48 MPs for Maharashtra, 42 each from Andhra Pradesh and West Bengal, 40 from Bihar, and 39 from Tamil Nadu. At the other end of the spectrum Goa has two MPs, and Sikkim, Mizoram, and Nagaland have one each. Among the Union territories, Delhi has seven *Lok Sabha* MPs, and the rest have one each. Each MP is elected for five years, unless the *Lok Sabha* is dissolved sooner.

Elections to the *Lok Sabha*, conducted broadly on political-party lines, resulted in Congress Party majorities in 1950–71 and 1980–85. Coalitions or minority groupings, whether involving the Congress Party or otherwise, have formed governments in the intervening periods. The rise of strong regional parties has fractured the composition of the *Lok Sabha*. This has meant that, at times of coalition government, state-based regional parties have exercised a decisive influence over bargaining and policy making, including representation in the cabinet and appointment to other ministerial positions.[17] Even though the composition of the *Lok Sabha* includes untouchables, tribals, agriculturalists, trade unionists, businesspeople, and party workers,[18] party identities have played a more decisive role. This has led to the regionalization of the *Lok Sabha*, decisively affecting its working and functioning.

Within the parliamentary system, the government is accountable to the *Lok Sabha*, which voted or forced out of office various governments in 1979, 1991, 1992, 1996, and 1998. Invariably, both larger opposition and smaller regional and splinter parties have played an important role. To meet the problem of members changing party allegiance in mid-term, India amended the Constitution in 1985 and then again in 2003 to add the Tenth Schedule of the Constitution, which is applicable to the *Lok* and *Rajya Sabhas* and to the state legislatures. The object of these changes, which were designed to prevent legislators from crossing the floor in order to destabilize governments, has been significantly frustrated by partisan decisions of the speakers of the various houses, in whom power to make the decision about disqualification lies.[19] Generally, the law has been less efficacious than it might have been.

RAJYA SABHA (*COUNCIL OF STATES*)

The *Rajya Sabha* has 250 members, 238 of whom are elected by the lower houses of the legislatures of the states[20] and 12 of whom are nominated by the Union executive for their contribution to literature, science, art, and social service.[21] The distribution of the elected seats depends on the respective populations of states, in accordance with a formula that gives the less populous states only a minor edge. Larger states have more seats. Thus Uttar Pradesh has 31 members, Tamil Nadu and Andhra have 18 each, and Bihar and West Bengal have 16 each. The six states of the North East, Sikkim, and Goa have one member each. The Union territories of Delhi and Pondicherry have three members and one member, respectively, while the other Union territories have no representation in the *Rajya Sabha*.

The indirect elections to the *Rajya Sabha* take place broadly along political party lines but nevertheless may produce fractured results due to the rise of strong regional parties. In some senses the *Rajya Sabha* has also become a haven for politicians who have either not contested or have lost *Lok Sabha* elections, whether or not they are from the state in question or even from the state political party that enables their election. Given that cabinet and other ministers can also be drawn from the *Rajya Sabha*, many well known ministers (including, at one point, Indira Gandhi, later prime minister) were, and continue to be, drawn from the *Rajya Sabha*. This may have resulted in qualified and well known persons entering the *Rajya Sabha* but at the cost of turning seats into a species of pocket boroughs in the hands of political parties in power in Delhi and the state capitols, where candidates are handpicked by party high-commands and elected by processes that confirm predictable results. Because this practice is convenient for all political parties, Parliament passed an amendment to the election law in 2003 allowing a person to be elected to the *Rajya Sabha* even though not domiciled in the state he or she represents. This has resulted in *Rajya Sabha* seats being even more readily available for political patronage, geared to representing party rather than state interests.

The general composition of the *Rajya Sabha* has been changing. Earlier, a greater number of *Rajya Sabha* members apprenticed in state legislatures, the *Lok Sabha*, or local government. In recent years fewer *Rajya Sabha* members have been members of state legislatures. Frequent changes in the composition of the state legislatures, which are the electoral colleges for *Rajya Sabha* elections, have encouraged political opportunism in the sense that newly formed political majorities in power in the states have patronized new people hungry for office without reference to their past political record or service. Equally, less effective *Rajya Sabha* MPS continue as MPS for a second and third term. While the significance and extent of these changes should not be overstated, they display a perceptible trend.[22]

While the *Lok Sabha* is elected for five years (unless dissolved sooner), *Rajya Sabha* members are elected or nominated for six years, with one-third retiring every two years. This has meant that the party political composition of the *Rajya Sabha* is often markedly different from the *Lok Sabha,* more so when the latter has been prematurely dissolved or its term extended, as in the emergency of 1975–77.[23] The different composition of the two houses was most significant in the wake of the emergency in 1977 when Indira Gandhi's Congress Party lost its mandate in the *Lok Sabha* and was no longer in government but had a majority in the *Rajya Sabha.* Congress thus was in a position to force the incumbent Janata government (1977–79) to compromise on many legislative issues, including constitutional amendments intended to redesign the centralist and anti-civil libertarian constitutional amendments of the emergency.[24] When the BJP (Hindu nationalist)-led coalition was confronted with such an opposition majority in the *Rajya Sabha* in 2002, it called a joint session of both houses to override the majority in the *Rajya Sabha* in order to pass anti-terrorist legislation. This procedure is described in greater detail below; it is rarely invoked, however, and the *Rajya Sabha* derives considerable significance from its capacity to block Union legislation.

Relationship between the Lok Sabha *and the* Rajya Sabha

The Constitution provides that the Council of Ministers, or cabinet, "shall be collectively responsible to the House of the People" (Article 75[3]). Within parliamentary democracies, this means that the prime minister and his or her ministerial colleagues – even if some of them are not members of the lower but only of the upper house – must enjoy the support of the *Lok Sabha.* Where an election does not result in a clear majority, a convention has evolved whereby the president requires the selected prime minister to obtain a confidence vote within a stipulated period.[25] In 1996 a BJP minority government failed to command a majority and fell after thirteen days in office. Equally, two Union governments fell in 1979 and without a vote. Requiring a confidence vote from a fragile minority or coalition government even before it has commenced its political life is an Indian innovation that contributes to instability in the name of stability. So far, lack-of-confidence votes have caused the fall of ministries in 1990 and 1996, while in 1979, 1991, 1996, and 1998 prime ministers resigned without facing a confidence motion because they felt that they did not have a majority in the *Lok Sabha.* The pivotal role of the *Lok Sabha* in determining the right of a government to hold office represents its unique significance, in contrast to the *Rajya Sabha.*

The two houses have co-equal powers in respect of all legislation except money bills. Amendments to a money bill by the *Rajya Sabha* can be overridden if the *Lok Sabha* passes the bill again without the amendments

proposed by the *Rajya Sabha*. However, when it comes to legislation other than money bills, changes by the *Rajya Sabha* cannot be overridden so simply. There are many instances in which the *Lok Sabha* has accepted *Rajya Sabha* amendments to proposed legislation, including the constitutional amendments of 1979. The only formal way to break a deadlock between the *Lok Sabha* and the *Rajya Sabha* over bills other than money bills is to call a joint session of Parliament, pursuant to Article 108. This happens rarely; the procedure was invoked, however, in 1961 over the Dowry Bill, in 1977 over a bill on banking, and in 2002 over anti-terrorism legislation. Where the government has an overall numerical majority in both houses, the effect of the procedure is to nullify the dissent of the *Rajya Sabha*.

The *Rajya Sabha* has also, on occasion, contributed to legislative centrism. In 1950, 1951, and 1986, it used the power vested in it by virtue of its federal character to resolve by a two-thirds vote that it was necessary to the national interest for Parliament to make laws on specified state matters, thus, potentially at least, undermining legislative federalism.[26]

The *Rajya Sabha*'s institutional veto on non-money bills has enhanced its reputation and significance. Generally, however, differences between the two houses do not result in brinkmanship. In most cases negotiations among political parties break the deadlock, often by not passing the legislation in question. More significantly, bills may be referred to a joint committee (in which the *Lok Sabha* usually has a majority) to resolve differences. Negotiations in joint committee are conducted against a background of awareness of the strength of the various parties in the *Rajya Sabha,* which inevitably influences the outcome.

Since 1992 permanent joint select committees have been set up to oversee particular ministries, monitoring the operation of the ministries as well as considering bills referred to them. This dual task has generally overloaded these committees to the point where their operation needs to be reexamined in order to make them more effective. Both houses retain power to form their own permanent or select committees or to agree to the establishment of joint select committees. Ultimately, political forces determine the extent to which the *Rajya Sabha* checks and balances the *Lok Sabha*.

The Rajya Sabha *and federalism*

Although the *Rajya Sabha* is described as a council of the states, reservations have been expressed about its efficacy as a "federal" chamber.[27] This is due to aspects of its design as well as to operational pressures on its function and working. First, the states are unequally represented, which results in the domination of the more populous states and of the parties deriving support from them. Second, members are selected on the basis of political-party patronage, as a result of which the composition of the *Rajya Sabha* has become

increasingly fractured along regional and party lines, to the point where elections effectively take place in party caucuses in Delhi and the state capitols. Detracting further from the federal character of the *Rajya Sabha*, members who have no link with a state can now be nominated from that state in order to provide seats for supporters of the party. This is a problem that all political parties seem to want to perpetuate. Finally, although opinion is divided on the actual performance of the *Rajya Sabha*, which has often forced the incumbent government and the *Lok Sabha* to rethink issues, it nevertheless is a less powerful house that is seen as representing political party priorities at the expense of regional and state interests.

Both the Sarkaria Commission of 1988 and the National Commission to Review the Working of the Constitution of 2002 assumed that the *Rajya Sabha* played a federal role, without examining its work and role or making any real suggestions for reforming it. No attempt therefore has been made to alter the status quo. Changes that might enhance the role and status of the *Rajya Sabha* include, for example, giving all states equal representation in this house; providing for direct election of members of the *Rajya Sabha* by the people; and requiring such matters as executive appointments and certain foreign policy decisions to be approved by the *Rajya Sabha.* The result would be a smaller house, elected by the people with more specific functions that could, perhaps, enrich Indian federalism.

THE UNION EXECUTIVE

The President and Cabinet

India has a parliamentary form of government whereby the president is the formal head of state while the active business of government is carried out by ministers drawn from and responsible to the Parliament. The president and vice-president are elected by an electoral college consisting of the members of the Union Parliament and state legislatures according to a formula in which elected members of the federal legislature and members of the state legislatures have the same number of votes and in which the proportion of each state's votes depends on the proportion of its population share. In this way, direct election is avoided but the base from which the president is elected is broader than that of the federal legislature alone. A system of proportional representation is used for the election, involving a single transferable vote, ensuring that the successful candidate has an absolute majority.[28] Normally, votes occur along political party lines, with the result that most elections are not seriously contested. There have been a few exceptions, however. In 1967 a former chief justice of India entered the fray but lost after receiving almost 45 percent of the votes of the electoral college. Similarly, in 1969, Indira Gandhi successfully urged her party

members to vote against the official Congress Party candidate. Since the emergency (1975–77), presidential elections have been contested more vigorously; but generally, following attempts to obtain consensual support from the opposition parties, the candidate of the Union government in power has been elected. Given the volatility of Indian politics, it is difficult to predict what will happen in the future.

The president represents the federation as a whole but has to act on the aid and advice of the prime minister, except in limited situations relating to the selection of the prime minister and the dissolution of the *Lok Sabha.* But the president is not prevented from playing an active role in governance and has the constitutional right to be informed, with access to files and information.[29] There have been occasional conflicts between the president and prime minister, and while the advice of the prime minister will ultimately prevail if he or she wishes it to do so, the role of the president may be a complicating factor. Thus in 1986 the government allowed its unpopular postal bill to lapse when, after it had passed both houses and was sent to the president for assent, the president returned it to the government for reconsideration.[30] In 1978, following the emergency (during which the president acted as a rubber stamp to a dictatorial prime minister), the Constitution was amended to give the president the right to return the advice of cabinet on a once-only basis. This is a unique power, which could also be used to remind the Union government of its responsibilities to the states. The power has been formally exercised only in one instance, however, when President K.R. Narayanan, in 1998, asked the cabinet not to impose emergency presidential rule on the state of Bihar. The intervention of the president stalled the imposition of emergency rule for a few months. When the proposal was revived in 1999, however, the president was powerless to intervene again because of the once-only rule. The proclamation was made but subsequently had to be revoked when it became apparent that it would not be approved by the *Rajya Sabha*.[31]

The Union cabinet is effectively chosen by the prime minister. In choosing a cabinet, however, a prime minister always seeks to include representation from all the regions of India and as many states as possible. This is dictated as much (if not more) by expediency as by respect for the federal principle.[32] However, the capacity to expand the size of the cabinet to diversify political and regional representation was curtailed by a constitutional amendment in 2004, which states that the size of the Union and state cabinets cannot be greater than 10 percent of the size of the lower house to which the cabinet is accountable. Thus, following the constitutional amendment, a Union cabinet cannot have more that 53 persons until the size of the *Lok Sabha* increases in 2026.[33] Since 1989 the governments in power in the Union sphere have generally been coalition governments with minority support in Parliament. This has enabled the

members of the coalition to bargain for and obtain a more diversified political party representation in the Union cabinet.

Executive power

The Union executive has broad, sprawling power. Following a Supreme Court ruling of 1955,[34] this power can broadly be conceived as having two parts: (1) an executive power that is coterminous with the legislative powers of the Union, even where no legislation has been passed on the subject, and (2) a statutory executive power to implement laws passed by Parliament. While the latter is conditioned by guidelines from Parliament, the former can be used by the government at its discretion, as long as it does not transgress any enacted law or constitutionally guaranteed fundamental rights.[35] The combination of the narrow and wider species of executive power enables the executive to act in a great many ways without recourse to the legislature. The Constitution also empowers the Union and state executives to make ordinances when the legislature is not in session. An ordinance has the same effect as any law but must be ratified by the relevant legislature within six weeks after it reassembles.[36] This power has been much abused. An example is the strong anti-libertarian anti-terrorist legislation, initially introduced by ordinance in 2001,[37] obviating federal and democratic discussion.[38]

The Union's wide executive power dominates both foreign affairs and internal policy. The treaty-making power encompasses any agreements with other nations. Theoretically, no treaty is legally effective unless incorporated into the domestic law by legislation. In fact, however, self-fulfilling multilateral treaties, like the World Trade Organization (WTO) agreements, have transformed Indian governance. At least three states – Tamil Nadu, Orissa, and Rajasthan – filed cases in the Supreme Court questioning the Union's right to enter into treaties without consultation with, if not the consent of, the states, but the cases were not pursued. Anxiety about federal domination through this power remains, however, especially within a contemporary global context in which so much is ordained through multilateral treaties.[39]

The capacity of the Union executive to use its executive power to devise policies for the states without enacting Union legislation is characteristic of the practice of Indian federalism. A great deal of state governance is framed by national policies declared by the Union executive. A core agency for this purpose is the Planning Commission, a non-statutory body established in the exercise of executive power, through which India's socioeconomic planning takes place. The commission is chaired by the prime minister. While in form it is only an advisory body, in fact it is highly influential in the development of the national policies articulated by Union ministries

in all fields, including health, education, environment, water, forests, population, food, transport, and communications. These policies provide a basis for the allocation of resources and are followed by all states. Nonstatutory mechanisms that are used to secure compliance include conditional grants and loans.

In addition, the Union has a narrower executive power to implement statutory laws, which are enacted pursuant to the Union's vast reservoir of legislative powers and which affect every aspect of India's economy. Even after the liberalization of the economy in 1991, techniques of Union control over, for example, the Telecom Regulatory Authority, the Competition Commission,[40] and the stock market remain significant. Education, including various aspects of tertiary and professional education, is regulated by Union legislation as well. Some public-sector enterprises are created by the executive under the general corporations law, but Union legislation has also created public corporations in areas such as broadcasting, communications, banking, finance, engineering, airlines, and food distribution, which intervene to dwarf both private and state activity. The increasing privatization of the economy is likely to diminish the importance of these institutions – but not yet, and not completely.

Union administration

India's federal governance is bureaucracy-driven. Adapting the pre-independence British model of centralized civil services designed to sustain a revenue-based law-and-order federal structure, independent India took the view that a powerful centralized bureaucracy was necessary to secure the nation's unity and to enable planned development. Under the Constitution both the Union and the states recruit their own civil servants through independent public service commissions.[41] At present the Union's All-India services include the Indian Foreign Service, Indian Administrative Service, Indian Police Service, and Central Tax Services. The Constitution permits the Union to create more All-India services if there is a resolution to that effect by at least two-thirds of the *Rajya Sabha*. Following such resolutions, the All-India Services Acts 1951–63 created the possibility for the Indian Service of Engineers, Indian Medical and Health Service, and Indian Forest Service. However, only the Indian Forest Service has been created. Later, *Rajya Sabha* resolutions for All-India Education and Agriculture Services eluded implementation because of strong opposition by the states.

Recruitment to the All-India services is conducted centrally; once appointed and trained, however, the officers are allocated to cadres, which for the most part are coterminous with states and thus made available for state administration. During this time, they are under the operational control of the state concerned, although they remain officers of the Union

subject to recall by Union authorities. Through the All-India services, the Union exercises influence throughout the entire administration of India, including the states' own subordinate services, recruited by state civil service commissions.

Union legislation may be administered either by the Union itself or by the states. In practice, the Union civil service is relatively restricted, and much administration takes place in the state sphere. Union legislation enacted pursuant to concurrent powers is likely to be administered by the states, unless the legislation provides otherwise. In addition, authority to administer Union laws made in the exercise of an exclusive power may be conferred on state officials below the governor.[42] Conversely, states may confer administrative functions on the Union[43] through an amendment to the Constitution in 1956 that was prompted initially by experience with the execution of development projects.[44]

The Constitution provides a framework of principle for these arrangements. Union functions may be conferred on states by the president, conditionally or unconditionally, only with state consent.[45] Union legislation, however, may confer functions on states without a requirement for state consent. In either case, additional administrative costs must be met by the Union. State functions can be conferred on the Union only by the governor of the state concerned and only with Union consent.

Inevitably, there is a question about the extent to which one sphere can supervise the exercise of its executive power by the other. The Union has authority to give directions to the states in particular cases but has more general authority as well, which is relevant in this context. First, the states are obliged to exercise their executive power in a way that complies with both Union and state law, and the Union may give directions to the states for this purpose.[46] Second, the states are obliged to exercise their power in a way that does not impede the executive power of the Union, and again, Union directions may be given to this end.[47] A sanction lies in Article 365: if a state does not comply with Union executive directions, the president may declare that the government of the state is unable to be carried on in accordance with the Constitution, triggering a Union takeover of state administration.

Thus, in both theory and practice, India's constitutional setup creates a strong central legislature and executive. But it is the Union executive, with a powerful bureaucracy at its command, that controls Union and state government, with limited functional accountability to the Union legislature. Although the legislature has tried to strengthen its control over the executive through debates, legislation, and the committee system, the executive remains dominant.

Powerful centralized bureaucracies thus are a disturbing feature of Indian federalism. Although recruited independently by the constitutionally created Union Public Service Commission, the All-India services are

employed by the Union, which controls them for disciplinary purposes and can transfer them in and out of any state. It is bureaucrats drawn from these central services who effectively run the Union government and all state governments and have a pivotal presence in every local district in India. In the state and district arenas the Union's bureaucrats work under the direction of state governments but remain employees of the Union. As long as the same dominant political party ruled the Union and the states, problems did not surface. Nevertheless, in 1967 the Administrative Reforms Commission on federal relations thought it was "unusual" that All-India services serve state government but are "controlled by the Union." In 1969 an expert committee from Tamil Nadu noted that state bureaucracies should be recruited by the states not the Union. This was followed in 1974 by a demand from Tamil Nadu's Assembly that this should be so. The Union's Sarkaria Commission (1988) revealed that many state chief ministers giving evidence to the commission had insisted that state governance should be run exclusively by the state's own civil servants and not by Union-appointed bureaucrats. In reality, it is imperative for Indian federalism that the states be permitted a more expanded role to recruit their senior bureaucrats or at least have greater control of the officers seconded to them.[48] The Union, backed by its powerful All-India bureaucracies, is unlikely to yield to this demand – using India's unity, endemic disorder, and planned development as the rough-and-ready excuses for not doing so. Although there is ongoing consultation between Union and state governments over the control and use of Union bureaucracies in state administration, any overall change is unlikely in the near future.

THE UNION JUDICIARY

The Constitution created a common hierarchy of courts, beginning with district courts and culminating in the Supreme Court of India. However, this hierarchy is structured along federal lines. Each state has a high court with comprehensive powers to adjudicate on all aspects of the exercise of public power by the Union and state governments, including the enforcement of fundamental rights. The executives of the state, in consultation with the respective high court, create the lower courts of the state, including the magistracy and hierarchy of district courts, which is constitutionally under the administrative control of the state high court. The Constitution permits the creation of an All-India judiciary through an act of Parliament, following a resolution agreed to by two-thirds of the members of the *Rajya Sabha*. Although this has not occurred, the Supreme Court has mandated working conditions of service for the subordinate judiciaries of all the states in order to sustain judicial standards and to protect the independence of the judiciary.[49] Thus, state judiciaries are appointed and controlled by state

authorities even though all their judgments can be appealed not just to the state high court but also to the Supreme Court.

The Supreme Court of India strides like a colossus over Indian governance. The Court has exclusive jurisdiction to decide interstate disputes, original jurisdiction to defend fundamental rights, special jurisdiction to give advisory opinions, and appellate jurisdiction over all matters decided in the courts below. Over the years it has expanded the scope of all these jurisdictions through interpretation of the Constitution. Apart from its wide jurisdiction, the Supreme Court has acquired control over appointments to both the Supreme Court and state high courts. Although these appointments are made by the president in consultation with the Supreme Court and state high courts, in a series of judgments between 1981 and 1998 the Supreme Court wrested from the executive the power to make these higher judicial appointments. The authority of the Supreme Court includes transferring high court judges from one high court to another and determining their elevation to the Supreme Court.[50] To provide a structure for this exercise of power, the Supreme Court has created a collegium of its five seniormost judges to vet all appointments; the executive invariably accedes to its decisions. Almost all Supreme Court judges are appointed from among the high court judges and rarely directly from the bar. In most instances Supreme Court appointments violate the principles laid down by the Court itself, by-passing the experience and merit criteria in favour of intuitive selections. Through this process, the Supreme Court virtually controls the high courts with respect to both appointments and to transfers of judges, without reference to the state governments and with the nodding approval of the Union executive. The Constitution also permits the Union to create All-India tribunals with special jurisdictions, which are subject to judicial review by both the high courts and the Supreme Court.[51]

Over the years, the Supreme Court has given the Union great latitude in the reorganization of state boundaries, the interpretation of the legislative lists, the scope and priority of Union legislation in all matters concerned with centralized planning, and the Union's exercise of emergency and other powers over the states.[52] This trend continues, although the Court has not been wholly unmindful of state powers.[53] More significantly still, the Court has used its powers to determine issues relating to fundamental rights to create a species of public interest litigation. Thereby, along with the Union, the Court can issue directions to control government activities in relation to the environment, forestry, education, food distribution, welfare, and substantive and procedural due process. In this regard, the Supreme Court of India may be the most powerful federal court in the world.

However, in 1993,[54] the Court, while exercising judicial review over the Union's power to impose president's rule on the states, declared that "federalism" is part of the unalterable basic structure of the Constitution,

beyond the reach of even the plenary power of constitutional amendment. Both the theoretical and practical implications of this conceptual statement are not clear. There have been too many amendments to the Constitution's federal provisions to sustain the argument that no part of the original federal structure can be altered. This being so, it is not clear as to what is alterable and what is not. Equally, if the concept of federalism as part of the basic structure is an interpretative tool to control or temper the exercise of legislative or executive power, there is little evidence of such a concept being generally invoked – still less a systematic exposition of what "federalism" implies as a concept underlying the working of the Constitution.

In short, India's unified judicial system provides for considerable autonomy and independence of the state judiciary, which is under the control of state high courts. However, the whole system is presided over by the Supreme Court, which comprehensively influences and dominates the Indian judiciary. Generally centrist in its approach, the Supreme Court has not been insensitive to the claims of the states on an ad hoc basis. Yet the judicial pronouncement that federalism is part of the basic structure of the Constitution has thus far eluded both application and elucidation as a central motif of Indian governance.

THE STATES

State legislatures

The parliamentary system of the Union is replicated in the states, with some modifications.[55] State legislatures are constituted by and under the Constitution to include the governor and the houses of the legislature. The governor summons and can prorogue both houses of the legislature, dissolves the lower house, makes an address to it every year, signs all bills or reserves them for the assent of the president, and promulgates ordinances when the legislature is not sitting. All states have a legislative assembly to which the state cabinet is responsible. The assembly is elected for a term of five years unless dissolved sooner. A state legislature may also have an upper house, called a legislative council, which is not more than one-third of the size of the assembly, subject to a minimum membership of 40. Members are elected for six-year terms, and one-third retire every two years. The composition of a legislative council is complex. Unless Parliament makes provision to the contrary, one-third of the members are elected by local governments, one-third by members of the legislative assembly, and one-twelfth each from constituencies consisting of secondary school graduates and of secondary and tertiary education teachers. The remaining members are appointed by the governor and must have excelled in literature, science, art, cooperative movements, or social service (Article 171).

Bicameralism in the states was a controversial issue in the Constituent Assembly, where the inherently conservative character of a second chamber was seen as undesirable by some and as a useful check on over-hasty legislation by others.[56] Given the manner of the formation of the Indian federation, some states entered the Union with legislative councils that had been created during the colonial period, while others did not. The Union Parliament is empowered either to create or to abolish a legislative council for a state, on the basis of a resolution of the legislative assembly passed with a weighted majority (Article 169). The procedure has been used to abolish councils in West Bengal (1969), Pubjab (1970), and Tamil Nadu (1986). As a result, only five states, including Jammu and Kashmir, which has a somewhat more autonomous position in the Indian federation,[57] now have a bicameral legislature.[58] It may be that this is unfortunate and that with the advent of a constitutional third order of local government, there is a case for legislative councils to be reinstalled to represent local government and to enhance democratic and responsive government.[59]

Like the *Rajya Sabha*, a legislative council cannot block a money bill from enactment. But, while the *Rajya Sabha* can force the government to call a joint session of both houses to resolve a disagreement over other kinds of bills, the legislative council of a state can only delay such bills. There is no provision for a joint session of a state legislature. If bicameralism were revived, changes might be needed to restructure the houses of state legislatures, their *inter se* relationship, and their respective powers.

However, it is the unelected governor, appointed by the Union executive but normally acting on the advice of the state cabinet, who plays a critical role in the working of the legislature by summoning, proroguing, and dissolving the legislative assembly and by signing bills passed by the legislature to transform them into statutes. The governor has the power to refuse to assent to a bill (especially if it relates to the constitutional powers of the high court) and reserve it for consideration by the president.[60] Both the governor and the president may refer a non-money bill for reconsideration by the legislature. Where the legislature passes the bill again, the governor will give his consent or reserve it for reconsideration by the president. These complex provisions give both the governor (who, in this instance, acts for the Union and is not bound by his own cabinet's advice) and the Union executive a veto power over state legislation. The Sarkaria Commission suggested that these provisions have been greatly abused. In some instances, years passed before the president recorded his assent to state legislation. Even if such a power exists, it should be structured and subjected to time limits.[61]

The powers of the state legislatures extend to matters on the state and concurrent lists of India's Constitution. State legislation on the concurrent

list repugnant to Union legislation is void, and even some of the items in the state list are subject to override by any legislation passed by the Union to the contrary. By this means, some of the powers of state legislatures are restricted even in areas otherwise exclusively reserved by the Constitution for the states as matters of primary state responsibility, including education, health, industry, agricultural land, mining, police, and some aspects of revenue-raising. Since the 1992 constitutional amendments creating a mandatory third order of local government, state legislatures are also required to devolve powers to local government, including fiscal powers to raise revenue, even though the bulk of funds for the third sphere of government come from grants from the governments of the states.[62]

However, this picture of the restraints on the legislatures of the states should not detract from their constitutional and political importance. State governments are accountable to state legislatures and hold office as long as they enjoy the confidence of the latter. One consequence is that state legislators vie for office, switching sides despite the anti-defection provisions in the Constitution, holding state governments to ransom as more and more coalition and minority governments come to power in the states. State legislation remains singularly important in the crucial areas of policing, welfare, agriculture, natural resources, local government, and provincial governance generally.

State Executives

Although parliamentary government is replicated in the states, there are important differences in the way in which it functions. The Constitution provides that state executive power is exercised in the name of the governor who acts on the advice of the state cabinet. But the governor is appointed by the president on the advice of the Union government, acts as a conduit between the Union and the state, and can be seen as a political agent of the Union, in the guise of a constitutional head of the state.[63]

The Constituent Assembly considered whether governors should be elected by the people of the state. The plan was abandoned on the grounds that a nominated governor would enhance Indian unity, would be more likely to be impartial, and would not rival the chief minister of the state for political power.[64] There have been many controversies over the appointment and removal of governors. The Union government generally consults about appointment with the chief minister of the state, but the state has no veto over appointment. Patronage, rather than ability, plays a considerable role in the choice of governors, many of whom are defeated politicians or retired bureaucrats. Although governors are appointed for five years, they hold office at the "pleasure" of the president, and they can

and have been summarily transferred or removed from office. Where a different party is in power in the Union and a state, a governor may act to destabilize the government of the state. In 2006 the Supreme Court declared that it is important that governors appointed by the Union be persons of integrity and high calibre.[65]

Governors have the power to appoint and dismiss chief ministers. They also reserve bills for assent by the president as a veto on legislation passed by the state legislatures. Most important, however, is the power of the governor to recommend that an emergency president's rule be imposed because of a failure of the constitutional machinery in the state. When this happens, state democracy is overridden, the Union legislature takes over the state legislature's functions, and the governor acts for the president. The chief minister is dismissed, and, in most cases, the state legislature is dissolved to enable fresh elections or kept alive until a new government favoured by the Union takes over. These draconian measures have been invoked 95 times. In two instances, in 1977 and 1980, nine state ministries were removed at once.

There is a view that the provisions for president's rule should be abolished.[66] Such abolition would not render the Union incapable of exercising its general powers to impose an emergency in any part of the territory of India if faced with war, external aggression, or armed rebellion. Where such a general emergency is imposed, the material mechanisms of democratic accountability remain undisturbed. The Union Cabinet remains accountable to the Union Parliament and the State Cabinet remains responsible to their respective Legislatures. This can be contrasted with a situation in which the Union imposes president's rule on a state because of the latter's breakdown of constitutional machinery. In such cases, the Union executive and Parliament take over the legislative and executive functions of the state, subverting both democracy and federalism. All parties complain about abuse of this procedure when they are out of power; once in power, they seek to preserve it.

In all other respects, the executive power of the states is exercised in a manner similar to that of the Union. State governments have broad executive power, which can be exercised without reference to legislation, to create instrumentalities and corporations in order to further their activities. They also have a more narrow executive power to implement legislation. The states have at their command the services of officers of the All-India services as well as members of the state services selected through state service commissions. The state government exercises control over the third tier of local government, including the power to impose emergency rule.

As in the Union sphere, therefore, the executive branch of government dominates governance in the states, subject to the requirements of accountability to the people through their state legislature and the electoral process.

State Judiciary

India has a single court system, with a high court and subordinate courts in each state, from which appeals lie to the Supreme Court of India.[67] A high court can also be established by the Union Parliament for two or more states, and this happened in two instances.[68]

The judges of each state high court are appointed by the president through a procedure that involves consultation with the governor or governors of the states concerned, but in which the Supreme Court has a decisive say. High court judges can be transferred by the president to another state but may be removed only by impeachment through Parliament.[69] The high courts are constitutionally powerful and can strike down both Union and state legislation that violates the Constitution, including the fundamental rights of citizens. The lower judiciary of the state is, in effect, under the judicial-administrative control of the state high court, which must be consulted by the governor on appointments and which hears all appeals from other state courts. Corruption and incompetence in the lower judiciary is dealt with by the high court, which can force the dismissal of lower court judges. Despite misgivings about the operation of the state judiciary, which is overburdened with work resulting in a huge backlog of cases, the state judiciary in India remains a crucial custodian of the rule of law, dispute settlement, and justice.

LOCAL GOVERNMENT

From the outset, India's Constitution provided for the structure and empowerment of village *panchayats* by the states as a directive principle of state policy (Article 40). Local government was also included in the state list of legislative powers. Implementation of the requirement for local self-government was slow and patchy, however, and in 1992 the Constitution was amended to entrench local self-government.[70] The Constitution now provides a framework for multilevel *panchayats* in rural areas and municipalities in urban areas. The type, size, and organization of the local authority depend on the area it serves, ranging from a municipal corporation, with an average population of 1 million people, to a *gram panchayat* serving between 700 and 20,000 people.[71] The constitutional provisions delineate the core requirements for the composition of local government: direct election from equal constituencies; five-year terms of office; reserved seats and reserved positions as chairperson for scheduled castes, scheduled tribes, and women (including women who are members of scheduled castes and tribes); and supervision of elections by the state election commission. The Constitution authorizes states to confer such powers on local authorities as are "necessary to enable them to function as units of self-government" in relation to a range of

specified matters, including water, public health, and primary education, foreshadowing their involvement in the preparation and implementation of schemes for economic development and social justice. It also empowers states to make financial provision for local government through the conferral of tax-raising authority, tax-sharing, and grants, and it requires the establishment of state finance commissions to advise the state governor on the financing of local government. These provisions were not initially extended to tribal areas, for which the Union subsequently made special provision.[72]

These amendments established India as a responsive multilevel federation in which local government is part of constitutional governance. They mobilized the power of people at local levels, effecting change most notably in relation to the involvement of women and of disadvantaged communities. However, local government remains dependent on state action for its powers and financial resources, and the states have, in general, been reluctant to surrender either power or resources, raising a question of whether devolution of power should be mandated by the Constitution itself.[73] Outside the relatively limited areas of authority entrusted to local authorities, local governance remains the domain of district authorities (including the police) who are drawn from the All-India and state administrative services.

INTERGOVERNMENTAL RELATIONS

In order to ensure smooth intergovernmental relations, various centralizing mechanisms have been created by the Constitution itself and by various statutes. These include the comptroller and auditor general of India, who audits the accounts of the Union and the states and reports to their respective legislatures (Articles 149–151); the Election Commission, which conducts elections to the Union Parliament; the state assemblies and the posts of president and vice-president (Article 324(1)); and the Union Public Service Commission, which recruits All-India bureaucrats to govern at all levels (aside from those positions held by minor bureaucrats recruited by the state public service commissions) (Articles 315–323). A powerful mechanism in the form of the Union Finance Commission was created by the Constitution to distribute revenues and grants and work out equalization formulas for distributing financial resources based on state demands and needs. While the work of successive finance commissions has not escaped criticism, without them Indian federalism would become unworkable, especially in the light of the limited revenue-raising power of the states.[74]

Because the Constitution elliptically empowers the Union with far-reaching powers, Union legislation has been enacted in vast areas of socioeconomic significance. The Constitution has sought to ensure that the Union's legislation and directives are implemented. A special chapter dealing with

Administrative Relations (Articles 256–262) ensures that the Union can give directions to the states to implement its legislation and give overriding directions on the construction and maintenance of strategic communications, highways, waterways, and railways. With the consent of the governor, special duties may be assigned to state governments for which the Union has to bear the extra costs of administration. The Constitution was amended in 1976 to enable the Union to unilaterally send in armed forces to the states, but this amendment, which was made during the emergency, was repealed soon thereafter in 1979. However, various mechanisms for decision making and enforcement are built into the legislation enacted by the Union. The Reserve Bank of India controls banking throughout India. Under various statutes, paramilitary forces have been created and used mainly in the border states. Special provisions were enacted in 1958 for the North East to use the army to "assist" the civil administration, and new mechanisms are now contemplated by the Union to contain religious strife and communal violence in the states. A Central Bureau of Investigation (CBI) was created by statute in 1946 and can investigate crimes within states with their consent. The CBI has been mandated by the Supreme Court and state high courts in a number of cases to conduct investigations of state authorities on the directions of the courts without the consent of the state governments. The Central Vigilance Commission, which was originally created as a non-statutory body, has now been statutorily empowered to examine cases of malfeasance by public officials throughout the country. To ensure professional standards for professional and tertiary education, Union statutes have set up All-India bodies under the Advocates Act, 1961; the University Grants Commission Act, 1956; the University Medical Council of India Act, 1956; and the All-India Council for Technical Education in 1987. Although represented on these councils, the states have been unhappy that their control over education has been subordinated to these powerful bodies. The courts have stepped in to rectify the imbalance in some cases while generally supporting regulation by the Union through these statutory bodies. Union legislation often creates institutions in which the states are represented and where the implementation of the statute is left to the states and their officials.

Given that India was committed to social change through the social and economic goals of planned development, in 1951 Prime Minister Jawahar Lal Nehru created a powerful planning commission under the executive power of the Union consisting of the prime minister and experts and advisors appointed by him. The Planning Commission has dominated India's economy without any representation from the states, although they are consulted informally on an ongoing basis. Even after the liberalization of the economy since 1991, the Planning Commission remains a pivotal body that defies federal principles of representation and mandatory consultation. As if

to assuage the feelings of the states, in 1952 Nehru's government executively created the National Development Council to approve state development plans. The council includes the chief ministers of the states in its membership and tends to decide by consensus rather than majority vote – conscious that planning decisions lie with the Planning Commission and revenue-sharing with the Finance Commission.

Formally, all disputes between the Union and the states or among the states are left to adjudication by the Supreme Court. An exception is made for water disputes between states; these are decided by special tribunals established by the Union. Informally, there are intermittent meetings of the governors of the states. Such meetings, which are held often, do not regularly give the Union feedback on what is happening in the states and are treated with suspicion by opposition political parties in power in the states. Concurrently, and much less frequently, meetings of the chief ministers of the states have occasionally been called. Initiated in 1946 during British rule, this practice never matured and fell into disuse; instead, Prime Minister Nehru made it his personal practice to correspond with Congress chief ministers. Chief ministers have preferred to band together on party political lines rather than come together as a collective group. Meetings between various state and Union ministers and bureaucrats take place individually but rarely collectively, except in certain areas. On the suggestion of the Supreme Court in Aruna Roy's Case (2002), the Central Advisory Board on Education (CABE), originally established in 1926, was revived to effect collective consultations between the Union and the states on education. The National Integration Council was created in 1961 and has been reconvened from time to time. Its mandate includes discussions on multicultural governance. More significantly, the Union set up the National Water Resources Council in 1982 to examine water development plans. But such mechanisms are limited to their subject areas.

The Constitution envisaged the creation of a central forum in which chief ministers could collectively formulate policies and make decisions. Although the Constitution made provision for an interstate council for "investigating and discussing subjects [of] common interest ... or making recommendations,"[75] ever since 1967 or so, when non-Congress ministries emerged in various states, there has been discontent about interstate relations. Tamil Nadu's Rajmannar Committee Report in 1971, West Bengal's Memorandum of 1978, and various protests by other states led to the appointment of the Sarkaria Commission, which, in 1988, recommended a large number of piecemeal changes in various areas. One of the recommendations of the Sarkaria Commission was to establish the Interstate Council, which had been provided for by the original Constitution but never brought into being.

In 1990 a non-Congress Union government created a permanent interstate council. It is a somewhat unwieldy body in which all states are represented. It has not been particularly effectual, and each state continues to try to resolve its problems with the Union by direct negotiation. Within the council, no mechanism has emerged for the chief ministers to meet and make mandatory decisions. Fractured election results with a multiplicity of parties forming coalitions within the Union and states have further resulted in the states falling back on political mechanisms to obtain crucial financial and planning dividends. States feel their interests are better negotiated individually rather than through a politically fractured collectivity.[76] They are wary of a collective interstate council that could tower over state governance and undermine accountability to the state legislature.

In dealing with intergovernmental issues, the practice of Indian federalism prefers to address problems in a multiplicity of ways rather than through mechanisms that over-centralize negotiatory decision making. There is a need to develop an interstate council, but it will continue to be ignored as long as other, more effective political, constitutional, executive, and statutory decision-ensuring mechanisms exist alongside it. To some extent, the states are right not to surrender their autonomy to an interstate body that can only strengthen executive federalism at the expense of democratic accountability.

LOOKING TO THE FUTURE

No single chapter can do justice to the complexity of Indian federalism. The people of India reflect a religious, linguistic, cultural, and social diversity that is unparalleled even when compared with what is found in the various other continents of the world. Devising a constitution for India was like creating a constitution for many civilizations rolled into one.[77] At the same time, the disparity between the rich and the poor is so great that, unless adequate interregional transfers and allocations are made through some measure of centralized planning, the disparities will remain.

Adapting the revenue-based law-and-order approach to governance bequeathed by the British to independent India, India's constitution makers created a strong centrist model for planned development. It was also clear that, while all states were entitled to equal respect, they had to be treated unequally. According to their needs, specific provisions in the Constitution ensured preferential provisions for some states and areas within states. However, in the early 1950s the southern states demanded a language- and culture-based federalism. From 1956 India's internal geographic boundaries were restructured to provide for a multicultural federation – a process that is ongoing. At one level, this suggests a weakness in Indian federal

governance in that even the geographic boundaries of a state can be violated. But in some respects, this flexibility has proved to be a strength of Indian federalism. Federalism has been further fortified by the rise of regional parties, which, in the era of coalitions, have preserved India's diversity within a negotiatory federal arrangement.

The script of Indian federalism has been further rewritten by the local government amendments of 1992, which require the states to devolve power and resources permanently to the control of three-tier local *panchayats* from grassroot to district levels. These local governments are to be serviced by their own bureaucracies borrowed from the state civil services.

The problems and possibilities of Indian federalism arise from the complexity of its internal workings and the challenges before it. In the event of India not breaking up, the geographic restructuring of the states along linguistic and cultural lines will challenge assimilative overtures arguing for centralism. In time, the very large states might break up into smaller states with their own distinct social and cultural identities. But there are some inherent problems in the structure and working of Indian federalism that need attention. India has an executive-dominated parliamentary system backed by powerful All-India bureaucrats who dominate an over-centralized governance system. This is complicated further by the states not having enough revenue-raising powers, even though a constitutional amendment enlarged the share of the states to be distributed by the Finance Commission. What will alter the balance of power within Indian federalism is greater parliamentary control of the executives of the Union and the states, decentralization of the All-India bureaucracies to enable the states to have greater control over the officers who serve them, greater revenue-raising powers in the states, and a more people-based direct democracy emerging from local government. As between states, India needs to work through a more effective negotiatory federalism but still needs to develop further the institutional structures, processes, and practices that will enable this. It is in this sense that a Supreme Court judge asked if India's Constitution – and, perforce, its federal system – is in a state of being or becoming.[78]

NOTES

1 On the constitutional origins of India's federal structure, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (New Delhi: Oxford University Press, 1966), 186–264; B. Shiva Rao, ed., *The Framing of India's Constitution – A Study* (Bombay: N.M. Tripathi Ltd., 1968), 592–707. In addition, see Akhtar Majeed, "Republic of India," *Constitutional Origins, Structure, and Change in Federal Countries*, ed., John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 180–207; George Mathew, "Republic of India," *Distribution of Powers and Responsibilities in Federal Countries*, ed., Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown

(Montreal and Kingston: McGill-Queen's University Press, 2006), 156–180; Francine R. Frankel and Douglas V. Verney, eds., "Emerging Federal Processes in India," *Publius: The Journal of Federalism* 33 (Fall 2003): entire issue.

2 Benjamin Disraeli, "The Maintenance of Empire," a speech delivered at the Crystal Palace, 1872, <http://www.lclark.edu/%7Ecampion/hist328/imp-speeches.htm>, viewed 8 January 2006.

3 The phrase "idea of India" is here taken from Sunil Khilnani, *The Idea of India* (London: Hamish Hamilton, 1997) and draws sustenance from Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983). All federations – as, indeed, their units – are "imagined communities," portraying an "idea," which, in time, may take root as social reality either to pull a federation together or to divide it.

4 The best overview remains the Sarkaria Report by the Government of India, *Commission on Centre-State Relations: Report* (New Delhi: Government of India, 1988); note also the not very inspiring *Report of the National Commission to Review the Working of the Constitution* (New Delhi: Government of India, mimeo, 2002), chap. 8. For a broad overview see R. Dhavan and G. Goel, "Indian Federalism and its Discontents," *Federalism and Decentralisation: Centre-State Relations in India and Germany*, ed. Gert W. Kuek (Delhi: Mudrit, 1998), 43–83. The literature on federalism is legion. More recently, see B.D. Dua and M.P. Singh, ed., *Indian Federalism in the New Millennium* (Delhi: Manohar, 2003); Lawrence Saez, *Federalism without a Centre: The Impact of Political and Economic Reform on India's Federal System* (New Delhi: Sage Publications, 2002).

5 Constitution of India, Articles 3 and 4. Rasheeduddin Khan in his *Federal India: A Design for Change* (New Delhi: Vikas Publishing House Pvt. Ltd., 1992) suggests breaking up India into more than 50 states.

6 Government of India, *Census of India 2001*, <http://www.censusindia.net/results/resultsmain.html>, viewed 8 January 2006.

7 Government of India: *Census of India 2001: The First Report on Religion Data* (New Delhi: Registrar General and Census Commission, 2004). Apart from Hindi and English (the national and official languages) the Constitution's Eighth Schedule recognizes 22 languages.

8 Note the special provisions in the Constitution for Kashmir (Article 370), other states (Articles 371–371G and 378A), and Tribal areas (Fifth and Eighth Schedules read with Articles 244 and 244A).

9 Constitution of India: Part XI (Articles 245 – 255) read with the legislative lists in the Seventh Schedule – discussed by M.P. Jain, *Indian Constitutional Law* (Nagpur: Wadhwa and Co., 2003), 557–662.

10 Constitution of India, Part XVIII: Emergency Processes (Articles 352–360).

11 Article 3.

12 The famous "basic structure" case is *Kesavananda v. State of Kerala* (1973) 4 *Supreme Court Cases* 225 – on which see Granville Austin, *Working of a Democratic Constitution: The Indian Experience* (New Delhi: Oxford University Press, 1999), 258–277,

328–333. A brilliant innovation, the basic structure doctrine has been followed in various cases both as inspiration and example – see M.P. Jain, *Indian Constitutional Law*, 1897–1935; on federalism as part of the basic structure, see *S.R. Bommai*'s case (*infran.* 54).

13 The Constitution of India empowers the Union to appoint the Election Commission (Articles 324–342) to conduct elections to the offices of the president and vice-president (Articles 54–58), Union Parliament (Articles 79–81), and State Legislatures (Articles 170–171). The actual elections are conducted under the Representation of Peoples Acts, 1950 and 1951.

14 Appointed by the Union under the Delimitation Commission Act, 2002 (earlier 1952), the Delimitation Commission structures constituencies on a demographic basis. However, at present all constituencies are frozen until the year 2026 by the Constitution (Eighty-Fourth Amendment) Act, 2001.

15 Sections 123 (2),(3),(3A),(3B), and 125 of the Representation of the Peoples Act, 1951; and note the decision of the Supreme Court in *Dr Ramesh Prabhoo v Prabhakar K. Kunte* (1996) 1 SCC 130 that appeals to "Hindutva" were not necessarily appeals to the Hindu religion but to Indian culture.

16 On the rise of fundamentalist politics, see C. Jaffrelot, *The Hindu Nationalist Movement and Indian Politics* (New Delhi: Penguin Books, 1993).

17 On recent Indian elections, see M.P. Singh and Rekha Saxena, *India at the Polls: Parliamentary Election in the Federal Phase* (New Delhi: Orient Longman, 2003); and for earlier elections see Z.D. Butler, A. Lahiri, and P. Roy, *Indian Divides: Elections 1952–1995* 3rd ed. (New Delhi: Books and Things, 1995).

18 On the composition of the *Lok Sabha* see Subhash Kashyap, "Members of the Lok Sabha 1952–1996" *Politics India* (October 1996): 22–32.

19 For examples, see M.P. Jain, *Indian Constitutional Law*, 5th ed. (New Delhi: Wadhwa and Company Nagpur, 2003), 50–57.

20 Article 80.

21 Constitution of India, Article 80 and the Fourth Schedule.

22 This point was made by Sandeep Shastri, in a paper delivered to the Country Round Table in June 2004, held in preparation for this chapter. The paper is entitled "Representing the States at the Federal Level: Role of the Rajya Sabha."

23 On constitutional change during the "Emergency," see R. Dhavan, *The Amendment: Conspiracy for Revolution* (Allahabad: A.H. Wheeler, 1978).

24 See R. Dhavan, *Amending the Amendment* (Allahabad: A.H. Wheeler, 1979).

25 Jain, *Indian Constitutional Law*, 156–161.

26 Article 249. A resolution can authorize such legislation for a maximum period of one year, but it may be renewed.

27 A point also made by Sandeep Shastri during the Country Round Table. See note 22.

28 Article 55.

29 Articles 78 and 167 give rights to information to the president and governors.

30 The bill would have authorized the authorities to intercept mail on a range of public security grounds. See Jain, *Indian Constitutional Law,* 75.
31 Jain, *Indian Constitutional Law,* 821–822.
32 See generally V.A. Pai Panandikar and A.K. Mehra, *The Indian Cabinet: A Study in Governance* (Konarak Publication Pvt. Ltd., 1996).
33 Constitution (Ninety-First Amendment) Act, 2004.
34 *Rai Sahib Ram Jawaya Kapur v. State of Punjab* (1955) 2 SCR 225. On the Ordinance-making power, see Constitution of India, Articles 123 and 213; and on its abuse, see *D.C. Wadhwa v. State of Bihar* (1987) 1 SCC 378.
35 *Kharak Singh v State of UP* AIR 1963 SC 1295; *Bijoe Emmanuel v State of Kerala* AIR 1987 SC 748.
36 Articles 123 and 213. Given the constitutional requirements for a session of Parliament every six months, this means that the maximum period for which an ordinance might operate is seven and one-half months. See Jain, *Indian Constitutional Law,* 208.
37 Prevention of Terrorism Ordinance 2001
38 Pradip K. Ghosh, "Indian Anti-Terrorism Law," *Jurist* (January 2002) <http://jurist.law.pitt.edu/world/foreignjan02.php>, viewed 8 January 2006.
39 Article 253; see R. Dhavan, "Treaties and People: Indian Reflections" *Journal of the Indian Law Institute* 39 (1997): 1–46; the later landmark judgment on *Visaka v. State of Rajasthan* (1997) 6 SCC 241 incorporating human rights treaties into Indian Law as guaranteed rights even without implementing legislation. In 1992 various states filed cases against the Union on joining the World Trade Organization (WTO) treaty, but they did not take the matter further.
40 Competition Act, 2002, <http://www.competition-commission-india.nic.in/>, viewed 8 January 2006. The Union government may issue policy directions to the commission and may "supersede" it if it persistently fails to comply. See sections 55, 56.
41 Articles 31–320.
42 Article 154(2).
43 Article 258A.
44 Jain, *Indian Constitutional Law,* 771.
45 Article 258, 258A.
46 Article 256.
47 Article 257.
48 Era Sezhiyan, "On Contentious Territory," *Frontline,* August 18–31, 2002.
49 Constitution of India, Article 312; and the Supreme Court's successive orders in *All India Judges Association v. Union of India* (1992) 1 SCC 119; and finally, in the same case, at (2002) 4 SCC 247.
50 *Special Reference No. 1* (1998) 7 SCC 739 explaining the earlier cases of 1982 and 1993.
51 Constitution of India, Articles 323A and B, and further *L. Chandra Kumar v. Union of India* (1997) 3 SCC.

52 See M.P. Jain, *Indian Constitutional Law*, 557–662 (on federal issues) and 1546–1555 (on public interest litigation); more generally, on "India's judiciary's 'new' approach," see R. Dhavan, "Judges and Indian Democracy: The Lesser Evil," *Transforming India: Social and Political Dynamics of Democracy*, ed. Francine Frankel (New Delhi, Oxford University Press, 2000), 314–352.
53 *State of West Bengal v Kesoram Industries* (2004) 10 SCC 201; *ITC v Agricultural Market Produce Committee* (2002) 9 SCC 232.
54 *S.R. Bommai v. Union of India* (1994) 3 SCC 1.
55 For an overview, see "Legislative Bodies in India," <http://legislativebodiesinindia.nic.in/>, viewed 9 January 2006.
56 Jain, *Indian Constitutional Law*, 342.
57 See generally Jain, *Indian Constitutional Law*, chap. 17.
58 Bihar, Maharashtra, Karnataka, and Uttar Pradesh.
59 K.C. Sivaramakrishnan, "A House under Scrutiny: The Second Chamber Has Its Uses," *The Tribune On-line*, 16 July 2004, <http://www.tribuneindia.com/2004/20040716/edit.htm#4>, viewed 9 January 2006.
60 Article 200.
61 Articles 200–1; and on its abuse, Government of India, *Commission on Centre-State Relations*, 139–159.
62 Constitution of India, Chapters IX (Panchayats) and IXA (Municipalities).
63 See Government of India, *Commission on Centre-State Relations*, 111–38; Austin, *The Indian Constitution*, 574–593; and, more elaborately, A. Kashyap, *Governor's Role in Indian Constitution* (New Delhi: Lancers Books, 1993).
64 Rao, *Framing of India's Constitution*, 398–407.
65 *Rameshwar Prasad v. Union of India*, 2006 (1) SCALE 385.
66 Article 356 of the Constitution of India. On "President's Rule" generally, see Rajeev Dhavan, *President's Rule in India* (Bombay: N.M. Tripathi, 1978); B. Dua, *Presidential Rule in India 1950–84* (Delhi: S. Chand and Co., 1985); Amal Ray with John Kincaid, "Politics, Economic Development, and Second-Generation Strain in India's Federal System," *Publius: The Journal of Federalism* 18 (Spring 1988): 147–167; Kashyap, *Governor's Role*, 537–679; Government of India, *Commission on Centre-State Relations*, 161–89; Jain, *Indian Constitutional Law*, 785–824.
67 See generally, Articles 214 – 237; for analysis, see Jain, *Indian Constitutional Law*, 434–532.
68 Article 231. The states with a common high court are, first, Punjab and Haryana and, second, Assam, Arunachal Pradesh, Nagaland, Meghalaya, Manipur, Mizoram, and Tripura.
69 R. Dhavan, "The Transfer of Judges," *The Hindu*, 27 October 2004.
70 Constitution (Seventy-Third) Amendment Act 1992 and Constitution (Seventy-Fourth) Amendment Act 1992.
71 Commonwealth Local Government Forum "The Local Government System in India," <http://www.clgf.org.uk/2005updates/India.pdf>, viewed 9 January 2006.
72 Panchayat (Extension to the Scheduled Areas) Act 1996.

73 See reported remarks of Union Minister for Urban Affairs, Ghulam Nabi Azad, "Powers to Local Bodies: Constitutional Amendment Likely," *The Hindu*, 3 April 2005, <http://india.eu.org/2295.html>, viewed 9 January 2006.

74 Constitution of India: Articles 264–293; Government of India, *Commission on Centre-State Relations*, 243–356; Jain, *Indian Constitutional Law*, 663–760; and M. Govinda Rao, "Indian Fiscal Federalism from a Comparative Perspective," *Federalism in India: Origins and Development*, ed. N. Mukharji and B. Arora (New Delhi: Vikas Publishing House, 1992), 272–316.

75 Article 263(b)(c).

76 On interstate relations, see Constitution of India: Articles 256–263 (on administrative relations and the interstate council). More generally, on interstate cooperation, see Jain, *Indian Constitutional Law*, 825–880; Austin, "Working a Democratic Constitution," 614–630; and on interstate councils, see Rekha Saxena, *Situating Federalism: Mechanisms of Intergovernmental Relations in Canada and India*, (New Delhi: Manohar, 2006).

77 See Rajeev Dhavan, *A Constitution for a Civilisation*, M.N. Kapur Memorial Lecture, New Delhi, 2000 (mimeo).

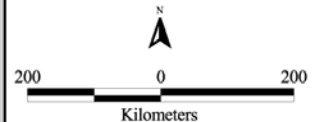
78 Justice Dwivedi in *Kesavananda v. State of Kerala*, at 921.

NIGER
CHAD
BENIN
CAMEROON
Sokoto
Katsina
Jigawa
Yobe
Borno
Kebbi
Zamfara
Kano
Kaduna
Bauchi
Gombe
Niger
Adamawa
Plateau
Abuja
Nassarawa
Kwara
Oyo
Taraba
Ekiti
Kogi
Osun
Benue
Ogun
Ondo
Anambra
Enugu
Lagos
Edo
Ebonyi
Cross
Delta
Imo
Abia
River
Akwa Ibom
Bayelsa
Rivers
Gulf of Guinea

Nigeria

Capital: Abuja
Population: 132.7 Million
(2002 est.)

Boundaries and place names are representative only and do not imply any official endorsement.



Sources: ESRI Ltd, CIA World Factbook

The Federal Republic of Nigeria

EBERE OSIEKE

Nigeria became an independent state on 1 October 1960. Since then, the military has ruled the country for a total of 30 years while democratic governance has existed for only 17 years – 1960–66, 1979–83, and 1999 to the present. This may appear to be a short period upon which to base a proper evaluation of the interaction between federalism and the institutions of government, especially in comparison with federations that have existed for decades or even centuries. The focus of this chapter, however, is not so much on the evolution of democratic institutions as it is on their nature and characteristics. The Nigerian case is interesting for another reason as well. Nigeria has experimented with two major systems of government during its relatively short experience with democratic rule: (1) a parliamentary system, in a form broadly along the lines of the Westminster model, which operated from independence in 1960 to 1966 when the military first took over the government; and (2) a presidential system somewhat similar to that of the United States of America, which was in use from 1979 to 1983 and is in use again now. The colonial era also provides interesting examples of strategies and structures that, in the circumstances of Nigeria, led to the creation of a federation.

THE LAND AND THE PEOPLE

The evolution of Nigeria as a nation can be traced to 1914, when the British protectorates of Northern and Southern Nigeria were amalgamated by the imperial government. The amalgamation was motivated by the desire to pool resources so that the relatively rich territories of southern Nigeria could assist their poorer neighbors in the North.[1] It also made it easier for the British to control the entire territory. It was, therefore, the pursuit of European economic ambitions and expeditions through conquest that crystallized in the rather artificial creation called Nigeria. The opinions of the

peoples so amalgamated were not sought, and there was no form of consultation with their kings or rulers. Indeed, amalgamation and British rule were greeted with protests, and there were continual threats of secession at different times before independence in 1960 and even up to today.[2]

The artificially created Nigeria of 1914 brought together a multiplicity of tribes and ethnic groups with different languages, cultures, and traditions. Some of the independent nation-states, kingdoms, and communities that were thus combined included the kingdoms of Kanem-Borno, which had a history before the advent of colonialism; the Sokoto Caliphate, which for over a hundred years preceding its conquest by Britain had ruled much of present-day northern Nigeria; the city-states of Niger-Delta; the largely decentralized Igbo-speaking peoples of the South East; and the Yoruba Empire of Oyo, which had once been the most powerful state on the West African coast.[3]

It is estimated that there are between 250 and 400 national and ethnic groups in Nigeria. Each group has its own language and customs and has accepted one or more of the main religions: Christianity, Islam, and African traditional religion. Until recently, the imported religions of Islam and Christianity were confined mainly to the northern and southern parts of the country, respectively, but both are now gradually spreading to various parts of the country, primarily as a result of the dispersal of the major ethnic groups throughout the federation.[4]

Nigeria has a land area of 923,768 square kilometres, situated fully within the tropical zone. The population is estimated at between 110 and 130 million people. Nigeria's gross domestic product (GDP) per capita is US$300 per person or less. Geographically, the country can be classified into two major temperature zones: the tropical rainforest area, which stretches from the coast to about 9° latitude north, and a savannah zone, which covers the rest of the country up to the Nigeria/Niger border.[5]

Some crucial agricultural products are found in each zone, although the bulk of agricultural production is in the North. The mineral wealth of Nigeria, however (including, for example, petroleum, coal, marble, limestone, clay, and salt), is found mainly in the rainforest area, while tin, limestone, gold, platinum, bayrite, iron, and steel are found in the North. All of Nigeria's seaports are located in the southern part of the country.[6] The interdependence of the North and the South with regard to the location of natural resources, seaports, and agricultural products are important factors that have fuelled federalism in Nigeria.

HISTORY

Nigeria's constitutional development has been ably canvassed elsewhere.[7] It is examined here only to the extent that it throws light on contemporary

institutions. The point was made earlier that the various parts of what is now Nigeria were brought together as a single colony within the British Empire in 1914. From this time until Nigeria achieved independence in 1960, a succession of four colonial constitutions was put in place, providing for a range of governing institutions and performing legislative, executive, administrative, and judicial functions, albeit still subject to imperial authority.[8] As a generalization, the effect of these constitutions was to confer increasing degrees of internal self-governance on Nigeria, although gradually at first and without significantly involving the Nigerians themselves in the business of government until the last decade before independence. Nevertheless, this period was important in two ways. First, the institutions established during this time were broadly in the British common-law tradition, whose influence on institutional design continued after independence. Second, the foundations of Nigeria as a federation were also laid during this time, through a process that has been described as "creeping federalism."[9] Thus the three regions for which the Constitution of 1946 provided, reflecting earlier colonial administrative groupings,[10] were given a greater measure of self-governance in the quasi-federation of 1951[11] and became the constituent units of a Nigerian federation in the last colonial Constitution of 1954.[12]

The independence Constitution of 1960 retained the Queen and other indicia of former colonial status, but it was replaced by a republican Constitution in 1963. Both the constitutions of 1960 and of 1963 were federal in character, however, establishing three (and from 1963 four) strong regions with constitutions and institutions of their own. Power was divided for federal purposes using both an exclusive and a concurrent list, leaving the residual power to the regions. A senate was established as a federal chamber, with members selected by the regional legislatures from persons nominated by the governors,[13] but with power only to delay rather than to veto legislation.[14]

Both constitutions also provided for parliamentary government. In addition, the 1963 Constitution established the position of president of the republic.[15] The president was elected by the houses of the federal Parliament in a joint sitting for a term of five years, was designated commander-in-chief of the armed forces, and was invested, at least formally, with executive power. The office was largely ceremonial, nevertheless, and in most cases the Constitution required the president to act on government advice.

The post-independence period was turbulent, marked by a succession of crises as parties struggled viciously for the power and resources of the centre, embroiling the institutions of the state in the battle against their opponents. Arguably, the parliamentary system, with its winner-take-all ethos and with the potential for tension between the formal power of the president and the actual power of the prime minister, contributed to the difficulties of the time.[16] Whatever the cause, however, this first phase of government in

independent Nigeria ended on 15 January 1966 when the military assumed control. The Constitution of 1963, with its institutions of republican government, was abolished. For a time, federalism was abolished as well, until the resulting ethnic conflict caused it to be restored, albeit in altered form. In 1967, 12 states were created in place of the previous four strong regions, and another seven states were added in 1976, further strengthening the federal sphere of government at the expense of the state sphere. The process of subdividing the country into smaller and smaller units continued until, in 2005, there were 36 states and 774 municipalities. During the military period, additional powers were transferred to the federation as well, including the universities and telecommunications.

Military rule came briefly to an end in 1979, only to be reinstated in 1984 for another 15 years. Between 1979 and 1984 the civilian Constitution provided for a presidential rather than a parliamentary form of government. It also retained federalism and used a number of other devices to attempt to reduce ethnic tension, including the "federal character" principle to mandate recognition of the diversity of Nigeria's people in the composition of any government body.[17] The failure of the Constitution was the result of mismanagement and misuse, involving both spheres of government.[18] When military government ceased for the second time in 1999, the new civilian Constitution broadly followed the model of the Constitution of 20 years before.

THE FEDERAL LEGISLATURE

General

The federal legislature is the bicameral National Assembly, which is composed of the Senate and the House of Representatives.[19] The National Assembly makes laws on matters assigned to the federation, either exclusively or concurrently. The 68 exclusive powers of the federation include, for example, trade and commerce and other commercial powers, labour, aviation, other forms of transport of an interstate or international character, police and prisons, and minerals and mining.[20] The National Assembly also has the power to make treaties – signed on behalf of Nigeria by the executive – part of Nigerian law by "domesticating" or enacting them as Nigerian municipal laws irrespective of subject matter.[21] The National Assembly has the power, as well, to secure "safety and public order."[22] In the exercise of the latter power, it may also take over the law-making functions of the legislature of a state where the state legislature is unable to function "by reason of the situation prevailing in that state." The president has power to proclaim a state of emergency, which can last for two days when the National Assembly is in session or

for ten days when it is not in session (unless it is supported by a resolution adopted by two-thirds of all the members of both houses).[23]

Like most legislatures, the National Assembly also has functions in relation to the control of the public money of the federation (through taxation, appropriation, and supplementary appropriations) and the scrutiny of expenditures. In recent years this has emerged as an area of conflict between the legislature and the president. The Constitution provides that withdrawal of public money from the consolidated revenue fund must be authorized by an appropriation.[24] However, it is the function of the president to prepare the estimates of revenue and expenditure and to lay them before the National Assembly.[25] In these circumstances, it is argued that the National Assembly may not examine, reduce, or increase the sums attributed to particular items in the estimates submitted by the president. The members of the National Assembly maintain, however, that an appropriation bill is like any other bill that goes through the normal legislative process and that the legislature has a right to examine its provisions and to change the figures if it chooses to do so, either by increasing or reducing them. This view receives some support from provisions of the Constitution dealing with the legislative process, which does not make a distinction between ordinary bills and appropriation bills regarding the powers of the National Assembly to consider and adopt them.[26]

Refusing to accept the position of the National Assembly, the president tried in a subtle manner to apply sanctions against it by withholding approved budgetary allocations to it and thus, in effect, twisting its arm. The Assembly responded by proposing a bill to establish its own financial autonomy, adapting the precedent already in place for the judiciary. In addition, on more than two occasions a draft notice for the impeachment of the president was circulated on the grounds, inter alia, that he had acted in gross violation of the Constitution by withholding monetary allocations that had been approved by the National Assembly.[27] On each occasion, however, the problem was resolved through negotiation between the protagonists and the intervention of the political parties and traditional rulers. One conclusion that can be drawn from these events is that the president appears to be so powerful that the legislature finds it difficult to check his violations of the Constitution.

Another, classical, function of the National Assembly involves scrutiny of government and associated inquiries. This has also proved controversial at times. The Constitution authorizes the Assembly to conduct investigations into matters falling within the sphere of federal authority, for purposes relevant to its own functions.[28] In one instance, in the early 1980s, a committee of the Senate had asked an editor of a national newspaper to appear before it in relation to material he had published and which was derogatory to the

image of the Senate.[29] Instead of doing so, the editor approached the courts to restrain the Senate from compelling his attendance. The High Court granted him relief. On appeal, the Court of Appeal struck out the suit altogether, saying that the provisions of the Constitution were not "designed to enable the Legislature to usurp the general investigative functions of the Executive and the adjudicative functions of the Judiciary. In other words, the section does not constitute the House as a universal 'Ombudsman' inviting and scrutinizing the conduct of every member of the public for purposes of exposing corruption, inefficiency, or waste."

More recently, however, a federal minister who was being investigated by an ad hoc committee of the House of Representatives went to the High Court to stop further proceedings against him.[30] The defendants filed a preliminary objection in which they claimed that the issue was a matter internal to the legislature. The courts upheld the objection. The National Assembly has no authority to require citizens to appear before it beyond the circumstances for which the Constitution provides. But equally, the Court of Appeal said that it could not assume jurisdiction over internal proceedings of the legislature in respect of a mere invitation to a citizen to appear before it, where the invitation did not materially affect the civil rights of the citizen. It is clear from these cases that the courts do not want to interfere with the legislature in the exercise of its functions and powers so long as there is no breach or violation of the Constitution.

The relationship between the National Assembly and the president is broadly typical of a presidential rather than a parliamentary system, although it should be noted that opinion in Nigeria is sharply divided over whether a parliamentary system should be introduced. Those in support of reintroduction maintain that a parliamentary system is less expensive to run than is a presidential system, encourages viable opposition in Parliament and in the polity, and fosters accountability. However, despite these positive factors, the prevailing view seems to support continuation of the presidential system because it has not given rise to any insurmountable problems.

The institution of a presidential structure has the following consequences. The president is not a member of the National Assembly. Nevertheless, he or she is free to attend any joint sitting of the National Assembly or any meeting of either house, either to deliver an address on national affairs (including fiscal measures) or to make statements on government policy that he/she considers to be of national importance.[31] In practice the president presents his/her annual budget speech at a joint sitting of the Senate and the House of Representatives. A minister may also attend either house, when invited to do so, in relation to matters concerning his or her ministry.

The president is also involved in the law-making process in various ways. First, as the head of the executive branch, the president introduces bills to the National Assembly for passage into law, in addition to the budgetary

measures that were discussed earlier. Second, the president must give assent to a bill passed by the National Assembly before it can become law.[32] If the president fails to give assent within 30 days or signifies that he/she withholds assent, the bill is returned to the Assembly. If passed again by each house with a two-thirds majority, the bill becomes law without the president's assent.[33] If the president withholds assent to a taxation or appropriation bill, on the other hand, the Constitution provides that the bill may be presented to a joint sitting of the two houses of the National Assembly. If passed by a two-thirds majority at the joint meeting of members of both houses, it becomes law without the president's assent.[34] The president has refused to give his assent to bills on only a few occasions. One of these concerned the Electoral Bill 2002. The president claimed that it contained provisions inconsistent with provisions of the Constitution. However, the Senate and the House again passed the bill, and it became law without the assent of the president.

Finally, the president has power under Section 315 of the Constitution to make such modifications to laws that were in existence before 29 May 1999 as he or she considers "necessary or expedient" to bring the laws into conformity with the Constitution. Although this is a limited power to deal with one aspect of the transition from military rule, there is a view within the National Assembly that conferral of legislative power on the president in this way is a usurpation of the powers of the Assembly. Thus, when the president, soon after taking control in 1999, exercised this power by dissolving the Petroleum Trust Fund (PTF), which was created by a pre-1999 statute, he was accused of acting illegally and unconstitutionally. His action was not, however, challenged in the courts because many constitutional lawyers maintained that the measures he took were in conformity with the provisions of the 1999 Constitution.[35]

There are no constitutional provisions or even informal constitutional arrangements that guarantee the representation or participation of certain groups or representatives of minorities in the National Assembly. However, the Assembly recognizes the need to ensure the representation of minority-party members in some committees. Major committees normally consist of members nominated by the various political parties represented in either of the houses in accordance with their numerical strength.[36] It should be noted in this regard that, at present, the National Assembly is dominated by two major parties: the People's Democratic Party (PDP) and the All Nigeria Peoples Party (ANPP).

The House of Representatives

The House of Representatives represents the people of Nigeria in proportion to population. It consists of 360 members, elected from single-member

constituencies according to a first-past-the-post electoral system. There has been some discussion of changing to proportional representation, but no concrete proposals have been made, and the debate – if it is a debate – is still in its early stages. The total number of members of the House is distributed between the states according to population. It follows that the largest states, such as Oyo and Kano, have the largest number of House members. No constituency may cross state borders. The Constitution requires the constituencies to be nearly equal in population size.[37]

The registration of voters for both federal and state elections, the drawing of federal constituency boundaries, the conduct of federal elections, and the registration of political parties are under the direction and supervision of the Independent National Electoral Commission (INEC).[38] The chair and twelve other members of INEC are appointed by the president. The president must consult with the Council of State, an advisory body that includes all former heads of government and chief justices of Nigeria, the presiding officers of the two houses of the Assembly, all state governors, and the attorney general.[39] Appointments to INEC are also subject to confirmation by the Senate. Concern has been expressed about the influence of the president over the appointment process because of the need to insulate the electoral officers from partisan politics and control by the executive.[40]

The Constitution requires INEC to review and, if necessary, to revise constituency boundaries at least every ten years. The effectiveness of this procedure depends on the availability of information about population figures, obtained through the census or another mechanism. In any event, new constituency boundaries cannot come into effect until approved by the two houses of the legislature. There has, however, been no census since 1991, and the holding of a census – which was being attempted in March 2006 – is a controversial issue because population figures dictate the distribution of federal funds and the operation of the federal character principle and have other implications for relations between the very diverse groups that constitute Nigeria.[41]

The House of Representatives has a fixed four-year term.[42] All resident Nigerians over the age of 18 years have a right to vote. A candidate for election must be a citizen of Nigeria, at least 30 years of age, and educated to at least school certificate level or its equivalent. A candidate must also be sponsored in the election by a political party of which he or she is a member. It follows that independent candidates cannot contest elections in Nigeria and that a candidate cannot change party allegiance during his or her legislative term. Commentators have criticized the requirement of party membership as undemocratic, and there appears to be a broad view that the restriction should be removed. There has been a question, too, about whether the education qualification should be increased, in recognition of the complexity of legislation and governance in the contemporary world; however, no consensus has emerged.

Members of the House of Representatives are subject to a range of disqualifying criteria: dual citizenship, forms of criminal conviction, and bankruptcy, among others.[43] In addition, a member may be recalled if a petition signed by more than half of his or her registered constituents is approved at referendum.[44] So far, no legislator has been recalled either from the federal or a state legislature, although legislators are often threatened with recall by their constituents.

Although thirty registered political parties contested the general election in 2003, only four of them – the People's Democratic Party (PDP), the All Nigeria Peoples Party (ANPP), the Alliance for Democracy (AD), and the All Progressives Grand Alliance (APGA) – were able to sponsor candidates successfully into the House of Representatives. However, the PDP received a clear majority in the House, controlling about 70 percent of the members, with 25 percent for the ANPP and about 5 percent for the AD.

Interestingly, the majority party has good support from various parts of the country and within the three major ethnic groups of Hausa, Igbo, and Yoruba as well as among minority groups. It is also the party to which the president of the federation, Chief Olusegun Obasanjo, belongs. In practice, due to the absence of strict party discipline, the president does not always receive the full support of party members in the House of Representatives. Nevertheless, the president has the total support of the party's political leaders.

The Senate

The second chamber of the federal legislature is the Senate. It comprises three senators from each of the 36 states of the federation, and one senator from the federal capital territory, Abuja, bringing the total number to 109.[45] The Senate has the same term as does the House of Representatives, and the qualifications of voters are the same. The qualifications of candidates are also much the same, with one exception: candidates for the Senate must be at least 35 years of age.

As with the House of Representatives, INEC is responsible for registering voters and conducting the Senate elections. INEC is, for this purpose, authorized to divide each state of the federation into three senatorial districts in such a way that the number of inhabitants in each district is as nearly equal to the population quota as is reasonably practicable. Every district returns one member to the Senate.[46]

In contrast to the House, the composition of the Senate is based on the principle of the equality of states. Each state is entitled to three senators, irrespective of its population size. During the debate in the Constituent Assembly, it was claimed that this arrangement is consistent with contemporary principles of federalism. Again, however, there is some debate about change. First, it has been suggested that the Senate should be restructured to allow

nominated members, rather than just elected politicians, to serve. Such nominees might represent special interests such as women, labour, youth, and civil society, and they might involve such professional bodies as the Nigerian Bar Association and the Nigerian Medical Association. The presence of such experts in the Senate would improve its ability to review legislation thoroughly and effectively. Second, it is sometimes argued that the present bicameral situation, whereby the House of Representatives and the Senate are elected in much the same manner and perform similar functions, is a waste of time and effort.

It should be noted, too, that although the senators are elected from the component states, they do not see themselves as direct representatives of their states. In fact, sometimes a senator may even refuse to support a matter involving his or her state merely because the governor of that state is a political enemy or belongs to a different political party. Senators tend to see themselves as representing their constituents rather than their states.

The Senate shares law-making power with the House of the Representatives. In addition, the Constitution confers other, specific powers on the Senate. No member of the armed forces of the federation can be deployed on combat duty outside Nigeria without the approval of the Senate unless the president is satisfied that national security is under imminent threat.[47] Nominations for appointment to a ministerial position must be confirmed by the Senate.[48] The Constitution also requires the Senate to confirm the nominations by the president for a range of other positions on commissions established by the Constitution, including INEC, the Federal Character Commission, and the federal Judicial Service Commission.[49]

Bills may originate in either house and are required to pass both houses. Inevitably, conflicts arise from time to time between the positions taken by the respective houses on particular measures. The Constitution makes provision for such a disagreement where the bill concerned is a taxation or an appropriation bill. Where a bill of this kind is passed by one house but not by the other within two months from the commencement of a financial year, the president of the Senate must convene a meeting of the joint finance committee to try to resolve the differences between the houses. If the bill is passed at the joint sitting, it is presented to the president for assent.[50] There is no comparable constitutional procedure for other categories of bills. In practice, however, the joint committee system is used in these cases too. The conflicts over the Electoral Bills of 2001 and 2002 are examples. By agreement, the Senate and the House of Representatives are equally represented in a joint committee. The members of the House normally concede the chair to the Senate and accept the deputy chair position, but this is not a settled matter or general rule.

The joint committee system has proved an effective means of dealing with disagreements between the houses. There is no recorded case where

the committee failed to reach a consensus, and the two houses have always approved the reports of the joint committee.

THE FEDERAL EXECUTIVE

Political executive

The president is the head of state of Nigeria, the chief executive of the federation, and the commander-in-chief of the armed forces. The executive power of the federation is vested in the president, who may exercise the power directly or through the ministers or other officers. The scope of executive power is described by the Constitution as extending to "the execution and maintenance of this Constitution, all laws made by the National Assembly, and … all matters with respect to which the National Assembly has … power to make laws."[51]

The president thus wields extensive powers. He or she nominates the vice president, who is elected on the same ticket as is the president, appoints all federal ministers subject to the approval of the Senate and assigns responsibilities to them, and appoints other public officers, again subject to Senate approval. In a reflection of the federal character of the country, the Constitution requires the president to appoint one minister from each state; ministers may, however, be removed from office at the will of the president.

To qualify for election to the office of president, a person must be a citizen of Nigeria, have attained the age of 40 years, be a member of a political party and be sponsored by that party, and have been educated up to at least school certificate level or its equivalent. The qualifications for election as president are the same as are those for the National Assembly, except that a presidential candidate must be at least 40 years old. The president is elected for a fixed four-year term on a ticket with the vice-president. He or she may be re-elected for only one further four-year term. Either the president or the vice-president may be removed from office by impeachment on the grounds of gross misconduct in the performance of the functions of office. The decision to proceed with impeachment must be approved by a two-thirds majority of each house; the charges themselves, however, must be investigated by a panel especially appointed under Section 143 of the Constitution. The panel's report, in turn, must be accepted by a two-thirds majority in each house. So far, no president or vice-president has been impeached.

The president is directly elected, using the country as a whole as a single constituency. The electoral system is a modified first-past-the-post system, which also requires the successful candidate to receive at least one-quarter of the votes cast in at least two-thirds of the states and the capital of Abuja.[52] The rationale is to ensure that the president has some support in

at least two-thirds of Nigeria's states. A simple national majority alone would not be adequate because a presidential candidate with support in four big states could readily obtain a simple majority over the other candidates but would not necessarily have broad-based support throughout the country. It is difficult to say whether this system provides the expected broad-based support, given that, at almost every previous presidential election, there have been allegations that the elections were characterized by malpractice and corruption.

In recent years, there had been some debate about changing the rules for electing the president. There may be emerging consensus that the country should be composed of six geo-political zones: three in the North and three in the South. One suggestion for structural and institutional reform is that the post of the president of the federation should rotate between the North and the South, among the geo-political zones. The south-south zone, from which Nigeria produces its oil, maintains vigorously that, because it has not produced a president since independence, the next president, to be elected in 2007, should come from there. Other suggestions include provision for multiple vice-presidents, or even for a presidential council comprising six members, with one from each zone. These and other ideas were considered by a national political reform conference that was established by the president in 2005.[53]

From time to time, the configuration of parties and the electoral results require a degree of power-sharing between the parties. Thus during the civilian government of 1979–83, the National Party of Nigeria (NPN), which produced the president and which had its base primarily in the North, was compelled to enter into a political alliance, or understanding, with the Nigerian Peoples Party (NPP), which had its base in the East. The parties shared the posts of ministers and chairpeople as well as membership of boards and parastatals. In 1999 and 2003, however, the position was quite different. President Obasanjo is a member of the People's Democratic Party (PDP), which sponsored him for the election. The PDP has an overwhelming majority of members in the Senate, in the House of Representatives, and in local councils. Presently it controls about 28 of Nigeria's 36 councils. It can govern without substantial reliance on any other groups.

There is, however, one body – the Council of State – of which state governors are members, together with a range of other current and former office-holders. The Council of State advises the president on a range of matters, including the census, the prerogative of mercy, the grant of amnesty to convicted criminals, the awarding of national honours, and INEC. To the extent that the council includes state governors, it reflects the federal character of the country, even though its function is purely advisory.

In 2005, however, the president drew on the support of the council in making difficult decisions. In March 2005, when the government wanted to

establish a national political reforms conference, the National Assembly opposed it and refused to approve financial allocations of about one billion Nigerian naira for the conference on the grounds that there was no budgetary allocation for it. The Assembly insisted that the president should submit a supplementary appropriation bill explaining the need for the conference and the details of the proposed expenditure. The president took the matter to the Council of State, which supported holding the conference and advised the president to get money for it from outside the Consolidated Revenue Fund so as to avoid the need for the National Assembly's consent. With the support of the Council of State, the president established and inaugurated the conference. Some members of the House of Representatives took the matter to court, challenging the action of the president as unconstitutional; however, the court's decision was not given before the conference completed its assignment. At the conclusion of its work, the conference submitted its report to the president of the federation who, in turn, submitted it to the National Assembly, requesting that it be taken into account in the course of its deliberations on amendments to the Constitution.

Administration and other Institutions

There is a federal civil service in Nigeria, organized in ministries, departments, and other agencies. Fourteen federal executive bodies have constitutional status and are subject to a distinct constitutional framework, which is further considered below.

The civil service itself is firmly under the control of the president. The executive power of the federation, which is vested in the president, may be exercised through "officers in the public service of the federation."[54] The president appoints ministers and assigns departments to them, at his or her discretion. Senior positions in the civil service, including the permanent secretaries of ministries and heads of departments, are filled by the president; incumbents hold office at the president's "pleasure."[55] In filling these positions, the Constitution requires the president to have regard to the "federal character of Nigeria and the need to promote national unity." The Federal Civil Service Commission has the power of appointment and disciplinary control of other officers in the public service. This commission is one of the executive bodies established by the Constitution. Its members are appointed by the president, subject to approval by the Senate, and have some constitutional protection against arbitrary dismissal.[56]

The seat of the federal government is the national capital of Abuja. A federal secretariat has been established in each state capital, however, in which certain departments have state headquarters. These arrangements appear to work well, subject to the problems of bureaucratization and corruption that affect much of the Nigerian public service.

The Constitution provides for the establishment of 14 specific federal executive bodies, providing a framework for their functions and powers and for the appointment and removal of their members. Three have been encountered already: the Council of State, INEC, and the Federal Civil Service Commission. Two others, with particular relevance to federalism, are examined briefly below: the Federal Character Commission and the Revenue Mobilization Allocation and Fiscal Commission. Generally, however, it should be noted that, with some specified exceptions, appointments to these bodies require the approval of the Senate; that in a few cases, of which INEC is an example, appointments also require consultation with the Council of State; and that the members of some bodies, including those examined below, have some formal constitutional protection against arbitrary dismissal, at least to the extent of requiring an address from two-thirds of the Senate, seeking removal on the grounds of misconduct or inability to discharge the functions of the office.[57]

Some bodies, including those below, are also protected from direction but only with regard to making appointments or exercising disciplinary control. The National Population Commission has wide protection in relation to its substantive functions; on the other hand, members of this commission are automatically dismissed if the president declares a census report "unreliable" and/or if it is rejected by the Senate on the advice of the Council of State.[58]

One federal executive body with particular relevance to federalism is the Federal Character Commission. The commission plays a role in relation to the fundamental objectives and guiding principles of state policy, which are set out in Chapter II of the Constitution. These objectives and principles are directed to ensuring unity of the diverse peoples of Nigeria in an unusually explicit way. In particular, the composition of the government and the conduct of its affairs are required to "reflect the federal character of Nigeria … ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in the government or in any of its agencies."[59] The function of the Federal Character Commission is to monitor implementation of this principle; to work out an equitable formula for distributing posts, which must be approved by the National Assembly; to promote and enforce compliance with the principle; and to take legal action against bodies that fail to comply.[60] The commission comprises a chair and a representative of each state and of the federal capital. Appointments are subject to approval by the Senate.

A second executive body with particular relevance to federalism is the Revenue Mobilization Allocation and Fiscal Commission. Nigeria uses an elaborate system of fiscal federalism, pursuant to which revenues collected by the federation are paid into a federation account and are disbursed between the three spheres of government (i.e., federal, state, and local) in a

manner that takes into account certain constitutional criteria, including, significantly in the circumstances of Nigeria, the principle of derivation in relation to revenues from natural resources.[61] The commission monitors the accruals to and disbursements of revenue from the Federation Account; periodically reviews the revenue-allocation formulae; advises both spheres of government on fiscal efficiency; and determines the remuneration for specified political and judicial office holders in the federal and state spheres of government, including the president, the governors, legislators, and judges of federal and state courts.[62] The commission comprises a chair and members from each state and from the federal capital.

The final executive body to be considered in this part is the Corrupt Practices and Other Related Offences Commission. Unlike the earlier bodies, this commission is not recognized in the Constitution. It was established by statute in 2000 in an attempt to deal with the problem of corruption, which has dogged the progressive development of the Nigerian federation and which successive federal governments have failed to resolve. It is indisputable that corruption is a serious stumbling block both to socioeconomic development and to the effective and efficient operation of institutions of governance. The control or eradication of corruption is a first important step to the attainment of stable democracy. The Corrupt Practices and Other Related Offences Act creates offences in relation to corrupt practices. The commission is responsible for investigating and prosecuting offenders against the act throughout the country. The commission comprises a chair and twelve other members, two of whom must come from each of the six geo-political zones of the federation. Members are appointed by the president, subject to approval by the Senate. The commission has undertaken a number of prosecutions against some prominent public officers for corrupt practices; however, as yet, no important convictions have been recorded, primarily because of the difficulty in obtaining the relevant evidence and the dilatory nature of the proceedings.

THE FEDERAL JUDICATURE

The Nigerian federal structure provides for both federal and state courts exercising federal and state judicial power, respectively. There is a greater degree of interdependence between the spheres of government in relation to the judiciary, however, than in relation to the legislative and executive branches. Most significantly, appeals lie from the high courts of the states to the federal Court of Appeal and from there to the Supreme Court of Nigeria. In addition, appointments to the courts in both spheres are made by the respective heads of state on the recommendation of the National Judicial Council, another federal executive body established by the Constitution.[63] Among the 23 members of the council are the chief justice of Nigeria, five

retired justices, and five chief judges of states, chosen from the states in rotation. The council also deals with disciplinary matters, court budgets, and the removal of judges from office on constitutional grounds.

The hierarchy of federal courts comprises the Supreme Court, the Court of Appeal, and the Federal High Court. The 22-judge Supreme Court has limited original jurisdiction over disputes between governments but otherwise exercises appellate jurisdiction from the Court of Appeal. The Court of Appeal comprises 50 judges, at least one of whom must have expertise in Islamic personal law and at least three of whom must have expertise in customary law. The Court of Appeal has original jurisdiction to deal with election petitions relating to the election of the president and the vice-president; otherwise, it exercises appellate jurisdiction from the federal High Court and from state courts, including state *sharia* and customary courts. Its original jurisdiction can be onerous. Since the 1999 Constitution came into force, there have been frequent election petitions to the court alleging that the president was not elected in conformity with the Constitution or that there had been electoral malpractice or corruption during the election. As there is no time limit within which the Court must conclude proceedings on an election petition, the litigation can drag on for three or four years – effectively for the whole period of office of the candidate concerned. Thus election-petition proceedings against President Obasango, for example, went on for over two years after his being sworn in as president.

The final federal court of record, apart from the courts established for the federal capital of Abuja, is the Federal High Court, which exercises broad, original federal jurisdiction.

The Constitution of Nigeria is supreme, and laws inconsistent with it are void. The powers of judicial review on the ground of constitutionality can be exercised by both federal and state courts, with a final right of appeal to the Supreme Court of Nigeria. Certain matters are non-justiciable, however. The courts may not determine whether law or government action is consistent with the Fundamental Objectives and Directive Principles of State policy set out in Chapter II of the Constitution. Nor can the courts deal with questions about whether laws were lawfully made during the periods of military rule.[64]

STATE INSTITUTIONS

The federal institutions of government are broadly replicated in the states, where all three branches of government can be found: legislative, executive, and judicial. There are considerable similarities in the structure and rationale for these institutions, but there are some important differences as well. There are no separate state constitutions; the framework for state as well as federal institutions is found in the Constitution of Nigeria.

State legislatures

Each of the 36 states has a unicameral legislature known as the house of assembly. The total size of each house of assembly is three or four times the number of seats to which the state is entitled in the federal House of Representatives, within a range of 24 to 40.[65] Each state is divided into the relevant number of constituencies, and the Constitution requires the division to reflect a broad equality of population numbers in each constituency. Elections are conducted for the states by INEC. States use the voters' roll prepared by INEC for the country as a whole.

The houses of assembly perform the same functions for the states as does the National Assembly for the federation. However, the legislative powers of the state assemblies are limited to the Constitution's list of concurrent powers. If a federal law is inconsistent with a state law on a matter in the concurrent list, then, to the extent of the inconsistency, the federal law will prevail and the state law will be void. The legislative procedure in the states is similar to that of the National Assembly, subject to the obvious difference that the state assemblies are unicameral. As in the federal sphere, the governor has a veto, which can be overridden by a two-thirds majority of the assembly.[66] Unlike in the National Assembly, no distinction is made between financial and other bills.

The Constitution provides several sets of circumstances in which the federation can intervene in the affairs of states, involving the state assemblies. First, the National Assembly may legislate for a state if a state house is unable to perform its functions because of a particular situation prevailing in that state. In this case, the federal legislature effectively takes over the legislative functions of the state assembly as long as the situation lasts. So far, the National Assembly has not taken over the powers and functions of a state assembly.[67] Second, the president may declare an emergency in a state on the request of a state governor, with the support of a resolution of two-thirds of the state assembly, in the face of an actual or pending breakdown of public order and safety or of a natural disaster or calamity in the state. The president may issue a proclamation in these circumstances even without a state request, if a state governor fails to make a request "within a reasonable time."[68] Thus in May 2004 the president proclaimed a state of emergency in Plateau, in the face of sectarian violence apparently sparked initially by a dispute over land and livestock. The president suspended both the governor and the state assembly for six months.[69] The proclamation was supported by both houses of the federal legislature. Use of this power is rare, and the suspension of the state authorities was criticized in some quarters as contrary to the Constitution.[70]

Members of state legislatures are sponsored by the same political parties that sponsor federal members of Parliament. In reality, the state legislators

are expected to support the policies of the executive branch that are in conformity with the manifestoes of their political parties. In practice, though, there is no organized system of relationship between the legislators and their political parties or between the legislators at different levels of the legislature. In the end, both state and federal legislators act according to their perceived interests.

Political executive of the states

The executive branch in each state is structured in broadly the same way as in the federal sphere, with some modifications. Each state has a governor, who is the chief executive officer of the state, and a deputy-governor, elected on the same ticket as the governor. For the purpose of gubernatorial elections, the entire state is a single constituency. The election rules require a candidate not only to receive a majority of votes (or a majority of "yes" over "no" votes in an uncontested election) but also to receive support from at least one-quarter of the voters in at least two-thirds of the local government areas in the state.[71]

The executive power of each state is vested in the governor. The governor may appoint commissioners, who function effectively as ministers, and assign functions (including responsibility for departments) to them. State executive power must not be exercised in such a way as to impede the exercise of federal executive power, endanger any federal asset or investment, or endanger the continuance of the federal government in Nigeria.[72]

Apart from the contested case of the exercise of emergency power, to which reference has already been made, the federal government does not have a supervisory role over the activities of governors of the states. A dispute in 2004 illustrates the point, in a particular context. Some states had created new local authorities. The president took the view that the states lacked the power to do so under the Constitution and withheld payments to those states from the Federation Fund in relation to local government. In effect, the president sought to argue that the local government bodies recognized by the Constitution are fixed, inhibiting the power of states to create local authorities unilaterally. The states successfully challenged the action of the president in the Supreme Court. The Court held that the power to create local authorities lay with the states under Section 8 of the Constitution and that the president had no constitutional power to withhold monetary allocations to them in these circumstances.[73]

State administration

Each state has its own civil service carrying out administrative functions for the state. States do not perform administrative functions for the federal government. As in the federal sphere, each state also has some specific

executive bodies that are recognized by the Constitution, which prescribes procedures for appointment and dismissal and confers functions and powers. The state executive bodies are the civil service commission, an independent electoral commission carrying out functions in relation to local elections, and a judicial service commission advising the National Judicial Council on judicial matters relevant to the state. In constituting administrative bodies, the states are obliged to take into account the diversity of the people of the state and the need to promote national unity.[74]

State judiciary

Each state has its own court system. The Constitution provides for three types of state courts: the high court, a *sharia* court of appeal, and a customary court of appeal. States may also establish lower courts. Examples include the customary courts and magistrates courts in the southern parts of Nigeria that deal with customary marriages, misdemeanors, and torts and contracts outside the jurisdiction of the high courts. By contrast, area, or *sharia,* courts have been established in the North. Appeals lie from these various courts either to the high court of the state or to the *sharia* court or the customary court of appeal of the state, as the case may be.

The high court is the highest state court, with general civil and criminal jurisdiction over matters arising within the state which do not fall within the exclusive jurisdiction of the federal High Court. A state high court also exercises appellate and supervisory jurisdiction over junior state courts or tribunals. Appeals lie from the high court to the federal Court of Appeal.

The high court of a state comprises a chief judge and a number of judges prescribed by state law. All judges are appointed by the governor of the state on the recommendation of the National Judicial Council. In addition, the appointment of the chief judge is subject to confirmation by the state house of assembly. A state judicial council advises the National Judicial Council on suitable persons for appointment to all three categories of courts. It may also recommend their removal to the national body, and it exercises disciplinary authority over the registrars of state courts.

The Constitution also authorizes the states to establish either a *sharia* court of appeal or a customary court of appeal to deal with questions of Islamic law or customary law, as the case may be. The appointment of judges of these courts is made on the recommendation of the National Judicial Council. Appeals lie to the federal Court of Appeal.

LOCAL GOVERNMENT

Local governments are potentially effective instruments for rural transformation and for delivering social services. This is because of their proximity to the people and the relative ease with which they can communicate with them

within the local jurisdiction. The Constitution guarantees the existence of a system of democratically elected local government councils. Each state must enact legislation to establish local councils and to provide for their structure, composition, finance, and functions within the parameters prescribed by the Constitution.[75] A local government area must be defined as clearly as possible, with due regard to the common interests of the community, traditional associations of the community, and administrative convenience. Presently, there are 774 local government councils. Some people believe that more local governments should be created, but it has not been possible to do so because of the cumbersome provisions of the Constitution.[76]

The Constitution envisages that local councils will participate in the economic planning and development of the area for which they are constituted and undertake such other functions specified in the fourth schedule of the Constitution, including some licensing functions, some road construction and maintenance, and registration of births, deaths, and marriages. Councils comprise a chair and other councillors who are elected for three-year terms and who may be re-elected once. After an election, the chair appoints one of the councillors as a deputy and three or four others as supervisory councillors. The remaining councillors are supposed to constitute the legislative arm of the local government body. Local elections are organized and conducted by the state independent electoral commission.

Despite the constitutional provision for local government, it is neither well structured nor well organized, and the system is both inefficient and ineffective. Additional problems in the local sphere stem from excessive state government control and interference; the diversion by state governments of statutorily allocated revenues or grants intended for local government; and encroachment by state governments on the revenue-yielding functions of local governments.[77] Reform of the local government system is one of the challenges presently facing the federal government. The president had appointed a committee to look into the matter in 2004, but the report was not made public. The existing constitutional provisions are vague, but the question of local governments is under review by the joint committee of the National Assembly on the review of the 1999 Constitution.

INTERGOVERNMENTAL RELATIONS

There are no formal or informal interrelationships between the component units of the Nigerian federation, between the president and the state governors (for example), or between the legislative bodies in the two spheres. The only body that brings the president, the governors, and the leadership of the National Assembly together is the Council of State, which meets once a month at the instance of the president, and which has areas of responsibility upon which it advises the president.

ANALYSIS AND EVALUATION

The institutional structure of Nigerian federalism presents a complex and unique picture. Nigeria has had a succession of different forms of governance from its inception as a nation in 1914: colonialism, internal self-government, monarchy and republicanism, militarism, and both parliamentary and presidential democracies. In the early twenty-first century, Nigeria is still in search of a system and structure of government that is effective and acceptable to all its peoples. Federalism is one feature of the system upon which there appears to be general consensus; even so, there is talk of "confederation" from time to time. One source of discontent may lie in the fact that the people of Nigeria have never really gathered together to freely negotiate their political destiny. There is a view in Nigeria that the original state was an artificial creation, imposed on the people by the British colonialists, and that those who negotiated Nigeria's independence were not genuinely free to act on the people's behalf.

All the systems of government that have applied in Nigeria since 1922 have been based on a written constitution, but it was not until 1963 that a constitution assumed the status of fundamental law. Under the independence Constitution of 1960, the Queen of England was the supreme authority. The supremacy of the Constitution was a primary feature of both the 1979 and 1999 constitutions. As the history of Nigeria shows, however, constitutional supremacy alone is no panacea for a bad government or socioeconomic problems, nor can a system of government, however sound, unilaterally cure all the ills of society.

The major political legacies of the colonial period were a weak constitutional basis for development-oriented politics; an unbalanced federation; regionalism that engendered mutual jealousy and fear and erected barriers against the free movement of people, goods, and ideas, thus encouraging chauvinism; a philosophy of governance in which the masses were perceived as an exploitable group and in which the leadership was unaccountable to the people; region-based political constituencies; and, most important, the existence and operation of an institutional system of government in which most of the indigenous population was unrepresented and from which it was excluded.

After independence, Nigerian federalism continued to suffer from a range of structural defects. The most serious was the overwhelming size of the northern region, which was larger, more populous, and therefore politically more powerful than the two southern regions (in the East and the West) put together. Another problem was the failure of the system to meet the demands of the ethnic minorities in all three regions. At the same time, the state was vulnerable to fragmentation in the face of pretensions to sovereignty and self-sufficiency on the part of each of its constituent

parts. At various times during the 1950s and 1960s, each of the regions threatened secession. The regions enjoyed the loyalty of their respective major ethnic communities, commanded relatively substantial constitutional powers and financial resources, had become internally self-governing before Nigerian independence in 1960, and were run by the most talented politicians and bureaucrats in the country.

After seizing power in 1966, the military brought federalism as it had existed under the Constitution of 1963 to an end. Although in outward form the state remained the "Federal Republic of Nigeria," with twelve constituent units, what existed in practice was a unitary system of government tailored to suit the hierarchical authoritarianism associated with militarism.

Federalism is regarded as indispensable to the Nigerian system of government, the only system that can guarantee the survival of the country as an indivisible sovereign state. But the present institutional structure has given rise to an unsatisfactory form of centralized government, which is dominated by the federal sphere in each of the branches of government: legislative, executive, and judicial. The component states do not have the degree of autonomy to run their own affairs that is generally enjoyed by the constituent units of a democratic federation. In the federal sphere, the two houses of the legislature appear to duplicate each other in terms of constitution, functions, and powers. The executive, centred on the presidency, is over-powerful, gradually eroding or usurping the powers of the rather weak legislature, sometimes to the point of near-autocracy. The independence of the judiciary is not reliable, especially in the face of disputes in which the government has an interest. Finally, there are continuing problems in relation to the equitable distribution of principal political and public offices – to giving all Nigerians the opportunity to participate and contribute to governance in the legislative, executive, and judicial arenas. The present negative state of affairs has led to calls for a new constitution that would emanate from and embody the will of Nigeria's peoples and stipulate the conditions and principles of relationships and associations in the Nigeria of the future.

NOTES

1 See Government of Nigeria, *Report of the Political Bureau* (Abuja: MAMSER, 1987), 27.
2 Ibid.
3 Ibid., 20.
4 Government of Nigeria, *Report of the Political Bureau*, 19–20.
5 Ibid., 19. See also "Debt Cancellation: A Case for Nigeria," Nigerian High Commission London (2002).
6 Ibid.

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44 Ibid., Section 68.
45 Ibid., Section 48.
46 Ibid., Section 71.
47 Ibid., Section 5(4) and 5(5).
48 Ibid., Section 147(2).
49 Ibid., Section 154.
50 Ibid., Section 59(2).
51 Ibid., Section 5(1)(b).
52 Ibid., Section 133.
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55 Ibid., Section 171.
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62 Ibid, Schedule 3, Clause 32.
63 Ibid., Schedule 3, Clauses 20–22.
64 Ibid., Section 6.
65 Ibid., Section 91.
66 Ibid., Section 100.
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68 Ibid., Section 305.
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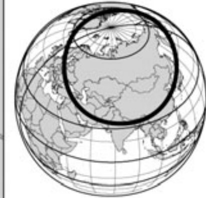
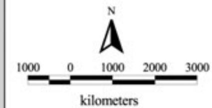
Russian Federation (Overview)

Capital: Moscow
Population: 144 Million (2002 est.)



Boundaries and place names are representative only and do not imply any official endorsement.



Sources: ESRI Ltd.; CIA World Factbook; Times Atlas of the World

Murmanskaya o.
Leningradskaya o.
Kaliningradskaya o.
26
R. Kareliya
Pskovskaya o.
Novgorodskaya o.
Tverskaya o.
Smolenskaya o.
Kaluzhskaya o.
Bryanskaya o.
Orlovskaya
Kurskaya
Belgorodskaya
Voronezhskaya o.
Rostovskaya o.
Krasnodarskiy k.
R. Adygeya
R. Severnay Osetiya
Ingushskaya R.
R. Dagestan
Chechenskaya R.
Kalmykiya-Khal'mg Tangch
Astrakhanskaya o.
Orenburgskaya o.
Chelyabinskaya o.
R. Bashkortostan
Vologodskaya o.
Arkhangel'skaya o.
Nenetskiy A. Ok.
R. Komi
Kirovskaya o.
Permskaya o.
Sverdlovskaya o.
Khanty-Mansiyskiy A. Ok.
Tyumenskaya o.
Kurganskaya o.
Omskaya o.
Novosibirskaya o.
Tomskaya o.
Kemerovskaya o.
Altayskiy k.
R. Altay
R. Khakasiya
R. Tyva
Krasnoyarskiy k.
Yamalo-Nenetskiy A. Ok.
Taymyrskiy (Dolgano-Nenetskiy) A. Ok.
Evenkiyskiy A. Ok.
Irkutskaya o.
R. Buryatia
Ust'-Ordynskiy Buryatskiy A. Ok.
Aginskiy Buryatskiy A.Ok.
Chitinskaya o.
Amurskaya o.
R. Sakha (Yakutiya)
Khabarovskiy k.
Yevreyskaya A. Oblast
Primorskiy k.
Sakhalinskaya o.
Magadanskaya o.
Chukotskiy A. Ok.
Koryakskiy A. Ok.
Kamchatskaya o.

1. Kabardino-Balkaskaya Resp.
2. Karachayevo-Cherkesskya Resp.
3. Stavropol'skiy k.
4. Volgogradskaya o.
5. Sarativskaya o.
6. Samaraskaya o.
7. Ul'yanovskaya o.
8. Penzenskaya o.
9. Tambovskaya o.
10. Lipetskaya o.
11. Tul'skaya o.
12. Ryazanskaya o.
13. R. Mordoviva
14. Chuyashskaya R.
15. R. Mariy-El
16. R. Tatarstan
17. R. Udmurtskaya
18. Komi-Permyatskiy A. Ok.
19. Nizhegorodskaya o.
20. Moskva Gorod **(Moscow)**
21. Vladimirskaya o.
22. Moskovskaya o.
23. Ivanovskaya o.
24. Kostromskaya o.
25. Yaroslavskaya o.
26. St-Petersburg Gorod

The Russian Federation

ALEXANDER N. DOMRIN

The Russian Federation is the world's largest country in terms of surface area.[1] Originally founded as a group of city-states (e.g., Kiev, Moscow, and Novgorod), now, more than 1,000 years later, Russia's territory stretches across nine time zones and is approximately 1.8 times larger than that of the United States of America and six times larger than that of India. Because of its location in the heartland of Eurasia, Russia is often described as a "geographic and political bridge between Asia and Europe."[2]

The country is extremely rich in natural and mineral resources such as oil, gas, coal, timber, and fresh water.[3] Yet, only 7.3 percent of Russia's land is arable; its main territories are located in permafrost, close to or within the Polar Circle, which makes effective agriculture practically impossible.[4] The Polar territory of Siberia alone is ten times bigger than France and fifteen times bigger than Germany.[5] It is believed by some observers that Russia's harsh climate and vulnerability to foreign invaders[6] have made the Russian people more reliant than those of Western nations on a centralized government to provide them with security and protection in difficult times.[7]

Since the start of radical market reforms at the beginning of the 1990s,[8] Russia's population has been shrinking rapidly due to premature mortality. The population shrank by 4 percent, or 5.8 million people, from 1993 to 2005. Depopulation of the country has been recognized by the United Nations as "a human crisis of monumental proportions."[9] According to the Russian federal Ministry for Healthcare and Social Development, Russia ranks 136th in the world in male life expectancy and 91st in the world in female life expectancy.[10]

The December 1993 Constitution defines the Russian Federation as a federal state[11] composed of 89 component units, or "subjects," of the federation.[12] Approximately two-thirds of the subjects are named after the *territory* in which they are located, whereas the remaining third are named after the titular *ethnic* group historically living in each area. Federal units of Russia do not confer their own citizenship, and – unlike the

republics of the former Union of Soviet Socialist Republics (USSR) – they do not have a right of secession.

In contrast to the United States and some other federations whose states, provinces, or cantons enjoy equal status, subjects of the Russian Federation have varying status. Even though the Constitution proclaims that federal units have equal rights and responsibilities and "enjoy full state power outside the limits of jurisdiction" of the federation or the spheres of "joint competence,"[13] in practical terms some subjects enjoy full state power more than others. In this respect, it is fair to say that some component units of the Russian Federation, especially those with significant ethnic minorities, are more equal than others.

The Constitution divides all subjects of the Russian Federation into six groups: (1) republics, (2) autonomous regions, (3) autonomous areas, (4) regions, (5) territories, and (6) two federal cities (Moscow and St. Petersburg). It should be noted that (2) and (3) are national-territorial units, while (4), (5), and (6) are administrative territorial units. Such division makes Russia an asymmetric federation.[14] For instance, autonomous areas share formal equality in their rights and responsibilities with larger territories or regions. In reality, such equality is problematic because autonomous areas are usually constituent parts of territories and regions.[15]

Federal units of Russia vary widely in size and population. The territory of the largest subject of the Russian Federation, Yakutia, is 3.1 million square kilometres – approximately the size of India. Yakutia is 408 times larger than the smallest subject, Adygeya, which is only 7.6 thousand square kilometres. Even though Russia has an average population of 1.9 million people per subject, Moscow, with its official 8.54 million citizens, is 474 times more populous than is the least inhabited region, Evenkia, with 18,000 people.

Russia has always been ethnically diverse. Indeed, F.J.M. Feldbrugge has written that "only the Roman empire can vie with the Soviet Union in the number of ethnic entities within its border and their cultural and linguistic diversity."[16] Following the disintegration of the USSR in December 1991, Russia remains the most multinational and multiethnic country of all the former Soviet republics, with more than 100 nationalities and ethnic groups and with representatives of all major world religions living within its borders.[17] This cultural and linguistic heterogeneity "add[s] an extra burden to the problem of maintaining the political and economic coherence"[18] of Russian society.

CREATION OF THE RUSSIAN FEDERATION

Pre-revolutionary Russia had a loosely centralized government structure. It relied heavily on local legal orders and traditions, with canon law playing a

strong role in matters of daily and family life.[19] However, the Russian Empire was not a federation but, rather, a unitary state with a number of autonomous regions enjoying special status (e.g., Finland, Poland, and Ukraine).[20]

Many of Russia's current ethnic, national, and federative problems were not inherited from the imperial past but, rather, are a legacy of the USSR. The country was first defined as a federation in the Declaration of the Rights of the Toiling and Exploited People (adopted by the Fifth Soviet Congress on 10 July 1918) and the first Constitution of Soviet Russia of July 1918. In the days of the Bolsheviks' accession to power in 1917 and the creation of the USSR in 1922, federalism was thought to be useful as a "means against disorder and … [for the] amalgamation of the odd territories."[21] But the Soviet "federal" structure and the right of nations to self-determination proved to be a ticking bomb.

Officially proclaimed as a multinational federal state, the USSR proved to be a centralized federation with many features of a unitary state, and it was dominated (until 1990) by one-party rule. Carl J. Friedrich once observed that the operation of Soviet federalism was "little known, even to Soviet scholars."[22] As a secondary element of the Soviet state system, federalism was rarely considered an appropriate problem for advanced study by Soviet social scientists. The dysfunctionality of the federal character of the Soviet state

> was only a minor nuisance while the absolute supremacy of the political leadership remained intact. Once the latter began to slip, repressed national aspirations reasserted themselves and the federal idea, like a dried-out desert plant after the rain, came to life again and emerged as one of the most intractable problems of the *perestroika* era, leading ultimately to the breakdown and dissolution of the Soviet Union.[23]

There are certain parallels between the creation of the USSR and the creation of the Russian Federation. The USSR was created as a result of the collapse of the Russian Empire and the secession of Poland, Finland, the Baltic provinces, and others. The Russian Federation was created as a result of the disintegration of the Soviet Union into fifteen independent states. A multiethnic state itself, comprising 89 federal subjects with regional (often ethnic) elites demanding increased political and economic power, the Russian Federation inherited all of the problems that led to the USSR's disintegration.

The government of President Boris N. Yeltsin (1991–99) was aware of all the complexities of the transitional period for the federation, and it sought to solve the immediate and most urgent ones before adopting a new federal constitution. On 31 March 1992, just three months after the dissolution of the Soviet Union, a federation treaty (or, rather, three separate treaties collectively known as the Federation Treaty) was adopted. The treaty was aimed at appeasing regional and ethnic elites through

decentralizing power and redistributing budgetary, fiscal, and material benefits in a way that favoured these elites. A weak federal centre kept control over the following powers and state institutions: currency, customs, banking and credit institutions, communications, postal service, transport, nuclear energy, space exploration, arms and defence, security, administration of justice, and weights and standards. Concurrent powers were recognized in the spheres of environmental protection, conservation, historic preservation, education, science, culture, sports, health care, social welfare and social protection, disaster relief and emergency management, and natural resources, minerals, and forestry.

Adopted in December 1993 in the aftermath of a violent confrontation between the Russian federal Parliament and the president,[24] the new Constitution of Russia created an "imperial presidency," or "superpresidential," form of government. The Constitution essentially introduced a centralized federation with elements of a unitary system. Unlike in the Constitution of the RSFSR,[25] the units themselves are formally defined as "subjects" rather than as "constituent units" of the Russian Federation.

Article 71 of the 1993 Constitution defines the areas of exclusive federal jurisdiction. Federal jurisdiction is extremely broad, and most contemporary Russian law is federal law. It includes the main Russian codes of legislation: the Civil Code and the Code of Civil Procedure, the Criminal Code and the Code of Criminal Procedure, the Code of Arbitration Procedure, and almost all commercial law. The areas of exclusive federal jurisdiction also include control over federal property, the federal budget, federal taxes, transport, communications, power generation, currency, the treasury, financial institutions, postal service, the armed forces, defence and security, foreign policy, and foreign economic relations.

The spheres of joint federal-regional jurisdiction are listed in Article 72, including control over land use and disposal, mineral resources, water and other natural resources, public health facilities, social services, and cultural, educational, recreational, and scientific facilities. Federal, regional, and local officials are jointly responsible for environmental protection, housing, law enforcement, delimitation of state property, and the establishment of the general principles for the organization of local self-government.

THE CENTRAL LEGISLATURE

Russia's Parliament[26] became bicameral as the result of a 1990 constitutional amendment, shortly before the disintegration of the USSR. Its bicameral structure was retained under the 1993 Constitution. The Parliament (Federal Assembly), defined by the Constitution as the "representative and legislative organ of the Russian Federation,"[27] is composed of two chambers: the State Duma and the Federation Council.[28]

The State Duma was named after the first Russian parliament of 1906–17, from the Russian word *dumat*, meaning "to think". It consists of 450 deputies. The Federation Council has 178 members (sometimes calling themselves "senators"), two from each of the 89 subjects of the Russian Federation.

State Duma deputies are elected for a four-year term,[29] but the Constitution is vague with regard to the formation of the Federation Council. The Council is not elected but, rather, "formed,"[30] which leaves room for various interpretations. Indeed, the Federation Council has been formed in three different ways since 1993. Originally, senators were directly elected to the Federation Council through popular voting. That happened only once: during the first parliamentary elections that were held (simultaneously with the constitutional referendum) in December 1993. After that, each subject of the federation was represented in the Council by the heads of its administration and legislature. According to the 1995 law "On the Formation of the Federation Council" and a subsequent act of 5 August 2000, Russia's federal units are represented in the Federation Council by two persons: one appointed by the governor and the other elected by the regional legislature.[31] Such persons need not be residents of the respective regions. As a rule, the regions select somebody of national stature who has enough muscle to represent the interests of the region in the federal arena.[32] The chamber does not have prescribed terms; rather, its membership is renewed gradually, after the formation of new administrations and legislatures in the constituent units of the federation. In other words, the term of each Federation Council member ends with that of the body he or she represents. Unlike the lower chamber of the Federal Assembly, the Federation Council cannot be dissolved by the Russian president.

The Federation Council plays no role in the appointment of the prime minister ("chairman of the government"); rather, the president of Russia appoints the prime minister with the "consent" of the State Duma.[33] Neither chamber plays any role in the presidential appointment process of other federal ministers.

If the State Duma rejects three candidates for the office of the chair of the government, the president is authorized to (1) appoint the prime minister, (2) dissolve the Parliament, and (3) call new elections.[34] The State Duma cannot be dissolved during the first year of office; if it is considering treason charges against, and possible impeachment of, the president; during a declared state of emergency; or if the presidential term is within six months of expiring.

The Federation Council is supposed to supervise foreign policy, emergencies (a presidential decree introducing a state of emergency or martial law is to be approved by the Federation Council), the armed forces, security affairs, and the internal relations of the subjects of the federation. In practical terms, the activities of the chamber are regulated by its Standing Orders of

30 January 2002. The chamber elects its chairperson and his deputies as well as the chamber's council. It also forms committees and commissions.[35] The sessions of the chamber are held in Moscow, but the Standing Orders also allow the Federation Council, by a decision of the Council, to hold meetings and hearings elsewhere.[36] If requested by the Russian president, prime minister, speaker, a committee (or commission) of the chamber, or a group of at least 25 senators, the chamber can hold a closed meeting. The chamber holds two sessions a year: in the spring (January 25-July 15) and in the fall (September 16-December 31). However, this does not mean that the senators are physically present in Moscow for the duration of these sessions. As a rule, meetings of the chambers are held at least twice a month, each meeting lasting several days, and each month the senators are supposed to spend up to ten days in their respective regions. Quorum is satisfied if meetings of the chamber are attended by more than half of its members (currently, 90). Members of the Federation Council may belong to different political parties, but party membership may not interfere with their work in the Council. Creation of factions in the upper chamber is not allowed.[37]

The 1990s witnessed an epidemic of party-building in Russia. Several hundred political parties have appeared and vanished from the political arena without trace. The existence of 199 officially registered political parties and movements as of July 2001 could be explained by several factors, but public necessity was certainly not one of them. In fact, many of these parties could be considered "sofa parties" (meaning the entire membership could sit on one sofa) and existed only on paper.[38]

On more than one occasion in the 1990s, corrupt businesspeople founded fly-by-night parties to carry them into Parliament and buy them the immunity from prosecution that comes with a seat in the State Duma.[39] Boris Berezovsky's recent romance with the Liberal Party of Russia is another example of this phenomenon. In this case, a robber baron hiding in England used a "political party" as a proxy tool and weapon against the Russian government. The fact that the Liberal Party fired Berezovsky as soon as he stopped financing the party hardly improved the Russian public's attitude towards parties in general or the Liberal Party in particular.

Indeed, opinion polls show that political parties are the least trusted institution in the country. In 1997, six years after adoption of the first law "On Political Parties," only 1 percent of respondents in a nationwide survey declared complete trust in them, with 4 percent trusting parties "to a certain extent," and 76 percent expressing complete distrust of political parties and movements. Four years later, the average citizen expressed distrust of seven out of ten key institutions of Russian society, with political parties being the least trusted (7 percent) and courts and the armed forces being the most trusted institutions in the country (at 40 percent and 62 percent, respectively).

A survey conducted by the Russian Public Opinion and Market (ROMIR) independent research centre entitled "Value Change and the Survival of Democracy in Russia (1995–2000)," indicates that, in 2000, 0.7 percent of respondents were "members" of political parties and organizations, while only 0.3 percent were "activists." These figures are even lower than the figures from 1995: 2 percent and 1 percent, respectively. Official statistics substantiate ROMIR's findings. Today fewer than 1 million people – or about 0.7 percent of the Russian population – belong to political parties.[40] The recent and much publicized study prepared by the Information for Democracy Foundation (INDEM) shows that Russians consider political parties not only the least trusted institution in the country[41] but also the most corrupt.[42]

The adoption in 2001 of a new law "On Political Parties" was a significant legislative measure aimed, among other things, at reducing the inflated quantity of parties in the country. By August 2002 the number of newly registered parties was a modest 23. In the elections to the State Duma of December 2003, only four national parties were able to clear the 5 percent threshold and bring their members to the lower chamber of the Russian Parliament.

Western governments continue to provide financial support to their favourite parties (e.g., Union of Rightist Forces, Yabloko, "Our Choice," and some others), even though Russian legislation expressly forbids foreign funding of political parties and the use of foreign money in election campaigns.[43] According to the U.S. General Accounting Office, between 1992 and 1997 two American programs in Russia – run by the National Democratic Institute (NDI) and the International Republican Institute (IRI) – received $17.4 million in grants from the U.S. Agency for International Development (USAID) to "help reformist political parties strengthen their organizational structures and their role in elections."[44] The 2002 U.S. Russian Democracy Act[45] openly states: "United States Government democratic reform programs … have led to the establishment of more than 65,000 non-governmental organizations … and numerous political parties" in Russia. In other words, U.S. law makers openly admitted that the U.S. government and American money were behind one out of every five of 300,000 registered NGOs in Russia as well as – again, in violation of Russia's legislation – certain political parties.

In reality, Western support for Russian political parties will have little effect in terms of "strengthening democracy in Russia" because political parties can hardly be characterized as a democratic element of today's Russian society. Party building and party politics are still the concern of elites rather than the people.

The adoption of the U.S. Russian Democracy Act, which pledges an additional $50 million a year to pro-American "political parties and coalitions" in

Russia, "democratic activists," "democratic forces," and "reform-minded politicians," was one of the main catalysts of recent legislative changes in Russia. These changes were aimed at curbing the infiltration of foreign money, under the guise of funding Russia's NGOs, into electoral and political processes in the Russian Federation.[46]

THE CENTRAL EXECUTIVE

The Russian Federation is a presidential republic. The president is the head of state,[47] representing the Russian Federation in international relations.[48] The president is also proclaimed the guarantor of the Constitution and of human rights and freedoms.[49] He is empowered to protect the sovereignty, independence, and national integrity of the Russian Federation; ensure the coordinated functioning and interaction of agencies of authority; and determine the basic orientations of internal and foreign policy of the federation in accord with the Constitution and federal laws.[50] The Constitution does not provide for a vice president.[51]

The president appoints the prime minister (with the consent of the State Duma), as well as other federal ministers, on proposals of the prime minister.[52] The Council of Ministers is a technical organ rather than a strategic decision-making body. In contrast to some other federations, such as those with a parliamentary form of government and a president with very limited powers, the Russian federation's requirement that the president act on the advice of the prime minister can hardly be considered a binding norm. Technically, nothing can prevent the president from proposing new members of the government to the prime minister rather than getting the new candidates from him. Similarly, the president can fire the Council of Ministers at his pleasure. In 1997 the Federal Assembly undertook a dramatic attempt to limit the president's grip on the Council of Ministers.[53] A federal constitutional law "On the Government of the Russian Federation" introduced a norm saying that a prime minister can be dismissed by the president in two cases only: (1) following the prime minister's request or (2) because of the prime minister's "inability to exercise his functions."[54] Moreover, a prime minister can be dismissed by the president not only in his individual capacity but also with his entire government.[55] However, the 1997 act failed to prevent Yeltsin from replacing three governments and their heads (Stepashin, Kirienko, Primakov) in 1998.

The president is elected for a term of four years on the basis of universal, equal, and direct suffrage by secret ballot. He can be re-elected for a second consecutive term. A simple majority of the electorate must take part in the election, and the winner is determined by a simple majority of the votes. Failure to attract the participation of a simple majority of the electorate will lead to new elections, and failure to determine a winner in the first round of

elections will lead to a second round between the two main contestants.[56] The winner is supposed to get a simple majority of votes, provided this number is bigger than the number of votes cast "against all" candidates.[57]

Although the Constitution mentions the possibility of impeaching the president, the process for doing so is so complicated that, in practical terms, the president is virtually unimpeachable.[58] However, the president may resign voluntarily (for instance, for health reasons) with the prime minister succeeding him as an acting president, with an obligation to hold a new presidential election within three months.[59]

The 1993 Constitution introduced new provisions relating to the separation of powers between the branches of government.[60] The president, for instance, calls elections of the State Duma,[61] and the Federation Council calls the presidential election, which may be a regular election once every four years or an extraordinary election (if the president's functions are terminated prematurely).[62] The president has the right of legislative initiative; he or she can also veto parliamentary legislation.[63]

Russia's "superpresidential" Constitution gives the president great powers but also provides Parliament with certain countervailing prerogatives. Article 107 sets out in detail the veto procedure of the president. According to the Constitution, an adopted law shall be sent to the president for signing and publication within five days of its passage through Parliament. The president has two options. Within fourteen days he/she can (1) sign a law and publish it or (2) veto it and send it back to the Federal Assembly. In the event of presidential veto, the State Duma and the Federation Council may either take into account the president's comments and criticism and work out a new draft or, with two-thirds of the total number of deputies of both chambers, override the veto and approve the law in its original version. After that, the law shall be signed by the president within seven days and published. The Constitution is silent, however, as to whether the legislation becomes law in the event the president refuses to sign the previously vetoed bill. In this respect, Russian constitutional law does not contain any provision similar to the principle written into U.S. constitutional law that provides that the president may not use executive powers to thwart the expressed will of Congress.[64]

Among other state officials, the president nominates the chairperson of the Central Bank, subject to final approval by the State Duma,[65] as well as the prosecutor-general and the judges of the Supreme Court, the Constitutional Court, and the Supreme Arbitration Court, whose appointments must be approved by the Federation Council.[66]

The federal president is authorized to suspend acts by executive officials in the federal units when those acts contravene the federal Constitution, federal law, and/or Russia's international treaties, or when they "violate the rights and freedoms of the human being and citizen." The final decision about the validity of such acts is to be made by the courts.[67]

THE JUDICATURE

There are three court systems: (1) the Constitutional Court (created in 1991); (2) regular courts or the courts of general jurisdiction (including military courts); and (3) arbitration courts (*arbitrazh*) or commercial courts. It is important to emphasize that Russia does not have a single highest, or ultimate, court. All three highest courts – the Constitutional Court, the Supreme Court (the highest court among courts of general jurisdiction), and the Supreme Arbitration Court – enjoy similar status.

Within the context of the discussion of federalism in Russia, the Constitutional Court is of greatest interest. It is designed to guarantee the supremacy of the federal Constitution as well as to guarantee the protection of democracy and fundamental human rights. Besides the Constitution itself,[68] the functions and composition of the Court are regulated by a special act: the 1994 federal constitutional law "On the Constitutional Court."

Of the six main categories of cases in which the Constitutional Court is empowered to exercise its jurisdiction, two concern matters of federalism in Russia. First, the Court may resolve cases concerning conformity with the federal Constitution of federal laws, normative acts of the federal president, chambers of the Parliament and the government, and draft international treaties. It also resolves cases pertaining to the constitutions and charters of the federal units, their laws, and other normative acts issued on questions of federal or concurrent jurisdiction.[69] Second, the Constitutional Court can settle disputes over competence between three categories of "organs of state power": (1) federal government bodies (e.g., between the president and the State Duma or the government and the Federation Council); (2) federal organs of state power and organs of state power of the federal units; and (3) the "highest organs" of state power of the "subjects" of the Russian Federation.[70]

LEGISLATIVE AND EXECUTIVE INSTITUTIONS AND ADMINISTRATION OF THE CONSTITUENT UNITS

The component units of the federation enjoy full state power in all areas that have not been expressly allocated to the federation or defined as spheres of joint competence. The subjects of the Russian Federation have the power to adopt legislation in areas of their exclusive jurisdiction and concurrent jurisdiction. As in other federations, laws and other normative acts of the federal units in areas of joint jurisdiction may not contravene federal legislation. Federal law prevails in cases of inconsistency.

The Constitution grants the federal units the right to establish their "system of organs of state power … independently." This right is limited by two

conditions: the system cannot violate "the basic principles of the constitutional order" of Russia and it must comply with "the general principles of the organisation of representative and executive State government bodies which are established by federal law."[71]

Subjects of the federation may adopt their own constitutions (in ethnic republics only), charters, or basic laws having superior status to any other legislation on that subject. As in the federal sphere, the consistency of the regional legislation is reviewed by respective constitutional courts (or "charter courts"). Yet in the hierarchy of sources of law in the Russian Federation, constitutions (or charters and basic laws) and the legislation of the federal units of Russia occupy the second position from the bottom. They come after the federal Constitution, international treaties, federal constitutional laws, federal statutes, and federal presidential decrees and regulations promulgated by the federal administration. Only a seventh source of law – custom – comes after constituent constitutions or charters.

The federal Constitution reserves for the joint jurisdiction of the federation and its subjects the "establishment of the general principles of the organization of the system of State government and local self-government bodies."[72] The Constitution is silent regarding the procedure for electing or appointing the heads of the executive organs of state power of the subjects of the federation. It only says that "the people shall exercise its power directly, as well as through State government bodies and local self-government bodies,"[73] which probably means that the heads of any organs of state power should be either properly and democratically elected or appointed by a democratically elected federal president.

In 1999 the federal Parliament adopted a new act "On the General Principles of the Organization of Legislative (Representative) and Executive Organs of State Power in the Subjects of the Russian Federation."[74] As the title of the act suggests, this legislation establishes only general principles. For instance, it provides that state power in the subjects shall be exercised on the basis of "the unity of the system of state power" and "separation of the legislative, executive and judicial branches." It also requires "periodic elections" of all organs of state power.[75] According to the act, elections of deputies of regional legislatures shall be held at least every five years.[76] Concrete details of the organization and functioning of executive and legislative bodies of state power are determined in the federal units themselves.

It is difficult to discern any pattern or norm in terms of how the subjects of the federation design their institutions of government. Official titles of regional legislatures are established by regions themselves and often reflect historical or ethnic preferences, such as City Duma (in Moscow), Legislative Sulgan (in Evenkia), State Assembly–El Kurultai (in Altai), State Council–Khase (in Adygeya), and People's Khural (in Buryatia). Most regional legislatures are unicameral; some other federal units have bicameral legislatures.

The legislatures have varying membership, ranging from 11 in the Taimyr autonomous area to 120 in Bashkortostan. As a rule, the deputies are elected for four- or five-year terms. There is also no single model of Standing Orders in Russia's regional legislatures.

Heads of administration in Russia's federal units are usually called presidents (in the republics) or governors. They are elected for four or five years for not more than two consecutive terms. Presidents of Russia's federal units can be impeached by a vote of two-thirds of the legislature of the federal unit, subject to the concurrence of the regional constitutional court. Constitutions of some republics within Russia also provide for a vice president.[77]

While proclaiming Russian to be the official language of the federation throughout its territory,[78] the Constitution also grants one type of federal unit – republics – the right "to establish their own official languages" to be used alongside "the State language of the Russian Federation."[79] Some republics (like Kalmykia and Tatarstan) have declared themselves bilingual; some others (like Dagestan, Kabardino-Balkaria, and Mari El) are multilingual.

The federation has a unified public service, known as the "state service," with a hierarchy of ranks and degrees. Russia's public servants occupy key positions in the apparatus of legislative and executive bodies in both the federal and regional spheres. Vacancies are filled in competitively. The most advanced staffers may raise the level of their professional competence and gain new skills and experience at the Academy of State Service under the president's administration in Moscow. Although it is officially "unified," in practical terms Russia's state service remains fragmented, with many civil servants dependent on regional authorities rather than on the federal centre. Public servants are supposed to be excellent independent specialists in their areas, but in practical terms it is common for newly appointed heads of administration to bring with them certain members of their entourage, who are united not only by their previous work but also by their loyalty to the boss.

Autonomous areas are a particularly troublesome type of "subject" within the federation. These clumsy administrative structures, which appeared in Russia in 1992, are sometimes called *matryoshkas,* or "nesting dolls." An autonomous area is a component part of another federal unit but, at the same time, is an absolutely "independent" subject of the federation, with its own legislative assembly, executive leader, and administration. The existence of the nesting dolls has entailed many conflicts and contradictions, based primarily on the fact that the authorities of the subjects could not seem to agree on what taxes would be collected and by whom, and, most important, on how to spend them.[80]

How can a territory or region exercise full jurisdiction over its territory if a part of it (an autonomous area) is deemed to be an equal part of the Russian Federation as well? (To get a clearer picture of this peculiar arrangement, American constitutionalists should imagine a situation in which the State of

Iowa and Johnson County, which is a part of Iowa, are proclaimed equal subjects of the USA.) The Russian Constitution does little to clarify the situation as the only article dealing with this question is extremely vague. It provides merely that the relations of autonomous areas that form part of a territory or region may be governed by federal law and a treaty between the organs of state power of the autonomous area and, respectively, the organs of state power of the territory or region.[81] Paradoxically, the Constitution itself seems to be one of the sources of chaos and confusion in Russian intergovernmental relations.

Subjects of the federation are supposed to play a significant role in the process of adopting constitutional amendments. They are empowered to exercise this right through their representatives in the Federation Council and in the regions directly.[82] After a constitutional amendment is adopted by two-thirds of all members of the State Duma, it is sent (within five days) to the Federation Council. In the upper chamber the bill must have the support of three-quarters of the senators.[83] Within five days the amendment is to be published and sent to the regions for their consideration. The amendment is considered to be adopted and can be signed into effect by the Russian president only if it is supported by two-thirds of the subjects of the Russian Federation within one year from the date of its adoption by the Federation Council. Another significant detail indicating the special role of the regions in this process is that each federal unit determines its own procedure for considering the matter.

On 7 December 2004 the Federation Council (by a vote of 145 to one, with two abstentions) approved new legislation that eliminates direct gubernatorial elections across the country. Five days later President Vladimir Putin signed the bill into law. The newly adopted amendments to the federal laws "On the General Principles of the Organization of Legislative (Representative) and Executive Organs of State Power in the Subjects of the Russian Federation" and "On Guarantees of the People's Suffrage for Participation in Referendums" legislatively confirmed the practice of the de facto appointment of heads of Russia's regions.

This legislation became one of the series of measures aimed at reforming the Russian federal structure. Putin announced the new principles for forming regional authorities on 13 September 2004 after the tragic terrorist events in Beslan.[84] The proposal to nominate heads of Russia's regions by the federal president instead of electing them by direct vote was presented along with other initiatives that were supposed to mobilize the society; strengthen the Russian nation; and improve administration of the subjects of the federation, making them capable of responding appropriately to modern threats and challenges. These moves towards greater centralization of power are seen by the Russian federal government, its political elite, and much of the general public as being necessary in order to keep the country together.[85]

The new legislation gives the president the right to nominate Russia's regional leaders, who then must be confirmed by the regional legislatures, which can either accept or reject the nominee. If the president's candidate is rejected twice, the president can then dissolve the rebellious legislature and appoint his own choice as acting governor. Since the new regulation came into effect, at least 18 governors have been re-nominated by the president, and four have been dismissed.

On 27 December 2004 Putin signed a decree on the procedure for considering candidates for the post of head of a subject of the Russian Federation. According to the decree, the presidential representative in the respective federal district will recommend candidates to the chief of staff of the president. The latter will then pass the names to the president.

Increasing centralization of the Russian government and streamlining its administration are not straight-forward processes, however. On 30 June 2005 Putin issued a decree altering the procedure for considering candidates for chief executive posts in regions of the federation. The new, altered procedure will allow envoys in the federal districts to nominate candidates without coordinating with the president's chief of staff. Finally, the new decree applies the same procedure for selecting all regional leaders. Previously, leaders who asked Putin for a vote of confidence well before their terms were due to expire were able to go through an expedited appointment process, facing less scrutiny from presidential envoys. In its decision of 21 December 2005 the Constitutional Court of Russia upheld the constitutionality of the president's power to nominate Russia's regional leaders.

The process was further elaborated in December 2005, when the federal Parliament amended the law "On Political Parties" with a provision allowing the political party that has won the most seats in its regional legislature to nominate a candidate for the post of the head of the regional executive. If more than one party has received an equal number of seats, then each party will be allowed to nominate a candidate. The measure is viewed as being aimed at strengthening the role of the regions in the nomination process as well as at developing the system of national political parties. The amendment was signed by President Putin on 1 January 2006.

THE JUDICATURE OF THE CONSTITUENT UNITS

It is difficult to say whether the subjects of the federation have their own court systems. The 1993 Constitution does not contain any norms providing for separate court systems in the subjects of the federation. This position was subsequently supported by a decision of the federal Constitutional Court.

According to Art. 71 of the Constitution of the Russian Federation, the establishment of the system of federal organs of judicial power … and the organization of

the courts ... fall within the jurisdiction of the Russian Federation (and not of its subjects). Art. 118(3) of the Constitution of the Russian Federation provides that the judicial system of the Russian Federation shall be established by the Constitution of the Russian Federation and by federal constitutional law. Pending the enactment of such a law, the existing judicial system is also governed by the law of the Russian Federation; according to this law, it is a unified judicial system because it does not contemplate independent judicial systems of the subjects of the Russian Federation.[86]

Even so, the fact that Russia's federal units do not have judicial systems of their own does not mean that they do not have courts per se. It means that (regardless of their territorial location) all subordinate courts within the jurisdiction of the Supreme Court or Supreme Arbitration Court are federal courts and that the only regional courts in Russia are constitutional courts of the subjects and so-called peace courts.[87] Just like the federal Constitutional Court, constitutional courts (or "charter courts") in Russia's federal units can declare executive actions (at their level) invalid.

Even though the Constitution and the 2001 Russian federal constitutional act, "On a State of Emergency,"[88] provide for federal intervention into the affairs of the subjects of the federation, neither a federal intervention nor a state of emergency has ever been introduced in Chechnya de jure. Two de facto federal interventions were exercised in Chechnya without imposing any special legal regime in the region. Presidents Yeltsin and Putin used their commander-in-chief powers to deploy troops to Chechnya. Obviously, a legal emergency regime would have imposed restrictions not only on those against whom such a regime was aimed (Chechen terrorists and separatists) but also on those who were ordered to implement it (armed forces and special police units). Thus, declaration of a state of emergency, or a de jure "federal intervention," was in the interests of both the people of Chechnya (apart from the insurgents and terrorists) and the federal armed forces and law-enforcement agencies. On the one hand, the absence of such a declaration, shifting the emphasis from emergency de jure to emergency de facto, made the use of federal troops less legally defined and restricted and, on the other hand, made federal armed services responsible for certain grave mistakes made by Moscow's political leadership, especially in 1994–96.

It was no surprise that, when the first de facto "federal intervention" in Chechnya triggered a new round of discussions on legal regulations for states of emergency and their practical implementation, two state institutions proved to be the strongest supporters of the introduction of a legal mechanism for a state of emergency in Chechnya: the State Duma and the Ministry of Defence.[89]

Federal interventions are certainly an extreme measure. The Constitution obliges the president and the government of Russia to "ensure the exercise

of federal state authority throughout the territory of the federation."[90] Ordinarily, the president uses mediation to settle differences between federal and regional organs of state power and between different organs of state power in the regions themselves.[91] However, if necessary, the president can suspend the acts of executive organs of Russia's federal units.[92] The final word after such suspension belongs to the federal Constitutional Court or a constitutional court (or charter court) in the relevant region. On a daily basis, smooth relations between the Russian Federation and its units are ensured by the president's plenipotentiary representatives in Russia's regions and respective departments in the administration of the president and apparatus of the Russian government.

LOCAL GOVERNMENT

The 1993 Constitution defines organs of local self-government as systems created by citizens "for the independent resolution … of issues of local importance, and the possession, use, and disposition of municipal property."[93] According to Article 131 of the Constitution, "local government shall be administered in urban and rural settlements and on other territories with due consideration of historical and other local traditions. The structure of bodies of local government shall be determined by the population independently."

Besides Chapter 8 of the Constitution, local self-government in Russia is regulated by federal legislation[94] as well as by separate charters adopted by individual organs of self-government, or "municipal entities."[95] The most important element of local self-government in Russia is that the organs of self-government are autonomous within the limits of their powers and are not part of the system of federal or regional governments.[96] In practical terms, the organs of self-government deal with numerous local matters like public safety; the possession, use, and disposition of municipal property; and referendums. Local self-government bodies may have recourse to the courts if their rights are infringed. New legislation permits elected officials in bodies of local self-government to serve simultaneously in regional legislatures.

There are three types of associations of local self-government: federal, interregional, and regional. Such associations are a relatively new phenomenon in Russia. The first of them – Association of Siberian Cities – was created in 1986. In 1991 the Union of Russian Cities was formed; subsequently, the Union of Small Russian Cities was also established. Interregional associations include Cities of Siberia and the Far East, and Cities of Southern Russia. The Union of Russian Cities proved to be the most influential association: it participated in drafting the new Russian Constitution and in drafting federal legislation on local self-government.

RECENT CHANGES AND FUTURE TRENDS

Issues of federalism are among core elements of contemporary far-reaching reforms in Russia. The collapse of the Soviet Union and the initiation of Yeltsin's reforms enormously weakened the country and led to a gaping vacuum of authority. Many of the provincial governors exploited the situation and used "the increasingly dysfunctional nature of President Yeltsin's regime to head their own *nomenklatura*/business/criminal clans and become largely autonomous rulers of their own domains,"[97] turning a number of Russia's regions into their personal fiefdoms.

The very first major initiative of Vladimir Putin as the president of Russia[98] was to divide the federation into seven federal districts, sometimes called "superdistricts,"[99] each incorporating several republics, territories, and regions under specially appointed administrators (plenipotentiary presidential representatives).[100] The Decree of 13 May 2000 became the first attempt of Russia's federal president to regain power that had been ceded to increasingly unruly regions during the Yeltsin period in return for their support at critical times, in particular during the notorious 1996 Yeltsin re-election campaign.

According to the decree, the plenipotentiary representatives in the federal districts (each of them as large as Western Europe) are appointed and relieved of their duties by the president upon a recommendation of his chief of staff. They are "directly subordinated and accountable" to the president, and their term of office is determined by him. The most important "basic tasks" of the envoys, as defined by the decree, are to organize control over the implementation of federal decisions in their district; to be the conductor of the president's personnel policy; and "to provide regular reports to the RF president on national security matters … and on the political, social and economic situation in the district."[101]

In practical terms, the envoys are authorized to coordinate the activities of the federal bodies of executive authority in a given federal district, including their interaction with government bodies of the regions, local self-governments, political parties, and public and religious organizations. If instructed by the president, the envoys organize conciliation measures to resolve disagreements between federal and regional authorities. The envoys also organize control over the observance of federal laws, decrees, and decisions of Russia's federal authorities, and they analyze the effectiveness of law-enforcement agencies. In cases where normative acts of regional executives "contradict the RF Constitution, the federal laws and international commitments of the Russian Federation, or violate the rights and freedoms of individuals and citizens," envoys may recommend to the president that such acts be suspended.[102]

The powers of the plenipotentiary representative are vast. He may obtain information from federal and regional bodies of authority, local

self-governments, and organizations located within a given federal district, and he may dispatch his deputies and staff to work directly in regional bodies and local self-governments. He can also inspect the fulfillment of decrees and instructions of Russia's president, the implementation of federal programs, and the use of federal property or revenue in the federal district. The plenipotentiary representative may receive complaints from the citizens in his district and forward them to the relevant bodies, and he may recommend commendation of, or disciplinary action against, the heads of certain agencies within his district. A separate provision guarantees that "when fulfilling his duties, the plenipotentiary representative shall have free access to any organisations located within the given federal district."[103]

Besides restoring the chain of command between Russia's federal and regional authorities, Putin's decree scrapped an entire layer of ineffective federal bureaucracy. Under Yeltsin, there had been a presidential envoy in each of the 89 regions, but they had been powerless next to the elected regional governors.[104] The warning of some Western-leaning Russian analysts[105] that Putin's decree of 13 May 2000 would backfire and that he would make such powerful enemies and rivals that his job would be threatened in the 2004 election[106] fell flat. The creation of seven superdistricts proved to be just the beginning of the reforms designed to reverse a decade of fragmentation in the country, stabilize the situation in the provinces, temper the ambitions of the regional leaders (especially in ethnic republics), and restore federal control over Russia's regions.

Re-elected in a landslide in March 2004, Putin began his second term with a sweeping initiative aimed at redistributing powers between the federal centre and regions and reducing the number of constituent units. First, a proportional election system was introduced for the State Duma. The next Duma will be elected in accordance with party ballots alone. The new law provides that each political party must have at least 50,000 members, with regional chapters boasting at least 500 people each. Second, the regional election system was overhauled. New electoral laws state expressly that, from now on, all territorial governors shall be elected by territorial legislatures in line with presidential recommendations.[107] Third, Russian authorities began the process of merging some of the country's federal units. Current changes are a continuation of attempts by the executive and legislative branches of the Russian government to strengthen the federation from the centre and to establish a strong "vertical axis of power."

The federation is still feeling the negative consequences of Yeltsin's populist appeal to the country's regional elites (in his struggle against the Soviet Union and its authorities in 1990–91) to take "as much power" as they could "swallow." In the evaluation of an American scholar (living in Russia), Yeltsin's appeal

reflected state weakness and had more to do with feudalization than attempts to re-order Russia's federative nature legally. Rich regions, such Tatarstan and Bashkortostan, simply grabbed as much power as they could and negotiated special deals with the Kremlin in the process … [T]he end result was the enrichment of some exploitative local elites at the expense of Russia's people and the integrity of the state.[108]

Tax evasion by Russia's regions and their failure to pay taxes to the federal budget became endemic in the mid-1990s. In 1994 Tatarstan transferred to the federal budget 16 percent of the tax revenue that it was supposed to transfer; Bashkortostan 12 percent; Ingushetia 11 percent; Karelia 5 percent; Yakutia, the main producer of diamonds in Russia, 0 percent; and so on. In 1995 the respective figures were slightly higher: Yakutia, for instance, paid 0.5 percent of its taxes.[109]

From March 1995 to December 1997 the Russian Constitutional Court ruled on the constitutionality of 19 different legislative acts of Russia's constituent units and found only one of the disputed laws to be in line with the Russian Constitution. Between 1995 and 1998 the federal Ministry of Justice reviewed 44,000 normative legal acts adopted in Russian regions and found that one-third of them failed to comply with federal legislation.[110] The campaign to bring regional legislation into conformity with federal laws intensified after Vladimir Putin was elected as the new president in March 2000. According to an analysis conducted by Putin's administration in 2000, of the constitutions of 21 ethnic republics, only that of the Republic of Udmurtia fully conformed to the Russian Constitution.[111]

There is no consensus among Russian scholars on the future of Russia as a federal state. It is hard to agree with authors who proclaim that, historically, Russia has tended to federalism. Neither the Russian Empire nor the USSR were true federations.[112] Unlike many other federations, Russia was not formed as a product of treaties between various regions of the union but, rather, grew by acquiring (forcefully or voluntarily) neighbouring lands. For more than a thousand years Russia was a strong unitary state, flexible enough to have territorial autonomies yet not a federation. The existence, and remarkable economic development, of China as a unitary state negates the argument that big countries should necessarily have a federal structure. Even though Russia is a multiethnic country, ethnic minorities constitute no more than 15 percent of its population, making it comparable to France. Even among ethnic republics named after a titular nation, there are very few in which the titular group constitutes a majority.[113] The Russian-speaking minority constitutes about 40 percent of Latvia's population and more than half of the population of Riga (Latvia's capital), yet this Baltic state is not a federation.

In economic terms, only 14 to 16 subjects of the federation[114] have proved to be fully sustainable, and these play the role of donors in the Russian federal budget. The budgets of all other units are formed (sometimes up to 93.3 percent, as in Ingushetia) by subsidies and donations from the federal centre.[115] Survival of such subjects – often artificial, quasi-federal formations – depend not on truly federative but, rather, on paternalistic decisions made in Russia's centre.

The Russian Federation in its present transitional form is a country of stunning disparities, and this fact makes the development of a normal and stable nation extremely challenging. The gross regional product (GRP) of the most advanced region (Moscow, with its 2217.9 billion rubles) is 380 times greater than that of the least effective unit (the ethnic republic of Ingushetia, with its 5.84 billion rubles). In terms of GRP per capita, there is a 34-fold gap between the Khanty-Mansi autonomous area (431,000 rubles) and Ingushetia (12,700 rubles). For comparison, there is a narrower gap in GDP per capita between the richest and the poorest regions of Europe (those regions being Hamburg in Germany and Epeirus in Greece, respectively) than in Russia. Whereas in the United States the so-called "variation coefficient" (or coefficient of the deviation of GDP per capita in the states from the average deviation for the whole country) is not bigger than 0.15, in Russia it reaches 0.61.[116]

The disparity of economic potential between Russia's subjects results in a considerable gap in living standards. The average income of a Moscow resident (14,000 rubles a month) is nearly double the average for the rest of the country (7,120 rubles). The ratio between the average income and so-called "minimum of sustainable existence" of a Moscow dweller is 5.73, whereas in the Aga Buryat autonomous area it is just 0.38.[117] As Philip Hanson has pointed out, "in the 1990s, subnational state power proved to be the main obstacle for economic reconstruction" in Russia, and the "chaotic compromises of Yeltsin with regional leaders … [were] disastrous for the economy."[118]

Economic necessity may dictate creating a new administrative map of the country as one measure aimed at creating a more harmonious and congenial administration. Russia may abolish national-state entities in the future simply because having 89 constituent members of the federation is extremely cumbersome. In the process of reform, the number of regions may be sharply reduced. Regions with approximately equal population are supposed to coincide to the maximum extent with the borders of the historically established economic regions.[119]

Some scholars recommend reducing the number of subjects of the federation from 89 to 28. For comparison, at the time of Peter the Great Russia had only eight provinces; during the rule of Catherine the Great there were 40 provinces; in 1917 there were 56 provinces and regions on the territory of present-day Russia.

The federal government has taken a number of measures aimed at eliminating ethno-territorial federalism in the country, changing the status of ethnic republics, and bringing them down to the level of ordinary regions. First, the State Duma has passed a law that gives the federal president authority to remove popularly elected regional leaders, including presidents of ethnic republics. Second, the division of Russia into seven federal districts (each comprising about ten to twelve subjects of the federation) may eventually lead to the merging of ethnic and non-ethnic entities within federal districts.

On 2 July 2005 Putin announced his plans to sign a decree that will return to the heads of Russia's regions many of the powers that had been taken away from them as a result of his regional policies. Addressing a session of the State Council in Kaliningrad with a special report entitled "On Improving the Mechanism of Federal Relations," Putin emphasized that the delegation of additional powers to the regions was not a goal in itself but, rather, a step towards helping secure economic growth in the regions. The powers to be delegated include authority over forestry, environmental policy, cultural landmarks, education, and science.

Appointments to head regional branches of federal agencies will again be coordinated with regional leaders, although federal authorities will have the power to override governors' objections. Regional leaders will regain oversight powers of the regional heads of many federal ministries and agencies, such as the Ministry of Justice, the Interior Ministry, and the Ministry for Emergency Situations. (The list of such ministries does not, however, include the Federal Security Service or the Defence Ministry). Governors will also receive increased authority over licensing, but federal agencies will retain sole authority to issue licences to extract natural resources such as oil and gas. According to Russian observers, overall the latest Putin initiative will return to the heads of regions 114 of their original powers.[120]

This does not overshadow a more general centralization tendency. Moreover, Putin's "Kaliningrad report" supported the idea of establishing direct federal rule in financially insolvent regions. The rationale behind this idea is that the failure of the regional authorities to effectively use their numerous powers to ensure the proper use of allocated funds aggravates economic problems, increases the unemployment rate, and eventually strengthens extremism. In such cases, direct federal rule from Moscow would be a necessary and justified measure.

The first and most immediate step in implementing the new reform is the abolition of the *matryoshkas* (nesting dolls). It was decided that the liquidation of the nesting dolls would occur after the government had gained the necessary experience and perfected the techniques of unification. The policy of unification itself has the strategic purpose of simplifying and optimizing the federal structure, under which the territories are to become

economically solvent and more equal subjects of the federation, capable of carrying the burden of responsibility and independence.

On 30 June 2005 Putin signed a federal constitutional law on the formation of a new subject of the federation – Perm territory (*krai*), which was formed as a result of the merger of Perm region (*oblast*) and the Komi-Permyak autonomous area. He also submitted to the State Duma a draft law that would create a new subject of the Russian Federation by merging the Krasnoyarsk territory (*krai*) and the Evenk and Taimyr autonomous areas. The decision on the merger of those federal units was adopted in popular referendums held on 17 April 2005. Voters in all three regions voted overwhelmingly in favour of unification.[121] The three territories will be formally merged on 1 January 2007, at which point the administrations of the autonomous areas will be dissolved and a new governor selected for the new federation subject, which will be known as Krasnoyarsk territory (*krai*). The draft law also calls for completing the process of forming state bodies in the new region by 31 December 2007.

On 2 January 2006 the chairman of the Central Election Commission, Alexander Veshnyakov, announced the Russian government's intention to set fixed election dates in a bid to reduce election costs and to overcome the negative effect of so-called "voter fatigue," which results in low turnout. It was also confirmed that elections to legislative bodies will be held in 17 Russian regions in 2006. On 16 April 2006 the electorate of the Irkutsk *Oblast'* and the Ust'-Ordyn district will hold a referendum on the merger of those two regions, thus making enlargement of subjects of the Federation an ongoing process rather than a single event.[122]

Another significant legal and political development of 2006 was the creation of a new institution, the Public Chamber.[123] Establishment of the Public Chamber is the third and final point of a program the president made public in the aftermath of the Beslan tragedy. The first points of reform were the changes under which State Duma elections will be held on party lists alone and the heads of Russian regions will be elected by legislative assemblies after being nominated by the president (rather than by direct vote).

The purpose of the Public Chamber is to facilitate citizen involvement in state administration and to exercise public control over the activities of state institutions.[124] The principles of formation of the Public Chamber are quite peculiar. First, the president of Russia (who can be considered the founding father of the chamber) appoints one-third of its members: 42 citizens. The individuals who become members of the Public Chamber on the president's invitation will select another 42 colleagues from among representatives of civil society organizations, while the remaining one-third will be elected from the regions. After that, the state and the president will

no longer be able to influence the Public Chamber. The duty of the state will only be to provide funding and organizational support. Every year, 30 percent of the members are to be replaced.

Members of the Public Chamber are supposed to be authoritative, prominent public figures who will work on a voluntary basis. If they are members of a political party, their membership in the party will be suspended as party bias must not hinder the work of the new body. The Public Chamber will form a number of commissions,[125] but uniting along national, religious, and even regional lines in the chamber will be prohibited.

The main area of the Public Chamber's activities will involve summing up public initiatives, preparing draft laws, and submitting them to the State Duma. It is expected that the Public Chamber will cooperate closely with the lower chamber of the Federal Assembly. The first meeting between the newly elected secretary of the Public Chamber, well known Russian nuclear scientist and academic Evgeniy Velikhov, and the speaker of the State Duma Boris Gryzlov on 1 February 2006 probably disappointed those who suspected that the whole idea of creating the Public Chamber was to "undercut" and "weaken" the State Duma. The heads of two institutions agreed that the Public Chamber, as a structure of civil society and expert community, will be able to prepare its findings for the first reading of socially important draft laws. To this end, members of the chamber may attend meetings of the committees and commissions of the State Duma and address plenary sessions of the Duma. How they will do this is yet to be decided. According to Oleg Kovalev, chair of the Duma Committee on Standing Orders, the State Duma will decide on a case-by-case basis whether to give the Public Chamber representative the floor or to limit the Public Chamber's functions by allowing its members to submit comments on the draft laws.[126]

In summary, the Russian Federation is undergoing major legal reform. Overall, it is clear that, despite the constitutional provisions and all official statements to the contrary, Russia has unsettled relations with federalism. Federalism in Russia is hardly a destiny: it is more a marriage of convenience. Adoption of the 1993 federal Constitution is not a culmination of Russian history or of Russia's constitutional development; rather, it is just the beginning of Russia's experiment with federalism. The outcome of this experiment cannot yet be predicted.

Even though complete abandonment of federalism in Russia is very unlikely in the foreseeable future, one may argue that the expansion of Russia's federal government activity into virtually all spheres of life can be considered a sign of Russia's transition from cooperative federalism (based on treaties between the federal centre and subjects of the federation) to coercive federalism (based on the federal Constitution and the strict compliance of the

federation units); from the current asymmetric federation to a more structured union, which may eventually involve just one type of subject of the federation rather than six.

NOTES

1 Total territory of the country equals 17,075,200 square kilometres, with 16,995,800 square kilometres of land, and 79,400 square kilometres of water.
2 George Vernadsky, *The Origins of Russia* (Oxford: Clarendon Press, 1959), 7.
3 Lake Baikal in Siberia, for instance, has more water than do all the U.S.-Canada Great Lakes.
4 Russia's main agricultural lands are located on the same latitude as are the northern states of the United States (Montana, Washington, North Dakota, Maine). The warm Gulf stream tide in the Atlantic Ocean makes Scandinavia much warmer than Russia.
5 In one of its periodicals, the Assembly of European Regions mentions two larger regions of Russia – Republic of Komi and Arkhangelsk *Oblast'* (over 400,000 square kilometres each) – that cover areas almost as large as Spain and that are 10,000 times bigger than Europe's smallest region, the Swiss canton of Basel City (37 square kilometres). Assembly of European Regions, "Europe's Future Lies in Its Regions," *Thematic Dossier of the Assembly of European Regions* 11 (Winter 2005): 1.
6 In its whole history Russia was occupied for approximately 400 years. For one continuous period from 1240 to 1480 Russia was under the total control of a Mongol-Tatar "Golden Horde." Prior to the Mongol invasion, in a 234-year period at the beginning of Russia's existence as a state, the country was attacked nearly 160 times. See Alexander Kornilov, *Modern Russian History: Being an Authoritative and Detailed History of Russia from the Age of Catherine the Great to the Present* (New York: Alfred A. Knopf, 1945 [1916]), 7–9.
7 See F.J.M. Feldbrugge, "The Law of Land Tenure in Kievan Russia," *Russian Law: Historical and Political Perspectives*, ed. William E. Butler (Leiden: A.W. Sijthoff, 1977), 16.
8 During the first five years of Yeltsin's economic reforms, Russia's GDP shrank by 38 percent. For comparison, during the four years of the First World War GDP shrank by 25 percent; by the end of the Second World War, it shrank by 21 percent. For details, see A.N. Arinin, "Problemy razvitia rossiyskoy gosudarstvennosti v kontse XX veka" [Problems of Development of Russia's Statehood at the End of the 20th Century], ed. M.N. Guboglo, *Federalism vlasti i vlast' federalisma* [Federalism of Powers and Power of Federalism] (Moscow: IntelTekh, 1997), 41–42. Yeltsin's regime destroyed Russia's social infrastructure and health-care system and brought with it the return of many diseases that had not been known in the country since the 1930s. For instance, from 1990–97 the number of people infected with syphilis rose by

50 times (from about 4,000 to more than 200,000). See Sergei Glazyev, Sergei Kara-Murza, Sergei Batchikov, *Belaya kniga: Economicheskie reformy v Rossii 1991–2002 gg.* [*White Book: Economic Reforms in Russia, 1991–2002*], ed. M.N. Guboglo (Moscow: IntelTekh, 1997), 41–42.

9 See United Nations Development Programme, *Transition 1999: Human Development Report for Central and Eastern Europe and the CIS* as well as United Nations Development Programme, *Men Hardest Hit by Hurried Transition to Free Markets in Ex-Soviet Countries* (New York: Press Release, 29 July 1999) at <http://hdr.undp.org/reports/detail_reports.cfm?view=175>, viewed 31 March 2006. For more than a decade, Russia has been losing up to half a percent of its population a year. "Russia may have already lost the equivalent of its casualties in two, or more, World War Is through premature mortality since 1992." See Nicholas Eberstadt, "Russia, the Sick Man of Europe," *The Public Interest* 158 (Winter 2005): 20.

10 "Official Says Russia Ranks 136th in World in Male Life Expectancy," *Radio Free Europe / Radio Liberty Newsline*, 24 February 2006.

11 Russian Constitution, Article 1.

12 Russian Constitution, Article 65(1). The 89 subjects are listed in alphabetical order.

13 Russian Constitution, Article 73.

14 For details, see Ludvig M. Karapetyan, *Federativnoe ustroistvo Rossiyskogo gosudarstva* [Federative Composition of the Russian State] (Moscow: NORMA, 2001).

15 Nine out of ten autonomous areas are constituent parts of larger territories and regions. Only one autonomous area – Chukotka (currently headed by Roman Abramovich, a notorious tycoon, owner of the Chelsea football club in England, and recognized by British mass media as the richest resident of the United Kingdom) – does not belong to a "nesting doll" structure.

16 F.J.M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (Dordrecht: Martinus Nijhoff Publishers, 1993), 36.

17 Russia (Rus) was converted to Christianity by Kiev's Prince Vladimir I in 988–989. A country with an overwhelmingly Christian population, the Russian Federation is defined by the Freedom of Conscience and Religious Organizations Act, 1997, (No. 125-FZ) as having four "traditional religions": Russian Orthodox, Islam, Buddhism, and Judaism.

18 Feldbrugge, *Russian Law*, 36.

19 "In areas conquered or annexed by Russia it was generally the practice to introduce the Russian administrative system, to eliminate some of the worst local practices (e.g., slavery and blood vengeance), and otherwise to allow local legislation or customary law to continue to operate." William E. Butler, *Russian Law* (Oxford: Oxford University Press, 1999), 29.

20 For instance, in those years when Finland was a part of the Russian Empire as a Grand Duchy (1809–1918), it had its own legislative organ (the Estates General), governing body (Senate), and official language (Finnish). No law in Russia's Finland could be adopted, amended, or repealed without the consent of the Finnish legislature.

21 M.I. Kukushkin, ed. *Gosudarstvennoe ustroiystvo Rossiyskoy Federatsii* [The State Structure of the Russian Federation] (Ekaterinburg: URGUA, 1993), 21. Quoted in Marat S. Salikov, "Russian and American Federation: Comparative and Legal Analysis of Their Origins and Developments," *Tulsa Journal of Comparative and International Law* 3 (Spring 1996): 171.
22 Carl J. Friedrich, *Trends of Federalism in Theory and Practice* (New York: Frederick A. Praeger, 1968), 174.
23 Feldbrugge, *Russian Law*, 41–42. See also Gregory Gleason, *Federalism and Nationalism: The Struggle for Republican Rights in the USSR* (Boulder, CO: Westview, 1990).
24 In September-October 1993 Yeltsin's troops killed hundreds of protesters and defenders of the Parliament and the Constitution. By a majority of votes (nine to four), the Constitutional Court of Russia voted that Yeltsin's Decree No. 1400 (21 September 1993) dissolved the Russian Parliament, violated the Constitution, and justified impeachment. The Court held that the president violated Article 121(6) of the Constitution, which stated that the president could not use his powers "to dismiss, or suspend the activities of, any lawfully elected agencies of state power." If he were to do this, his powers would be "discontinued immediately."
25 The Constitution of the Russian Soviet Federative Socialist Republic (RSFSR) was adopted in 1978 but was radically changed through numerous amendments between 1989 and 1993. By some evaluations, these amendments replaced almost three-quarters of the original text of the Constitution.
26 Constitutions of the Soviet period used the word "legislature" rather than "parliament," which was considered a "bourgeois" term.
27 Russian Constitution, Article 94.
28 Even though the Constitution does not define the chambers as "lower" and "upper" in terms of their functions and institutional design – with the legislative process starting in the Duma – it is fair to characterize the Duma and the Federation Council as lower and upper chambers of the Federal Assembly.
29 Elections to the State Duma are regulated by a group of federal laws, most important: "On the Main Guarantees of Electoral Rights of Citizens of the Russian Federation" (No.56-FZ of 06.12.1994) and "On Elections of Deputies of the State Duma of the RF Federal Assembly" (No.90-FZ of 21.06.1995).
30 Russian Constitution, Article 96.
31 The newly defined Federation Council met for its first session on 10 April 2001.
32 The Federation Council has among its members 12 major businesspeople and entrepreneurs and more than 40 representatives of large corporations and financial-industrial groups. Together, they form about one-third of the chamber and constitute the largest group within the Council.
33 Russian Constitution, Article 83(a).
34 Russian Constitution, Article 111(4). This provision was dramatically tested in March 1998, when President Yeltsin, in violation of his own Constitution, nominated not three different candidates but the same person, Sergei Kirienko, three times. Facing an imminent dissolution, the State Duma surrendered and

approved the candidate after Yeltsin nominated him for the third time. The government of Kirienko was short-lived, however. Just five months later, in August 1998, the "reformist" government of Kirienko (a "dream team," as it was called by the American advisors of the Russian government of that period) brought the Russian economy to financial collapse and was dismissed by Yeltsin.

35 The Federation Council has 16 committees (e.g., constitutional legislation, local government, budget, international relations) and seven commissions (e.g., Standing Orders and organization of the parliamentary activities, natural monopolies, information policy).

36 Russian Constitution, Article 35.

37 For the most authoritative study of the upper chamber of the Russian Parliament, see L.V. Smirnyagin, ed. *Sovet Federatsii: Evolyutsia statusa i funktsiy* [Federation Council: Evolution of Its Status and Functions] (Moscow: Institute of Law and Public Policy, 2003).

38 Vitaly Tretyakov, former editor-in-chief of *Nezavisimaya gazeta*, was correct when he publicly questioned how many peasants Yuri Chernichenko, the founder of the Peasants Party of Russia, had seen since the registration of his party in 1991. It would be appropriate to ask similar questions of many other heads of "parties" and "movements." The text of Tretyakov's speech at the Ten Years of Modern Russian Parliamentarism: Results and Perspectives roundtable, held in Moscow on 16 May 2000, was published in *Parlamentarizm i mnogopartiynost' v sovremennoy Rossii* [Parliamentarism and Multiparty System in Russia Today] (Moscow: Fond razvitia parlamentarizna v Rossii [Foundation for Development of Parliamentarism in Russia], 2000).

39 For example, this happened with Sergei Mavrodi, founder of the notorious MMM pyramid scheme and chairman of the People's Capital Party, who was elected to the State Duma in October 1994 while being held in detention.

40 See statistics in *Ekonomicheskie i social'nye peremeny: Monitoring obshchestvennogo mneniya* [Economic and Social Changes: Monitoring of Public Opinions] (Moscow: VTSIOM, 1997), 15; *Interfax*, 2 July 2001; <http://www.romir.ru>, viewed 16 April 2006; and Richard Rose, "Rethinking Civil Society: Postcommunism and the Problem of Trust," *Journal of Democracy* 5 (July 1994): 25–26. Russia is not unique in this respect. Rose finds a "similar level of distrust" in the Czech Republic, Slovakia, Hungary, and Poland (see p. 25).

41 Western observers make a common mistake when they call Galina Starovoitova, a long-time activist in the Democratic Choice of Russia movement, a "Russian presidential candidate" in 1996. She was never registered by the Central Election Commission as a presidential candidate because a random examination of signatures presented by Starovoitova for her registration showed that half of them were made by the same hand. Foreign sympathizers of Starovoitova never admitted the obvious and prefer to say that she was "kept off the Presidential ballot in 1996 for technical reasons." See Harley Balzer, "Who Shot Starovoitova?" *Johnson's Russia List*, 24 November 1998, <http://www.cdi.org/russia/johnson/2489.html##6>, viewed 6 April 2006.

42 On 23 November 2002 this conclusion was repeated by Vladimir Rimsky, head of INDEM's Sociology Department, in *Vremena*, a weekly analytical program on Russia's TV Channel 1.

43 See the federal law "On Elections of the Russian Federation State Duma Deputies" (Art. 64[7]) and federal law "On Political Parties" (Art. 30[3]).

44 See U.S. Government Accounting Office, *Promoting Democracy: Progress Report on U.S. Democratic Development Assistance to Russia* (Washington, DC: GAO, 1996), 37.

45 Public Law, 107–246 (sec. 2[a][(3][A]).

46 For details, see Alexander Domrin, "The Sin of Party-Building in Russia," *Russia Watch: Analysis and Commentary* 9 (January 2003); <http://bcsia.ksg.haravard.edu/BCSUA content/documents/RW/%200103.pdf>, viewed 18 April 2006; Alexander Domrin, "'Free But Not Fair': Not 'Fair' for Whom," *Russian Election Watch* 3 (February 2004) <http://daviscenter.fas.harvard.edu/publications/REW 2 04.pdf>, viewed 18 April 2006; Alexander Domrin, "Controls over Foreign Funding of NGOs: What Do They Have to Do with Development of Civil Society in Russia," 3 August 2004, <http://www.untimely-thoughts.com/index.html?art=779>, viewed 18 April 2006.

47 Russian Constitution, Article 80(1).

48 Ibid., Article 80(4).

49 Ibid., Article 80(2).

50 Ibid., Article 80(2) and (3).

51 From 1991 to 1993 the Russian Constitution provided for the position of vice-president.

52 Russian Constitution, Article 83(e).

53 The act was adopted by the State Duma on 11 April 1997 and by the federation Council on 14 May 1997, but the president refused to sign it, even though he has no such prerogative under federal constitutional law. The president denounced the act as "unconstitutional" and announced his plans to appeal to the Constitutional Court but never did so. Trying to break the gridlock, in December 1997 legislators and President Yeltsin came to the following compromise: Yeltsin would sign the act, simultaneously introducing amendments to it. As a result, the law came into effect with presidential "corrections" on 31 December 1997.

54 Article 7(2) of the federal Constitution, "On the Government of the Russian Federation."

55 Article 7(4) of the federal Constitution, "On the Government of the Russian Federation."

56 The 1995 law "On Elections of the Russian Federation President," No. 76-FZ.

57 Russian Constitution, Article 56. Russia has had four presidential elections since introduction of the presidency in 1991. Boris Yeltsin won in the first round in 1991 and in the second round in 1996. Vladimir Putin won in a landslide in the first round of the presidential elections of 2000 and 2004.

58 Russian Constitution, Article 93.

59 That is exactly what happened after President Yeltsin's resignation on 31 December 1999.

60 For details, see Alexander Domrin, "The Trophy Art Law as an Illustration of the Current Status of Separation of Powers and Legislative Process in Russia," *Democracy and the Rule of Law*, ed. Norman Dorsen and Prosser Gifford (Washington: Congressional Quarterly Press, 2001).

61 Russian Constitution, Article 84.

62 Ibid., Article 102.

63 Ibid., Articles 104 and 107.

64 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

65 Russian Constitution, Article 83(d).

66 Ibid., Article 83(f).

67 Ibid., Article 85(2).

68 Mainly Article 125 of the Russian Constitution.

69 Russian Constitution, Article 125(2[b]). Constitutional review of such acts may be initiated by the president, chambers of the Federal Assembly, one-fifth of the members of the Federation Council or deputies of the State Duma, the government, the Supreme Court or the Supreme Arbitration Court, or organs of legislative and executive power of the "subjects" of the Russian Federation.

70 Russian Constitution, Article 125(2). The remaining four categories of cases of the Constitutional Court's jurisdiction include (1) constitutional interpretation of cases the Court receives from regular courts or arbitration courts; (2) interpretation of the federal Constitution upon requests from organs of state power of the federal and state levels; (3) constitutional review on the complaint of individuals; and (4) impeachment of the federal president.

71 Russian Constitution, Article 77(1).

72 Ibid., Article 72(m).

73 Ibid., Article 3(2).

74 *Sobranie zakonodatel'stva Rossiyskoy Federatsii* [Collection of the Russian Federation Legislation], No.42, item 5005 (1999).

75 Russian Constitution, Article 1.

76 Ibid., Article 4.

77 Adygeya, Tyva, Yakutia, Karachaevo-Cherkesia, and Ingushetia.

78 Russian Constitution, Article 68(1).

79 Ibid., Article 68(2).

80 The most well known example of a "nesting doll" is the Tyumen region (*oblast*), which includes the Yamalo-Nenetsk and Khanty-Mansi autonomous areas. These areas are extremely rich in oil and natural gas and are the main operating grounds of Gazprom and other major Russian oil companies. Effectively paying taxes to the federal budget, these rich oil-producing areas have been refusing to pay taxes to the budget of the Tyumen region, even though they are located within the *oblast*'s borders.

81 Russian Constitution, Article 66(4).

82 It is necessary to note that the Russian Constitution has never been amended since its adoption in 1993.

83 If the bill is rejected, the upper chamber may propose to the Duma the creation of a conciliation commission for further work on the text.

84 The Beslan tragedy happened on 1–3 September 2004, when Chechen and Ingush terrorists took about 1,200 hostages, 330 of whom were killed (including 176 children).

85 The views of the electorate regarding the process of centralization of power reflected the general mood in the country in 2005. According to one opinion poll, held by the Institute of Comparative Social Studies, 39 percent of Russians considered 2005 to be better ("somewhat better" or "much better") for the country than 2004, compared to 13 percent who thought it was worse. Respective views of Moscovites are 35 percent versus 9 percent. See more detailed charts, *Komsomol'skaya pravda*, 23 December 2005, 14.

86 See "Case Concerning the Charter (Fundamental Law) of Chitinskaia *Oblast,*" *Vestnik Konstitutsionnogo suda* 1 (1996): 4–17.

87 "Peace courts" were first established in the Russian Empire. They usually deal with civil, administrative, and criminal cases as a court of first instance. Judges of the "peace courts" are appointed or elected to their positions.

88 For a more detailed analysis of the new act, see Alexander Domrin, "Federal'niy konstitutsionniy zakon 'O chrezvychainom polozhenii'" [Federal Constitutional Law on a State of Emergency], *Sovet Federatsii i konstitutsionnie protsessy v sovremennoy Rossii* [Federation Council and the Constitutional Process in Contemporary Russia] (Moscow: Institute of Law and Public Policy, 2002), no.1; Alexander Domrin, "Novy Federal'niy konstitutsionniy zakon 'O chrezvychainom polozhenii'" [A New Federal Constitutional Law 'On a State of Emergency'], *Predstavitel'naia vlast'-XXI vek: Zakonodatel'stvo, kommentarii, problemy* 3 (2004): 35–44.

89 Western media also reported that Minister of Defence Pavel Grachev repeatedly raised this question (see Scott Parrish, "Debate over Imposing State of Emergency in Chechnya", *Open Media Research Institute Daily Digest,* 14 August 1996. Also Prime Minister Viktor Chernomyrdin recommended imposing a state of emergency or a "federal intervention" in Chechnya; however, this was opposed by Minister of Justice Valentin Kovalev, Security Council Secretary Aleksandr Lebed, and, eventually, President Yeltsin.

90 Russian Constitution, Article 78(4).

91 Ibid., Article 85(1).

92 Ibid., Article 85(2).

93 Ibid., Article 130.

94 Federal legislation, "On the General Principles of Local Self-Government in the Russian Federation" of 6 October 2003, no.131-FZ, came entirely into effect on 1 January 2006.

95 For details, see Vsevolod I. Vasiliev, *Mestnoe samoupravlenie* [Local Self-Government] (Moscow: IZSP, 1999); Vsevolod I. Vasiliev, *Zakonodatel'naya osnova munitsipal'noy*

reformy [Legislative Foundations of the Municipal Reform] (Moscow: Formula prava, 2005).

96 Russian Constitution, Article 12.

97 Peter Reddaway, "Historical and Political Context," *Dynamics of Russian Politics: Putin's Reforms of Federal-Regional Relations*, vol. 1, ed. Peter Reddaway and Robert W. Orttung (Lanham: Rowman and Littlefield, 2004), 2.

98 Putin was elected on 26 March 2000.

99 The seven federal districts (and their centre) include the Central Federal District (Moscow); the Northwest (St. Petersburg); the North Caucasus (Rostov-na-Donu); the Volga Federal District (Nizhniy Novgorod); the Urals (Yekaterinburg); the Siberian Federal District (Novosibirsk); and the Far Eastern Federal District (Khabarovsk).

100 Creation of the seven federal districts was thoroughly analyzed in a number of sources, including Peter Reddaway and Robert W. Orttung, eds., *Dynamics of Russian Politics: Putin's Reforms of Federal-Regional Relations*, 2 vols. (Lanham: Rowman and Littlefield, 2004–05).

101 Presidential Decree of 13 May 2000, Article 5.

102 Ibid., Article 6.

103 For text of the decree, see *Rossiyskaya gazeta* (Moscow), 16 May 2000.

104 From 1992 to 1997 the number of staff employed by federal and regional governments increased by 1.2 million. See Reddaway, *Dynamics of Russian Politics*, 1:7.

105 Such as Lilia Shevtsova of the Moscow Carnegie Endowment Centre.

106 Giles Whittell, "Putin Decree Raises Military Rule Fears," *The Times* (London), 16 May 2000. Reprinted in *Johnson's Russia List*, 16 May 2000, <http://www.cdi.org/russia/johnson/4304.html>, viewed 16 April 2006.

107 The Russian population remains divided over Putin's reforms to electoral legislation. According to a 2005 poll by the Moscow-based Public Opinion Foundation, 35 percent of respondents approved of the new system implemented by Putin, while 35 percent disapproved, and the remaining 30 percent found it "hard to answer" this question. See *Rossiyskaya gazeta* (Moscow), 25 June 2005.

108 Peter Lavelle, "Russia Profile, Weekly Experts' Panel: The Appointment of Regional Governors – A Blast From the Past or a Present-Day Necessity," *Untimely Thoughts*, 26 August 2005, <http://www.untimely-thoughts.com/index.html?art=1914>, viewed 18 April 2006.

109 For details, see Arinin, "Problems of Development," 61.

110 Ibid., 39. Between mid-1995 and June 1996, the Russian Federation Ministry of Justice reviewed 16,000 normative legal acts adopted in the regions and found 7,000 of them to be out of compliance with the federal Constitution or legislation.

111 To be fair, it must be said that sometimes contradictions and inconsistencies between federal and regional legislation are caused by the (understandable) slowness on the part of the Russian Federal Assembly to adopt legislation. Regions fill these legislative lacunae with legal instruments that are often controversial.

112 On Russia's "big, though equivocal, experience in developing federalism," see Yu. G. Goloub, "Historical Origins of Russian Federalism," *Federalism: Reports from*

Russian-American Scientific Conferences: February 1996, Wyoming, May 1996, Saratov (Saratov: Saratov University, 1997), 5–16.

113 Even among "republics," the highest type of Russia's federal units, titular nations constitute the majority only in six (out of 21) republics. See B.N. Topornin, Yu.M. Baturin, R.G Orekhov, eds., *Konstitutsia Rossiyskoy Federatsii: Commentariy* [Constitution of the Russian Federation: Commentary] (Moscow: Yuridicheskaya literatura, 1994), 327. In the Republic of Adygeya, for instance, ethnic Adygs constitute 22.1 percent of its population and ethnic Russians 68 percent; in the Republic of Karelia, ethnic Karels constitute 10 percent and ethnic Russians 73.6 percent; in the Republic of Buryatia, ethnic Buryats constitute 24 percent and ethnic Russians 70 percent; in the Republic of Khakasia, ethnic Khakas constitute 11.1 percent and ethnic Russians 79.5 percent, and so on. For details, see *Natsional'niy sostav naselenia SSSR* [Ethnic Composition of the USSR Population] (Moscow: Goskomstat, 1991).

114 The population of nearly all of the "region-donors" is predominantly ethnic Russian.

115 For details, see Marat Salikov, *Sravnitel'niy federalizm SSha i Rossii* [Comparative Federalism of the USA and Russia] (Ekaterinburg: URGUA, 1998), 594–602.

116 *Regiony Rossii* [Regions of Russia] (Moscow: Goskomstat Rossii, 2001), table 2.1. Quoted in Philip Hanson, "Federalizm s rossiyskim litsom: regional'noe neravenstvo, administrativnye funktsii i regional'nye byudjety v Rossii" [Federalism with a Russian Face: Regional Disparities, Administrative Functions and Regional Budgets in Russia], *Sravnitel'noe konstitutsionnoe obozrenie* 2 (2005): 118.

117 For the most updated statistics, see Vasily Dadalko, "Kak nam obustroit' nashi regiony: O nekotorykh aspektakh ukrupnenia sub'ektov Federatsii" [How Shall We Develop Our Regions: On Certain Aspects of Enlargement of Federal Regions], *Fel'dpochta*, no. 41, 8 November 2004, 9.

118 Hanson, *Federalism with a Russian Face.* See also P. Hanson and M. Bradshaw, *Regional Economic Change in Russia* (Cheltenham: Elgar, 2000).

119 It's possible that St. Petersburg could be merged with the Leningrad, Kaliningrad, Novgorod, and Pskov regions into the Northwestern province. Moscow, Moscow region, and nearby areas could become the Central province; Belgorod, Kursk, and Orel regions may become the West Black Soil province; ethnic "republics" of Dagestan, Ingushetia, Kabardino-Balkaria, North Ossetia, and predominantly Russian ethnic Stavropol territory would form the North Caucasus province; the "republic" of Bashkortostan and Orenburg region would become the South Urals province; Tatarstan and Ulianovsk region would be merged to the Volga-Kama province; Novosibirsk, Tomsk, and Omsk regions would form the West Siberian province; Primorye (the Maritime Territory), Kamchatka, and Sakhalin would be united into the Pacific province; and so on.

120 *Vremya novostey* (Moscow), 4 July 2005.

121 In Taimyr, nearly 70 percent of voters favoured the merger, while 29.1 percent voted against it. In Evenkia the vote was 79 percent in favour and 20 percent opposed, while in Krasnoyarsk territory 92.3 voted in favor and just 7.2 percent were opposed (*Interfax* [Moscow], 18 April 2005).

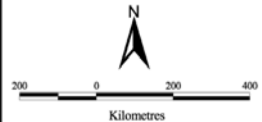
122 "Russia Setting Fixed Election Dates," *ITAR-TASS*, 2 January 2006.
123 Pursuant to a bill that Putin submitted to the State Duma in October 2004 and that was adopted two months later.
124 See the law "On the Public Chamber of the Russian Federation."
125 On 22 January 2006 the Public Chamber formed 17 commissions and elected the chairs of social affairs; health care; competitiveness, economic development and enterprises; relations with law enforcement agencies; culture; and so on.
126 For details, see Aleksey Levchenko, "Public Chamber Will Wait in Dressing Room," <http://www.gazeta.ru>, viewed 6 February 2006.

Republic of South Africa

Capital: Pretoria
Population: 43.5 Million
(2002 est.)

Boundaries and place names are representative only and do not imply official endorsement.

ZIMBABWE
BOTSWANA
NAMIBIA
MOZAMBIQUE
Walvis Bay
Pretoria
Gauteng
Limpopo
Mpumalanga
SWAZILAND
North-West
Free State
KwaZulu-Natal
LESOTHO
Northern Cape
Eastern Cape
Western Cape
Cape Town
ATLANTIC OCEAN
INDIAN OCEAN



Not shown: Prince Edward Islands

Sources: CIA World Factbook; ESRI Ltd; Times Atlas of the World: UN Cartographic Dept.

Republic of South Africa

CHRISTINA MURRAY

In 1994 South Africa held its first democratic elections, shaking off three centuries of oppressive, undemocratic government, first by the Dutch and the British and, in the twentieth century, by a white, racist elite. The settlement that preceded the elections included a constitutional commitment to decentralization. This chapter is concerned primarily with the relationships between legislatures and executives in South Africa's new system. However, these relationships can be understood only in light of the overall architecture of the system and its political context.

The Constitution states that there is to be a single, united Republic of South Africa. This republic is divided into three "spheres" – national, provincial, and local – which are "distinctive, interdependent and interrelated" (section 40). Nine provinces have their status and powers secured in the Constitution. The third sphere, local government, also has a constitutionally entrenched role. However, the considerable power of the national sphere to direct and intervene in the affairs of provinces, and the similar powers of both the national government and the provinces to intervene in the affairs of municipalities, leads many commentators to deny that the system is federal. Indeed, at most, the Constitution establishes a weak form of federalism, and the term itself does not appear in the Constitution or in official documents.

To the extent that the system is federal, it is not a competitive, divided federalism with watertight compartments but, rather, an integrated and co-operative federalism. In this constitutional model the national government is clearly dominant – a dominance currently reinforced in political life through the hegemony of the ruling party, the African National Congress (ANC). But, as in Germany, a great many national policies are delivered by provincial and local governments.

Two principles guide the division of responsibilities. First, provinces share the authority to make laws on many major matters with the national government. The list of shared, or concurrent, powers includes most

matters that are central to development in South Africa, such as education, health, and housing. In these areas the national and provincial legislatures have equal law-making powers. If they enact conflicting laws, provincial law will prevail, suggesting a presumption in favour of provincial authority. However, there is a major qualification. National law prevails if it meets a test set out in the Constitution (section 146). The Constitution lists a wide variety of circumstances that justify national supremacy – including the need for "efficient government." The result is that there are few real constraints on the assertion of national supremacy. This scheme is intended to ensure that the national sphere can impose national norms and standards while allowing provinces to respond to their own particular needs. The second principle is that provinces, and not the national government, will be responsible for implementing national laws that fall under the broad areas of shared competence. Hence the primary provincial role in the system is the delivery of nationally determined policies and programs.

Extensive powers are assigned to local governments, but they are subject to regulation by both the provincial and national governments. This is because, in many cases, local responsibilities are closely related to provincial or national functions. For instance, local governments are responsible for "municipal health services" while the national and provincial governments share responsibility for "health services." A similar pattern prevails in environmental matters and urban development.

The "soft boundaries" between the three spheres of government and the top-down character of the South African regime are also reflected in the power of the national government to intervene in the management of provincial and sometimes local governments and in the similar power vested in provinces to intervene in municipalities. Centralizing elements in the design are even more obvious in financial arrangements. The national sphere has a virtual monopoly on raising taxes and provides more than 95 percent of provincial revenue. Municipalities have slightly more fiscal autonomy than provinces through their power to raise property taxes.

Recognizing that the overlap built into the system demands a high level of intergovernmental coordination, the Constitution sets out principles of "cooperative government" to manage the relationships between the three spheres. These principles were heavily influenced by the German concept of *Bundestreue*. They demand consultation, coordination, and cooperation among the three spheres of government and anticipate that intergovernmental relations will be regulated by national legislation (section 41).

As the rest of this chapter demonstrates, the model of shared powers has a significant impact on every aspect of government. It determines the role and functioning of the national Parliament, relationships between national and provincial legislatures and executives, the roles and practice of the central executive and provincial executives, and the development of local government.

But four basic elements of South Africa's political and social context are as significant to the way in which the system functions as is its formal design. First, South Africans are reluctant federalists. The ANC, which now governs the country, opposed strong provincial powers from the outset. It associated federalism with the hated apartheid "Bantustans." Its constitution makers believed that only through building a system of unified, concentrated authority could government address the immense challenges of building a united country out of a deeply divided society; deepening and widening democracy; and engaging in the massive tasks of economic development, eradication of poverty, and promotion of equality. Moreover, the motives of those proposing a federal system were viewed by many as attempts to protect enclaves of privilege. The political circumstances of achieving the "pact" that would make a transition possible ensured that the system would have many of the characteristics of federalism, but it was to be a federalism in which provinces and local governments would play a subordinate role in a nation-building project led from the centre.

Second, the South African democratic system is very new. It has just passed its tenth anniversary. Provincial government had to be created virtually from scratch at the outset; the implementation of local government is even more recent. The process of institution building has had successes, but it has also experienced many growing pains. To the dominant elites in South Africa "government" means the national government; decentralized institutions and the values of decentralization are not at the forefront of their minds. The complex system of shared powers remains poorly understood by citizens and political actors. The institutions and practices needed to make it work are still being developed, and there is an enormous gap between the intricate details set out in the Constitution and the realities of day-to-day political and administrative life. Citizens hardly identify with provinces. Yet, the Constitution opens the door to local and provincial autonomy and initiative and creates new political elites and new arenas for participation.

Third, all three spheres of government have very limited resources and capacity to built institutions and to carry out their substantial responsibilities. This is most obvious for local and provincial governments, but the national government also experiences resource constraints. These limitations are not simply budgetary. The scarcity of skilled policy makers, administrators, and professionals is a profound impediment to the development of effective government.

Finally, South Africa has a one-party dominant system heavily influenced by its Westminster origins. All nine provinces are governed by the ANC, which also commands 69 percent of the vote nationally. Party discipline (and loyalty) is strong, and the individuality and innovation that federal or multilevel systems may be expected to reflect and promote is yet to be seen. Provinces have developed little distinct political identity.

THE PEOPLE

The 2001 census[1] indicated a population of 44.8 million, of which black Africans comprise approximately 79 percent. The estimated GDP is US$491,400 million.[2] The majority of the population is urban. Disparities among the nine provinces are enormous. For instance, the arid Northern Cape, the biggest province, comprises 29.7 percent of the surface area of the country but has only 1.8 percent of the people. Urban Gauteng, the smallest province, comprises only 1.4 percent of the surface area but is the second most populous province with 19.7 percent of the population. Unemployment in the Eastern Cape has been estimated at 54.7 percent of the population aged between 15 and 65 years. In contrast, the unemployment rate in the more wealthy Western Cape is estimated to be less than half that, at 26.1 percent.[3] As the *South African Human Development Report* of 2003 noted: "Poverty and inequality continue to exhibit strong spatial and racial biases."[4] Limpopo province rates at under 0.6 on the Human Development Index, while the Western Cape has the highest rating at 0.75.[5]

South Africa is also a country of minorities. There are 11 official languages and the most-spoken first language, Zulu, is the mother tongue of less than one-quarter of the population.[6] Although most of the country is Christian, no major grouping (such as Protestant, Roman Catholic, or African Independent Church) can command a majority of adherents.[7] Africans, nominally a majority, are divided on linguistic, religious, economic, and other grounds. However, politics is not primarily animated by these ethnic differences; instead, under apartheid, what dominated politics and economics was the fundamental divide between white people and black people. This divide continues to shape the views and priorities of those concerned with government and nation building. Whether the black-white difference will fade in significance and be replaced by linguistic and ethnic divisions within the majority remains to be seen, but the multiplicity of language groups, the concentration of some of these groups in particular provinces, and the continuing presence of traditional governments may suggest the future potential for ethnic political mobilization.

The final decisions on drawing the provincial map of South Africa were taken by political parties behind closed doors. This may suggest that particular interests were being served and that "a considerable degree of political horse-trading and that electoral calculations on the part of minority parties (including the national party, the democratic party, and homeland parties) played an important role."[8] However, the similarity of the current provincial boundaries to those of nine "development areas" devised by the South African development bank in the late 1980s suggests that, once negotiators agreed upon a small number of sizeable provinces rather than upon many small regions, discussions focused on some troublesome boundaries rather than on the broad parameters of the provinces.

Thus, despite the existence of many different ethnic groups, provincial boundaries are not designed to coincide with racial or tribal boundaries; indeed, given the distribution and mobility of the population, that would have been very difficult. Also, people do not identify themselves as citizens of provinces. South African constitution makers explicitly rejected the models adopted by many other federations, which are designed to empower distinct national or ethnic groups with their own political institutions. Cultural differences are recognized in the Constitution,[9] but these cultural identities are not empowered by federalism itself. As a result, debates about federalism in South Africa are not primarily about the resolution and accommodation of ethnic difference; rather, the provincial system is designed to deepen democracy and to enhance the equitable delivery of services.

HISTORY

The history of multijurisdictional government in South Africa has been described by Nico Steytler in an earlier volume in this series.[10] In brief, decentralization of some form or another has been part of South Africa's constitutional design since 1910, when four British colonies merged to form the Union of South Africa. However, the four provinces that were created under the 1909 South Africa Act did not have protected powers, and government soon became highly centralized. The bantustan policy introduced by the apartheid government after 1948 introduced another form of decentralization. Part of this plan was to create ethnically distinct territories, which, in due course, would become independent states. The apartheid government declared four of these territories to be "independent" between 1976 and 1981, and four others were given extensive powers. This process was brought to an end by increasing resistance to apartheid policies during the late 1970s and 1980s. It left most South Africans with a deeply felt distaste for any form of federalism. As a result, in the negotiations to end apartheid and to establish democracy during the late 1980s and early 1990s, "federalism" was a dirty word, and progress became possible only when it was deleted from the discourse.

Now, quasi-federalism in South Africa can be seen as part of the "pact" that made a democratic transition possible, but its continuing contribution to democracy and development remains in question. That question inevitably permeates the discussion of the executive and legislative institutions and the practices that are the focus of this chapter.

NATIONAL INSTITUTIONS

South Africa's Westminster heritage is evident in many aspects of the design and practice of its central institutions. It has a parliamentary system. The cabinet is drawn primarily from the National Assembly. Under the

Constitution, ministers are both individually and collectively accountable to Parliament. As in other parliamentary democracies, virtually all legislation emanates from the executive and, with some notable exceptions, Parliament approves it with only minor amendments. There is no presidential "checking" or veto power, and the assent of the president to bills is required unless he or she has concerns about their constitutionality; if so, they must be referred back to Parliament for reconsideration. As a last resort, the president may refer such bills to the Constitutional Court (section 79).

There are some differences between South Africa's parliamentary model and its Westminster forebear. The most striking is that South Africa has no prime minister; instead, at its first sitting after an election, the National Assembly elects a president from among its members. The new president immediately resigns his or her seat in Parliament and assumes the position of both head of state and head of the national executive.[11] As head of state the president assents to bills passed by Parliament, makes various appointments on the recommendation of other authorities, recognizes ambassadors, pardons offenders, and confers honours (section 84). These powers must be exercised within the constraints of the Constitution and are subject to the bill of rights.[12] The president's role as head of the national executive is formally the same as that of a prime minister in a Westminster system.[13] The Constitution departs from the Westminster model by permitting the president to choose two members of the cabinet from outside the National Assembly (section 91[3]) and by setting a five-year term limit for the Assembly.[14] But the difference that these variations on the British parliamentary system introduce seems to be more apparent than real. The president does not have an electoral base independent of Parliament, and his or her cabinet performs executive functions subject to retaining the confidence of the legislature.

One significant difference between government in Westminster and government in South Africa lies not in the design of the system but, rather, in its practice. It is the government's attitude to opposition politics. The Westminster system embraces the notion of a loyal opposition, which is recognized as a "government in waiting" and is expected to criticize the government of the day. This idea has not taken root in South Africa, although the institution of the "official opposition" does exist; instead, a strong emphasis on consensus is propped up by the fact that there is no credible government in waiting.[15]

THE NATIONAL PARLIAMENT

The Constitution gives the national Parliament three main functions: it must pass laws, oversee the executive, and provide a forum for debate (section 42). In addition, the National Assembly is expected to choose

certain officials (including the president) (section 42). While the National Assembly represents all South Africans as individuals, the second chamber, the National Council of Provinces (NCOP), represents the provinces, and its members are chosen by provincial legislatures. With characteristic detail, the Constitution spells out the oversight role of Parliament and demands public "access to and involvement in" processes in both houses (sections 59 and 72). This means that committee meetings are closed to the public only in exceptional circumstances and that public hearings are held on many matters. The Constitution also specifies that parliamentary rules must ensure that minority parties can participate in proceedings and committees "in a manner consistent with democracy" (sections 57 and 70).

The National Assembly

The 400 members of the National Assembly are elected on a closed-list proportional-representation system under which voters may vote just once for the party of their choice. The system was chosen with simplicity and inclusiveness in mind. Illiterate voters could easily identify their chosen party. Moreover, a proportional representation system with no artificial threshold number of votes for representation in the Assembly ensures that even very small parties are represented. This was particularly important for the first election. As Andrew Reynolds comments: "It is probable that even with their geographic pockets of electoral support the Freedom Front (nine seats in the National Assembly), Democratic Party (seven seats), Pan-Africanist Congress (five seats), and African Christian Democratic Party (two seats) would have failed to win a single parliamentary seat if the elections had been held under a single-member district 'first past the post' electoral system. While these parties together only represent six percent of the new Assembly, their importance inside the structures of government far outweighs their numerical strength."[16] The proportional representation system has also contributed to the relatively strong representation of women in Parliament.

Although to voters the system appears to be one in which the country is treated as one huge constituency, it does have a provincial element. Half of the 400 seats are filled from provincial lists supplied by the parties;[17] the remaining half come from the parties' national lists. The number of seats allocated to each province to be filled from provincial lists is based on the population of the province. The purpose of provincial lists was apparently to ensure some links between parties and their provincial voters. However, most voters are unaware of this nuance in the system, and, in any event, the provinces from which these lists are drawn are so large that voters are unlikely to see them as providing a closer tie with political representatives. Nevertheless, politicians in some parties do seem to take these seats seriously. For instance,

there is some evidence that ANC politicians would prefer their names to appear on the provincial list rather than on the national one because this shows that they have real support from local party members and are not merely placed on the list by the party elite. The national lists may be more important for the representation of diversity than are the provincial lists. These lists are usually reviewed by party leaders and adjusted to ensure that seats are secured for representatives of diverse groups and people with necessary skills.

Like other legislatures in Westminster-based systems, the work of the National Assembly is dominated by government business. However, with some exceptions, the committee system is vibrant, and the constitutional requirement that minority parties should be represented on committees contributes to timetables that enable very small parties represented in the National Assembly to join a reasonable number of committees. (Of the 12 parties currently represented in the National Assembly, nine have fewer than ten seats.) Over the past five years the National Assembly has frequently discussed its oversight role, which is so emphasized in the Constitution, but the practice of oversight remains weak where the interests of the ANC are threatened. Moreover, in the period set aside to question members of the executive, parties are allocated time according to the proportion of seats they hold, giving the ANC control of most of that part of the agenda. This degree of executive control over legislative business is, of course, the norm in parliamentary systems with majority governments. What is unexpected is the fact that, although the ANC government faces no realistic possibility of defeat, it has not eased party discipline.

The National Assembly plays little role in reflecting federalism and regionalism. Even those members selected from provincial lists do not see themselves as provincial representatives. However, the National Assembly cannot ignore the implication of the multilevel system entirely. For instance, in a dramatic break from apartheid parliamentary tradition, the National Assembly and the other South African legislatures are constitutionally committed to the participation of the public in their proceedings. This has led to some disagreement. Provinces have argued that they should be responsible for holding public hearings and reporting back to Parliament on the results through the NCOP. The National Assembly retorts that it represents all South Africans and can hold hearings both at its seat in Cape Town and elsewhere. Oversight raises similar issues about the division of responsibilities. For instance, can the National Assembly oversee local government or the implementation of national legislation by provincial executives? These and other similar questions have yet to be answered.

The National Council of Provinces

The NCOP is an ambitiously designed federal house. The Constitution describes its role as representing the provinces "to ensure that provincial

interests are taken into account in the national sphere of government" (section 41[4]).[18] In fact, as an institution linking all three spheres of government (local government may send a delegation to the NCOP), it should do far more than bring provincial interests to the attention of the national government. It is a concrete expression of the commitment to cooperative government in chapter 3 of the Constitution and has the potential to become a vibrant arena of cooperative government, with an active program of inter-legislative relations.[19]

The NCOP has three main responsibilities. It considers and passes national bills; it balances the interests of the three spheres of government through a number of very specific oversight tasks allocated to it by the Constitution; and, through these and other activities, it attempts to ensure that government in South Africa is a partnership. Provinces should not act in isolation but, rather, should be alert to national needs and interests; conversely, national legislation and policies should be sensitive to provincial needs and concerns.

Membership of the NCOP is based primarily on provincial representation. Each of the nine provinces sends a ten-member delegation to the NCOP. A similarly sized delegation from organized local government may participate in the NCOP but may not vote. Each provincial delegation includes members of the provincial legislature (drawn from different parties) and the executive. Delegations are made up of six "permanent" delegates and four "special" delegates. The permanent delegates are appointed by the provincial legislature after a provincial election on the basis of the nominations of the parties entitled to delegates. (A constitutional formula ensures that representation on the permanent part of a provincial delegation to the NCOP is proportional to the representation of parties in the provincial legislature.) The four special delegates in each delegation are members of the provincial legislature chosen to represent the province from time to time on the basis of their expertise in the particular matters coming before the NCOP. The overall composition of the delegation must also reflect the party balance in the legislature and is supposed to represent both the provincial legislature and the provincial executive. The provincial premier or his or her nominee is head of the delegation, and the agreement of the legislature, the premier, and party leaders is required for the designation of other special delegates.

Although provincial politicians, recently schooled in the doctrine of separation of powers, find it difficult to understand, the representation of both the executive and the legislature on the provincial delegation is critical. This is because, under the South African system of shared powers, the provincial delegations in the NCOP must consider and pass any national legislation that imposes responsibilities on the provinces. The participation of the provincial executive is necessary because it is best placed to assess the ability of the province to implement proposed legislation. The

participation of members of the provincial legislature is intended to act as a check on executive decision making and to provide a link to the provincial electorate.

The NCOP considers all national bills, but it has most influence over those that affect provincial powers. When dealing with these bills, each provincial delegation in the NCOP has just one vote, and the delegation must cast that vote on the instructions of the provincial legislature. An elaborate process of consultation between NCOP committees and provincial legislative committees is needed to manage this process. If the NCOP refuses to pass such a bill, or proposes amendments to which the National Assembly does not agree, the Constitution instructs that the bill must be sent to a mediation committee on which the NCOP and National Assembly each have nine representatives. The Mediation Committee has no decision-making powers but is intended to negotiate a solution to the impasse that will be approved by both houses. Should agreement between the two houses not be reached, the National Assembly can override the objections of the NCOP with the support of a two-thirds majority of its members. Although the absence of a final veto power suggests that the NCOP is weaker than the German *Bundesrat* upon which it is modelled, it is unlikely that the National Assembly will easily muster a two-thirds majority on a bill that has failed to command the support of even five of the nine provinces.

The NCOP's formal influence over bills that do not affect provincial powers is limited. Here it acts primarily as an arena of "sober second thought." Should it reject, or propose amendments to, such a bill, the bill will nevertheless become law if the National Assembly passes it again with a simple majority. When the NCOP takes decisions on these matters, voting is not by delegation; rather, each delegate has one vote, and voting is effectively along party lines. When the NCOP is criticized for paying inadequate attention to provincial interests and failing to maintain real contact with the provinces, delegates frequently assert that their role in these non-provincial matters justifies the attention that they pay to national, as opposed to provincial, issues. Certainly, the Constitution anticipates that the NCOP will consider non-provincial matters. However, the emphasis placed on them contributes to the NCOP's failure to fulfill its primary role as a house of the provinces.

The NCOP's responsibility to monitor relationships between the spheres of government is as important as is its role in law making. The Constitution grants the national government substantial powers to intervene in relation to underperforming provinces and gives provinces even more drastic powers in relation to failing municipalities. It also allows the national executive to block the transfer of the equitable share of revenue to a province if it is being mismanaged. As this grant comprises about 95 percent of a province's budget, this is a drastic power. The NCOP provides a check. It may stop an intervention in a province by the national executive and overturn a decision to

stop provincial funding. It has less power over provincial interventions in municipalities but must oversee these actions as well. In taking decisions here, as with law making, the delegations in the NCOP must act on the instruction of their provincial legislature.

The NCOP's third responsibility is to promote cooperative government by bringing provincial concerns to national attention, by ensuring provinces understand national concerns, and by providing a forum both for provinces to interact with one another and for local government to be heard by the national government. It is designed as a house of provinces, intended to complement rather than to duplicate the National Assembly's role. The participation of members of both the provincial executive and the legislature in delegations and the requirement that delegations vote on the instruction of their provincial legislatures is intended to avoid government by the executive as seen in the *Bundesrat*. Constitution makers may not have envisaged a totally independent second house, but they certainly saw the NCOP as a house in which provincial legislatures would engage actively with the National Assembly and the national executive. In practice this vision has not been effectively realized.

The NCOP has made progress in some respects. It runs relatively smoothly, the massive challenge of effective liaison with provincial legislatures has been met, and its internal organization is stable. Its greatest success has been in overseeing provincial interventions in municipalities. Provinces have intervened in municipalities to maintain service delivery and to manage budget processes on a number of occasions since the new local government system was established in 2000. The NCOP's role here is an excellent example of the impact of the ANC's political dominance. It has enabled the NCOP to fashion its oversight role as one focused on the shared vision of transformation and the need to build and strengthen new institutions (such as municipalities). Here oversight is, by and large, not competitive and adversarial but supportive.

The most significant failure of the NCOP is in its consideration of national bills. Members of provincial executives simply do not engage in the consideration of bills before the NCOP. A common explanation is that provincial ministers have already expressed their views on proposed laws in executive intergovernmental forums. However, as discussed later, those forums are often top-down information sessions run by the relevant national minister. They seem seldom to provide a real forum for assessing the feasibility of national policies. The engagement of provincial legislatures with national bills is equally weak. In the eight years since the NCOP was established, few amendments that reflect provincial concerns have been proposed by provinces. The failure of the NCOP to fulfill its main law-making role properly simply means that the national government takes over any real legislative role that might be played by provincial legislatures and

executives. As in Germany, national legislation that is to be implemented by the provinces is very detailed. No room is left for provincial legislatures to supplement the programs it prescribes.[20]

These failures of the NCOP have many causes. Some are political. The hegemony of the ANC discourages the expression of strong provincial views in national politics. The NCOP's status is undermined by the general antipathy of many politicians and bureaucrats towards the provincial system. For instance, it is common to hear of politicians being "promoted" from the NCOP to the National Assembly. Often it is suggested that delegates to the NCOP are chosen from candidates whose names were too low on the list to win a seat in the provincial legislature. The newness of the system and the complexity of its design also contribute to its limited success. Many provincial legislatures are weak and struggle to fulfill their own provincial responsibilities. They cannot meet the considerable demands of the NCOP, which require them to consider complex national legislation in a very brief period. Communication between provincial delegations and the provincial legislatures and executives requires extraordinarily efficient legislative bureaucracies both in the NCOP in Cape Town and in the provinces.

The question that dominates this chapter is applicable here: is the weakness of the NCOP to be attributed to the complexity of its design, to the challenges of setting up new institutions in a transitional democracy with limited human resources, or to the current political landscape? The answer is probably "all of the above." This means that it is too early to assess the institution properly.

THE NATIONAL EXECUTIVE

As already noted, the Constitution formalizes many conventions of Westminster parliamentary government. This is particularly evident in the constitutional provisions on the composition, operation, and functions of the national executive, or cabinet.[21] The cabinet is headed by the president, who takes on the role of a prime minister. The Constitution instructs the president to select his or her cabinet colleagues from among the members of the National Assembly; it unequivocally spells out the principles of individual and collective cabinet responsibility under which cabinet and all its members must account to Parliament; and it sets out procedures for and the consequences of votes of no confidence. It also lists the functions of the executive. However, from the perspective of scholars of federalism, it is not the detail of the constitutional provisions on the national executive that is interesting but two omissions. First, the Constitution does not demand power sharing. The South African president, like a Canadian or Australian prime minister, is not constitutionally restrained in the choice of cabinet colleagues. Second, the Constitution's otherwise detailed chapter

on the national executive does not mention any responsibilities that the system of shared powers may place on the national executive.[22]

Power-sharing was a key element of the 1993 settlement that enabled the 1994 elections to take place. The 1993 interim constitution established a government of national unity with a multiparty cabinet for the first five years of democracy. Under this arrangement, any minority party with more than 20 percent of the vote was entitled to choose a deputy president, and each minority party was entitled to a member of cabinet for every 5 percent of the vote it commanded.[23] The majority ANC's main partner in the cabinet, the National Party, withdrew from this arrangement within three years, believing that, as a junior member of government, it had little influence, that its close identification with the majority ANC restricted its ability to build its own constituency, and that it would be more effective in opposition.[24]

Although many foreign observers advocated some form of executive power-sharing as the best way to deal with the deep racial divisions in South Africa, its rejection by constitution makers was not surprising. The experience of the defeated apartheid government, the National Party, as a junior member of the new cabinet confirmed the weakness of a power-sharing model in a system in which one party commands such a huge majority of the vote; instead, negotiators relied on the supremacy of the Constitution, a strong bill of rights, and independent courts to protect their diverse interests.

Since 1999 there has been no formal constitutional requirement for multiparty representation in cabinet, but the idea lingers on. Typically the president draws a small number of minority party members into cabinet. Today this co-option is not based on a need to bring opposing parties on board but, rather, on a deeply held South African belief in the importance of consensus politics. Cynics view this as a way of undermining opposition challenges (in particular) as collective cabinet responsibility prevents cabinet members from openly criticizing government policy.

The omission of power-sharing arrangements from the constitutional provisions on the national executive is not surprising; but the second omission – the absence of any express reference to multilevel government in the constitutional description of the responsibilities of the national executive – is critical. This is because so much of what the national executive does involves provinces and local governments. The national government effectively determines their powers, depends on them to implement national laws, funds them, and monitors, supervises, and regulates them. It can take few decisions without considering their impact on provinces. The implementation role of provinces closely ties national policy to their capacity to perform. It also demands complex coordination between national departments responsible for national competences (such as justice and water) and both national and provincial departments working in related areas (such as social services and agriculture). For instance, policy relating to

the detention of children awaiting trial by the national Department of Justice depends for its implementation on the provision of "places of safety" by the nine provincial welfare departments. In theory, these programs should be coordinated by the national government through national norms and standards and properly assured intergovernmental coordination. Indeed, since the 1997 report of the Presidential Review Commission, much attention has been paid to making cabinet more effective. Nevertheless, despite the fact that provinces are written into the plans, the disparate capacity of the provinces, the limited resources of the national government, and, some say, the absence of any inclination on the part of the national government to develop the political capacity of provinces, mean that coordination is weak. Provinces remain junior partners, instructed on their responsibilities rather than consulted.

Although the system of shared powers shapes the practice of government, it has had no obvious impression on the composition of cabinet and the allocation of portfolios. Unlike in Canada, for instance, in South Africa there is no expectation that provinces will be "represented" in the cabinet. Similarly, no cabinet members have responsibility for different regions. Nevertheless, recently there has been some public debate about what is perceived as the overrepresentation of two provinces in cabinet. This may signal the beginning of increased pubic demands for diversity in the executive.

Two other features of the national executive branch of government are important in understanding multilevel government in South Africa. First, the Constitution requires a single public service. This means that, technically, bureaucrats in the national and provincial administrations are all part of the same service, which "must function, and be structured, in terms of national legislation"[25] (section 197[1]). The implications of this were tested when the national Public Service Act[26] was amended to require a uniform change to the responsibilities of provincial directors-general. The Western Cape challenged the new legislation, arguing that national legislation that prescribed the structure of its administration infringed on its autonomy, but it lost the case.[27] Further central control is placed on provincial governments by constitutional provisions that require national legislation to regulate the terms and conditions of employment in the public service. Provincial governments may appoint and manage their own staff within a "framework of uniform norms and standards" (section 197[4]). However, salaries are negotiated centrally. As salaries make up 50 percent of most provincial budgets, the constraint that this places on provincial spending is considerable.

Second, the role of the national Department of Provincial and Local Government is to "have an effective and integrated system of government consisting of three spheres working together to achieve sustainable development and service delivery."[28] The location of this department in the national

sphere allows it to work with other national departments to coordinate programs that are to be implemented by the provincial and local governments. However, it also contributes to a sense that the national government is firmly in control.

THE NATIONAL JUDICATURE

The role of the courts in South Africa changed radically in 1994 when a system of parliamentary sovereignty was replaced by constitutional supremacy. Now the Constitutional Court has the final say over the interpretation of the Constitution, and laws and executive actions that are unconstitutional can be declared invalid by the courts.

Justice is a national function, and the courts are structured in a single hierarchy. No courts fall under provincial jurisdiction.[29] Provinces have a very limited role in the justice system. The only constitutional concession to possible provincial interest in the courts is the inclusion on the Judicial Service Commission of the relevant provincial premier when a matter relating to a provincial high court, including appointments, is before it (section 178[1] [k]).

With a few exceptions, all courts, except magistrates' courts, the lowest level of civil courts, and courts of traditional leaders, may decide on the constitutionality of laws and executive action. The Constitutional Court has exclusive jurisdiction over relationships between organs of state in the national and provincial spheres, the constitutionality of provincial constitutions, and, at the request of either the president or the relevant provincial premier, the constitutionality of national or provincial bills (section 167). In addition, only the Constitutional Court can decide that "Parliament or the President has failed to fulfil a constitutional obligation" (section 157[4] [e]). High courts and the Supreme Court of Appeal may declare national and provincial acts and conduct of the president unconstitutional and thus invalid, but their decisions are subject to confirmation by the Constitutional Court.

The powerful Constitutional Court is the most significant check on the exercise of state power. Its independence is protected in the Constitution, and its judges are appointed by the president from a short list drawn up by the Judicial Service Commission (section 174).[30] The Constitutional Court has a rather unusual role in relation to provincial constitutions. A provincial constitution does not become law until the Constitutional Court has certified that it complies with the national Constitution (section 144). The court has been asked to fulfill this role on two occasions. In both cases it rejected the proposed provincial constitution but, in the case of the Western Cape, it finally approved an amended constitution.[31] Generally, as discussed below,

in disputes relating to the multilevel system, the Constitution expects the courts, including the Constitutional Court, to use their power sparingly. Section 41(3) requires parties involved in intergovernmental disputes to "make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute." If a court is not satisfied that this has been done, it is entitled (and perhaps expected) to refer the dispute back to the parties to reach a settlement. The Constitutional Court has used this provision twice to avoid deciding matters,[32] but the dominance of the ANC in the local, provincial, and national spheres means that it has not really been tested.

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

The Constitution establishes a "default" constitution for provinces. Provinces may depart from it within limits defined by the national Constitution by adopting their own constitution. Presently only one province (the Western Cape) has a constitution, and its departures from the national Constitution are minor.[33] Provincial constitution making is discouraged. There is a widely held view that provincial constitutions would be divisive, and now that the Western Cape is governed by the ANC, there is talk of repealing its constitution. However, KwaZulu-Natal, which failed in an attempt to adopt a provincial constitution in 1996, is once again considering a constitution. Unlike its unsuccessful predecessor, this proposed KwaZulu-Natal constitution is unlikely to contain innovations. Its purpose would be to take up the opportunity offered in the national Constitution to make provision for the Zulu king, thereby settling a matter that has threatened to destabilize the already volatile political settlement in the province.

Under the Constitution, provincial legislatures and executives are to operate in the same way as does the national Parliament and executive. The only major difference in the design of provincial institutions is that they have unicameral legislatures. Less important variations are that a provincial premier remains a member of the provincial legislature on election, unlike the national president, who resigns his or her seat; that provinces do not have deputy ministers; and that a provincial executive is limited to eleven members (section 132). The key difference lies not in the design of these institutions but in politics. When the ANC controls a province, the premier is appointed – "deployed" in South African terminology – by the national president. This has a direct impact on the ability of the provincial government to act as an autonomous instrument of its own electorate. Normally in parliamentary systems the premier and cabinet derive their legitimacy and authority from the fact that they are the leaders of the majority

party in the legislature and are responsible to it. Deployment from the centre means that the premier is in fact accountable not to his or her legislature but, rather, to the central authority. Nor is the premier accountable to the local party organization. Its leadership may be excluded from cabinet representation. This creates tensions between the local party leadership and the provincial government, which now essentially acts as an agent of the centre. The result is that provincial government has limited legitimacy, and its role as a democratic institution representing the local population is eroded. Moreover, the pattern undercuts the checks and balances implicit in the multisphere design of the system.

LEGISLATURES

In a federal system the subnational legislatures are usually expected both to deepen democracy by providing representation that is closer to the people and to promote more effective government by ensuring that policies reflect local needs and interests. In South Africa the second role is intended to be fulfilled in two ways – through the development of provincial legislation and through provincial engagement with national legislation in the NCOP. Provincial legislatures in South Africa have a third role. Together with the provincial executive they are expected to support and supervise local government (section 155[6] and [7]).

There is consensus that South Africa's provincial legislatures fail on all of these counts. The question is whether failure is built into the system or whether it is a result of the newness of the system and the current political context.

Provincial electoral systems are prescribed by national law. The constitutional framework for this law is substantially the same as that for the National Assembly; the electoral system for the provinces must result "in general in proportional representation" (section 105[1]). Within this framework the Constitution permits variation between the national and provincial systems. The Western Cape attempted to institute an alternative electoral system. Its draft constitution proposed a mixed system on the German model in order to introduce an element of constituency representation. However, the Constitutional Court rejected the plan, holding that the province was not entitled to design its own system.[34]

Provincial elections are currently held on the same day as are national elections. In fact, it was only after protracted debate in the 1993 constitutional negotiations that agreement was reached that separate ballots should be used for the election of provincial legislatures and the national Parliament. Electoral campaigns are dominated by national concerns, and provincial leadership battles do not reflect provincial concerns. Nevertheless, the opportunity for voters to split votes is a way of reminding them

that provincial legislatures are, in fact, distinct from the national Parliament. Some voters have used the system to split their votes, and it seems that generally small provincial parties have benefited.[35] Significantly, although the ANC controls every provincial legislature, the composition of the opposition varies considerably from province to province.

Like the National Assembly, provincial legislatures usually serve a term of five years. As in the case of the National Assembly, the Constitution allows earlier dissolution of a provincial legislature by a vote of a majority of its members, provided three years have passed since its election. Should a provincial legislature use this power, provincial and national elections would no longer be synchronized. This is clearly viewed as undesirable by the national government, and a threat to call an early election in KwaZulu-Natal in 2003 was deftly averted through intense negotiations between political leaders in the province and in the national government.

Provincial legislatures are also expected to engage actively with the public in between elections. Proceedings in the legislatures are open to the public, and the Constitution enjoins the provincial legislatures to facilitate public involvement (section 118). In practice, public participation varies greatly from province to province with public hearings almost routine in some and rare in others. A recent survey suggests that civil society organizations are more likely to engage with provincial legislatures than with the national Parliament.[36] Nevertheless, surveys tell us that citizens in South Africa have less contact with their political representatives than do citizens in other Southern Africa Development Community states and that trust in provincial governments is low.[37]

The record of provincial legislatures in promoting effective government either through developing provincial law tailored to their particular needs or ensuring that national legislation that binds provinces is sensitive to provincial needs is equally patchy. The fact that provincial legislatures pass very few laws is often pointed to as evidence of their failure. This seems unfair. At present, as the national government is committed to implementing a massive national transformation program, the most important role of provincial legislatures is to ensure that national programs are workable and to oversee their implementation. However, although one or two legislatures spend a substantial amount of time on national legislation and participate conscientiously in the NCOP, many others hardly engage with it. The problem is not one-sided. Provinces that do attempt to participate complain that their contributions are not always welcome. The "uncooperative" style that characterizes executive intergovernmental relations in South Africa is sometimes also experienced in the NCOP.

Provincial oversight programs are no better. Again, although one or two provincial legislatures have started implementing oversight programs, others do little or no oversight. The complexity of overseeing programs developed

by the national government and, in effect, merely delivered by provincial executives compounds the problems.

The third responsibility of provincial legislatures is to support local government. The legislative role here is clearly subordinate to that of the provincial executive. To avoid developing a sense that municipalities are accountable to the provincial legislature rather than to their own electorate, provincial legislatures should fulfill this role primarily through oversight of the provincial department of local government rather than through direct contact with municipalities. Either way, however, although a number of provincial legislatures plan to carry out this function, very little has been done.

Aspects of the design of the overall system of multilevel government and the provincial legislatures may contribute to the poor performance of the legislatures. For instance, some provincial legislatures are very small. Three have only 30 members. Once the premier and executive have been drawn off and a speaker elected, these provinces are left with just 18 active members. Yet they are expected to deal with large quantities of national legislation as well as their own business. These undersized legislatures are found in provinces with smaller populations and fewer skilled people to draw on as legislative staff. Second, the relationship of provincial ministers (MECS) to provincial legislatures is ambiguous. Although formally they are accountable to the legislature (section 133), the implementation of national legislation is their main concern. As suggested below, there is a strong impetus for them to account to the national government rather than to their provincial colleagues. This, and the operation of a parliamentary system that concentrates power in the executive, weakens provincial legislatures.

Together with the NCOP, provincial legislatures are the most controversial institutions in South Africa's system of government. A strong body of opinion would have them abolished: "If provincial legislatures do not serve to deepen democracy, there is no use in maintaining them." Others argue that the huge developmental needs faced by the country demand a strong central government. They see the subservient nature of provincial legislatures as an unfortunate but necessary trade-off for effective government and argue that, even if they work imperfectly, provincial legislatures provide a useful training ground for politicians.

EXECUTIVES AND ADMINISTRATION

By design, the provincial executives, like the legislatures from which they are drawn, are fully fledged provincial institutions independent of the national sphere. The Constitution stipulates that, after an election, each provincial legislature must elect a premier from among its members and, as in the national sphere, the premier then selects a cabinet (called an

executive council) from the members of the legislature. The Constitution restricts the size of provincial cabinets to eleven members, including the premier. The provincial premier plays much the same role in the provincial sphere as the president does nationally. For instance, he or she signs provincial bills, may appoint commissions of enquiry, and may call a referendum (section 127). The premier is also head of the executive council and serves at the pleasure of the legislature (section 130).

The autonomy of provincial executives is limited in two significant ways – by the Constitution and by political practice. First, as already outlined, the system of shared responsibilities casts provincial executives and their administrations as implementers of national policy and not as initiators of policy. Each province must implement national legislation that falls within the list of shared competences. Even if it does adopt its own laws on these matters, the province must maintain the norms and standards that are set in such national legislation. In practice, provinces have few of their own laws and instead operate within the legislative framework established nationally. The main function of provincial executives and the administrations that they control is to implement national legislation.

Second, the provincial executives are subordinate to the party's central executive. As noted earlier, in ANC-led provinces, the premier is chosen by the national leader of the ANC, the national president. In 2004 the identity of provincial premiers was not revealed to voters until after the elections and so could not influence the casting of votes. Past practice also suggests that the National Executive Committee of the ANC plays a role in the composition of provincial cabinets.[38] There are instances of provincial individuality. For instance, in 2002, following the lead of a province then held by an opposition party, Gauteng broke ranks with the national government on its policy on the supply of drugs to people living with HIV/AIDS.[39] But such examples are rare.

These two factors, one constitutional and one political, determine the relationship of provincial members of the executive council to the national executive and national ministers. Intergovernmental forums are frequently reported to be top-down, and provinces seem to be silent. One commentator has noted that the provincial ministers view themselves as deputies to the national ministers. The question once again is: are these practices determined by the design of the system or by the current context? We will return to this question below.

LOCAL GOVERNMENT

Local government has a key place in South Africa's constitutional vision of transformation. For constitution makers, municipalities closely linked to

their communities and at the front line in the delivery of government services offered real opportunities to deepen democracy and to promote development. Accordingly, local government is a separate sphere of government, with constitutionally secured powers and subject to and protected by the same principles of cooperative government that apply to the national and provincial spheres. The introductory section to the Constitution's chapter on local government draws on the German Basic Law to state that "A municipality has the right to govern, on its own initiative, the local government affairs of its community" (section 151[3]). Sections 152 and 153 supplement this by describing the developmental role of local government. The Constitution also recognizes the newness of local government and its lack of development and infrastructure. So, provinces and the national sphere have obligations to support and, if necessary, intervene in the new municipalities to ensure the delivery of services (section 139). Municipalities are thus subject to three sets of laws. First, the Constitution sets out their powers and functions. Second, a growing body of national legislation prescribes in considerable detail, among other things, how they should be structured and how they should operate, the format of their budgets, and "planning, performance management, resource mobilization" processes.[40] Third, provincial laws regulate the way in which many day-to-day functions (such as urban planning, health care, environmental protection, and transport) must be carried out.

In a slow and difficult process spanning ten years, the 284 newly demarcated municipalities are starting to take responsibility for basic service delivery. The entire country is divided into municipalities. "Metros" govern the six major metropolitan areas. Outside the metros, the new municipal system comprises two distinct levels: 47 district municipalities (covering wide areas) and local municipalities that serve smaller communities within those district municipalities. A municipal council has both executive and legislative authority. The smallest of these councils are elected on a closed list proportional representation system, but elections in larger municipalities are based on a combination of closed list proportional representation and ward representation.

The tension between the vision of local government as an equal partner with the national and provincial spheres and the level of support that the new municipalities need is stark. The increasing body of national legislation governing local government reflects this, but the clearest acknowledgment of the weakness of many municipalities is a 2003 constitutional amendment that gives provinces and, should they fail, the national government drastic powers to intervene in failing municipalities, to take over their budgets, and, if necessary, to dissolve their councils (section 139).

There is enormous variation in local government institutions. The metros are special, with considerable capacity and comparatively strong

infrastructures. They have achieved an unexpected level of autonomy from the national government. Most other municipalities are battling to fulfill their functions on their own. Thus, competent, confident officials in well equipped offices are found in Cape Town, Johannesburg, and other metros; one-room municipal offices with dirt floors are still to be found in some rural areas. The challenges are compounded by the fact that the existence of two levels of local government in all but the metros increases the complexity of intergovernmental relationships. Two-tiered local government was required by the pact that enabled the transition to democracy in South Africa and governed the design of the new Constitution, but it has imposed a rigidity on the design of local government that has hampered development. There is little clarity or understanding of just who should do what in many policy areas, and how to divide responsibilities between district and local councils has preoccupied bureaucrats in the national Department of Provincial and Local Government for the past four years.

For many rural municipalities, traditional authorities add to the complexity of developing democratic processes and delivering services. Although most traditional leaders were discredited by their involvement in apartheid, the past ten years have seen powerful lobbies of chiefs demanding protection of their traditional rights to govern.[41] Traditional leaders argue that they should replace local government entirely. This extreme view has not been accepted, but many concessions have been made. Thus, the 2003 Traditional Leadership and Governance Framework Act[42] gives traditional leaders a special role in relation to the municipalities under which they fall. As traditional leaders often have an ability to deliver services that exceeds that of the new, under-resourced municipalities, they wield much influence, and reports suggest that those subject to their authority remain heavily dependent on them. This threatens to block the development of municipalities that can be responsive to real local needs because needs are filtered through the tribal elite that make up traditional authorities.

Creating totally new democratic structures is never easy, and many of the problems faced by South Africa's young municipalities may be characterized as teething problems. In part the challenges that would be faced in realizing a vision of "developmental local government" were anticipated by constitution makers, hence the provisions requiring the national and provincial governments to support municipalities. The constitutional stipulation that provinces should assign additional functions to municipalities as they develop the capacity to manage them is another provision that captures the sense of municipal capacity building as a work in progress (section 156[4]). Nevertheless, South Africa's experience in this area, as elsewhere, points to the importance of ensuring that political solutions are matched by the capacity needed for their implementation.

INTERGOVERNMENTAL RELATIONS

It is abundantly clear that government in South Africa is heavily dependent on effective intergovernmental relations. The Constitution provides a framework for a cooperative rather than competitive system of intergovernmental relations. Although many of the provisions in the section of the Constitution headed "Principles of co-operative government and intergovernmental relations" are vague, a few are very concrete. They require an act of Parliament that provides for "structures and institutions to promote and facilitate intergovernmental relations" and that establishes an intergovernmental dispute-resolution mechanism. In addition, as mentioned above, they require court proceedings to be avoided wherever possible.

Since 1994 a multitude of intergovernmental forums engaging both politicians and bureaucrats has been established. Nevertheless, the cooperation demanded by the system is hugely sophisticated. There are many examples of misunderstandings and poorly coordinated policies. In 2005 the law facilitating intergovernmental relations anticipated by section 41 of the Constitution was adopted[43] because, in the words of the president, "better co-ordination was needed if government was to realize its policy objectives."[44] There is some irony in using law to enforce cooperation "in mutual trust and good faith" (section 41[1] [h]), but experience over the past ten years has underlined the need to clarify roles and responsibilities. Nevertheless, by placing control of intergovernmental relations firmly in the hands of the president, the new law entrenches an approach to intergovernmental relations that, because of its top-down style, has been described as uncooperative.[45] Two aspects of the system are probably responsible for this. The first is the weak capacity of new provincial and local governments (and sometimes national departments) combined with the urgent need to establish efficient systems and effective delivery of services. The second is the dominant one-party system. It is unfortunate that the new act does nothing to affirm the partnership among the spheres of government envisaged by the Constitution. This may have built the confidence of provinces and municipalities in their engagement with the national government.

The Financial and Fiscal Commission, established by the Constitution as a check on the national executive's power over the financial resources of provinces, has been equally ineffective as an institution of intergovernmental relations. It has a constitutional mandate to make recommendations to Parliament and the provincial legislatures on matters affecting the share of revenue raised nationally that is allocated to the provinces and local government. These recommendations provide provinces with an analysis of the way in which the national government proposes to distribute revenue, and one might expect provinces to treat them very seriously. However, provinces have

paid little attention to the recommendations, and the commission has tended to focus its attention on attempting to influence the national Treasury. Originally, each province nominated a member of a 22-member commission, but in 2001 a constitutional amendment reduced its size to nine. Now no members are chosen directly by the provinces; instead, the president selects three of the nine members of the commission from a list compiled in consultation with provincial premiers. Once again, we see intergovernmental relations firmly under the control of the national government.[46]

The principles of cooperative government include an element of supervision together with cooperation and autonomy.[47] With very limited exceptions, the power to supervise reflects a hierarchy of governments. The national sphere may supervise provinces, and provinces have a significant power to intervene in local government. The supervisory role of national and provincial government has been crucial over the past decade. Although it is seldom formally invoked, it legitimates not only provincial interventions in municipalities but also active engagement of national government departments – particularly the national Treasury – in the affairs of provinces. The latter has included using the constitutional power to dissolve municipal councils. The main safeguard on the misuse of these powers used to lie with the NCOP, and, as noted above, this has been one of the areas in which the NCOP has functioned well. However, recent constitutional amendments have limited the NCOP's role in overseeing interventions by provinces in municipalities. Approval of the NCOP is no longer required for interventions,[48] and it has no veto right in interventions triggered by financial problems. This change has occurred at a time when there is a strong and shared sense of the challenges that face South Africa and an overwhelming desire simply to make it all work and to make each sphere of government viable and sustainable. These conditions and the current political unity sideline concerns about checks and balances. In the longer term, the absence of a political monitoring body may draw courts into the process, undermining the Constitution's attempts to have intergovernmental disputes resolved by discussion rather than by judicial fiat.

ANALYSIS AND CONCLUSIONS

Constitutional Framework

The Constitution sets out the arrangements for the institutions of government, including the system of three spheres, in unusual detail. As this chapter describes, it codifies many practices that are conventions in other parliamentary systems. The need for and value of such detail in the constitution of a new democracy are obvious. A full description of roles and responsibilities provides clear instructions to those who must implement

the system and reduces areas of disagreement. For instance, the articulation of the rights of minority parties in Parliament, the clear description of how the president is chosen and how decisions are taken in legislatures, the framework for parliamentary privilege, and the carefully defined role of the executive in appointing judges make an important contribution to the system's stability. The relationship between the three spheres of government is equally thoroughly articulated. In a young democracy every issue is a new one, and there are few precedents to guide problem solving. Detail in the constitution can compensate for this.

However, the cost of detail is inflexibility. In South Africa, this has meant that the Constitution was amended eleven times between its implementation in 1997 and the end of 2003. By and large, these amendments have remedied oversights and ensured workability, but constitutional amendment is an elaborate and cumbersome process for what are sometimes rather mundane changes to procedures. Moreover, whether or not this is intended, each amendment reduces the authority of the Constitution by placing a question mark over its permanence and signalling its vulnerability to current political pressures. The balance of power between spheres is not less susceptible to change than other aspects of South Africa's constitutional system, and, in fact, up to now the most significant changes – those to section 139 of the Constitution – have affected this.

The Interaction between Federalism and Representative Institutions

Constitution makers must determine the way they wish to balance two equally important goals. The first is to create "limited" government. This protects rights and ensures that governments do not become coercive and authoritarian. The second is to create effective government. The tension between these goals is expressed in terms of whether power and authority will be shared and dispersed or concentrated and unified, and it may be expressed along two axes. The horizontal axis concerns the design of executives and legislatures within a single sphere of government, national or provincial. The vertical axis concerns the distribution of authority among levels of government.

On the horizontal axis is South Africa's Constitution. The Westminster model of parliamentary/cabinet government in the national and provincial spheres places emphasis on effective government with concentrated authority. However, it is balanced by the bill of rights, constitutional provisions spelling out an active role for Parliament and the provincial legislatures, and independent institutions designed to safeguard democracy. On the vertical axis authority is dispersed to provincial and local institutions, but it is also concentrated through national paramountcy and national supervision of subnational governments.

The design is imaginative and carefully crafted. However, as the discussion in this chapter shows, in some significant ways the intricate balance aspired to by the Constitution has not been achieved. This is most clear in the provincial legislatures and executives. Apparently designed to operate in the same way as legislatures and executives do in a regular parliamentary system, they are profoundly affected by their subordinate position in the system of shared responsibilities. Most provincial legislatures have yet to demonstrate that they can fulfill either of two complementary functions: those of "ordinary" parliaments (responding to the needs of the citizens that they represent and supporting the government of the day) or those required by the multilevel system (informing national policies and monitoring their implementation in the provinces). Provincial executives behave more as agents of the national executive than as independent bodies accountable to a particular region. As a result, democracy in the provinces does not temper the concentration of power at the centre. Overall, the Westminster logic of the system means that the central executive dominates. It is striking that the only institution that was carefully designed with the multilevel system in mind, the NCOP, is also one of the most unsuccessful institutions, struggling more than others to entrench its position and to fulfill its constitutional mandate.

The central question to ask is whether the problems in the system should be attributed to either an imperfect design or the context – the newness of the system, the overwhelming imperative for social transformation, and the dominance of the ANC. The answer must be that both contribute to the weaknesses. The design raises two different concerns. One is that the system is complicated so that almost any action demands much coordination and consultation. The complexities are magnified in the local government arena where responsibilities are divided between two tiers (district and local) and are overseen by another two (provincial and national). A second concern related to the design arises from the combination of a centralizing Westminster-style parliamentary system, with three spheres of government in which few powers are truly dispersed and in which accountability tends to be upward rather than towards the electorate. This means that the balance between effective government and limited government is tipped strongly in favour of the former.

But the context is also important in understanding the way the system works now. This system is new. The newness of the system is not simply an excuse for its failings. The task of establishing a properly functioning system of multilevel government with real opportunities for democratic engagement in the local and provincial spheres in a country with a limited pool of skills and even more limited experience of institutionalized democracy is enormous. Similarly, the dominance of the ANC obviously influences relationships between the spheres of government. It may explain the

failure of some provincial politicians to represent provincial interests vigorously at the centre. It also explains the apparent ease with which the centre dominates decision making. However, ANC hegemony may bring with it one of the strengths of the present situation. Reasonably coherent policy can be developed to achieve the transformation goals that are certainly shared by the vast majority of the population.

NOTES

1 The following figures are taken from *Population Census, 2001*, Statistics South Africa (2003) <http://www.statssa.gov.za/census01/html/default.asp>, viewed 16 December 2005.
2 <http://www.cia.gov/cia/publications/factbook/rankorder/2001rank.html>, viewed 29 September 2005.
3 The official definition of unemployment is controversial and includes only those people who have taken active steps to seek employment in the four weeks prior to census night. Those who had given up looking for work, for example, would not be considered part of the economically active population.
4 *South African Human Development Report 2003: The Challenge of Sustainable Development in South Africa – Unlocking People's Creativity*, "Introduction" (Cape Town: United Nations Development Program, South Africa Oxford University Press, 2004), 5 <http://www.undp.org.za/NHDR2003/NHDRSumFull.pdf>, viewed 21 July 2004.
5 Figure 3, p. 8. The Human Development Index is calculated on a scale of 0 to 1.0: "All countries are classified into three clusters by achievement in human development: high human development (with an HDI of 0.800 or above), medium human development (0.500–0.799), and low human development (less than 0.500)." See United Nations Development Programme, *Human Development Report 2002: Deepening Democracy in a Fragmented World* (New York: Oxford University Press, 2002) 147. This scale suggests that the disparity between the Western Cape and Limpopo is significant.
6 Statistics South Africa, *Census 2001: Census in Brief* (Pretoria: Statistics South Africa, 2003), 14.
7 *Census 2001* data calculated by author.
8 Yvonne Muthien and Meshack M. Khosa, "'The Kingdom, the Volksaat and the new South Africa': Drawing South Africa's New Regional Boundaries," *Journal of Southern African Studies* 21, 2 (1995): 303, 320.
9 Express recognition of cultural rights is found in the bill of rights generally, in section 6 on national languages; in chapter 12 on traditional leaders; in section 185, which sets up a commission for the promotion and protection of the rights of cultural, religious and linguistic communities; and in section 235, which permits recognition of the right of cultural and linguistic communities to "self-determination," to be determined by national legislation.

10 Nico Steytler, "Republic of South Africa," *Constitutional Origins, Structure, and Change in Federal Countries,* ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 311–346.
11 The president's seat is immediately filled from his or her party's list.
12 *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC).
13 Section 91 of the Constitution requires the president to appoint a deputy president but the deputy has no special constitutional roles other than to "assist the president in the execution of the functions of government" (Sec. 91[5]).
14 Section 49 of the Constitution sets a fixed term for the National Assembly; however, in section 50 provision is made for the National Assembly to be dissolved if a majority of its members resolve that this should be done.
15 Some commentators would also argue that the racialization of politics contributes to the weakness of opposition parties: the ANC's support base is predominantly black and the strongest opposition party is still predominantly white. See, for example, J. Seekings, "Social and Economic Change since 1994: The Electoral Implications" (unpublished paper, October 2004); but B. Mattes's contemporaneous analysis of race and voting patterns – "Voter Information, Government Evaluations and Party Images, 1994–2004" (unpublished paper, October 2004) – takes the opposite position.
16 Andrew Reynolds, *South Africa: Election Systems and Conflict Management* <http://www.aceproject.org/main/english/es/esy_za.htm>, created 13 December 1997, viewed 24 July 2004.
17 In most parties the practice is to allow regional party structures to compile these lists.
18 The Constitution deals with the NCOP in sections 60–72.
19 Christina Murray and Richard Simeon, "From Paper to Practice: The National Council of Provinces after Its First Year," *SA Public Law* 14 (1999): 96.
20 In theory, provincial legislatures could enact conflicting legislation that might override the national law. However, in practice this will not happen while the ANC governs at both the national level and the provincial level.
21 See Constitution, sections 83–93.
22 Although section 100 does provide for intervention by the national executive in the affairs of a province if the province is failing to fulfill its responsibilities.
23 Constitution Annexure B, item 4.
24 This assessment proved wrong. In the 2004 national elections, the National Party received just 1.7 percent of the vote. In 1994 it had commanded 20.4 percent.
25 Local government bureaucrats are not included in the "single public service."
26 Public Service Act, 1994 (Proc. 103/1994).
27 *Premier of the Province of the Western Cape v. President of the RSA* 1999 (3) SA 657 (CC).
28 Department of Provincial and Local Government Web site, "Vision" <http://www.dplg.gov.za>, viewed 29 July 2004.
29 The Superior Courts Bill, currently before Parliament, proposes the alignment of the jurisdiction of the superior courts with the new (1994) provincial boundaries.

30 This commission is dominated by the governing party, and, in 2004 in particular, its selection of judges for the high courts was very controversial. Nevertheless, its inclusion of judges and members of the profession, its practice of holding public interviews of candidates for judicial positions, and its overall record have established it as a body that contributes to securing the independence of the judiciary.

31 *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996*, 1996 (4) SA 1098 (CC); In *re: Certification of the Western Cape Constitution 1997*, 1997 (3) SA 795 (CC), *Certification of the Amended Text of the Constitution of the Western Cape, 1997*, 1997 (12) BCLR 1653 (CC).

32 *National Gambling Board v. Premier of KwaZulu-Natal*, 2002 (2) BCLR 156 (CC) and *Uthukela District Municipality v. President of the RSA*, 2002 (11) BCLR 1220 (CC). In the first of these cases, the dispute was between a province then controlled by a national minority party and the ANC-led national government; in the second, it was an IFP-run municipality that had brought a case against the national government. It is unlikely that the section will be much used while the ANC controls virtually all government in South Africa.

33 Christina Murray, "Provincial Constitutions in South Africa: The (non) Example of the Western Cape," *Jahrbuch des offentlichen Rechts Neue Folge Band* 49 (2001): 481.

34 *Certification of the Western Cape Constitution 1997*, para. 58.

35 Election results are available on <http://www.elections.org.za/>, viewed 16 December 2005.

36 Of 253 civil society organizations concerned predominantly with service delivery that were surveyed, 70 percent reported that they engaged with provincial legislatures while only 59 percent reported that they engaged with the national Parliament. See Samantha Fleming, Collette Herzenberg, and Cherrel Africa, *Civil Society, Public Participation and Bridging the Inequality Gap in South Africa* (Durban: University of Natal Press, 2003), 3 and 52.

37 Robert Mattes, Yul Derek Davids, and Cherrel Africa, *Views of Democracy in South Africa and the Region: Trends and Comparisons*, Afrobarometer Paper No. 8, pp. 71 and 34.

38 Tom Lodge, *Politics in South Africa: From Mandela to Mbeki* (Cape Town: David Phillip, 2002), 38.

39 Nico Steytler, "Federal Homogeneity from the Bottom Up: Provincial Shaping of National HIV/AIDS Policy in South Africa," *Publius: The Journal of Federalism* 33, 1 (Winter 2003): 59–74.

40 "Preamble," Local Government: Municipal Systems Act 32 of 2000. See also Local Government: Municipal Structures Act 32 of 2000 and the Municipal Financial Management Act 56 of 2003.

41 For discussions of traditional leaders in South Africa, see T. Maloka and D. Gordon, "Chieftainship, Civil Society, and the Political Transition in South Africa," *Critical Sociology* 22 (1996): 37; L Bank and R Southall, "Traditional Leaders in South Africa's New Democracy," *Journal of Legal Pluralism* 37–38 (1996):407; and

C. Murray, "South Africa's Troubled Royalty: Traditional Leaders after Democracy," Law and Policy Paper 23 (The Federation Press in association with the Centre for International and Public Law, Faculty of Law, Australian National University, 2004).

42 Act 41 of 2003.

43 Intergovernmental Relations Framework Act 13 of 2005.

44 "State Organs Need a Boost," <http://www.news24.com/News24/South_Africa/Politics/0,6119,2-7-12_1548267,00.html>, viewed 19 July 2004.

45 Nico Steytler and Lawrence Boulle, "Discussion Document: Towards a National Policy on Intergovernmental Relations," April 2002, 16.

46 Joachim Wehner, "The Institutional Politics of Revenue-Sharing in South Africa," *Regional and Federal Studies* 13 (Spring 2003): 1–30.

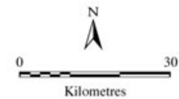
47 Steytler and Boulle, "Discussion Document," 2.

48 But the NCOP may bring an intervention to an end.

Schauffhausen
GERMANY
Basel-Town
Basel-Country
Thurgovia
Appenzell Outer-Rhodes
Argovia
Zurich
Jura
Solothurn
Appenzell Inner-Rhodes
FRANCE
St. Gall
AUSTRIA
Zug
Lucerne
LIECHTENSTEIN
Schywz
Neuchâtel
Glarus
Berne
Nidwalden
Obwalden
Uri
Grisons
Fribourg
Vaud
Ticino
Geneva
Valais
ITALY

SWITZERLAND

Capital: Bern
Population: 7.2 million (2002 est.)



Swiss Confederation

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Switzerland is a small country in the centre of Western Europe with a surface area of about 41,290 square kilometres and a population of 7.3 million people. Its per capita GDP in 2004 was estimated as US$33,800.[1] It has three spheres of government, each with its own institutions: the federation, 26 cantons,[2] and approximately 2,900 communes.[3] Within each sphere of government there is a separation of powers between the executive, the legislature, and the judiciary. Historically speaking, the Swiss federation[4] represents a case of bottom-up nation building and a true example of "non-centralization." When founding the federation in 1848, the cantons kept their statehood, their own constitutions, and most of their political autonomy.

The Swiss constituent units are unequal in two respects. First, they are different in size, in relation to both population and territory. While the most populous cantons (such as Zurich or Bern) each have a population of more than one million people, smaller ones (such as Uri or Appenzell) number only several tens of thousand inhabitants. From a territorial point of view, the biggest canton is the Canton of Grisons (Graubünden). Its surface area of 7,105 square kilometres contrasts with the 37 square kilometres of the smallest constituent unit, Basel-Town. Second, economic differences between the cantons are substantial. The urban cantons of Geneva and the two Basles, together with the metropolitan region of Zurich, are economically stronger than the rest of the country as a whole. In contrast, some rural and mountain regions are relatively poor.[5]

The political stability of Switzerland's parliamentary system is outstanding. For more than forty years, the Federal Council, the seven-member head of the Swiss government, has been composed of a coalition between the same four political parties, representing together about 75 percent of the electorate. Switzerland belongs to the type of consensus democracy characterized by political power-sharing. Political solutions are not found by majority decisions but through negotiation and compromise among the

important political forces. In addition to voting for representatives in regular elections, the Swiss people participate directly in making important political decisions. In this sense, they are part of the federal legislature. Using the instruments of the referendum and the popular initiative, the people can have the last word on the decisions of their parliaments. This reflects the emphasis that the Swiss place on the sovereignty of the people, on the belief that it is the people and not Parliament or the courts that should decide the most important issues.

Federalism is another significant element of Swiss consensus democracy.[6] Several institutions that are the product of federalism enable the cantons to influence federal governance and to cause attention to be paid to cantonal interests and concerns. The first that should be mentioned is the Council of the States. This is the second chamber of the federal Parliament, in which all cantons are equally represented, irrespective of their size.[7] As all parliamentary decisions need a majority in both chambers, the small and generally rural cantons have a strong voice in the Council. Similarly, in popular voting on constitutional amendments, a positive decision requires not only the majority of the people but also of the cantons. The cantons also have the right of parliamentary initiative, which allows a single canton to require the federal Parliament to consider a proposal. Eight cantons, acting together, can use the instrument of a cantonal referendum in order to resist certain parliamentary decisions. Last but not least, cantons participate in the process of consultation on legislation, and they influence federal policies through the implementation of federal legislation.

BACKGROUND

The People

Indigenous people in Switzerland speak four languages: 70 percent speak German, 22 percent French, and 7 percent Italian. The fourth language, Romansch, is spoken by a minority of less than 1 percent in the alpine region of Southeast Switzerland.[8] The language groups are divided between the constituent units of Switzerland in such a way that, in most cantons, an overwhelming majority speaks one language. Hence, it is possible to distinguish between the sixteen German-speaking cantons, the six French-speaking cantons, and the single Italian-speaking canton. The two cantons of Fribourg and Bern use both German and French. One canton, Grisons, is trilingual, using German, Italian, and Romansch.

In relation to religion, the country is 42 percent Roman Catholic and 35 percent Protestant. The rest of the population either adheres to other religions or to no religion. Although these differences are no longer of overriding importance, the religious cleavage, which in earlier times coincided with

cantonal borders, was an important cause of conflict until the twentieth century. Roman Catholics and Protestants fought four civil wars against each other. At the time of nation building, religion was still the crucial cleavage in Switzerland, culminating in a cultural struggle (*Kulturkampf*) that went beyond religion to engage different views of society and state.[9]

A Swiss nation-state came into being in 1848, but federalism guaranteed the political autonomy of the cantons and allowed the peoples in the cantons to live with their linguistic and religious differences. Federalism, therefore, helped to overcome the strong political cleavages of religion and language in a peaceful way.[10] Additionally, it enabled the constitution of a Swiss society that originally did not exist. Cantonal identities and differences continue to be important. German speakers, for instance, still use different dialects that distinguish persons from Valais, Basel, or Zurich. Cantonal autonomy implies different political institutions and different cantonal policies as well. Economists often say that many Swiss cantons are too small to be efficient service providers. Will cantonal autonomy and identity therefore vanish? One new, but still limited, trend pointing in this direction is the merging of some communes within cantons – a development that was not conceivable ten years ago. Given the limited capacities of small cantons to cope with the growing complexity of policy, one can imagine a similar development taking place among these cantons. For the time being, however, any notion of cantonal fusion is a long way off.

In 2002, 20 percent of the inhabitants of the country were foreigners. A significant proportion of the Swiss population thus does not participate in the political process. This is problematic from the standpoint of legitimacy and also detracts from the potential for integration through political participation in governing institutions.

In the past, Swiss enterprises actively sought foreign workers. However, with the growth of the foreign population and with the arrival of refugees from Third World countries, substantial political tensions have arisen. The emergence of xenophobic parties and groups, which bring increasing pressure to bear on political authorities to restrict immigration so as to protect against social "alienation," makes it clear that the integration of foreigners into Swiss society is proving much more difficult than was the integration of the indigenous religious and linguistic minorities during the nineteenth century.

History

The origins of Switzerland date back to the thirteenth century, when three tiny alpine regions, later followed by some cities, successfully claimed some privileges from the Habsburg regime. By the time of the French Revolution, ten other regions and cities had followed suit. Together, they formed a loose confederation. In 1798 Napoleon's troops invaded Switzerland, promising

to bring democracy. However, the French imposition of a centralized Helvetic Republic was not a success, and in 1803 Napoleon partially restored cantonal autonomy in the Mediation Act. In 1815 the Swiss chose to return to the old confederal system. Considering themselves as sovereign states, of which by then there were 25, they re-established a treaty to guarantee collective security through mutual assistance. By the middle of the nineteenth century, however, this loose confederation was no longer efficient enough for a majority of the cantons. They pointed to the need for a more powerful federal government to keep up with the demands of state building, modernization, and economic development that were occurring in the surrounding countries of Germany, France, Italy, and Austria.

In 1848 the Swiss federation was created through a constitutional act that was approved by the majority of the cantons and declared binding for all. The creation of this federation involved a political compromise between the two major political forces: the radicals and the conservatives. The former, mainly from urban and Protestant cantons, gave priority to industrialization; the latter, mainly from rural and Roman Catholic regions, feared domination by what was, at that time, a Protestant, liberal majority. For two reasons, federalism was essential. First, it was the political compromise between those wanting a strong central state and those wanting to maintain the status quo. Second, federalism was a durable power-sharing arrangement. It meant the creation of a federal authority, but it also allowed the (now 26) cantons to maintain different cultures, languages, and religions as well as their historical heritage of political autonomy.

The basic concept of the Swiss nation-state, influenced by the historical circumstances outlined above, can be explained by reference to the following four characteristics.[11] First, Switzerland is a political nation-state for a culturally segmented society. From the beginning, Switzerland was a multicultural nation-state. It was not based on the principles of a common language, religion, or ethnicity but, rather, on the abstract principle of citizenship. The Constitution of 1848 made it clear that it is the cantons and their peoples who constitute the Swiss federation. Thus, the Swiss nation-state is a political, not a cultural, nation-state.[12]

The second characteristic of the Swiss nation-state is nation building from the bottom up, which respects regional and local autonomy. Initially, only a few powers, such as defence and foreign relations, were given to the federation. The cantons retained statehood and considerable political autonomy, based on their own constitutions, and defined their own powers, including taxation. Even today, any proposal for a new federal responsibility must be formally decided through a constitutional amendment, which needs the approval of the majority of the people, counted both nationally and within the cantons. This approach to nation building is characterized by non-centralization. Federalism within this context is a vertical power-sharing device.

The third characteristic of the Swiss nation-state is strong political participation by leaders and citizens of the cantons in federal decisions. Ivo Duchacek once observed that the "decisive participation" of constituent units in amending the federal constitution is one of the yardsticks of all federal systems.[13] Swiss federalism goes much farther. The Swiss cantons participate in many of the affairs of the federation, whether it be amending the Constitution, enacting new legislation, or conducting federal administration. To be valid, all decisions of Parliament need a majority in both houses. Similarly, all voting on popular initiatives or referenda on constitutional amendments require a majority of the cantons as well as of the people. Thus, most important federal decisions are the subject of a double decision rule, reflecting the democratic principle of "one person one vote" and the federal principle of "one vote for each member state".

The final characteristic of the Swiss nation-state is the proportionality of the representation of different political cultures. From the beginning, many federal institutions were designed to provide for the proportional representation of the different language and cultural groups of the cantonal peoples. Thus, the executive branch consists of a collegiate body of seven members who decide collectively on all important government matters. In order to integrate the different language regions, Parliament elects representatives from all of the three important regions of the country. Today, proportional representation of the different language groups is the practice, although not the law, in all branches of the federal sphere of government and at all levels of the federal administration.

The Swiss are proud of their political institutions. They sometimes idealize direct participation, power sharing, and federalism as delivering the best possible democracy, and they sometimes overestimate the advantages of local and cantonal autonomy. In doing this, they tend to overlook the fact that the Swiss welfare state, in this age of globalization, has undergone many forms of centralization. Some people make the criticism that, in these circumstances, federalism has become a myth. However, myths can be driving forces in history. In this sense, federalism is not only a functional institution for the Swiss but also one of the strongest symbolic values in the Swiss national culture.

FEDERAL INSTITUTIONS

The Federal Legislature

General According to the Swiss Constitution, the Federal Assembly (*Vereinigte Bundesversammlung*, or *l'Assemblée fédérale*) is the supreme power in the federation, subject only to the powers of the people (Article 148 B-V). The Assembly functions either as one united chamber or as two independent

chambers. It holds the legislative power to make all federal laws (with each chamber deciding independently) and appoints the members of the executive branch, the members of the Federal Court and other major federal bodies, and the commander-in-chief of the army in times of war (with the chambers deciding as a united body). Furthermore, the two chambers of Parliament, having exactly the same competences, supervise all the authorities of the Swiss federal government and approve the annual budget prepared by the Federal Council.

However, the political supremacy of the Swiss Parliament gradually diminished near the end of the nineteenth century – a process that culminated, at the latest, during the First World War. There are several reasons for the differences between theory and practice in relation to the power of the Federal Assembly.

The most important factor in the decline of Parliament is probably direct democracy as introduced in 1874. Referenda give the people the last word with regard to legislation. Through a popular initiative, the people can impose constitutional change. These political rights of the people substantially diminish the decision-making powers of both chambers of the legislature. In fact, a referendum presents a considerable risk that parliamentary decisions will be defeated by the people. Parliament tries to reduce this risk by taking decisions that do not depart too far from the status quo.

A second factor in the decline of Parliament is the development of the welfare state, in which executive decisions taken in the course of implementation are often more important than is the legislation itself. And a final factor concerns the primacy of the executive in foreign affairs. Against the background of an increasingly close link between foreign and domestic politics, the stance of the executive on foreign affairs increasingly constrains the decisions of Parliament.[14]

For these reasons one cannot really speak of parliamentary supremacy in practice; rather, there is in Switzerland a kind of equilibrium of power between the legislature, the executive, and the people that is similar to what one finds in some states in the United States.

As noted earlier, the Swiss Parliament consists of two equal chambers: the National Council (*Nationalrat,* or *Conseil national*) representing the people and the Council of the States (*Ständerat,* or *Conseil des États*) representing the cantons. This bicameralism reflects the equal importance of democratic and federal influences. Both chambers can initiate constitutional amendments and bills and propose the revision of laws. Every bill must be approved by a majority of both chambers. If a bill, or some of its propositions, fails to gain a majority in one of the chambers, the two chambers try to find a compromise through a procedure that, finally, involves negotiation between delegates of the two chambers in a joint committee.[15] In the absence of agreement, the bill does not get through.

The internal organization of both chambers is modelled on the concepts of power sharing and inclusion. For example, the members of all parliamentary committees proportionally represent the different language groups and parties. Even though there are some legal obligations, proportional representation in this context is less a formal norm than it is an informal and flexible political agreement among the main political forces. The main difference between the two chambers is the mode of election used, and this is described in the following sections.

National Council The National Council represents the people, and its 200 members are elected every four years on the democratic principle of one person, one vote. The National Council is elected from 26 districts, corresponding to the 26 cantons, and the seats are divided among the cantons according to their population shares. Each canton has at least one representative.

This logic has three consequences. First, the choice given to the electorate varies considerably between the small and large cantons. While the inhabitants of the canton of Appenzell Innerrhoden, with its some 15,000 inhabitants, elect only one parliamentarian, the canton of Zurich, with its more than one million people, sends 34 representatives to the National Council.

Second, the differences in the size of the population of the constituent units influence the operation of the electoral system of proportional representation. The proportionality rule, introduced in 1918 by a popular initiative, should offer a better chance to small parties in the segmented Swiss party system. However, while this objective is realized in the larger cantons such as Zurich, where a party can win a seat with less than 3 percent of the votes, in a small canton with, for instance, only two seats, the same party would need 34 percent of the votes in order to win a seat. In small cantons, therefore, the proportionality rule is very close to a winner-takes-all majority system in which smaller parties risk being left out.

Finally, as the cantons are the constituencies for the election, only candidates with sufficient cantonal support have a chance to be elected. Thus, even if the National Council formally represents the Swiss people as a whole, cantonal politics, cantonal interests, and cantonal parties have a strong impact on its composition and operation.

Council of the States The Council of the States is composed of two members from every full canton and one member from each half-canton, resulting in a total of 46 members. The members of the Council of the States are considered to be the representatives (or even delegates) of the once-sovereign cantons. Therefore, elections to the Council of the States are cantonal elections, and the cantons have the competence to determine the mode of election (in contrast, in this respect, to the Senate of the United States). Before direct elections became the rule after the Second World War, in

many cantons the two delegates to the Council of the States were nominated by the cantonal parliament. By now, however, the Council of the States is elected by the people in all cantons, usually following the principle of majority rule. This means that a candidate must gain the absolute majority of votes in order to win the seat.

The majority-election rule has two important consequences.[16] First, it demonstrates another effect of federalism as the small cantons with two seats are overrepresented in comparison to the larger cantons. Originally, this was meant to protect the interests of the small, Roman Catholic cantons, which feared a central state dominated by liberal, Protestant forces. Second, however, the composition of the Council of the States shows the effect of party strength. While the composition of the National Council reflects the proportional electoral strength of the different parties quite well, the distribution of seats in the Council of the States is usually biased. The major bourgeois parties are able to form a political coalition that gives them an absolute majority in almost every canton. The parties of the political left, on the other hand, which in most cantons get between 20 percent and 40 percent of the vote, lack the electoral potential to constitute a majority coalition. Therefore, the bourgeois parties dominate the Council of the States, while the left forces are underrepresented.

The question is whether these institutional differences have an influence on the practice of the two chambers. A survey of the members of Parliament[17] has concluded that the members of the Council of the States feel themselves primarily as representatives of the cantons, while the National Councillors see themselves as representatives of the people. Thus, subjectively, the differences between the two chambers are as intended by the Constitution. However, this is not borne out by their political behaviour. Of the decisions actually made by the two chambers, the National Council brings up as many federalism concerns as does the Council of the States, and the latter does not particularly insist on cantonal interests. On the basis of this comparison, the Council of the States is not the privileged arena for federal affairs.[18]

If the Council of the States does not really make a difference in legislation, one could ask whether it should be reformed or abandoned. Critics suggest that the members of the National Council are not in tune with the constituted bodies of their cantons. One way to strengthen the link between cantonal interests and federal politics would be through the device of dual mandates, making a member of each cantonal government a representative in the Council of the States at the same time. Another possibility would be the introduction of binding mandates.

Dual mandates are rare for two reasons, however. First, the responsibilities of the Council of the States have become more and more demanding in terms of time. Second, citizens have become suspicious of dual mandates. The legislation of some cantons now actually forbids accumulating political

power in this way. Nor do citizens tend to support the use of binding guidelines for politicians – or binding mandates, which are contrary to Swiss ideas of a free parliamentary mandate. In any event, in reality neither the existence nor the functions of the Council of the States are seriously questioned. Although the Council of the States may not serve as a "real" chamber of the cantons, its acceptance is unaffected, and it therefore plays an important symbolic role as a federal chamber.

There is a question whether this level of acceptance would continue if the Council of the States consistently took decisions in opposition to the National Council, thus blocking the legislative process. This is not so fanciful as, today, the differences in population shares and between the interests of the larger and the smaller cantons are much increased over what they used to be. If the small cantons, representing only one-fifth of the Swiss population, were to form a permanent majority, pressing their own interests, the legitimacy of their more-than-proportional representation in the Council of the States would probably be questioned. Hence, a rather cynical conclusion could be that the Council of the States owes its high level of acceptance not least to the fact that it is a federal chamber in the sense of symbolic representation rather than in the sense of real decision making.

The Federal Executive

General The Federal Council (*Bundesrat,* or *Conseil fédéral)* is elected by the Federal Assembly, the joint assembly of the 246 members of both houses of the federal Parliament. There is no vote of confidence, however, and members of the Federal Council are usually re-elected after the normal four-year period, if they so desire.

As a result, Switzerland fits neither of the ideal types of a presidential or a parliamentary system. Alois Riklin and Alois Ochsner[19] call Switzerland "non-parliamentary" (because the executive is not dependent on legislative confidence) and "non-presidential" (because there is no head of state elected directly by the people). Conversely, one can say that the Swiss Constitution represents a mixed type of democratic system showing elements of both parliamentary and presidential models. On one hand, the Swiss system shares the election mode with parliamentary systems, where the executive is elected by Parliament; on the other hand, once elected, the Federal Council is independent from the legislature, as in a presidential system.

The Federal Council is the supreme executive and governing authority (Article 174 V-G), with far-reaching constitutional powers. It defines the general aims and instruments of federal policy and plans and coordinates the corresponding activities. It determines foreign affairs and defence policy and directs the administration and the implementation of all federal policies. In relation to legislation, it organizes the pre-parliamentary process and makes subordinate legislation.

Constitution of the Federal Council Although the Federal Council is a collegial executive, each of the seven members is elected individually. After the parliamentary elections, which take place every four years, the councillors are each separately re-elected, requiring an absolute majority. Since 1959 the same four governmental parties of Radicals, Christian-Democrats, Social Democrats, and the People's Party have shared the seats on the Federal Council. The proportional representation of political parties overlaps with that of language. In order to integrate the different linguistic regions, Parliament elects representatives from all of the three important such regions of the country, normally allocating two or three seats to the French-speakers and Italian-speakers collectively.

Political power sharing in the executive is the result not of a constitutional requirement but, rather, of a political arrangement among the ruling parties. Initially, the Radicals established a one-party executive, but gradually the other parties became part of the government. This process was influenced by the mechanism of direct democracy. The participation of different political forces was needed to prevent Opposition-led referenda from systematically blocking federal decisions.

As a result of political power sharing, the proportional composition of the Federal Council did not change until decades after 1959. Individual members normally could be confident of re-election. In 1999 and 2003, however, the People's Party increased its percentage of votes substantially, growing from the smallest to the strongest of the four parties. Holding only one out of the seven seats, the People's Party claimed a second federal councillor. This claim gave rise to highly controversial discussions and was eventually accepted in 2003, at the expense of the Christian-Democrats.

Head of the State The most unusual characteristic of the Federal Council, as the Swiss executive, is that it is a collegial body, which decides collectively on all important issues. The seven members are elected as equals and without any attribution to a particular department. After their election, the members of the Federal Council decide on the (re)distribution of the departments. They state their preference in order of seniority; however, if there is a contest, the majority principle applies. There is no permanent head of government with special prerogatives. Every year Parliament elects one of the seven councillors as president of the federation. The president is merely *primus inter pares*, with no special political privileges and mainly formal duties. Essentially, the role of the president is to chair the meetings of the collegiate body. The Federal Council, as a collective body, is the Swiss head of state.

In fact, the diversity of Switzerland probably would not permit a head of state constituted by a single person. The Swiss system avoids the risk of concentrating power in the hands of a strong president, while the collegiate character of the Federal Council corresponds to the needs of a multicultural

society. Many observers note that, in consequence, there is little continuity of purpose and that government action very often lacks coherence.

Administration The Swiss federal administration is made up of seven departments, each headed by one of the federal councillors, in addition to a number of autonomous and semi-autonomous agencies. Concerning the scope of the federal administration, several points must be mentioned here.

The first is that, as the Swiss nation-state was built in the course of the nineteenth century, little attention was paid to the federal administration. Consistently, with the pattern of development from the bottom up, the cantons were designated to implement federal policies – a solution that allowed differences in implementation, reflecting cantonal concerns. Thus, the founders of the federation believed that there was no need for a special federal administration. Until the Second World War the federal administration was very small.

Events of the past 50 years, however, have increased both the influence and the size of the federal administration. With the development of the welfare state, the formulation of new policies and proposed legislation has become more complex. Having its own interest in the reform process, and using its particular expertise and resources, the administration defines priorities and options and also influences the choice of policies. Political scientists speak of the appearance of a "political administration" that not only implements the decisions of Parliament but that has also become a political actor. The role of the administration in the legislative process has been further strengthened, moreover, by the formalization of the pre-parliamentary process. The federal administration organizes this process. It proposes the participants for appointment to the expert committees that advise the Federal Council on many aspects of its activities, directs the hearings, and prepares the draft legislation on behalf of the executive for submission to Parliament. Finally, legislation itself often provides general rules in the nature of guidelines, leaving the details open to specification during implementation. Discretion in the course of implementation not only serves the autonomy of the cantons but can also be used by the federal administration in enacting ordinances.

The federal administration has experienced less growth than have the cantonal and communal administrations. Its importance as an actor that influences policy at different stages, however, is not primarily a question of numbers but, rather, a consequence of the growing complexity of government and of the processes of centralization and internationalization.

Given the greater political role of the administration, it is not surprising to find that political criteria also play an increasingly important role in selecting people for administrative positions. The principle of equal treatment of the four official languages is particularly relevant. Most federal departments

are subject to an agreement that provides for the proportional representation of ethnolinguistic groups in their organization, both quantitatively (i.e., the number of employees from each ethnolinguistic group) and qualitatively (i.e., the type of employment). This means that proportional representation must be respected at all levels in order to grant the linguistic minorities access to significant positions. In consequence, over the last 30 years the share of Italian-speakers in the top management of the federal administration has more than doubled. A similar phenomenon can be observed in relation to the expert committees, where the share of positions held by the French- and Italian-speaking minorities has also grown.

Other institutions This section deals with three other institutions that affect the operation of government in the federal sphere in Switzerland. The first concerns the historically important concept of "public service" and how it applies to the federal sphere. The concept implies that a supply of primary infrastructure and of good-quality services should be available at an appropriate price for the whole population – in all regions and on the same conditions. This idea has been central to Swiss federalism for many decades. As a result, communities in remote areas have also profited from the equal availability of postal services, public transport, roads and highways, telecommunications, and energy. The contemporary trend towards liberalization and privatization of government services, however, places a higher value on economic efficiency than it does on equality of access to public goods. Thus, privatization and the rationalization of public services have become a crucial issue and have given rise to contradictory tendencies. On one hand, remote and rarely used postal service offices or railway stations have been closed; on the other hand, decentralization of the federal administration has continued, in the sense that some federal offices have moved from the capital, Bern, to cities in other regions.

The second point concerns the party system in Switzerland. Like the Swiss nation-state itself, the Swiss party system developed from the bottom up. At the beginning of the nineteenth century, political parties originated in the communes and cantons before they coalesced around 1900 in national parties.[20] Even today, political parties are organized in a federal manner, with every party having national, cantonal and communal organizations. The party system follows the logic of the decentralized political system in such a way that the lower levels can always exert substantial influence on the upper levels. Thus, even though the Swiss parties are national, their structure, their decentralized configuration of power, and the differences between the cantonal parties are endemic to the political system and have persisted.

In the communes and cantons the parties are important for recruiting political personnel. As a result of the decentralized structure of the party

system, the members belong to the cantonal party first and to the national party second. In addition, elections to the federal Parliament are cantonal elections in the sense that it is the cantonal parties that nominate the candidates. Political careers normally start in the communes or cantons. Thus, success within the party at a subnational level is essential for candidates who want to climb the ladder to a further career, including political office in the federal legislature or the federal government.

One final institution that requires mention in this context is the national bank. The bank is largely independent of politics in Switzerland. Nevertheless, both the establishment and the structure of the bank have been shaped by federalism. The federation had no competence in the area of monetary policy until the end of the nineteenth century. While most other industrialized countries accepted the need for a central bank, the idea went against federalist tradition in Switzerland. A proposal for the establishment of such a bank was rejected in a popular vote in 1897; finally, however, the Swiss national bank was founded in 1907. Its structure continues to reflect federalist ideas, with the cantons holding shares in it. Together with the cantonal banks and other public institutions, they constitute a majority in its general assembly. At least two-thirds of the profits made by the bank go to the cantons.

The Federal Judicature

The federal structure of Switzerland is also reflected in a dual judicial system, with the Federal Court (*Bundesgericht*, or *Tribunal fédéral)* in the national sphere and 26 cantonal court systems. The Federal Court is primarily the appellate court for matters of federal law. In addition, it functions as a constitutional court to protect the federal Constitution against the cantons. Thus, it can engage with cantonal law but only to the extent necessary to decide whether federal law, due process of law, and the human rights laid down in the Constitution have been respected. In an overwhelming majority of cases, the Federal Court confirms cantonal judgments.

The function of the Federal Court should not be underestimated. While the federal executive and legislative branches have neither the legal nor the political means to force the cantons to implement federal tasks, the Federal Court can compensate for this in several ways. In particular, it can review a cantonal policy or the cantonal implementation of a federal task on the grounds that it contradicts federal law. As a result, it is sometimes necessary for the court to deal with political rather than with strictly legal questions (e.g., such highly controversial matters as naturalization policy).

The following decision of the Federal Court illustrates the point.[21] Some communes followed the practice of deciding on each individual application for Swiss citizenship by a popular vote. In 2003 the Federal Court accepted

the complaint of a number of citizenship candidates who claimed that this procedure was unconstitutional. The Federal Court reasoned that such decisions have to be substantially justified, which is not possible in a popular vote at the polls. Generally, judgments about fundamental rights and principles of law are relatively uncontested. However, this case not only affected individual rights but also interfered with democratic rights and the right to self-determination of peoples. As a result, the decision attracted vehement reactions, and there was intense political discussion concerning the relationship between fundamental rights, federalism, and direct democracy.

As the supreme authority interpreting the Constitution, the Federal Court and its decisions have an integrating effect in that they lead to a certain amount of homogenization between the cantons. Nevertheless, the Federal Court cannot declare acts of the Federal Council or the Federal Assembly invalid on constitutional or legal grounds. As mentioned in the introduction, final authority lies with the people and is to be exercised in relation to legislation through the mechanisms of direct democracy. In the view of the Swiss, a law that has been accepted by the people either directly in a popular vote or indirectly by refraining from a referendum vote should not be corrected by judicial review.

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

General

The ample political autonomy of the constituent units is best illustrated by the fact that the cantons have their own constitutions. Cantonal constitutions are restricted only by requirements prescribed in the federal Constitution to respect principles of democracy and to guarantee fundamental rights and the rule of law. To this end, cantonal constitutions and any changes to them must be approved by the federal Parliament. The cantons have both their own political organization and their own political authorities. They also have their own tax resources.[22] Thus they are guaranteed ample autonomy in legislation, in implementing their own policy preferences in relation to public goods and services, and in financial matters. As a result, the cantons differ substantially in most aspects of their internal structure, ranging from the extent of direct democracy and the degree of autonomy of the municipalities to the procedures for selecting judges.

Legislatures

The most important difference between the federal and cantonal legislatures is that cantonal legislatures have only one chamber of parliament.

Consistent with the federal principle, most of the cantons are very decentralized (*Gemeindeautonomie*), which makes for a three-level system in which the lower levels, when compared to the upper level, have substantial autonomy. As a result of the degree of cantonal autonomy, the size and other features of the parliaments of the cantons vary considerably. Thus, the number of seats in cantonal parliaments ranges from 46 in Appenzell Inner Rhodes to 200 in Bern and Argovia. As a corollary, the number of inhabitants per parliamentary seat also varies considerably from, for example, 6,000 in Zurich to 325 in Appenzell Inner Rhodes.

As in the federal sphere, so in the cantonal sphere proportional representation is used for election to the cantonal parliament.[23] However, in many cantons the electoral districts are small, with only a few seats to be assigned. On one hand, this protects regional minorities. For instance, in Grisons a high number of electoral districts ensures the proportional representation of the territorially segmented Italian- and Romansch-speaking minorities. On the other hand, in small electoral districts the proportional representation of political parties is more compromised. In half of the cantonal electoral districts more than 10 percent (or even 20 percent) of the vote is necessary in order to win a seat, making electoral success difficult for smaller parties.[24]

Political Executive

Generally, cantonal executives are structured in a manner similar to the federal executive. The executive in each canton is a collegial body consisting of representatives of the most important political parties. Each of the five to seven executive members leads one or several departments of the cantonal administration. The number of departments varies among the cantons between five and fourteen. In all the cantons one member of the executive acts as chairperson; this presidency changes every year. The chairperson presides over the meetings of the collegial body but has no particular prerogatives other than to assume the representation of the canton.

The most important difference between the federal and the cantonal executives is the mode of election. While the Federal Council is elected by Parliament, cantonal executives are elected by the people, and majority rule is applied in most of the cantons.[25] A candidate must win an absolute majority in the first ballot in order to be elected; in the event of a second ballot, a relative majority is sufficient. In practice, the majority rule is supplemented by the idea of “voluntary proportionality.” This is a political arrangement between the parties to mutually respect a proportional share of the government seats. Although majority rule is formally applied for the elections, the strongest parties offer only a limited number of candidates, thus leaving some seats to the other parties. This leads to a collegial body

in which all bigger parties are included in the executive in proportion to their share of the votes. Such agreements among political parties have two objectives: (1) they reduce the risk for each party of their favourite candidate not being elected, and (2) they enhance the legitimacy of cantonal governments, which thus stand a better chance of preserving their legislative projects in the face of a popular vote.

Constitutional rules protect specific minorities in some cantons. For instance, in Berne one seat is reserved for the French-speaking Jura minority, and in Valais at least one seat is granted for the three German-speaking districts.[26]

Due to the fact that the executive and legislative branches are elected independently of each other, the independence of the executive branch of the cantons vis-à-vis cantonal parliaments is even more pronounced than is the case in the federal sphere. Thus, following Arend Lijphart,[27] cantonal political systems are also types of mixed democracies. In contrast to the federation, however, they manifest two important elements of a presidential system: direct election by the people and executive independence from Parliament. With the exception of the very small cantons, the presidents of the governments are not elected by the people but, as is the case with the federal government, by Parliament and by strict rotation.

Direct Democracy

Another important difference between the federal and the cantonal political systems is the extended use of direct democracy in the cantons. While the design of the instruments of direct democracy varies substantially among the cantons, there are three general points of contrast with the federal sphere that influence the functions of both Parliament and the executive branch.

First, contrary to the federal arrangement, the popular initiative in the cantons is applied not only for constitutional amendments but also for modifications of ordinary law. Second, in many cantons the referendum is used to challenge both general laws and individual parliamentary decisions (e.g., a particular financial resolution involving high costs). Finally, in some cantons the people can theoretically recall the government and/or the parliament. This option was used very rarely in the nineteenth century and always failed in the popular vote (e.g., in 1852 in Berne). In the twentieth century no examples are known; therefore, in practice, the instrument no longer exists.

Administration

Most federal policies are implemented by the cantons and the communes. No parallel federal administration with its own regional services, agencies,

or courts has been established. This form of cooperation between the federation and the cantons is controversial. In the past, federal legislation was of a rather general nature, leaving considerable room for cantonal implementation. Today, when uniform implementation is required, federal legislation is more detailed, and cantonal actors have to report to federal authorities on its implementation. Nevertheless, cantons typically take the view that their autonomy is endangered if federal legislation is too detailed, giving them no leeway in implementation and, thus, leading to informal centralization. They regard the margin within which they implement federal legislation as an expression of political autonomy – something that ensures their quasi-statehood. Cantons consider the right to be different as a central element of federalism. For these reasons, the cantons want the federal government to enact minimal standards and goals but not the detailed procedures prescribing the means by which these goals are to be reached.

Judicature

The cantons are free to organize their own judicial system. There is no central influence or control on the structure of the judicature and appointments to the courts.[28] Hence, judicial organization varies considerably among the cantons. For instance, in some cantons the people elect the judges; in other cantons the judges are appointed by the parliament, the superior court, or the government. While the number of judges in the cantonal courts varies substantially between the cantons, the period of office typically lasts from two to six years. In recent decades the most important development has been the creation of administrative courts. Review of the legality of administrative action has increasingly been moved from the executive branch to administrative courts in order to increase the judicature's independence from politics.

All cantonal legal systems are multilevel systems, leading ultimately to the Federal Court, which acts as the last national appellate instance on most issues. Every canton is divided into regional court districts integrating a group of communes. Furthermore, in most of the cantons, each commune elects one or several magistrates to deal with minor local conflicts.

LOCAL GOVERNMENT

Much of what has been said about the cantons applies also to the 2,867 communes.[29] Communes have been guaranteed autonomy in the federal Constitution since the revision of 1999 (Article 50).[30] No commune can be merged with another against its political will. Communes have their own political organization and their own policies with regard to the production and

distribution of local public goods. Most important, they have a large degree of autonomy with regard to questions of local taxes and financial policy generally. There are some variations in the degree of autonomy, depending on cantonal law.

There are two basic models of political organization that apply in the communes, according to their size. In larger communities, the institutional structure is quite similar to that of the cantons: the people elect a communal parliament and a collegiate body as the executive.[31] Decision making and legislative processes are complemented by instruments of direct democracy, both referenda and popular initiatives. As in the federal sphere, the collegial body normally represents an oversized coalition of several political parties, which leads to power sharing in the communes. In bigger communes, the members of the council are full-time professionals and have a professional administration at hand.

In small communes the political organization is mainly non-professional. The administration relies partly or entirely on the service of volunteers. The same can be said for the executive body, which is also a collegial council. Its members fulfill their tasks mainly on a part-time basis and, generally, are not paid for this work. In these small communes a type of "assembly democracy" is practised. Instead of a parliament, all Swiss citizens of a commune participate in a general assembly. This assembly meets once or twice a year to decide on the budget and on the most important issues.

INTERGOVERNMENTAL RELATIONS

In the middle of the nineteenth century divisions between federalist and anti-federalist forces led to a clear distinction and division of power between the federation and the cantons. This concept, however, has subsequently been altered through intensive cooperation between the three spheres of the federal system.

At the core of Swiss cooperative federalism are equalization policies for the different cantons and their regions, following the idea of a commonwealth of all regions and of mutuality.[32] Institutionally, this approach involves different levels of government cooperating in the same policy program. An example is social policy, in which parts of the social security system are national while other parts are local.[33] In many policy fields the federation is responsible for the general legislation while cantons and communes are in charge of special legislation and implementation.

Cooperative federalism has given rise to a broad system of financial compensation between the federation, the cantons, and the communes, which comprises revenue-sharing as well as financial compensation through block grants and subsidies.[34] These arrangements serve to adjust differences in financial revenue and expenditure between rich and poor cantons or

communes, or to pay the bigger cantons for the services they provide for smaller cantons (which the latter do not provide for themselves).

In addition to these vertical intergovernmental arrangements, there are a number of horizontal instruments of cooperative federalism that enable the cantons to take collective action without the involvement of the federation. One can distinguish two types: intercantonal organizations and agencies and concordats representing a form of contractual cooperation.

The traditional instruments of horizontal cooperative federalism are the concordats: intercantonal treaties functioning as instruments of regional cooperation. Concordats allow subnational units to regulate administrative, legislative, and judicial matters among themselves. However, the instrument has significant limitations. Concordats are most effective if all cantons subscribe, but it is difficult to achieve unanimity. For example, for a long time a concordat was unable to overcome the traditional particularity of half of the cantons starting the school year in spring and the other half starting in autumn. Nevertheless, the instrument of the concordat can serve the needs of cooperation. The cantons are typically driven by the same continuing interest of defending their own competences and of discouraging federal government regulation.

Intercantonal organizations and agencies play an important role as consultative institutions. They provide a forum to share experiences and to coordinate tasks between cantonal politicians and officials. Even 20 years ago one could find more than 500 intercantonal organizations, with the Conference of Cantonal Ministers traditionally being the most influential.[35] In the last ten years the Conference of the Cantonal Executives (*Konferenz der Kantonsregierungen* or *Conférence des gouvernements cantonaux*) has been established as yet another organization. It can be understood as an attempt on the part of the cantons to extend their direct influence over the federation, especially in the field of foreign policy, and to ensure a collective and coordinated definition of problems. In the 1990s, when questions of Switzerland's relations to the European Union were a permanent and salient political issue, the cantons significantly increased their influence in foreign policy. Today, this body has not only become a successful lobby group for the cantons but is also an important dialogue partner of the federal government. The conference has certainly strengthened the voice of the cantons, but only in areas of common cantonal interest and then only if they are sufficiently in agreement to speak with one voice.

As the conference cannot issue binding guidelines but only recommendations, it relies on consensus among the cantons and their willingness to take action. This happened, for example, in relation to the reform of the tax system in 2003, when the cantons feared they would lose an important part of their tax revenues. The conference mobilized against the changes. For the first time in history, eleven cantonal parliaments decided to use the

possibility of a cantonal referendum to enforce a popular vote. Supported by considerable resistance from other sources, it resulted in a clear majority of the population rejecting the reform and thus helped to put the cantons' claim through.

Locally, one finds a similar pattern of collaboration. Communes organize themselves to decide or to implement policies on a regional basis. Their principal motive is similar: communes prefer to coordinate among themselves rather than to delegate competences to the canton.

Both the traditional form of horizontal cooperation in concordats and such newer forms of collaboration as the Conference of the Cantonal Executives are sometimes criticized on the ground of legitimacy. They are based on collaboration between executives, and cantonal legislatures, representing the people, are not participants. This becomes especially problematic if cooperative arrangements have a substantive effect on the decisions that are made, as is the case with the Conference of Cantonal Executives. However, conference decisions only have the status of recommendations and are not binding. Hence, formally at least, parliamentary supremacy is not at risk. Final legislative decisions remain in the hands of the cantonal parliaments.

Yet there is a consensus that the participation of parliaments in the processes of intergovernmental relations should be strengthened because intercantonal cooperation, be it in the form of concordats or intercantonal agencies, is increasingly being used in an ever-widening range of fields. Intercantonal cooperation among parliaments is therefore an important issue on the federalist agenda. The first attempts to involve the parliaments in intercantonal cooperation have been made in the French-speaking cantons. In these six cantons there now are joint meetings of the parliaments in order to discuss general questions arising from specific concordats. These arrangements are rather cumbersome, however, and are criticized for not being very effective.

ANALYSIS AND CONCLUSIONS

Constitutional framework

Daniel J. Elazar once said: "Federalism is not only a structure but also a process and a culture."[36] This is true of Swiss federalism. On one hand, federalism is firmly anchored in the Swiss Constitution, which sets out basic characteristics that have not changed. Two, in particular, should be mentioned: first, the Constitution guarantees utmost autonomy for the cantons, which retain their right to be different and which participate strongly in the decision making of the federal state; second, Swiss political institutions continue to combine the two modes of decision making – "one person, one

vote" and an "equal vote for every subnational unit." As a result, the small cantons have a disproportionately large influence. On the other hand, Swiss federalism has processes and cultures that go beyond constitutional law. These might be summarized as follows:

Power sharing: Institutionally, federalism is linked to a wider system of power sharing. Federalism is part of the model of "consensus democracy," which can deal better with the conflicts of a mainly territorially segmented or multicultural society than can other modes of governance.

Non-centralization of powers: The different preferences of the cantons forbid strong processes of centralization. In this first decade of the twenty-first century the federal government controls only about 30 percent of the entire public budget. Cantonal politicians are eager to have their say in federal decision-making processes.

Vertical division of powers: In the nineteenth century federalism was a political compromise that allowed Swiss nation building, despite the strong opposition of rural and Roman Catholic forces. While cultural cleavages have become less important, the autonomy of the cantons has remained an essential element of the political culture. Cantons want to be different; they defend their powers; and they reject the idea of a strong federal government. Thus federalism has kept its significance as an instrument for the vertical division of powers.

Solidarity: A second element of political culture is solidarity and cooperation between the cantons. A complex system of horizontal and vertical financial equalization is designed to compensate for economic inequalities between rich and poor regions. This is the antithesis of economic federalism, which aims to encourage competition between subnational governments.

Swiss federalism is therefore an example of a complex combination of shifting elements: formal and informal, legal and political, and last, but not least, culture and history.

Challenges

There are (at least) three sets of challenges for the future of the institutional arrangements for federalism in Switzerland. The first concerns cantonal autonomy and decentralization. Clearly, in the Swiss context, both offer some important advantages. Most obviously, they allow for regional solutions, responding to specific cantonal interests and concerns. Cantonal and local governments are closer to the people than is the federal government and are therefore more responsive to the preferences of the regional people. This is especially true under a regime of direct democracy, which allows citizens to express their preferences in cantonal and local legislation. Also, the governments of the different spheres can learn from each other.

As new tasks for government emerge, for example, some cantons play a pioneer role. A process of trial and error takes place, the best practice is developed, and finally the other cantons (and probably even the federal government) share the experience produced by the pioneers. In addition, as the federation depends on the willingness of the cantons to implement policy, the voice of the cantons carries weight in the federal legislative process. Thus, decisions in Switzerland are always the result of a compromise and of cooperation not only between the political parties but also between the different cantonal preferences. Cantonal autonomy also allows for cultural difference and diversity of political preferences. The logic of Swiss federalism is as follows: if there are no uniform preferences, then it simply does not make sense to centralize. Federalism, however, has to accept the political differences and the costs associated with them. The rationale for the system is not economic (with an emphasis on efficiency) but political (with an emphasis on understanding federalism as a political project).

However, if federalism is judged from an economic rather than from a political point of view, Switzerland's extensive decentralization may be considered inefficient in that it produces fragmented solutions, with every canton (or even commune) having costly differences in its own system of public services. Examples can be found in the areas of environment, traffic, and employment, where it does not make sense for every canton to implement its own policies. Thus, the opportunity to live differently can result in a lack of coordination and the rejection of necessary centralization.[37] In recent years some experts have proposed reducing the number of cantons from 26 to seven. However, the defeat of an official project to merge the two cantons of Geneva and Vaud shows that, at the moment, such a revolutionary idea has no political prospects. Other experts pretend that the major problem is not, in fact, the number of cantons and their differences but, rather, the unequal size of the cantons. Thus, some of the cantons or communes do not have enough resources and capacities to deliver technically complex services. Practice shows that they buy these from stronger or bigger cantons. However, the difficulty with this solution is that, at least in this case, the small cantons can no longer live up to their political autonomy.

Another challenge for the future concerns the potential for small minorities to block federal decision making. While, thanks to mutual learning processes, innovation on the part of the cantons is effective, innovation on the part of the federal government is sometimes difficult. As a federal policy can always be challenged by a referendum, an acceptable compromise with the people and the cantons must be found. To this end, direct democracy and federalist institutions provide strong veto points in the decision-making processes of the federation. As a result, decisions close to the status quo are favoured. In the worst case scenario, there is no decision at all.

A current topic of political discussion can be understood within the context of this last point. It involves the question of whether the powerful position of the small cantons in popular votes, with its need for a double majority, should be reduced or even eliminated. Indeed, in a popular vote, where the double majority rule is mandatory, the federalist principle of "every canton carries the same weight" can contradict the democratic principle of "one person, one vote." Theoretically, against the wishes of an 89 percent democratic majority, a small "federalist" majority of 11 percent of the Swiss people can block a constitutional amendment. There have been only six cases during the last 20 years in which a cantonal majority has overruled a popular majority, and so this is far from being the rule in practice. Nevertheless, in such a case, one citizen from Uri may outweigh more than 30 citizens from Zurich to achieve a majority of the cantons. Yet a reform that involved cutting back the disproportionate influence of the small cantons would most probably be defeated by the opposition of those small cantons. This example illustrates that it is easier to grant minorities institutional privileges than to take them back. Federalization, in this respect, is a one-way street.

Conversely, the urban regions generally and the cities in particular are in a rather weak position within the federal system. Although many problems of the economically important urban regions are salient, these regions, in contrast to the periphery, lack an institutionalized voice. Within this context, initiatives to enable better coordination between the cities, in order to extend their influence, need to be progressively developed.

The final challenge concerns the relationship between the federation and the cantons. Historically, there was a clear division of powers between the federation and the cantons. Today, the complexity of modern infrastructure, society, and the economy makes it necessary to cooperate. Most federal legislation is implemented by the cantons, accompanied by extensive financial arrangements and revenue sharing. This cooperation, however, is not free from problems. On one hand, one can argue that the implementation of federal tasks increases the political influence and weight of the cantons; on the other hand, cantons feel that their autonomy is in danger if federal legislation becomes too detailed, giving them no leeway and thus leading to informal centralization. The cantons are sceptical of uniform policies: it was the possibility of living differently from each other that led to the success of the federalist solution.

In conclusion, 150 years ago the new Swiss federalist structure was a political compromise between the progressive, mostly Protestant radicals who wanted a strong nation-state and the rural, mostly Roman Catholic conservatives who wanted no federation. Federalism was, therefore, a key to nation building and to the development of a Swiss identity. Meanwhile, Switzerland has developed into a modern society in which most historical conflicts have

vanished. But still, the peoples in the cantons want to be different from each other. Cantonal autonomy and self-determination are highly praised values. This is much more important than is the fact that some federalist structures and procedures have severe shortcomings. In this sense, symbolic and integrating values are strong barriers to institutional reforms, even though the latter would make sense from a rational point of view.

NOTES

1 <http://www.cia.gov/cia/publications/factbook/geos/sz.html#Econ>, viewed 17 December 2005.

2 The 26th canton, Jura, was founded in 1978, when the fight for the separation and autonomy of the northern part of the second largest canton, Bern, ended in the creation of a new canton. There are now 22 full cantons and six so-called half-cantons. The half-cantons are Basel Stadt, Basel Land, Appenzell Ausserhoden, Appenzell Innerhoden, Obwalden, and Nidwalden. They are historically peculiar in two relevant respects. Their votes count only as a half in calculating the cantonal votations in federal referenda, and they each have only one delegate in the Council of States.

3 For further discussion of Swiss federalism, compare Nicolas Schmitt, "Swiss Confederation," *Constitutional Origins, Structure, and Change in Federal Countries*, ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 348–380; Thomas Fleiner, "Swiss Confederation," *Distribution of Powers and Responsibilities in Federal Countries*, ed. Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown (Montreal and Kingston: McGill-Queen's University Press, 2005), 266–294; and Daniel J. Elazar, ed., "Federalism in Switzerland," *Publius: The Journal of Federalism* 23 (Spring 1993): entire issue.

4 As the word "confederation" in the international use denotes a loose system of independent states, the official title of Switzerland, "Swiss Confederation," is not exactly correct. In this chapter we therefore use the term "Swiss Federation."

5 While the Canton of Basel-Town in 2000 had a national income of CHF 88,477 per capita, the national income of the Canton Obwalden only equalled CHF 32,872 per capita: Swiss Federal Statistical Office, *Statistical Yearbook of Switzerland* (Zürich: NZZ Verlag, 2003), 249.

6 Ulrich Klöti, "The Government," *Handbook of Swiss Politics*, ed. Ulrich Klöti, Peter Knoepfel, Hanspeter Kriesi, Wolf Linder, and Yannis Papadopoulos (Zürich: NZZ Verlag, 2004), 152.

7 The six half-cantons that for historical reasons have one representative only are an exception.

8 If the total resident population, including foreigners, is considered, the percentages change slightly: 65 percent German, 20 percent French, 6 percent Italian, and 0.5 percent Romansch.

9 Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, 2nd ed. (Houndmills/Basingstoke/Hampshire/New York: Palgrave Macmillan, 2002), 19–21.

10 The success of federalism in solving the minority conflicts depends largely on the fact that the minorities are mainly territorially segmented in Switzerland. Federalism is not a solution for all minorities – only for territorially concentrated minorities that are able to constitute a political majority in a subnational unit. See also Yannis Papadopoulos, "Connecting Minorities to the Swiss Federal System: A Frozen Conception of Representation and the Problem of 'Requisite Majority,'" *Publius: The Journal of Federalism* 32 (Summer 2004): 47–65.

11 Wolf Linder, "Federalism: The Case of Switzerland," *Decentralization and Power Shift*, ed., Alexander B. Brillantes, Simeon A. Ilago, Eden B. Santiago, and Bootes P. Esden (UN Development Programme Philippines, 2003). The modern function of these principles is discussed in Thomas Fleiner, Walter Kälin, Wolf Linder, and Cheryl Saunders, "Federalism, Decentralisation and Conflict Management in Multicultural Societies," *Federalism in a Changing World: Learning from Each Other,* ed. Raoul Blindenbacher and Arnold Koller (Montreal and Kingston: McGill-Queen's University Press, 2003), 197–215.

12 Cultural nations comprise people of a specific origin, history, religion, or language. The classification is based on hope in the integrating effect of a common history, origin, or ethnicity. This idea of a nation-state made of "one language, one culture, one religion" largely influenced nation building in France, Italy, and Germany during the nineteenth century. In contrast, a political nation is defined as one in which all the people are citizens, irrespective of language, origin, and the like. In this case, the founders of the Constitution hope that the polity will have an integrating effect. See Urs Altermatt, das Fanal von Sarajevo, *Ethnonationalismus in Europa* (Zürich: Neue Zürcher Zeitung, 1996), 29–34.

13 Ivo D. Duchacek, "Consociational Cradle of Federalism," *Publius: The Journal of Federalism* 15 (Spring 1985): 44.

14 Interestingly, the cantons also have a right to foreign relations within their sphere of power. Similar observations can be made about the relations between cantonal parliaments and executives in these cases.

15 If one chamber proposes changes to a bill, it is sent back to the other chamber before being returned to the first chamber. If the differences still remain after this second round of discussion, the chambers appoint delegates to a joint committee, or *Einigungskonferenz,* which tries to find a common solution.

16 Wolf Linder, *Schweizerische Demokratie. Institutionen – Prozesse – Perspektiven, 2. Auflage* (Bern/Stuttgart/Wien: Paul Haupt, 2005), 202–203.

17 Annina Jegher, *Der Einfluss von institutionellen, entscheidungspolitischen und inhaltlichen Faktoren auf die Gesetzgebungstätigkeit der Schweizer Bundesversammlung* (Bern: Paul Haupt, 1999).

18 Reto Wiesli and Wolf Linder, *Repräsentation, Artikulation und Durchsetzung kantonaler Interessen in Stände- und Nationalrat,* Studie im Auftrag der Parlamentsdienste (Bern: Institut für Politikwissenschaft, 2000).

19 Alois Riklin and Alois Ochsner, "Parlament," *Handbuch Politisches System der Schweiz,* ed. Ulrich Klöti (Bern: Haupt, II, 1984), 79.
20 Andreas Ladner, "The Political Parties and the Party System," *Handbook of Swiss Politics,* ed. Ulrich Klöti, Peter Knoepfel, Hanspeter Kriesi, Wolf Linder, and Yannis Papadopoulos (Zürich: NZZ, 2004), 210–211.
21 cf. BGE 129|217 and BGE 129|217.
22 Actually, direct taxes in Switzerland are mostly cantonal and local, while indirect taxes (VAT) are federal.
23 The exceptions are the cantons of Appenzell Inner Rhodes and the Grisons, which still apply the winner-takes-all rule to elect representatives.
24 Adrian Vatter, *Kantonale Demokratien im Vergleich: Entstehungsgründe, Interaktionen und Wirkungen politischer Institutionen in den Schweizer Kantonen* (Opladen: Leske and Budrich, 2002), 121.
25 The exceptions are the cantons of Ticino and Zug, where the proportional rule has been applied since the nineteenth century.
26 Georg Lutz and Dirk Strohmann, *Wahl- und Abstimmungsrecht in den Kantonen* (Bern/Stuttgart/Wien: Paul Haupt, 1998), 27.
27 Arend Lijphart, ed., *Parliamentary versus Presidential Government* (Oxford: Oxford University Press, 1992).
28 Exceptions are some specialized administrative tribunals (e.g., for rents) for which some central influence exists.
29 Andreas Ladner, "Die Schweizer Gemeinden im Wandel: Konvergenz oder Divergenz?" *Swiss Political Science Review* 9 (Spring 2003): 233–259.
30 Until 1999 the communes were not mentioned in the Constitution, but the Federal Court protected their autonomy in the manner of a fundamental right.
31 The canton of Neuchâtel, where the communal parliament appoints the executive council, is an exception.
32 Linder, *Swiss Democracy,* 62.
33 Provisions for retirement are an example. The federal old-age insurance scheme provides a basic pension for everybody who has contributed to it. However, if a retired citizen is too poor to live on the federal allowance, she or he may get additional grants from the canton, or even national assistance, which is in the competence of the communes.
34 Linder, *Swiss Democracy,* 54–55, 62.
35 Max Frenkel, "Interkantonale Institutionen und Politikbereiche," *Handbuch Politisches System Schweiz. Band 3: Föderalismus,* ed. Raimund E. Germann and Ernest Weibel (Bern: Paul Haupt, 1986), 330.
36 Daniel J. Elazar, "Federalism and Consociational Regimes," *Publius: The Journal of Federalism* 15 (Spring 1985): 22.
37 Linder, *Swiss Democracy,* 158.

United States of America

C A N A D A

WA OR CA ID NV MT WY UT AZ CO NM ND SD NE KS OK TX MN IA MO AR LA WI IL MI IN OH KY TN MS AL GA FL SC NC VA WV PA NY VT NH ME MA CT RI NJ DE MD

Washington, DC

Atlantic Ocean

Pacific Ocean

MEXICO

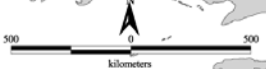
Gulf of Mexico

CUBA

Capital: Washington, DC
Population: 290,8 Million
(2003 est.)

(sources: CIA World Factbook; ESRI Ltd.; Times Atlas of the World)

Insets not shown to scale



AL	ALABAMA
AK	ALASKA
AZ	ARIZONA
AR	ARKANSAS
CA	CALIFORNIA
CO	COLORADO
CT	CONNECTICUT
DE	DELAWARE
DC	DIST. OF COLUMBIA
FL	FLORIDA
GA	GEORGIA
HI	HAWAII
ID	IDAHO
IL	ILLINOIS
IN	INDIANA
IA	IOWA
KS	KANSAS
KY	KENTUCKY
LA	LOUISIANA
ME	MAINE
MD	MARYLAND
MA	MASSACHUSETTS
MI	MICHIGAN
MN	MINNESOTA
MS	MISSISSIPPI
MO	MISSOURI
MT	MONTANA
NE	NEBRASKA
NV	NEVADA
NH	NEW HAMPSHIRE
NJ	NEW JERSEY
NM	NEW MEXICO
NY	NEW YORK
NC	NORTH CAROLINA
ND	NORTH DAKOTA
OH	OHIO
OK	OKLAHOMA
OR	OREGON
PA	PENNSYLVANIA
RI	RHODE ISLAND
SC	SOUTH CAROLINA
SD	SOUTH DAKOTA
TN	TENNESSEE
TX	TEXAS
UT	UTAH
VT	VERMONT
VA	VIRGINIA
WA	WASHINGTON
WV	WEST VIRGINIA
WI	WISCONSIN
WY	WYOMING

Not shown: American Samoa, Baker I., Guam, Howland I., Jarvis I., Johnston Atoll, Kingman Reef, Midway, Navassa I., N.Mariana I., Palmyra Atoll, Puerto Rico, Virgin I., Wake I.

United States of America

JOHN DINAN

The United States comprises 50 states, encompassing 9,631,418 square kilometres of territory and a population of 293 million people.[1] It is thus much larger and more populous than it was when the federal Constitution was drafted in 1787. Nevertheless, it makes sense to begin an analysis of the U.S. federal system with its origin, before tracing its development during the intervening 220 years.[2]

Delegates to the federal convention of 1787 generally concurred about the wisdom of establishing a more powerful federal government than the one established under the Articles of Confederation (1781), but they were equally firm in opposing a unitary government. The economies and political cultures of the Confederation's thirteen member-states were sufficiently diverse that it would have been impossible, much less advisable, to place them under a unitary government. It was difficult enough for delegates from southern and northern states to agree on issues such as the slave trade, mode of representation, and regulation of interstate commerce. It would have been much more difficult to resolve these disputes if the states had not been left intact and permitted to retain sovereignty in a number of areas. In any event, the states would not have accepted the kind of dramatic diminution of their power that would have been brought about by a unitary government, and so such a system would never have been approved by the ensuing state ratifying conventions.

Several issues about the nature of the federal system were settled by the ratification of the Constitution. On one hand, the federal government would exercise enumerated rather than plenary powers, and the states would have a significant role in the selection, composition, and operation of federal institutions. Congress would be a bicameral body, with the members of the House of Representatives apportioned among the states by population and the Senate comprised of two members from each state. The president would be selected independently of Congress, through an Electoral College system in which states played an important role. On the other

hand, the states were given no direct role in the selection of the federal judiciary, which was expected to police the boundaries between the federal and state governments.

Other issues were resolved by subsequent events and developments, of which the most significant was the Civil War (1861–65). After many years during which southern and northern states had sparred over the extension of slavery and various tariffs, the election of President Abraham Lincoln prompted eleven southern states to secede and form the Confederate States of America. At the end of a war that claimed nearly as many American lives as all other American wars combined, the confederacy was defeated and the southern states brought back into the union. As a result, several questions that had been debated in Congress and by the general public for decades – such as whether states have a right to secede or to nullify acts of Congress – were, for all practical purposes, settled on the battlefield. Of additional importance was the passage of the Civil War amendments to the federal Constitution (the Thirteenth, Fourteenth, and Fifteenth Amendments), particularly the Fourteenth Amendment (1868), which provides that: "All persons born or naturalized in the United States … are citizens of the United States and of the State wherein they reside." In addition, the states were prohibited from "abridg[ing] the privileges or immunities of citizens of the United States," "depriv[ing] any person of life, liberty, or property, without due process of law," or "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." Moreover, Congress was given the "power to enforce, by appropriate legislation," each of these provisions.

Several late-nineteenth and twentieth-century developments also contributed to the centralization of power in the federal government. The Industrial Revolution and growth of corporate trusts prompted the federal government to assume more responsibility for regulating railroads and other corporations, particularly during the Progressive era (1900–20). Meanwhile, the ratification of the Sixteenth Amendment in 1913 gave Congress the power to levy an income tax, and although the states retained their independent taxing power, this amendment increased substantially the federal government's ability to raise revenue. In the 1930s President Franklin D. Roosevelt's New Deal legislation led to the nationalization, in whole or in part, of several social insurance programs. Then, in the 1960s, President Lyndon B. Johnson's Great Society legislation brought another significant increase in federal participation in social welfare programs, including medical insurance for the poor and elderly.

The Civil Rights Movement in the 1960s contributed to a further centralization of power. Although the substantive goal of the movement was to eliminate discrimination against blacks in education, employment, and voting, the main governmental response was to increase national responsibility

and to reduce state control over these areas. Thus the Civil Rights Act, 1964, was motivated by a desire to overcome discrimination in southern states, but it has had sweeping effects on the balance of power between the federal government and all state governments. Similarly, the Voting Rights Act, 1965, was intended to increase minority voter turnout in the South, but it also provided the vehicle through which federal courts and the U.S. Department of Justice were able to order state and local governments to make numerous and wide-ranging changes in their voting systems, most notably in regard to the drawing of legislative and municipal district boundaries and the elimination of many at-large and multimember districts.

The final decades of the twentieth century and the first part of the twenty-first century have seen a continuing centralization of power that has been driven by a desire on the part of Congress to achieve various national policy goals in ways that have diminished state autonomy and responsibility. In response to public concerns about drug trafficking and other crimes that were for many years prosecuted by state officials, Congress has federalized an increasing number of criminal offences since the late 1960s. Out of a desire to secure national uniformity in matters such as the drinking age (to take a leading example) Congress has made increasing use during this period of its power to place restrictions on the receipt of grants-in-aid as a way of bringing an end to the diversity of state laws on various subjects. In recent decades Congress has also taken increasing advantage of its power to preempt state legislation and regulation in various areas, such as by preventing state and local governments from taxing Internet service providers and various forms of Internet commerce. In an effort to secure national policy objectives without assuming responsibility for the associated costs, Congress also imposed numerous unfunded mandates on state and local governments up through the mid-1990s.

Additionally, the increased mobility and transience of the citizenry, coupled with the growth of national commercial and telecommunication networks, have contributed in recent years to a greater sense of a national community. This has led more people to consider themselves members of the nation rather than of their state. This general willingness of individuals to consider their primary attachment to be to the nation (many southern states are a significant exception) has been aided by the fact that state boundaries have for many years borne little relation to the residence patterns of racial, ethnic, and religious minorities. Certain states do have high concentrations of particular minority groups, but in no case does such a group make up a majority in a state. Thus Hispanics, who make up over 13 percent of the American population, are particularly concentrated in southern and southwestern states, including New Mexico, where they make up 42 percent of the state population. Blacks also make up over 13 percent of the population and are heavily concentrated in southern states, most notably Mississippi, where

they make up 32 percent of the state population. Asians make up just over 4 percent of the U.S. population but are found in greater numbers in western states, most notably Hawaii, where they make up 42 percent of the population. Jews comprise just over 2 percent of the nation's population but are particularly well represented in several northeastern states, including New York, where they make up over 8 percent of the population.

FEDERAL INSTITUTIONS

Congress

The United States Congress is a bicameral legislature, with a House of Representatives and a Senate, each wielding effectively equal power in the legislative process. The only difference in the legislative powers of the two houses is that all revenue bills must originate in the House of Representatives. In terms of other differences between the chambers, treaties negotiated by the president must receive the consent of the Senate (by a two-thirds vote), and presidential nominations of ambassadors, judges, and other officials must also be approved by the Senate (with a majority vote). In addition, the two houses are assigned different roles in the impeachment process, with the House of Representatives responsible for impeaching officials and the Senate responsible for trying impeachments.

The membership of the House of Representatives is apportioned among the states by population. As James Madison wrote in *Federalist 39*, the House would "derive its powers from the people of America" rather than from the state governments. In this regard, the House of Representatives would be a "national" rather than a "federal" institution.[3] The number of representatives from each state is adjusted every ten years to reflect population changes since the previous census. The smallest states each elect a single representative. The largest state, California, now elects 53 representatives, nearly one-eighth of the total House members. The overall size of the House was allowed to increase for many years to keep pace with population growth but was finally fixed at 435 members by a 1911 federal statute.

The states were given significant discretion as to how to elect their representatives, and until the 1960s several states still elected some or all of their representatives on an at-large basis.[4] Currently, all states provide for single-member House districts, though there are various ways in which the states draw district boundaries, such as through the legislature or by independent commission. Congress has long required that House districts be compact and contiguous. Also, in a series of rulings handed down since the 1960s, the U.S. Supreme Court has required that House districts be equal in population[5] and that race not be a predominant factor in the line-drawing process.[6] However, as long as states adhere to these requirements,

they retain control over redistricting and, potentially, the ability to use their line-drawing powers to influence congressional behaviour. There has been no move of any kind to withdraw this responsibility from the states.

House members may serve an unlimited number of two-year terms. If a House member fails to complete his or her term, the state governor calls a special election to fill the vacancy. However, the absence of term limits and the existing procedures for filling vacancies were the subject of discussion in the late twentieth and early twenty-first centuries. This began when a number of states, believing that incumbents enjoyed undue advantages in the electoral process, tried to impose term limits on their representatives. However, in 1995, in *U.S. Term Limits, Inc. v. Thornton,* the U.S. Supreme Court invalidated these laws before they could have any effect (although term limits for state legislators were deemed permissible and are in effect in numerous states).[7] Second, after the terrorist attacks of 11 September 2001, and in light of reports that the U.S. Capitol was an intended target, in which case House members might have been killed in such large numbers that it would have been impossible to obtain the majority quorum required by the Constitution to conduct business, Congress has considered ways to ensure that a quorum can be obtained without waiting for governors to call special elections to fill the vacancies. Constitutional amendments were introduced that, for instance, would have permitted governors to make temporary appointments in the event that more than half of the House seats became vacant.[8] To date, however, such amendments have not passed either chamber.

The Senate is comprised of two members from each state, and therefore has 100 members. Equal-state representation in the Senate was the product of a hotly contested compromise in the federal convention between large states that wanted to apportion both houses by population and small states that preferred equal-state representation in both houses. Not everyone was satisfied with the resulting compromise. However, even if there had been any desire to revisit this issue in later years, it would have been fruitless because Article v of the U.S. Constitution stipulates that "no State, without its Consent, shall be deprived of its equal suffrage in the Senate."

Originally, senators were appointed by state legislatures and were expected to represent their interests. As Madison explained in *Federalist 39,* the Senate would "derive its powers from the States as political and coequal societies; and these will be represented on the principal of equality"; thus it would be a "federal" rather than a "national" institution.[9] This was formally changed in 1913 with the passage of the Seventeenth Amendment, which provided for direct election of senators and brought an end to any sense in which senators might have been viewed as representing state interests. In fact, though, senators had long ceased to represent state legislatures, given that by the mid-nineteenth century senators were no longer

instructed by legislatures on how to vote in Congress and were rarely recalled on account of the votes that they cast. Moreover, one could say that the decline of the concept of senators as representatives of state legislatures was inevitable because the Constitution permitted the two senators from each state to cast their votes separately rather than as a bloc, as was the rule under the Articles of Confederation.[10]

Senators serve six-year terms and, as in the House of Representatives, can serve an unlimited number of terms. Unlike in the House, though, Senate vacancies may be filled immediately by gubernatorial appointment, and such appointees serve until the next regular election, when voters elect a permanent replacement to fill the remainder of the term. Also unlike the House, only one-third of senators stand for election every two years.

Of the two chambers, the Senate is the more prestigious body. Not only is it smaller than the House, with 100 as compared to 435 members, but its members are required by the Constitution to be slightly older (30 as compared to 25 years of age) and to have been a citizen for a slightly longer time (nine as compared to seven years). As a result, Senate seats are more highly prized than House seats and generally attract higher-quality candidates, many of whom have previously served in the House.

The Senate is also the more obstructionist chamber. This is due in part to its smaller size. With over four times as many members, the House rules are more strict and allow less leeway to individual members, whereas the Senate runs on unanimous-consent agreements and permits non-germane amendments. The obstructionist character of the Senate is also attributable to filibustering, which is allowed by the rules of the Senate but not the House, and which permits a minority of senators (currently 41 of 100) to prevent legislation from coming to a vote. For many years the filibuster was only employed in extraordinary cases, such as when southern states sought to prevent the passage of civil rights legislation in the 1950s and 1960s. In recent years, though, the filibuster has been used routinely, so that virtually all non-budget measures and many judicial nominees must attract the support of three-fifths of the senators.[11] In this respect, although the Senate no longer provides specific institutional protection for state governments, its procedural rules do have the effect of limiting the exercise of federal power.

Although the Senate is more obstructionist than the House, it should be emphasized that both houses of Congress exercise significant power in the U.S. political system, whether in terms of obstructing or promoting the passage of legislation. Certainly, the U.S. Congress is more powerful than are legislatures in parliamentary systems; it also wields more power than do legislatures in many other presidential systems. In fact, although different institutions can be said to take the lead role in the U.S. political system at different times, Congress is frequently the dominant actor, both in the

sense of generating policy initiatives and in terms of frustrating, weakening, or delaying the enactment of initiatives developed in other institutions.

The Presidency

The United States has a presidential system, in which a president serves as chief executive and head of state and is elected independently of Congress. The Electoral College system of presidential selection is quite complicated and is governed in part by constitutional provisions, in part by congressional statutes, and in part by state laws. Each state, along with the District of Columbia, has a number of electoral votes equal to its representatives plus senators, for a total of 538 electoral votes. Thus, the smallest states have three electoral votes each, and California has the most electoral votes (55). The states are free to award their electoral votes as they see fit. In the late-eighteenth and early-nineteenth centuries, states allocated their electoral votes in all sorts of ways, including by legislative selection or district election. Today, however, all but two states award their entire slate of electoral votes to the winner of a plurality of the popular vote in their state. The exceptions are Maine and Nebraska, both of which provide for a division of their electoral votes, awarding two votes to the winner of the statewide popular vote and the remaining votes to the candidate who wins the popular vote in each U.S. House district. The candidate who obtains a majority (270) of electoral votes across the country wins the office and begins a four-year term. The same person may serve only two full terms, under the Twenty-Second Amendment (1951).

The Electoral College has been the subject of more than 700 constitutional amendment proposals throughout U.S. history, far more than any other constitutional provision. The procedure attracts particular attention on the rare occasions when the winner of the popular vote fails to win a majority of electoral votes.[12] The most recent such occasion (the other clear case was in 1888) was in 2000, when Al Gore won over 500,000 more popular votes than did George W. Bush but received five fewer electoral votes. Because most of the controversy in 2000 centred on how to count Florida's popular votes – Bush was eventually declared the winner of the state by 537 votes and awarded the state's 25 electoral votes – the Electoral College itself received less scrutiny than it otherwise would have done. Still, scattered calls were heard for reforming the system, and if future elections generate similar controversies, these reforms are likely to receive serious consideration.

As long as the Electoral College is retained, it will continue to have an influence not only on presidential campaigns but also on presidential governance. The principal effect is to encourage candidates to target the 15 to 20 states that are sufficiently competitive in any given year to be considered

battleground states. The remaining states receive few or no visits from presidential candidates and see few or no campaign commercials. The impact of the Electoral College can even be seen in the way that presidents behave once in office. During their first term, at least, presidents make more visits to what they perceive to be the likely battleground states in the next election, and they are particularly attentive to the needs and interests of these states when making policy decisions.

Although the Electoral College was originally intended to ensure that the president would be chosen by a select group of individuals "most likely to possess the information and discernment requisite to" the task, the institution is currently defended for quite different reasons. Among its other virtues, it encourages candidates to run a nationwide campaign and to be sensitive to state and local interests. It also lends support for the two-party system, through the winner-take-all rule in effect in nearly all states, as well as the constitutional requirement that a candidate obtain a majority of electoral votes to win the office.

In terms of the powers wielded by presidents, the constitutional powers of the office are actually rather modest. In regard to foreign affairs, the president is commander-in-chief of the armed forces and is responsible for negotiating treaties and receiving ambassadors. In regard to policy making, the president can veto bills passed by Congress, and a veto can be overridden only by a two-thirds vote in both houses of Congress. However, any list of formal powers cannot come close to describing the powers actually wielded by modern presidents. The "executive power" clause gives the president significant discretion in regard to the implementation of congressional statutes and the issuance of executive orders, which do not require congressional approval. Moreover, presidents have interpreted this clause as implying the possession of all sorts of additional powers, and, partly on this basis, they now routinely undertake military interventions without a congressional declaration of war. During the twentieth century, presidents also began to make use of various informal powers, such as televised public addresses and personal lobbying, to secure the passage of legislation.[13]

Although twenty-first century presidents wield significantly more power than did their predecessors, they are generally less powerful than are executives in other presidential, as well as parliamentary, systems. At times the president is the dominant actor in the U.S. political system, such as during wars or crisis situations or when his party holds extraordinary majorities in both the House and the Senate. However, at other times, presidents can be relatively ineffectual and are forced to engage in protracted bargaining with Congress in order to have any success in securing passage of their legislative initiatives.

The federal bureaucracy, whose control is shared by the president and the Congress, comes in different forms, with varying levels of responsiveness to the general public and to state and local officials. The heads of executive departments (e.g., the Department of Education) and executive agencies (e.g., the National Aeronautics and Space Administration) are nominated by the president and approved by the Senate and serve at the pleasure of the president. These bodies, while less responsive to public pressure than the executive and legislative branches themselves, are still more responsive than independent regulatory commissions (e.g., the Federal Communications Commission), whose members are also nominated by the president and approved by the Senate but who cannot be dismissed except for wrongdoing.

Judiciary

The United States has separate court hierarchies: the federal court system and the court systems of the 50 states, the District of Columbia, and Puerto Rico. The federal courts wield extraordinary power. They can invalidate state or federal executive actions on the grounds that they are inconsistent with the U.S. Constitution or federal statutes. They can also invalidate state or federal statutes as inconsistent with the Constitution. Any federal court with proper jurisdiction may invalidate such acts (though those decisions are subject to appeal).

All told, the U.S. Supreme Court has invalidated more than 150 federal statutes and well over 1,000 state laws since 1789. In the last half-century alone, the Court has exercised its power of judicial review to end racial segregation, prohibit prayer in public schools, legalize abortion in the first two trimesters of pregnancy, and require police to abide by strict requirements in questioning suspects and conducting searches.

The authority of the federal courts is not completely unchecked. In fact, each of these controversial decisions generated efforts by the other branches to limit a judicial decision's reach or bring about its reversal. However, throughout American history, these efforts have produced few results. Congress can propose a constitutional amendment to overturn a Supreme Court decision, but this has been done successfully on only four occasions. In 1795 the Eleventh Amendment responded to *Chisholm v. Georgia*[14] by preventing federal courts from hearing suits brought by citizens of one state against a government of another state; in 1865, 1868, and 1870 the Thirteenth, Fourteenth, and Fifteenth Amendments, respectively, responded to *Dred Scott v. Sandford*[15] by securing the freedom and the civil and voting rights of African-Americans; in 1913 the Sixteenth Amendment responded to *Pollock v. Farmers' Loan and Trust Co*[16] by authorizing a federal income tax;

and in 1971 the Twenty-Sixth Amendment responded to *Oregon v. Mitchell*[17] by reducing the voting age in state elections to eighteen.[18]

Congress can also remove matters from the appellate jurisdiction of the Supreme Court. For the most part, however, this has been no more than a threat. The power has been used to actually prevent a federal statute from being invalidated on only one notable occasion, when Congress sought to prevent the Supreme Court from striking down the Reconstruction Acts, 1867. The Court acquiesced in this congressional denial of jurisdiction in *Ex parte McCardle* (1869).[19] Technically, another threat lies in the possibility of legislation to increase the size of the Court, which currently has nine members. However, in the aftermath of the Senate's rejection of President Franklin Roosevelt's 1937 effort to respond to the Court's invalidation of portions of his New Deal program by increasing the membership to as many as fifteen justices – he would have added a justice for every sitting justice over age 70 – any future effort to change the Court's size would be met with significant resistance.

Turning from the power of the courts to their composition and organization, federalism plays a role in the structure of the federal judiciary in several ways. In organizing the federal courts, Congress uses state boundary lines to define the boundaries of the 94 federal judicial districts (each of which is wholly contained within a state), as well as the 12 appellate circuits (which comprise multiple states and do not divide any state between circuits).

With regard to the selection process, federal judges are nominated by the president and confirmed by the Senate, and serve during good behaviour. Although state governments have no formal role in the appointment process, senators exert significant influence in selecting appellate judges and, to an even greater extent, district judges. During this process senators may consult with and seek suggestions from state officials about potential candidates to be nominated by the president.

In terms of federal court jurisdiction, the system is also sensitive to federalism. State courts have complete jurisdiction over all matters except those that the Constitution authorizes Congress to vest in the federal courts. In practice, though, the boundaries between federal and state jurisdiction are not always defined clearly. For instance, certain acts can be prosecuted either as a federal or a state crime, and prosecutors have discretion as to whether such an offence should be tried in state or in federal court. In addition, participants in civil suits can, under certain circumstances, petition for their cases to be moved from state courts to federal courts. Finally, any state case that runs its full course through the highest state court and raises any sort of federal question may be appealed to the U.S. Supreme Court, which has complete discretion as to whether to grant the appeal.

Although the number of federal judges and overall workload of the federal judiciary have grown steadily throughout American history, federal

courts still hear only about 2 percent of the legal cases in the United States. All told, there are 1,748 federal judges, including district judges and other trial judges (i.e., bankruptcy judges), circuit court of appeals judges, and Supreme Court justices, who altogether hear a total of 2 million cases per year. Conversely, there are 30,842 state judges who hear 80 million cases each year, ranging from family, juvenile, and traffic suits all the way to capital cases.[20]

INSTITUTIONAL ARRANGEMENTS OF THE CONSTITUENT UNITS

Legislatures

The design and arrangement of state institutions are established by state constitutions, which were drafted in some states as early as the late 1770s (and therefore a decade prior to the drafting of the federal Constitution in 1787), and which have been the subject of revision and amendment well into the early twenty-first century.[21] State constitution makers enjoy a great deal of latitude in structuring their governing institutions, subject only to the stipulation in Article IV of the U.S. Constitution, which holds that every state is guaranteed a "Republican Form of Government." In fact, just over half of the states, primarily in the West, currently provide for the popular initiative and/or referendum (in contrast with the absence of any form of direct democracy in the federal sphere); since the mid-1970s these direct democratic institutions have become an increasingly important avenue for policy making in many of these states.

In many respects, the government institutions that emerge from the 50 state constitutions are structured along the same general lines as is the federal government, in that all states have presidential systems (though the chief executive is called "governor" rather than "president"). In addition, virtually all state legislatures are now and always have been bicameral, with the notable exception of Nebraska, which adopted unicameralism in 1934 and remains the only current unicameral state.

Bicameralism is seen as promoting deliberation in state legislatures, just as in the Congress. But whereas bicameralism in Congress is also seen as providing representation for the states in one house and for the population in the other house, this type of arrangement is not possible in state legislatures, at least since it was prohibited by the U.S. Supreme Court in *Reynolds v. Sims*.[22] As a result, states have chosen to distinguish their legislative chambers primarily by references to their size, term length, and powers. In every state the house has more members than the senate, usually by around a 2:1 or 3:1 margin. In a majority of states, house members also have shorter terms than do senators. Two-year house terms and four-year

senate terms are the most popular arrangement, though some states provide for two- or four-year terms in both houses. Many states have also retained their long-standing requirements that revenue bills must originate in the lower house.

The rules governing the composition and selection of state legislatures are generally established in state constitutions, but federal statutes, constitutional provisions, and judicial decisions also govern particular aspects of state electoral systems. Of particular importance is the federal Voting Rights Act, 1965, as extended and amended in 1970, 1975, and 1982, and as implemented by the U.S. Department of Justice and interpreted by the Supreme Court.[23] Among other effects of the law, state legislatures are prevented from drawing legislative and congressional district lines that dilute the votes of racial and ethnic minority groups. Increasingly, in the 1980s and 1990s, this provision was interpreted as requiring the creation of majority-minority districts that could be counted on to elect a representative of a racial minority. In practice, of course, population patterns frequently make it impossible to draw enough majority-minority districts to produce a proportionate representation in the legislature of all minority groups. As a result, blacks and Hispanics are generally underrepresented in state legislatures and in the U.S. House of Representatives. These minority groups are even more dramatically underrepresented in the U.S. Senate, where state boundary lines cannot be altered to create majority-minority districts.

State legislatures play several roles in the operation of the federal system, aside from drawing boundary lines for U.S. House districts. State legislatures play a part in selecting the president, in that they decide the rules by which their state's electoral votes will be allocated. State legislatures are also assigned an important role in proposing and ratifying amendments to the federal Constitution. Amendments may be proposed in one of two ways: either by a two-thirds vote in both houses of Congress or upon the request of two-thirds of the state legislatures to Congress. To date, the 33 amendments that have been formally proposed have all followed the former path. Amendments may also be ratified in one of two ways: either by three-fourths of the state legislatures or by three-fourths of state ratifying conventions elected by the people. All but one of the 27 amendments have been ratified through the first path.

The State Executive

All state constitutions provide for a governor who serves both as chief executive and head of state. In several important respects, though, the state executive branch departs from the national model, most notably in that virtually all states have a plural executive of sorts. For the federal

government, the president and vice-president are elected on one ticket, and the president appoints, subject to Senate confirmation, the heads of executive departments and agencies. In the states, the governor is frequently elected independently of other executive branch officials. This is a product of the Jacksonian movement (named after President Andrew Jackson) of the 1830s, which sought to bring about more popular control over the executive branch by electing as many officials as possible. This was only partially reversed during the Progressive era in the early twentieth century, when reformers argued that popular control and accountability might actually be achieved through adoption of a short ballot and the election of fewer executive officials. As a result, the number of elected officials in the state executive branch ranges from one, as in New Jersey, all the way to thirteen, as in Georgia.[24] These independently elected executive officials occasionally wield significant power not only in their own states but also throughout the country. State attorneys general, who are elected by the people in 43 states, have been especially active in recent years. In particular, they were responsible for negotiating the 1998 Master Settlement Agreement between 46 states that, together with individual agreements with the other four states, required tobacco companies to pay $246 billion to state governments over the next quarter of a century, essentially setting national policy in regard to cigarettes.[25]

In other respects, the structure of the executive branches of the states is broadly similar to that of the federal executive (albeit without any use of the electoral college mechanism that operates in presidential elections). There is a governor in each state, who is popularly elected, for a four-year term in all but two states, and for a maximum of two terms in many states. Only Vermont and New Hampshire elect their governors for two-year terms. In regard to term limits, Virginia alone prohibits its governor from serving successive terms; a number of other states impose no term limits.[26] In part as a result of these limits, but also because of the valuable executive experience that they gain while in office, a number of governors choose to run for, and are viewed as particularly attractive candidates for, the presidency. In fact, four of the last five presidents (Jimmy Carter, Ronald Reagan, Bill Clinton, and George W. Bush) were governors.

In terms of the powers of state governors, all governors now possess the power to veto legislation. In some states, though, the gubernatorial veto can be overridden by less than the two-thirds legislative majority that is required for Congress to overturn a presidential veto. Moreover, all but six states entrust the governor with the item-veto power, which can be used to invalidate particular provisions in a statute and allow the remaining provisions to take effect.[27]

Finally, like the president, the governor is responsible for appointing the heads of various regulatory agencies. In some cases, these state agencies

perform functions similar to their national counterparts, as for instance with state environmental protection agencies. In other cases, there are state regulatory agencies not found in the federal government (e.g., state insurance commissions) due to the different responsibilities of state governments.

State Administration

For many years, the federal government refrained from requiring state governments to carry out functions on its behalf. It is true that state judges have long performed legal and administrative functions on behalf of the federal court system. Save for exceptional cases, though, state legislatures and governors were not pressed into the service of the national government.

This changed in the second half of the twentieth century, in part because federal statutes and judicial decrees increasingly required states and localities to carry out all sorts of tasks by mandating that certain actions be taken by state and local governing officials. However, the U.S. Supreme Court has also begun to impose certain limits in this regard. In *New York v. United States*[28] the Court ruled that Congress could not "commandeer" a state legislature by ordering it to dispose of nuclear waste in a particular fashion. In another case, *Printz v. United States*,[29] the Court prohibited Congress from ordering state executive officials to conduct background checks on handgun purchasers. In each case, the Court found that the congressional statute ran afoul of the Tenth Amendment, which 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."

Although Congress may not commandeer state legislators or executives for the administration of federal statutes, it can and frequently does secure the assistance of state officials in other ways. A favourite approach is to offer additional funding to state governments that require states to meet certain federal goals or to satisfy federal requirements as a condition of accepting federal funding. The U.S. Supreme Court ruled in *South Dakota v. Dole*[30] that this is an acceptable practice, and Congress has used the threat of withholding federal funds to achieve all sorts of goals, including the establishment of a uniform 21-year-old drinking age, a .08 percent blood-alcohol level for drunk driving, and the administration of annual tests to schoolchildren in the third through eighth grades. State officials frequently complain that they are unable to make a real choice in these instances because they cannot afford to lose federal funding for roads, schools, and other programs. However, this is an attractive way for Congress to achieve national goals and secure state participation in the administration of national programs, and there is every reason to expect Congress to continue to use its spending power in this fashion, especially given that the Supreme Court has foreclosed several other means of achieving federal goals.

State Judiciary

State courts have the same power as federal courts to invalidate executive and legislative acts. Any state court with proper jurisdiction can invalidate a state executive act as inconsistent with a statutory or constitutional provision. State courts can also invalidate state statutes as inconsistent with a constitutional provision.

In recent decades state courts have been quite aggressive in interpreting state constitutions to provide a greater level of protection for individual rights than is found through the U.S. Supreme Court's interpretation of the Bill of Rights of the U.S. Constitution. Moreover, as long as these state-court decisions are grounded solely in an interpretation of the state constitution, they cannot be appealed to the U.S. Supreme Court. For instance, although the U.S. Supreme Court has not recognized a federal constitutional right to same-sex marriage, in 2003 the Massachusetts Supreme Judicial Court interpreted the Massachusetts Constitution as requiring the state to issue marriage licences to same-sex couples.[31] Because the ruling rests on state constitutional grounds, it cannot be appealed beyond the state supreme court; therefore, same-sex marriage is legal in Massachusetts but in no other state. However, a state supreme court decision of this sort can be overturned by a state constitutional amendment, although a proposed amendment to the Massachusetts Constitution has thus far been unsuccessful. Moreover, the decision can also be overturned by a federal constitutional amendment, and several such amendments to the U.S. Constitution have been debated in Congress in recent years.

The exercise of judicial review rightly attracts a great deal of scholarly attention, but the greater part of the workload of state, as well as federal, courts is concerned with other matters, such as resolving civil suits and hearing criminal trials. In organizing their court systems to deal with these matters, states have generally provided for trial courts, intermediate appellate courts, and a supreme court, though there is significant variation in state-court hierarchies.

In selecting judges to serve on these courts, most states differ significantly from the federal practice. Several states select judges by gubernatorial nomination and legislative confirmation, as is the case with federal-court judges, but the vast majority of states select their judges in some other fashion. Two states provide for legislative appointment of trial and appellate judges. A significant number of states provide for partisan or non-partisan popular election of judges. A growing number of states operate some sort of merit-selection plan. The usual procedure in merit-selection states is that a nominating commission assembles a list of judicial candidates; the governor appoints one candidate from the list; and after one term in office, the people vote on whether to retain the judge for another term or whether to begin the selection process anew.[32]

OTHER SPHERES OF GOVERNMENT

Local Government

There are 87,849 local governments in the United States. These include 3,034 county governments, which are found in 48 states (in Louisiana, parishes function as counties; in Alaska, counties are called boroughs), and which are general purpose local governments. Two other types of general purpose local governments are the 19,431 municipal governments and 16,506 townships (which are particularly prevalent in New England and the Midwest). Finally, there are 48,878 special-district governments, many of which are established to run school systems or to assume responsibility for environmental or transportation matters.[33]

Local government officials are selected in a variety of ways, depending on the form of government and on different assessments as to how best to provide effective governance. For instance, counties generally elect a board of commissioners or supervisors from at-large and/or single-member districts. A number of these counties also provide for the election or appointment of a county executive or manager, in addition to these board members. Other county officials typically include a sheriff, prosecuting attorney, treasurer, and clerk of court, among other officials.

Local governments are creatures of state governments and therefore exercise powers only as permitted by the state constitution or legislature. It is important to note, in this regard, that in the late-nineteenth and early-twentieth centuries a home-rule movement sought, through the passage of state constitutional amendments and statutes, to devolve power and give more flexibility to municipalities, in particular. As a result, local governments in a number of states enjoy a significant amount of discretion in structuring their governing institutions, levying taxes, and making policy.

Tribal Government

All told, there are 562 federally recognized American Indian tribes, and many members of these tribes live on reservations and possess sovereignty in regard to the governance of these reservations. Although a number of these reservations are quite small, covering just a few hundred acres of land, others are quite large, such as the Navajo Reservation, which spans 16 million acres across parts of three southwestern states.[34]

Congress may regulate tribal governments, but state and local governments have no power to regulate their internal affairs. In practice, though, there is a good deal of dispute about these relationships, as state governments have increasingly sought to subject tribal governments to various regulations and as the U.S. Supreme Court has increasingly tended to

uphold these regulations.[35] Gaming policy has been a source of particular controversy in recent years. After 1988, in particular, the federal Indian Gaming Regulatory Act, 1988, led a number of tribal governments to begin operating casinos, thereby enabling them to amass significant revenue, some of which is contributed to state political campaigns with an eye towards influencing state policy.

INTERGOVERNMENTAL RELATIONS

In comparison with some other federal systems, the U.S. Constitution provides for very little formal cooperation among federal, state, and local officials. States can and do form interstate compacts, whether among several neighbouring states (e.g., the Port Authority of New York and New Jersey) or among all or nearly all states (e.g., the Emergency Management Assistance Compact). Such interstate compacts, which cannot be created without the consent of Congress, are in some cases intended to establish a joint authority for governance in a certain policy area; in other cases, they are designed primarily to facilitate communication among state officials in participating states.[36] However, the federal Constitution does not establish any formal institutions that require the participation of state and local officials or that encourage collaboration among federal, state, and local officials.

There are a number of opportunities for informal cooperation, particularly among state and local officials. Governors are members of the National Governors' Association. State legislators attend meetings of the National Conference of State Legislatures (with many conservative state legislators attending meetings of the rival American Legislative Exchange Council). For state attorneys general, there is the National Association of Attorneys General. Meanwhile, officials from the major state administrative agencies are members of similar organizations. These state intergovernmental organizations – local officials have their own groups – provide forums to discuss common problems, learn about experimental solutions, and, most important, pool information and resources to lobby the federal government. State officials also meet in smaller groups, including by region (i.e., the Western Governors' Association) and by party (i.e., the Republican Governors' Association). There are also plenty of opportunities for ad hoc cooperation among particular groups of state officials. For instance, the Republican governors of the four most populous states – California, Texas, New York, and Florida – recently announced a plan to pool their resources to lobby the federal government to secure increased federal funding for roads and other projects.[37]

There are fewer opportunities for informal communication and cooperation between officials from comparable elected offices in the state and federal spheres. However, administrative officials from federal, state, and

local agencies often work together. For instance, the federal Environmental Protection Agency works closely with state environmental agencies. But there simply are not many opportunities for communication among elected officials in the various spheres of government. State legislators, especially, would appear to have much to say to federal legislators, whether in terms of advice during the drafting of federal legislation or regarding the effects and burdens of federal legislation once enacted. But with the direct election of U.S. senators, there is no need for federal legislators to listen or cater to the needs of state legislators, other than every ten years when state legislators draw boundary lines for congressional districts.

ANALYSIS AND CONCLUSIONS

Constitutional Framework

The constitutions of the United States and of the 50 states take different approaches to the amount of detail they provide about institutional arrangements and to the ease with which these arrangements can be revised. The U.S. Constitution is a relatively short document that sets out general provisions about the composition, selection, and powers of governing institutions. It is also quite difficult to amend. Only 27 amendments have been adopted, and ten of these (which make up the U.S. Bill of Rights) were ratified just after the founding, in 1791.

One consequence of drafting a short national constitution with a rigid amendment process is that many details of the operation of national institutions are located in extra-constitutional sources, whether in statutes or institutional rules. An additional consequence is that the structure of national institutions has undergone few significant changes. Only a portion of the 17 amendments adopted since the Bill of Rights deals with the structure of government institutions, and only a fraction of these amendments have had important consequences for federalism. For instance, in 1795 the Eleventh Amendment immunized non-consenting states from federal suits brought by individuals in other states. In 1913 the Sixteenth Amendment authorized a national income tax, and the Seventeenth Amendment brought about the direct election of U.S. senators. No amendment has been more important in this regard than the Fourteenth Amendment, which in 1868 prohibited states from depriving persons of "life, liberty, or property, without due process of law" or denying "equal protection of the laws," and then gave Congress the power to enforce these provisions "by appropriate legislation."

The fact that there have been few constitutional changes to national governing institutions does not mean that significant changes have not taken

place in the power and behaviour of these institutions. However, these changes have taken place outside the formal constitutional processes. For instance, twenty-first-century presidents wield significantly more power than did their predecessors; however, this is due not to the passage of any constitutional amendments but, rather, to actions taken by particular presidents, especially during the twentieth century. In addition, the power of the Supreme Court to invalidate legislation derives not from any express constitutional provision on this subject; rather, judicial review of congressional statutes was first exercised in 1803 as a result of Chief Justice John Marshall's interpretation of the underlying purpose of a constitution. Moreover, the increasing exercise of judicial review in the late nineteenth century (the Court did not invalidate another congressional statute until 1857) was due not primarily to any constitutional amendment adopted during this period but, rather, to the changing attitudes of particular justices and the increasing degree of governmental regulation of business and commerce during this period.

State constitutions, by contrast, are invariably longer and more easily amended. As a result, they contain more detailed rules about governing institutions. A number of state constitutions provide detailed legislative procedural rules that are designed to promote transparency in the legislative process, such as requirements that each bill be read three times before being approved and that each bill be limited to a single subject that is accurately described in the bill's title. The executive branch also receives detailed treatment in many state constitutions, such as in regard to the exercise of the pardon power. State constitutions are also more apt to provide detailed rules regarding the structure and operation of the judiciary, and some constitutions go so far as to regulate the number of judges for a quorum and the number and site of supreme court sessions.

As a result of their more flexible amendment procedures, state constitutions also permit a greater range of experimentation with the structure and composition of governing institutions. In terms of the legislative branch, four states have adopted unicameralism throughout American history, although three of them eventually decided to revert to bicameralism. In terms of the executive branch, states were able to provide for the election of numerous executive officials in the Jacksonian era and then to move back towards a short ballot during the Progressive era. As for the judiciary, the mid-nineteenth century saw a move towards the popular election of judges; by the mid-twentieth century, a number of states were drawn instead to merit-selection plans. In each of these cases, significant changes were made to state government institutions, and these changes were made through formal constitutional channels.

Interaction between Federalism and Representative Institutions

In assessing the interaction between federalism and representative institutions, it is helpful to take note of several important decisions made at the federal convention of 1787. In general, decisions about the presidency and the U.S. Supreme Court ensured that these branches would be agents of centralization. As for Congress, the founders expected members of the House of Representatives and the Senate to be particularly responsive to state and local interests, but over the years these expectations have increasingly not been borne out.

As for the executive, the first crucial decision was to create a single president rather than a plural executive whose members might have represented different geographic regions. This decision, coupled with the requirement that presidential candidates must win a majority rather than a plurality of electoral votes, played an important role in the establishment of two national parties rather than multiple regional or state-based parties. Another important decision involved the establishment of a presidential system that enabled the president to wield power independently of Congress, including in ways that increased national power and that, at an even more basic level, kept the nation together. Thus it is highly improbable that, in a parliamentary system, President Abraham Lincoln would have been able to take the actions that he did in early 1861 and throughout the Civil War to preserve the union.

It is true that several recent presidents have undertaken significant federalism initiatives, and thus there is nothing to prevent presidents from occasionally acting as agents of decentralization. In particular, both Richard Nixon and Ronald Reagan called for "New Federalism" programs and tried, with mixed success, to stem the centralization of power in the federal government and return responsibility for various federal programs to the states.[38] However, the dominant trend throughout American history has been for presidents to be more responsive to national pressures and less responsive to state interests. In this respect, current president and former governor George W. Bush's general lack of attention to federalism represents more of a continuation of, than a departure from, general patterns of presidential behaviour.

Throughout American history the U.S. Supreme Court has been a great engine of centralization, as would be expected in light of several choices made at the federal convention. The first key decision concerned the appointment process and, in particular, the denial to the states of any role in the selection of federal judges. To the extent, therefore, that Supreme Court justices are likely to be disposed towards either the federal government or the states in disputes between the two, one would expect them to favour the government of which they are a constituent part and to whose officials they owe their appointment.

A second decision that affected the judiciary was the move to permit Congress to exercise enumerated rather than plenary powers, which ensured that there would be a continuing struggle to define the boundaries of these powers. More important, some sort of institutional arrangement would have to be devised to police these boundaries, and although the states made several late-eighteenth- and early-nineteenth-century efforts to play a role in this regard, the task ended up falling largely to the federal judiciary. It is true that the Supreme Court has at times used its power to invalidate congressional statutes that exceed constitutional boundaries. Thus it issued several decisions in the Progressive and New Deal eras that blocked or delayed enactment of national social and economic reforms on the grounds that they exceeded Congress's enumerated powers. Then, after some 60 years in which the Court essentially refrained from striking down congressional statutes on federalism grounds, during the 1990s and early 2000s the Court limited congressional power to regulate the possession of guns near schools and to provide federal civil remedies in cases of gender-motivated violence (among other areas). Nevertheless, these state-protective decisions have been issued infrequently throughout American history and have generally had little effect on stemming the pace of centralization.

The most important founding decision that affected judicial power was the rejection of a proposal to empower Congress to veto state laws. Madison argued that it was essential that this power be lodged somewhere in the federal government in order to "control the centrifugal tendency of the States," and he tried repeatedly during the convention to give this power to Congress.[39] This proposal was rejected, but Madison was correct in foreseeing that the power to veto state laws was essential in a federal system, and this task soon came to be exercised by the Supreme Court. In the nineteenth century the Court wielded its power of invalidating state legislation to eliminate barriers to interstate commerce and thereby establish a national economic market. Then, in the late twentieth century, the Court used this power to implement national policy in regard to issues such as school desegregation, abortion, and the rights of criminal defendants. In fact, in several of these areas, Congress lacked the power to fashion a national policy, and so federal judicial decisions were the only means of bringing about some degree of uniformity.

If the presidency and Supreme Court could have been expected to serve as nationalizing forces, based on the design of each of these institutions, Congress was expected to play a different role. The framers of the U.S. Constitution certainly expected that members of Congress would be responsive to state and local interests and that senators would be especially representative of state government interests. Moreover, several institutional developments throughout American history have helped make it possible for Congress to make good, at least in part, on this expectation.

One such decision, which was not finalized until the federal Apportionment Act, 1842, and then reconfirmed in 1967, was the creation of single-member U.S. House districts. This meant that all members of Congress would be tied to a particular geographic area, whether to a state or a portion of a state, and ensured a certain degree of congressional responsiveness to state and local interests. A second decision, which was implemented through Senate Rule XXII, was the establishment of the filibuster in the Senate. The filibuster has generally made it quite difficult to enact federal statutes, in that a three-fifths vote is now required to invoke cloture and to force a vote on a filibustered bill. But it has also enabled southern states to prevent federal action contrary to their interests, both during the nineteenth century and then again when federal civil rights legislation was debated in the 1950s and 1960s.

However, the time has long passed when these aspects of the congressional design could be seen as enabling Congress to play an important decentralizing role in the U.S. political system. The adoption of the Seventeenth Amendment, with its provision for direct senatorial election, brought an end to any notion that senators were representatives of state interests. Additionally, although members of Congress are still more tied to local electoral constituencies than are members of the executive and judicial branches, members of both the House and the Senate have become increasingly responsive to national interest groups and media and to their desire for national responses to various problems and issues. As a result, Congress has in recent decades federalized a number of policy areas that were once the province of the states, whether in regard to crime, education, or environmental policy. Recent congresses have also preempted state power in a variety of policy areas and have issued mandates that have imposed significant costs on state and local governments.[40]

To be sure, as has been pointed out by scholars who have recently perceived signs of a "devolution revolution," members of Congress, along with state governors, were the chief advocates of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 1996, which gave the states more discretion in regard to the administration of welfare policy. It is also true that members of Congress acceded to the entreaties of state and local government officials by passing the Unfunded Mandates Reform Act (UMRA), 1995, thereby making it more difficult for future congresses to continue issuing burdensome mandates to states and localities. However, it is important not to overstate the significance of these two recent statutes, given that PRWORA also contains a number of provisions that are highly centralizing, and given that UMRA may have stemmed the increase of unfunded mandates but is inapplicable to numerous federal requirements that are viewed by state and local officials as tantamount to mandates, such as are contained

in the No Child Left Behind Act (NCLB), 2002. Moreover, PRWORA and UMRA remain exceptions to the dominant trend of congressional legislation in recent decades.[41]

These various founding decisions and institutional developments regarding the executive, judicial, and legislative branches have each had consequences for the federal system. However, there are also a number of contemporary issues and decisions that will shape the federal system in future years. It is appropriate to close by taking note of each of them.

One current issue concerns the possibility of reforming the Electoral College. The 2000 election led to some consideration of reforming the system, and if there are additional elections where a candidate wins the popular vote but loses the electoral vote, these reform proposals could well be adopted. A variety of proposals have been advanced – such as instituting a direct popular vote, encouraging more states to allow their electoral votes to be split among candidates, or having a number of large states establish an interstate compact whereby they would agree to cast all their electoral votes for the winner of the national popular vote – and it would be important to consider the full effects of each proposal on the federal system. In particular, would alternatives to the current system lead presidential candidates to campaign and govern in ways that would be less responsive to state and local concerns? Would these proposals make it easier for candidates to win office with the support of much less than a majority of the populace, and thereby encourage the creation of multiple parties, some of which might be geographically based?[42]

Another issue is the possibility of reforming the process of drawing congressional districts so as to produce more competitive elections and increase the accountability of House members. In recent years, technological advances have made it possible for state legislatures to manipulate House district lines in such a way as to leave no more than 40 of 435 house races competitive in a given year. This has implications for the electoral system, in that few voters have an opportunity to participate in competitive House elections, and the only real competition often comes in party primaries to fill open seats. It also has implications for congressional governance. Given that there is little chance of being unseated in the general election (95–98 percent of incumbents who seek reelection are generally successful), few House members have any incentive to compromise with members of the other party or to move to the middle of the political spectrum.[43] For these reasons, a movement is afoot to entrust redistricting to state institutions other than legislatures. A small but growing number of states (including New Jersey, Washington, and Arizona, among others) entrusts this task to an independent redistricting commission. One state (Iowa) has chosen to assign this task to legislative staff members who are directed to ignore considerations of

party and incumbency. In still other states, judges draw district lines when the legislature is unable to reach agreement on a legitimate redistricting plan, and they might be asked to handle this task on a routine basis.[44]

A final development that is being followed with keen interest is the series of recent Supreme Court decisions that have imposed limits on congressional power and upheld state sovereignty in the face of congressional encroachments. On one hand, some scholars applaud these decisions as a long-overdue effort to police the boundaries between federal and state governments and as a necessary reminder to Congress that it possesses enumerated rather than plenary powers; on the other hand, the vast majority of commentators have criticized these judicial decisions as an inappropriate intrusion into matters that should be determined by Congress or by voters who are free to unseat congressmembers when they exceed their constitutional powers. Despite disagreement about the propriety of these recent rulings (most of which have been decided by a five-to-four vote), there is general agreement that these decisions represent a significant departure from the Court's usual approach to federalism cases. Yet to be determined, though, is how far a majority of the Court is willing to go in issuing further decisions that limit congressional power (particularly with the replacement of Chief Justice William Rehnquist by John Roberts and the retirement of Justice Sandra Day O'Connor and the appointment of her successor, Samuel Alito) as well as whether these decisions will have real consequences in terms of influencing the exercise of congressional power vis-à-vis the states.[45]

Thus in this issue, as in the other issues, the debate about U.S. legislative and executive governance continues. At this point in time, the debates are not so much about fundamental questions of institutional design. These have long since been settled, and there have been few significant changes in the structure of the legislative or executive branches since the founding. Rather, the current debates raise narrower, but nevertheless important, questions about the performance of long-standing institutions.

NOTES

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Legislative, Executive, and Judicial Institutions: A Synthesis

CHERYL SAUNDERS[1]

COMPARING FEDERATIONS: SIMILARITY AND DIFFERENCE

The significance of the structure and operation of the institutions of government within both spheres of government in all federations was noted in the introductory chapter to this volume. The subsequent chapters described and analyzed the legislative, executive, and judicial institutions of 11 of the world's 25 federations:[2] Argentina, Australia, Austria, Canada, Germany, India, Nigeria, Russia, South Africa, Switzerland, and the United States. The purpose of this chapter is to draw the results together and to assist in understanding them by placing the experiences of the countries in context and by making comparisons between them.

Effective comparison requires awareness of both similarity and difference. In comparing federal institutions, the similarities are clear enough. Each country has a federal political system, and each has key institutions that, at one level, are broadly similar in kind. The differences are more complex and demand more careful attention. This introductory section groups some of the principal contextual differences by reference to the size and wealth of the respective federations, characteristic features of their federal arrangements, and the general constitutional and political framework of which their institutions of government are a part. These should be borne in mind in evaluating the institutional arrangements of the 11 federations.

Size and wealth

First, the 11 federal polities vary in geographic area, population size, and economic prosperity. Table 1 illustrates the range. It shows one group of countries that are territorially vast, ranging from Russia with 17 million square kilometres to Australia with 7.7 million; a medium-size group, the

Table 1
Contextual differences between the 11 federations*

	Arg	*Aust*	*Austria*	*Can*	*Germ*	*Ind*	*Nig*	*Russ*	*SA*	*Switz*	*US*
Geog.size (m. sq kms)	2.8	7.7	0.08	10	0.35	1.2	0.9	17	1.2	0.4	9.6
Pop.size (m)**	37.5	20.3	8.2	32.8	82.4	1027	130	144	44.8	7.3	293
GDP 2004 ('000)#	12.4	30.7	31.3	31.5	28.7	3.1	1.0	9.8	11.1	33.8	40.0
Nos of units##	23	6	9	10	16	28	36	88	9	26	50
Legal system	civ	com	civ	com+	com	com	com+	civ	com+	civ	com
Stable since~	1983	1901	1945	1867	1949	1950	1999	1993	1994	1848	1789
Emergency power	yes	no	no	no	no	yes	yes	yes	yes	no	no
Political system	pres	parl	parl	parl	parl	parl	pres	pres	parl	mix	pres

* As of 2005, unless otherwise indicated.
** Approximate: based on most recent census or other recent estimates.
# Per capita GDP in USD.
Constituent units only; self-governing and other territories are not included.
~ The date from which (broadly unbroken) constitutional government runs.

largest of which is Argentina with 2.8 million square kilometres and the smallest of which is Germany with 357,023; and two states, Austria and Switzerland, with 83,870 and 41,290 square kilometres, respectively. Very large territorial areas present particular challenges for the coverage of both national institutions and the institutions of larger constituent units. It is more difficult in these circumstances, for example, to balance effective local representation with regular and consistent meetings of the national, or even a constituent unit, legislature.[3]

Differences in population size are equally marked. They do not necessarily correlate with geographic area, although, unsurprisingly, the populations of Austria and Switzerland are at the smaller end of the scale while Russia and the United States have substantial populations of 144 million and 293 million, respectively. But Canada and Australia, both of which have large or relatively large territories, also have small population sizes, with at least some communities dispersed over lightly populated areas, while India, with a medium-size territory, has one of the largest populations in the world. Both the overall size of the population and the degree of population concentration or dispersal affect the tasks that must be performed by the institutions of government. Population size is not necessarily reflected in the number of constituent units in a federal political system, although all else being equal, it must be a relevant consideration. There are, however, significant variations in the number of units in the various federations in this volume, as table 1 shows.[4] The total number of units in a federation may have some implication for the capacity of unit institutions, and it

will necessarily affect the design of national institutions in which the units are represented as well as the conduct of intergovernmental affairs.

The economic prosperity of a federation is a factor of a different kind, with the capacity to affect the design and operation of institutions and the services they provide. In this regard also, in this sample of federations, the differences are substantial. Per capita GDP admittedly provides only a single guide. It shows, however, a disparity of 40 to 1 between Nigeria (with a per capita GDP of $US1,000 in 2004) and the United States (with a per capita GDP of $US40,000). Five other federations are clustered with the United States at the more prosperous end of the scale: Switzerland, Canada, Austria, Australia, and Germany. The latter has the lowest GDP of this group, at $US28,700. All the remainder have a GDP that is less, and in some cases substantially less, than half the German figure.[5]

Federal systems

A second group of differences goes to the nature of each federal political system: the manner of its formation; the viability of its constituent units; the form of its federal division of power; and the depth of its federal culture.

The significance of some of these factors is obvious. In a federation formed by uniting existing polities, both spheres of government are more likely to have their own constitutions, with the accompanying potential for institutional innovation on the part of the constituent units, than would be the case in a federation formed from a polity that is already united, in form or effect, or by a process that combines aggregation and devolution.[6] This distinction may also have consequences for the extent of the autonomy of the constituent units and for the duplication of certain institutions between the two spheres. The causal link is not invariable, but it helps explain the relatively greater institutional autonomy of the constituent units in Argentina, Australia, Switzerland, and the United States as opposed to those in India, Nigeria, and South Africa.

A contrast of another kind, which also has implications for autonomy, can be drawn between federations in which some constituent units lack the capacity to deliver government services and federations in which the basic capacity of all units is deemed acceptable. The case for a national power to intervene is stronger in the case of the former, at some cost to federal principles. Unless problems of capacity are of a transitional nature, this factor suggests that, all else being equal, constituent units should be delineated with capacity in mind. This consideration has particular relevance in Nigeria, where the original three regions, one of which (the northern region) was disproportionately large, were progressively subdivided into what are now 36 states, weakening the state sphere in the process.[7]

The form of the federal division of power has a significant impact on institutions, in a manner that will be elaborated later in this chapter. The principal contrast is between federations in which power is divided vertically, by reference to subject matter, and those in which a horizontal division, by reference to function, is also used. In the former, of which Argentina, Australia, Canada, and the United States are examples, each jurisdiction enacts and administers its own legislation and has institutions to match. In their institutional structure, although not necessarily in their formulation and implementation of policy, such federations may be described as dualist. In the latter, of which Germany, Austria, Switzerland, and South Africa are examples, power is divided both vertically and horizontally, leaving to the constituent units both the responsibility and the right to administer much federal legislation. A division of this kind increases the need for each sphere of government to rely on the other and is typically marked by a greater integration of the institutions of the several spheres. The participation of the governments of the German *Länder* in the national law-making process through the *Bundesrat*, or Federal Council, is a good example.

The division of financial resources between the spheres of government also has institutional implications. The requirement for a legislature to approve taxation and expenditure is one of the principal checks and balances in a system of representative government. Where constituent units depend heavily on transfers from the national government, their institutions are necessarily affected to a degree, requiring the adaptation of traditional principles and practices to these altered circumstances.[8] Formalized tax-sharing is one common response, which also constrains the ability of the national government to exert undue influence over the constituent units through its control of financial resources (as occurs, for example, in Argentina).

The structure and operation of the institutions of both spheres may be affected by the country's commitment to federalism. Federal culture is the product of many factors,[9] one of which is the diversity of the people served by the federation. Population diversity is principally relevant to an understanding of federal institutions where it is linked with the delineation of the constituent units, creating what has been described as a pluri-national,[10] or multinational, federation.[11] Switzerland, Canada, India, Nigeria, and Russia are examples. By contrast, Australia, South Africa, and the United States can be distinguished as "territorial" federations, despite the multicultural composition of their peoples.[12]

The nature of the impact of population diversity on federal institutions varies. In Switzerland diversity has been central to the growth of a political culture that is consensual rather than majoritarian; in which the twin poles of self-rule and shared-rule are valued; and in which national minorities can share in the ownership of the state.[13] Interest in consensus is more

spasmodic in the other four pluri-national federations, to the extent that it exists at all. In each of them, however, population diversity manifests itself in ways that affect the institutions of government. Thus, the legal system and institutions in francophone Quebec are significantly different from those in the rest of Canada; in Russia and Canada a degree of asymmetry in the structure and operation of the federation is a response to substantial cultural difference between constituent units;[14] in Nigeria population diversity underpins efforts to mandate equity in appointments to the institutions of government through the federal-character principle. In India the linguistic diversity of the people has driven successive changes to state boundaries and has been a prime cause of the transition of a highly centralized federation into one that Rajeev Dhavan and Rekha Saxena describe as "negotiatory" in character.

Constitutional and political framework

Finally, there is a host of relevant differences between other aspects of the constitutional and political systems of these 11 federations. Those that are central to the design and operation of the institutions of government are the subject of this book and are examined in detail in the remainder of this chapter. Others, however, contribute to the context within which the institutions can be understood. These include the legal system, the configuration of political parties and the patterns of their support, the stability of the political system and the depth of the constitutional culture, and the availability and use of emergency power.[15]

Of the federations in this study, three – Australia, India, and the United States[16] – have common-law legal systems; another three – Canada, South Africa, and Nigeria – have mixed legal systems that, in the field of public law, are predominantly common law in character. The remainder have civil-law systems. The background legal system affects the institutions of government in a variety of ways. In civil-law systems legislative codes are the predominant source of law. In common-law systems the law derives from either legislation or judicial decisions, and the latter have precedential value. This difference informs the federal distribution of powers and has institutional consequences for the organization and operation of the courts. Other differences between legal systems affect intergovernmental relations. In particular, they explain why civil-law countries are more likely to require prior legislative consent to intergovernmental agreements than are common-law countries.[17]

Political parties are another dimension of the political and constitutional context that affects the operation of government institutions, both within and between the spheres of government. Parties have significance for the federal balance itself. The dominance of the African National Congress

(ANC) in all spheres of government in South Africa reinforces centralized decision making, discouraging independent action in the provincial sphere; the dynamics of Indian federalism changed once the rise of regional parties eclipsed the authority of the Congress Party; the regionalization of parties in Canada adds weight to the influence of the provinces; and political alignments across jurisdictional boundaries encourage collaboration between governments that, taken to an extreme as in Argentina, undermine constitutional safeguards. Levels of party support also affect the operation of particular institutions. Different political majorities in the two chambers of a national legislature will lead to disagreement and may lead to deadlock, as the chapter on Germany shows. Over a long period of time, identical majorities may result in the need for a second chamber to be questioned altogether, as Anna Gamper notes in the Austrian context.

The consequences of party configuration are easy to see; their causes are less easy to trace. Electoral systems are one, but only one, variable. Of the common-law federations in this study, all but India have majoritarian electoral systems, but the outcomes vary dramatically, from the tightly disciplined, effective two-party system in Australia, to the more loosely disciplined two-party system in the United States, to the significantly more regionalized parties in Canada. Similarly, forms of proportional representation produce both a relatively small and stable range of parties in Germany, Austria, and Switzerland and the hegemony of the ANC in South Africa, although the latter can be explained by reference to distinctive local factors.

Just as the depth of federal culture was described earlier as a significant, if sometimes nebulous, influence on the operation of federal institutions, so political stability and constitutional culture are influences as well. The federations in this study vary significantly in these respects. Australia, Canada, Switzerland, and the United States have enjoyed established constitutional systems for well over a century, and Germany and Austria have been constitutionally stable for more than 50 years. By contrast, in both South Africa and Russia the constitutional system is relatively new and follows decades of undemocratic or authoritarian rule, while both Argentina and Nigeria have had long periods of dictatorship, interspersed with constitutional government (which, in both cases, has been re-established relatively recently). It is not surprising, in these circumstances, to find more serious problems of capacity and performance in the institutions of this latter group of countries.

One further factor is interwoven with these differences. The constitutional arrangements of all of the four less established federations provide for the exercise of extraordinary power in emergencies in ways that affect both federalism and democracy. All except South Africa, moreover, have a history of using such powers, sometimes for long periods and always with significant effect. A fifth country, India, occupies the middle ground between the two

groups of federations in this respect. India has also been a federal constitutional democracy for more than 50 years, but constitutional stability has been punctuated by exercises of emergency power, sometimes affecting only particular states and sometimes affecting the country as a whole. Reaction against the excesses of emergency rule in the 1970s has now diminished the likelihood of its widespread use, but this power continues to be used in relation to individual states, with destabilizing effects.

The case studies thus illustrate a familiar conundrum. Provision of a specific emergency power brings with it the temptation to use and abuse it. In the absence of specific provision, however, a genuine emergency may cause the constitution to be flouted or abrogated altogether. The preferable course depends on the circumstances of the country concerned, bearing the lessons of both history and comparative experience in mind. A comparative model that merits attention is the Constitution of South Africa, which strictly confines the circumstances in which an emergency may be declared and the period for which it may last, requires the declaration to be made by an act of the Parliament, subjects the decision to judicial review, protects core fundamental rights from the exercise of emergency powers, and precludes indemnity for unlawful action taken during this time.[18]

NATIONAL INSTITUTIONS

General

The federal character of a system of government is generally reflected in the form and operation of the institutions of the national government in a variety of ways. This part surveys that range before I go on to examine particular institutions in detail. It shows that the federal form of the state typically has a profound impact on national institutions and that there is likely to be considerable interaction between the institutions of the spheres of government.

In some cases, the impact of federalism on national institutions is a natural consequence of the territorial division of the country into federal units and the development of political activity by reference to them. In most federations, for example, the electoral divisions for the chamber of the national legislature that is elected broadly by reference to population numbers (the "popular" house or chamber) are influenced in some way by the boundaries of the constituent units. The organization and operation of political parties are also likely to reflect the federal structure of the country, causing greater attention to be paid to regional concerns in some federations (e.g., Canada, India, and the United States), although having little or no effect in others.

The boundaries of constituent units are used for organizational purposes in relation to other national institutions as well. In most federations, they effectively dictate the placement of the regional offices of the national

administration. In federations in which there is a distinct federal court hierarchy (e.g., the United States, Australia, and Argentina), the design of judicial districts is likely to be guided by the boundaries of the constituent units.

In a second category of cases, the influence of federalism on national institutions is attributable to a concern for unit representation. Famously, this is the principal rationale for the composition and powers of federal chambers in national legislatures (see below). As the chapters in this volume show, however, concern for unit representation can affect the composition of popular chambers as well. In some federations, of which Argentina and Australia are examples, units are guaranteed a minimum number of seats, notwithstanding their population size. In an extreme manifestation of this concern in India, constituency divisions have been frozen until 2026, denying effect to the altered patterns of population distribution revealed by census data, so as to limit the domination of the populous northern Indian states in the *Lok Sabha*.

Constituent units are frequently represented in other national institutions too, although the details vary considerably between federations. In Canada appointments to the Supreme Court are apportioned between provinces or regions in historical shares; in most federations there is some kind of consultation with units regarding appointments to the principal constitutional court; in many federations cabinets are formed with an eye to unit representation as a political imperative. Unusually, Nigeria has formalized this procedure through a constitutional requirement for the appointment of at least one cabinet minister from each of the 36 states.

In an example of another kind, the constituent units are usually somehow involved in decisions to amend the national constitution, or at least those parts of it that involve the federal structure. In some cases they are involved directly through a double-majority referendum requirement, as in Switzerland or Australia; approval of a proposed change by a proportion of unit legislatures, as in Canada; or an option either to initiate or to approve proposed changes, as in the United States. In most other cases their involvement is indirect, through the consent of the federal legislative chamber. In cases of this kind, the units have an effective voice only to the extent that the federal chamber performs a substantive federal function.

In multinational federations, where unit boundaries coincide with linguistic, religious, or other cultural divisions, requirements for national institutions to reflect cultural diversity may also, de facto, involve unit representation. The representation of the three major language groups in the Swiss Federal Council is a case in point. The impact of the federal-character principle on the composition of institutions in Nigeria is an example of a different kind.

In a smaller number of cases the constituent units may play an instrumental role in the composition of national institutions. This is most obviously the

case where a federal legislative chamber comprises representatives of unit governments (as in Germany) or legislatures (as in Austria) or a mixture of representatives of both the provincial legislature and executive (as in South Africa). Even where the federal chamber is directly elected, however, unit institutions may have control over some aspects of the process of selection. In Switzerland, for example, the cantons prescribe the electoral system for the Council of States, and in Australia and the United States the states fill casual Senate vacancies. The United States offers other examples of this wider point. The states still have responsibility for drawing electoral boundaries for the US House of Representatives, for example, although within an increasingly prescriptive framework of judicial and congressional regulations. Similarly, the states retain the power to decide how their electoral college votes will be allocated for the purposes of presidential elections.[19]

Finally, the challenge of accommodating the institutional requirements of two spheres of government within a single state may cause some institutions to be shared. Two instances are particularly common. First, many federations have a single court system in which the lower courts are under the authority of the constituent units but also deal with federal cases. Germany, Austria, Switzerland, India, and Canada are examples. Second, in some federations the administration of federal legislation by the constituent units is a deliberate component of the federal design, linked to the federal division of power. To a greater or lesser degree, this is the case in Germany, Austria, Switzerland, South Africa, and India.

Political executives

One of the principal points of contrast between the 11 federations represented here concerns the relationship between the executive and legislative branches of government, involving, in most cases, the choice between a presidential and a parliamentary system of government.

Argentina, Nigeria, Russia, and the United States have presidential systems in which an executive president is elected separately from the legislature and does not rely on the support of the legislature to continue in office. The Russian system differs from the others to the extent that, theoretically, executive power is shared between the president and a prime minister or "chairperson of the government," and ministers are appointed by the president on the proposal of the prime minister along lines broadly reminiscent of the structure of government in France. The difference carries through to other aspects of the system. Unlike in the other three states, in Russia there is no provision for a vice-president, and the Russian Duma may pass a vote of no-confidence in the government, which can be removed by the president on other grounds as well. By contrast, Australia, Austria, Canada, Germany, India, and South Africa have parliamentary

systems in which the executive is drawn from the elected legislature and depends on the continued confidence of that legislature. Switzerland is an unusual case, designed to encourage consensus-style democracy through a collegial and inclusive structure. The members of the Swiss Federal Council are elected individually by a joint sitting of both houses of the national legislature. Once elected, however, they cannot be removed by a no-confidence vote.

The choice of a presidential system by the framers of the Constitution of the United States was compatible with federalism, in the sense that both involved limited and divided powers. As the presidential system operates in the United States, it has enabled Congress to develop as a legislative institution with a will of its own, in a major point of contrast to many parliamentary systems. Presidentialism is not necessarily either synonymous with limited government, however, or a neat complement to federalism. In Argentina, Nigeria, and Russia concentration of power in the presidency has enabled the office to dominate the system of government at the expense of both the independence of the legislature and the autonomy of the federated units. In Argentina and Russia attempts have been made to restrict presidential power by creating a chief of cabinet answerable to the Congress in the former and by limiting the circumstances in which the president can dismiss the chairperson of the government in the latter. Neither has made a significant difference to what the Argentinean chapter describes as "hyperpresidentialism" and the Russian chapter describes as "superpresidentialism." In Nigeria Ebere Osieke reports that there has been occasional consideration of reverting to a parliamentary form of government (abandoned in 1979 in favour of a presidential system in a brief return from military to civilian government) as a means of avoiding tension between the positions of president and prime minister.

The dramatically different consequences of the establishment of presidential systems in these four cases are attributable to a variety of factors. The first and most obvious is the extent of the power vested in the president. Despite the prominence of the office in the United States, the powers exercisable independently by the president are relatively confined. By contrast, in the other three presidential federations, the president tends to have broader formal powers, including a limited law-making function and access to emergency powers of various kinds. A second factor concerns the extent to which the president can make use of extraconstitutional political or economic levers to augment the effective power of the office. Thus in Argentina the dominant role of the president is reinforced by extensive powers of political patronage within party machines, facilitated by a closed-list voting system and by the fiscal dependence of the states on the national government. A third possible factor is the shallow commitment to constitutionalism, understood in this context as compliance with constitutional limitations on power.

Just as there are differences between presidential systems so, too, do the parliamentary federations differ in various ways. Of the six represented in this volume, South Africa is the most distinct. The leader of the South African government is drawn from the Parliament and depends on the confidence of Parliament in order to hold office. This justifies describing the system as parliamentary; however, it has some presidential features as well. The leader is described as a president rather than as a prime minister and plays the role of both leader of the government and head of state. He or she may be impeached as well as removed through a no-confidence procedure. Once elected, the president withdraws from the Parliament, although most ministers must be members of Parliament. This unusual structure thus offers an interesting combination of the key advantages of both systems. The presidency can provide the focus for national unity, but it remains under parliamentary control, and the efficiency of decision making that is a hallmark of parliamentary government is preserved.

The remaining parliamentary federations differ from each other in less obvious respects. Where the electoral system is based on proportional representation, as in Austria and Germany, more parties are likely to have significant representation in the legislature, making coalition government common or even the norm. Where a majoritarian system of one kind or another is used, as in Australia and Canada, elections are somewhat more likely to produce a clear majority for one party, although, as the Canadian experience shows, regional parties may be a complicating factor. Other differences concern the procedures for forming and removing governments. Australia, Canada, and India, all of which are common-law federations, tend to follow British constitutional practice, conferring broad formal power on the symbolic head of state, who is kept in check by largely unwritten conventions.[20] In both of the continental federations, the procedures for forming and removing governments are somewhat more specifically prescribed and include, in the case of Germany, a requirement that lack of confidence be expressed by a positive vote of majority support for an alternative government leader.

Heads of state

One further point of distinction between parliamentary and presidential systems concerns the position of head of state. In presidential systems the president is both the leader of the national government and the head of state. In this case he or she exercises not only the full range of national executive power but also performs the symbolic, ceremonial, and representative functions of the head of state, including those connected with the position of commander-in-chief. Parliamentary systems, with the exception of South Africa (for reasons explained earlier), typically have a separate

office of head of state, with limited substantive power, performing most functions on government advice. Of the federations in this category three – Austria, Germany, and India – are republics. Another two – Australia and Canada – are monarchies in which the functions of the Queen, based in the United Kingdom, are performed locally by representatives of the monarch who have become the de facto heads of state. Switzerland offers a model of an entirely different kind. The logic of the deliberately consensual framework for the Federal Council precludes a focus on any one of its members as head of state; instead, the council as a whole fills the position of head of state, while the less exalted position of chairperson of the council rotates annually between council members.

Switzerland aside, the position of head of state is held by a single person. In these circumstances there is a question about how to ensure that the head of state has a sufficiently broad support base – which is not associated exclusively with a particular party, social group, or sphere of government – to be able to effectively symbolize the unity of the state. The problem is particularly challenging in presidential systems, where the head of state is also leader of the government. Several techniques are employed for this purpose in the presidential federations analyzed in this volume. In both Argentina and Russia the president is directly elected on the basis of a second-round voting system so as to ensure that the successful candidate receives the support of at least a majority of voters. Argentina moved away from an electoral college system in 1994; Hernandez reports that the tendency of the change to lessen the breadth of a candidate's regional support was one of the controversial aspects of the electoral college. In Nigeria the president is directly elected as well, but the voting system requires the successful candidate to receive at least one-quarter of the votes in at least two-thirds of the states. Consideration has also been given to mandating the rotation of the presidency around the country's principal zones. In the United States the president is indirectly elected through an electoral college in which 48 of the 50 states each casts its electoral votes as a single block. This system has its drawbacks in majoritarian terms, but it encourages broad presidential campaigns during which explicit attention is paid to state interests.

The symbolism of the position of head of state is a factor that affects the design of the office in parliamentary federations. Austria has a directly elected president and, like Argentina and Russia, uses a second-round voting system. In both Germany and India the president is chosen by an assembly representing both the national legislature and the legislatures of the constituent units. In Canada the governor general, representing the Queen, is chosen alternately from among francophone and anglophone Canadians. In Australia the Queen herself tends to be regarded as a neutral symbol, and each jurisdiction has its own representative of her. The

question of how the head of state should be chosen, if and when Australia becomes a republic and the common symbol of the monarchy is removed, has not yet been resolved.

Legislatures

National legislatures in federations are frequently bicameral. Bicameralism has become accepted as the most obvious mechanism by which the constituent units can play a role in national institutions and thus be a key component of the arrangements for shared rule. Bicameralism takes a wide variety of forms, however. There are also some federations (e.g., Venezuela since 1999) that have no national bicameral legislature.[21] Nevertheless, the national legislatures of all the federations in this volume have two houses or chambers, subject to the caveat that, for reasons of history and composition, the German *Bundesrat* is "not a parliamentary organ in a strict sense" (Oeter, this volume).

One house in each national legislature is directly elected by reference to population numbers, giving broad effect to the democratic principle of one vote, one value. These houses perform the usual functions of any popularly elected legislature. They make laws, they approve budgetary measures, and they scrutinize the executive branch. In parliamentary systems this is the house on which the government principally depends and from which the leader of the government is drawn. In presidential systems this is the house in which impeachment proceedings typically start.[22] As described earlier, even this house is generally affected by the federal form of the polity in some respects: in procedures for the formation of constituencies; in requirements for the minimum representation of constituent units; and, occasionally, in the power of unit legislatures to prescribe aspects of the electoral process. From the perspective of federalism, however, the principal focus of attention is on the second house or chamber.

In all 11 federations, with the possible exception of Canada (see below), this chamber has a federal purpose that is representative, functional, or a combination of the two. This purpose, in turn, provides the rationale for conferring upon it extensive powers. In some federations, including Argentina, Australia, Switzerland, and the United States, the powers of the second chamber are almost co-extensive with those of the first. The latter usually has somewhat greater authority in financial matters, in recognition of its greater democratic legitimacy, although here, also, Switzerland is an exception. Further, in addition to any specifically federal functions, some second chambers have general, national powers that the other house lacks: to consent to treaties, to approve key executive and judicial appointments, or to try impeachments. In Germany, Austria, and South Africa, by contrast, the powers of the federal chamber are tailored more precisely to its

intended functions and are markedly less than are those of the other house. Nevertheless, the powers of the second chamber are significant in all these federations, creating the potential for conflict between houses constituted in different ways, to give effect to different principles.

The representative purpose of a federal chamber is achieved through its composition. Two variables are particularly important: (1) the manner in which its members are chosen and (2) the proportions in which the constituent units are represented. The manner of choice ranges between chambers that are directly elected and those that are indirectly elected (or appointed in some way). As a generalization, there has been a trend towards direct elections unless indirect elections serve some systemic purpose, although it is not entirely consistent. Thus, while the members of the federal chamber in Argentina, Australia, Nigeria, Switzerland, and the United States are directly elected by the people of the respective constituent units in three of these federations – Argentina, Switzerland, and the United States – members of the federal chamber were originally elected by unit legislatures. On the other hand, in Russia the Federation Council was directly elected when it was first formed in 1993, but the two members from each constituent unit are now, respectively, appointed by the unit governor and elected by the unit legislature. Of the remaining federations, Austria, India, and South Africa elect members of the federal chamber indirectly, in a way that involves the legislatures of the states concerned, while the German *Bundesrat* comprises representatives of the *Länder* governments. In Canada, exceptionally, senators are appointed by the national government until retirement at age 75, and the Senate is barely relevant to federalism, making Senate reform a subject of perennial debate. Even in Canada, however, Senate appointments are apportioned by reference to a regional formula, giving it a representational role of a kind.[23]

In many federations there are additional links between the units and the federal chamber of the national legislature that tend to reinforce its representational character. These are most obvious in Germany and South Africa, where the function of the federal chamber complements the federal division of power, and members of the chamber act, in effect, as delegations from the unit government or government and legislature, bound collectively by their instructions. Other examples can be found, however. In Switzerland elections to the Council of the States are controlled by the cantons. In Russia, in an example of an entirely different kind (reflecting the sheer geographical size of the Russian federation), each month members of the Federation Council are supposed to spend a stipulated period of time in the unit that they represent, although they need not be residents of it.

Elsewhere, however, while links continue to exist, there are signs that they are diminishing as national politics gradually become ascendant. In Australia, for example, as in Argentina and the United States, casual vacancies in

the Senate are still filled by state governments or legislatures, but a change to the Constitution in 1977 restricts the choice to members of the same party as that of the retiring senator. In India, since 2003, members of the *Rajya Sabha* no longer need to live in the state they represent, easing the way to filling the seats on the basis of party considerations alone. In Argentina two states retain the theoretical capacity to instruct and recall their senators, but the procedures are never used, and doubts have been raised about their constitutional validity.

The manner in which members of the federal chamber are chosen also affects the duration of their terms. In all the federations in this volume, with the exception of Nigeria,[24] the terms of members of the federal chamber vary from the terms of members of the more popular house. Where the federal chamber is directly elected, the term served by its members typically is fixed for a period of six years, with a proportion of the members facing election every two or three years, so that the chamber has a perpetual existence, at least in normal circumstances.[25] The link between direct election and fixed, rotating terms is not invariable, however. The Council of States is directly elected in Switzerland, but the terms of its members are regulated by legislation of the respective cantons. Conversely, members of India's *Rajya Sabha* have fixed six-year terms, even though they are elected indirectly. In all other cases of indirect election, the terms of members of the federal chamber depend on the term of the legislature of the constituent unit they represent. In these circumstances, the composition of the federal chamber may be in continual flux, complicating the development of a working relationship with the other house.

A second, important point of difference in the composition of federal chambers lies in the proportions in which the constituent units are represented. Equal representation gives effect to the principle of the equality of constituent units, possibly reflecting the lingering influence of conceptions of sovereignty attributable to the derivation of the federal idea.[26] It necessarily ignores differences in the population size of the constituent units, however, and to this extent detracts from the democratic principle (if the people are considered as a whole). It is not possible to reconcile the two sets of principles, and most chapters record some tension between them. Nevertheless, a clear majority of the 11 federations in this volume give effect to the equality principle: Argentina, Australia, Nigeria, Russia, South Africa, Switzerland,[27] and the United States. In all except Switzerland, arrangements for chairing the federal chamber are also designed to preserve the equal voting strength of each unit, either by providing for the national vice-president to act as chair or through the manner in which the votes are counted.[28] Austria, Canada, Germany, and India adjust the representation of the constituent units by reference to the distribution of population in ways that depart in varying degrees from a calculation based on population alone.

The representative function of a federal chamber is significant. It symbolizes the participation of the units, or the people organized in units, in the decisions of the federation as a whole. At least where the equality principle applies, it also gives less populous units, individually and collectively, a proportionately greater voice in the national legislature than they would otherwise have, and it facilitates the formation of parliamentary committees and cabinets representative of the country as a whole.

As many of the chapters show, the composition of the chamber by reference to the constituent units does not necessarily mean that it functions in a distinctively federal way by, for example, representing unit interests or defending any particular federal principle. Where specific responsibilities, relevant to federalism, are conferred on the federal chamber, it may be possible to make a compelling case that the chamber fills a substantive federal role.

Germany, South Africa, Austria, and, to a lesser extent, Switzerland illustrate the point. In these federations the role of the federal chamber complements the horizontal division of powers, whereby the constituent units administer federal legislation. In these circumstances, whatever other functions it may perform, the federal chamber becomes a forum though which such arrangements are mediated. Legislation to be administered by the units is approved; attempts to avoid or control unit administration are considered; and the adequacy of implementation resources are taken into account. In South Africa Christina Murray reports that the National Council of Provinces (NCOP) was designed as "a concrete expression of the commitment to cooperative government" in the Constitution.

Germany, South Africa, and Austria are also cases in which the members of the federal chamber are elected indirectly. In each case the composition of the federal chamber, the powers allocated to it, and the federal division of competences can be seen as an integrated package. Germany's *Bundesrat* comprises members of the governments of each of the *Länder* and thus institutionalizes a form of executive federalism. The *Bundesrat* can veto specific categories of laws of particular significance to the *Länder*, including, at the time of writing, laws dealing with the allocation of financial resources and with prescribing administrative procedures to be followed by the *Länder*, although some adjustments may be under way.[29] In relation to other types of laws, however, the veto of the *Bundesrat* can be overridden by the *Bundestag*. In South Africa and Austria the federal chamber comprises representatives of the legislatures of the constituent units, chosen to reflect the party balance in each legislature.[30] They thus avoid entrenching executive federalism, although at a possible cost to the clarity of the role of the federal house. In both cases the federal house has particular authority in relation to legislation affecting the powers of the constituent units and more limited authority in relation to legislation of other kinds. In Austria, however, proposed laws affecting the administrative functions of the *Länder*

also need the direct consent of the *Länder*. In South Africa the NCOP is already being criticized for not adequately reflecting provincial interests. An intriguing question is raised by South Africa in this regard. The requirement for the NCOP members who represent the same province to cast a single bloc vote on provincial questions, in accordance with instructions from provincial legislatures, is consistent with the functional role of this house. Accepting that NCOP members may cast an individual vote on matters that do not directly affect the provinces, however, may have encouraged the members to attach greater significance to such issues, despite the relative ease with which an NCOP decision can be overridden.[31]

India provides an interesting contrast. Members of the *Rajya Sabha*, also, are indirectly elected by state legislatures,[32] and authority to administer federal legislation may be conferred on the states. The states have no entitlement in this regard, however, and there appears to be no conception that the federal chamber might provide a link between the two spheres of government that would facilitate state administration of federal law.[33] The powers of the *Rajya Sabha* are not confined to questions of particular relevance to the state but are equal to those of the *Lok Sabha* (except in relation to financial legislation). The Constitution itself prescribes the manner in which administrative authority can be devolved and mandates the allocation of corresponding resources.

In these and other federations specifically federal functions of other kinds are sometimes conferred on the federal chamber. These may include the nomination, or consent to the appointment, of members of the constitutional or supreme court, as in, for example, Germany and the United States; consent to treaties, as in the United States and Argentina; and approval of emergencies or other exceptional extensions of national power over the affairs of the constituent units, as in India and South Africa. In Argentina, novel requirements for the federal chamber to initiate intergovernmental agreements for tax-sharing and other forms of fiscal cooperation came into force as a matter of law in 1994, but no action has yet been taken in relation to them.

Whatever their composition and functions, the operation of all federal houses is affected by the allegiance of their members to political parties, with the possible exception of Russia, where the Constitution forbids factionalism in the Federation Council. Where members of the federal chamber are elected directly, decisions are made almost exclusively on party lines. The United States is an exception, where relatively weak party discipline makes majorities more fluid in both houses. Even where members are indirectly elected and have specifically federal functions to perform, party interests tend to predominate.

The role of parties does not necessarily preclude a federal chamber from fulfilling its representative role. It impairs any substantive functional role, however, where federal considerations are subordinated to party interests.

The party political character of the house that is rationalized by reference to federalism also further complicates its relationship with the house that is popularly elected and that has party preferences of its own. If decisions in the federal house are made on party political grounds, it is in danger of becoming redundant where party majorities in the two houses coincide and inappropriately obstructionist where they do not. The problem is illustrated by most of the chapters. Thus, in relation to Austria, Gamper draws attention to the ineffectiveness of the federal chamber from the standpoint of federalism and to moves to abolish or reform it. In Switzerland Wolf Linder and Isabelle Steffen argue that the popular chamber performs at least as significant a federal function as does the federal house. Dhavan and Saxena note the failure of India's federal chamber to protect state power from national incursions, despite its specific authority to do so. In Germany, Stefan Oeter points to the frequent political differences between the two houses, prompting the current search for ways to limit opportunities for disagreement.

Where two houses disagree, even for reasons of party differences, informal negotiations often succeed in resolving the question in some way. In some federations, of which Argentina and the United States are examples, no other form of resolution is possible; so if the houses do not agree, the proposal does not proceed. Arguably, this approach reflects a view that each house plays a different role in the legislative process so that the consent of each is required. In most federations, however, formal mechanisms are provided to resolve disagreements between the houses. To the extent that such mechanisms favour one house over the other, they also enhance its bargaining position in any negotiations.

The mechanisms differ between federations. Germany uses a joint mediating committee in which the houses are equally represented, forcing compromise between the parties and giving rise to a degree of "hidden consociationalism" in the political system. In India a joint sitting of the houses of the legislature provides a rarely used fall-back mechanism, the outcome of which depends on the strength of the various parties in the two houses. In South Africa a super-majority of the popular house can override a decision of the NCOP, even on matters of specifically provincial interest. In Australia the centrepiece of the deadlock mechanism is an election for both houses, which has become a strategic weapon in the struggle for political power between the parties and is relatively useless for the purpose for which the procedure was originally designed.

Administration

It follows from what has already been said that there are significant differences between federations in the organization of the national administration. The principal contrast lies between dualist systems, typified by the United States, and integrated systems, typified by Germany. In the former

the national government has a complete administration of its own and normally administers its own legislative programs; in the latter a substantial portion of national legislation is administered, as of right, by the constituent units. Many federations exhibit elements of both approaches and lie somewhere between these two paradigmatic cases, which, in certain respects, also show some small signs of drifting closer to each other.

Of the 11 federations in this volume, five are essentially dualist: Argentina, Australia, Canada, Nigeria, and the United States. India also has some dualist characteristics, but its arrangements are so distinctive that it deserves specific consideration in its own right. In the dualist federations, by definition, the national administration covers all areas of national constitutional responsibility. In addition, however, at least in common-law federations, national activities generally extend well beyond areas of national legislative power to areas of state responsibility that are funded by the national sphere or are the subject of intergovernmental cooperation. Typically, national administrative bodies are established for these areas as well, so as to develop policies, monitor expenditure, and evaluate outcomes. In such federations there may be extensive duplication of administrative agencies between the spheres of government and an elaborate network of relations between them.

In Australia and the United States questions have arisen about whether the administrative functions of one sphere of government can constitutionally be conferred upon the other and, if so, in what circumstances. The Supreme Court of the United States has held that Congress cannot impose on states the obligation to administer its laws without the consent of the states concerned.[34] Australian courts have cast doubt on the extent to which state administrative functions can be conferred on national officers or agencies, even with the consent of the Commonwealth legislature.[35] These decisions have encountered some criticism in both countries for being excessively rigid interpretations of typically meagre constitutional provisions that detract from administrative convenience without good cause. There may be more to be said in their favour, however. In both countries the mechanisms for legal and political accountability are structured on the assumption that each government is responsible to its own legislature for the administration of its own laws. These mechanisms are disturbed by the conferral of administrative authority across jurisdictional boundaries, unless alternative provision is made. It should be noted, however, that in neither case does the constitution preclude the use of financial incentives, in the form of conditional grants, to induce the constituent units to adopt and to implement national policies and programs.[36]

India is distinctive in at least two respects. The first concerns the all-India Services: a traditionally independent, highly professional, administrative structure whose officers serve both spheres of government and are held to

account within the sphere in which they are working at any one time. The all-India Services are a product of Indian history, inherited by independent India from the British Raj and turned to the use of building and preserving national unity. Recruitment, training, and overall management of the services lie with the Union government, however, and Dhavan and Saxena note the influence thus exercisable by the Union over administration in the states. Additions to the all-India Services require the consent of a super-majority in the *Rajya Sabha*, which generally has not been forthcoming because of state opposition.

The second point of distinction in relation to India concerns the allocation of responsibility for the administration of national legislation between the Union and the states. State administration of Union legislation is the norm in areas of concurrent power,[37] and the states may be required to administer Union legislation in other areas as well.[38] The Constitution provides a framework of necessary principle that prescribes how the administrative authority of the Union is conferred on the states, requires the allocation of corresponding resources, and seeks to ensure that the authority is exercised in accordance with Union directions. State authority, conversely, may be conferred on Union administrative bodies with Union consent.

Other federations in which administration of national legislation by the constituent units is a structural feature of the system, linked to the federal division of powers, include Austria, Germany, South Africa, and Switzerland. In Austria, Germany, and Switzerland there is a national administration as well, but it is limited to a few areas in which the national sphere administers its own legislation, and the administration of the constituent units is correspondingly more extensive. In South Africa there is a single administration serving both spheres of government, for which the national legislature provides a fairly prescriptive legislative framework that extends to salaries and terms and conditions of employment. Murray draws attention to the impact of these decisions on budgetary management by the provinces.

In these federations the categories of national legislation to be administered by the constituent units in their own right are indicated in the constitution, in the same manner as is any other aspect of the federal division of competences. It is convenient to describe the power exercisable by the units in this case as an administrative competence. In addition, the constitutional scheme may authorize the conferral of additional authority on the constituent units to administer national legislation, if the national legislature, including the federal chamber, so decides, which is described here as administrative authority. Typically, national institutions exercise greater control over the administrative process where the units exercise only administrative authority, and, in Germany, additional funding is also required. Inevitably, the detail of these arrangements differs between federations. In Germany, for example, direct administration by the *Länder*,

in the exercise of their constitutional competences, is the norm unless otherwise indicated in the Constitution. The position is broadly similar in Switzerland. In Austria there is greater use of the technique of conferring administrative authority, although the *Länder* have competence to execute some national laws, in addition to their own; and they have both law making and administrative competence in areas of framework legislation. In South Africa the provinces administer as of right national laws enacted in areas of concurrent legislative power, subject to the Constitution and any national law to the contrary. Power to administer other national legislation may also be conferred on the provinces specifically. In each case the federal chamber plays a role in approving or disapproving departures from the basic scheme, to the extent that departure is possible.[39] In Austria, however, direct consent of the *Länder* may also be required, and in Switzerland direct democracy provides an alternative sanction.

In a system of this kind the national government must rely on the good faith and competence of the constituent units and must also accept some diversity in the implementation of its legislation. Remedial action is generally available in the event of administrative failure, through political intervention or judicial proceedings. South Africa's Constitution, in particular, makes careful provision for national supervision and intervention in the face of concern about provincial capacity.[40] Even so, such procedures are rarely used. These federations necessarily operate on the assumption that the constituent units are able and willing to perform their constitutional responsibilities, reinforced by the expectation that both spheres of government will act in good faith towards each other or, in South African terms, in the spirit of cooperative government.

There are signs in at least two of the chapters, however, that the model is under pressure. In Switzerland, Linder and Steffen report that the national administration is exerting greater influence in the formulation and implementation of national policy and that national legislation is becoming increasingly prescriptive, limiting the autonomy of the cantons, in the interests of uniformity. In Germany, similarly, an increase in the number of national statutes imposing more detailed administrative obligations on the *Länder* has increased the proportion of bills that are subject to the absolute veto of the *Bundesrat* and, thus, occasions for disagreement between the two houses. The present proposal is to diminish the potential for conflict by restricting the powers of the *Bundesrat* to a degree in relation to laws of this kind, compensating the *Länder* with new substantive powers.[41]

Some remaining aspects of the national administration can be dealt with more briefly. In dualist federations in particular, where the national administration is more extensive, there is a question about its geographic distribution. Head offices are often located in the national capital but may be placed elsewhere. The distribution of regional offices is likely to follow the

configuration of the constituent units, but smaller units may miss out and regions comprising groups of units may be used instead. In either case there is potential for argument about whether national authorities have been sufficiently even-handed.

In culturally diverse federations questions may also arise about whether the national administration and other national agencies are sufficiently representative. The Swiss chapter notes a requirement for proportionate representation of ethno-linguistic groups in most national departments. In Nigeria the composition of national agencies is required to "reflect the federal character of Nigeria" so as to preclude the domination of particular national groups.[42] In Canada official bilingualism gradually helped to secure a more proportionate representation of francophone Canadians.

In all federations the national government has other agencies as well, established for particular purposes. These may have no federal significance beyond the questions about location and composition. Two categories have some relevance from the perspective of federalism, however. The first comprises agencies created to play a specific role in relation to the federal system. Examples include the Nigerian Federal Character Commission, the Australian Grants Commission, and the South African Financial and Fiscal Commission. Second, the federal system is specifically relevant to the way in which some agencies are constituted. Central banks are, or were, an example, and although the influence of federalism on central banks has diminished, it has continuing significance in some federations, including Switzerland and Germany. Some other such agencies are the product of intergovernmental arrangements and are considered in that context below.

Courts

Every federation has a national court system of some kind. The interesting points of comparison lie in the scope of this system, the influence of federalism upon it, and its relationship with the courts of the constituent units, where separate and distinct courts exist. As a generalization, a point made by Osieke in relation to Nigeria applies to most other federal countries: there tends to be greater interdependence of courts in federations than there is of any other institutions of government.

Nevertheless, court systems in federations can also be characterized broadly as dual or integrated. Dual systems involve largely separate and parallel court hierarchies for each sphere of government, exercising the jurisdiction assigned to the respective spheres. Integrated systems involve a single court hierarchy, authority over which is likely to be divided between the national government and the constituent units. It may, however, be assigned to the national government alone. Austria, Russia, and South Africa are examples of federations in which the courts are entirely a national responsibility,

although in Austria there has been some discussion of creating *Land* administrative courts in order to spread the burden of adjudication and to further strengthen the *Länder.*

Federations with a dualist judicial structure include Argentina, Australia, Nigeria, Switzerland, and the United States. Those with an essentially integrated system include Austria, Canada, India, Germany, South Africa, and Russia. As a generalization, federations with a dualist administrative structure tend to have a dualist judiciary too, but the correlation is not complete, as in the example of Canada. This is an area in which distinctions between common-law and civil-law systems are also relevant, further complicating the accommodation of the structure of the judiciary to the realities of federally divided power. Thus, in Argentina, the need to allocate jurisdiction between different court hierarchies within a dualist court system potentially threatens the integrity of the interpretation of the legislative codes, as the principal source of law, necessarily enacted by the national legislature. Conversely, in Australia the integrating feature of a single, final court of appeal has had the effect of consolidating the potentially pluralist common law of the several states into a single common law.

These categories of dualist and integrated systems are not watertight. Most dualist systems involve some degree of integration or at least departures from the paradigm of parallel court systems. In Argentina an "extraordinary appeal" to the Supreme Court of Justice, alleging arbitrariness by a provincial court, is a device for improving consistency in the interpretation of federal codes, even when a dispute falls within provincial jurisdiction. In Australia federal jurisdiction can be conferred on state courts, and the apex court, the High Court, hears appeals in matters of both federal and state jurisdiction. In Nigeria, also, appeals lie from state to federal courts. In Switzerland, as a logical corollary of the horizontal division of power, most legal questions are handled in cantonal courts, with an appeal to the Federal Court only in relation to federal law, including, significantly, the consistency of cantonal law with federal law.

Conversely, most integrated systems enable the constituent units to have some ownership of the courts most relevant to them. In Germany judges of the first two levels of courts are appointed and paid by the *Länder.* In India judges of the highest state courts are appointed by the president, but consultation occurs with the governor of the state concerned, and the lower judiciary is subject to state control. These formal procedures are now significantly affected by the control over appointments exercised by the courts themselves, in a manner described more fully below. In Canada the superior court judges in each province are appointed and paid by the national government, but the decision about the number of judges to be appointed lies with the province. Even in South Africa, where the courts are nationally controlled, the premier of a province is included on the Judicial

Service Commission when appointments to the high court of the province are under consideration.

Arrangements to secure the independence of the courts vary with the structure of the court system. Federations with a dualist judicial structure, including Argentina, Australia, and the United States, are more likely to leave the protection of judicial independence to the respective spheres. Federations such as Germany, with a more integrated judiciary, typically have a common framework for the organization of the judiciary, sometimes allowing variation in matters of relative detail. Cutting across these considerations of federal design, however, is the effect of the experimentation with new mechanisms for protecting judicial independence that has taken place in many countries, federal and non-federal. Thus in Argentina, Nigeria, and South Africa specialist bodies have been created to deal with aspects of the organization of the judiciary, including the appointment and removal of judges, discipline, and, in some cases, funding: the Council of the Magistrature in Argentina, the National Judicial Council in Nigeria, and the Judicial Service Commission in South Africa. Here again, however, federalism has an effect. In Argentina the national council deals only with national courts, leaving provinces to establish their own councils if they so wish, as half have chosen to do. By contrast, in Nigeria the council has responsibility for the courts of both spheres of government. Appropriately in these circumstances, its membership includes some state representation, and advice on appointments goes to state, rather than national, institutions.

Another small trend of some potential significance is the role of the courts themselves in protecting judicial independence. The development is most marked in India, where Dhavan and Saxena describe the effective takeover of the process of appointment to the Supreme Court and to the state high courts by the Supreme Court itself and the corresponding control acquired by state high courts over appointments to the lower judiciary. But in Canada and Australia also, interpretations of the constitution in recent decisions have had the effect of reinforcing the independence of the courts of the constituent units.[43]

In all federations, with one exception, the compliance of both spheres of government with the federal constitution is underpinned by judicial review. The exception is Switzerland, where the constitutionality of national law is left to the processes of direct and representative democracy. Comparison of the remaining ten federations included in this volume reveals two broad approaches to the organizational arrangements for constitutional review. In one group of federations review can be carried out by all courts or, at least, all courts above a certain level, subject to final appeal to a court with both constitutional and ordinary jurisdiction at the apex of the national judicial hierarchy. Six federations are in this group: Argentina, Australia, Canada, India, Nigeria, and the United States. This is a typically common-law approach

to constitutional adjudication, and all these federations, with one exception, have common-law systems. The exception is Argentina, where the US constitutional model was followed closely, even in this respect. The alternative approach is to establish a specialist constitutional court to carry out the function of judicial review, precluding, or at least restricting, consideration of constitutional questions in other courts. Federations with arrangements of this kind include the remaining civil-law federations: Austria, Germany, and Russia. South Africa also has a specialist constitutional court. Consistent with its common-law heritage in matters of public law, however, other South African courts can also deal with constitutional questions, subject to a final appeal to the constitutional court, and there has been intermittent discussion for some time about establishing the constitutional court as a final, general, court of appeal.

Whichever approach is adopted, the court with final authority to interpret the constitution is an important actor in the federation. Responsibility for it usually lies with the national government, but the constituent units are often involved in some way, reflecting the role of the court in umpiring the boundaries of constitutional power between the two spheres, however contested its effectiveness may be. In the presidential systems of Argentina, Russia, and the United States, the federal chamber of the national legislature must consent to appointments to the court. In the fourth presidential system, Nigeria, appointments are made by the president on the advice of the National Judicial Council, whose members include five state judges. In Germany, also, the federal chamber plays a role in the composition of the Constitutional Court, but in this case the role involves the appointment by the *Bundesrat* of one-half of the members of the Court in recognition, as Oeter explains it, of the "overtly political relevance of such broad judicial control." In Canada and Australia the traditional power of the national executive to appoint judges is qualified by federal principle in relation to this particular court in yet other ways. In Canada, by convention, certain proportionate shares of the regions are observed in making appointments to the Supreme Court; three of the judges always come from Quebec, three from Ontario, two from the western provinces, and one from the Atlantic provinces. In Australia there is a legislative requirement for the national government to consult state attorneys-general before making appointments to the High Court.

INSTITUTIONS OF THE CONSTITUENT UNITS

Relations between spheres

By definition, the constituent units of a federation must have some degree of autonomy to organize and operate their own institutions. By definition also, however, membership in the same polity implies some common standards

and some interdependence, so that autonomy cannot be absolute. In each federation, therefore, the arrangements for the institutions of the constituent units strike a balance between self-rule and shared rule in much the same way as has become familiar in other aspects of federal design. A wide range of variations exist, therefore, between the extremes of autonomy and interdependence.

As a generalization, constituent units with their own constitutions are likely to have greater institutional autonomy than are those without, and a greater ability to experiment with institutional design. This feature of a federation tends to reflect the way in which the federation was initially formed and the extent of the territorial integrity of the constituent units. Constituent units that were independent of each other before the federation was formed usually join the federation with existing constitutional traditions of their own, which are maintained. Argentina, Australia, Switzerland, and the United States are examples. The German and Austrian *Länder* and the ethnic republics in Russia have also had their own constitutions but for reasons that are explicable by reference to the complex history of all three countries and that are consistent with the way in which territorial boundaries are changed.

By contrast, in India and Nigeria the constitutions of the states are prescribed in the national constitution. Many of the Indian states had no autonomy of their own before independence. More significantly, however, the states have been refashioned and their boundaries repeatedly redrawn in a manner that would have made a regime of separate state constitutions difficult, if not impossible. Nigeria is an example of a somewhat different kind. In the early years of Nigeria's federation, the three, and later four, constituent units had constitutions of their own, as had been the case in colonial times. After the first period of military rule, however, from 1966, the proliferation of states began, precluding the use of separate state constitutions for much the same reason as was the case in India. Canada and South Africa offer variations on this approach. In both countries the national constitution sets out a framework of government for the constituent units, which may be altered by the units themselves, within national constitutional constraints. The mechanisms are different, however. The Canadian provinces may either alter sections of the national Constitution that apply to them or enact legislation of their own of a constitutional kind.[44] In South Africa a province may substitute a provincial constitution for certain provisions in the national Constitution. The scope of the discretion of South Africa's provinces is significantly limited by the terms of the national Constitution, which also provides that the constitutionality of a provincial constitution must be certified by the Constitutional Court. Only two provinces have sought certification for a provincial constitution: Kwazulu-Natal and the Western Cape. Both initially were refused,[45] although a further application by the Western Cape ultimately succeeded.

In every federation there are national constitutional controls of some kind over the institutions of government of the constituent units, representing shared constitutional standards for the polity as a whole. Sometimes they are expressed in very general terms. Examples include the guarantees of "a republican representative system" in Argentina,[46] a "republican form of government" in the United States,[47] and a "republican, democratic and social state governed by the rule of law" in Germany.[48] Somewhat more stringent national constitutional controls often come in the form of constitutional protections of rights, which typically now apply to both spheres of government. Canada is a particularly interesting example. The Canadian Charter of Rights and Freedoms binds the governments and legislatures of the provinces as well as the federal government. It also, however, provides a mechanism by which a legislature can make a law "notwithstanding" a provision in the bill of rights that, consistent with federal principle, is available to both spheres of government as well.[49]

As the chapters in this volume demonstrate, however, there is a range of more specific ways in which the institutions of constituent units are constrained by the national sphere, which are less readily reconciled with federal principle. Thus, in Canada and India the titular heads of the constituent units are appointed by the national government, although in Canada practices of consultation with the constituent units have developed over time.[50] In Russia the national president can nominate and effectively appoint the governors of the constituent units. In South Africa the premier of a province that is controlled by the governing party is effectively chosen by the central party organization. As Murray argues in relation to South African practice, controls of these kinds not only detract from the checks and balances that federal governance may provide but also may impede democracy by inhibiting the development of political accountability within the constituent units themselves.

One link of a different kind between national institutions and those of the constituent units concerns the timing of elections. In most federations there is no correlation between the timing of the elections in the two spheres. In a few cases, however, elections for the two spheres of government tend to be held on the same day. The United States is an example, although some states depart from the typical pattern. Such a practice is not possible unless legislatures have fixed terms – a common phenomenon in presidential systems but achieved with greater difficulty in parliamentary systems.[51] Thus in South Africa, as Murray reports, while national and provincial elections are currently synchronized, early dissolution of a provincial legislature is constitutionally possible,[52] triggering differences in the electoral cycle of the province in question.

Synchronized elections have some advantages in terms of cost, time, and diversion from the ordinary business of government. Where the composition of

the federal chamber depends on the governments or legislatures of the constituent units, they may have another advantage as well. As the example of Germany shows, staggered elections may mean shifting majorities, further complicating relations with the popular house. In South Africa the NCOP's composition also depends on the constituent units. For the moment, however, the practice of synchronized elections ensures that NCOP members are chosen at the same time.

In most federations there is some capacity for the national government to depart from the usual constitutional order in ways that sometimes involve intervention in the affairs of constituent units, in the face of external aggression or, less frequently, internal insurrection. In addition, as noted earlier, where the constituent units administer national legislation, national institutions may have residual powers of intervention for that purpose as well if a unit is unwilling or unable to carry out a task effectively. There is also a third category of cases, however, in which the national government has more general emergency powers in relation to the federation as a whole or to the affairs of the constituent units, individually or collectively. The dilemma for federal institutional design that is thus presented was described earlier. On one hand, intervention is sometimes necessary in the interests of the security of the entire community, the integrity of the state, or the effective performance of government functions; on the other hand, intervention is inconsistent with the normal federalist assumption that constituent units have final responsibility for the conduct of their own affairs.

At least four of the federations in this volume allow national intervention of this somewhat more extraordinary kind: Argentina, India, Nigeria, and Russia.[53] With the possible exception of India, these are also among the least stable federal democracies. One question raised by the chapters in this volume, however, is whether the provision of emergency power is not only a response to instability but also a contributing factor.

The details of emergency arrangements differ between federations, in relation to the circumstances in which intervention is authorized, the action that may be taken, the checks and balances that are provided, and the extent to which the procedures are actually used. Nevertheless, some generalizations may be made. First, the circumstances that trigger intervention are typically stated broadly. In Nigeria, for example, a state of emergency may be proclaimed when there is a "clear and present danger of an actual breakdown of public order and public safety."[54] The consequences of the imposition of a state of emergency on grounds of this kind may include the suspension of the federal division of powers, the abrogation of some or all constitutional rights, and the expansion of executive power to make laws. Second, in most of these federations, extraordinary action can also be taken in the face of the failure, or perceived failure, of government in the constituent units. Thus, in India, "President's rule" can be given effect

where "a situation has arisen in which the government of a State cannot be carried on in accordance with the Constitution."[55] In cases of this kind, the institutions of a unit government may be suspended and their functions assumed by representatives of the national government.

A state of emergency generally augments the power of the national executive. The potential for abuse is obvious, and attempts are made to safeguard against it in various ways. Techniques in common use include a requirement for ministers to countersign presidential emergency decrees; requirements for approval by the legislature or by the federal chamber; or the consent of institutions of the constituent units. But it is the evidence of these chapters that none is completely reliable. In presidential systems, such as Argentina and Nigeria, ministers are dependent on the president for office. Legislatures are often in recess, and even when they are not, they may be controlled by the executive. Reliance on consent among unit institutions to provide a check and balance will be unlikely to be effective where the institutions themselves are the appointees of the national sphere, as is the case with the governors in India. The failure of preventative mechanisms is suggested by the frequency of recourse to emergency procedures in India and Argentina. These cases suggest that, if specific emergency powers are provided, the circumstances in which they can be used and the consequences of their use should be more carefully circumscribed, weighing the values of federal democracy in the balance.

Institutional arrangements

In all federations the constituent units have legislatures, executives, and administrations. These are primarily responsible to the people of the respective units, who may be conceived as citizens of their units, whether they are so described or not. In some federations constituent units also have a judicial branch. They may have an array of other institutions as well, such as ombudspeople, human rights commissions, and electoral commissions. By contrast, in other federations, the courts and other specialist institutions of government of this kind are common to the two spheres with the consequence, in most cases, of greater national control.

For the most part, the institutions of the constituent units are broadly similar to those of the national sphere and, thus, also to each other. Sometimes, as in Nigeria and India, and to a lesser extent in South Africa,[56] this occurs because the institutions of the constituent units are prescribed in the national constitution. Even in other cases, however, the principal institutions of the two spheres of government are likely to resemble each other.

There are some notable exceptions, however. The legal system and institutions of Quebec are influenced by the French civil-law model, while the rest

of Canada adheres to the common law and institutions of government that fall broadly within the British parliamentary tradition. In Nigeria there are *sharia* courts in some states and not in others. In Australia the referendum to establish a republic, which was rejected in 1999, would have left the states to break their own ties with the Crown, at their own speed, creating the possibility that some states would have become republics while others would have retained the monarchical system, at least for a period of time.

There are many lesser variations in the institutional arrangements of constituent units, some of which are common to a range of federations. First, it is relatively rare for the largely ceremonial position of head of state of the kind found in most parliamentary systems to be replicated in the constituent units. Australia is an exception, where governors are appointed by the Queen on the advice of state premiers in a manner almost identical to that involved in the appointment of the governor general, and they play a very similar role. In Canada and India the heads of state of the constituent units are appointed by the national government. Austria and Germany have no equivalent position, necessitating other minor adjustments to the operation of the parliamentary systems of the *Länder.*

Second, bicameralism is somewhat less common in the legislatures of constituent units. In Austria, Germany, Nigeria, South Africa, and Switzerland bicameralism is effectively precluded altogether. In Canada provincial second chambers have gradually disappeared. In Argentina, India, and Russia there is mixed use of bicameralism, but only a minority of unit legislatures now have two chambers. Only in Australia and the United States is bicameralism still a prevailing feature of the state governments. The rationale for bicameralism in this sphere is difficult to establish, however, beyond a general belief in the value of a second opportunity for deliberation, whatever the party composition of the second chamber. In this context the suggestion by Dhavan and Saxena that second chambers might develop as a forum within which local government is represented is of interest, particularly in view of the trend, noted in the next section, for local government to be accorded constitutional status.

Third, direct democracy is more likely to be used in the constituent units than in the national sphere, not only for constitutional change but also for other purposes as well. Switzerland, Austria, Germany, the United States, and Argentina are examples. In a related phenomenon, some constituent units of some federations, of which Switzerland and the United States are examples, also provide for the election of judges, although the practice can be controversial because of its implications for judicial independence.

It is apparent from the chapters in this volume that a degree of experimentation with institutional design takes place within the constituent units of some federations. The potential necessarily varies with the degree of national

control. Thus in South Africa, for example, an attempt by the province of the Western Cape to change its voting system was rejected by the Constitutional Court.[57] Similarly, with regard to Austria, Gamper describes how the Constitutional Court has limited the extent to which direct democracy can be used in order to retain the character of the polity as a representative democracy. Other chapters, however, show a degree of experimentation in the sphere of the constituent units in other federations in relation to, for example, electoral systems, legislative terms, and new mechanisms for accountability and transparency. A successful experiment in one unit may be adopted in others and even in the national sphere.

LOCAL GOVERNMENT

Just as the institutions of the constituent units are broadly similar to those of the national government in each federation, so the institutions of local government have some of the same general features as do the other two. There is, however, considerable variation both between and within federations in relation to the manner in which the head of each local government unit is chosen. Some are elected indirectly from the council or other elected body of local government representatives in each area. Increasingly, however, in many federations the mayor or other equivalent position is chosen through direct election, particularly in larger local government areas.

There is also a trend towards according local government constitutional status and increasing levels of autonomy in areas for which it is responsible. Local government is now recognised in a form that ostensibly gives it a degree of autonomy in the national constitutions of eight of the 11 federations in this volume: Argentina, Austria, Germany, India, Nigeria, Russia, South Africa, and Switzerland. In some cases it is recognized in the constitutions of the constituent units as well, and in Australia and the United States it is recognized only in state constitutions. In Canada it is mentioned in passing in the national Constitution, as a component of exclusive provincial power, in terms that have no implications for the autonomy of local government.[58]

The strength of the guarantees of local autonomy varies between federations. In some cases the national constitution provides only a framework for local government, leaving the constituent units considerable residual authority in relation to the structure of local governing institutions; in other cases the constitution is more prescriptive. In any event, constitutional promise does not necessarily equate to performance, as the chapters on Argentina and India show. There is continuing tension between the traditional autonomy of constituent units in relation to local government and the relatively new-found autonomy of local government. It may be that these difficulties are transitional and that a systemic change is under way, to which the institutions of the other spheres will adapt in time.

INTERGOVERNMENTAL RELATIONS

It has become a truism that the spheres of government in all federations work together in various ways, no matter how powers are divided between them and whatever the logic of their institutional design. Institutional design is significant for the particular forms that intergovernmental interaction takes, however. The converse is also true. The operation of institutions originally developed in the context of unitary systems of government may be adversely affected by intergovernmental activity unless deliberate countervailing provision is made.

In many federations intergovernmental activity is envisaged from the outset, and provision is made for it in the national constitution. In this case intergovernmental forms and procedures are likely to be compatible with the institutional design and may even be integral to it. Arguably, federations of this kind are increasing. It is almost impossible to imagine the establishment of a new federation in the twenty-first century in which some provision is not made for intergovernmental activity.

Formally planned arrangements for intergovernmental interaction take a particular form in federations with a horizontal division of power, separating legislative from administrative competence. Germany is a striking example in which relations between governments are systematized through the *Bundesrat*. There are variations on this model in both Austria and South Africa, where members of the federal chamber do not represent governments but are chosen by legislatures, enhancing its legitimacy as a legislative chamber but detracting from its usefulness as a forum in which governments, representing their respective constituencies, can reach agreed solutions. Thus, in Austria, laws that deny the *Länder* their administrative authority require the direct consent of the *Länder* as well as the federal chamber. In South Africa the functions of the NCOP are complemented by constitutional principles of cooperative government and intergovernmental relations. Assessment of this model is complicated by both the dominance of a single party and the challenges of transition. Murray suggests, however, that the NCOP is still a long way from fulfilling an intergovernmental role.

In federations with a more dualist structure, planned intergovernmental arrangements take a variety of other forms. In the United States and Argentina treaties or compacts between states provide a basis for joint action on matters of mutual interest, subject to the approval of the national legislature. Such arrangements may, inter alia, provide for the establishment of joint regulatory or administrative agencies. In the absence of specific constitutional authority, it has proved more legally complex in Australia to establish bodies of this kind; many such bodies exist, but they sit less easily in the federal constitutional framework. However, the Australian Constitution

specifically authorizes intergovernmental arrangements of another kind, in the form of a power for state legislatures to refer matters within their authority to the Parliament of the Commonwealth, thus providing a degree of flexibility in the federal division of powers while retaining the essentially dualist institutional design. Nigeria and India make specific provision for forums, outside the normal institutional structure of government, in which intergovernmental consultation can occur. In Nigeria the constitutional body is the Council of State, which acts as an advisory body to the president on matters that include questions of particular interest to the states,[59] and it includes the state governors in its membership, together with a range of functionaries of other kinds. In India the comparable body is the Inter-State Council, envisaged in the Constitution as a forum through which the various governments might meet. The council was not established until 1990, however, and has not yet fulfilled its apparent potential.

Planned intergovernmental relations thus contemplate a range of new institutions: meetings of ministers or other executive officers, joint administrative agencies, or agreements between governments of various kinds. These same institutions also form the core of the myriad of intergovernmental arrangements that exist in all federations for which no specific constitutional provision is made. In these circumstances intergovernmental institutions are a pragmatic response to the experience of federalism in action, further fuelled by the pressures of globalization and internationalization and, often, by an imbalance in financial resources between the spheres of government. Intergovernmental institutions rarely have coercive authority or effect in their own right; rather, they are mechanisms to facilitate coordination between the spheres, dependent for any regulatory effect on implementing action by governments, legislatures, and courts.

Systematic arrangements for meetings of ministers are a common feature of parliamentary systems in which, in normal circumstances, legislatures can be expected to faithfully implement commitments made by their respective governments. Successive chapters in this volume detail the proliferation of such meetings, not only in Canada, Australia, and Switzerland, where the federal chamber does not provide a forum for cooperation within the institutions of the federal sphere, but also in Austria and Germany, where it does. In systems with a separation of powers, where the legislature is not necessarily controlled by the executive branch, meetings of this kind are likely to be confined to the exchange of information and coordination of executive action, not least in lobbying the national government. The National Governors' Association in the United States is an example. Even so, the chapter on Argentina suggests that such an institution could be useful in that country as a forum in which the governors of the provinces could draw strength from each other through collective action, presenting a united front to the national government in the interests of the provinces as a whole.

Other intergovernmental arrangements may be the product of deliberations between governments in forums of this kind. Decisions may be enshrined in formal agreements, which may also be called treaties, concordats, or compacts. Agreements, in turn, may have a variety of purposes, ranging from joint funding of projects to uniform legislation to shared administration of a program of mutual interest. In this case the agreement may call for the creation of a joint agency or the conferral of administrative authority on other spheres of government, across jurisdictional lines. Experience in both Australia and the United States suggests that there may be constitutional obstacles to mixing authority in this way, unless it is specifically authorized by the constitution, as is the case in India.

Some intergovernmental arrangements require the involvement of national institutions – typically, the national legislature and in some cases the federal chamber. Argentina is an example, where legislation to give effect to an intergovernmental agreement on fiscal co-participation must be initiated by the Senate, which has, so far, failed to act. Even where there is no constitutional requirement for national involvement, the institutions of the national sphere often participate in intergovernmental arrangements, either because the arrangement in question requires national resources or authority or because the national sphere has historically assumed a coordinating role. In Canada and Australia ministerial councils typically involve ministers from the national government, even when dealing primarily with questions that fall within the competence of the constituent units. National involvement in such matters is not universal, however, and there are some signs, briefly described below, of a trend towards the creation of coordinating bodies involving the constituent units alone.

Intergovernmental relations in federal systems are sometimes associated with the practices of "executive federalism." The name reflects the reality that, in many federations, intergovernmental outcomes are precipitated by agreements between the governments of the participating spheres, relying on the compliance of their legislatures. However, there is no single form of executive federalism, and the term has different meanings in different contexts. In Germany it refers to the activities of representatives of the *Land* governments in the *Bundesrat*. In common-law parliamentary federations it refers to the activities of ministerial councils. In some presidential federations, of which Argentina is an example, it refers to the dominance of the executive branch vis-à-vis the legislature, reinforced by the relationships between the president and governors. In each case the practice creates some difficulties for the regular operation of democratic institutions and sometimes, also, for the rule of law. Most obviously, it further subordinates legislatures to the executive arm of government. In doing so it exacerbates a familiar difficulty for the chain of democratic accountability in many systems, which continues to be based on the premise that elected legislatures

hold the executive branch to account and themselves take the decisions of greatest importance: to make law, to tax, and to spend. The typical complexity and lack of transparency in intergovernmental relations further compounds the difficulty.

Nevertheless, intergovernmental relations have a relatively good press as an efficient and effective response to the complexity of governance in a system in which power is divided and institutions duplicated. There is a case, therefore, for them to be managed and refined so as to improve their compatibility with the institutions of federal democracy. The evidence of several of the chapters in this volume is that the process is under way. To the extent that intergovernmental arrangements have a centralizing tendency, it may be countered to a degree by the emergence of such bodies as the Council of the Federation in Canada and the Conference of Cantonal Executives in Switzerland, representing the constituent units alone. Gamper notes that, in any event, intergovernmental arrangements are not invariably centralizing; in the context of the centralized design of the Austrian federation, cooperation between the *Länder* provides a counterweight to the authority of the national government.

Problems of transparency and accountability may be more difficult to overcome, given the inherently executive character of these processes. Even here, however, there are signs of change. Steps to involve unit legislatures in intergovernmental arrangements have been taken in some federations, presaging the emergence of a new form of "legislative federalism." In relation to Switzerland, for example, Linder and Steffen show how the collaboration of cantonal legislatures can work to the benefit of the constituent units, in that case by instigating a popular vote, which rejected proposed taxation changes that would have disadvantaged the cantons. In a development of a different kind, in Canada in 2004 the first ministers meeting on health care was televised in a gesture towards transparency that could, however, as Thomas Hueglin observes, compromise the goal of securing a negotiated solution.

TRENDS AND CHALLENGES

One clear conclusion of all the chapters is that there is a remarkable degree of interaction between federalism and the institutional structure of government. The interaction is most evident in relation to the federal chamber of the national legislature. Federalism affects most other institutions as well, however: the popular legislative chamber, the executive branch, the administration, and the courts. In addition, it has been the catalyst for the emergence of new forms of institutions serving specifically federal purposes.

A second conclusion is that the institutions of government and the federal design are integral parts of the same constitutional and political system and cannot fully be understood in isolation from each other. To a degree, it is possible to explain and understand the resulting composite types by reference to some of the standard categories that have been used in this chapter. Thus it is possible to characterize federations variously as dualist or integrated; dividing powers only vertically or also horizontally; with a parliamentary or presidential form of executive government; or operating within the framework of the common law or the civil law. But the categories are not discrete. In many cases a federation that ostensibly belongs to one category for a particular purpose in fact has characteristics drawn from another, or country-specific features of its own, defying the standard categories altogether. This is a time of considerable experimentation in the design of federal institutions, and the degree of intermixture is likely to increase. The categories, therefore, are useful for analytical purposes and for understanding the implications of certain institutional combinations, but their use should not be pushed too far.

It is difficult to generalize about challenges and trends across such a diverse range of federations. At one level, it is inevitable that the challenges differ with the circumstances of the federations concerned. In the less stable or emerging federations of Argentina, Russia, Nigeria, South Africa, and, in some respects, although to a lesser extent, India, the foremost challenges are to develop capacity, find a basis for stability, increase and share the benefits of economic prosperity, tame emergency power, and safeguard the rule of law. In the other long-standing and relatively prosperous federations, the principal preoccupations are more likely to be efficiency and economic competitiveness; the fine-tuning of institutions to improve accountability; and the impact of the growing influence of international and supranational arrangements on the balance of authority between the national sphere and the constituent units.

At another level, however, one challenge at least is common: that of realizing the potential of a system of government that is complex and sophisticated but that nevertheless holds considerable promise for the governance of diverse and demanding societies in an increasingly interdependent world. In response to this challenge, certain trends may, tentatively, be observed. One is a revival of interest in the possibilities as well as the limitations of bicameralism, in both spheres of government. Another, which may conceptually be connected to it, is the gradual emergence of local government as an autonomous sphere of government with constitutional status of its own. A third is the design of intergovernmental structures and processes to facilitate federal governance in a manner that safeguards the democratic accountability upon which the legitimacy and effectiveness of institutions ultimately depend.

Necessarily, there is some tension between federalism and majoritarian democracy, particularly if attention is confined to the national government alone. Each federation resolves this tension for itself, in its own version of federal constitutional democracy. An assessment of the strengths and weaknesses of the arrangements that result cannot be judged by the institutions of the national sphere alone.[60] Federal democracy necessarily involves the institutions of both spheres, their relations with their respective peoples, and the interaction between them.

NOTES

1 I am grateful to Ronald L. Watts, Christina Murray, and John Kincaid for their helpful comments on earlier versions of this chapter.

2 For the complete list, see Forum of Federations, *List of Federal Countries*, <http://www.forumfed.org/federalism/cntrylist.asp?lang=en>, viewed 22 February 2006.

3 See, for example, Domrin's description in this volume of the meeting pattern of the Russian Federation Council, further balanced by a requirement for members to spend a mandatory period each month in the region they represent.

4 Unless otherwise indicated, discussion of constituent units is confined to units that are full members of the federated polity, with a degree of constitutional autonomy in their own right. It should be noted that, in many federations, including Argentina, Australia, Canada, India, Nigeria, and the United States, there are self-governing territories with significant de facto autonomy that perform the role of a constituent unit in relation to their respective populations. The institutions of such territories are likely to be broadly similar in design to those in the constituent units, although this is not necessarily so.

5 2005 CIA World Factbook, <http://www.photius.com/rankings/economy/gdp_2005_0.html>, viewed 24 May 2006.

6 Of the federations in this volume, Canada and India are examples of a combination of aggregation and devolution. For elaboration of this distinction, and its application in other cases, see Ronald L. Watts, "Comparing Forms of Federal Partnerships," *Theories of Federalism: A Reader,* ed. Dimitrios Karmis and Wayne Norman (New York: Palgrave Macmillan, 2005), 233, 249.

7 A table detailing the subdivision is provided in Ignatius Akaayar Ayua and Dakas C.J. Dakas, "Federal Republic of Nigeria," *Constitutional Origins, Structure, and Change in Federal Countries,* ed. John Kincaid and G. Alan Tarr (Montreal and Kingston: McGill-Queen's University Press, 2005), 253.

8 Cheryl Saunders, "Budgetary Federalism: Balancing Federalism and Representative Government," *Mensch und Staat: Festschrift for Thomas Fleiner,* ed. Peter Hanni (Freiburg: Universitatsverlag Freiburg Schweiz, 2003), 175–199.

9 See Michael Burgess, *Comparative Federalism, Theory and Practice* (London: Routledge, 2006), 140–144.

10 Brendan O'Leary, "Power-Sharing, Pluralist Federation, and Federacy," *The Future of Kurdistan in Iraq,* ed. Brendan O'Leary, John McGarry, and Khaled Salih (Philadelphia: University of Pennsylvania Press, 2005), 49. O'Leary identifies "pluri-national" federations as states "in which there are multiple recognised nations, whose respective nationals may be both concentrated and dispersed," in contrast with multinational federations, "often interpreted as indicating spatially discrete and homogeneously adjacent nations."

11 Will Kymlicka, "Federalism, Nationalism and Multiculturalism," *Theories of Federalism: A Reader,* ed. Dimitrios Karmis and Wayne Norman (New York: Palgrave-Macmillan, 2005), 276.

12 Ibid.

13 Thomas Fleiner, Walter Kalin, Wolf Linder, and Cheryl Saunders, "Federalism, Decentralisation and Conflict Management in Multicultural Societies," *Federalism in A Changing World: Learning from Each Other,* ed. Raoul Blindenbacher and Arnold Koller (Montreal and Kingston: McGill-Queen's University Press, 2002), 227–258; Thomas Fleiner, "The Challenge of Ethnic Diversity to Federalism," *Le Fédéralisme dans tous ses États,* ed. Jean-Francois Gaudreault-DesBiens and Fabien Gélinas (Québec: Editions Yvon Blais, 2005), 184.

14 For a critical analysis of the difficulties of asymmetry in these circumstances, see Kymlicka, "Federalism, Nationalism and Multiculturalism," 269–292.

15 Another, which might have been included, is the use of direct democracy. Apart from Switzerland, however, where direct democracy has a profound effect on the operations of institutions in both spheres, its influence so far has been muted (where it has been used at all). For this reason I do not treat it here, but I draw attention to its effect in considering particular institutions below.

16 Louisiana, with its civil-law system, makes the United States technically a mixed legal system. In this context, however, the exception is too minor to cause the categorization to be altered. Even so, the use of a French run-off system of election in Louisiana, in contrast to the rest of the country, is a development of some interest for present purposes. See Louisiana, *Revised Statutes,* title 18, secs. 481, 511.

17 Johanne Poirier, "Les Ententes Intergouvernementales et la Gouvernance Fédérale: Aux Confins du Droit et du Non-Droit," in Gaudreault-DesBiens and Gélinas, *Le Fédéralisme dans tous ses États,* 463–472.

18 South Africa Constitution, sec. 37.

19 In the wake of the contested results in the 2002 presidential election Congress enacted the Help America Vote Act, 2002. See also, Century Foundation Working Group on State Implementation of Election Reform, *Balancing Access and Integrity* (Washington: Century Foundation, 2005) <http://www.reformelections.org/publications.asp?pubid=542>, viewed 5 March 2006.

20 India Constitution, Article 74, is more explicit than are the other two in this regard, requiring the president to act in accordance with the advice of the council of ministers.

21 Allan R. Brewer-Carias, "Some Problems of the Centralised Federation and Subnational Constitutionalism in Venezuela," <http://www.camlaw.rutgers.edu/

statecon/subpapers/brewer.pdf>, viewed 12 May 2006. Other federations without bicameral national legislatures are St Kitts-Nevis, Micronesia, Comoros, and the United Arab Emirates.

22 Nigeria is an exception. Both houses initiate impeachment proceedings; the investigation is conducted by a separate panel, whose report must be accepted by both houses.

23 The Canadian Senate also has extensive powers, which are rarely used, reflecting its lack of electoral legitimacy.

24 In Nigeria both houses have fixed four-year terms.

25 Australia's Senate can be dissolved as a whole for the purpose of resolving deadlocks between the houses. The procedure is cumbersome, however, and has been used only six times in more than 100 years of federation.

26 See, however, Burgess, *Comparative Federalism*, drawing on *Federalist 62* to argue that, whatever the origins of the notion, "Equality of representation was ultimately a circumstantial compromise," 196.

27 While Switzerland has six half-cantons, with one rather than two representatives in the Council of States, this is the consequence of historical circumstances in which three full cantons were divided and, in that sense, is not a departure from the equality principle.

28 In Australia the president of the Senate has a deliberative vote, and, in the case of a tied vote, the question passes in the negative. In South Africa each province has a single vote.

29 In February 2006 Chancellor Angela Merkel and the premiers of the *Länder* reached agreement on a package of federalism reforms that would reduce the authority of the *Bundesrat* in return for greater policy authority to the states in relation to, for example, education. German Info, "Long-Sought Deal Paves Way for Federalism Reform," 24 February 2006, <http://www.germany.info/relaunch/info/publications/week/2006/060224/politics1.html>, viewed 24 May 2006.

30 In Austria the members are elected by the *Land* legislature but need not be members of it. In South Africa the premier of the province leads its delegation in the National Council of Provinces.

31 Note, however, the suggestion in the chapter on the United States that the absence of a bloc vote requirement for the US Senate inhibited its evolution as a distinctively federal house, even during the period when senators were elected by the state legislatures.

32 Twelve of the 250 members are also appointed by the national executive for their contribution to certain aspects of public life.

33 Note, however, the requirement for a super-majority in the *Rajya Sabha* to consent to legislation extending the All-India Services and, thus, effectively detracting from the administrative independence of the states, even in relation to their own legislation.

34 *Printz v. United States*, 521 US 898 (1997); *New York v. United States*, 505 US 144 (1992).

35 *R v. Hughes* 202 CLR 535 (2000).
36 *South Dakota v. Dole,* 483 US 203 (1987); *State of Victoria v. Commonwealth* (1957) 99 CLR 575.
37 India Constitution, Article 73(1).
38 India Constitution, Article 258.
39 The authority of the federal chamber for this purpose is not necessarily comprehensive. In South Africa, for example, additional administrative responsibility can be conferred on the provinces without attracting the requirement of the consent of the NCOP, acting in its functional federal capacity, sec. 125.
40 South Africa Constitution, sec. 100. See also sec. 125(3), restricting the executive authority of each province by reference to the extent to which it "has the administrative capacity to assume effective responsibility."
41 German Info, "Long-Sought Deal Paves Way for Federalism Reform," 24 February 2006, <http://www.germany.info/relaunch/info/publications/week/2006/060224/politics1.html>, viewed 24 May 2006. The proposed changes were still under consideration in May 2006, with an expectation that at least some of them would be made by the end of the calendar year.
42 Nigeria Constitution, Article 14(3).
43 *Reference re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.* [1997] 3 SCR; Kable.
44 Peter W. Hogg, *Constitutional Law of Canada,* 4th ed. (Toronto, ON: Carswell, 1997), 90–92.
45 *Certification of the KwaZulu-Natal Constitution* CCT15/96; *Certification of the Constitution of the Western Cape* CCT6/97.
46 Argentina Constitution, Article 5.
47 US Constitution, Article 4(4).
48 Germany Constitution, Article 28.
49 Canadian Charter of Rights and Freedoms, sec. 33. Sec. 31 of the Charter also has federal significance: "Nothing in this Charter extends the legislative powers of any body or authority."
50 Similarly, in Canada, constitutional powers of the national sphere to require the reservation of provincial legislation and to disallow provincial legislation have fallen into disuse, under the effect of constitutional convention.
51 Fixed terms in a parliamentary system require provision to be made for the rare but important case in which a government loses the confidence of the legislature and no other government can be formed.
52 South Africa Constitution, sec. 109, allows dissolution within the last two years of a five-year term if so resolved by a majority of the provincial legislature or if there is a vacancy in the office of premier, which has not been filled by the legislature within a stipulated period.
53 South Africa falls (just) outside this group because of the more controlled and targeted nature of its emergency powers.
54 Nigeria Constitution, sec. 305(3)(d).

55 India Constitution, Article 356.

56 South Africa Constitution, sec. 143, provides a default constitution for the provinces but enables them to adopt their own constitutions with legislative and executive (or traditional monarchical structures) that differ from those in the constitutional template.

57 *Certification of the Western Cape Constitution* 1997 9 BCLR 1167 (CC), 1997 4 SA 795 (CC).

58 For a discussion of the significance of these developments, see Nico Steytler, ed., *The Place and Role of Local Government in Federal Systems* (Johannesburg: Konrad-Adenauer-Stiftung, 2005).

59 These include appointments to the National Electoral Commission and the National Judicial Council, both of which perform functions for the state as well as the national sphere.

60 See the important distinction drawn by Stepan between federal institutions that are "demos-enabling" and "demos-constraining" in Alfred Stepan, "Toward a New Comparative Politics of Federalism, Multinationalism and Democracy," E.L. Gibson, ed., *Federalism and Democracy in Latin America* (Baltimore: Johns Hopkins University Press, 2004), 29.

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Index

Abbott, Tony, 65n18
Abele, Francis, 132n6
aboriginals. *See* Indigenous peoples
Abraham, Henry J., 341n18
absolute veto (Austria), 79
Adamolekum, Ladipo, 221n7
Adamovich, Ludwig K., 94n4
administration, federal: Argentina, 18–19; Australia, 49–50; Austria, 82–4; Canada,111–13; Germany, 147–8; India, 179–81; Nigeria, 211–13; Russia, 23–8; Switzerland, 300–1; USA, 320–7
Administrative Court (Austria), 84, 85–6
African National Congress (ANC), 259
Albanese, Susana, 33n21, 34n31
Alberdi, Juan Bautista, 10
Allen, Christopher S., 160n6
American states: administration, 330–1; bicameralism, 327; constitutional framework, 334–5; executive, 328–30; governors, 327, 328, 329–30; interstate compacts, 333; judiciary, 331; legislatures, 327–8; regulatory agencies, 329–30; sovereignty, upholding, 340
Anderson, Benedict, 193n3
anomia (Argentina), 29–30. 32n8
Argentiná: allocation of powers, 12; anomia, 29–30, 32n8; centralization, 13, 30; Chamber of Deputies, 14–15; chief of ministerial cabinet, 17, 18; cooperative federalism, 12; Constitution, 10–11, 20; constitutional change (1994), 12–13, 16, 17, 19, 26–7, 29; co-participation agreements, 16, 19, 23; coups d'état, 9, 32n9; decentralization, 11, 12; demographics, 8–9; dictatorships in, 12; economy of, 8; federal administration, 18–19; federal legislature (Congress), 13–14; federalism, development and features of, 9, 10–13; General Audit Office, 18–19; geography, 8; history of, 8, 10–13; indigenous people, 8; intergovernmental relations; 28–9; intermunicipal relationships, 27–8; judicial appointments, 20–1; judiciary, federal, 19–21; local government, 26–8; map of, 7; municipal government, 12; national executive branch, 17–18; natural resources, 12; president, 13–14, 17–18; public emergency powers, 32n11; Senate, 15–17; Supreme Court, 19–21; tax-sharing agreements, 16, 19, 23
Argentina, provinces: administration, 25–6; authority, 12–13; constitutions and autonomy, 21–2; establishment, 10; executive, 24–5; judiciary, 26; legislatures, 22–4
Austin, Granville, 192n1
Australia: administration, 49–50; cabinet, 47; Commonwealth executive, 46–52; Commonwealth institutions, 50–1; Constitution of, 40–1, 46–7; constitutional framework, 61–2; constitutional monarchy, 46–7, 48, 49, 56; cross-vesting (courts), 52; delegation of powers, 52, 53–4; demographics, 41–2; elections, 55; executive powers, 47; federal courts, 57; federal judicature, 51–2; geography, 41–2; government ministers, 55–6; governor general, 44, 46–7,

48; head of state, 48–9; High Court, 51–2; High Court appointments, 52; history of, 39–41; House of Representatives, 43–4; indigenous peoples, 41; intergovernmental arrangements, 56–7; intergovernmental relations, 59–60; joint administrator/regulator, 60; legislative councils, 54; legislature (Parliament), 42–6, 62–4; local government, 58–9; map of, 37; ministerial councils, 59–60; Northern Territory statehood, 64; parliamentary responsible government vs. federalism, 62–4; political executive, 47–8; political parties, 43; references of power, 60; rights protection, 63–4; Senate, 44–6; Senate review role, 44–5; separation of powers, 47
Australian Capital Territory, 41
Australian Securities and Investment Commission (ASIC), 51
Australian states: administration, 56–7; executive branches, 55–6; governors, 56; institutional arrangements, 53–8; judicatures, 57–8; legislatures, 53–5
Austria: Administrative Court, 84, 85–6; chancellor, 81; civil law system, 73; concordats, 91–3; constitution, 73; Constitutional Convention (2003), 72, 93; Constitutional Court, 84, 85, 86, 87; demographics, 73; distribution of powers, 82; European Union law, 94n2; federal administration, 82–4; Federal Council, 74–80; federal executive, 80–4; federal judicature. 84–7; federal legislature, 74–80; federalism and the federal executive, 81–2; geography, 72; history, 73–4; indirect federal administration, 82–3; institutional reform, 72, 93–4; intergovernmental relations, 91–3; local government, 89–91; map of, 71; mayors of municipalities, 90–1; minority groups, 73, 94n5; National Council, 74–7; no confidence vote, 81; organization of, 72–3; president, 81–2. *See also* Federal Council; *Land/Länder.*
Austrian Stability Pact Concordat, 92
autonomous areas (Russia) 236–7
Ayua, Ignatius Akaayar, 221n7

Badura, Peter, 162n39
Basic Law (Germany), 141, 147–8, 157
Bennett, Scott, 65n25
Bernier, Luc, 131n5
bicameralism: Australia, 54; Germany, 138, 142; India, 183–4; Switzerland, 295–6; United States, 327
Binder, Sarah, 341n11
Blair, Philip, 162n44
Braunthal, Gerard, 160n6
British North America Act, 1867 (Canada), 112
Brose, Eric Dorn, 161n15
Bubjäger, Peter, 95n9; 96nn25, 32
Buenos Aires (city), 8, 9; capital of Argentina, 11, 12; constitutional autonomy, 12; Federal Fiscal Commission, 19; government structure, 23; territorial integrity, 11
Buenos Aires (province), 8, 12; secession of, 11
bureaucracy: Australia, 49–50; US, federal, 325. *See also* Administration, federal; Civil service; Public service
Bundesrat. See Federal Council
Bundestag. See Germany, federal legislature
Butler, William, E., 249n19
Butler, Z.D., 194n17

cabinet: Argentina, 17–18; Australia, 47; Canada, 110, 111–12; German federal, 142, 146; India, 174, 177–8; *Land* (Germany), 152; Russia, 232; South Africa, 263–4, 270–3
Canada: British North America Act, 1867, 119; cabinet ministers, 111–12; Charter of Rights and Freedoms, 103, 118–19; constitution of political executive, 110–11; constitutional framework, 128–9; constitutional monarchy, 106; constitutional references, 116–17; Council of the Federation, 126–7; court system, 103; demographics, 102, 104; economy, 102; elections to House of Commons, 106–8, features of federation. 105–6; federal administration, 111–13; Federal Court, 116; federal executive, 109–15; federal judicature, 115–19; federal legislature, 105–9; First Ministers conferences, 125, 126; geography, 102, 103–4; governor general, 111; head of state, 111; history, 105; House of Commons, 106–8; indigenous peoples, 104–5; intergovernmental affairs, 113; intergovernmental

relations, 125–8; judicial review, 116; local government, 123–5; map of, 101; minority governments, 107–8; multiculturalism, 104; municipal governments, 103; notwithstanding clause, 118, 119; Official Languages Act, 113; party leaders, 110–1; patriation of the Constitution, 116–17; political parties, 107–8; Prime Minister's Office (PMO), 112; Privy Council Office (PCO), 109, 112; public/ Crown agencies, 113–14; Quebec, 104; regionalism, 108, 110, 125; regulatory agencies, 114; royal commissions, 114, 115; Senate, 106, 108–9; Supreme Court, 116
Canadian Alliance Party, 107
Canadian Charter of Rights and Freedoms, 118–19
Canadian provinces: administration, 122; judicatures, 123; local governments, 123–5; parliaments, 119–20; political executives, 120–2; regulatory bodies, 121–2
Cairns, Alan C., 132n6
centralization: Austria, 72; Argentina, 13, 30; India, 188–9; Russia, 245–6
Chamber of Deputies (Argentina), 14–15
Chancellor: Austria, 81; Germany 138, 142, 146
civil service, Nigeria, 211–3. *See also* Administration, federal; Bureaucracy; Public service
Clarkson, Stephen, 133n26
coalition government, 108, 146
collaborative federalism (Canada), 127
Commonwealth of Australia. *See* Australia
Commonwealth grants (Australia), 55, 56
Commonwealth Grants Commission (CGC, Australia), 50
communes (Switzerland), 306–7
concordats (Austria), 91–3
Conference of Cantonal Ministers (Switzerland), 308
confidence vote: Austria, 81; India, 174
Congress (USA): characteristics, 320; decentralizing role, 337–8; devolution revolution, 338; districts, drawing, 339–40; elections, 320–1; enumerated powers, 337; House of Representatives, 320; limiting power of, 340; Senate, 321–3; veto power, 337
consensus democracy (Switzerland), 290, 291
consociationalism, 142,150, 159
constitution: Argentina, 10–11, 20; Australia, 40–1, 46–7; Austria (B-VG), 73, 94nn3, 4; Canada, 116–17; Germany, 157–8; India, 166–7, 172, 177, 188; Nigeria, 214; Russia, 227, 228, 233; South Africa, 259–60, 282–3; Switzerland, 309–10; USA, 334–5
Constitutional Court (Austria), 84, 85, 86–7
constitutional monarchy: Australia, 46–7, 48–9, 56; Canada, 106
Consultation Mechanism Concordat (Austria), 92
Conway, John F., 131
cooperative federalism: Argentina, 12; Austria, 91–3; Germany, 141; South Africa, 259–60; 281–2; Switzerland, 307–8
Córdoba, 23
Corrupt Practices and Other Related Offences Commission (Nigeria), 213
Council of Australian Governments (COAG), 59, 60
Council of the Federation (Canada), 126–7
Council of Ministers (India), 174
Council of State (Nigeria), 210–11, 212
Council of States (India): composition of, 172, 174; efficacy as federal chamber, 175–6; elections to, 173, 174; relationship with the House of the People, 174–5; veto powers, 175
Council of the States (Switzerland), 296–8, dual mandates, 297–8
Cowen, Sir Zelman, 67n66
Crown corporations (Canada), 113–14
Currie, David P., 160n7

Dakas, Dakas C.J., 221n7
deadlock: Australia, 45–6; Germany, 145; India, 175, 190
decentralization: Argentina, 11, 12; Canada, 113; South Africa, 259–60; US Congress, 337–8
delegation of powers: Argentina, 14; Australia, 52, 53–4
Delimitation Commission (India), 194n14
demographics: Argentina, 8–9; Australia,73; Austria, 73; Canada, 102, 104; Germany, 136, 139–40; Nigeria, 199–200; Russia, 225–6; South Africa, 262–3; Switzerland, 291–2; USA, 319–20
de Rosas, General Juan Manuel, 10
Dette-Koch, Elisabeth, 163n65
Dhavan, R., 193n4, 194n23

dictatorship (Argentina), 12
Diedrichs, Udo, 163n53
direct democracy: Austrian *Länder,* 88–9; Switzerland, 295, 305
Disraeli, Benjamin, 193n2
division of powers: Argentina, 12; Australia, 52, 53–4; Austria, 82; India, 166
Domrin, Alexander, 252n46
double majority (Austria), 78
Dua, B.D., 193n4
Duchacek, Ivo, 294, 314n13
Dyck, Rand, 132n9

Ebere, Osiecke, 221n35
Edtstadler, Karl W., 95n7
Elaigwa, J. Isawa, 221n7
Elazar, Daniel J., 309, 315n36
Election Commission (India), 170
elections: Argentina, 23; Australia, 55; Austria, 76–7, 87; Canada, 106–8; Germany 142–3; India, 170–2, 176–7; Nigeria, 206–9; Russia, 229, 246, 250n29; South Africa, 265; Switzerland, 296, 297; USA, 320–1
Electoral College (USA), 323–5; reforming, 339
electoral systems, majoritarian: Canada, 106, 107, 132n11; Germany, 142, 151
equalization policies (Switzerland), 307
Ermacora, Felix, 95nn6, 8
ethno-territorial federalism (Russia), 245
European Union: framework for legislation, 141; and German executive federalism, 144; German representation in, 141
Evans, Harry, 66n46
executive, federal: Argentina, 14, 17–18; Australia, 46–52; Austria, 80–4; Canada, 109–15, Germany, 146–9; India, 176–81; Nigeria, 209–13; Russia, 232–3; Switzerland, 298–302; South Africa, 270–3; USA, 320–7
executive federalism: Canada, 103, 123; Germany, 138, 144

Färber, Gisela, 161n10
Faucher, Phillippe, 32n12
Fawehinmi, Gani, 223n70
federal administration. *See* Administration, federal
Federal Assembly (Germany), 147
Federal Assembly (Switzerland), 294–8: bicameralism, 295–6; Council of the States, 296–8; National Council, 296; powers, 294–8
Federal Character Commission (Nigeria), 212
Federal Constitutional Court (Germany), 149–50
Federal Council (Austria): absolute veto right, 79; delegates to, 77; legislative powers, 74–6; non-federal character, 80; proportional representation of, 77–8
Federal Council (*Bundesrat,* Germany), 143–6: deadlocks, resolving, 145; members, 144; structure, 138, 144–5; veto powers, 144–5
Federal Council (Switzerland), 290–1, 298–302: constitution of, 299, as head of state, 299–300
Federation Council (Russia), 228–30, 237, 252n35
Federal Court (Canada), 116; Switzerland, 302–3
Federal Courts (Australia), 51
federal intervention, powers of (Argentina), 11, 30
Federal Investment Council (Argentina), 28
Federation Council (Russia), 228–30, 237, 251n35
Federation Treaty (Russia), 227–8
Feldbrugge, FJM, 248n7
filibustering (USA), 322, 338
Finland, 249n20
Fleiner, Thomas, 36n68
Frankel, Francine R, 193n1
free mandate (Austria), 75
Frenkel, Max, 315n35
Frias, Berardo, 33n19
Friás, Pedro José, 32n13, 34n30, 36n59
Friedrich, Carl J., 250n22
Funk, Bernd-Christian, 96n36

Gagliardo, John G., 161n14
Galipeau, Claude Jean, 131n5
Galligan, Brian, 65n17, 66n45
Gamper, Anna, 94n5, 95n19; 96nn20, 36
Gandhi, Indira, 173, 176
Gboyega, Alex, 223n77
German states*, see Land/Länder*
Germany: bicameral reform commission, 138; *Bundesrat, see* Federal Council; central bank, 148–9; chancellor, 138, 142, 146; coalition governments, 146; consociationalism, 142, 150, 159; constitutional framework, 157–8; counties, 155; county-free cities, 155; demographics, 136, 139–40; districts, 155; elections to federal Parliament, 142–3; federal administration, 147–8; federal cabinet, 142, 146; Federal Constitutional Court, 149–50; Federal Council, 143–6; federal executive, 146–9; federal judicature, 149–51; federal legislature, 141–5; federal president, 147; federal (supreme) courts, 149–50; federalism vs. representative institutions,

158–60; geography, 136–7; government structure, 138; head of state, 147; history, 137, 140–1; intergovernmental relations, 155–7; joint mediation committee, 145; joint reform commission, 159–60; judges, appointing, 150–1; local government, 154–5; map of, 135; minorities, 139; political parties, 138; politicians, 143; regionalism, 137, 139–40; unification, 140–1
Ghosh, Pradip K., 195n38
Gorton, John, 67n62
governor(s), state/provincial: Argentina, 24; Australia, 56; India, 184; Nigeria, 216; USA, 327, 328, 329–30
governor general: Australia, 44, 46–7, 48; Canada, 111
Grabenwarter, Christoph, 96n30
Greiner, Nick, 56
Gunlicks, Arthur B., 160n1
Guobadia, A., 222n40

Häberle, Peter, 98n67
Hamilton, Alexander, 341n3
Hanson, Philip, 256n116
Harper, Stephen, 108
Hawke, Robert, 56
head of state: Argentina, 13–14, 1–18; Australia, 48–9; Austria, 81–2; Canada, 111; Germany, 142, 147; India, 176; Nigeria, 201, 202, 203, 204–5; Russia, 232–3; South Africa, 264; Switzerland, 299–300; USA, 323. *See also* president; prime minister
Hernández, Antonio M., 32nn8, 10; 33nn21, 26; 34n36
Herrmann, Günter, 163n36
High Court, Australia, 51–2
Hillgruber, Christian, 161n11, 161n23
Hirst, J., 64n4
Holcombe, Randall G., 341n4
Hon, Sebastine, 221n8
House of Commons (Canada), 106–8
House of the People (India): 172; and Council of States, 174–5
House of Representatives (Australia), 43–4
House of Representatives (Nigeria), 205–7
House of Representatives (USA): elections to, 320–1; membership, 320; single-member districts, 338; terms, 321
Howard, John, 65n19
Hrbek, Rudolf, 163n53
Huber, Ernst Rudolf, 161n17
Huber, Peter Michael, 161n11
human rights. *See* Rights protection
hyperpresidentialism (Argentina), 9, 15, 16

impeachment, Argentina, 15; Russia, 250n24; USA, 320
Independent Administrative Tribunal (Austria), 79
Independent National Electoral Commission (INEC) (Nigeria), 206, 212
India: centralizing mechanisms, 188–9; communal electorate, 171; Constitution, 166–7, 172, 177, 188; constitutional empowerment of the Union, 188–9; Council of Ministers (Cabinet), 174; dispute resolution, 190; division of powers, 166; elections, 176–7; electoral role of religion, 171–2; geography, 167; head of state, 176; history of federalism, 166–7; intergovernmental relations, 188–91; judiciary, 181–3; legislative councils, 184; local government, 187–8; map of, 165; multiculturalism, 167, 168; nature of federalism in, 168–9; *panchayats*, 187, 192; Planning Commission, 189–90; president, 176–7, 186; prime minister, 177; scheduled castes and tribes, 171; Union executive, 176–81; Union legislature, 169–76
Indian states: bicameralism, 183–4; executives, 185–6; governors, 184, 185–6; interstate council, 190–1; judiciary, 187; legislatures, 183–5
Indigenous peoples: Argentina, 8; Australia, 41; Canada, 104–5; India, 171
indirect federal administration (Austria), 82–3
intergovernmental relations: Argentina, 12, 28–9; Australia, 56–7, 59–60; Austria, 91–3; Canada, 125–8; Germany, 155–7; India, 188–91; Nigeria, 218–20; South Africa, 281–2; Switzerland, 306–9; USA, 333–4
Interstate Commission (ISC, Australia), 50
Irving, Helen, 64nn1, 4

Jabloner, Clemens, 97n52
Jackson, Robert J., 132n9
Jaffrelot, C., 194
Jain, M.P., 193n9
Jeffery, Charlie, 162n37
Jegher, Annina, 314n17
Joint Administrator/Regulator (Australia), 60
Joyal, Serge, 132n14
Juárez, Carlos, 25
judicial review (Canada), 116
judiciary, federal: Argentina, 19–21; Australia, 51–2; Austria, 84–7; Canada, 115–19; Germany, 149–51; India, 181–3; Nigeria,

213–14; Russia, 234; South Africa, 273–4; Switzerland, 302–3; USA, 325–7

Karapetyan, Ludvig, M., 249n14
Kathrein, Irmgard, 95n18
Katz, Ellis, 340n2
Kelly, James B., 131n3
Kelly, Margot, 65n21
Khilnani, Sunil, 193n3
Kielmannsegg, Peter Graf, 162n30
Kirchner, Néstor, 21
Klöti, Ulrich, 313n6
Knopff, Rainer, 131n1
Kramer, Jutta, 160n1
Kukushkin, M. I., 250n21

Ladner, Andreas, 315n20
La Nauze, J.A., 64n4
Land/Länder (Germany): administering federal legislation, 147–8, 153–4; coalition agreements, 152; courts, 149; executives, 152–3; government participation in federal legislation, 145; history, 137, 140–1; judiciary, 154; judicatures, 154; legislatures, 151–2; prime minister, 153; regulatory agencies, 153; role of, 153
Land/Länder (Austria): coalition pacts, 76; concordats with public law, 91-3; consent for federal bills, 79; contracts with the federation, 91; direct democracy, 88–9; executives of, 89; Independent Administrative Senates, 83–4; indirect federal administration, 82–3; legislatures, 87–91; parliaments, 87, 88; representation in federal legislature, 77–8
Lee, Christopher, 341n8
legislative councils: Australia, 54; India, 184
legislative deadlocks, *see* Deadlock
legislature, federal: Argentina, 13–14; Australia, 42–6; Austria, 80; Canada, 105–9; Germany, 141–5; India, 169–76; Nigeria, 202–9; Russia, 228– 32; South Africa, 264–65; Switzerland, 294–8; USA, 320–7
Lerche, Peter, 162n34
Liberal Party (Canada), 107
Lijphart, Andreas, 315n29
Linder, Wolf, 314n9
Leonardy, Uwe, 160n3
Lerche, Peter, 162n34, 162n42
local government: Argentina, 26–8; Australia, 58–9, Austria, 89–91, Canada, 123–5; Germany, 154–5; India, 187–8; Nigeria, 217–18; Russia, 240; South Africa, 278–80; Switzerland, 306–7; USA, 332
Lodge, Tom, 287n38
Lok Sabha. See House of the People (India)

Madison, James, 320
Majeed, Akhtar, 192n1
Maqueda, Juan Carlos, 35n43
Margedant, Udo, 161n12
Martin, Paul, 112, 124
Masing, Johannes, 162n33
Mattes, Robert, 287n37
Matthew, George, 192n1
Mavrodi, Sergei, 251n39
mayors (Austria), 90–1
Meisel, John, 114
Menem, Carlos, 12,14, 21
Merkel, Angela, 146
Meyer, Hans, 161n26
Midón, Mario, 32n13
military rule (Nigeria), 202
ministerial councils (Australia), 59–60
ministers of government (Australia), 55–6
minorities: Austria, 73, 94n5; Canada, 104–5; Germany, 139; Nigeria, 205; Switzerland, 305, 313. *See also* Indigenous peoples; multiculturalism
monarchy (Austria), 73–4. *See also* Constitutional monarchy
multiculturalism: Canada, 104; India, 167, 168; Russia, 226, Switzerland, 291, 293, 300–01. *See also* Indigenous peoples; Minorities
municipalities: Argentina, 12, 27; Austria, 89–91; Canada, 103; Germany, 154–5; South Africa, 278–80; USA, 332. *See also* Local government
Murray, Christina, 286n19
Muthien, Yvonne, 285n8

Narayanan, K.R., 177
National Assembly (Nigeria): functions 203–4; House of Representatives, 205–7; joint committee system, 208–9; minorities, representation in, 205; relationship with president, 204; Senate, 207–9; structure and characteristics, 202–5
National Assembly (South Africa), 264, 265–6
National Competition Council (NCC, Australia), 51
National Council (Austria): election of, 76–7; legislative powers, 74–6
National Council (Switzerland), 296
National Council of Provinces (South Africa): failures, 269–70; membership, 267; monitoring relations, 268; provincial bills, 268; provincial concerns, 269; responsibilities, 267
natural resources (Argentina), 12
negotiatory federalism (India), 166

Neugebauer, W., 95n9
Neuhofer, Hans, 98n75
Neustadt, Richard E., 341n13
New Democratic Party (Canada), 107
New Federalism (USA), 336
New South Wales, 41, 44
Nigeria: administration, 211–13; civil service, 213, 214; constitution, 201–2, 214; constitutional supremacy, 219; Council of State, 210–11, 212; defects of federalism, 219–20; demographics, 199–200; economy, 200; electoral system, 206–9; federal executive, 209–13; federal intervention provisions, 215; federal judicature, 213–14; federal legislature, 202–9; geography, 199–200; history of the federation, 200–2; intergovernmental relations, 218–20; law-making powers, 208; local government, 217–18; map of, 198; military rule, 202; National Assembly, 202; political parties, 205, 207, 210; president, 201, 202, 203, 204–5, 209–10; Senate, 207–9; Supreme Court, 213, 214
Nigerian states: administration, 216–17; civil service, 216–17; executive, 216; governor, 216; institutions, 214–17; judiciary, 217; legislatures, 215–16; political executives, 216
Nino, Carlos S., 32n8, 36n66
Nipperdy, Thomas, 160n1
Nixon, Richard, 336
No Child Left Behind Act (NCLBA), 339
no confidence vote, *see* confidence vote
Northern Territory (Australia), 41; statehood, 64
notwithstanding clause (Canada), 118, 119

Ochsner, Alois, 298
Oeter, Stefan, 160n3
Official Languages Act (Canada), 113
Öhlinger, Theo, 94n4, 96n30
Opeskin, Brian, 68n84
opposition leaders (Germany), 142
opposition parties (Canada), 108, 110
Ostrom, B., 341n20

Pai, Painandikar, V.A., 195n32
Painter, Martin, 69n104
parliamentary systems: Australia, 38, 46–7; Austria, 80–1; Canada, 105–6; executive leadership in, 109–10; Germany, 142–3, 151; India, 176; Nigeria, 201–2; South Africa, 263–4
Parti Quebecois (Canada), 107
Pernthaler, Peter, 94n4, 95nn7,10; 96nn20, 36
Perón, Juan Domingo, 21, 33n18
Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), 338, 339
Pesendorfer, Wolfgang, 97n44
Pietzcker, Jost, 163n63
Pincione, Guido, 33n17
political parties: Australia, 43; Canada, 107–8; Germany, 138; Nigeria, 205, 207, 210, 215–16; Russia, 230–32, 251n38; South Africa, 265; Switzerland, 301–2, 304–5
Posser, Diether, 161n25
president: Argentina, 9, 13–14, 17–18; Austria, 81–2, 88; Germany, 142, 147; India, 176–7; Nigeria, 201, 202, 203, 204–5, 209–10; Russia, 232–3; South Africa, 264; Switzerland, 299; USA, 323–5
presidential republic (Austria), 80–1
prime minister: Canada, 109, 110; German *Land*, 153; India, 177; Russia, 229
Prime Minister's Office (PMO, Canada), 112
Privy Council Office (PCO, Canada), 112
proportional representation: Austria, 77–8; Switzerland, 304
public service: Russia, 236, South Africa, 272. *See also* administration, federal; bureaucracy; civil service

Quebec, 104, references, 104
Queen. *See* Constitutional monarchy
Quick, J., 64n4

Rajya Sabha. See Council of States (India)
Rao, B. Shiva, 192n1
Reagan, Ronald, 336
referendum: Australia, 40–1; Austria, 73, 81; Canada, 103, 104; Switzerland, 295, 305
Reform Party (Canada), 107
R. v. Kirby; ex parte Boilmakers' Society of Australia, 64n7
regionalism: Canada, 110–11, 125; Germany, 137, 139–40
Rentzsch, Wolfgang, 164n68
Republic: Australia, proposal, 48–9
Republic of Austria, *see* Austria
Reserve Bank of India, 189
Revenue Mobilization Allocation and Fiscal Commission (Nigeria), 212–13
revenue sharing (Switzerland), 307

Reynolds, Andrew, 265, 286n16
Richardson, Jack, 66n51
rights protection: Australia, 63–4; Canada, 103, 118–19; India, 171; USA, 318–19. *See also* Indigenous peoples; minorities; multiculturalism
Riker, William H., 341n10
Riklin, Alois, 298, 315n19
Rill, Heinz Peter, 99n82
Roberts, Geoffrey K., 160n6
Rose, Richard, 251n40
Rosner, Andreas, 99n90
royal commissions (Canada), 114, 115
Rudolf, Walter, 163n63
Russia: areas of federal jurisdiction, 228; autonomous areas, 236–7; 249n15; central executive, 232–3; central legislature, 228–32; centralization, 245–6; constitution, 227, 228, 233; Constitutional Court, 234, 243; council of ministers, 232; creation of the federation 226–8; demographics, 225–6; depopulation, 249n9; economy, 244, 248n8; elections, 229, 246, 250n29; ethno-territorial federalism, 245; executive institutions of constituent units, 234–8; Federation Council, 228–30, 237, 251n35; federal districts, 241; federal interventions, 239–40; Federal Treaty, 227–8; future of federation, 243; geography, 225; history, 248n6; impeaching president, 250n24; judicature, 234; local government, 240; map, 224; multiculturalism, 226; nature of the federation, 225–6; peace courts, 254n87; plenipotentiary representative, 241–2; political parties, 229, 230–2, 251n38; president, 232–3; prime minister, 229; public chamber, 246–7; reform of federal structure, 237–8; regions, 248n5; senators, 229; State Duma, 228–9; state (public) service, 236; superpresidential government, 228, 233; tax evasion, 243
Russian constituent units: administration, 234–8; executive, 234–8; judicature, 238–40; legislature, 234–8; reducing, 242

Sabsay, Daniel, 34n31
Sagüés, Néstor P., 32n13
Sarkaria Commission (India), 190
Sarkaria Report, 193n4
Saunders, Cheryl, 64n9
Sawer, Geoffrey, 66n40
Scarrow, Susan E., 160n3
Schäffer, Heinz, 96n36
Schambeck, Herbert, 97n59
Scharpf, Fritz, 163n64
Schmitt, Nicolas, 313n3
Schneider, Hans, 162n36
Schultze, Rainer-Olaf, 163n68
Seekings, J., 286n15
Seewald, Olfried, 163n59
senate: Argentina, 11, 15–17, 23; Australia, 44–6, Austria, 83; Canada, 106, 108–9; Nigeria, 207–9; Russia, 229
senate (USA): election of senators, 321–2, 328; filibustering, 322; membership, 321; power, 322–3; terms, 322
separation of powers (Australia), 47
Sezhiyan, Era, 195n48
Shastri, Sandeep, 194n22
Silvia, Stephen J., 161n23
Simeon, Richard, 131n2
Singh, M.P. 194n17
Sivaramakrishnan, K.C., 196n59
Solimano, Andrés, 31n5
South Africa: bill of rights, 285n9; cabinet, 263–4, 270–3; characteristics of the federation, 261; constituent units, 274–5; constitutional amendments, 283; Constitutional Court, 273–4; constitutional decentralization, 259–60; constitutional framework, 282–3; cooperative federalism, 259–60, 281–2; demographics, 262–3; elections, 265; Financial and Fiscal Commission, 281; history, 263; intergovernmental relations, 281–2; local government, 278–80; map, 258; National Assembly, 264, 265–6; National Council of Provinces, 266–70; national executive, 270–3; national judicature, 273–4; national Parliament, 264–5; parliamentary government. 263–4; political parties, 265; president, 264; provincial electoral systems, 275; public service, 272
South Africa constituent units: administration, 277–8; executive, 277–8; institutional arrangements, 274–5; legislatures, 275–7
Stare decisis, Argentina, 20
Starovoitova, Galina, 251n41
State Duma (Russia), 228–9
Steytler, Niu, 286n10
Stone, Bruce, 69n99
superpresidential government, Russia, 228, 233
Supreme Court of Canada: constitutional references, 116–17; Quebec Secession Reference, 117
Supreme court(s): Argentina, 19–21; Canada, 116–17; Germany, 149–50; India, 181, 182–3; Nigeria, 213, 214; USA, 325, 326,

336, 337. *See also* Federal Court; High Court
Swiss cantons, 303–6: administration of, 305–6; constitutions of, 303; direct democracy, 305; elections, 304; judicature, 306; legislatures, 303–4; political executive, 304, 305; proportional representation, 304; voluntary proportionality, 304–5
Switzerland: cantons, 303–6; challenges, 310–11; characteristics of nation-state, 293–4; communes, 306–7; consensus democracy, 290, 291; constitutional framework, 309–10; cooperative federalism, 307–8; demographics, 291–2; direct democracy, 295, 305; elections, 296, 297; federal administration, 300–1; Federal Assembly, 294–8; federal-canton relations, 312; Federal Council, 298, 299–301; Federal Court, 302–3; federal executive, 298–302; federal judicature, 302–3; geography, 290; head of state, 299–300; history of the federation, 292–4; intergovernmental relations, 307–9; local government, 306–7; minorities, 305, 313; mixed democracy, 298; multiculturalism, 291, 293, 300–1; political parties, 301–2, 304–5; president, 299; public service, 301
Tarr, G. Alan, 340n2
Tasmania, 41
Thaysen, Uwe, 160n9
Toronto (Canada), 124
tribal government (USA), 332–3
triple-E Senate (Canada), 108–9

Uhr, John, 66n43
Unfunded Mandates Reform Act (UMRA), 338, 339
Union administration (India), 179–81; bureaucracy 179–81; constitutional framework, 180–1; legislation, 180; relation to states, 180–1
Union executive (India), 176–81; power of, 178–9
Union judiciary (India), 181–3; Supreme Court, 181, 182–3
Union legislature (India): Council of States, 173–6; election of, 170–2; functions, 169–70; joint select committees, 175; House of the People, 172; legislative powers, 169–70; structure and characteristics, 169–70
Union Pact of San José de Flores, 11
United States of America (USA): Civil Rights Movement, 318–19; Civil War, 318; Congress, 320–3; constitutional framework, 334–5; demographics, 319–20; elections, 320–1; Electoral College, 323–5, 339; federal bureaucracy, 325; federal court jurisdiction, 326; federal institutions, 320–7; federalism vs. representative institutions, 336–40; filibustering, 322, 338; funding for federal goals, 330; geography, 317; head of state, 323; intergovernmental relations, 333–4; judiciary, 325–7; local government, 332; map, 316; New Federalism, 336; origins of federal system, 317–20; presidency, 323–5; presidential powers, 324; selecting federal judges, 326, 336; Supreme Court, 325, 326, 336, 337; tribal government, 332–3. *See also* American states
USSR, 227. *See also* Russia

Vatter, Adrian, 315n24
Vernadsky, George, 248n2
veto: Argentina, 14; Austria, 79–80, 188; Germany, 144–45; India, 169, 175; USA, 337
Vipond, Robert C., 132n7
Voluntary proportionality (Switzerland), 304–5

Walter, Robert, 94n4, 95n18,
Watts, Ronald L., 95n19
Weber, Karl, 95n7, 97n41
Webner, Joachim, 288n46
Welfare state (Switzerland), 295, 300
Weller, Patrick, 67n72
Werndl, J., 96n36
Western Australia, 41
Wiesli, Reto, 314n18
Willoweit, Dietmar, 160n1

Yeltsin, Boris N., 227
Young, Lisa, 132n13