Constitutional law

Unitary and federal systems

The distinction between unitary and federal states

No modern country can be governed from a single location only. The affairs of municipalities and rural areas must be left to the administration of local governments. Accordingly, all countries have at least two levels of government: central and local. A number of countries also contain a third level of government, which is responsible for the interests of more or less large regions.

The distribution of powers between different levels of government is an important aspect of the constitutional organization of a state. Among states with two levels of government, distinctions can be made on the basis of the greater or lesser autonomy granted to the local level. The British government's respect for local self-government has always been a characteristic of its constitution. In contrast, France traditionally had kept its local authorities under strict central control. In countries with three levels of government, the distribution of powers between the central and the intermediate governments varies. States formed through the union of formerly independent states usually maintain an intermediate level with considerable legislative, executive, and judicial powers (as in the United States, Argentina, and Switzerland), though some grant few powers to this level. The latter situation occurs often in countries that have introduced the intermediate level as a correction to their previous choice of two levels—as Italy did in its constitution of 1948 and Spain in its constitution of 1978.

Depending on how a constitution organizes power between the central and subnational governments, a country may be said to possess either a unitary or a federal system (*see also* federalism). In a unitary system the only level of government besides the central is the local or municipal government. Although local governments may enjoy considerable autonomy, their powers are not accorded constitutional status; the central government determines which decisions to "devolve" to the local level and may abolish local governments if it so chooses. In federal systems there is an intermediate level of governmental authority between the central and the local; it usually consists of states or provinces, though other entities (e.g., cantons or republics) may exist in some countries. Aside from the number of levels, the most important distinction between a unitary system and a federal one is that the states or provinces of a federal state have constitutionally protected sovereignty. Within a federal system the state or provincial governments share sovereignty with the central government and have final jurisdiction over a broad range of policy areas.

Federal and unitary systems are ideal types, representing the endpoints of a continuum. Most countries fall somewhere in between the two extremes—states can be more or less unitary or more or less federal. So-called "semifederal" countries occupy a middle category, possessing an intermediate level of government that does not have the same protections of sovereignty that the states or provinces of federal states enjoy.

A proper understanding of these types of constitution requires the consideration of additional features of each type. The model federal state is characterized by the existence, at the national level, of a written, rigid constitution guaranteeing the several intermediate governments not only permanence and independence but also a full complement of legislative, executive, and judicial powers. The national constitution enumerates the powers granted to the central government; the remaining powers are reserved to the intermediate governments at the state or provincial level. These subnational entities are generally represented at the national level, possibly on an equal footing, in a second chamber of the national legislature (often called the upper house, or senate). They also often are central to the process of amending the national constitution. For example, some number of state or provincial legislatures may be required to consent to the ratification of amendments passed by the federal legislature. States or provinces in federal systems also have their own constitutions that define the institutions of their respective governments, as well as the powers that are devolved further to their local governments. Such constitutional arrangements are a guarantee against possible efforts of the central government to enlarge its jurisdiction and so imperil the important political role that intermediate governments play in a federal system. More than formal constitutional safeguards are required to preserve that role. Apart from constitutional amendments, the central government may seek to broaden its own powers through the use of constitutional clauses granting "implied powers." In some federal states (e.g., Argentina and India), there are emergency provisions by which the central

government may suspend the powers of individual state or provincial governments. If abused, these provisions—meant to be used only in cases of rebellion or other severe disturbance against the constitutional order—may seriously compromise the constitutionally enshrined principle of shared sovereignty that is the hallmark of federalism. Even in established federal democracies (e.g., Canada, Germany, and the United States), the exact distribution of powers between levels of government is a matter of constant dispute between central and subnational governments. Disputes about federal-state matters are often the subject of rulings in courts or constitutional tribunals or conferences involving the heads of the central and subnational governments.

Semifederal states are also based, as a rule, on rigid written constitutions granting some limited legislative and administrative (though seldom judicial) powers to the intermediate or regional governments. But because regional governments in semifederal states possess jurisdiction only over enumerated matters (and even here they are subject in part to the overriding powers of the central authorities), their actual role and political influence within the system largely depend on the tendency of the central government to buttress or to restrict their autonomy. Where the powers granted by the constitution to the regional governments are particularly minimal, the semifederal state will look in many respects like a unitary state. Where the powers are relatively large and the central government favours their expansion—perhaps because the central government is itself a coalition of national and regional parties—the state tends to assume federal characteristics, even if the typical hallmarks of the federal system are not present. Spain and Belgium are good examples of semifederal states that have become increasingly more federal in practice.

Classifying states as federal or unitary

Federal and semifederal states

Classifying a particular state as federal or unitary is usually straightforward, though in some cases it can be more difficult. The United States and Switzerland are clearly federal states; all of the above-mentioned characteristics of the federal state are present in their constitutional systems. Australia and Germany too can be considered federal in all respects. Canada also is a federal state, despite the fact that some of the formal features of ideal federalism are absent from its 1982 constitution: the provinces' powers, not the central government's, are enumerated. Additionally, there is no constitutionally mandated representation of the provinces in the upper house of the federal legislature, whose members are appointed by the central government (though they are chosen, by convention, in a way that ensures provincial representation). Nevertheless, the provinces' powers are vast, and the constitutional guarantees of their rights and independence are particularly strong.

There are several federal states in Latin America. Argentina and Brazil probably are the most clearly federal, with rigid constitutions, equal representation of the regional governments in the upper house, and significant power reserved to the regional level. The central government, however, has the ability to intervene in state or provincial affairs in some circumstances, particularly in the case of Argentina. Moreover, neither constitution assigns a formal role to the subnational governments in the process of amending the national constitution. In Argentina amendments must be passed by a nationally elected constitutional assembly. In Brazil amendments are passed by supermajorities of the two houses of the federal legislature but are not subject to ratification by the states. Mexico is a federal state, but both formally and informally it has long deviated from many principles of federalism. Formally, the upper house represents the states, but it is much weaker than the lower house. Informally, until the late 1980s a single highly centralized party controlled the federal government and all state governments, rendering subnational autonomy moot. With greater competition between parties, Mexico increasingly has come to resemble the federal state its constitution has long described.

The case of India is somewhat ambiguous. The Indian federal constitution spells out a long list of important subjects over which the states and territories that compose the union have exclusive jurisdiction. But the constitution gives the central government the power to legislate on any subject—including the ones reserved to the regional governments—it deems a matter of national importance. In addition, the central government has direct powers of control over the regional governments (e.g., the national Parliament can dissolve the legislative council of any state or territory).

The former Soviet Union was, by constitution, a federal state; but, apart from the nominal character of at least certain parts of its constitution, the constitutional role entrusted to the Communist Party unified the system to such an extent that the state was

essentially unitary with some semifederal aspects. Post-Soviet Russia, in contrast, has a federal constitution in all respects.

Both Italy and Spain can be considered semifederal states, though Italy is much closer to the unitary model. The regions in these countries are endowed with legislative and administrative powers in certain areas, but all the courts are national. Italy is perhaps one of the best examples of how a state may closely resemble a unitary system notwithstanding the presence of regional governments. The limited powers constitutionally granted to the regions have been extended by the national legislature through its devolution of additional matters to the purview of regional legislatures. Regional laws, however, must respect general principles laid down in national statutes, and in practice little room is left for genuinely autonomous regional legislation. Moreover, the regions are not financially independent. Thus, on the whole they can be considered almost a branch of the system of local governments, on a par with communes and provinces, rather than a distinct third level of government.

Unitary states

The United Kingdom often is cited as the quintessential example of a unitary state, despite the presence of regional governments. Northern Ireland has alternated between periods of special autonomy and direct rule by the British government; in the 1990s an autonomous government for the region was reestablished, though autonomy was sometimes suspended by the British government. Also in the 1990s a Scottish Parliament and a Welsh Assembly were established (the former, but not the latter, was given extensive powers, including taxation), and the government debated introducing assemblies in some English regions. In the absence of a rigid constitution at the national level, however, the powers of the regional parliaments remained ill-defined. Indeed, an act of the central Parliament at Westminster theoretically could take powers away from the regional governments or in fact abolish them. Although France is a unitary state, in 1982 it established elective regional governments less dependent on the centre.

International unions of states

Beginning in the second half of the 20th century, there was a growing tendency in many countries to allow the direct operation within their constitutional systems of international laws and the laws of special international organizations to which they belonged. The constitutions of Germany and Italy, for example, require the legal system to conform with international customary law. Because both constitutions are rigid, this means that ordinary national statutes conflicting with such law are unconstitutional.

At various times, groups of nation-states have formed unions that resulted in the creation of supranational governmental agencies whose laws became part of the legal systems of the member states. Although these unions did not constitute a new political community in the strict sense, they did act as something like a new level of government above the ones already existing. The most important examples of such a system are the European Union (EU) and its predecessor organizations. The Treaty of Rome (1957), which established the European Community, created a government for the organization consisting of a commission, a council of ministers, an assembly (now the European Parliament), and a court (the European Court of Justice; ECJ). Directives and regulations enshrined in EU law must be applied by the national courts and must take precedence over national legislation. In addition, by adopting the euro, a single currency, member states agreed to cede substantial authority on financial management to the EU. The ECJ, which issues binding interpretations of the treaty and of EU regulations, allows for individual recourse.

In 2004 the heads of government of the EU signed a constitution that created the posts of president and foreign minister and expanded the powers of the European Parliament, though that constitution has since failed to be ratified. Under this constitution, the EU also was given a “legal personality,” meaning that it could negotiate most treaties on behalf of its members. The EU may be the embryo of a future federal state, if the union develops into an organization whose central government is capable of making decisions independently of the consent of member states, and particularly if it is given substantial freedom to act in the field of foreign and military policy. Even as it exists now, however, the EU is much more than a simple alliance of states that issues regulations in its members’ common economic interest. The structures of the EU penetrate deeply into the constitutional structures of the national member states, in much the same way as the structures of the central government penetrate those of regional governments in a federal system. Some features of federalism, such as the precedence of community law in member states and the restriction of interpretive functions to a central agency, are already present in the EU. Unlike state members of a true federal

system, however, members of the EU may withdraw from the union at any time. But until a member takes such a step, it is subject to EU law in practically the same way that a subnational state or province is subject to federal law in a federal system.

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