

Constructive and Co-operative Federalism?
A Series of Commentaries on the Council of the Federation

Intergovernmental Councils in Federations

intergovernmental council has been proposed. The Pepin-Robarts report in 1979 advanced some proposals.¹ In 1991 the Government of Canada's formal proposals which triggered off the discussion and negotiations leading eventually to the Charlottetown Agreement, included a federal-provincial Council of the Federation, although this was not included in the final Charlottetown Agreement 1992.² Is the Council of the Federation then an idea whose time has now come?

The purpose of my article is to examine the experience of other federations to see what may be learned from them on this issue. Among the approximately 180 politically sovereign states in the world today there are some two dozen federations containing approximately two billion people or about 40 percent of the world's population, and encompassing some 480 federated states or provinces. There are many variations among these federations in their institutional design, the character of the diversity within their societies, their degree of economic development, and their policy agendas. Nevertheless a common feature among them has been the need for effective internal intergovernmental arrangements. Thus, while there is no single federal model or example that is applicable everywhere, there is much to be gained from examining the similarities and differences in their approaches to facilitating federal-provincial and inter-provincial co-operation and co-ordination. Since many of the problems we face in Canada are common to virtually all federations, examining the experience of other federations in institutionalizing intergovernmental relations

sovereignties. In a federation federal and provincial (or state) governments exist side by side, each separate and virtually independent in its own sphere of constitutionally assigned authority. According to the traditional account, that was how the classical federations of the United States (1789), Switzerland (1848), Canada (1867) and Australia (1901) began, but developments in the 1930s and then following World War II led in each of these federations to the replacement of 'dual federalism' by 'co-operative federalism.' The latter involved interdependence and a variety of co-operative intergovernmental relations made necessary particularly by the growth of social programs and the financial arrangements to support them.

In truth, however, interdependence among governments (partm)8.61otionssg

It should be noted that intergovernmental interdependence within federations has two important dimensions. First, there are the vertical relations between governments of different orders, i.e. federal-provincial relations and provincial-local relations. Increasingly such vertical relationships within federations may also involve supra-federation organizations or other countries. A second dimension is the horizontal relationships of different governments within the same sphere, such as inter-provincial or inter-local relations. Typically, in federations both kinds of intergovernmental relations have been important. Within each of these two dimensions, intergovernmental relations may involve all the governmental units within a federation, regional groupings of governments, or be bilateral.

In this context, all federations, both old and new, have had to come to terms with the changing scope, character and varied dimensions of interdependence among governments. An important instrument for this in most federations has been the establishment of both formal and informal councils, committees and conferences. These are usually held frequently enough to enable representatives of the different governments – first ministers, ministers, officials and legislators – to share information, discuss common problems, contemplate co-ordinated or even joint action and where appropriate establish joint bodies or agencies. In most federal polities such formal councils, committees, conferences and agencies have become numerous. Furthermore, recent decades have seen significant developments and reforms, including a number of innovations, in coming to terms with the changing and increasing demands of interdependence among governments within federations.

Examples of Intergovernmental Councils

Australia, like Canada combines federal and parliamentary institutions. Although with the exception of the Loan Council, intergovernmental relations are not referred to in the constitution as amended, Australia has established a number of major formal councils to deal with policy issues that have

intergovernmental implications. In this respect Australia has gone considerably further than Canada.

The Council of Australian Governments (COAG) is Australia's primary intergovernmental institution.³ It was established [The CTnTc0.00

states and territories to reach a consensus, if possible, on issues to be raised with the federal government.

Where issues take on major intergovernmental significance, these issues may be raised in COAG. Typically COAG, after setting out a strategy and action plan may return the particular issue to an appropriate ministerial council for implementation.

Among the major reforms that have been achieved under COAG auspices have been an agreement upon mutual recognition of the regulation of trade in goods and of occupations, an agreement on national gas pipeline access, establishing an intergovernmental process for

intergovernmental relations have, however, been influenced more by Australian examples, particularly those relating to intergovernmental financial relations.

The constitution presupposes a functional interdependence between the two orders of government. Article 263 provides for an Inter-State Council (ISC) for harmonizing Union-State and interstate relations and for policy co-ordination. It was only in 1990, however, that this enabling constitutional provision was implemented. The ISC has, in practice, yet to come fully into its own.

On the other hand, an extensive number of extra-constitutional intergovernmental forums have been established such as the National Development Council (NDC) set up in 1952 for intergovernmental approval of the five-year plans. There are also several intergovernmental national councils in policy areas such as local government, health and population. As well, under the States Reorganization Act in 1956 Zonal Councils for regional groups of states were established, but except for the Northeastern Council these have not been very active. In the same year some interstate tribunals were established under the Inter-State River Water Disputes Act. In the domain of intergovernmental financial relations, the quinquennial Finance Commissions provided for by the constitution (article 280) have had a significant impact upon the allocation to the states of constitutionally mandated transfers.

All the formal or informal intergovernmental councils have shunned majority rule and have relied instead upon consensus processes with agendas set by the Union in consultation with the states. As a general pattern, Union governments have preferred the informality and flexibility of non-formal intergovernmental forums, finding them more convenient. Nonetheless, the Sarkaria Commission on Centre-State Relations, 1987-8, did recommend the constitutional entrenchment of the NDC as being, along with the ISC, one of the two major organizations of intergovernmental executive relations. It also recommended the streamlining of the Finance Commission and the

Planning Commission as the two staff agencies for executive federalism in India.⁶

South Africa differs from the preceding examples in having a hybrid presidential-parliamentary system. The highly centralized and integrated federal structure in the 1996 constitution was largely modelled on that of Germany. A notable feature of the 1996 constitution is Chapter 3 (articles 40-41) which is entitled "Co-operative Government." This explicitly enunciates that intergovernmental co-operation is to be the underlying philosophy for the conduct of government and the relations between the three spheres of government: national, provincial and local. Furthermore, to encourage intergovernmental co-operation the constitution empowers the Constitutional Court, if it is not satisfied that every reasonable effort to settle a dispute by intergovernmental negotiation has been taken, to refer a dispute back to the governments involved (article 41(4)).

As in Germany, the South African federal second chamber, the National Council of the Provinces (NCOP), consists of delegates of the provinces, who have an absolute veto on certain kinds of legislation and a suspensive veto on others. Unlike the German example, however, each provincial delegation consists not only of members drawn from the provincial executive, but a majority drawn from the provincial legislature based on a proportional representation of the political parties in the provincial legislature concerned. Including representatives from the legislature in this way was considered a democratic improvement on the German model, but in practice this mixed composition of provincial delegations has made it a less coherent and effective body for conducting

The **United States** is distinctive among the federations considered here because of its non-parliamentary character. Within each order of government the institutions are marked by a separation of powers: between the President and Congress, and between the Governors and the Legislatures. This diffusion of power within each level of government has given the character of intergovernmental relations within the United States a distinctive cast.

Intergovernmental relations have as a result involved a wide variety of channels between executives, administrators and legislators in different governments, often with the intervention of various interest groups, in a variety of crisscrossing patterns. This is further compounded by the fact that in a federation of 50 states there is such an enormous variety of state interests that it has been difficult to get agreement on specific matters.

There is nothing, therefore, directly comparable to the executive federalism and formal intergovernmental councils prevalent in the parliamentary federations described above. That is not to say that intergovernmental co-operation does not exist. Indeed, from the very beginning of the federation in 1789, federal, state, and local officials have recognized their interdependence and the need to co-operate in a variety of ways to achieve both their common and separate objectives.⁹ But while this co-operation has been extensive, it has involved a wide range of separate federal, state and local government offices and officials usually working directly with each other. Currently, there are no general governmental co-ordinating bodies. However, some co-operation of state and local officials occurs through their voluntary, non-profit, national organizations such as the National Governors' Association, the Council of State Governments, and the National Conference of State Legislatures. For a time, between 1959 and

⁹ J. Kincaid, "Intergovernmental Relations in the United States of America," in P. Meekison, ed., *Intergovernmental Relations in Federal Countries* (Ottawa: Forum of Federations, 2002), pp. 33-44; D. J. Elazar, *Federalism and the Way to Peace* (Kingston: Institute of Intergovernmental Relations, Queen's University 1994), pp. 133-58.

1996, there was an Advisory Commission on Intergovernmental Relations, which consisted of three members of the President's cabinet, three members of the House of Representatives, three senators, four governors, three state legislators, three country commissioners, four mayors and three private citizens. During its existence, it did useful work in monitoring intergovernmental relations, but it was dissolved in 1996 when Congress withdrew its funding support in a period of financial constraint.

Conclusions: Lessons for Canada

From this review it is clear that interdependence among governments *as partners* has been inherent in federations. It is not surprising, therefore, that extensive intergovernmental institutions and processes have been a pervasive feature of most contemporary federations, although the precise form of these has varied from federation to federation depending on their particular circumstances. Indeed, Alen and Ergec, writing about the new Belgian federation, came to conclude that the *three fundamental requirements* for an effective federation are: (1) a distribution of jurisdiction ensuring autonomy for the federated units, (2) the formal participation of representatives of the federated units in the institutions of federal government, and (3) intergovernmental relations and co-operation.¹⁰ Most federations, especially parliamentary ones, have consequently found formal or informal federal-provincial and inter-provincial councils of considerable value for facilitating intergovernmental collaboration. It is also noteworthy that in a number of federations there have been recent reforms to make these bodies more formal and more effective as co-ordinating institutions.

While contemporary federations have ranged somewhere along the spectrum between interlocking intergovernmental relations and arm's length co-operation, most, it would appear, have developed intergovernmental collaboration to a much greater degree than Canada. Thus, in

¹⁰ A. Alen and R. Ergec, *La Belgique fédéral après la quatrième réforme de l'État de 1993*, 2nd ed. (Brussels, Ministère des Affaires étrangères, F/98/1, 1998), pp. 29-30.

comparative terms, it must be recognized that Canada has been less well-equipped to manage the contemporary challenges of interdependence than most federations. Federations elsewhere, therefore, illustrate possible improvements, including formal federal-provincial and inter-provincial councils, which Canadians would do well to consider carefully. At the same time, it