INTERGOVERNMENTAL RELATIONS IN FEDERAL SYSTEMS

Comparative Structures and Dynamics

EDITED BY

Johanne Poirier
Cheryl Saunders
John Kincaid

Published for:

Forum of Federations/Forum des fédérations
International Association of Centers for Federal Studies (IACFS)

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries.

Published in Canada by
Oxford University Press
8 Sampson Mews, Suite 204,
Don Mills, Ontario M3C 0H5 Canada

www.oupcanada.com

Library and Archives Canada Cataloguing in Publication

Intergovernmental relations in federal systems : comparative structures and
dynamics / edited by Johanne Poirier, Cheryl Saunders, and John Kincaid.

Includes bibliographical references and index.
ISBN 978-0-19-902226-7 (bound)

1. Federal government. 2. Central-local government relations. 3. Comparative
government. I. Poirier, Johanne, 1962–, author, editor II. Saunders, Cheryl, author,
editor III. Kincaid, John, 1946-, editor

JC355.I64 2015 321.02 C2015-904036-1

Cover image: © ikatod/iStockphoto

Printed and bound in the United States of America

1 2 3 4 — 18 17 16 15

Contents

Co-editor Johanne Poirier wishes to thank the Faculty of Law of the Université libre de Bruxelles, as well as McGill University and the Université de Montréal, where she spent part of a sabbatical finalizing this project. Co-editor Cheryl Saunders wishes to thank Anna Driedzic, research fellow at Melbourne Law School, who assisted with editorial work on some of the country chapters and with certain sections of the concluding chapter.

We also thank our colleagues and associates at the Forum of Federations and at the International Association of Centers for Federal Studies. This book could not exist without their assistance and expertise. We wish to acknowledge the work of the entire Forum of Federations staff and particularly Rupak Chattopadhyay, president of the Forum, and vital staff members Phillip Gonzalez, Felix Knuepling, and Rhonda Dumas, as well as Carl Stieren. Thanks are due also to Terry A. Cooper, administrative assistant, for her work on behalf of this volume at the Robert B. and Helen S. Meyner Center for the Study of State and Local Government at Lafayette College, Easton, Pennsylvania. Finally, we thank the staff at Oxford University Press for their assistance in producing this volume and working with us to ensure its success.

Lastly, for this volume on intergovernmental relations, we acknowledge and celebrate the works of Richard Simeon, formerly of the University of Toronto, and Deil S. Wright, formerly of the University of North Carolina, Chapel Hill. Both men passed away during the development of this book. Simeon and Wright were pioneers and major figures in the study of intergovernmental relations in their respective countries and in the field of comparative federalism.

John Kincaid
General Project Editor

Comparing Intergovernmental Relations in Federal Systems: An Introduction

Johanne Poirier and Cheryl Saunders

Intergovernmental relations (IGR) are a ubiquitous—if sometimes underappreciated—dimension of federal systems.[1] Despite differences between federations, substantial interaction between orders of government is unavoidable.[2] Regardless of the formal and initial structure of a federal system, orders of government become increasingly interdependent. Few policy sectors escape intervention by several orders of government. Federal actors collaborate for a wide range of purposes. They share information, pool power and resources, and negotiate and implement co-operative arrangements that determine who does—or should do—what. At the heart of this interaction are numerous institutions and processes through which federal partners enter into relations with each other. This volume identifies and compares these mechanisms in thirteen federal systems around the world.

Taken in its widest sense, "intergovernmental relations" is a dimension of the practice of federalism. Modalities of interaction between orders of government in a federation include co-operative institutions and processes (e.g., consultation, co-decision, and coordination) as well as more conflictual processes of tension, collusion, competition, control, and even coercion. Understanding the politics of federalism as played out behind formal structures and rules is undeniably essential to understanding a particular federal system. Both co-operation and confrontation are affected by many factors, including history, geography, and culture, as well as ethnic, religious, and linguistic diversity. Both also are driven in some federations by a vertical or horizontal fiscal imbalance or inequality in natural-resource distribution, among other factors.

This book compares IGR in twelve countries, as well as in the European Union. The thirteen chapters that follow were written by experts who are deeply knowledgeable about IGR in their own federation. Each contribution was drafted in accordance with a common template to assist comparison across federations and to ease the inevitable methodological challenges, which are discussed below. The

questionnaire invited attention to the *processes, structures, rules, and institutions* of interaction between each federation's orders of government, whether they be partners or rivals. Importantly, authors were asked to situate the mechanisms through which interaction takes place within the relevant historical, political, and economic contexts of their federation. This volume offers considerable insight into the collective experience with the variety of practices, similarities, differences, challenges, and trends of IGR in federations across the world. As in any comparative exercise, though, context must be taken into account in evaluating the experience of particular federations.

Objectives

The underlying premise of this volume is that IGR are an integral and significant part of every federal system; a form of oil or friction in any federal machine. Despite their significance, however, IGR are often opaque, even to analysts of a single federal system. In this context, the present comparative study has two main objectives. The first is to identify and contrast in a systematic manner the diverse array of IGR mechanisms in a broad spectrum of federations. The second is to assess the impact of IGR on federalism through a number of cross-cutting perspectives and to outline common trends and challenges raised by IGR in those federal systems.

This study, thus, is both descriptive and analytical. It does not seek to defend a normative thesis or theory of IGR, although explanatory factors are frequently suggested. Given the diversity of these federations, any such theory necessarily would be too general to be of practical use and would be questionable in comparative terms. Nor, for similar reasons, is the volume prescriptive. Rather, it offers a detailed, contextual portrait of the range of methods used by the various orders of government in their complex interactions to provide a reliable source from which comparative conclusions may be drawn. Methodologically, the project bridges the gap between political science and law regarding formal and informal IGR structures. By channelling the analysis through a common template, complemented by a common conceptual vocabulary, this collection contributes to understanding what is required for effective comparison between diverse federations and provides a basis for a reliable, systematic dialogue.

Overview of the Federal Systems

This comparative analysis of IGR encompasses thirteen federal or federal-type systems: Argentina, Australia, Austria, Brazil, Canada, the European Union (EU), Germany, India, Nigeria, South Africa, Spain, Switzerland, and the United States. These systems vary greatly in geography, population size, and wealth, as Table I.1 shows.

TABLE I.1 General Features of the Federations

	Argentina	Australia	Austria	Brazil	Canada	EU	Germany
Geographic size (million sq. km.)	2.8	7.7	0.08	8.5	9.9	4.4	0.35
Population (million)[3]	40.5	23	8.4	193	34	503	82
GDP per capita (USD) 2013–2014[4]	14,715	67,458	50,546	11,208	51,958	35,500	46,268
No. of CUs[5]	23	8	9	27	13	28	16

	India	Nigeria	South Africa	Spain	Switzerland	United States
Geographic size (million sq. km.)	3.2	0.9	1.2	0.5	0.04	9.6
Population (million)[3]	1185	170	49.97	47	7.7	309.9
GDP per capita (USD) 2013–2014[4]	1,499	3,005	6,618	29,863	84,815	53,042
No. of CUs[5]	28	36	17	9	26	50

The choice of these thirteen cases was notably dictated by a concern for a wide range of federal experiences. Collectively, they comprise both old federations and some established only recently, as well as federations from the North and the South, and emerging economies. The selection also includes countries with parliamentary, presidential, and hybrid forms of government as well as those with civil law, common law, and mixed legal systems. Alongside another significant dimension, some of the federations have relatively homogeneous populations while others are heterogeneous and provide a federal governance framework to politically salient cultural/ethnic/racial/religious or national groups.

While the impact of the European Union on the workings of some federal countries has been addressed by others,[6] this volume treats the EU as a type of federal system in its own right.[7] The EU has a number of federal characteristics, including a complex set of institutions and practices to manage what has been termed "multi-level governance." In this comparative exercise, the institutions and processes of interaction between the EU's member states (and, in some cases, their constituent units, such as regions, communities, or *Länder*) and between those units and EU institutions themselves have been analyzed using a similar set of questions to those used to frame the comparison of the twelve federal countries. As the concluding chapter shows, this method facilitates identification of similarities and significant differences between more "classic" federations and the emerging quasi-federal system of the European Union.

Identifying and Comparing IGR Institutions and Mechanisms

IGR processes are the lifeblood of federalism in practice. The first and most important purpose of this comparative exercise is to take stock of the various institutions and processes through which IGR interactions occur in a wide range of federal systems. While some of the institutions and processes will be familiar to most students of federalism, others are rather innovative and original, or have been under-studied comparatively. Moreover, even similar institutions may function differently, and have distinct impacts on federal politics, in distinct contexts. While contextual attention is given to *why* relations occur in certain ways in particular countries, a major aim of the comparative exercise is to survey and contrast *how* these interactions are structured. In other words, this project aims to provide scholars and "practitioners" of federalism with a non-exhaustive catalogue of formal and informal tools used by various federations to conduct their IGR. There is substantial literature on IGR in some federations, and there is some comparative work generally restricted to specific issues or to a limited number of federations. However, the present broad-based systematic comparison fills a gap in the growing research on comparative federalism.

Assessing Common Trends and Challenges

In addition to actually describing the main IGR mechanisms and processes in their respective federal systems, contributors were asked to highlight those that work particularly well and those that do not. This assessment rests on a number of cross-cutting considerations. First, authors were asked to evaluate whether mechanisms and processes are effective in terms of policy-making and implementation. Unsurprisingly, the short comparative answer is that it depends. A number of variables contribute to the assessment, including policy areas, periods examined, or the very criteria for assessing efficiency. In the interests of contextual understanding, the framework for this study did not dictate a systematic common benchmark for this assessment, but invited authors to identify how, and to what extent, IGR affect policy outcomes in their respective federations.

Second, authors were asked to evaluate the impact of IGR on democracy, citizen participation, transparency, accountability, justice, and the rule of law. Almost invariably, the verdict was that IGR tend to be opaque, to reinforce the dominance of the executive branch, and to pose serious challenges to political accountability through legislatures and legal accountability through judicial review or control. While this is sometimes seen as a necessary trade-off for the imperative of concerted action, the volume reveals a number of techniques that have been attempted, with variable success, to limit the democratic deficit engendered by IGR.

Third, authors examined whether formal and informal modes of interaction favour centralization, decentralization, and/or asymmetrical arrangements and, in turn, whether these ease or foment political and societal tensions between orders of government. Answers vary depending on each federation's constitutional, historical, economic, and political contexts. Overall, however, it is apparent that IGR affect how the official structure of a federation operates. These various findings are explored in the conclusions to this volume.

While the three preceding sets of questions had been outlined from the outset, a number of arresting findings emerged more inductively, once we compared and contrasted this volume's thirteen narratives. Hence, in addition to dealing with the fragile equilibrium between efficiency and flexibility on one hand, and accountability and respect for the rule of law on the other, the concluding chapter also pinpoints the interplay of formal and informal rules and mechanisms; the increasing horizontal action between constituent units (often alongside rather hierarchical vertical relations); the emergence of new actors that complicate the networks of IGR, and that can have the effect of "squeezing" constituent units out of the system; and finally, the constitutional engineering role played by IGR, often on the margins of the official constitutional architecture and rules.

Methodology

The project that generated this volume brought together an international team of political scientists and jurists who were asked to explore and explain IGR in their respective federations in a systematic manner so as to facilitate transnational and transdisciplinary dialogue and comparison. This endeavour entailed a number of methodological challenges.

The Challenge of Terminology

Scholars of comparative federalism face the perennial challenge of finding and using a common vocabulary with shared meaning. In fact, the very title of this volume raises an important lexical and conceptual difficulty. While, for the most part, the term *intergovernmental relations* (IGR) is used to denote the subject matter of this study, at least two sets of caveats should be borne in mind.

First, while English-speaking political scientists traditionally use the expression *intergovernmental relations* to refer to the wide variety of ways in which orders of government enter into relations with each other, until recently, this expression was rarely used in continental European federations, where the expression *co-operative federalism* has tended to dominate, particularly

among jurists. Neither term, unfortunately, is fully adequate. The former suggests that these relations are dominated by the respective executive branch of each order, thus marginalizing other institutional arrangements. Meanwhile, *co-operative federalism* is clearly under-inclusive in the sense that interaction between federal partners includes negotiation, conflict, competition, and coercion as well as collaboration.[8] *Co-operative federalism* conveys a more harmonious vision of federal life than may be true.

Second, the term *intergovernmental* has a specific meaning in the context of the European Union where it essentially refers to the "international relations" the member states maintain between themselves as sovereign states rather than as members of a quasi-federal system. Put another way, in EU parlance, IGR are not normally considered an integral part of federalism, but in *opposition* to it. Clearly, this may generate a certain degree of confusion. Consequently, studying IGR within the European Union, if logical on a comparative basis, can appear as an oxymoron within the field of EU studies since "intergovernmentalists" and "federalists" usually sit on opposite sides of the table. This said, once the object of our study focuses on co-operative mechanisms or modes of interaction, fruitful comparison and distinctions with more classical federations become possible.

Several other expressions that are widely used throughout the volume, and have the potential for misunderstanding, also deserve an explanation.

One is *dualist*, which has a number of distinct meanings in the context of federalism. In this volume, the term refers to federal systems in which each order of government has an executive power and a civil service that implements its norms and policies.[9] In principle, this is the case in Australia, Brazil, Canada, Spain, and the United States, for example. By contrast, in *integrated* (or administrative or executive) federal systems, the constituent units implement most federal laws and programs.[10] The expression *functional division of competences or powers* is also used to describe this structural arrangement.

In integrated systems, constituent units frequently participate in some institutionalized way in federal law-making. In other words, constituent units have some say over programs and policies they will then have to implement through their own administrative apparatus.[11] This is what is sometimes referred to as *intra-state* federalism, a third term that deserves attention. By contrast, in most dualist systems (but not all), IGR will essentially take the form of diplomacy-like relations between orders that are officially less interdependent than are integrated ones. This model of interaction often bears the name of *intergovernmental* federalism. As the chapters reveal, however, the dichotomy is not watertight, as several intra-state systems have also developed parallel intergovernmental ones.

A fourth expression is *executive federalism*. The literature sometimes uses this expression to refer to what we have termed *integrated* (in which constituent units execute federal laws). In this volume, we reserve the expression

executive federalism to describe the widespread phenomenon of relations between federal partners being handled mostly by the executive branches of the respective orders of government (particularly, but not exclusively, in parliamentary systems).

Finally, while the terminology of *horizontal* and *vertical* interaction is commonly used in many federal systems to describe relations between constituent units and between units and the centre respectively, it is less familiar in others.[12] In some federations, for example, relations between constituent units are rather described as *interjurisdictional*; in others, however, this conveys relations between courts, making it inappropriate for general use. Some individual chapters in this volume have opted for more specific terms, such as *federal–provincial*, *interprovincial*, *federal–cantonal*, *federation–Länder* and *Commonwealth–state*. In the interests of consistency, we have chosen to use the generic expressions *horizontal* and *vertical* relations. In doing so, though, we insist that the word *vertical* does not necessarily imply any form of hierarchy between orders of government (although it may do so in some cases).

The Role of Law in IGR

In the political science literature, IGR are often conceived in terms of power games and negotiations, in which the legal system plays a marginal role (except, perhaps, when a significant judicial ruling on the distribution of competences reinforces a party's particular position). In fact, IGR are framed by law in many ways. It is important to understand the intersection of law and politics to study IGR, particularly from a comparative perspective.

An original contribution of this comparative project is to identify and explore the distinction between those systems in which the role of the legal system is more visible and those in which IGR are presumed to be largely immune from legal norms. It should be underscored that in this context, *law* refers both to the existence of a constitutional or legislative framework that provides some ground rules for IGR and to the possibility of judicial review of the conduct of IGR (or some aspects of them).

Our original working hypothesis was that the dominant common-law or civil-law legal culture might exert some influence on the design and workings of federal systems, and notably on co-operative mechanisms.[13] The comparative conclusions partly confirm this hypothesis. Civil law systems tend to be more "legicentrist" and thus have a greater predilection for written, formal rules, including rules of conduct between federal partners than do their common-law counterparts. This distinction must be nuanced, however. Other factors influence the reliance on the legal dimensions of IGR. These include the timing of federal processes (older federations were less alert to the likelihood of interaction at the onset of the federal adventure) and trajectories (federations that emerged from a process of dissociation

tend to institutionalize IGR to a greater degree than those which emerged from aggregation). In other words, while the role of legal culture deserves some exploration in analyzing institutions and processes of IGR, it does not lead to clear dichotomies.

Six of the cases covered in this volume are federations grounded in the civil law tradition (i.e., Argentina, Austria, Brazil, Germany, Spain, and Switzerland); four have a legal system grounded in the common law (i.e., Australia, India, Nigeria, and the United States); two have both common law and civil law present (i.e., Canada and South Africa) although in both latter cases public law, particularly constitutional and administrative law, is primarily common law in character. At least two of those federations recognize some form of religious law (i.e., India and Nigeria), although public law remains the domain of the common law (at least in terms of relations between public authorities). The legal system of the European Union also arguably is mixed, including in its public law dimension.

The impact of law on IGR is equivocal. On one hand, it appears that law—in terms of both norms and judicial involvement—plays a greater role in IGR than is often thought to be the case, even in the more pragmatic common-law federations. On the other hand, comparative analysis suggests that the role of law should not be overstated. Even in federations in which IGR are governed by processes and institutions with a substantial legal basis, informal IGR also have a significant function.

The impact on IGR of the accommodation of religious or traditional law remains largely uncharted territory. Shari'a is increasingly applied in some northern states in Nigeria, while various religious laws govern personal status in India. Some customary law is also respected in South Africa, and to a more limited extent in Aboriginal communities in some countries such as Australia, Canada, and the United States. While the co-existence of various legal regimes (or the refusal to acknowledge legal pluralism) may raise political tensions, the present study does not reveal any impact of customary or religious law on the actual processes or institutions of IGR.

Stepping Out of the Comfort Zone

Effective international comparisons require effective comparative methods and dedicated teams of inquisitive and open-minded researchers. The template on which the chapters in this volume are based was initially drafted by us, as editors, drawing on our comparative knowledge and experience. We were aware, however, that it was likely not to make sufficient allowance for differences in theory and practice in the wide variety of federations included in this study. To minimize this problem, the template was reviewed by experts from a wider range of federal-type systems, including the European Union, before it was finalized. As noted earlier, the template

provided a framework for country authors to examine the mechanisms of IGR and the issues that arise in practice in their federal systems and to present their findings in a consistent way.

Before drafting their chapters, authors consulted those involved in IGR in the federation for which they were responsible—including politicians, civil servants, journalists, policy experts, members of non-governmental organizations and civil society, and academics—on the technical aspects of IGR as well as the political and cultural features of their federal systems. These consultations took place through twelve national seminars, as well as one held at the Committee of the Regions of the EU in Brussels, each involving twenty to thirty expert practitioners and scholars. Preliminary drafts of the chapters subsequently were circulated at an international round table of authors, where they were carefully examined and parallels were discussed. Each chapter was then reviewed by experts from the respective countries (to get a form of "local second opinion"), as well as from general peer reviewers. The common framework established by the template, coupled with the many interactions between authors, editors, peer reviewers, and other experts, greatly assisted us to draw out similarities and differences between IGR in federal systems and to identify common trends and divergences. It follows that this volume is the result of an extensive, original, and demanding process in order to make a significant contribution to a better understanding of how federal partners interact.

Discussing IGR between very different incarnations of the federal idea often requires significant efforts in reconceptualizing aspects of IGR that may not have appeared relevant in the domestic context, or at least are not commonly portrayed in terms familiar in other parts of the world. While this is no doubt true of any major transnational exercise in comparative federalism, it is particularly the case with IGR. For instance, while the distinction between *legislative techniques* and *executive mechanisms* makes sense in a number of dualist parliamentary federations (such as Australia and Canada), it does not easily translate in the context of more integrated federal systems. To give but one example, Germany's *Bundesrat* is the second federal parliamentary chamber (a legislative organ), but it is composed of members of the various *Land* executives (thus bridging the legislative/executive distinction). Nor does the distinction work as clearly in presidential systems.

Similarly, many federations in which IGR have largely been understood to be essentially political (along the international relations model) find the legalistic and judicial approach to IGR quite puzzling, if not beside the point. Yet, by considering the legal dimensions of IGR, authors in those federations have contributed to the reflection on the impact of legal cultures on federalism, and may have brought out aspects of IGR that are often neglected in their own countries.

In other words, all the contributors to this volume were asked to respond to questions that, at first sight, may have seemed either irrelevant or conceptually odd. It is in this zone of discomfort that the true dialogue takes place, particularly the dialogue between systems not often compared with one another. It is also in this space that country specialists may be brought to re-examine their own systems through new lenses.

To illustrate the point: any comparison of IGR between two or more of Australia, Canada, Nigeria, India, or the United States rests on a number of common features and assumptions. They share a conceptual vocabulary (including the use of terms such as *government* or *IGR*) and comparisons can then move on to the micro level (comparing, for example, institutions, processes, and evolutions). It can also move on to more socio-political considerations since others can more easily understand the major institutions.

Similarly, comparing IGR in Austria, Germany, and to a lesser extent Switzerland is facilitated by the existence, if not of identical institutions (the *Bundesrat* or the *Conseil fédéral*), at least of largely similar conceptual tools (e.g., the notions of "state," of "co-operation," of "implementation" by constituent units and so on).

Crossing the divide between groups of federations that are more commonly compared renders the exercise all the more challenging and enriching. The process becomes more challenging still if a third category of federations is introduced into the mix, comprising systems, which have borrowed and adapted from various models (e.g., Spain, South Africa, and the European Union) or whose IGR are largely dependent on fragile democratic practice (e.g., Argentina). To meet the challenge and to take advantage of the opportunities thus offered, analysts must question their own assumptions as to what is the normal structure of IGR and seek to find functional equivalents in systems organized in very different fashions. Often, this type of comparison remains relatively general. In this volume, however, through careful attention to comparative methodology, we have sought to provide fruitful insights at both the macro level (comparing major trends of interaction) and the micro level (explaining, in context, specific rules, institutions, and mechanisms) in a way accessible to those with less prior comparative knowledge.

Structure of the Volume

The federations explored in this book are deliberately presented in alphabetical order. While the volume might have been organized around thematic, chronological, or geographical factors, these options would have overplayed certain questions or trends to the detriment of others. The dual objectives of the project—to present processes and structures and to identify common trends and challenges—seemed better served by providing the reader with

case studies that can be accessed easily and logically. Each country chapter follows a similar ten-part structure. The comparative conclusions are then outlined in the final chapter.

The reader may thus peruse specific chapters dedicated to a particular federation, or canvass the study in a cross-cutting fashion by focusing on certain topics in a number (or all) of them. The common outline for each of the chapters begins with an introductory section that synthesizes the federation's main features, including the modalities of the distribution of competences and resources and, in some cases, the impact of external factors on IGR (I). This is followed by a general overview of IGR in the case study (II). Sections are then devoted to legislative and executive processes and institutions involved in IGR (III and IV), as well as to the role played by independent agencies (V), the practice of intergovernmental agreements (VI), and the interplay between IGR and fiscal federalism (VII). The final three sections deal with the overarching issues of efficiency in policy-making and delivery (VIII), democratic deficit and transparency (IX), and, finally, the overall impact of IGR on the equilibrium within the federal system (X).

In reading the volume, one can pursue topics of particular interest (e.g., legislative techniques, independent commissions, co-operation agreements, or fiscal federalism) across the case studies by focusing on the relevant subsections. As always in comparative studies, however, context is critical. Hence, care must be taken in drawing conclusions about particular IGR tools or processes without having a broad picture of how they fit in the overall federal systems in which they are deployed.

Exploring IGR allows one to read the subtext of federalism as it is lived. The main story that emerges through this comparative exercise is that IGR are integral to the practice of federal-type systems but that they generally are opaque and often under-studied. Through their analysis of IGR in their respective federal systems, the various contributors to this book have produced revealing "pointillist" paintings. Unsurprisingly, there are considerable differences, as well as notable similarities, between this volume's thirteen federal systems in terms of both the main institutions and the processes for conducting IGR. Considered globally, and with some distance, a number of common pictorial themes emerge. While some seem relatively undisputable, others are more tentative but may, we hope, engage analysts of the federal phenomenon to pursue further cross-federation dialogue.

Notes

1. See, below, the section "The Challenge of Terminology," for further consideration of the use of this expression.
2. Robert Agranoff, "Intergovernmental Policy Management: Cooperative Practices

in Federal Systems," in Michael A. Pagano and Robert Leonardi, eds, *The Dynamics of Federalism in National and Supranational Political Systems* (Basingstoke/New York: Palgrave MacMillan, 2007), pp. 248–83.

3. Estimate figures from *The World Atlas*, 2012–14, http://www.worldatlas.com/aatlas/populations/ctypopls.htm (last access February 15, 2015) and European Union, *Facts and Figures*, http://europa.eu/about-eu/facts-figures/living/index_en.htm (last access February 15, 2015).
4. World Bank, *Data: GDP per capita (current US$)*, http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (last access February 15, 2015).
5. We have not included all forms of associated territories in this list, but only territorial divisions that either are formally constituent units or enjoy a very similar de facto status (such as Australian and Canadian territories).
6. See Hans Michelmann, ed., *Foreign Relations in Federal Countries* (Montreal: McGill-Queen's University Press, 2009). See also the special issue of *Regional and Federal Studies* (vol. 3, no. 24, 2014) on "The Regional Mobilization in the 'New Europe'" and part 2 of Elke Cloots, Geert de Baere, and Stephan Sottiaux, eds., *Federalism in the European Union* (Oxford: Hart Publishing, 2012).
7. For other comparisons, see Kalypso Nicolaidis and Robert Howse, eds. *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001); Finn Laursen, ed., *The EU and Federalism: Polities and Policies Compared* (Farnham/Burlington: Ashgate, 2011); John Kincaid, "Confederal Federalism and Citizen Representation in the European Union," *West European Politics* 22, no. 2 (April 1999): 34–58.
8. Robert Schapiro, "Towards a Theory of Interactive Federalism," *Iowa Law Journal* (2006) available at: http://papers.ssrn.com/abstract=734644 (last access August 11, 2014).
9. The adjective *dualist* (or *dual*) is also often used to refer to the distribution of legislative competences in a way that maximizes their autonomy, principally by a series of "exclusive" competences. This is in contrast to systems where most competences are *shared*, *concurrent*, or *complementary* (see Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* [Oxford: Oxford University Press, 2009]). In some countries, *dualist* is also used to describe judicial systems in which constituent units have their own courts, as opposed to those in which justice is exclusively a federal matter. To complicate things further, *dualist* can also refer to the distinction between systems in which there are specialized public law courts (typically, a constitutional court or tribunal, or a council of state) alongside the regular judicial hierarchy. This is to be contrasted with *monist* systems in which nearly all courts can rule on any type of legal disputes, with a supreme court at the apex. Finally, in international relations and international law literature, *dualist* refers to systems in which the international and domestic legal orders remain distinct (obligations from the former having to be "incorporated" into the latter). This is to be contrasted to *monist* systems which favour more of a seamless integration of both domestic and international legal orders. There may be a parallel between the dominant conception of IGR (particularly with regards to agreements) and the dominant conception of the relation between the domestic and international legal orders in a particular federation; see Johanne Poirier, "Les ententes intergouvernementales dans les régimes fédéraux: aux confins du droit et du non-droit," in Gaudreault-Desbiens, Jean-François and Fabien Gélinas, eds, *Le fédéralisme dans tous ses états: Gouvernance, identité et méthodologie / The States and Moods of Federalism: Governance, Identity and Methodology* (Montreal/Brussels: Carswell/Bruylant, 2005), pp. 441–74 at 468–70.
10. For an example, among many, Swenden uses the terms *administrative* vs. *legislative* federalism to refer to what we describe as *integrated* and *dualist*: Wilfried Swenden, *Federalism and Regionalism in Western Europe: A Comparative and Thematic Analysis* (Basingstoke/New York: Palgrave MacMillan, 2006), pp. 49 ff.

11. Tanjia Borzël, "What Can Federalism Teach Us About the European Union? The German Experience," *Regional and Federal Studies* 15 (2005): 245.
12. Or may be used in different ways. For instance, Stephens and Wikstrom use *horizontal* to refer to the separation of powers between legislative, executive, and judicial branches (p. 4), but also to refer to interstate relations in the United States (p. 30): G. Ross Stephens and Nelson Wikstrom, *American Intergovernmental Relations: A Fragmented Polity* (New York/Oxford: Oxford University Press, 2007).
13. The potential impact of legal systems, cultures, and structures on federalism has been invoked, often in passing; see Cheryl Saunders, "Legislative, Executive, and Judicial Institutions: A Synthesis," in Katy Le Roy and Cheryl Saunders, eds, *Legislative, Executive, and Judicial Governance in Federal Countries*, (Montreal & Kingston: McGill-Queen's University Press, 2006), p. 348; John Kincaid, "Comparative Observations," in John Kincaid and G. Alan Tarr, eds, *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal & Kingston: McGill-Queen's University Press, 2005), p. 442; Ronald L. Watts, "Comparative Conclusions," in Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown, eds, *Distribution of Powers and Responsibilities in Federal Countries* (Montreal & Kingston: McGill-Queen's University Press, 2006), pp. 325, 329, & 339). For a more substantial reflection of the potential explanatory power of this distinction, see Thomas Fleiner, "Constitutional Underpinnings of Federalism: Common Law vs. Civil Law," in Thomas J. Courchene, John R. Allan, Christian Leuprecht, Nadia Verreli, eds, *The Federal Idea: Essays in Honour of Ronald L. Watts* (Kingston: Institute of Intergovernmental Relations, Queen's University, 2011) pp. 99–110; Cheryl Saunders, "Administrative Law and Relations between Governments: Australia and Europe Compared," (2000) 28 *Fed L.R.* 263; Thomas Fleiner and Cheryl Saunders, "Constitutions Embedded in Different Legal Systems" in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders, eds, *The Routledge Handbook of Constitutional Law* (Oxford: Routledge, 2013), 21–32; and Johanne Poirier, "Les ententes intergouvernementales dans les régimes fédéraux : aux confins du droit et du non-droit," supra, note 9 at 463–72. More recently, the civil law–common law divide has been held as an explanatory factor in the different degrees of unification of material law: see Daniel Halberstam and Mathias Reimann, "Federalism and Legal Unification: Comparing Methods, Results, and Explanations Across 20 Systems," in Daniel Halberstam and Mathias Reimann, eds, *Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems* (Dordrecht/Heidelberg/New York: Springer, 2014), pp. 41–5.

1 Intergovernmental Relations in Argentina: Systematic Confusion and Predominance of the Centre

Walter F. Carnota

I. Introduction

Federalism in Argentina is often considered weak because many of its basic premises, including decentralization and provincial autonomy, remain unfulfilled. Processes of intergovernmental relations (IGR) were not salient features of Argentina's original federal design of 1853. During the twentieth century, factors such as increasing centralization, a growing fiscal imbalance, the emergence of national political parties, and rise of economic liberalization brought about a higher degree of interaction between the different orders of government. Through a significant constitutional revision in 1994, substantial coordination between the orders of government became entrenched for the first time. Despite this initiative, however, IGR continue to be conducted mostly on an informal, ad hoc basis, usually bypassing explicit constitutional guidelines. The role of large, nationwide political machines, coupled with executive dominance, congressional inaction, and chaotic fiscal allocation give Argentina's IGR a distinct and unique character.

Empirical studies on Argentina tend to support William H. Riker's famous party-based theory of federalism that the extent to which one party controls the executive is a major influence in the evolution of the federation in practice. In Argentina, same-party control of the federal presidency and provincial governorships is associated with very significant levels of centralization.[1]

General Features of the Federation

Argentina[2] has more than 41 million inhabitants, half of them concentrated in either the city or the province of Buenos Aires, which are two separate entities. The country's territory comprises 2,780,400 square kilometres, and the annual GDP per capita in 2013 amounted to US$14,715, according to World Bank figures. Some parts of the country are sparsely populated,

particularly the southern and northern regions. The cities of Buenos Aires, Rosario, and Córdoba are the largest urban centres.

The Argentine form of government is republican and presidential. Presidentialism by definition entails a sharper division of powers between the executive (president or head of state), legislative (Congress), and judicial (Supreme Court and lower courts) branches of government. The president heads both the state and the federal government. According to the country's 1853 Constitution, which is still in force (although changed significantly at critical junctures in 1860, 1866, 1898, 1957, and 1994), each branch has specific functions and tasks. A presidential form of government operates in the provinces as well, with governors as heads of the executive.[3]

Executive dominance has been a constant feature of Argentina's political experience, even in democratic times, and presidential leadership remains deeply ingrained in Argentine political culture. This is manifest even in local government, where mayors are significant players, sometimes even using city hall as a stepping stone for the advancement of their own political careers. By way of example, Presidents Fernando de la Rúa (1999–2001), Eduardo Duhalde (2002–3), and Néstor Kirchner (2003–7) were first mayors of their own cities before achieving higher prominence. Some suburban mayors in the province of Buenos Aires wield more de facto power than many provincial governors.

Argentina is a product of the integration[4] of fourteen historical provinces, which during the first half of the nineteenth century signed numerous pacts among themselves that ultimately resulted in a federation.[5] In 1853, all the then provinces, with the exception of Buenos Aires, came together under a new constitution. Buenos Aires joined the federation in 1860, after the Constitution was modified to achieve a higher degree of decentralization, following the US model.

From the original fourteen, Argentina now has twenty-three provinces, in addition to the city of Buenos Aires. Since 1994, the latter has enjoyed a special autonomous status while also serving as the federal capital. The distinct province of Buenos Aires has been the largest and most populous constituent unit,[6] which originally attracted all the wealth derived from its gateway to the Rio de la Plata. It still wields huge economic influence and political power. After Buenos Aires, the provinces of Córdoba and Santa Fe are the most significant in economic, demographic, and political terms. Córdoba is strategically located at the country's heartland, while Santa Fe borders the Paraná River. Both provinces are endowed with important economic resources in the form of agriculture, cattle, industry, and trade. Since 1998–9, they have tried to coordinate policies through the Centro Region, which they form together with the province of Entre Ríos. In doing so, they stressed the fact that they stood in the midst of a "bi-oceanic corridor" that runs from the Atlantic Ocean to the Pacific. This central region

encompasses more than seven million inhabitants. Politically, it has forty-six deputies (out of a total of 257) and nine senators (out of seventy-two) in the bicameral Argentine Congress. Comparatively speaking, the Patagonia[7] provinces (i.e., Tierra del Fuego, Santa Cruz, Chubut, Neuquén, Río Negro, and La Pampa) are sparsely populated and heavily dependent on federal fiscal assistance merely to survive.

Argentina's population is relatively homogenous. Apart from the indigenous peoples, of whom there are more than one million, there are no significant religious, linguistic, or ethnic cleavages in the country; the majority of Argentineans descend from Spanish or Italian immigrants (although other European and non-European communities exist, to a far lesser degree). Culturally, there are no substantial differences to spur identity politics, although increasing claims for land redistribution and the application of customary law have been made in recent years by indigenous peoples, particularly in some Patagonian provinces, of which Neuquén is an example.

Institutionally, Argentine federalism can be described as formally dualist, patterned after the US Constitution.[8] Each order of government (both federal and provincial) has its own constitution, legislation, programs, regulatory agencies, and judges. As a result of this dual approach, the original federal Constitution did not provide any explicit IGR framework. Over time, this lacuna has fostered confusion and overlapping of functions.[9] The rest of the legal system, however, has a continental European imprint and is rooted primarily in the civil law tradition of Spain and France, relying on codified norms, rules, and principles.[10] The principal legislative codes are enacted by Congress,[11] leaving the provinces only a relatively limited field of legislative power, in relation to, for example, their own political institutions, schools, provincial court systems,[12] and judicial procedure.[13]

From the late 1970s interdependence between the orders of government gained momentum as new federal councils were set up by the then military government to facilitate joint policies and achieve eventual harmonization. The 1994 constitutional reform eroded the federation's dualist character further. This vast reform was initially a product of a quid pro quo involving the country's two top political leaders. On one hand, President Carlos Menem from the Justicialista Party wanted a new term in office (the 1853 Constitution barred him from immediate re-election). On the other hand, former President Raúl Alfonsín, leader of the opposition Radical Civic Union, wanted to extract some concessions from Menem in return, concerning the containment of presidential power. Federalism was also an ingredient, albeit a lesser one, of the reform package, because most provinces had felt left out of the constitutional process altogether after decades of neglect and lack of empowerment. This revision brought new actors into the IGR game, as it provided for regions (Article 124) and established an autonomous government for the city of Buenos Aires (Article 129). Local government and fiscal co-participation were more precisely prescribed within new, explicit, constitutional provisions.[14]

The Distribution of Competences

Two main aspects of the relationship between the national and provincial orders of government are relevant for present purposes.

First, as a constitutional principle, federal rules prevail over provincial ones under a supremacy clause patterned after Article VI of the US Constitution. In case of conflict between federal and provincial law, the former prevails, with the exception of particular provincial competences. Second, the powers are divided in three categories: exclusive federal powers, concurrent powers, and retained provincial powers.

Constitutionally, because the provinces existed prior to federation, there are both "retained" (provincial) and "exclusive" (federal) competences. The United States approach was again adopted by enumerating a list of matters in relation to which Congress could legislate exclusively, with the constituent units retaining residual responsibility for any matter not vested directly in the federal government. However, as Frías observed, there has been "no government area which required national aid or interjurisdictional consensus that ultimately did not end up in federal hands."[15]

Between these two defined categories of powers is a substantial domain of concurrent powers or shared powers in relation to which both orders of government may act. They include such significant fields as environmental and consumer protection, economic development, and health.[16] These areas are not explicitly assigned by the 1853 Constitution to the federation, but over the years an extensive reading of the "commerce clause" has triggered blurring and slippage.[17]

The textual foundation for this intricate system rests in the first part of Article 121 of the Constitution: "Provinces retain all powers not delegated by this Constitution to the federal government." This language suggests a narrow set of federal competences, located primarily in Articles 75 (congressional powers), 99 (presidential prerogatives), and 116 (federal judicial functions). However, broad interpretation of federal authority by a subservient judiciary, by military governments, and by a Congress dominated by political parties with national reach eroded much of Article 121's original meaning and intent. What was purported to be narrow and limited became open-ended, facilitating centralization. This was exacerbated when welfare-state policies adopted during the first half of the twentieth century expanded federal powers in such critical areas as energy, transportation, and communications. As economic liberalization gathered pace in the 1990s, this trend was partially reversed. More recent developments since 2003, however, have witnessed a degree of recentralization as the federal

government became more active again on many fronts, of which social security is an example.

The federal constitutional reform of 1994 attempted to outline a more accurate division of competences and resources. Article 41, for example, includes an environmental protection clause that outlines clearer roles for both the federation and the provinces, pursuant to which the former sets minimum protection standards, leaving the latter a sphere for complementary regulation.[18] In an example of another kind, Article 124 specifically recognizes each province's "original ownership of its natural resources." The fate of the 1994 reforms is considered further below.

II. General Overview of IGR in Argentina

The literature on federalism in Argentina has sometimes preferred the wording *interjurisdictional relations* to *IGR*, indicating a highly formalistic and legalistic approach. Since the late 1950s, scholarship occasionally has referred to a particular type of co-operative federalism called *federalismo de concertación*.[19] There has, however, been a severe overall shortage of problem-oriented analysis because decentralization literature has focused on rigid constitutional structures instead of policy processes. The term *IGR* has only recently gained currency in Argentina, as federalism studies have absorbed the influences of contemporary sociology, economics, and political science, identifying for the first time IGR problems, practices, and operations.

Key factors in the manner in which IGR have developed in Argentina include centralization, the fiscal imbalance, the national reach of political parties, and economic liberalization.

Centralization has been a major force in the country's political system. Historically, centralization involved continuous federal government intrusion even in areas constitutionally reserved to provincial control. Military governments from 1930 onwards dismissed provincial governors at will and replaced them with their own delegates.[20] They banned political parties of all kinds and provincial legislatures as a whole. The pattern of central dominance became ingrained. Even democratic governments have preferred centralization over the years.

Several factors explain centralization in Argentina. Some are historical and cultural, going back even to colonial times. The most significant factor, however, has been the vertical fiscal imbalance. From 1985 to 1995, for instance, an average of 35 percent of provincial expenditures was funded by taxes collected by provincial authorities, while the rest (65 percent) was financed from taxes collected nationally, as a result of the practices of fiscal "co-participation" which are explained below. Fiscal transfers brought a heightened federal presence. Provinces were able to

spend, but had no incentives for fiscal discipline. Co-participation encouraged chronic provincial inefficiency and indebtedness. Intergovernmental relations were again dominated by the federal government, as the only "responsible" actor.

Economic liberalization has been another key driver of IGR. During the 1990s, a number of education and health responsibilities were "devolved" to provincial and local governments following privatization and deficit-reduction policies.[21] Tepid decentralization had been attempted by the military governments in the late 1970s and early 1980s, but it did not involve structural changes. A new stage of IGR interaction began as both orders of government had to clarify who did what. Provincial cabinets increased the number of portfolios, as they had to include provincial equivalents to their national counterparts. Intergovernmental agreements (IGAs) became more prevalent as instruments for the necessary coordination of policies.

Party politics are also a critical influence on the conduct of IGR. Intergovernmental relations are negotiated informally and in flexible ways, essentially through different political party channels. Congruence between the party in power in the federation and in each province has always been a significant although not necessarily determining factor. For instance, Justicialista governors were able to impose their will on fiscal co-participation quotas in 1988 over then Radical President Raúl Alfonsín when their party controlled the Senate. Since democracy was restored in 1983, governors have been key players not only as provincial executive officers but also as party leaders; five out of the last seven presidents had previously been governors.

Both the Justicialista and Radical parties have national appeal, but their internal factions are driven primarily by reference to the person who leads them, giving rise to the phenomenon of personality politics, or *caudillismo*, to use a well-known Spanish word. Provincial parties have historically been significant in smaller provinces such as Neuquén, Tierra del Fuego, and Catamarca, although they have declined in recent years as the two main parties have gained strength nationwide. There are no substantial differences between the major parties as far as federalism or IGR are concerned. Parties with national reach have little interest in setting a federalist agenda or devising new IGR tools. Rather, personality politics drive the IGR process forward, and political parties rubber-stamp policies.

Intergovernmental relations are sometimes negotiated; in many cases, however, they are the outcome of outright federal executive imposition using economic sanctions by means of discretionary budget allocations.[22] IGR have been largely vertical. There has been scant experience with horizontal interprovincial interaction.[23] Presidentialism within both orders of government tends to foster vertical rather than horizontal relationships.

III. Legislative Mechanisms

The federal Congress plays a somewhat important role in intergovernmental relations, but the provincial legislatures have little impact on intergovernmental relations.

Legislative Institutions

The Constitution provides for a second chamber, the Senate, which technically represents the provinces, with three senators for each province and the city of Buenos Aires. Pursuant to the 1994 constitutional revision, senators are directly elected by popular vote for six-year terms, under voting arrangements that provide for two senators from the party that attracts the most votes and one from the next most popular party (Articles 54 and 56). Under previous arrangements, each province had two senators, appointed by provincial legislatures. This evolution broadly mirrors that of the United States (Amendment XVII to the US Constitution, ratified in 1913).

In fact, senators represent political parties commanded by national figures and supported by well-oiled partisan machines that transcend provincial boundaries. This feature became accentuated after the changes to Senate representation that occurred in 1994. For some, the new Senate lost its typical federal character, only to rely even more heavily on political parties.[24] National political divisions prevail in the Senate, thus perverting bicameralism's assumption of territorial rather than party representation. The Chamber of Deputies, or lower house of Congress, has the authority to initiate legislation on tax matters (Article 52, Argentine Constitution), with the exception of co-participation, which must be first introduced in the Senate (Article 75, Section 2).

There are few institutional differences between the two houses of Congress. Moreover, the Senate is neither formally nor informally linked to provincial legislatures, with the rare exceptions of the constitutions of La Rioja and Córdoba, which allow for instructions to their federal senators.[25] The significance of this exception should not be overstated, however. In 2008, for example, during a pivotal debate, the Córdoba legislature instructed its federal senators to cast their vote against export taxes.[26] Senator Haide Giri refused to do so, following the national government's line instead, to no legal consequences.

Provincial legislatures have also a very limited impact on IGR because most negotiations are conducted by governors, true to the paradigm of executive dominance in both orders of government. Provincial legislatures seldom oversee the conduct of IGR by governors or its implementation by executive cabinet or sub-cabinet officers. Structurally, only eight provincial legislatures are bicameral;[27] the rest are unicameral. There was a political trend, around

2000, to reduce deliberative bodies, eliminating the second chamber of some provincial legislatures on the grounds that there was no formal difference between the upper and lower houses. Córdoba, for instance, shut down its Senate and became unicameral in 2001.

A relevant horizontal legislative experience has been the Patagonian parliament. It was established by the Neuquén Declaration of November 1, 1991[28] and subsequently became an integral part of the institutional framework when the Patagonia Region was formed in 1996. Six provinces are involved: La Pampa, Neuquén, Rio Negro, Chubut, Santa Cruz, and Tierra del Fuego. The Patagonian parliament is composed of a maximum of twelve sitting provincial legislators per province, with three alternates. It serves as a forum for discussing common regional problems; it also seeks to coordinate and integrate regional policies. Its officers (president, vice-president, and secretary) are elected biannually. It meets each year in a different, rotating provincial legislature, and its decisions—mainly in the form of statements and recommendations on current affairs[29]—are taken by simple majority vote. Its main mission is to foster legislative uniformity across the six participating provinces. It also has important data-gathering functions.[30]

Not all regions have a comparable deliberative body: New Cuyo and Centro are examples. But the Northwestern provinces (i.e., Salta, Tucumán, Jujuy, Catamarca, and Santiago del Estero) also meet in a regional parliament. Each participating province sends five sitting legislators and five alternates to this forum, which was created in 1993. An executive board, comprising a president and one legislator per province, acts as the parliament's governing body. The parliament holds bi-annual sessions and issues resolutions and statements that, admittedly, are mostly symbolic.[31]

Legislative Techniques

The separation of powers in provinces is similar to that of the central order.[32] There is no integration of the executive and the legislature, which, conversely, is a normal feature of parliamentary systems. Consequently, provincial and federal executives enjoy autonomous regulatory powers, which is not derived from legislative delegation.

An interesting technique called *ley-convenio* (agreement-law) has been used for fiscal co-participation purposes. Pursuant to co-participation, most taxes are collected nationally and are then allocated between the federation and the provinces. It is a transfer system that originally evolved outside the formal constitutional design.[33] At the outset, in 1934, it applied only to consumption taxes. Under these arrangements, Congress would enact legislation imposing taxes that normally fell under concurrent or even provincial jurisdiction, and provinces could subsequently consent to this

framework by acts of their own legislature. The federal government took 82.5 percent of the tax pie, and redistributed the remaining 17.5 percent to the provinces. Not surprisingly, not all provinces participated in these arrangements.

Over time, new taxes were added to the arrangements for co-participation, including sales taxes and, eventually, income taxes.[34] *Ley-convenio* methodology now extends to other areas apart from taxation, such as communications between courts from different jurisdictions, transit rules, and environmental provisions on mining. To take one of these initiatives as an example, as provinces adhere through legislation to federal transit guidelines, they must provide for local procedures and control mechanisms, appoint a provincial transit authority, develop particular programs, and become part of the Federal Highway Safety Council (Article 91, law 24.499).

The 1994 constitutional reform incorporated this revenue-sharing system into the constitution, combining bottom-up and top-down mechanisms in what is envisaged as a three-stage process (Article 75, section 2). At the outset, provinces would be involved in an unspecified and presumably complex negotiating process.[35] In a second, more formal phase, Congress would enact a national law imposing new, objective standards, providing for the automatic remittance of funds and uniform criteria for distribution and banning unfunded mandates. Finally, provinces would adhere to the law.

There has been much discussion of the intricate legal nature of such an instrument. Is it merely an ordinary law of Congress? Is it more accurately described as an intergovernmental agreement (IGA)? The answer depends on whether emphasis is placed on the congressional origin of the arrangement or on the subsequent provincial consent. Some authors emphasize that such norms have federal legal status[36] and so do not involve an IGA per se. In any event, however, Congress has failed to pass any new law on these matters since the 1994 constitutional amendments; hence, the pre-1994 legal order is still in place.[37] In 2015, the Argentine Supreme Court was meant to rule on cases concerning the co-participation arrangements.[38]

IV. Executive Mechanisms

Executives, especially the Argentine president, play very important roles in intergovernmental relations, sometimes being the principal drivers of such relations.

Forums for Top Executive Interaction between Federal and Provincial Officials

From a constitutional standpoint, the Argentine national executive comprises only the president (Article 87). There is no constitutional or legal requirement for regional or ethnic representation in cabinet or subcabinet positions. Typically, presidents bring in some close ministers and high-ranking staff from their home province (e.g., Carlos Menem from La Rioja, Eduardo Duhalde from suburban Buenos Aires, and Néstor and Cristina Fernandez de Kirchner from Santa Cruz).

The entire apparatus of government revolves around the president. He or she meets regularly (on an ad hoc basis) with governors, but only with one governor, or a small group of them, or on a strictly partisan lineup (e.g., "Justicialista" governors). There is no formal setting for these meetings. During both the Néstor Kirchner (2003–7) and the Cristina Kirchner (2007–present) administrations, there was a sustained distrust of collegiality, so that cabinet and other structural meetings were avoided and informal contacts highly prized. IGR become in this way more personal and less institutional.

According to Article 128 of the Constitution, governors are "natural agents of the federal government." This clause is unnecessarily repeated by several provincial constitutions, including those of Formosa, Mendoza, Neuquén, Santa Fe, San Juan, and Buenos Aires. It denotes the more centralized approach to federalism espoused by the original 1853 Constitution. It has been rarely invoked and has received little attention in Supreme Court case law. Nevertheless, in October 2009, the Supreme Court ruled that the governor of Santa Cruz was the federal government's "natural agent" to whom befell the task of reinstating a former provincial attorney general who had been sacked in 1995. In the face of the governor's inaction, in 2010, the Supreme Court launched a criminal investigation into his behaviour on the ground of obstruction of justice, although to no avail.

Meetings between the president and governors are mostly focused on financial transfers to the provinces, budget matters, and federal public works. The president always chairs the sessions, and the minister responsible for the particular functional area, who is also in attendance, helps to set the agenda. Meetings mostly involve political negotiations, with the president generally getting the upper hand and no formal voting taking place. Ministerial influence, by contrast, tends to be confined to technical rather than political issues. Only a fraction of this activity is made public, mainly as photo opportunities. A full understanding of what transpires at these meetings is rarely made public; although a brief summary may be provided for reporters and the press as a token of transparency.

Official Forums for Top Executive Interaction between Provinces

Governors are key figures because they run vast bureaucracies—the most important single employer in nearly all provinces—and are able to forge more permanent links with the national executive or other key political

actors. They play the same personality-politics game as does the national president. The status of governor is more important than that of senator in a typical political career.

Traditionally, it has been exceptional for the heads of all provincial executives to meet together as occurs, for example, in the US National Governors Association. But governors interact on a regional basis (for example, the Patagonia, Centro, and New Cuyo regions each have a board of governors of their own) and on specific subjects (e.g., natural disasters and other kinds of emergencies). Governors personally set the agenda and meet with their top ministers and main staff in tow. There are no decision-making rules, as these meetings serve mostly as consultative and information-sharing events.

The governors of the Patagonia provinces interact and consult frequently among themselves at their Assembly of Governors meetings. They often hail from different political parties or factions of parties, but they have common problems to tackle, including those affecting the environment or natural resources. They devise joint policies to be submitted for approval by the Patagonian parliament.

Centro Region governors also meet, in an even more institutionalized setting, also known as the Board of Governors. The region started promisingly in 1998,[39] when Córdoba and Santa Fe signed a horizontal IGA (*Tratado de Integración Regional*, or interprovincial treaty), which Entre Ríos joined in 1999. These governors were at the forefront of the regionalization process, and they constitute the region's main political decision-making body. They make decisions by consensus and they have both an executive committee composed of provincial ministers and an administrative secretariat for technical backup, including setting the agenda items and other support functions.

Regional mechanisms mostly provide for policy coordination and seldom evolve into a unified front or bloc against the president. Region Centro became an exception in 2008, when a crisis erupted over export taxes on agricultural products. Publicity is limited to press releases; there is no systematic flow of information or proper meeting documentation.

Meetings and Forums of Sectoral Policy Ministers

Much IGR coordination takes place in specially designed forums known as federal councils.[40] They act as venues for generating policy consensus among the different orders of government. There has been an increasing use of these forums since the first horizontal council (*Consejo Federal de Inversiones*, or CFI) dealing with investment was created in 1959.[41] The military government of 1976–83 subsequently established two further federal councils. More recently, other councils were formed by civilian federal governments, with little provincial input at their inception.

These councils are not constitutionally mandated. They are created by ordinary federal legislation on an ad hoc basis for particular policy areas. Typically, there is a strong federal sectoral minister who provides funding and administrative support for the relevant council; he or she also runs it by chairing both its assembly as a deliberative body and its executive committee in charge of compliance with decisions. These are common features of most federal councils. Indirectly, the president may control its agenda, given the degree of presidential control of the Argentine government.

Presently, there are almost forty such federal councils,[42] including the Federal Education and Culture Council (CFCE); the Federal Health Council (COFESA); the Federal Social Security Council (COFEPRES); and others dealing with employment, industries, fisheries, women's rights, housing, tourism, youth, production, population, planning, human rights, drug control, culture, mass media, the environment, and security, among many other significant policy areas. They play a substantial role in the sphere of concurrent power, where both the federation and the provinces have a say, paving the way for greater federal/CU dialogue. Because federal authorities set the agenda, however, the lines of influence in the councils are primarily vertical.

One of the most successful attempts at IGR coordination has been the Federal Council on Culture and Education created by law[43] in 1979. As education services were more thoroughly decentralized during the 1990s, the council became increasingly relevant as school syllabuses, budgets, and responsibilities were significantly revised. Authorities realized that a common framework should be settled among different jurisdictions in order to avoid overlapping and to foster uniform guidelines, as required by the 1993 Federal Education law.[44]

The Federal Council on Culture and Education has an assembly and an executive committee, both presided over by the national education minister. The assembly is composed of all provincial education ministers, and the executive committee is entrusted with decision compliance. The council exhibited a considerable degree of dynamism in the 1990s, as more than 172 internal resolutions and policy recommendations were adopted and put into effect.[45] By way of example, it has been responsible for a uniform academic school curriculum throughout the country.

A similar IGR forum is the Federal Health Council (COFESA). Until 1945, the Argentine state played a secondary and minor role in health matters. From 1945 to 1955, public intervention (the so-called "public health paradigm" or *sanitarismo*) replaced state inaction, following the social welfare credo of Juan Perón (1946–55).[46] A rudimentary Health Council was set up in the early 1970s, but in 1981 the military government[47] refurbished it as a more effective federal council. Since then, its dominant features have

remained intact. It offers a flexible forum in which federal and provincial health authorities interact so as to devise common policies in relation to medical programs, disease control, and hospital management. Its first two decades of existence were unimpressive, primarily because there was no actual need for much policy coordination, since the national health authority centralized all major decisions. When democratic rule was reinstated in late 1983, party bickering dominated the council to such an extent that the Justicialista Party provinces formed a health council of their own from 1987 to 1989.

As in many parts of Latin America, however, social services in Argentina were devolved during the 1980s and to an even greater extent in the 1990s. Provinces had to face new tasks in this uncharted territory as market-oriented reforms were pushed by the Menem administration. The share of federal public sector spending on health fell from more than 70 percent in 1986 to less than 55 percent in the 1990s. Budget and fiscal constraints were the main reasons for this development, which was constitutionally feasible because the Constitution is silent on health issues. However, these policies gave provinces the opportunity to identify priorities of their own, reach out to faraway locations, and closely target and monitor specific programs. Public hospitals began to experience self-management, even to the point of threatening overall provincial control. Within this newly decentralized context, policy clashes increased and coordination became essential to avoid further conflict.

These new challenges, coupled with the severe economic crisis of 2002, ushered in a new proactive era for the Federal Health Council, as a forum in which to secure more effective coordination between the national health minister and his provincial counterparts. Since 2002, the council has aimed at streamlining IGR in health care. Common goals include determining minimum health standards; establishing new integrated programs (e.g., vaccination and reproductive health) and plans (e.g., the federal health plan for 2004–7); initiating legislative and administrative reforms (e.g., identifying indicators for the distribution of medical resources); fostering public debate on health issues; and bringing local government and nongovernmental organizations into the process. All of these initiatives were emphasized in the Federal Health Agreement of 2003.[48]

Since 2003, therefore, the council has become increasingly visible and dynamic. For instance, during the 2009 flu pandemic, the council worked promptly and smoothly, suggesting that life-and-death issues trigger a better and quicker IGR response. Nevertheless, despite some NGO involvement, its activities are poorly communicated to the public and are not properly documented.[49] Technical backup is minimal, comprising a full-time staff of two or three people. This organizational reality is standard fare for nearly all federal councils.[50]

Another very important actor has been the Environmental Federal Council (COFEMA). It was established by an IGA in La Rioja in 1990. In 2002, it was incorporated into the new Federal Environmental Law[51] as the main vehicle for IGR (Article 9, law 25.675) in this field. It serves as a strategic coordinating body for national and provincial agencies, as both orders of government are involved in environmental matters. It attempts to devise integrated environmental policies, for both preventive and corrective purposes by, for example, exercising policing functions in relation to polluting corporations and implementing new regulatory guidelines across the board.

Provincial social security heads also meet regularly in the Federal Social Security Council (COFEPRES), which was created in 1990[52] to develop a common policy regarding pensions. Its mission is oriented to the drafting of uniform legislation, inter-regional compensation mechanisms for migrant workers, social security policy assistance, and inter-agency coordination. It is mainly a deliberative body with a primarily advisory role and very limited executive functions beyond, for example, data sharing.

Federal councils typically involve top-down policy-making processes. Nevertheless, they offer very useful forums for the necessary flow of information and the generation of policy consensus, enabling provinces to voice their concerns and priorities.

The Civil Service

Each order of government has its own bureaucracy, staffed with civil servants and political appointees. Consistent with Argentina's dualist federal system, civil servants very rarely move from one order to another (federal to provincial or vice versa). In principle, a civil servant can pursue his or her career in the other order, but this is rather exceptional. Rigid public structures are the norm, as civil servants enjoy employment stability and distinct pension rights in each order of government. This greatly reduces mobility.

As the civil services are not structurally connected, bureaucratic overlapping occurs frequently, mainly in the areas of concurrent powers, where both the federation and the provinces claim responsibility. Too often, parallel structures operate in both orders in relation to health, education, tourism, and the environment.

Public administration in both orders of government is frequently overly politicized, a reflection of the weak institutional system as a whole. Intergovernmental relations in particular are the domain of political appointees, usually with cabinet or sub-cabinet rank. Professional and technical activity is confined to the lower ranks of the administration (*Direcciones Nacionales* or *Direcciones Provinciales*, respectively). Adequate civil service training is a challenge in many provinces. The

federal bureaucracy is technically better educated, better staffed, and more prone to quick responses, although some provincial bureaucracies, of which Santa Fe is an example, are exceptions. Civil servants are not specially trained in IGR at either level.

Specific IGR Organs within the Federal Administration: The Logistics of Executive IGR

The Ministry of the Interior[53] (its very name is eloquent, suggesting a sharp division between Buenos Aires, as the capital city, and the rest of the country, as the "interior") serves as the relevant federal department for IGR.[54] There is a sub-cabinet position in charge of relations with provinces within the ministry (*Secretaría de Provincias*), and another that deals exclusively with local government (*Secretaría de Asuntos Municipales*). This ministry also supervises elections through the National Elections Directorate (*Dirección Nacional Electoral*). Effectively, it is responsible for all politics-related matters within the federal government structure, whether formal (i.e., provinces and municipalities) or informal (e.g., political parties). The Ministry for the Interior thus is a logical player in the IGR game.

A treasury undersecretary from the Economics and Public Finance Ministry deals with IGR of a fiscal nature (*Subsecretario de Relaciones con las Provincias*). Otherwise, IGR are mainly conducted through the national minister for the sectoral area concerned, who typically also chairs the corresponding federal council.

Federal councils are frequently understaffed and underfunded. No specific secretariat is charged with responsibility for council meetings across the federal government as a whole. Federal councils operate in a fragmented and sectoral way, as a small appendix of the specific area national ministry. Higher-level negotiations with governors are conducted directly from the presidential office.

Specific IGR Organs within CU Administration

Generally, governors concentrate on relations with national authorities. IGR are deemed too important to be left to bureaucrats or professionals. Each province has its own *Ministerio de Gobierno* (Government Ministry) that is a loose provincial equivalent cabinet agency of the national Interior Ministry. Provinces also have economics or treasury ministries with tax, budget, and debt oversight functions that frequently involve IGR actions. Governors' chiefs of staff play a very significant role in tackling many issues (*Secretario General de la Gobernación*[55]), including IGR.

Informal IGR

Informal IGR are of paramount importance. Social and political networks drive the whole process forward. Frequently, connections based on family, friendship, provincial origins, or political affiliation are key. Behind-the-scenes meetings are common, and official actions serve only to approve decisions previously reached privately. Personal connections are highly prized. Formal arrangements, by contrast, play a minor role.

Parties, coalitions, and factions permeate political life. Governors, mayors, and deputies, as elected officials, are obviously recruited from party ranks. Consequently, they often act informally in relation to IGR through these structures. Lobbying is not regulated at any level, but unions and business and farm associations play a significant role[56] in tandem with political parties with national appeal.

Governors of the same political affiliation usually meet in order to coordinate joint political strategies. Increasingly, governors from the same geographic area exchange information and develop public positions, as shown by the experiences of the Patagonia and Centro regions, to which reference was made earlier. Senators and deputies consult governors for political directives. Sometimes, pressure groups attempt to participate in IGR. Political parties are particularly well suited for the conduct of IGR, however, due to their ability to lead flexible negotiations and influence actors in different orders of government and agencies. National parties usually have huge bureaucracies at their disposal, enjoy grass-roots support, and even collect federal election funding from the *Fondo Nacional de Partidos Políticos*, which is run by the Interior Ministry.

V. Joint Agencies, Specialist Agencies, and Independent Commissions

On many occasions, provinces and federal authorities have formed commissions or joint bodies in order to cope with specific problems. One key area in this regard has been natural resource management, which involves complex interjurisdictional questions affecting rational use and allocation.

Notably, several commissions operate in river-basin development areas. As an example, the *Comisión Regional del Bermejo* (COREBE, established by an IGA in 1981 and ratified by federal law in 1982)[57] is managed by two bodies: a Governing Council, chaired by a federal minister, on which the governors of six provinces (Chaco, Formosa, Jujuy, Salta, Santa Fe, and Santiago del Estero) sit and serve on an annual, rotating basis as the deputy chair;[58] and a board of directors, composed of provincial water officials in charge of policy implementation. In the Governing Council, voting is by a single majority. Another example is the Limay and Neuquén

Basin Authority, which is chaired by the federal Secretary of State for Water Resources. The Salí-Dulce basin, the Río Atuel, and the Río Colorado commissions also handle river resources.[59]

Commissions and committees on hydro resources serve as forums for IGR interaction between federal and provincial agencies. They are almost invariably vertical. It is rare for provinces to form horizontal agencies of their own with no federal input, and commissions without a federal presence typically have lacked bite. The Interprovincial Coordinating Committee for the Paraná Medio Development, which the governors of Entre Ríos, Santa Fe, Corrientes, and Chaco formed in 1981, initially was an exception. The governors led the main council themselves, with no federal interference. The committee sought to coordinate the interests of the relevant provinces in relation to the projected Paraná Medio dam, so as to act in unison vis-à-vis federal authorities. In the end, however, national authorities undermined these initiatives. Joint action in a horizontal fashion has been reserved for smaller border projects, such as the underwater tunnel that links the cities of Santa Fe and Paraná. Oil-producing provinces also have established joint bodies of their own.

The environment has been an arena of substantial joint action between the federal government and the provinces. Pollution is a severe problem in several parts of the country, particularly in the greater Buenos Aires area, which is highly industrialized. This region poses enormous challenges of overlapping jurisdictions and agencies because the national government, the city of Buenos Aires, and the province of Buenos Aires are all involved. Since 2006, the federal Supreme Court has outlined a vast and ambitious program for the Matanza-Riachuelo basin environmental cleanup (ordered by the so-called *Mendoza* decisions),[60] for the first time tackling a very complex environmental IGR issue by judicial means. The first decision, in June 2006, ordered the federation, the province of Buenos Aires, the city of Buenos Aires, and the Environmental Federal Council to submit a full-fledged, interjurisdictional plan to protect the environment. Nine years later, many matters remain unresolved.

As it became evident that the cleanup task was a vast undertaking, Congress created a new agency, ACUMAR, as an interjurisdictional public law entity within the Environment and Sustainable Development Secretariat of State.[61] ACUMAR's main legal goals lie in the regulation, control, and development of industrial activity in the Matanza-Riachuelo basin, which poses considerable health risks. It has monitoring, prevention, cleanup, and use of natural resources oversight functions.

ACUMAR has the Environment and Sustainable Development Secretary of State as its presiding officer and includes two more representatives of the federal executive, two delegates from the province of Buenos Aires and two from the city of Buenos Aires. National representation thus totals four out of

the eight seats. During 2008–9, this joint agency began taking lab samples and started to outline programs in order to relocate the neighbouring populace, consolidate inspecting staffs from different jurisdictions, improve sewage systems, and conduct a health and environmental census. Subsequently, the World Bank awarded it a loan equivalent to US$840 million.

VI. Agreements between Orders of Government

Intergovernmental agreements, which are usually negotiated by governors, are common in Argentina.

The Practice of Agreements

The federal partners regularly conclude intergovernmental agreements (IGAs), which in Argentina are called interprovincial treaties or interprovincial agreements. Equivalent expressions such as pacts or conventions are also used, interchangeably. Interprovincial treaties were envisaged in the original 1853 Constitution, and their role was enhanced in the second paragraph of the new Article 125 by the constitutional revision of 1994. The first paragraph of this clause provides that "Provinces may enter into partial treaties for purposes of the administration of justice, economic interests and works of common benefit, with knowledge of the Federal Congress, and may promote industry, immigration, the construction of railroads and navigable channels, the colonization of provincial lands, the introduction and establishment of new industries, the import of foreign capital and the exploration of rivers, by laws protecting these goals with their own resources." The constitutional provision refers to the execution of provincial treaties "with federal congressional knowledge." There has been considerable dispute over whether this provision merely requires information or whether it also entails federal approval. Provincial constitutions include similar rules, allowing provinces to enter into vertical and horizontal IGAs.

Typically, IGAs are negotiated by governors following a federal lead,[62] then signed by executive officers and subsequently approved by provincial legislatures. Finally, they are approved by Congress and made public; no referendum or further political action is required for completion. IGAs may from time to time have legal consequences, for example, if a citizen or province sues under their aegis in federal court.

Most IGAs are vertical, involving both the federation and the provinces. They do not usually involve third parties, and municipalities participate only through provincial authorities. IGAs operate mainly in the fields of economic development, taxation, social security, and the environment.

IGAs are the direct outcome of the co-operative federalism of the late 1950s. There is little documentation about them: no

centralized data bank and no comprehensive assessment of their number and nature. IGAs are not properly catalogued and some documents have even been lost.[63] An IGA registry was started by the Senate in 1973, but eventually failed.[64] IGAs are rarely even published as full-text instruments. They only appear in full in the federal record (*Boletín Oficial*) if Congress has previously approved them by law. IGAs lack a standard format, specific budgetary support and clear procedures for monitoring and control. Congress has been unable to pass legislation regulating IGAs in detail.[65]

The Functions Played by Agreements

IGAs are primarily used in the concurrent or shared areas of competence to help sort out the roles and responsibilities of the orders of government. In 1992–3, for example, many federal pacts, or treaties, were concluded as devolution took place in the education and health areas while, conversely, social security services were transferred to the federation.[66]

Some IGAs are highly symbolic. For instance, the Federal Environmental Pact of 1993 ostensibly was a response to the need for greater action following the Rio de Janeiro Earth Summit of 1992. It called for policy coordination, but it lacked specific dispositive rules. By contrast, the Federal Pact on Employment, Production, and Growth of 1993 is replete with explicit norms on tax powers and social security management.

Sometimes, IGAs have created joint services, as illustrated by the various river-basin commissions discussed earlier in the chapter. IGAs act as the basic framework for these entities, usually providing for the governing organs of the commission and its composition and functions.

Horizontal IGAs played a significant role as provinces began to group together in regions, even before the amendment of Article 124 in 1994 entrenched them in the Constitution. In 1987, the Norte Grande region (comprising Catamarca, Corrientes, Chaco, Formosa, Jujuy, Misiones, Tucumán, Salta, and Santiago del Estero) emerged with little institutional development. One year later, the New Cuyo region was formed by an IGA, comprising Mendoza, San Luis, San Juan, and La Rioja. Another IGA was signed in 1996, creating the Patagonia Region in the southern tip of the country. In August 1998, another horizontal IGA between Córdoba and Santa Fe established the all-important Centro Region, which Entre Ríos joined in 1999.

IGAs do not usually circumvent or undermine constitutional norms. In principle, they complement the Constitution as a mechanism for better policy articulation and implementation. Exceptionally, further co-operation procedures are established in follow-up documents known as protocols (*Protocolos*). Regarding their operation, there are self-executing IGAs, of which the San Juan social security transfer agreement is an example, and non-self-executing IGAs, which indicate a mere willingness for or commitment to future action to be taken in the future. The Federal Education Pact of September 9, 1997 is an example of this latter kind.

Dispute Resolution Regarding Agreements

There are no official forums for handling disputes over IGAs, apart from the Supreme Court, which has become involved in IGA litigation sporadically. The Supreme Court has original jurisdiction in such cases, on the grounds that one or more provinces are involved.[67] Sometimes, citizens sue both orders of government (e.g., in health issues and environment matters) as a backup strategy should provinces fail to comply with court decisions.[68]

The Constitution also confers a "settlement jurisdiction" (*jurisdicción dirimente*) on the Supreme Court should two or more provinces stake "claims" (Article 127). This vehicle for litigation involves the court in political rather than legal adjudication, based more on courtesy and diplomacy than on fine points of law. In December 1987, the Supreme Court relied on this source of authority for the first and, so far, the only time when it ordered the provinces of Mendoza and La Pampa to conduct negotiations so as to end the Atuel river dispute,[69] which lately has been reignited.

Suits to enforce IGAs can be brought before the court only if the IGA is first enacted by Congress; IGAs of a political nature are impossible to adjudicate. Even where an IGA is justiciable, litigation is complex because federal and provincial laws and the interpretation of constitutional clauses may all be involved. In reality, the Supreme Court is not fully equipped to tackle the nuances and complexities of IGA litigation. Nevertheless, judicialization has become an increasing trend in national life.[70] Many people turned to courts seeking adequate redress for their plight after the government froze bank deposits following the economic crisis of 2001–2. This generated an enormous workload for federal judges. Pensioners also sued the national government in large numbers as pensions became meaningless due to high inflation and fixed incomes. Social security transfers had been dominated by IGAs, so they became a focal point of litigation, with important legal consequences as previously acquired benefits were at stake.[71]

VII. IGR and Fiscal Federalism

A sophisticated revenue-collection system was introduced under the 1853 Constitution. As a rule, provinces would levy direct taxes (such as income tax). Only exceptionally could Congress do so. Indirect taxes (such as VAT) became concurrent, or shared, as both the national and the provincial governments had the authority to impose them.

Over time, fiscal imbalance, overlapping, and double-taxation occurred. In 1932, the federal government relied on its exceptional powers to create a temporary, nationwide income tax, which later became permanent. Two years later, Congress enacted its first co-participation law (*Ley Federal de Coparticipación de Impuestos*) to which provinces were invited to adhere, foregoing use of their own tax powers in exchange for participation in "national" revenue collection. These arrangements were constantly renewed up to 1988, when Justicialista governors[72] successfully pushed for a more balanced fiscal bargain from then President Alfonsín, thus obtaining a higher allocation of funds to the provinces. At that time, remittances to the provinces accounted for more than 57 percent of the total. Subsequently, in the early 1990s, the share of co-participation revenues allocated to provinces fell to 49 percent; it now stands at a mere 30 percent. Specialized literature has often referred to these arrangements as a sort of "fiscal labyrinth,"[73] given the complexity of different shared taxes and expenditure functions.

The 1994 constitutional reform explicitly recognized tax sharing. It called for a new law on the subject based on "egalitarian distribution criteria throughout the national territory, such as solidarity, quality of life and equal opportunity" for all constituent units.[74] Unfunded mandates (obligation to administer programs without financial compensation) were banned as a general rule, subject to exceptions by specific legislation enacted by Congress and approved by the concerned provinces.

The reformed constitutional text also calls for a fiscal body to take charge of co-participation monitoring and control. After an astonishing twenty-one-year delay, the new clause is not yet operational and this new entity, which would be the first IGR agency with constitutional status, is not yet in place. An old (and still in force) federal law provides for a Federal Tax Commission (*Comisión Federal de Impuestos*, CFI) to resolve conflicts among involved parties. It remains unclear whether the CFI is supposed to be phased out under the 1994 constitutional arrangement, or whether it could function as the "fiscal body" required for IGR in this area by the new constitutional bargain.[75] The harsh reality is that informal mechanisms dominate fiscal federalism, permeated by politics rather than by constitutional norms.[76]

Economically, as direct revenues represent only 18 percent of all provincial resources, provinces are highly dependent on the federal treasury. Some revenues are not itemized as sources for co-participation, depriving provinces of much-needed resources. Under co-participation, the provinces have lost their powers to tax, but retain the power to spend. Moreover, while tax collection is centralized, borrowing is decentralized, further encouraging fiscal irresponsibility. Direct grants from the National Treasury to provinces have developed as a discretionary tool for the federal government to reward "obedient" governors and to

punish those who do not follow the official federal line. The nature of these grants, which are subject to less scrutiny than tax distribution, facilitates political patronage and clientelism.

VIII. IGR and Efficiency in Policy-Making and Implementation

Today, intergovernmental relations in Argentina are more geared toward implementation and information-sharing than policy decision-making, which is still highly centralized. IGR can promote efficiency, but because of their informal character, they frequently cause overlap and duplication of government effort. Federal authorities seek to impose their will on provincial organs, but as the latter have the "home advantage,"[77] gridlock may occur. Sometimes there is a "joint-decision trap"; a scenario in which one order of government blames the other for inaction or any real or perceived ills.

IGR have not yet developed sufficiently to foster adequate coordination between different orders of government, with the exception of some of the federal councils to which reference was made earlier. Policy-making is still concentrated in the capital city of Buenos Aires; coordinated solutions are rare and triggered on an ad hoc basis by specific needs. The flu pandemic of 2009 offers an example. As noted previously, this public-health emergency led to quick coordination among the national and provincial ministers who sit in the Federal Health Council, and action was taken expeditiously in order to avert further spread of the disease.

IX. Political Accountability, the Rule of Law, Citizen Participation, and Democratic Legitimacy

Argentina's IGR are conducted mainly by executive officials. There have been concerns about lack of transparency and accountability. Nevertheless, public policy requires the enhanced participation of all actors,[78] reinforcing the case for IGR.

The operations of IGR tend to confirm the general inadequacy of the country's political system, heightening the democratic deficit. The executive, including the president, governors, and mayors, are the main formal actors, with political parties as effective channels of communication. Executive authorities seem to be the only ones able to deliver in all aspects of political life. IGR are not the exception. Courts are playing an increasing role,[79] but many lash out at the so-called activism of judges, who are unelected officials. Congress and the provincial legislatures play a very minor role compared to that of the executive branch of government.

Opacity is a real problem as negotiations take place behind closed doors. Relevant non-governmental organizations are constantly seeking greater access, but Congress has passed no laws mandating greater transparency. When he took office in May 2003, Néstor Kirchner vowed to enhance access to information, but these initiatives did not bear fruit as they did, for instance, in neighbouring Chile. Public documentation in the form of reports or memoranda of IGR activities is scarce, although the Internet has improved the situation. IGR reinforce executive dominance. There is little congressional involvement in the oversight of IGR or any other follow-up actions.

Further, independent oversight is difficult to achieve because there is a minimal "control culture" in the country regarding auditing and its benefits. Too often, auditing is perceived as a stumbling block to governance instead of an effective way of gauging its quality.

X. The Impact of IGR on Federalism: Overall Assessment and Future Directions

Formal IGR in Argentina are weakly developed, despite the increasing constitutionalization following the 1994 reform. IGR typically are conducted informally through political parties and local leadership channels. IGR tend to be disorganized, primarily vertical, mainly ad hoc, and free from formal constraints. There has been a trend since 1994 toward a higher degree of formalization. Paradoxically, the few IGR success stories, such as the federal councils on education and health, have been products of legislation and executive action and have not been spurred by constitutional arrangements.

In the past, centralization and economic liberalization were the main drivers of IGR. Nowadays, party influence and fiscal imbalance are moving the whole process forward, eroding the formal separation of powers and posing significant challenges for the rule of law.

Vertical IGR predominate; horizontal co-operation is limited. Most IGAs are initiated by the centre. Occasionally, IGR provide for asymmetrical solutions that are not compatible with the formal legal structure but that ease some social tensions along the way. As IGR are conducted informally, negotiation is the best method of conflict resolution. Threats to sue in a federal court occur but are often hollow in the face of a legal system that is tardy and cumbersome.

Senate reform, greater equity, effective implementation of policies agreed by both orders of government through IGAs, correction of the tax distribution framework, and an increasing role for non-governmental organizations to effectively monitor provincial governments and enhance transparency at all orders would make IGR more effective. However, these changes are unlikely to occur in the absence of greater measures of democratization and respect for the rule of law.

Notes

1. For a complete analysis, see Jorge P. Gordin, "Testing Riker's Party-Based Theory of Federalism: The Argentine Case," *Publius: The Journal of Federalism* 34, no. 1 (Winter 2004): 21–34, 33.
2. For earlier studies, see Antonio M. Hernández, "Republic of Argentina," in Katy Le Roy and Cheryl Saunders, eds, *Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006), pp. 7–36; Eduardo Iglesias, Federico Merke, and Valeria Iglesias, "Republic of Argentina," in Hans Michelmann, ed., *Foreign Relations in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2009), pp. 10–35.
3. Dardo Pérez Guilhou, "El Ejecutivo en las Constituciones Provinciales," in Dardo Pérez Guilhou, ed., *Derecho Público Provincial y Municipal*, vol. I (Buenos Aires: La Ley, 2007), pp. 250.
4. Paloma Biglino Campos, *Federalismo de integración y de devolución (El debate sobre la competencia)* (Madrid: Centro de Estudios Políticos y Constitucionales, 2007), p. 168.
5. Among the most significant were the Federal Pact of 1831 and the Agreement of San Nicolás of 1852, just prior to the adoption of the 1853 Constitution.
6. Although physically contiguous and bearing the same name, the province has no relation to the city.
7. The provinces in the Patagonia Region encompass 35 percent of the land area, but account for only 7 percent of the population of Argentina and 7 percent of its GNP.
8. Daphne A. Kenyon and John Kincaid, "Introduction," in Daphne A. Kenyon and John Kincaid, eds, *Competition among States and Local Governments: Efficiency and Equity in American Federalism* (Washington DC: Urban Institute Press, 1991), p. 7; and Manuel Ballbé and Roser Martínez, *Soberanía Dual y Constitución integradora* (Barcelona: Ariel, 2009), p. 28.
9. "The more a constitution tries to separate competences, the greater the need to find appropriate modes of cooperation to avoid the negative effects of competition or cancelling out each other's actions," Arthur Benz and Felix Knüpling, "Introduction," in Arthur M. Benz and Felix Knüpling, eds, *Changing Federal Constitutions (Lessons from International Comparison)* (Berlin and Toronto: Barbara Budrich Publishers, 2012), pp. 13–23.
10. Víctor Tau Anzoátegui, *La Codificación en la Argentina* (Buenos Aires: Emilio J. Perrot, 2008).
11. Constitution Article 75, section 12. In 2014, Congress approved a new Civil and Commercial Code, an all-important piece of legislation for a civil law country such as Argentina.
12. Constitution Article 5.
13. Constitution Article 75 section 12.
14. Constitution Articles 123 and 75 section 2 respectively.
15. Pedro J. Frías, *El Proceso Federal Argentino* (Córdoba, 1988, Author's edition), p. 14.
16. In relation to health, see Walter F. Carnota, "El derecho a la salud en el constitucionalismo provincial argentino," in *Revista Jurídica de la Universidad de Ciencias Empresariales y Sociales* 15 (Spring 2011): 418–42, 419.
17. Constitution, Article 75, Section 13. It closely resembles its US counterpart, enabling Congress to regulate interjurisdictional and foreign trade.
18. Walter F. Carnota, "La regulación de la intergubernamentalidad ambiental como legado del artículo 41 de la Constitución Nacional," *Revista de Derecho Ambiental* 40 (October/December 2014): 153–67, 159.

19. See particularly the work of Pedro J. Frías, who became the country's leading expert in federalism and founder of the group of scholars on this subject based in Córdoba.
20. Historically, civilian performance in this regard has also been poor. Since 1853, federal intervention has replaced top provincial authorities more than 175 times, relying on Article 6 of the Constitution, which provides emergency powers in the face of provincial instability. Halberstam notes that "A transplant of the Guarantee Clause has enabled the federal government of Argentina to take over state government functions repeatedly and for extended periods of time." Daniel Halberstam, "Federalism: Theory, Policy, Law," in Michel Rosenfeld and András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press, Oxford: 2012), pp. 576–608, 592. However, the Supreme Court has systematically refused to rule on the legality of federal interventions, dismissing them as "political questions" to be worked out exclusively by Congress and the president. George Anderson, *Una introducción al federalismo* (Madrid: Marcial Pons, 2008), 81.
21. Walter F. Carnota, "Rights and Politics in Argentine Social Security Reform," *Australian Journal of Political Science* 44, no. 1 (March 2009): 115–26, 116.
22. Federal agencies are able to freely distribute funds known as ATN (Aportes del Tesoro Nacional) among provinces.
23. Examples nevertheless include meetings of the Patagonia, New Cuyo, or Centro Region governors, or interprovincial management of shared river basins.
24. Jorge Horacio Gentile, "El Senado, ¿Es una Cámara Federal?" in Walter F. Carnota, ed., *Derecho Federal (Sus Implicancias Prácticas)* (Buenos Aires: Grün, 2004), pp. 97–159, 151.
25. Article 102, section 16 of the Province of La Rioja Constitution empowers the provincial legislature to instruct La Rioja national senators when provincial interests are at stake. In that same vein, see Article 104, section 5 of the Córdoba Constitution.
26. During the first semester of 2008, export taxes on certain crops (particularly soybeans, wheat, and sunflowers) were increased and became the focal point of heated discussions between farmers, agricultural provinces, and the national government. Cristina Kirchner's then new administration argued that world commodities prices were extremely high and that taxes on farm exports should subsidize internal consumption. Farmers massively protested, and the country's then vice-president (acting as the Senate's presiding officer) broke the tie in the upper house by casting the pivotal vote against higher taxation (July 2008).
27. Mendoza, Entre Ríos, Santa Fe, San Luis, Catamarca, Corrientes, Buenos Aires, and Salta.
28. A flexible, political statement made by Patagonian provincial legislators. By contrast, the region was created five years later by a horizontal IGA called Tratado Constitutivo (Constituent Treaty) of legal character.
29. For instance, the Patagonian parliament in 2006 highlighted the importance of local arts and economic development; stressed environment-friendly housing; recommended that Patagonian legislatures change criminal procedure; and urged provincial executives to encourage the president to sign the Protocol of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Statements play a perfunctory role, while recommendations contain policy guidelines aimed at specific provincial organs of government.
30. Daniel Alberto Sabsay, "El federalismo y la incorporación de la noción de *región* en la reforma constitucional de 1994," *La Ley* (June 13, 2013): 1–5, 4.
31. In this respect, it closely resembles the decision-making dynamics of other regional parliaments. In 2010, for example, the Northwestern parliament paid special tribute to the country's bicentenary and to local artists; approved measures on forestry, environmental impact, and tourist sites; and called on provincial executives to control the production and distribution of hydro resources.

32. This is consistent with Watts' thesis: "When the principle of separation of powers has prevailed at the federal level . . . the form of government prevailing at the subnational level has in practice been in parallel," Ronald L. Watts, *Comparing Federal Systems in the 1990s* (Ontario: Queen's University Press, 1996), 76.
33. Germán J. Bidart Campos, *Tratado Elemental de Derecho Constitucional Argentino*, volume I-B (Buenos Aires: Ediar, 2001), 439.
34. For instance, income derived from lotteries and other prizes. Alfredo J. Lamagrande, "Período 1943–1946," in Horacio A. García Belsunce and Vicente Oscar Díaz, eds, *Historia de la Tributación Argentina (1810–2010)* (Buenos Aires: Errepar, 2010), pp. 427–83, 466.
35. It has been argued that this process is foreign to federalism because it resembles confederal rather than federal arrangements. María Angélica Gelli, *Constitución de la Nación Argentina. Comentada y Concordada* (Buenos Aires: La Ley, 2005), 655.
36. Germán J. Bidart Campos, *Tratado Elemental de Derecho Constitucional Argentino*, volume I-B (Buenos Aires: Ediar, 2001), 443.
37. According to Transitional Disposition Number Six, added by the 1994 constitutional reform, the pre-existing distribution of competences, services, and functions could not be modified in the meantime without provincial consent.
38. San Luis, Santa Fe, Corrientes, and La Pampa, among others, argued that they deserved better fiscal treatment under the pre-1994 rules still in force. Santa Fe stated that the federal government had extended co-participation taxes for social security financing without its consent. Consequently, the province sued the federal government before the Supreme Court. The matter was heard on March 17, 2010; the outcome was still pending in early 2015. The Supreme Court also held hearings on the fiscal situation of the Province of Córdoba.
39. Interprovincial treaty of 15 August 1998. Follow-up protocols were signed in Córdoba (2004) and Santa Fe (2009).
40. Germán J. Bidart Campos, "El Federalismo Argentino desde 1930 a la actualidad," in Marcello Carmignani, ed., *Federalismos Latinoamericanos: México/Brasil/Argentina* (Mexico: Fondo de Cultura Económica, 1993), pp. 363–96, 392.
41. A vertical federal council dealing with highways had been set up in 1958.
42. Martín Astarita, Santiago Bonifacio, and Natalia Del Cogliano, "Relaciones Intergubernamentales (RIGS) en la Administración Pública Argentina," in Juan M. Abal Medina and Horacio Cao, eds, *Manual de la nueva Administración Pública Argentina* (Buenos Aires: Ariel, 2012), pp. 227–81, 233.
43. National law number 22.047 (1979).
44. This is one example of a concurrent area where centralization initially took place (education as a by-product of the welfare state) and services subsequently became decentralized in the later part of the twentieth century as the welfare state waned.
45. Valeria Palanza, "Espacios de consenso alternativos: Los Consejos Federales de la política social en Argentina," 18 (mimeographed version), 2002.
46. Health also is an example of a concurrent area where centralization and decentralization were practised alternately.
47. National law number 22.373.
48. The Federal Agreement on Health (22 March 2003) recognized the role of civil society in health policy development. Jorge A. Mera and Julio N. Bello, "Federalismo y salud," *Revista de la Asociación de Clínicas, Sanatorios y Hospitales Privados de la República Argentina* 6 (December 2009): 18–21, 20.
49. Federico Tobar and Pilar Rodrigáñez Ricchieri, *Hacia un Federalismo Sanitario Efectivo* (Buenos Aires: Ediciones ISALUD, 2004), 81.
50. A main weakness of intra-federal organs is their lack of budgetary provisions and administrative structures. See Juan R. Walsh, *Los presupuestos mínimos para la protección ambiental y la actividad agropecuaria (Herramientas jurídicas para el desarrollo sustentable)* (Santa Fe: Universidad Nacional del Litoral and Fundación Habitat y Desarrollo, 2009), p. 71, note 6.

51. National law number 25.675.
52. National law number 23.900.
53. The Interior Ministry is a multi-faceted body, very different, for example, from the US Department of the Interior, a cabinet agency bearing the same name. In 2012, after transportation services were added to its responsibilities, it became the Interior and Transportation Ministry.
54. Article 17, Section 5 of law 26.338 (also known as Law of Ministries) entrusts the Interior Ministry with undertaking "relations with provincial governments . . . and interjurisdictional relations and questions." Section 6 authorizes it to draft national legislation regarding "coordination of federal and provincial norms."
55. Horacio Cao, "Las provincias y el gobierno autónomo de la Ciudad de Buenos Aires," in Juan M. Abal Medina and Horacio Cao, eds, *Manual de la nueva Administración Pública Argentina* quoted at note 42, pp. 113–70, 145.
56. Pressure groups such as Confederación General del Trabajo (which binds labour unions) and Sociedad Rural Argentina (which concentrates farmers) exert significant influence.
57. National law number 22.697, 1982.
58. A bill was introduced by Senator Adriana Bortolozzi de Bogado in 2006 to establish an annual rotating presidency among the federal minister and these provincial governors, but she later withdrew it.
59. Cristina del Campo, "Los organismos interjurisdiccionales de cuenca y el nuevo orden jurídico ambiental. De la gestión de aguas por tramos a la gestión de aguas por cuencas," *Revista de Derecho Ambiental* 22 (April–June 2010): 107–20, 107. Guillermo Barrera Buteler, *Provincia y Nación* (Buenos Aires: Ciudad Argentina, 1996), p. 367.
60. Ricardo Luis Lorenzetti, *Teoría del Derecho Ambiental* (Buenos Aires: La Ley, 2008), p. 137.
61. National law 26.168, 2006.
62. The president shows considerable leadership in this area, personally or through delegates. Pedro J. Frías, *Derecho Público Provincial* (Buenos Aires: Depalma, 1985), p. 107.
63. Raúl Marcelo Díaz Ricci, *Relaciones Gubernamentales de Cooperación* (Buenos Aires: Ediar, 2009), p. 31.
64. Jorge Luis Riveros, *Tratados Interprovinciales (Facultades concurrentes de las provincias)* (Córdoba: Editorial Mediterránea, 2006), p. 88; Guillermo Barrera Buteler, *Provincia y Nación* quoted at note 59, p. 345.
65. One near-exception was an ill-fated bill introduced by former Córdoba national deputy Jorge Gentile. It eventually failed to gain congressional support as both the federation and the provinces were reluctant to rein in their own discretionary powers. Jorge Horacio Gentile, *Rendición de Cuentas como Diputado de la Nación*, vol. 3 (Buenos Aires: National Congress, 1991), p. 43.
66. IGAs acted as a vehicle for both the integration and the devolution policies of the Menem administration (1989–99). They were tools for decentralizing schools and hospitals, and instruments for centralizing provincial pension funds, which were transferred to the national Social Security Administration so as to prevent rampant provincial indebtedness.
67. Constitution Article 117, Silvia B. Palacio de Caeiro, "La competencia federal," in Silvia B. Palacio de Caeiro, ed., *Competencia Federal* (Buenos Aires: La Ley, 2012), pp. 51–80, 71.
68. For example, in health matters, it is legally feasible to sue both orders of government because the federation is internationally bound by human rights treaties and provinces run the hospitals. As the latter are usually short of funds, the former typically ends up paying.
69. Cristián Altavilla, "El rol de la Corte Suprema en los conflictos intergubernamentales. Análisis del fallo "Provincia de La Pampa c. Provincia de Mendoza," *Cuaderno de Federalismo* 22 (2009): 119–49. The Supreme Court stressed in this ruling that provinces should strive to reach agreement after negotiations take place.

70. "It is not only the national governments who find themselves relying on the courts to solve institutional conflicts but also the subnational levels of government that have become increasingly important in recent years as political decentralization has afforded greater representation to subnational institutions and actors. Within federal structures, state or provincial governments can and often do challenge the federal government through the courts." Rachel Sieder, Line Schjolden, and Alan Angell, "Introduction," in Rachel Sieder, Line Schjolden, and Alan Angell, eds, *The Judicialization of Politics in Latin America* (New York: Palgrave Macmillan, 2005), pp. 4–20, 6.
71. *Blanca Lidia Blanco de Mazzina*, Argentine Supreme Court "Fallos": 331: 232.
72. Fiscal imbalance and party politics influence IGR, and party disharmony has been associated with an increase in the provincial share of federal funds. See Gordin, "Testing Riker's Party-Based Theory of Federalism," quoted at note 1, 32.
73. Sebastian M. Saiegh and Mariano Tommasi, "Why is Argentina's Fiscal Federalism So Inefficient?" *Journal of Applied Economics* 2, no. 1 (1999): 169–209.
74. Constitution, Article 75.2.
75. Enrique Bulit Goñi, "Constitución y Tributación Local," *Cuaderno de Federalismo* 22 (2009), 151–62, 158. This unreasonable impasse may give credence to Vermeule's dictum that "Constitutional rulemakers should have no obsessions." Adrian Vermeule, *The Constitution of Risk* (Cambridge University Press: New York, 2014), p. 188. In other words, regrettably, the risk of constant fiscal imbalance was not thwarted by a lengthy constitutional rule.
76. Sebastian M. Saiegh, "The Sub-national Connection: Legislative Coalitions, Cross-Voting and Policymaking in Argentina," in Flavia Fiorucci and Marcus Klein, eds, *The Argentine Crisis of the Millenium: Causes, Consequences and Explanations* (Amsterdam: Aksant, 2004), pp. 107–26.
77. Information asymmetry typically occurs because "[s]maller jurisdictions can be more effective because local decision-makers have a better grasp of the relevant local facts than would actors at the central level of governance." Daniel Halberstam, "Federalism: Theory, Policy, Law," in Michel Rosenfeld and András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), pp. 576–608, 587.
78. Anabella Ester Córdoba, *La planificación de las intervenciones públicas* (Buenos Aires: Lumen, 2010), p. 39.
79. Walter F. Carnota, "Judicial Globalization: How the International Law of Human Rights Changed the Argentine Supreme Court," in Donald W. Jackson, Michael C. Tolley, and Mary L. Volcansek, eds, *Globalizing Justice (Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms)* (Albany: SUNY, 2010), pp. 255–66.

2 Intergovernmental Relations in Australia: Increasing Engagement within a Centralizing Dynamic

John Phillimore and Jeffrey Harwood

I. Introduction

Institutions and processes of intergovernmental relations (IGR) were not prominent features of Australia's federal design. Nevertheless, over the past century, relationships between governments—formal and informal, vertical and horizontal—have steadily broadened and deepened to a point where Australia can now be considered to have quite a dense set of IGR institutions and practices. This process accelerated during the past twenty years or so, with several periods being of particular note. First, in the early 1990s, a burst of negotiations between governments led, in 1992, to the establishment of the current forum in which Australian heads of government meet, the Council of Australian Governments (COAG). A second covers the period from 2007–13, during which a federal Labor government was explicitly committed to an intense form of co-operative federalism. A third may be in the offing, with a federal Coalition government elected in 2013 committing to produce a major policy paper on reform of the federation.

COAG has been the main avenue through which new models of co-operation have been pursued, although its lack of institutional foundations means that IGR are subject to fluctuations in their levels of intensity and co-operation and are, inevitably, ultimately at the mercy of the federal government. The latest wave of federalism reform is driven by a reaction against aspects of the COAG process under the federal Labor government, combined with changes of government at federal and State levels across Australia. Its goals include drawing clearer lines of responsibilities between the levels of government and a consequent cooling of IGR. Whether this direction can be maintained in a federation that has become accustomed to centralization remains to be seen.

Australia is a country of close to twenty-four million people, spread over 7.7 million square kilometres. Most people live in urban areas in a relatively narrow strip near the southeast and southwest coastlines. Almost two-thirds of the population live in the capital cities of the six States and

two self-governing mainland Territories. Over a quarter of Australians were born overseas, and another 20 percent have at least one overseas-born parent. The indigenous Aboriginal and Torres Strait Islander population numbers around 670,000, or 3 percent of the total. Almost 30 percent of the population of the Northern Territory is indigenous, compared with less than 5 percent in each of the other States and Territories.[1]

Despite this diversity, demographic and population factors have limited impact on Australian federalism and IGR. Apart from the Northern Territory, there are no substantial territorially based minority language population centres, and cultural and regional variations are relatively slight between the main urban population centres.

Australia's economy has experienced uninterrupted growth since the 1990–1 recession. Its GDP in 2013–14 was US$1,431,431 million,[2] with a per capita GDP of US$61,405. In recent years, a boom in commodity prices and in trade with China in particular has seen the economy grow rapidly; coupled with low public debt and relatively strong financial institutions and regulations, Australia passed through the global financial crisis of 2008–9 virtually unscathed.

Australia itself was formed in 1901 through the voluntary union of the six self-governing British colonies that occupied the country. The Constitution was adopted following a decade of discussion, delegate conventions, and popular referendums, culminating in the passage by the British Parliament in 1900 of the Commonwealth of Australia Constitution Act.

The States and Territories vary significantly in size, population, and economic structure (see Table 3.1 for a summary). The two traditionally dominant States—New South Wales (NSW) and Victoria—have steadily lost population share to the faster growing resource-based economies of Queensland, Western Australia, and the Northern Territory. NSW and Victoria accounted for 65 percent of Australia's population in 1956, but only 57 percent in 2014. The smaller States, South Australia and Tasmania, have the oldest age profile and slowest population growth. There are about 560 local governments, established under State and Territory legislation. Local government is not referred to in the Constitution.

The Commonwealth and State governments (as the national and subnational orders are called) have an almost complete set of executive, legislative, and judicial institutions and their own constitutions. To the extent allowed by the Commonwealth Constitution, each State is "sovereign" in the conduct of its own affairs. While the two self-governing Territories likewise have their own institutional structures, their powers of self-government derive from Commonwealth legislation and, at least in theory, can be removed.

Australia combines the traditions and institutions of federalism with those of parliamentary responsible government within a common-law legal

TABLE 2.1 Australian States and Territories, 2013–14[3]

	Total area		Length of coast line[a]	Population June 2014	Gross Product per capita[b] 2013–14	Gross Household (income per capita 2013–14
	sq. km.	%	km.	'000	US$ ('000)	US$ ('000)
New South Wales	800,642	10	2,137	7,518	59.8	54.2
Victoria	227,416	3	2,512	5,841	54.6	49.2
Queensland	1,730,648	23	13,347	4,722	57.6	51.2
South Australia	983,482	13	5,067	1,685	52.0	48.9
Western Australia	2,529,875	33	20,781	2,573	91.1	63.4
Tasmania	68,401	1	4,882	514	44.3	44.3
Northern Territory	1,349,129	18	10,953	245	78.2	59.6
Aust. Capital Territory	2,358	-	-	386	85.4	94.0
Australia	7,692,024	100	59,736	23,490	61.2	53.5

[a]Includes islands
[b]GDP per capita concentrates on the level of economic production and does not provide a measure of incomes received by residents of a particular jurisdiction, because a proportion of income generated in the production process may be transferred to other States or overseas (and conversely income may be received from other States or overseas). WA and the NT have high GDP per capita, which is significantly influenced by capital-intensive, often foreign-owned mining for which the terms of trade have increased significantly in recent years. A more accurate measure of relative income that takes these flows into account is gross household income per capita, which is included in the final column.

system. The federal elements were principally modelled on the American system and included adoption of a written constitution; enumeration in the Constitution of the competences of the Commonwealth Parliament; specification of the process for amending the Constitution through referendum; and the establishment of two houses of the Commonwealth Parliament—a House of Representatives, in which governments are formed, and a Senate, with equal representation from each of the six States, and with almost equal powers granted to each house. There is a rarely used provision allowing the dissolution of both houses of Parliament, followed by a joint sitting of Parliament if necessary, in order to pass blocked legislation in the event of a deadlock between the two houses.[4]

The High Court is the highest court in Australia. It hears appeals from both Commonwealth and State courts and determines constitutional challenges to the validity of Commonwealth and State laws. Its seven justices are appointed to the court until age 70 by the "Governor General in Council"—that is, by the executive government, with no involvement by the Parliament. Section 6 of the High Court of Australia Act 1979 requires the Commonwealth attorney general to consult State attorneys general before an appointment is made, but there is no requirement for (and little evidence of) State views being heeded by the Commonwealth.

The responsible government elements of the Australian system were adopted from Britain and are primarily based on convention rather than written rules. The Governor General (the Queen's representative) is a largely ceremonial head of State; government is formed by the political party (led by the prime minister) commanding a majority in the lower house of Parliament. There is a system of cabinet government encompassing collective and individual ministerial responsibility, and a tradition of a neutral and professional public service that serves the elected government. This responsible government model also prevails in the States and Territories.

The Constitution adopts the American approach to the distribution of competences by enumerating (in section 51) a range of areas in which the Commonwealth is permitted to legislate, with the States retaining responsibility for any matters not explicitly vested in the Commonwealth. Most of the Commonwealth's powers are concurrent, or shared with the States—although section 109 provides that in the event of an inconsistency, the Commonwealth law will prevail. The Commonwealth's exclusive powers are the traditional ones aimed at granting it control over external relations and the economic union—e.g., currency, defence, customs and excise duties—while others, such as foreign affairs, trade, immigration, and postal and telegraph services are effectively exclusive Commonwealth responsibilities in association with section 109. The States' powers are not listed and were intended at federation to consist of the bulk of government's functions outside those limited duties assigned to the Commonwealth.

Notwithstanding the concurrent powers listed in section 51, it is generally considered that the framers of the Constitution intended to adopt a form of federalism in which each sphere of government was relatively autonomous and IGR played a fairly minor role.[5] However, this did not materialize. Shared responsibility and governance are common, while the Commonwealth has become predominant in many areas that initially seemed to have been left to the States. Nevertheless, institutionally, Australia retains a dual federation in which the Commonwealth and the States each have their own executive branch and public service to implement their own policies and programs.

II. General Overview of IGR in Australia

The strong dualism envisaged by the constitutional framers meant that they did not establish any explicitly intergovernmental institutions. The Senate—designed as a key protector of States' interests—divided along party lines early in the 1900s and never effectively performed this function. An Inter-State Commission, designed to deal with aspects of protectionism in interstate trade, was provided in the Constitution in section 101. However, its power to adjudicate was emasculated by an adverse High Court ruling in 1915 and it never worked as envisaged.[6] It was in any case

always a Commonwealth body rather than an IGR institution per se. It no longer exists.

These factors, combined with the constitutional guarantee of autonomy for each order of government, have meant that "any interaction or joint action [between governments] has evolved out of practical exigencies, for political and administrative convenience."[7] Such interactions and relationships—formal and informal, vertical and horizontal—have steadily broadened and deepened over the past century, and particularly since the early 1990s.

The official IGR bodies include peak-level forums for heads of government—both vertical (Council of Australian Governments, or COAG) and horizontal (Council for the Australian Federation, or CAF). COAG has become the linchpin of the IGR system. There are also a number of ministerial councils representing functional areas of government, such as education, health, and transport, in addition to independent and semi-independent bodies responsible for regulation and policy-making in certain policy fields. These IGR institutions can also involve local government representation in areas such as planning and heritage.

Underlying these formal institutions are constant interactions between government officials, and all the while the interplay of party and Commonwealth–State politics is never far from the surface.

Developments in IGR have largely been shaped by the same factors driving Australian federalism more generally. The most important of these has been centralization, along with economic reform and a pragmatic attitude to federalism.[8] Centralization has taken the form of increasing Commonwealth involvement and influence in policy matters, as well as centralization *within* both orders of government, as central agencies (such as treasury and first minister's departments) have come to dominate IGR compared to line agencies responsible for service delivery.

Centralization has several explanations. First, and perhaps the most important, is vertical fiscal imbalance. As is explained below, the Commonwealth collects over 80 percent of revenues but spends only half of what it collects for its own purposes. The converse is true for the States and Territories, which require funding from the Commonwealth to perform their functions. Under section 96 of the Constitution, "the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." Over time, the Commonwealth has used this provision to enter new policy areas and influence—if not dominate—more and more policy fields, as well as spending funds directly on purposes such as roads, capital works, and community grants.

Second, successive High Court decisions have allowed the Commonwealth to enter—and sometimes take over—policy areas that had been preserves of the States. The most important was the High Court's decision during

World War II that enabled the Commonwealth to monopolize income taxation.[9] A 1983 decision permitted the Commonwealth to use its external affairs powers to enact laws to implement treaties in areas of State jurisdiction.[10] A 2006 decision expanded the Commonwealth's power to take over most of the industrial relations system.[11]

Third, the Constitution can only be changed through a referendum in which a majority of voters overall, and a majority of voters in a majority of States, support an amendment proposed by the Commonwealth Parliament (section 128). The State and Territory governments and parliaments are assigned no formal role in the referendum process. Although only eight of the forty-four referendum questions held since federation have secured a "yes" vote, some of these have been significant in expanding the Commonwealth's power to legislate in certain areas, such as social services[12] and indigenous affairs.[13]

One of the few constraints on centralization has been the High Court's application of a broad protection principle for the States to function as independent units.[14] In general, this principle holds that there is within the Constitution an implied limitation that prohibits the Commonwealth from legislating so as to infringe on the structural integrity of the States and their ability to exercise their functions.[15] In addition, three recent decisions have brought into question the Commonwealth's powers to spend directly on functions outside those explicitly provided for in the Constitution (such as grants to sporting bodies and local government infrastructure funding). However, the effect is likely to be that legislative and administrative solutions will be found to enable Commonwealth spending to continue, if only as grants through the States, rather than it vacating its involvement in the policy areas concerned.[16]

Another key driver of IGR has been economic reform. Since the 1980s, governments at all levels and of all political persuasions have vigorously pursued economic liberalization and new public management reforms within the public sector. There has been a sustained focus on increased competition, privatization, contracting out of government services and functions, deregulation, reform of public finances, and performance management.

As part of this market agenda, a significant reform program—the National Competition Policy (NCP)—was undertaken from the mid 1990s. The NCP sought to create national markets (and associated institutions) for electricity and gas; establish a national competition regulatory regime; and introduce competitive reforms to State-based industries and business enterprises. The incentive to participation was significant financial support to the States from the Commonwealth, dependent on achieving reform milestones as judged by the National Competition Council. These reforms were the culmination of several years of negotiation between the States and the Commonwealth initiated in the early 1990s by State premiers and

supported by the "new federalism" of Prime Minister Bob Hawke.[17] Efforts continue to this day to extend the NCP reforms through national harmonization of business regulations in many sectors, with strong support from business groups.

Finally, Australians, their governments, and the High Court have for many years taken a pragmatic attitude toward federalism. From at least the 1980s, there was a general absence of ideological debates and struggles over the balance of power between the Commonwealth and the States.[18] The public, as well as interested policy communities, are normally more concerned with "what works" than with "who does what." Hence, federal principles have not had a strong restraining effect on IGR in terms of Commonwealth "intrusion" into State policy responsibilities.

Yet, popular surveys, as well as media and key interest groups, regularly call for federalism to be "fixed," and for an end to the "blame game" between Commonwealth and State governments. This is particularly the case for the health-care system, which accounts for around a quarter of State government expenditure and where cost-shifting and duplication are rife. Other significant targets of criticism are cross-border issues, such as the parlous state of the Murray-Darling River that flows through four States; inconsistent transport regulations (e.g., relating to heavy vehicle loads for interstate road operators and safety requirements for interstate rail); indigenous affairs policy failures; and the inconveniences faced by people moving interstate (e.g., inconsistent school systems).

This has led to two broad responses. First, and most common, is a call for more clearly defined roles and responsibilities between the two orders of government so as to reduce overlap and duplication. There is less agreement on whether this should mean restoring more power to the States over particular policy areas or, by contrast, giving more power to the Commonwealth. In practice, the latter has been more common, although it has not necessarily occurred through co-operative means. Commonwealth assertiveness has also played an important role. The second and related response is to recognize that shared and overlapping roles are both the current reality and to some extent inevitable, and that there is therefore a need for closer and more effective co-operation between governments—which of course brings IGR to the fore.[19] Commonwealth fiscal support has often played an important role in securing such co-operation from the States and Territories, and it is usually accompanied by institutional mechanisms to support and oversee policy initiatives and monitor their progress. These two trends—a general tendency toward increased Commonwealth power combined with bursts of activity in which IGR are prominent, assisted by financial sweeteners from the Commonwealth—have increasingly been the main avenues through which change and reform have occurred in the federation and IGR.

Partisan differences between State and Commonwealth governments have generally not been the major determinant of IGR, despite the two major parties having traditionally adopted different attitudes toward federalism. Historically, the Australian Labor Party favoured a more centralist and interventionist approach compared to a more federal and States' rights ideology espoused by the Liberal Party and its rural Coalition partner, the National Party. Major IGR-related initiatives in the early 1990s were achieved between a Commonwealth Labor government and State governments of both persuasions. The Coalition (conservative) government led by Prime Minister John Howard (1996–2007) achieved significant reforms in fiscal federalism with Labor and Coalition State governments, and secured major agreements on counter-terrorism legislation with Labor-led State governments.

Nevertheless, partisanship has occasionally been important. For example, Labor governments during World War II and its immediate aftermath centralized income-taxing powers and secured passage of a key referendum in 1946 that laid the basis of Australia's modern welfare state. The Whitlam Labor government (1972–5) encountered stiff opposition to many of its initiatives (particularly its expanded use of section 96 conditional grants) from non-Labor States. By comparison, federal Coalition governments gave the States a monopoly over payroll tax (in 1971) and partially opened an opportunity (although it was not taken) for States to reintroduce income taxes in the late 1970s.

The differences between the two parties over federalism became more blurred following the liberalizing of the economy in the 1980s and the related reduction in planning and economic interventionism by Commonwealth Labor governments. At the same time, the Liberal Party and its leaders became much more "nationalist."[20] As a result, until the election in 2013 of the Liberal–National Coalition government, there was little concerted political opposition to the centralizing dynamic of Australian federalism on either side of federal politics. It is too early to tell whether the Coalition's latest moves toward federalism reform will develop into an ideological wedge between the parties, although some significant policy differences on this score can readily be predicted.

The centralizing tendencies of successive federal governments encounter opposition from the States, however, whatever their political complexion. When Labor was in government in all States and Territories from 2002 to 2007, for example, tensions increased in the face of the more centralist and interventionist strategy of the then federal Coalition government sometimes referred to as "opportunistic federalism."[21] This included Commonwealth actions to take over policy areas from the States (e.g., industrial relations); bypass them (e.g., establishing its own vocational training colleges); and force policy and administrative

changes on them (e.g., education reporting). During the same period, State and Territory Labor governments developed an alternative position on climate change; established the Council for the Australian Federation; and proposed a new national reform agenda.

There is no explicit or implicit constitutional obligation for "good faith" behaviour by either order of government. Consequently, the way in which IGR are conducted depends greatly on governments of the day, their leaders and officials, as well as their intersection with events and policy agendas. As Martin Painter notes, "despite the plethora of such [IGR] arrangements, the original arm's-length relationship remains intact. Adversarial politics and joint administration coexist as a matter of course."[22]

Partly for this reason, Australia has devised a number of independent or semi-independent institutions responsible for certain policy areas and responsibilities involving IGR that are somewhat removed from daily Commonwealth–State politics. Some of these have become permanent fixtures (e.g., the Commonwealth Grants Commission and the Australian Loan Council). Others (the COAG Reform Council and the Australian National Training Authority) were more short-lived, but still had a significant impact. These institutional innovations are discussed in section V below.

III. Legislative Mechanisms

Legislative bodies are important in some respects, but intergovernmental relations are driven much more by federal and state executives.

Legislative Institutions

All Australian parliaments, except those of Queensland and the two self-governing Territories, are bicameral. The Commonwealth House of Representatives has 150 single-member constituencies elected through a preferential voting system;[23] elections are held every three years. Almost all members come from one of two major party groupings (Labor and the Liberal–National Coalition). The Senate has seventy-six senators—twelve from each of the six States and two each from the two Territories. Senators are elected for six years by proportional representation using each State as a single electorate, but staggered terms mean that half the Senate faces the polls at each election. The government rarely has a majority in the Senate; the balance of power is normally held by minor parties and independents.

There are few if any formal co-operative mechanisms between the Commonwealth Parliament and State and Territory legislatures, or between State and Territory parliaments, either generally or in specific relation to IGR.

A partial exception is treaty-making. The Commonwealth government can sign and ratify treaties without reference to Parliament or to State governments or parliaments. As the number and scope of treaties has expanded, both Commonwealth and State governments and parliaments have criticized the fact that Commonwealth power can increase without adequate scrutiny. Partly in response, an intergovernmental Treaties Council was established by COAG in 1996. Although the Council has only met once (in 1997), the 1996 COAG meeting also established consultation mechanisms, in particular a Standing Committee on Treaties (consisting of senior Commonwealth, State, and Territory officers), which has the potential to meet more regularly to discuss upcoming treaties, providing an opportunity for comment by States, and a forum to coordinate State representation on international delegations where this is deemed appropriate.[24] In addition, a Commonwealth parliamentary committee—the Commonwealth Joint Standing Committee on Treaties (JSCOT)—was established to scrutinize (but not veto) treaty-making by the Commonwealth government. This Committee also provides written advice to State premiers and parliaments on treaties, inviting submissions on whether Australia should take binding treaty actions. The period for response is typically short. Only Western Australia has a parliamentary committee charged with scrutinizing proposed treaties, and it responds rarely, if ever, to the invitations offered.

Federalism and IGR are predominantly executive-led in character.[25] Parliamentary oversight of IGR is normally limited except for those cases where government requires legislative approval for particular initiatives, programs, or funding. As governments generally have a clear majority in their lower houses, the limited scrutiny that does take place (e.g., through committees) generally occurs where the governing party does not control the upper house of parliament.[26]

Legislative Techniques

A range of legislative techniques are used across the federation involving IGR.[27] The technique that provides the least amount of ongoing autonomy and capacity to constituent units is a referral of powers. Section 51(xxxvii) of the Constitution permits the Commonwealth to legislate in regard to matters referred to it by any State or States. Any consequent Commonwealth law only applies to the referring State(s), not to the entire federation. States may refer matters individually or collectively, and non-referring States may subsequently join the referral or adopt the Commonwealth law relating to a matter referred by another State.[28] As Cheryl Saunders notes, the referral option "represents a mechanism whereby, through co-operation, complete uniformity of legislation, administration and adjudication can be achieved in areas not otherwise within Commonwealth power."[29] The referral route

has been used sparingly since federation. States have been reluctant to refer powers when it is unclear what might happen once a referral has been made, fearing—incorrectly, in legal terms—that it may constitute a once-and-for-all surrender of powers. Examples of referred powers include mutual recognition of certain skilled occupations; the regulation of corporations and securities; and criminal code powers concerning terrorism.[30] Typically, a referral takes the form of legislation for enactment by the Commonwealth, together with power to amend the legislation, following an agreed process.

Another legislative technique involves one jurisdiction enacting a law and that law then being adopted by other parliaments. While this restricts the autonomy and capacity of individual States and Territories, it lessens the risk of the Commonwealth exceeding or extending its powers beyond the legislation. It also normally involves States and Territories working together to achieve harmonization, thus enabling them to be active policy players. This technique may be associated with the establishment of a policy-making or regulatory body on which States and Territories are represented directly or have a say over key appointments.[31] It assumes the need for complete uniformity in statutes and subordinate legislation and also generally assumes a single administrative portal—normally, although not always, established by the Commonwealth—to implement uniform administrative rules and decisions.

A related legislative technique involves a model law being developed (often by a ministerial council), with each State Parliament then enacting it in an agreed form. States can sometimes make variations to the model to meet local circumstances. This technique provides for a degree of harmonization, while still allowing States and Territories to implement their own versions and retain some ownership over implementation. Commonwealth legislation that has been mirrored in the States and Territories includes consumer protection, offshore minerals and petroleum, censorship, and financial transactions reporting. This legislative technique has also been used by States and Territories to cover areas of government–citizen relations where the Commonwealth has no direct involvement (e.g., child protection and interstate transfer of prisoners).

A legislative technique that allows the most autonomy and capacity to constituent units—and for that reason is rarely favoured by the Commonwealth—involves the establishment of a generic framework of policy intent, which outlines a set of minimal conditions or regulations, or expresses a minimal set of national provisions. This mechanism is designed to give States the power to vary the provisions, usually up rather than down. For example, minimal provisions are contained in national templates while State governments can adopt higher standards or offer better provisions to the national template. This occurs in situations where the Commonwealth establishes procedures to deal with an issue, but allows State procedures to replace them if they are

deemed adequate by the Commonwealth. Examples are environmental protection and native title (i.e., indigenous land rights) provisions.

IV. Executive Mechanisms

Executive mechanisms for intergovernmental relations involve several somewhat formalized institutional arrangements.

Council of Australian Governments (COAG)

The Council of Australian Governments (COAG) is Australia's peak IGR body. It was established at a heads-of-government meeting in May 1992 by informal agreement between the prime minister and the State premiers.[32] COAG comprises the heads of government (i.e., prime minister, premiers, and chief ministers) of the Commonwealth, six States and the two Territories, as well as the president of the Australian Local Government Association (ALGA). There is no formal intergovernmental agreement or legislation establishing COAG; hence, its operation has varied over time. For example, following the election of the federal Labor government in November 2007, Prime Minister Kevin Rudd invited treasurers from the Commonwealth and from the States and Territories to attend, partly to signal his intention to drive a substantial new reform agenda including reform of fiscal federalism. His successor, Prime Minister Julia Gillard, discontinued this practice.

COAG was a successor to the annual Premiers' Conferences that were traditionally concerned with the size and distribution of Commonwealth financial assistance grants to the States and Territories and, thus, were occasions for conflict and political grandstanding. Over time, COAG developed the capacity to become a more co-operative executive body, especially since the introduction of the goods and services tax (GST) in 2000 (which replaced the old financial assistance grants and whose net proceeds go to the States and Territories as general-purpose funding). It provides leadership on national issues and concludes the final stage of negotiations over contentious issues that require a collaborative federal approach. It now generates much of the agenda for ministerial councils.

Meetings of COAG are called and chaired by the prime minister. The agenda is set by the prime minister, with States and Territories normally having just one nominated item for discussion. Meeting frequency varies. COAG meetings have generally been held once or twice each year (except 1998 when it did not meet), but it met four times in both 2008 and 2009 before reverting back to its more typical frequency in subsequent years.

First ministers are responsible to their cabinets and authorized to speak on their behalf. However, it is tacitly agreed that during negotiations, first

ministers may have to make decisions "on-the-run" without prior opportunity to discuss events with their cabinet colleagues.

Decisions are by consensus, and it is accepted that the respective federal partners cannot formally impose their will on one another. This does not lead automatically to stalemates. Negotiations beforehand by officials and at ministerial councils mean that first ministers are already aware of one another's positions and they arrive at the (usually one-day) COAG meetings ready to negotiate the final details of any arrangement. There is normally a leaders-only dinner the previous evening at which loose ends and disagreements are sorted out. Occasionally, draft final communiqués are circulated at the last minute, and agreement is difficult to reach. Also, individual governments have on relatively rare occasions noted their dissent from or inability to agree with certain communiqué resolutions.[33]

COAG meetings are held in private. In addition to first ministers, the others present in the meeting room are members of the COAG secretariat and one or two senior advisers from each of the first ministers' departments or private offices, as well as the president and chief executive officer of the Australian Local Government Association.

Decisions taken in the context of these meetings are not formally binding; however, leaders are expected to stand by the decisions. Decisions are made public, with communiqués and related intergovernmental agreements and other documents (e.g., discussion papers) being published on the COAG website, usually on the afternoon of the meeting. As the decisions are not formally binding, they cannot be challenged in the courts. However, any subsequent legislation passed to enact the agreements can be challenged by applicants with standing in an appropriate court, if grounds exist to do so.

Council for the Australian Federation (CAF)

Historically, horizontal IGR between the States and Territories have been weak in Australia, as opposed to those involving vertical relations between the Commonwealth and the States. This is partly for practical reasons: with only six States, operational "boundary" issues are relatively few in number and of minor importance apart from those in which the Commonwealth already takes a keen interest, such as regulatory harmonization affecting business or the management of Australia's major river system, the Murray–Darling. Perhaps more significantly, economic competition between the States, as well as differences in their industrial base and level of fiscal dependence on the Commonwealth, have traditionally meant that they have generally been unable to combine forces politically or institutionally for long enough either to act collectively without the Commonwealth or to present a united front in their relationship with the Commonwealth.

Nevertheless, there have been some moves to rectify this situation in recent years, most notably through the Council for the Australian Federation (CAF), which was established by a memorandum of understanding in October 2006.[34] It comprises the premiers and chief ministers of the States and Territories. The need for such a body had been identified for many years, and CAF is modelled on Canada's Council of the Federation. CAF meets at least yearly or on an "as needs basis" to provide State and Territory leaders with an opportunity to discuss matters related both to COAG (either in advance or subsequent to COAG meetings) and to cross-jurisdictional issues in which the Commonwealth may have little or no role. It also provides a platform to communicate broader issues of public interest. All members attend CAF meetings, even if, on occasion, some agenda items only apply to certain States and Territories (e.g., common dates for summertime daylight saving, which only operates in some States). Meeting communiqués are later published on the CAF website.[35]

Whereas COAG is effectively a meeting chaired by the prime minister with a secretariat consisting of Commonwealth public servants, CAF has a rotating chair and an agenda set by a secretariat that is funded by all its members. Like COAG, consensus decision-making is the intention, and decisions are not formally binding.

CAF was established at a time when all State and Territory governments were Labor-led but the Commonwealth government was in Coalition hands. In 2007, Labor won government federally, meaning it was in office in all nine jurisdictions. The Australian political landscape does not remain static for long, however, and by 2014 Labor was in office only in South Australia and the ACT. Despite releasing a fourth *Federalist Paper* in 2011, CAF has lost momentum so that its meetings have essentially reverted back to the situation prior to CAF's establishment—that is, a tactical meeting of first ministers just prior to COAG meetings.

Ministerial Councils

Ministerial councils have been relatively informal instruments of co-operative federalism, providing an opportunity for portfolio ministers from across the federation (and, in certain cases, representatives of ALGA as well as of New Zealand) to meet to discuss issues of common interest on a regular basis. Historically, they have ranged in number from more than forty during the 2000s to just eight councils under the auspices of COAG since December 2013, in addition to another five "legislative and governance forums." Over time, they have become more formal and less secretive, and COAG now provides some guidelines for their operation.[36] Typically, they are established by COAG or under a formal agreement, and a small number are established or empowered under statute.[37] Their rules,

membership, and meeting frequency vary. While most ministerial councils rely on consensus decision-making, a few (normally those linked to a statute or a formal IGA and with the authority to take joint executive action) permit majority voting.

At ministerial council meetings, most ministers have a degree of autonomy depending on how the prime minister and premiers want to manage their cabinets. In cases where policy matters pertain directly to a minister's portfolio and do not constitute a budget item, they usually have some autonomy. Where budget commitments or whole-of-government matters are involved, ministers tend to refer back to their cabinets for discussion and approval.

Ministerial councils occupy a curious place in Australia's collaborative federalism. They can be venues of conflict, negotiation, and (partly due to most councils insisting upon consensus decisions) inertia. At the State level, they are often considered as events to be attended "after the real work is done" (i.e., pressing State issues). They are typically dominated by the Commonwealth. Their strategic role varies with the extent of oversight by COAG. Lobby groups (especially business) are reluctant to see matters passed on to ministerial councils because they fear issues will be delayed. Hence, there is constant pressure for matters to be "passed upwards" to COAG for prioritizing and final decision. Yet, some ministerial councils are sites of co-operation and progress with problem-focused meetings. Those linked to semi-independent regulatory bodies (see section V below) are important decision-makers in their own right.

The COAG meeting of February 2011 agreed to establish a new system of ministerial or COAG councils. In recognition of the failings and criticisms of ministerial councils, it was agreed that they will be more closely focused on national reform and oriented toward supporting COAG's work. Three types of ministerial council were established: twelve permanent *standing councils*, to address "enduring issues of national significance"; seven *select councils* to concentrate on "specific reform tasks of critical national importance"; and *legislative and governance forums* (five, initially) concerned with oversight of ministerial responsibilities set out in legislation, treaties, and intergovernmental agreements that do not fall under the purview of the standing councils.[38] More recently, however, in December 2013 at the first meeting of COAG held by the new federal Coalition government, the number of ministerial councils under the auspices of COAG was cut further to just eight, and the distinction between standing and select councils was removed. The new structure reflects an explicit promise that "[i]n future, COAG will focus on a few important national priorities, and on outcomes rather than process."[39] It is unclear whether other ministerial councils, not under COAG direction or oversight, will be maintained or established under this new system.

The Civil Service

Each order of government has its own civil service (the Australian term is *public service*). Officers can move from one government to another at their discretion (through job application), but such mobility is relatively infrequent.

The issue of whether the public service has been politicized is widely debated. On one hand, the public service maintains that it continues to uphold the best independent traditions of the Westminster system, providing professional, politically neutral, and "frank and fearless" advice to ministers. On the other hand, concerns have been raised as to whether department heads and other senior public servants are as prepared to challenge their ministers as in the past, and whether they are prone to engage in partisan politics. The introduction of performance-based and fixed-term contracts for senior public servants is seen as having changed the incentive structures in this regard.[40]

At the Commonwealth level, there is little formal education or training in IGR, with learning being done "on the job." In most States and Territories, IGR tend to be the explicit responsibility of relatively few officers in a small number of agencies.

There are regular meetings of officials from both orders of government in most policy sectors, normally linked to a COAG or ministerial council direction or agenda item. These meetings usually take place "as needed" and involve Commonwealth representatives, although some meetings involve officers only from State and Territory departments. Meetings of officials provide advice to ministerial councils, resolve issues at policy and strategic levels, and, in conjunction with the ministerial council secretariat, set the agenda for the next ministerial council meeting. Typically, the chair rotates between jurisdictions.

The senior officers' meetings of COAG are the most significant meetings preceding COAG. They are normally chaired by the secretary of the Department of the Prime Minister and Cabinet—the senior public servant in the Commonwealth government—and comprise the secretaries of the premiers' and chief ministers' departments and related officials, and the chief executive officer of ALGA. They meet both in the lead-up to COAG to prepare the agenda papers, and after the meetings to arrange the next steps forward. Several COAG working groups were established in December 2007 to advance the then new government's national reform agenda.[41] In a novel and somewhat controversial initiative, a Commonwealth minister chaired each working group, with the deputy chair being a State government senior official; State government ministers were not formally included in this process. The working groups are no longer in operation and these processes seem unlikely to be replicated.

IGR Units

The Commonwealth has no dedicated department in the public service charged with conducting IGR with the States and Territories. The Department of the Prime Minister and Cabinet houses a COAG unit and secretariat. Some, but not all, of the functional departments have a specific IGR section or division.

State and Territory governments have similar arrangements, if somewhat less elaborate. Most have a specific IGR unit in their first minister's department, often co-located with their cabinet or policy unit. These units provide advice to the premier or chief minister on COAG and CAF meetings, working groups, and related matters. They also coordinate cross-government IGR activity relevant to the premier. Some of the larger sectoral departments (normally those receiving significant Commonwealth funding through a section 96 specific purpose payment agreement—such as housing, health, and education) have dedicated IGR sections, as do most treasury and finance departments. Smaller jurisdictions are less likely to have dedicated IGR units due to a lack of human resources. They therefore have to rely on larger States for some of their information and policy advice. Central agency IGR units prepare cabinet papers in advance of COAG, so that collectively agreed policy positions can be taken by first ministers to COAG.[42]

Logistics of Executive IGR

The COAG secretariat oversees the logistics of vertical executive IGR. The COAG secretariat is not, however, in charge of ministerial councils. Responsibility for these normally resides with a designated secretariat in the relevant Commonwealth department, or is drawn from the respective State and Territory departments in the case of health, education, and attorneys general. Officer involvement in these meetings is financed by their respective departments.

In 2007, a Reform Council reporting directly to COAG was established to oversee progress on COAG's National Reform Agenda. Staff for its secretariat were drawn from both Commonwealth and State/Territory governments.

Social networks are crucial to the conduct of IGR. The bases for these networks are varied. Some officials have been working in IGR for a decade or more. Moreover, some public servants have moved back and forth between industry, academia, and government and have expanded their networks across these areas as a result. Political parties also provide social networks that can facilitate IGR, while some ministers get to know each other quite well—even if they are from different political parties—through ministerial councils. This can help smooth over problems on occasions.

Informal exchanges, whether by telephone, email, or personal meetings, are integral to keeping participants informed about events and people. Although it is not possible to assess the relative importance of formal and informal arrangements accurately, personal relationships working in parallel with the institutional and legal frameworks clearly facilitate IGR.[43] Several authors[44] have also attested to the importance that a core group of key State and Commonwealth officials (including Kevin Rudd, then a senior official in the Queensland government who later became prime minister) played in the early 1990s in developing and keeping on track the cooperative IGR agenda that culminated in the establishment of COAG and the National Competition Policy.

V. Joint Agencies, Specialist Agencies, and Independent Commissions

Australia has a long tradition of establishing independent agencies for a host of public policy issues. Many are explicitly joint (i.e., involving both orders of government)—both in their creation (e.g., through intergovernmental agreement backed up by corresponding legislation) and in their operation (with members appointed by both Commonwealth and State governments). Others are formally Commonwealth bodies that nonetheless play an important role in IGR and are substantially independent of the government (e.g., the Commonwealth Grants Commission). They cover a multitude of roles, including fiscal federalism (Commonwealth Grants Commission); evaluation (COAG Reform Council and National Water Commission); research and analysis (Australian Bureau of Statistics and Institute for Health and Welfare); policy advice (Food Standards Australia and New Zealand; National Transport Commission); and regulation (Australian Competition and Consumer Commission, Office of the Gene Technology Regulator, Great Barrier Reef Park Authority, and Australian Energy Regulator).

For most of the explicit IGR bodies, membership and operational rules are established through intergovernmental agreement (sometimes with associated Commonwealth legislation). In many cases, membership is jointly (or separately) decided by the Commonwealth and the States and Territories, or the States and Territories may have the ability to veto Commonwealth-proposed members.[45] Depending on whether the agency is established by Commonwealth legislation or by IGA alone, it will report either to a Commonwealth minister or to a ministerial council.

Funding arrangements vary, based largely on the extent to which an agency deals with matters for which the Commonwealth has sole or prime responsibility. Most bodies established under Commonwealth legislation (e.g., the Commonwealth Grants Commission and the Australian Competition and Consumer Commission) are of this nature, and are

thus solely funded by the Commonwealth. However, there are exceptions. For example, States and Territories provide 65 percent of the National Transport Commission's budget even though it was established under a Commonwealth act, as it deals to a great extent with State transport issues. The National Environmental Protection Council Service Corporation (the public service body that advises environment ministers) is funded equally by the Commonwealth and the States and Territories, as it is similarly engaged on many State matters. State and Territory funding shares are normally based on population share.

Two agencies that have played an especially significant role in the conduct of IGR are the Commonwealth Grants Commission (CGC) and, more recently, the COAG Reform Council (CRC) before its abolition in 2014. The Grants Commission was established in 1933 to assess claims by the States and Territories for financial assistance. Today, its main role is to advise the Commonwealth Treasurer on horizontal fiscal equalization (i.e., the distribution to States and Territories of the revenue raised by the Commonwealth through the goods and services tax). The CGC is established under Commonwealth legislation,[46] sits in the treasurer's portfolio, and is financed by the Commonwealth. However, it is an independent agency that works closely with all governments. Its recommendations have always been accepted by the Commonwealth Treasurer. It also advises on financial assistance to local governments.

The COAG Reform Council (CRC) was created by COAG in 2007 and was the most important institutional innovation in IGR under the federal Labor government. Its functions gradually expanded, and it became central to the effectiveness of COAG's National Reform Agenda, as it provided the independent assessments (and related funding recommendations) for COAG to determine how the Commonwealth, States, and Territories were progressing against agreed performance benchmarks in various policy areas, for the purposes of the incentive payments.[47] The CRC's role here was analogous to that of the National Competition Council (NCC), which was established in the mid 1990s and was responsible for advising the Commonwealth on the progress made by States in achieving reforms under the National Competition Policy, along with associated recommendations of financial rewards and penalties.

The CRC comprised six members: three (including the deputy chair) appointed on the recommendation of the States and Territories, and three (including the chair) nominated by the Commonwealth. With offices in Sydney, the CRC secretariat was administratively located within the Commonwealth Department of the Prime Minister and Cabinet. However, it reported directly to COAG, not to a Commonwealth minister. Unlike the NCC (which was established under legislation), the CRC had no formal legislative status or dedicated intergovernmental agreement underlying it. Its vulnerability was

demonstrated when the newly elected federal Coalition government unilaterally announced the CRC's abolition in its first budget in May 2014.

Most of these joint bodies provide advice to executives (who in turn may inform the relevant parliament), who then make authoritative decisions. Decisions that require primary or delegated legislation must be approved, or at least not disapproved, by one or more parliaments, depending on the design of the scheme. Thus, one such body, Food Standards Australia and New Zealand, develops and administers the food standards, but enforcement is the responsibility of State and Territory health departments. However, some bodies established under their own legislation have their own powers; for example, the Australian Competition and Consumer Commission can initiate action against companies for uncompetitive activities, while the Gene Technology Regulator (appointed by the Commonwealth with the agreement of a majority of jurisdictions) issues licences for dealing with genetically modified organisms under the Gene Technology Act 2000.

Inquiries and planning reviews commissioned outside of a formal IGR-related body play a relatively minor role in the conduct of IGR. In 1996 and again in 2014, newly elected federal Coalition governments established national "Commissions of Audit" to enquire broadly into all aspects of government expenditure and organization.[48] Both commission reports recommended clearer roles and responsibilities between the levels of government, including providing constituent units with greater financial capacity and policy and service responsibility as a way of reducing Commonwealth government responsibilities and expenditures. The 1996 report had very little influence in this regard, and it remains to be seen whether the 2014 report's recommendations will fare any better.

Occasionally, one order of government may enquire into the effect of another government's policies, often in connection with a politically contentious matter. For example, in 2001, the governments of New South Wales, Victoria, and Western Australia commissioned a review of Commonwealth–State funding aimed primarily at amending the system of horizontal fiscal equalization to provide a better deal for these three "donor" States.[49] In 2004, the Commonwealth Parliament established an inquiry into alleged "cost-shifting" by State governments onto local governments.[50] In the late 1990s, the Victorian Parliament—concerned with what it perceived as the centralizing trends in Commonwealth policy—produced four reports on various aspects of IGR in Australia.[51] Pressure groups and think tanks provide regular (often critical) commentary on the state of Australian federalism.[52] CAF has commissioned research on aspects relevant to IGR, as a way to influence public opinion (and the Commonwealth) and increase understanding across jurisdictions.[53] There is some anecdotal evidence of "laboratory federalism" and policy-learning

between jurisdictions; however, it has received little scholarly attention and its extent is not clear.[54]

VI. Agreements between Orders of Governments

The use of intergovernmental agreements (IGAs), memoranda of understanding (MOU), and the like is common. Estimates of the number of IGAs currently in force vary, with some anecdotal evidence suggesting as many as 145.[55] An incomplete list of agreements is identified on the COAG website. No single body is responsible for collecting and archiving all IGAs. In the case of bilateral agreements, only the signatories may have copies.

Although most agreements are vertical, there are also a number of horizontal arrangements, and some involve two or more orders of government. For example, there is an agreement between States not to "poach" international businesses from one another,[56] and another on interstate water trading between States and Territories, which also involves the Commonwealth.[57] Such agreements do not usually involve third parties. There are also a number of IGAs involving local government, both at State level as well as in tripartite national agreements.[58] Major national agreements are usually "multilateral," although some only establish overall parameters and use bilateral agreements[59] to sort out details applicable to particular jurisdictions. Such bilateral agreements linked to national specific purpose payment (SPP) agreements have largely been superseded by the system of "broad-banded" SPPs and National Partnership Payments introduced in 2009 (see section VII below).

The purpose of IGAs is, typically, to assign roles and responsibilities to the respective signatory governments, provide details of any financial provisions, and establish requirements for performance reporting. IGAs are predominantly used in areas where States and Territories have primary responsibility for providing services, but for which the Commonwealth gives significant financial support. Many agreements are made public through the Internet, although some are only available on demand to the relevant department or through Freedom of Information legislation provisions.

Intergovernmental agreements are used both to harmonize the exercise of authority and to sort out "who does what" in cases of concurrent powers. For example, many IGAs implemented as part of the National Competition Policy initiative in the 1990s recognized that the Commonwealth, States, and Territories would retain exclusive control over how reform would be implemented within their jurisdictions.[60] By contrast, the IGAs for health care and education, associated with specific purpose payments from the Commonwealth, set out the roles and responsibilities of both orders of government in policy areas that have become shared in practice, although they are formally State matters.

In general, IGAs recognize the reality of shared governance and attempt to lay down the division of labour between orders of government, as well as address policy issues, particularly the harmonization of regulations or pricing and market rules. Asymmetrical arrangements are occasionally adopted in response to a jurisdiction's particular circumstances.[61]

Aside from section 105A of the Constitution, which permits the Commonwealth to enter into agreements with respect to State debts, no formal constitutional or general legislative regime governs agreements. Generally, agreements are the exclusive purview of the executive branches, concluded by the signature of the relevant ministers. With some exceptions, IGAs themselves are not normally approved by the Commonwealth or State parliaments, unless they are attached to consequent legislation (e.g., the 1999 Intergovernmental Agreement on the Reform of Commonwealth-State Financial Relations which initiated the GST arrangements[62]). Nevertheless, IGAs often form the basis for subsequent legislation relating to funding or the establishment of particular institutions (e.g., the National Transport Commission).

IGAs are not legal instruments, and thus generally create political rather than legal obligations.[63] Two High Court decisions in 2009–10 related to the national water initiative IGA made it clear that the Commonwealth cannot enter into agreements that contravene the Constitution.[64] Political pressure can also be applied when the parties to an IGA do not want to be seen as reneging on past agreements. But it is possible for signatories to withdraw from or break an agreement, especially if the IGA was signed by a previous government. For example, the new federal Coalition government advised States and Territories in May 2014 that it would not meet several funding obligations in a number of health and hospital IGAs signed by the former Labor government in 2011.[65]

Disputes concerning IGA implementation are primarily resolved through negotiation. Most agreements do not have a detailed dispute resolution mechanism, other than to say that the signatories agree to work through their issues. An exception was the 1998 health agreement, where an arbitration clause was invoked by the States to address a disagreement over indexation arrangements; however, the Commonwealth subsequently ignored the arbitrator's findings.

VII. IGR and Fiscal Federalism

As noted above, Australia has a high level of vertical fiscal imbalance, combined with a comprehensive, complex, and redistributive process of horizontal fiscal equalization. Both vertical and horizontal fiscal transfers involve extensive use of IGR institutions and processes. The Commonwealth Grants Commission (CGC) has, since its establishment in 1933, been at

the heart of the horizontal equalization system responsible for determining the distribution of general-purpose revenues from the Commonwealth to the States and Territories. The CGC was discussed above, so the discussion here focuses mainly on vertical fiscal federalism.[66]

Following a High Court ruling in the *First Uniform Tax* case in 1942, the Commonwealth has enjoyed a de facto monopoly over levying the income tax. Although the States retain the legal power to impose such taxes, the Commonwealth, with one exception, has declined to "create room" for them to do so by lowering its own tax rates.[67] Largely as a result, State expenditures have far exceeded income derived from State revenue sources (e.g., royalties, stamp duties, and payroll tax). Subsequent High Court decisions invalidating State and Territory taxes on the grounds that they imposed excise duties have exacerbated the situation.[68] Hence, the Commonwealth provides to the States two types of financial assistance: general-purpose grants with no strings attached (sourced, since 2000, from GST revenues and distributed to States and Territories according to a horizontal equalization formula recommended by the Grants Commission) and specific purpose payments (SPPs) under section 96 of the Constitution. These two types of grants commonly provide around half the budget of each State or Territory (i.e., a State's revenue typically comprises about 50 percent own-source revenue, 25 percent GST revenues, and 25 percent SPP revenues).[69]

SPPs have long been a bone of contention for State and Territory governments, which generally regard them as eroding State policy and program autonomy, while also being inefficient and inflexible due to a focus by the Commonwealth on tight controls over matching funding, program details, and reporting requirements.

To attempt to overcome these tensions and improve policy performance, a new Intergovernmental Agreement on Federal Financial Relations was finalized in November 2008 and came into effect in January 2009.[70] It formed the centrepiece of COAG's new national reform agenda, in association with the Federal Financial Relations Act 2009, which gives effect to the financial provisions of the intergovernmental agreement. Under the new system, ninety or more existing SPPs were rationalized (or "broad-banded") into five new SPPs supported by new national agreements in the areas of health care, schools, skills and workforce development, disability services, and affordable housing. Each SPP is accompanied by a mutually agreed statement that sets out the objectives and clarifies the roles and responsibilities of each order of government. Performance indicators and benchmarks were able to be established jointly, alongside policy and reform directions. Payments subject to these arrangements were effectively free of the prescriptive conditions contained in earlier SPPs, enabling a focus on outcomes, subject to monitoring by the COAG Reform Council. The only formal condition attached to these SPPs is that the funds provided be spent on the subject matter of the SPP.[71]

The Commonwealth did not entirely remove conditions from its grants to the States, however. These arrangements allowed the Commonwealth to also provide National Partnership Payments (NPPs) to the States, over and above its funding through the five SPPs, to support new projects and initiatives, to facilitate reforms by the States, and to reward States that delivered on reforms. States and Territories could to some extent tailor these targets to their own circumstances, following negotiations with the Commonwealth. The size of these NPP payments was significant. In 2009–10, boosted by the Commonwealth's economic stimulus package in response to the global financial crisis, NPPs totalled around AUS$29 billion (US$29.3 billion) or almost 30 percent of all Commonwealth grants to the States and Territories. In 2014–15 the amount budgeted for NPPs had fallen back to AUS$12.66 billion, or 12.5 percent of Commonwealth grants.

Thus, through SPPs and NPPs, the Commonwealth finances projects and programs over which it does not have direct legislative or constitutional authority. The Commonwealth also makes direct grants to industry, local governments, and community groups, bypassing the States and Territories (although it is now clear that at least some of these payments are unconstitutional, following recent High Court decisions[72]). The Commonwealth Parliament exerts little effective control over how these grants are made to the States and Territories. The Federal Financial Relations Act 2009 provides for a standing appropriation for grants to States and Territories, thereby removing the need for them to go through the annual budget process in the Commonwealth Parliament (although this was always a fairly perfunctory exercise). However, the Commonwealth budget papers normally include a specific paper on federal–state financial relations, outlining recent developments and detailing budget transfers.

VIII. IGR and Efficiency in Policy-Making and Implementation

The collaborative federalism experience of the early 1990s, associated most particularly with the establishment of the Council of Australian Governments and the National Competition Policy, led several observers to conclude that Australian federalism and its IGR machinery are capable of producing effective, efficient, and timely policy reforms: "the deliberate attempt at collaborative federalism . . . produce[d] better and more timely policy responses than the sterile standoff that had previously characterised too much of federal-state relations."[73] Significant progress—in the form of consistent national policy frameworks, agreement on implementation, and creation of jointly influenced institutions responsible for advice on

policy, regulations, and standards—was made not just in microeconomic policy, but also in environmental protection; vocational training, road, and rail regulation; and mutual recognition between jurisdictions of licensed occupations.[74]

Progress has not been constant; "rather, periodic phases of significant mutual achievements are often followed by periods of policy consolidation, refinement and extension."[75] Events can stir governments into action—for example, a shooting massacre in Tasmania in April 1996 swiftly led to gun ownership reforms across Australia. Similarly, Commonwealth-initiated national security reforms (albeit with amendments insisted upon by States and Territories) were also enacted relatively quickly following terrorist attacks in the United States in 2001 and in Bali, Indonesia, in 2002.[76]

Where policy disagreement is strong or party–political related (e.g., trade union-based issues such as industrial relations or occupational health and safety), progress can be slow or may conclude with a forcible Commonwealth takeover, or insistence on change through section 96 conditional grant funding. Similarly, some policy areas appear too central to State and Territory governments' raison d'être to be conceded lightly (e.g., control of government schools, land management, and mineral taxation), although even in some of these policy fields, the Commonwealth can provide political leadership or use its tax powers to secure its desired policy changes.[77] On occasions, the Commonwealth has set up alternative provision as a form of "vertical competitive federalism" in response to a rebuff from States to a Commonwealth policy proposal. Thus, the fourth Howard government (2004–7) established its own vocational training colleges and school facilities building program.

Media, business, and other groups express frustration and criticize both orders of government for continuing policy failures in areas either that are inherently concurrent (e.g., health and indigenous affairs) or where States and Territories have failed to respond with sufficient speed or policy effectiveness on cross-border issues, such as water or business regulation harmonization. In the latter case, financial inducements by the Commonwealth may be required to get States and Territories to agree to change.

The involvement of first ministers and a commitment from the Commonwealth appear to be crucial prerequisites for significant policy progress. Meeting at COAG in the national spotlight places pressure on State and Territory leaders to take a "national interest" rather than a local perspective on issues to an extent not evident at ministerial council meetings, where "old style" politicking and parochialism are more common.[78] This is especially evident now that the GST has taken most financial issues off the agenda at COAG meetings.[79]

While the initial impetus created by the COAG reform agenda in 2008–9 produced change in many areas, it is still too early to determine the extent

to which that change will be lasting or significant.[80] The experience of the 1990s suggests that the window of reform is only open for a limited period before reform fatigue and consolidation—as well as other pressing issues demanding governments' attention—take over. This becomes even more likely as new governments are elected to office with their own agendas, or as financial circumstances change. For example, the federal Coalition government elected in September 2013 adopted a policy of fiscal stringency in the aftermath of the more expansive policies pursued by Labor in the wake of the global financial crisis of 2008–9. Part of the new government's strategy was a cutback in funding to the States and Territories, and the winding up of many national partnership payments. As a result, it decided that there was no need to continue with the COAG Reform Council. With no prospect of future funding increases, States and Territories did not object to the Council's demise, although they were very critical of the announced cuts in current and future Commonwealth funding—potentially suggesting a return to "business as usual" in Commonwealth–State relations.[81]

IX. Accountability, Participation, and Legitimacy

As noted, Australian federalism is essentially executive in nature, conducted between governments, with occasional significant interventions by the High Court. Formal accountability occurs on several levels, not all of them satisfactory to the participants and stakeholders concerned.

Direct participation by, and consultation with, the public is rare.[82] Ministerial councils and COAG, from time to time, provide for consultation processes involving the release of discussion papers or closed discussions with key interest groups (such as health professionals over reforms to health workforce arrangements). COAG and CAF have fairly extensive websites displaying communiqués and related documents, such as agreements and work programs for officials.

The workings of ministerial councils tend to be less transparent and accessible, although performance is uneven. Specific meeting agendas are not published in advance at either the first minister or the ministerial council level (although upcoming issues are often flagged in the media).

The High Court has occasionally intruded into co-operative IGR mechanisms. For example, the Court struck down a co-operative ("cross-vesting") scheme concerning judicial power where State jurisdiction was vested in federal courts and vice versa, so that both courts could hear matters involving aspects of State and federal jurisdiction. In another case, the Court invalidated co-operative schemes conferring State executive power on Commonwealth agencies, unless the Commonwealth had a specific head-of-legislation power. These two decisions jeopardized a co-operative regime

for the regulation of corporation affairs, which was only overcome through a referral of powers to the Commonwealth by the States.[83]

The minimal accountability of ministers to parliaments for IGR co-operation has been criticized. Hence, the Senate (which is often controlled by non-government parties) has occasionally delayed or refused to pass legislation agreed upon by the Commonwealth with the States (although usually for reasons relating to substantive policy disagreements, rather than issues of IGR or executive–parliament relations as such). Examples include environmental and native title approvals, as well as the scope of the GST agreement reached after intensive Commonwealth–State negotiations.

Some State upper houses have been critical of uniform and mirror legislation placed before them by their governments. Western Australia's upper house, in particular, is often critical of this type of legislation on principle and has a committee to scrutinize such bills, which can lead to delays in their passage. Such behaviour is sometimes criticized by business groups for undermining the harmonization of regulations and therefore increasing business costs.

Two notable, but less commonly considered, aspects of accountability concern accountability *within* government and *performance* accountability *of* governments in particular policy fields.

COAG increased the central coordination of IGR and consequently the extent to which whole-of-government policy positions are now being taken by individual Commonwealth and State governments. This strengthened the ability of central agencies to oversee and control various IGR policy areas.[84]

Australia also pioneered the use of performance and benchmarking processes in IGR.[85] This began in the mid 1990s with the creation of the National Competition Council and its assessments of State and Territory government reform under the National Competition Policy, in return for payments from the Commonwealth. These assessments were sometimes controversial. For instance, Western Australia was penalized financially by the Commonwealth Treasurer for not liberalizing its retail trading hours, despite holding a referendum in which voters rejected such a move.[86] Benchmarking of State and Territory service provision was also instituted by COAG in 1994 through a joint Commonwealth–State exercise, which is published annually as the *Report on Government Services*. This report provides comparative information on the efficiency and effectiveness of a range of State government services such as housing, child care, hospitals, prisons, and schools.[87]

These two types of performance accountability were combined in the COAG Reform Council, which reported to COAG on the progress that States and Territories were making toward agreed benchmark outcomes in areas covered by Specific Purpose Payment and National Partnership

agreements. These public assessments formed the basis for reward payments from the Commonwealth to States and Territories under NPPs. However, as noted above, when the new federal Coalition government announced its intention in its first budget to severely cut its funding to the constituent units over the next decade, neither the Commonwealth nor State governments felt the need to continue with the Reform Council, and it was abolished in June 2014.

These increasingly intermeshed accountability processes did not completely preclude "old style" adversarial politics. For example, the Howard Coalition government (1996–2007) appealed to citizens to pressure State governments to reform certain policy areas (e.g., taxes and charges). Late in its term, it attempted a takeover of a hospital in Tasmania in response to an allegedly unpopular State government decision to close some of its services. State and Territory governments are also not averse to blaming the Commonwealth for funding shortfalls of their own making.

X. The Impact of IGR on Federalism: Assessment and Future Directions

There is no doubt that intergovernmental relations in Australia have deepened and broadened over the past twenty years. There is now a wide range of joint institutions and formalized structures, accompanied by a hive of Commonwealth and State bureaucratic activity. The establishment of COAG gave more permanence and prominence to IGR—both within government administration as well as in public debate and scrutiny—than ever before.

The underlying institutional, political, and economic contexts in which these IGR structures function are crucial for their operation. These contexts have consisted of centralization between and within governments; financial weakness at subnational level; a particular focus on competition and market reform (including a strong push by business to create properly functioning national markets); as well as other national issues that have encroached on traditional State policy realms. They have also involved preparedness by the Commonwealth to push forward with its agenda through a combination of leadership, co-operation, and coercion, depending on the circumstance. The Commonwealth normally retains the initiative due to the prevailing fiscal imbalance and resulting spending power; its expanded constitutional powers; and its ability to argue more convincingly that it is acting in the national, rather than parochial State, interest.

State governments—as the main providers of government services—retain some ability to defend themselves against Commonwealth encroachment, or at least to extract a price for agreeing to change. States and Territories have also initiated two major reform processes—the

competition agenda of the early 1990s and, prior to the 2007 election, the national reform agenda embracing competition and human capital initiatives which spurred the development of a new fiscal federalism architecture and extensive policy activity around COAG. In both cases, State leaders developed proposals for reforming the structure and conduct of IGR in a co-operative manner as a way to better deliver national policy reform.[88] These proposals were then taken up and shaped by the Commonwealth into national reform packages. A crucial part of these reform agendas was the "price" demanded by the States in the form of significant financial assistance from the Commonwealth in return for State policy reforms. In both instances, States argued that increased Commonwealth funding was necessary, not only to compensate States for the financial burden they incurred in implementing reforms (e.g., through foregone revenue and increased investment costs), but also to help States bear the political costs they anticipated from local interest groups objecting to many of the reforms.

Partisan politics assisted in the most recent round of reforms, when all jurisdictions had Labor governments for almost a year after November 2007. However, even then, support was not assured, with several States and Territories objecting to an impression that they were responsible for delivering on Commonwealth election commitments.[89]

Later, the same Commonwealth government—facing public criticism for a perceived lack of progress on key policies—took a much more critical and assertive stance toward the States, threatening to take over the health system (through referendum if necessary) unless its preferred reforms were agreed to. The subsequent two-day COAG meeting (accompanied by adversarial media sparring) produced a compromise agreement, with the only non-Labor government (Western Australia) refusing to sign. Subsequent political changes at both national (the replacement of Prime Minister Rudd following an internal Labor Party leadership tussle) and State (the election of Liberal governments in both Victoria and New South Wales) levels led to this compromise agreement being further amended, with the Commonwealth's initial position being weakened in the face of opposition led by non-Labor States.[90]

Three key issues in IGR can now be identified. The first is whether governments—particularly central agencies and their officials—can deliver reform in a timely and effective way, or whether complexity, cynicism, or changing political and policy priorities will undermine COAG's ability to achieve significant policy changes through intergovernmental consensus. At the first COAG meeting held soon after his election in December 2007, then Prime Minister Rudd declared his intention to turn COAG into a "workhorse for the nation."[91] He followed up with an unprecedented eight meetings in two years. Subsequently, however, disillusion set in, and COAG

was criticized as overloaded and ineffective, while at least two premiers revived calls for "competitive federalism" to be restored in order to increase accountability and performance.[92] The new Coalition government elected in September 2013 has promised to work with the States to produce a White (major policy discussion) Paper on federalism reform, recommendations from which it proposes to take to the election in 2016.[93] But, at the same time, it also reduced funding to the States and generated a political backlash from first ministers, including those from the same political party as the prime minister.

Second, the recent relatively co-operative relationship between the two orders of government is not really built on strong institutional foundations.[94] While the extent and density of IGR in Australia has undoubtedly increased, it has not been accompanied by institutionalization at the apex of these relations. COAG remains a meeting of leaders, served by a Commonwealth secretariat, without formal rules or status. The Commonwealth retains powerful financial, legal, and political levers, which it can use if it believes a co-operative approach is not delivering its policy agenda sufficiently well or quickly. This was demonstrated in 2010 with its proposed changes to health and hospitals funding and policy and to the taxation of mineral resources. It was in evidence again with the funding decisions of the new Coalition government in its 2014–15 budget, including the unilateral decision of the Commonwealth to cut back on grants to the States and to abolish the COAG Reform Council, which had not been underpinned by legislation or even an IGA. In the immediate wake of these announcements, the Prime Minister refused to hold a COAG meeting despite a request to do so from seven of the eight premiers and chief ministers.[95] These events show that most of the intergovernmental institutions established in the past twenty-five years through IGAs and Commonwealth legislation are ultimately at the mercy of the Commonwealth for as long as informal arrangements prevail at the peak level.

Third, these two points lead back to the ongoing question of whether the apparently unstoppable trend toward concurrent, shared governance in which the Commonwealth dominates has its limits. Is a reconsideration of roles and responsibilities between the Commonwealth and States required? If so, is it best achieved by constitutional reform or by agreement between the Commonwealth and States—as COAG attempted in the 1990s? That in turn would require debate about whether the future direction of IGR should increase Commonwealth responsibilities or instead mark out certain fields as belonging more clearly within the purview of the States. This latter approach has once again been canvassed by the National Commission of Audit established by the federal Coalition government. The terms of reference for the federalism White Paper suggest some recalibrating of the federation, with the States assuming more responsibilities

and intergovernmental activity playing a lesser role.[96] However, that would require significant reform of fiscal relations between the Commonwealth and the States and a firmer institutionalization of these relations through legislation or in some other way. Another White Paper, this time on taxation, is also proposed, which could at least indirectly have implications for federalism and IGR. But the history of Australian federalism suggests that a significant, long-term reassertion of State power is unlikely and that shared governance under Commonwealth leadership—with an underlying threat of Commonwealth sanctions ever present—will remain.

Notes

1. For accounts of various aspects of Australia's system of government, see Norman Abjorensen, "Commonwealth of Australia," in Wolfgang Renzsch, John Kincaid, and Klaus Detterbeck, eds, *Political Parties and Civil Society in Federal Countries* (Toronto: Oxford University Press Canada, 2015); Nicholas Aroney, "Australia," in Luis Moreno and César Colino, eds, *Diversity and Unity in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2009), pp. 16–46; Graham Sansom, "Commonwealth of Australia," in Nico Steytler, ed., *Local Government and Metropolitan Regions in Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 2009), pp. 8–36; Anne Twomey, "Commonwealth of Australia," in Hans Michelmann, ed., *Foreign Relations in Federal Countries* (Montreal and Kingston: McGill-Queens University Press, 2009), pp. 36–64; Alan Morris, "Commonwealth of Australia," in Anwar Shah, ed., *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal and Kingston: McGill-Queen's University Press, 2007), pp. 43–72; Cheryl Saunders and Katy le Roy, "Commonwealth of Australia," in Katy le Roy and Cheryl Saunders, eds, *Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006), pp. 38–70; John M. Williams and Clement Macintyre, "Commonwealth of Australia," in Akhtar Majeed, Ronald L. Watts, and Douglas M. Brown, eds, *Distribution of Powers and Responsibilities in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006), pp. 8–33; and Cheryl Saunders, "Commonwealth of Australia," in John Kincaid and G. Alan Tarr, eds, *Constitutional Origins, Structure and Change in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2005), pp. 13–47.
2. For GDP and GDP per capita, refer to Australian Bureau of Statistics, *5204.0 Australian System of National Accounts, September Quarter 2014*, (www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/C8750AFDEAF39B8CCA257DA2000D2B0D/$File/52060_sep%202014.pdf (viewed March 17, 2015). Currency conversions are based on period average exchange rates available in Australian Bureau of Statistics, *5368.0 International Trade in Goods and Services—December 2014*, www.ausstats.abs.gov.au/ausstats/meisubs.nsf/0/82CD4D3B11B5202ECA257DE0000D8B58/$File/53680_dec%202014.pdf (viewed March 17, 2015).
3. See note 2 above for population and currency conversions. Also refer to Australian Bureau of Statistics, *5220.0—Australian National Accounts: State Accounts, 2013–14*, www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/E6765105B38FFFC6CA2568A9001393ED?OpenDocument (viewed March 17, 2015).
4. This is the "double dissolution" provision (section 57). The only joint sitting of Parliament was held in 1974. The Senate's power was exemplified in November 1975 when the government was controversially dismissed by the Governor General following its failure to pass the budget.

5. An exception is Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge: Cambridge University Press, 1995), who argues that the constitutional founders intended a concurrent rather than a coordinate federalism model. The opposing view is summarized in Alan Fenna, "The Division of Powers in Australian Federalism: Subsidiarity and the Market," *Public Policy* 2, no. 3 (2007): 175–94.
6. *New South Wales v Commonwealth* (1915) 20 CLR 54.
7. Martin Painter, *Collaborative Federalism: Economic Reform in Australia in the 1990s* (Cambridge: Cambridge University Press, 1998), p. 23.
8. Alan Fenna, "The Malaise of Federalism: Comparative Reflections on Commonwealth-State Relations," *Australian Journal of Public Administration* 66, no. 3 (August 2007): 298–306.
9. The case is properly known as *South Australia v Commonwealth* (1942) 65 CLR 373. For the judgment, see http://www.austlii.edu.au/au/cases/cth/high_ct/65clr373.html (viewed March 17, 2015). A Second Uniform Tax Case, *Victoria v Commonwealth* (1957) 99 CLR 575, was also unsuccessful in overturning these arrangements. For the judgment, see www.austlii.edu.au/au/cases/cth/high_ct/99clr575.html (viewed March 17, 2015).
10. In *Commonwealth v Tasmania* (1983) 158 CLR 1, the High Court ruled that the Tasmanian Hydro Electric Corporation could not approve the destruction of old-growth forests because it contravened, under section 109 of the Constitution, the Commonwealth's World Heritage Properties Conservation Act 1983. For the judgment, see www.austlii.edu.au/au/cases/cth/high_ct/158clr1.html (viewed March 17, 2015). The judgment was important not just for this case, but also because, as the number of treaties increases and their subject matters expand ever wider, so does the Commonwealth's potential and actual legislative power.
11. In *New South Wales & Ors v Commonwealth* (2006) HCA 52, the Commonwealth government's *Workchoices* legislation was challenged on the grounds that the Constitution implied (in section 51(xxxv)) that except for interstate disputes, industrial relations were primarily a State responsibility. A majority of the High Court ruled otherwise arguing that section 51(xx), which grants the Commonwealth Parliament power to make law concerning "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" provided the Commonwealth with sufficient authority. For the judgment, see www.austlii.edu.au/au/cases/cth/high_ct/2006/52.html (viewed March 17, 2015).
12. In 1946, following a successful referendum, a new section 51 (xxiiiA) was included in the Constitution granting the Commonwealth authority to fund a variety of social services.
13. In 1967, following a successful referendum, section 51 (xxvi) was amended to enable the Commonwealth to make laws specifically with respect to Aboriginals.
14. Following *Melbourne Corporation v Commonwealth* [1947] HCA 26; (1947) 74 CLR 31 ("Melbourne Corporation"). For the judgment, see http://www.austlii.edu.au/au/cases/cth/high_ct/74clr31.html (viewed March 17, 2015). The *Melbourne Corporation* decision was confirmed and further defined by the High Court in *Austin v Commonwealth* (2003) 215 CLR 185, following a challenge to the right of the Commonwealth to impose a superannuation contributions surcharge on State judges as part of a wider scheme imposing a surcharge on higher income earners. Another High Court case involving a superannuation surcharge on a South Australian State politician (*Clarke v Federal Commissioner of Taxation* (2009) HCA 33) had the same result. The Court regarded the Commonwealth's surcharge as an impermissible interference with the State's capacity to function as a government.
15. For further discussion, see Anne Twomey, "Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another," *Federal Law Review* 31, no. 3 (2003): 507–39.
16. The cases are *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth of Australia* (2012) HCA 23; and *Williams v Commonwealth of*

Australia & Ors (2014) HCA 23. See note 72 below for commentaries on these cases.

17. For a summary of this period of reform, see Painter, *Collaborative Federalism*.
18. Robyn Hollander and Haig Patapan, "Pragmatic Federalism: Australian Federalism from Hawke to Howard." *Australian Journal of Public Administration* 66, no. 3 (August 2007): 280–97.
19. The *Intergovernmental Agreement on Federal Financial Relations*, signed in November 2008 and discussed further in section VII, contains six national agreements in Schedule F that define the respective roles and responsibilities of the States and the Commonwealth, as well as those that are shared. The overarching agreement and its schedules are infused with commitments by all governments to collaborate on policy development and service delivery and to coordinate actions. See http://www.federalfinancialrelations.gov.au/content/intergovernmental_agreements.aspx (viewed October 29, 2012).
20. Long-serving Liberal Prime Minister John Howard, for example, declared himself an "aspirational nationalist" and went to the 2007 election declaring that this might "require the Commonwealth bypassing the States altogether and dealing directly with local communities." See John Howard "Australia Rising to a Better Future," Address to the Menzies Research Centre, Sydney, August 21, 2007. www.theage.com.au/news/national/australia-rising-to-a-better-future/2007/08/20/1187462175044.html (viewed March 17, 2015). Howard's minister for health, Tony Abbott, took over leadership of the Liberal Party in December 2009; he is on record as a strong critic of the States and declared that he wished to expand Commonwealth powers to pursue national policy goals. See T. Abbott, *Battlelines* (Carlton: Melbourne University Press, 2009). He became Prime Minister following the federal election on September 7, 2013; his government now espouses a more devolutionary style of federalism reform.
21. Anne Twomey and Glenn Withers, *Federalist Paper 1: Australia's Federal Future*. A report for the Council for the Australian Federation (April 2007), 7. See www.caf.gov.au/Documents/AustraliasFederalFuture.pdf (viewed March 17, 2015).
22. Painter, *Collaborative Federalism*, 23.
23. Sometimes referred to as the "alternative vote," Australia's preferential voting system requires voters to rank the candidates on their ballot in descending order of preference. A candidate who receives 50 percent + 1 of first preferences is declared the winner. If, as is often the case, no candidate wins a clear majority on the first preference, then the candidate with the fewest preference votes is eliminated. The preferences on the ballots of those who voted for the discarded candidate are then distributed. The process continues for as long as it is necessary to push someone over the 50-percent line.
24. See the "Principles and Procedures for Commonwealth-State Consultation on Treaties," agreed at the COAG meeting of June 14, 1996: http://arp.nsw.gov.au/m1997-01-principles-and-procedures-commonwealth-state-consultation-treaties (viewed March 17, 2015).
25. Campbell Sharman, "Executive Federalism" in Brian Galligan, Owen Hughes, and Cliff Walsh, eds, *Intergovernmental Relations and Public Policy* (Sydney: Allen & Unwin, 1991).
26. One exception is Western Australia, whose upper house has a *Standing Committee on Uniform Legislation and Statutes Review* which has a standing order (rule) that requires it to consider and report on any proposed legislation that "ratifies or gives effect to a bilateral or multilateral intergovernmental agreement to which the Government of the State is a party; or . . . introduces a uniform scheme or uniform laws throughout the Commonwealth." Other State parliaments have committees responsible for scrutiny and review of legislation that may consider IGR issues, but they do not do so as a matter of course. The WA Committee's website provides more information, as well as examples of inquiries and reports it has been responsible for; see www.parliament.wa.gov.au/Parliament/commit.nsf/WHistorical/c78245ffab1ce5e848257831003b0143?OpenDocument&ExpandSection=6 (viewed March 17, 2015).

27. This discussion is based on Anne Twomey, "Federalism and the Use of Cooperative Mechanisms to Improve Infrastructure Provision in Australia," *Public Policy* 2, no. 3 (2007): 211–26.
28. Typically States refer the text of the law to be enacted, although problems may arise with referring the power to amend the referred law.
29. Cheryl Saunders, "Collaborative Federalism," *Australian Journal of Public Administration* 61, no. 2 (June 2002): 71.
30. For example, Mutual Recognition (Queensland) Act 1992 (Qld); Corporations (Commonwealth Power) Act 2001 (Tas); Trans-Tasman Mutual Recognition (South Australia) Act 1999 (SA); Criminal Code Amendment (Terrorism) Act 2003 (Cth) and related State Acts such as Terrorism (Commonwealth Powers) Act 2002 (NSW).
31. For example, Food Standards Australia and New Zealand was established using this legislative technique. Its board members must be approved by the associated ministerial council on which all States and Territories are represented and on which all jurisdictions have one vote (although it should be noted that decisions are almost all made by consensus).
32. See Painter, *Collaborative Federalism*, 44; Federal–State Relations Committee (Victoria), *Report on Australian Federalism: The Role of the States*, 1998.
33. For example, at the April 2007 COAG meeting, Victoria and the Australian Capital Territory "reserved their positions" with regard to the recommendations made by the Double Jeopardy Law Reform COAG Working Group. It was noted in the communiqué from the same meeting that COAG was "unable to agree" on the establishment of a national regulatory framework for the private security industry. See Council of Australian Governments, *Communiqué*, April 13, 2007, 9, http://archive.coag.gov.au/coag_meeting_outcomes/2007-04-13/docs/coag130407.pdf (viewed March 17, 2015). Western Australia refused to agree to funding arrangements associated with health reforms agreed to by all other governments at the April 2010 COAG meeting. See Council of Australian Governments, *Communiqué*, April 19–20, 2010, 1, http://archive.coag.gov.au/coag_meeting_outcomes/2010-04-19/docs/communique_20_April_2010.pdf (viewed March 17, 2015). Subsequent debate and leadership changes in Commonwealth and State governments led to these reforms being delayed and then revised substantially in 2011.
34. See www.caf.gov.au/Documents/MOU%20Between%20States%20&%20Territories.pdf (viewed March 17, 2015).
35. www.caf.gov.au/meetings.aspx (viewed March 17, 2015).
36. Department of the Prime Minister and Cabinet, *Guidance on COAG Councils*. https://www.coag.gov.au/sites/default/files/files/Guidance%20on%20COAG%20Councils%202014%20-%20May%202014.pdf (viewed March 17, 2015).
37. For example, the Legislative and Governance Forum on Gene Technology, which is empowered to issue policy principles, policy guidelines, and codes of practice by the Gene Technology Act 2000 (Cth).
38. The former ministerial council system is outlined in an appendix to the Council of Australian Governments, *Communiqué*, February 13, 2011, https://www.coag.gov.au/sites/default/files/2011–13–02.pdf (viewed March 17, 2015). For a list of the councils, see http://www.coag.gov.au/coag_councils (viewed March 17, 2015).
39. Council of Australian Governments, *Communiqué*, December 13, 2013, https://www.coag.gov.au/sites/default/files/COAG%20communique%20--%20FINAL.docx (viewed March 17, 2015).
40. These two positions can be found in the debate between Andrew Podger, "What Really Happens: Department Secretary Appointments, Contracts and Performance

Pay in the Australian Public Service," *Australian Journal of Public Administration* 66, no. 2 (June 2007): 131–47; and Peter Shergold, "What Really Happens in the Australian Public Service: An Alternative View," *Australian Journal of Public Administration* 66, no. 3 (September 2007): 367–70.

41. The seven working groups were concerned with health and aging; national health and hospitals reforms; the productivity agenda—education, skills, training and early childhood development; climate change and water; infrastructure; business regulation and competition; housing; and indigenous reform. For further details, see Council of Australian Governments, *Communiqué*, December 20, 2007, www.coag.gov.au/sites/default/files/Communique%2020%20December%202007.pdf (viewed March 17, 2015).
42. For further details, see Jeffrey Harwood and John Phillimore, *The Effects of COAG's National Reform Agenda on Central Agencies*, 2012, www.anzsog.edu.au/media/upload/publication/90_JCIPP-ANZSOG-COAG-Report-15-May-2012-Web-version.pdf (viewed March 17, 2015).
43. See Harwood and Phillimore, The Effects of COAG's National Reform Agenda on Central Agencies.
44. See, for examples, Painter, *Collaborative Federalism*; Michael Keating and John Wanna, "Remaking Federalism?" in Michael Keating, John Wanna, and Patrick Weller, eds, *Institutions on the Edge? Capacity for Governance* (St Leonards: Allen and Unwin, 2000), pp. 126–55, 132–9.
45. For example, the Commonwealth appoints members of the Australian Competition and Consumer Commission only after a majority of State and Territory governments indicate that they support the Commonwealth's selection.
46. For the Commonwealth Grants Commission Act (1973), see http://www.comlaw.gov.au/Details/C2008C00316/Download (viewed March 17, 2015).
47. The first report of the COAG Reform Council was on progress being made under COAG's initiative to build on the former national competition policy by harmonizing regulations and promoting national markets and competition. See COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Report on Performance 2008–9.* Sydney.
48. National Commission of Audit, *Report to the Commonwealth Government,* Canberra, June 1996, available at http://www.finance.gov.au/archive/archive-of-publications/ncoa/coaintro.htm (viewed March 17, 2015); and National Commission of Audit, *Towards Responsible Government: The Report of the National Commission of Audit,* Canberra, February–March 2014, available at www.ncoa.gov.au/report/index.html (viewed March 17, 2015).
49. Ross Garnaut and Vince Fitzgerald, *Review of Commonwealth State Funding: Final Report*, August 2002.
50. For details, see House of Representatives (Commonwealth) Standing Committee on Economics, Finance and Public Administration, *Rates and Taxes: A Fair Share for Responsible Local Government*, October 2003, www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=efpa/localgovt/report/fullreport.pdf (viewed March 17, 2015).
51. Federal–State Relations Committee (Victoria), *Report on International Treaty Making and the Role of the States*, 1997, Melbourne: Government Printer. Federal–State Relations Committee (Victoria), *Report on Australian Federalism: The Role of the States*, 1998. Melbourne: Government Printer. Federal–State Relations Committee (Victoria), *Report on Federalism and the Role of the States: Comparisons and Recommendations*, 1999, Melbourne: Government Printer. Federal–State Relations Committee (Victoria), *Report on Register of Specific Purpose Payments Received by Victoria*, 1999, Melbourne: Government Printer.
52. See, for example, Business Council of Australia, *Reshaping Australia's Federation—A New Contract for Federal-State Relations*, 2006, www.bca.com.au/Content/100802.aspx (March 17, 2015).

53. Twomey and Withers, *Federalist Paper 1*; John Wanna, John Phillimore, Alan Fenna and Jeffrey Harwood, *Federalist Paper 3: Common Cause: Strengthening Australia's Cooperative Federalism*, Final report to the Council for the Australian Federation, 2009, www.caf.gov.au/documents/FP3%20-%20final.pdf (viewed March 17, 2015); KPMG and the Department of Premier and Cabinet (Victoria), *Federalist Paper 4: Report on Intergovernmental Institutions*, Prepared for the Council for the Australian Federation, 2011, www.caf.gov.au/documents/Report%20on%20intergovernmental%20institutions%20-%20November%202011.pdf (viewed March 17, 2015).
54. There is a brief discussion of policy innovation and learning in Twomey and Withers, *Federalist Paper 1*, 13–15. A skeptical view about the extent to which such innovation exists was expressed by senior Liberal Party politician (now Prime Minister) Tony Abbott, Speech to Australian Federalism: Rescue and Reform Conference. Tenterfield, NSW October 30, 2008. www.griffith.edu.au/__data/assets/pdf_file/0019/206560/Abbott2008-tenterfieldspeech.pdf (viewed March 17, 2015).
55. This figure was mentioned by a participant at the Roundtable in Sydney held in March 2009 for the Forum of Federations.
56. The Interstate Investment Cooperation Agreement, first signed in 2003 and subsequently in 2006. All States and Territories except Queensland signed the agreement.
57. Most notably, the Intergovernmental Agreement on a National Water Initiative signed in 2004 by the governments of the Commonwealth, New South Wales, Queensland, South Australia, Victoria, the Australian Capital Territory, and the Northern Territory. See nwc.gov.au/__data/assets/pdf_file/0008/24749/Intergovernmental-Agreement-on-a-national-water-initiative.pdf (viewed March 17, 2015).
58. The most notable national tripartite agreement is the Inter-Governmental Agreement Establishing Principles Guiding Inter-Governmental Relations on Local Government Matters. This mainly addressses issues of cost-shifting. See https://www.lga.sa.gov.au/webdata/resources/files/IGA_on_cost_shifting_-_signed.pdf (viewed March 17, 2015).
59. Until 2009, combined multilateral and bilateral funding agreements were in force in the disabilities, housing, and indigenous policy areas.
60. Under the NCP, states received additional Commonwealth funding for carrying out competition reforms; if they did not liberalize their markets or were deemed by the National Competition Council not to have liberalized sufficiently, their Commonwealth payments could be withheld or reduced. This funding nexus provided an incentive for market reform but still left the ultimate decision with subnational governments, which for political or policy reasons might choose not to proceed with particular reforms (e.g., potato marketing in Western Australia) and suffer a reduction of additional funding accordingly.
61. For example, due to geographical practicalities, Western Australia is not part of the national electricity market; there are special provisions relating to WA in various energy-related IGAs as a result.
62. The IGA became Schedule 2 to the legislation providing for the GST, entitled A New Tax System (Commonwealth-State Financial Relations) Act 1999.
63. *SA v Commonwealth* (1962) 108 CLR 130. Also see Cheryl Saunders, "A New Direction for Intergovernmental Arrangements," *Public Law Review* 12 (2001): 274–87.
64. See *ICM Agriculture Pty Ltd v Commonwealth* (2009) HCA 51; and *Arnold & Ors v Minister Administering the Water Management Act 2000 & Ors* (2010) HCA 3.
65. Commonwealth of Australia, *Budget Overview 2014–15*, May 2014, 7. For commentary on the political fallout from this decision, see Tom Allard, "States

Face Huge Shortfall in Funding," *Sydney Morning Herald* May 14, 2014, www.smh.com.au/business/federal-budget/states-face-huge-shortfall-in-funding-20140513-388b8.html (viewed March 17, 2015).

66. For more on fiscal federalism, see Morris, "Commonwealth of Australia" (note 1 above).
67. See note 9, above.
68. See *Ha v New South Wales* (1997) 189 CLR 465, www.austlii.edu.au/au/cases/cth/HCA/1997/34.html (viewed March 17, 2015).
69. The level of dependence on Commonwealth funding varies; the Northern Territory receives about 75 percent of its revenue from the Commonwealth, compared to 33 percent for Western Australia. Overall, the Commonwealth is estimated to provide around 44 percent of state and territory revenues in 2014–15. This compares to 35 percent in 1999–2000, the last year before the GST was introduced and replaced a number of State taxes and charges (see *Queensland State Budget 2014–15 Budget Paper No. 2—Budget Strategy and Outlook*, p. 107).
70. See www.federalfinancialrelations.gov.au/content/intergovernmental_agreements/IGA_federal_financial_relations_aug11.pdf (viewed March 17, 2015).
71. Section 10 (5) of the Federal Financial Relations Act 2009, which relates to health care, states that "Financial assistance is payable to a State under this section on condition that the financial assistance is spent on healthcare." Similar general clauses are contained in the sections of the act related to schools, skills and workforce development, disability services, and housing.
72. See *Williams v Commonwealth of Australia & Ors* (2014) HCA 23; *Williams v Commonwealth of Australia* (2012) HCA 23; and *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1. For commentary on *Williams* (2014), see Gabriel Appleby, "Commonwealth Left Scrambling by School Chaplaincy Decision," *The Conversation*, June 19, 2014, http://theconversation.com/commonwealth-left-scrambling-by-school-chaplaincy-decision-27935 (viewed March 17, 2015); for *Williams* (2012), see Gareth Griffith, "The High Court's Decision in the School Chaplain's Case: Findings and Implications," *NSW Parliamentary Research Service e-brief* 14 (2012), www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/TheHighCourt'sdecisionintheSchoolChaplainscase:findingsandimplications/$File/Williams+v+the+Commonwealth.pdf (viewed March 17, 2015). For implications of *Pape*, see Cheryl Saunders, "The Sources and Scope of Commonwealth Powers to Spend," *Public Law Review* 20 (2009): 256–63; Andrew McLeod, "The Executive and Financial Powers of the Commonwealth: Pape v Commissioner of Taxation," *Sydney Law Review* 32, no. 1 (March 2010): 124–40.
73. Keating and Wanna, "Remaking Federalism," 139.
74. See Productivity Commission, *Review of National Competition Policy Reforms*. Productivity Commission Inquiry Report, 2005, No. 33, www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf (viewed March 17, 2015).
75. Keating and Wanna, "Remaking Federalism," 152.
76. Although States and Territories were responsible for gun licensing, a shooting of thirty-five people by a lone gunman in Port Arthur, Tasmania, led the prime minister to demand gun ownership reform. Subsequent meetings of the Australasia Police Ministers' Council resulted in the National Firearms Agreement (1996). For details, see Janet Phillips, Malcolm Park, and Catherine Lorimer, "Firearms in Australia: A Guide to Electronic Resources," Commonwealth Parliamentary Library, www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0708/FirearmsAustralia (viewed March 17, 2015). Similarly, in 2002, a swift, nationally coordinated response was considered appropriate to the threat of terrorist attacks. See archive.coag.gov.au/coag_meeting_outcomes/2002-12-06/docs/communique061202.pdf (viewed March 17, 2005).

77. Thus, after many years of discussion, in 2010 the federal Labor government secured agreement with States and Territories on the establishment of a national school curriculum (an idea initially proposed by a Coalition government), combined with a national testing and reporting regime for all schools across Australia. The Commonwealth also proposed a new system of resource rents on coal and iron ore (Australia's two largest export industries) that would effectively replace State-imposed mining royalties for these two commodities. This proposal met strong political resistance from resource-rich Western Australia and non-Labor State governments generally and was substantially watered down in subsequent legislation.
78. Geoff Anderson, "The Council of Australian Governments: A New Institution of Governance for Australia's Conditional Federalism," *University of New South Wales Law Journal* 31, no. 2 (2008): 493–508.
79. This is not to say that Commonwealth funding of States and Territories has ceased to be important; only that it is no longer the main subject at most COAG meetings, unlike at Premiers' Conferences of pre-COAG times. For example, the first-ever two-day COAG meeting was held in April 2010 to discuss the organization and funding of health and hospitals.
80. The COAG Reform Council was responsible for reporting on the progress of the COAG Reform Agenda. For an overview, see webarchive.nla.gov.au/gov/20140801013844/http://www.coagreformcouncil.gov.au/ (viewed March 17, 2015). The Council reports can be found at http://webarchive.nla.gov.au/gov/20140801015405/http://www.coagreformcouncil.gov.au/reports (viewed March 17, 2015).
81. Michelle Grattan, "Premiers Demand Abbott Meet Them, Insisting He Has Got His Budget Facts Wrong," *The Conversation* May 18, 2014, http://theconversation.com/premiers-demand-abbott-meet-them-insisting-he-has-got-his-budget-facts-wrong-26854 (viewed March 17, 2015).
82. A short-lived development was the creation of a COAG Business Advisory Forum in 2012. The forum was chaired by the prime minister and included all COAG members plus key business leaders and peak associations. It provided input to COAG from business on regulatory and competition issues. It has not been retained by the new Coalition government. See www.coag.gov.au/sites/default/files/BAF%20Communique%206%20December.pdf (viewed March 17, 2015).
83. The two cases are *Re Wakim; Ex Parte McNally* [1999] and *R. v Hughes* [2000]. For a discussion of their implications for intergovernmental relations, see Saunders, "Collaborative Federalism" (note 29 above) and George Williams, "Cooperative Federalism and the Revival of the Corporations Law: Wakim and Beyond." *Company and Securities Law Journal* 20 (May 2002): 160–71.
84. Cf. John Warhurst, *Central Agencies, Intergovernmental Managers and Australian Federal-State Relations* (Canberra: Australian National University, 1983); Glyn Davis, "Carving Out Policy Space for State Government in a Federation: The Role of Coordination," *Publius* 28, no. 4 (Autumn 1998): 147–64; Harwood and Phillimore, *The Effects of COAG's National Reform Agenda on Central Agencies*.
85. Alan Fenna and Felix Knüpling, eds, *Benchmarking in Federal Systems* (Melbourne: Productivity Commission, 2012).
86. See National Competition Council, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms* (Melbourne: National Competition Council, 2005), xxix–xxx. The Commonwealth was also assessed, but could not be penalized under the program. At the completion of the National Competition Policy in 2005, the Commonwealth had reviewed and reformed 78 percent of its legislation. Western Australia was the only jurisdiction that had been less productive in this regard (68 percent). The Commonwealth also refused the NCC's call to deregulate the wheat export industry and remove the Australian Wheat Board's effective monopoly over wheat exports. See National Competition Council, *Assessment of Governments' Progress*, p. 9.6 and pp. 10.1–10.4;

and Jeffrey Harwood and John Phillimore, "National Competition Policy and Cooperative Federalism" in John Wanna, Evert A. Lindquist and Penelope Marshall, eds, *New Accountabilities, New Challenges* (Canberra: ANU Press, 2015) 243–63.

87. The *Report on Government Services* is published by the Commonwealth Productivity Commission every January.
88. See, for example, J.N. Keddie and R.F.I. Smith, "Leading from Below: How Sub-National Governments Influence Policy Agendas," *Australian Journal of Public Administration* 68, no. 1 (March 2009): 67–82.
89. For example, States objected to a promise by the new Commonwealth Labor government for a major "computers in schools" program, as it involved significant extra expense for States. The Commonwealth had to increase its budget provision for this promise in order to proceed with the rollout of the program, and in March 2008 "COAG acknowledged that the Commonwealth should be responsible for its election commitments." See www.coag.gov.au/sites/default/files/2008-26-03%20Communique.pdf, 4 (viewed March 17, 2015).
90. The final health agreement was signed on August 2, 2011; see www.federalfinancialrelations.gov.au/content/npa/health_reform/national-agreement.pdf (viewed March 17, 2015).
91. Patricia Karvelas, "Rudd Harnesses COAG 'Workhorse'," *The Australian* December 21, 2007.
92. Editorial, "COAG Broken, Time to Trade It In," *The Australian Financial Review* April 22, 2013; Mark McKenna, "State against State: Campbell Newman's Federalism," *The Australian* April 12, 2012.
93. Tony Abbott, "White Paper on Reform of the Federation," *Media Statement* June 28, 2014, www.pm.gov.au/media/2014-06-28/white-paper-reform-federation (viewed March 17, 2015).
94. See Alan Fenna and John Phillimore, "Intergovernmental Relations in Australia: New Modes, Old Realities" in Francesco Palermo and Elisabeth Alber, eds, *Federalism as Decision Making: Changes in Structures, Procedures and Policies* (Leiden: Brill, 2015), 192–212, at 209–12.
95. Michelle Grattan, "States Told to Be 'Adults' as Abbott Rules Out Meeting," *The Conversation* May 14, 2014, http://theconversation.com/states-told-to-be-adults-as-abbott-rules-out-meeting-26704 (viewed March 17, 2015).
96. See Abbott, "White Paper," note 93 above. Also see Michelle Grattan, "Federation White Paper Will Look at a Slimmer Role for Canberra," *The Conversation* June 28, 2014, http://theconversation.com/federation-white-paper-will-look-at-a-slimmer-role-for-canberra-28572 (viewed March 17, 2015). The government website for the Reform of the Federation White Paper is https://federation.dpmc.gov.au/ (viewed March 17, 2015).

3 Intergovernmental Relations in Austria: Co-operative Federalism as Counterweight to Centralized Federalism

Peter Bussjäger[1]

I. Introduction

Austria's federal system is commonly described as highly centralized with a dominating role played by the federation and restricted fields of legislative competences exercised by the *Länder*. Moreover, participation of the *Länder* in federal law-making is—officially—weak because the second parliamentary chamber, the Federal Council, has limited competences.

This description, which is based on the Federal Constitution, seems to be in contradiction with the prominent role of certain instruments of informal co-operation within the Austrian federation, specifically the role of the Conference of the *Land* Governors. There is a gap between the provisions of the Federal Constitution and political reality. In fact, co-operative federalism acts as a counterweight to centralizing forces in Austria. How this works is the object of this chapter.

Co-operative federalism—as intergovernmental relations are generally known in Austria—has a long tradition and shapes the practical operation of the Austrian federal system.[2] The most important institutions of Austria's intergovernmental relations are the different conferences of representatives of the *Länder* (i.e., the constituent units) and formal agreements between federal partners, which are probably the most far-reaching legal instrument of co-operative federalism. Although the Federal Council, the second chamber of Austria's parliament, is an important institution in federal theory, its legal status is comparatively weak. The Conference of the *Land* Governors works to compensate for the weakness of the Federal Council. Co-operative federalism also plays a fundamental role in aspects of financial relations between the federation (as the federal order is known), *Länder*, and municipalities. Co-operative federalism also counterbalances the high degree of centralization, especially of legislative powers. However, co-operative federalism leads to interlocked action by various federal partners, which generates a high degree of non-transparency for the citizens.

26. Prior to the establishment of the commission as a permanent body by the military government of General Ibrahim Babangida in 1992, revenue was allocated on the basis of recommendations by ad hoc commissions and technical committees.
27. From time to time, however, states disagree with the decisions of the RMFAC. In June 2009, for example, the government of Cross River state disagreed with the commission's delisting of the state as an oil-producing state entitled to 13 percent derivation following (1) the loss of territory containing seventy-six oil wells to neighbouring Akwa Ibom state in a boundary adjustment; (2) the ceding of the oil-rich Bakassi peninsula, which was part of the state, to the Republic of Cameroon; and (3) the denial of offshore revenue to littoral states after the Supreme Court judgment. The governor of the state and the state house of assembly called for a reversal of the decisions of the National Boundary Commission and the revenue commission and reinstatement of the state as an oil-producing state.
28. See Egwaikhide, *Intergovernmental Relations in Nigeria*, p. 22. Also see A. Ekpo, "Federal Republic of Nigeria."
29. See *AG Abia State & 35 others v. AG of the Federation* (2002).
30. See *Attorney General of Abia State v. Attorney General of the Federation* (2006).

10 Constructing a Developmental State in South Africa: The Corporatization of Intergovernmental Relations

Derek Powell

I. Introduction

South Africa has a devolved system of government comprising elected national, provincial, and local orders of government, in which provincial and local government have genuine decision-making discretion in respect of limited areas of competence that are listed in the Constitution. Intergovernmental relations (IGR) between the three orders are highly formalized, centralized, and hierarchical, but there are significant opportunities also for IGR based on informality, inclusiveness, consultation, and pragmatic devolution. This duality is best described as the "corporatization" of intergovernmental relations.[1] Corporatization reflects the dominance of national government exercised through the devolved system of government. The national government's engagement with the provincial and local orders cannot be equated with intergovernmental bargaining with autonomous constituent units of the kind one would expect to find in a federal system. Rather, IGR function in ways that facilitate the integration of the provincial and local orders into the national developmental state (South Africa Inc.), as minority shareholders and implementing agencies of national policy that are subject to the direction of the majority national shareholder. Within the confines of the nationally defined terms of subnational integration there are currently still spaces for provincial and local governments to exercise their voices, experiment, influence national policy, and claim additional powers. But with the national project to construct South Africa Inc. gathering steam it cannot be assumed that what space there is for subnational autonomy will not be rolled back further.

Four factors explain why IGR in South Africa are corporatized in this way. The first is the hierarchy implicit in the structure of government; in particular the constitutional requirement that national legislation must provide a framework to regulate intergovernmental relations and the settlement of intergovernmental disputes. Second, the African National Congress

(ANC) is both the dominant political force in all three orders of government and a highly centralized revolutionary movement intent on pursuing a program of radical social and economic change to undo the effects of generations of racial discrimination and inequality. Third, the ANC is committed to building a developmental state that can intervene in the economy to lead growth, address the extremely high levels of poverty and unemployment, and transform patterns of wealth and ownership that are still heavily skewed toward whites. Fourth, the big cities have emerged as forces of dynamic political and economic change, and are increasingly in the position to stake a larger claim on power in the state. The corporatization of intergovernmental relations allows these contradictory, often competing, tendencies to be held in some form of equilibrium. Intergovernmental relations thus reflect both strong centralization and pragmatic devolution. National control over socio-economic development is transacted through the devolved system and (through ANC structures) imposed across the formal boundaries that separate the three spheres of government.

This chapter examines the evolution and structure of the intergovernmental system, analyzes the forces that have shaped intergovernmental relations in practice, and reflects on both the stresses in the system and the pathways of future reform.

Overview of the South African State

South Africa is the southernmost country in Africa, with a land territory of 1,219,090 square kilometres.[2] The country has an estimated population of 52.98 million, the majority of whom are female and below the age of thirty.[3] For most of its history, South Africa was ruled by colonial and white-minority governments that promoted the interests of the white minority by systematically oppressing and exploiting the black majority. With the rise to power of white Afrikaner nationalism in 1948, racial discrimination was institutionalized as a policy of separate development for blacks and whites (apartheid).[4] Apartheid was a system of political exclusion that supported the economic exploitation of black labour to serve white interests. Led by the African National Congress, mass resistance to apartheid grew over the years, and state repression became more brutal. By the late 1980s the country was on the brink of a civil war that neither side could win. With political violence out of control in some parts of the country and under growing international pressure to find a political solution, the country's political leaders negotiated a settlement in the early 1990s that opened the way for the first democratic elections in 1994 and a new Constitution in 1996.[5]

The South African Constitution established a highly centralized, "integrationist" form of federalism comprising three democratic orders: the national, provincial, and local spheres of government.[6] The national order has wide-ranging legislative and executive authority and control over the major fiscal and tax instruments. The provincial and local orders have original powers but their autonomy is limited to specific areas of competence defined in the Constitution and further restricted by the national order's powers to regulate their conduct and, in certain circumstances, intervene in their affairs.

Principles of co-operative government set out in chapter three of the Constitution prescribe standards for intergovernmental conduct that bind the three orders to work together to pursue the common good. However, the highly centralized and hierarchical nature of government is reproduced and patterned in intergovernmental relations among the three orders. Both tendencies are reinforced by the dominance of a single party, the African National Congress (ANC). The ANC sees the state as "developmental" and "interventionist"—that is, as an instrument to transform society and the economy to promote the aspirations and well-being of the black majority, which continues to suffer the effects of apartheid. This ideology proclaims a dominant role for the national order, encourages intimacy between the ruling party and the state, and mistrusts strongly asserted demands for greater provincial and local autonomy.

The national territory is demarcated into nine provinces and 278 municipalities.[7] There are eleven official languages corresponding to the major cultural groups, with isiZulu the most-spoken language.[8] Provincial boundaries are not co-extensive with ethnic group territories, although in fact each province is home to a dominant cultural linguistic group, and ethnic representation is a political factor in provincial government. The provinces differ greatly in size, population, development, geography, wealth, resources, and levels of poverty.[9] Poverty and inequality are highest in provinces that incorporated former apartheid homelands or large rural areas. Migration from these provinces to urban areas has contributed to the growth of informal settlements on the fringes of the largest cities and the urbanization of poverty.

The national order consists of a bicameral Parliament, a presidency and cabinet that exercise executive authority, and a judiciary with a Constitutional Court "as the highest court on all constitutional matters."[10] The Constitutional Court and the National Council of Provinces were inspired by the German model.

The powers and functions of the three branches of government are separated. The legal system is based on the common law (predominantly judge-made law, but with substantive rules derived from both the Roman Dutch tradition and English law). There is also formal recognition of customary law. Both the common law and the customary law are subject to a Bill of Rights that includes social, economic, and cultural rights, which the orders of government must take positive action to "progressively realize."[11]

The provincial order consists of nine provinces, with elected legislatures, and premiers and provincial executive councils that exercise provincial executive authority. The local order comprises three categories of municipality: metropolitan municipalities in the eight largest urban areas and forty-four district municipalities and 226 local municipalities outside urban areas.[12] Legislative and executive authority both reside in the municipal council, with the executive authority usually delegated to an executive committee or executive mayor. Local government has a prominent role in the constitutional order. The Constitution sets out specific local developmental objectives only for this order, which include the promotion of equal citizenship, community building, and sustainable local development.[13] The largest cities are also the country's main centres of economic growth and development. The twenty largest cities account for 82 percent of the total Gross Value Added (GVA) in the national economy, and nine of these are home to almost 40 percent of the country's population.[14] These factors explain the prominence the local order enjoys in IGR. The Constitution further promoted local government's importance in the country by requiring an act of Parliament to provide for the recognition of organized local government to represent the interests of the local order in IGR.[15]

The Distribution of Competences

The three orders have legislative and executive powers and an entitlement to an equitable share of nationally raised revenue. However, the provincial and local orders may exercise these powers only with respect to specific functional areas of legislative competence set out in schedules to the Constitution (the term used in the Constitution to describe what would often be called *competences* or *legislative powers* in other systems is *functions*). Provincial and local orders thus have no authority outside of their allocated functional areas. Residual powers lie with the national order. Additionally, the national order has exclusive control over the major tax instruments (value added, personal income, customs and excise, and companies taxes) and concurrent authority with provinces for important public services, such as schooling, welfare, and primary health care. [16] Within their functional areas and subject to national regulations, however, provinces and municipalities can pass laws, make policy, and determine their own expenditure budgets. Provinces have few exclusive functions (examples include liquor licenses and provincial roads and traffic), they possess limited powers to raise their own revenues, and the most important provincial services (those referred to above) are held concurrently with the national government.[17] Municipalities are responsible for functions such as water, sanitation, municipal health, electricity reticulation, and refuse removal, and can raise their own revenue through property

taxes and user charges for certain services such as the provision of water and sanitation.

The national order's supervisory power further limits provincial and local autonomy. Parliament can intervene in exclusive provincial functions when a particular national interest specified in the Constitution is affected, and the national executive can intervene when a province fails to perform a statutory executive obligation. The national and provincial orders can regulate the local order's exercise of its executive authority, and intervene when a municipality fails to perform an executive obligation in terms of the Constitution or legislation. The obligation of the provincial and local governments to implement national legislation further reinforces the "integrationist" nature of the three-sphere system. In practice, provincial and municipal service-delivery budgets are heavily funded through intergovernmental transfers that are weighted according to national priorities, and both orders expend considerable time and effort on implementing national policy.

Some provincial and local functional areas overlap, which creates uncertainty about the boundaries of each order's authority, as in the case of, for example, "provincial roads" and "municipal roads" and "provincial planning" and "municipal planning." There are also inconsistencies between the formal division of functions and the way authority is actually exercised. For example, before 1996, large cities were responsible for some of the services (e.g. public libraries) that are now exclusively provincial, and that practice continues in most cities, although cities regard these functions as unfunded mandates.

II. General Overview of IGR in South Africa

A unique feature of the South African Constitution is that it expressly provides the institutional framework for IGR between all three orders, with the detail of institutional arrangements provided in national legislation.[18] Four features of the constitutional framework have a direct bearing but varying degrees of influence on the conduct of IGR.

Principle of Co-operative Governance

The Constitution sets out general principles of co-operative government that bind the three orders to conduct IGR in ways that foster friendly relations, fair dealing, transparent conduct, coordinated action, and coherent government for the country.[19] Further, they must take positive steps to resolve IGR disputes, and to resort to court action to resolve a dispute only when their best efforts to do so have failed.[20] These principles aim to protect the integrity of each order as a distinctive sphere of government while

promoting "integrated" government for the country as a whole. They are legally binding and justiciable, and thus form the basis for judicial oversight of the conduct of IGR, although few cases concerning the principles have gone to court. All three orders routinely invoke these principles to justify or question IGR conduct in particular cases, but calls by the national government for greater coordination and integration between the orders are often a ruse for it to assert its authority over the other two spheres.

The National Council of Provinces

The National Council of Provinces (NCOP), the second chamber of Parliament, represents the interests of the nine provinces and the local order in national lawmaking.[21] The NCOP requires special voting majorities for constitutional amendments in order to protect the constitutional status and integrity of the provincial and local orders.[22] In practice, however, the NCOP has not forged a consistent, compelling, and organized provincial interest in national policy-making due to the ANC's political dominance in the provinces and other factors.

Mandatory IGR Legislation

The Constitution required Parliament to enact legislation to establish institutions to facilitate IGR and provide mechanisms to resolve IGR disputes.[23] The Intergovernmental Relations Framework Act (IGR Act), passed by Parliament in 2005, fulfills that constitutional requirement by establishing the main IGR institutions at the executive level in all three orders.

The Constitutional Court

The Constitutional Court is "the highest court on constitutional matters," and has exclusive jurisdiction to "decide disputes" between the national and provincial orders relating to their respective powers and functions.[24] The Court understands its latter role narrowly, defining disputes to mean intergovernmental disputes concerning powers and functions "explicitly or by implication provided in the Constitution."[25] This distinction protects judicial authority by avoiding the ouster of other competent courts from hearing intergovernmental disputes involving powers and functions conferred by legislation. At the same time, however, it offers the "expeditious and final resolution" of disputes that can disrupt government and intrude into the domain of the other branches in matters that are political in nature by confining them to the highest court alone.[26]

Nico Steytler discerns what he refers to as an "hourglass pattern" emerging in the Court's "jurisprudence on federalism," in which the space

for provincial government is constricted while that for national and local governments expands.[27] He argues that the general pattern in the Constitutional Court's federal jurisprudence has been a "pro-centre stance, emphasising the unitary language in the Constitution."[28] Steytler identifies two factors at play: national unity and the need for order, in the face of inefficient provincial service delivery. He argues that there has been some adjustment in this pattern of late. "Since 2005 [...], local government has come off the better in its scraps with provinces and the national government. Whether there is a decidedly pro-local and anti-provincial attitude is too early to say."[29]

External Influences

Beyond these institutional incentives, the practice of IGR has been deeply patterned by external political and economic forces that promote the integration and corporatization of the state. One of these factors is the pressure to address levels of poverty among the black population that have remained extremely high more than twenty years after the fall of apartheid. In 1994 millions of people did not have access to basic household and social services such as clean water, schooling, primary health care, proper sanitation, electricity, social security and a formal dwelling. Despite remarkable progress, universal access to these public services is still a long way off. The eradication of poverty is a national challenge, but the actual provision of household and social services falls to the provinces and municipalities. The effect of this division of roles is that national policy objectives in all key areas of public delivery condition IG activities, and the national order has assumed a strong directive role in relation to the other two orders, which implement the programs to achieve national targets.

The second factor is the ANC's electoral dominance in all spheres of government. The party is a hierarchical organization centred on national leadership structures; consequently, the most senior party leaders inevitably become ministers in the national executive, less senior leaders enter the provincial and local executives, and the least senior members enter the legislatures or local government. Political seniority within the ruling party is thus replicated in IGR, strongly patterning public authority along party lines and creating incentives to enforce party discipline on subnational governments and Parliament.[30] The ANC is a revolutionary liberation movement committed to the political and economic transformation of South Africa. It understands the political settlement of the 1990s that brought it to power as simply the first phase of democratic breakthrough in an unfolding national democratic revolution, with the current period as the second phase of radical economic reform that will fundamentally restructure patterns of ownership, wealth, and income to benefit the majority.[31]

The third factor is the economy. Faced with a stagnant, insular economy and massive public debt, the Mandela government introduced a macroeconomic framework in 1996 that aimed to achieve a growth rate of 6 percent per annum, the minimum level needed to halve the country's high rates of poverty and unemployment over the next ten years.[32] A long period of consistent economic growth saw GDP grow at about 4 percent per annum since 2004, approaching the 6 percent target in 2007.[33] However, the global financial crisis of 2007 had a severe impact on the economy, which went into recession in 2008–9, before returning to modest growth. Almost a million people lost their jobs in 2009, public revenue contracted sharply, public borrowing grew steeply, and the budget went from a modest surplus to a deficit.[34] Recovery has been slow and the economic outlook is worsening: The International Monetary Fund forecast a modest 2.3 percent growth in 2014, but the actual growth rate in 2014 was only 1.4 percent.[35] The official unemployment rate stands at around 25.3 percent (34 percent if discouraged work-seekers are included), with 50 percent of youth unemployed.[36] The crash simply exacerbated structural economic problems: levels of poverty, unemployment, and inequality are among the highest in the world and skewed along historical lines of race, class, and gender, with South Africa ranking in the top 5 percent of most unequal countries.[37] The impact of the economic crisis on the working class and the poor and unemployed has in turn fuelled racial polarization and political division among the ruling elite over future economic policy, which has contributed to general political instability in society.[38]

The economic situation in the country generally and the ANC's drive toward more radical state intervention impacts on IGR in two direct ways. First, the heavy dependence of provincial and local governments on national fiscal transfers to fund their service-delivery mandates means that growth and contraction of provincial and local expenditure budgets tracks the economy's capacity to generate public revenue. Fiscal austerity and tight national control over the public budget dictated the policy reform agenda for a long time and resulted in cuts in public expenditure as a percentage of GDP and under-investment in the productive economy.[39] Sustained economic growth in recent years, however, resulted in the rapid expansion of provincial and local expenditure budgets on national policy priorities for poverty reduction linked to the Millennium Development Goals.[40]

Nevertheless, increased revenue has not translated into increased subnational autonomy—quite the opposite. The 2008 economic recession saw some contraction of provincial and local budgets as a result of declining national revenue.[41] Steytler and Powell note that the bold and assertive leadership by national government, in particular the decision to maintain high levels of public expenditure on social services during the worst of recession, also had the positive effect of cushioning provincial and local governments by protecting their expenditure budgets.[42]

Second, radical economic reform implies more not less party intrusion in the state, intolerance of autonomous provincial and local conduct by national government, and corporatization of intergovernmental relations around national plans and programs for economic development. Between 2012 and 2014 a raft of new national measures was introduced to lay the foundations for the developmental state that further corporatize IGR, including a national development plan for the country up to 2030, a national infrastructure plan, national legislation on infrastructure development, and a new system of ministerial performance contracts linked to the implementation of key national priorities, which are signed by the executive authorities of all spheres of government.[43]

IGR in Practice

The IGR system is young by international standards and "in a state of perpetual dynamic evolution."[44] The institutional structures of devolved government and IGR, together with the external political and economic forces mentioned above, shape the conduct of IGR in complex, often unpredictable, ways. In general IGR have consistently exhibited three, somewhat contrasting, tendencies.

The first is the national executive's dominant role and influence in all spheres of government. The national executive sets the tone for IGR in the country. National ministers can assert their formal power over Parliament through their authority to initiate legislation, and their political influence by invoking their seniority in the ruling party over politically junior members of Parliament. The power to regulate provincial and local functions and convene IGR meetings enables ministers to exercise intergovernmental authority over the provincial and local orders.

Under the leadership of the executive, different types of national departments have different degrees of regulatory impact on IGR. The so-called "centre of government departments" have transversal regulatory and oversight responsibilities for IGR that cut across spheres and sectors. The most significant institutions in this group, from the standpoint of IGR, are the national ministry responsible for local government and intergovernmental relations (currently called the Ministry of Cooperative Government), which administers municipal legislation and the IGR framework legislation; the National Treasury, which exerts substantial control over economic policy, fiscal instruments, and the budget process and presides over the highly structured national intergovernmental fiscal relations apparatus and public finance regime and thus enjoys formidable standing on matters of policy and IGR at all levels; the presidency, the significance of which is

described further below; and a new ministry for economic development, which coordinates investment in economic infrastructure. The latter was created in 2009 to appease the left wing of the ANC alliance, which wants greater state intervention in the economy accompanied by a rolling back of the National Treasury's role, which they see as being too powerful and invested in neo-liberal policies.

In addition, there are national departments that have sector specific impacts on IGR, regulating IGR arrangements vertically between spheres within particular sectors such as land transport, water services, electricity, and so on. These are influential agents of change in IGR, because they interact directly with provincial and local service-delivery functions, structure service-delivery arrangements, decide on intergovernmental arrangements for the sector, and host intergovernmental forums.

The operations of the presidency deserve particular mention. In recent years, the centre of gravity in executive IGR has shifted from individual national ministries to the presidency, in response to a preoccupation with realizing national goals coupled with centralizing tendencies in power relations within the ruling party. Under the fourth ANC government, elected in 2009, the political authority of the presidency was further cemented with the creation of a National Planning Commission and a ministry for monitoring and evaluation that will have considerable influence over the provincial and local orders. The former developed the country's first national development plan, adopted by government in 2012. An innovation introduced by the presidency in 2009 and one of principal means for it to exert its influence is the ministerial performance contracts concluded between the president and every minister to achieve specified targets in each sector. The agreements are replicated at the intergovernmental level and between the national and provincial ministers and local mayors.

The second important trend in IGR has been the creation of formal statutory structures in order to direct the conduct of IGR toward the realization of national policy goals. In the early years (1994–2000), government focused on establishing the institutions of democratic government, and IGR were left to evolve organically with limited legislative prescription.[45] As the system matured, the performance of the orders and their capacity to meet national policy targets became the organizing principle of IGR. The introduction of the IGR Act in 2005 reflected this political shift and signalled the national executive's intention to exert a strongly directive influence on the course of IGR in the country. The Act provides the framework for executive IGR for all three orders and makes the realization of national policy targets for growth and poverty reduction the central objectives of IGR at all levels. An important shift occurred in 2014 with the introduction of the Infrastructure Development Act (discussed later), which establishes a highly structured intergovernmental process to coordinate the planning

and implementation of economic infrastructure projects across sectors and spheres of government.[46]

Third, centralization is a dominant tendency, but one that is uneven in scope and also checked by a countervailing tendency toward devolution of national and provincial functions related to the urban built environment in the major cities (discussed in more detail below). The Constitution requires the national and provincial orders to assign concurrent and exclusive provincial functions to the *local* order. Further devolution of functions is intended in the housing and public transport sectors. Assignment may strengthen the hand of local government in IGR but in practice there are also major risks, in particular where assignment without appropriate funding creates unfunded mandates for local government. Of late, devolution to local government has been tempered by greater national intrusion on the grounds of perceived widespread dysfunction and incapacity in municipalities. In 2009 the national government launched a local government "turnaround strategy," which, among other goals, required all 278 municipalities to achieve a clean financial audit by 2014.[47] Centralization rather than devolution is the trend in relation to the provincial order, as several former provincial services have been "nationalized" over the years. But there is also much innovation in provinces with large metropolitan regions, particularly in the areas of public transport, spatial planning, and regional development. The ANC has never been comfortable with provinces, and there is also an ongoing political debate about whether the country needs provincial governments at all.[48]

In practice, intergovernmental relations among national, provincial, and local executives occur frequently, and despite being strongly vertical in character, these relations are surprisingly consultative in nature. There are no voting procedures in executive IGR structures (voting procedures apply to IGR in Parliament, notably through the second chamber). Consensus-seeking is the usual practice in executive IGR, but "decisions" of IGR structures have no legal status as executive action unless they are endorsed—in a parallel fashion—by the executives of the orders affected.

Tensions between the orders of government over resources and authority are common, particularly between the provincial and local governments (over functions) but, due to the ruling party's electoral dominance in all three orders, tensions rarely lead to declarations of formal disputes or court action. Negotiations within the ruling party thus often substitute for IGR, and intra-party conflict is probably the most common form of political conflict. Conflicts between the executive and Parliament occur, but are generally mediated through the ruling party caucus. Parliament is widely regarded as being too subservient to the national executive, although in recent years, it has begun to assert its powers to oversee executive action more rigorously, in particular through its various finance and public accounts portfolio

committees. Since 2009, a new procedure for Parliament to amend money bills gives it a stronger stake in the budget process. IGR between orders under the control of different parties are often difficult and sometimes acrimonious, but adversarial rhetoric between orders controlled by different political parties sometimes masks general co-operation in practice.

III. IGR in the Legislative Branch

The National Council of Provinces and Other Legislative Institutions

Legislative authority is vested in the national Parliament, provincial legislatures, and municipal councils.[49] The Constitution establishes the institutional arrangements for Parliament and the provincial legislatures, but leaves it to Parliament and provincial legislatures to establish the structures of local government. In the national and provincial orders, the legislature and executive are separate branches, but in the local order, legislative and executive powers vest in the municipal council, which usually delegates the executive power to a mayor or executive committee.[50]

Parliament is bicameral, and consists of a National Assembly and a National Council of Provinces (NCOP). Parliament shapes the policy and institutional incentives for IGR through the NCOP specifically and its lawmaking and oversight roles generally. The purpose of the NCOP is "to ensure that provincial interests are taken into account in the national sphere of government."[51] It plays a role in IGR in three main ways. First, the NCOP represents provincial interests in the national lawmaking process—its most important function. Second, the NCOP "provides a national forum for public consideration of issues affecting provinces."[52] Third, the NCOP oversees the exercise of "intervention powers" by the national and provincial executives in areas falling within the authority of other spheres (see note 52 infra).

The NCOP is a unique platform for IGR in the constitutional order.[53] First, its membership comprises multi-party delegations from each province drawn from the provincial executive and legislature. Each province is represented by a single delegation of ten delegates, selected according to a procedure determined by the province, but subject to national law.[54] Within each delegation, six permanent delegates are appointed by the provincial legislature and drawn from the political parties in the provincial legislature on a proportional basis. They are the link between the NCOP and their provinces through which the latter can influence the content of national legislation. In addition, there are also four special delegates, comprising the premier of the province (or his/her nominee) and three others, who are members of the provincial government and legislature. Special delegates are meant to inject the practical experience of provincial administration into the national lawmaking process.

Second, the local order participates in NCOP proceedings through another ten-person delegation, which, by contrast with the previous one, has no voting rights.[55] Third, all national bills are automatically referred to provincial legislatures, which debate them and then mandate their permanent NCOP delegates to represent their interests by voting in a particular way. Mandating allows each province to define its peculiar interest in national legislation. The provinces determine their own mandate procedures within the framework of the uniform procedures contained in the national Mandating Procedures of Provinces Act of 2008.

All bills are discussed and voted upon in both houses, but the NCOP's influence on the outcome of a legislative process will vary according to the type of bill at issue, as defined in the Constitution.[56] The NCOP comes into its own when a bill is introduced that "affects provinces" (called section 76 bills), in which case a special voting procedure prescribed in the Constitution will apply. Each province has a single vote on a section 76 bill, with its delegation voting en bloc. The bill will pass if five of the nine provinces support it. A bill affects provinces, and is subject to this special procedure, if it addresses an area of concurrent national and provincial competence, exclusive provincial competence, or "matters of public administration, financial matters that affect provinces, and organized local government."[57] The special procedure protects the interests of the provincial order against undue encroachment by the national order, but also ensures that provincial considerations inform the national legislation that provinces must implement.

If both houses cannot agree on a single version of a bill, a special procedure is triggered to resolve the dispute. The Mediation Committee is a constitutional entity comprising members of both houses whose internal procedures are determined by a joint committee of Parliament. If mediation does not produce a version that both houses accept, the bill lapses, unless the National Assembly musters the support of two-thirds of its members for the version it favours. Thus far, the fact that the ruling party in the national order has always controlled at least seven provinces has prevented deadlock between the two houses, and the mediation procedure has been seldom used. Special majorities in both houses are also required for a bill amending the Constitution. If that bill affects provincial boundaries, institutions, powers, and functions, six of the nine provinces in the NCOP must support it for it to pass. In recent years, the NCOP has supported constitutional amendments that effected minor adjustments to the boundaries of several provinces.

The NCOP understands its broader constitutional mandate "to publically debate issues affecting provinces" as equivalent to custodianship of the IGR system.[58] In the past, the NCOP has also convened several conferences on IGR that involved all three orders of government.[59] The national

executive is generally respectful of the NCOP's special status in IGR. For example, the president of the country ordinarily delivers a special annual address on IGR to the NCOP.

How well has the NCOP promoted provincial interests in the national sphere of government? Studies commissioned by Parliament have expressed doubts that the NCOP has lived up to expectations, either in its role as law-maker or in its broader responsibility for co-operative governance.[60] In lawmaking, it is still unclear what protecting "provincial interests" means in practice, or how provincial specificity is in fact articulated in NCOP proceedings. Between 1999 and 2004, the vast majority of bills passed by the NCOP were ordinary bills, for which it has no special mandate, not bills affecting provinces. The NCOP's select committee on finance, however, has played a visible role in interrogating bills dealing with the division of revenue between the three orders, a crucial function given that provinces derive the majority of their revenue from transfers from the national order.

According to Parliament's most recent self-assessment, three problems are undermining the NCOP.[61] One, provincial legislatures have insufficient time to craft a thoughtful provincial position on national legislation. Two, provincial mandates to their permanent NCOP delegates seldom reflect substantive provincial inputs. Three, engagements between the provincial and national orders in plenary sessions of the NCOP generally lack policy substance. The president of the republic has in the past expressed doubts that provincial legislatures are doing enough to inject provincial perspectives into national policy.[62] Additional obstacles are the dominance of the national executive in IGR, and the ruling party's use of party discipline to enforce the party line in Parliament.[63] Overall the NCOP has failed to exercise the powers it has to assume a more proactive stance in the oversight of IGR in government.[64] For example, the NCOP was silent on high-profile failures in the schooling and primary health-care services, which are concurrent competences.[65]

Many of the weaknesses in the NCOP are replicated in the provinces, but provincial legislatures also have their own peculiar challenges.[66] The legislatures are small bodies (between thirty and eighty-five members, depending on the size of the province); thus, many of their members are also members of provincial executive councils. Moreover, some provinces took a long time to establish the infrastructure and systems of the legislature.

IGR between Parliament and Legislatures

In addition to the NCOP's IGR role, informal IGR between the legislatures of the three orders or between their various committees have become more regular and systematic in recent years. Inter-legislature IGR take place through special-purpose bodies and meetings, with some notable

examples of inter-legislative collaboration on matters of common interest. For example, the presiding officers of Parliament and the nine provincial legislatures, called speakers, have established a national speakers forum. In most provinces, provincial speakers have a similar forum with their local counterparts. A wide variety of issues is dealt with in these forums, including skills development, strengthening the role of constituency offices, and improving communication between legislatures and the public. Perhaps the most significant collaboration has been the ongoing effort to establish common national–provincial legislation to regulate the internal budgeting and financial management procedures of provincial legislatures and to increase their ability to hold provincial executives to account.[67]

Another example is the Association of Public Accounts Committees (APAC).[68] The national and provincial legislatures all have public accounts committees whose function is to oversee public expenditure in the interest of financial probity and accountable administration. APAC is an association of these committees that was formed as a platform to share experience and to develop their collective capacity for effective oversight in order to improve public sector governance. Over the years, public accounts committees have earned a reputation for effective oversight of the country's public finances, and some of the credit is due to this inter-legislative collaboration.

Parliament's Role in the Budget Process

In terms of the Constitution only the national minister responsible for finances may introduce a money bill in Parliament, and an act of Parliament must establish a procedure for Parliament to amend money bills.[69] Until 2009, there was no legislation, and the entire budget process was under the control of the Ministry of Finance, with Parliament playing no role in the formulation of the national budget. Legislation was enacted in 2009 to establish the procedure for amending money bills before Parliament, which outlines the various stages of the budget process, defines the role and functions of Parliament (including the NCOP) in amending money bills, and establishes the institutional architecture in Parliament to process the national budget.[70] The legislation goes beyond regulating IGR between the national executive and Parliament in the amendment of money bills. It also establishes national norms and standards that bind provincial legislatures in respect to the amendment of provincial money bills and regulates IGR between the provincial executives and legislatures in that regard.

Legislative Techniques

The Constitution provides for both hierarchical and more egalitarian IGR between the three orders in specific contexts. Hierarchy is implicit in the

rules that govern the devolution of powers from a "higher" order to a "lower" order, conflicts between national and provincial legislation in areas of concurrency, and intervention by a "higher" order into the affairs of a "lower" order. Because of the propensity for political conflict between the orders in these vertical intergovernmental relationships, South Africa's constitution-makers deemed it necessary to cater explicitly for conflict management in these cases and to create constitutional checks and balances. By contrast, an egalitarian norm is implicit in the duty of the national and provincial orders to consult organized local government whenever proposed legislation will affect local government matters. The purpose of this duty is to protect the local order from undue encroachment from the other two orders.

Assignment of Functions to a Lower Order

The Constitution provides that functions may be devolved to a lower order through a number of processes. Formally, lower orders may not devolve functions to a "higher order." However, unilateral centralization by the national order—with or without the tacit acceptance of provinces—is a trend. Hence, Parliament can "assign" (i.e., devolve) its ordinary legislative powers (but not its power to amend the Constitution) to a legislative body in another order.[71] This allows Parliament the flexibility to leave to another order that which is best legislated by that order. For example, the (national) law providing for the institution of traditional leadership assigned the responsibility to recognize traditional communities (which are entitled to form a traditional council for local governance in rural areas) to provincial premiers and the power to regulate the process of recognition to provincial legislatures.[72] In practice, assignment is likely to have a high degree of permanence, but is not irrevocable.

Parliament may also assign to the executive the power to promulgate regulations to assist the implementation of an act. Regulations are administrative action and have the force of legislation but must be consistent with the parent act. A national minister may also assign an executive power conferred by an act of Parliament to a member of a provincial executive council or municipal council, but only with their agreement.[73] The assignment takes effect upon proclamation by the president in the official government gazette.

Other than the assignment of a specific power to another order, the Constitution provides a general regime for devolution to the local order. The national and provincial orders "must assign by agreement the administration of *concurrent and provincial exclusive functions* to a municipality or a group of municipalities if the matter would most effectively be administered locally and the municipality has the capacity to administer it."[74] The

essence of assignment is that the municipality is invested with the authority to adopt by-laws (which is a form of regulation) and make policy with respect to a matter that was previously outside its jurisdiction.

The assignment of functions to the local order is a regular practice, but often occurs through "mandate creep" in regulation rather than through the procedures in legislation that were specifically designed to protect local government from unfunded mandates. As a result, claims by local government that whether wittingly or unwittingly the other two orders are imposing unfunded mandates are common. At the same time, however, the large cities in particular have, with some success, repeatedly called for provincial housing and public transport functions to be devolved to them in order to strengthen their control over the urban environment.

Devolution to local government is not a consistent trend, however. In the electricity sector, for instance, national government tried for thirteen years to centralize the local electricity reticulation into distribution bodies organized into functional regions that cut across the boundaries of municipalities, although in the end the project was aborted, in the face of massive resistance from cities fighting to protect a major source of own revenue.[75] Concerns about the maintenance of municipal water and roads infrastructure prompted plans to centralize municipal capital budgets into special-purpose vehicles under national control, culminating in new infrastructure development legislation, which corporatizes all decision-making about infrastructure under the control of the national ministry responsible for economic development. Nor has devolution led to greater fiscal autonomy; rather it is matched by a consistent rise in conditional grant funding as a proportion of municipal revenue. Some provinces have a greater appetite for devolution to local government than others. The government of the Western Cape, which is under the control of an opposition party, recently adopted a policy framework that encourages greater devolution to municipalities in the province.[76]

Devolution of additional functions to the local order is a trend, however haphazard it may be. By contrast, centralization of provincial functions, not devolution, is the counterpart trend. The disbursement of social security grants, formerly a provincial function, was centralized to a national agency in order to combat high levels of corruption and to improve efficiency. Further Education and Training (FET) colleges, which provide adult basic education, are currently in the process of being centralized.[77] Furthermore, the Financial and Fiscal Commission has recently recommended to Parliament that, in the future, provincial education, health, and social development functions should be funded through block grants, which would effectively centralize control over provincial social expenditure budgets.[78]

Conflict between National and Provincial Concurrent Legislation

A special procedure applies in the case of conflict between national and provincial legislation in a concurrent area of competence. National legislation "applying to the country" prevails in a number of cases, including when it "deals with a matter that cannot be effectively regulated by a province individually"; or "a matter that requires uniformity across the nation."[79] National legislation will also prevail over a specific province's legislation when the latter prejudices another province or national economic policy. These criteria are sufficiently broad that national legislation will invariably prevail over provincial legislation. If a court finds that there is conflicting legislation and one prevails over another, the latter is not invalidated, but only rendered inoperative for as long as the conflict remains. In practice, conflicting legislation has not been a major problem of IGR because there has been little provincial lawmaking in concurrent areas, although there are signs of a more assertive legislative stance emerging in the opposition-controlled Western Cape.[80]

Intervention into the Affairs of a Lower Sphere

The Constitution provides for both legislative and executive intervention by a higher sphere into the affairs of a lower sphere. Parliament can pass legislation to intervene in an area of exclusive provincial competence but only when it is necessary to "maintain national security, economic unity, and essential national standards; establish minimum standards for service delivery; or prevent unreasonable action by a province which prejudices other provinces or the country."[81] Such legislation would affect provinces; therefore, the bill providing for the intervention would have to comply with the section 76 procedure described earlier.

The Constitution permits the national executive to take corrective intervention when a province or municipality breaches an executive obligation.[82] The provincial executive has a similar discretionary power in respect of local government.[83] These are powers of last resort because they involve incursions into the affairs of another order. They are, however, a necessary form of supervision in a system where provincial and local orders are principally responsible for providing the public services that implement national legislation, as is typical in "integrated" federal systems.[84]

In both cases, intervention may take different forms, some more intrusive than others: calling for a report, investigating, directing the province or municipality to take specific action, and finally assuming responsibility for the obligation. The last mentioned is permissible only when the same grounds exist that justify Parliament to intervene in exclusive provincial

functional areas. A more onerous intervention regime applies to local government than to provinces in cases where a municipality has failed to adopt a budget or approve revenue-raising measures, or is otherwise in a financial crisis. In these situations, a province must intervene by appointing an administrator and forcing the municipality to adopt a financial recovery plan, or even dissolve the municipality.[85] If the province fails to intervene, the national executive must intervene instead.

Corrective intervention is an exceptional power reserved for situations where something has gone seriously wrong; hence, the Constitution provides for checks and balances. This is where the oversight role of the NCOP becomes important. The second chamber must, within a specified period, receive notice of a discretionary intervention that involves an assumption of responsibility or the dissolution of a municipality and of a mandatory intervention. The NCOP can disapprove discretionary interventions and may oversee their exercise, but it has no authority to stop a mandatory intervention (directed at local authorities).

Although national interventions into provinces under section 100 have been few, the most recent and prominent cases occurred in 2012, when a national ministerial team intervened in three provinces: Gauteng, Free State, and Limpopo. The interventions differed in scope, form, and degree of intrusiveness, the most intrusive being in Limpopo, where the provincial government was financially insolvent and five departments were placed under national administration.[86] There were numerous reasons for the intervention but "contract manipulation, overspending and unauthorised expenditure feature prominently in the list of fiscal transgressions" in the case of all three.[87] An earlier intervention took place in the Eastern Cape "in respect of [failures by the province to execute obligations relating to] social pensions and financial management."[88] Provinces have frequently intervened in municipalities under section 139 in cases of serious and persistent financial problems, service-delivery failure, and maladministration, but probably also for political reasons.[89]

Four main patterns of intergovernmental relations have emerged in the context of intervention. One pattern is willing and active co-operation on the part of the province or municipality subject to intervention, often on the basis of a memorandum of understanding signed by the parties and setting out the terms of the intervention.[90] A second, opposite, pattern is political resistance or even obstruction on the part of the province and municipality, which allegedly happened in the Limpopo intervention.[91] A third is for the province or municipality to co-operate but issue its own clarification about the nature of the problems and the terms of intervention.[92] Finally, there have been a few instances where the appropriateness of the intervention has been challenged in court.[93]

The Duty to Consult Local Government

A bill affecting the status, powers, and functions of local government must be published before it is introduced into the legislature to give organized local government an opportunity to make representations.[94] The IGR Act of 2005 also strengthened local government's position in IGR generally by investing organized local government with a statutory right to participate as a full member in all important IGR executive forums.

IV. IGR in the Executive Branch of Government

IGR are a routine and essential practice in the executive branch of government. The IGR Act of 2005 provides a general institutional framework for executive IGR between all three orders, but is not the only legislation providing for IGR. The Act defines IGR in general terms: "relationships that arise between different governments or between organs of state from different governments in the conduct of their affairs."[95] But it specifies four objects that executives must pursue through IGR: "coherent government, effective provision of services, monitoring implementation of policy and legislation, and realization of national priorities."[96] These objects were inserted in order to focus IGR activities on the implementation of national policy targets for poverty reduction linked to socio-economic rights, and thus reinforce the "integrated" nature of the state.

IGR are transacted through a wide variety of instruments, including party political processes, legislation, policies, plans, budgets, institutions, and informal relationships. Formal structures, however, play an important part, and the IGR Act establishes two main kinds. The first is forums for heads of governments. It includes the vertical President's Coordinating Council (PCC), the nine vertical provincial Premier's Intergovernmental Forum (often referred to as the Premier's Coordinating Forum or PCF), and the horizontal District Intergovernmental Forum (DIGF) in each of the forty-four district municipalities. The second type comprises vertical sector forums in concurrent functional areas. They bring together national ministers and their nine provincial counterparts (called "members of provincial executives"—MECs) responsible for the particular concurrent portfolio (e.g., health and housing). These forums are known by the acronym derived from combining *MINister* and *MEC*: MINMECs. The IGR Act also provides for interprovincial and inter-municipal forums, but their use is not common.[97] In other words, executive-type IGR are mainly vertical (national–provincial, provincial–local, or all three orders) but rarely horizontal.

Other acts of Parliament provide for statutory IGR institutions for specific policy sectors; for example, the National Treasury has established special forums that serve the budget process. The IGR Act does not apply where statutory structures already exist under these other acts. Before examining the operation of these IGR institutions, it is necessary to examine IGR within the national executive itself, for they include some important innovations.

Provincial and Local Participation in National Cabinet and the President's Coordinating Council

Perhaps the most important opportunity that provincial executive authorities and organized local government have to influence the shape of national policy comes through their participation in special sessions of the national cabinet and the President's Coordinating Council (PCC).

Special sessions of cabinet, known as extended cabinet, are held twice a year: in January, to determine the national executive's comprehensive program of action for the year, and in July, to review progress. The nine premiers and representatives of organized local government attend; thus, through their participation, the provincial and local orders have the opportunity to influence the national executive. All spheres of government also submit quarterly progress reports on the program of action to cabinet. Decisions of this body have the status of cabinet decisions. Cabinet may sit in extended sessions on other special occasions. For example, the IGR Act itself was crafted in two full-day sessions of extended cabinet before the bill was submitted to the regular cabinet for adoption and introduction to Parliament.

The other important avenue for the provincial and local orders to influence national policy is through their participation in the President's Coordinating Council, which stands at the apex of the IGR system.[98] The PCC comprises the president and deputy president of the country; the nine provincial premiers; the national ministers responsible for provincial and local government, finance, and the public service; and representatives of organized local government. The president chairs meetings, determines the agenda, and may invite any other person to a meeting.

The PCC, which meets at least twice a year, is a forum for the president to raise matters of national interest, and for mutual consultation on any matter affecting the implementation of national policy and legislation in provinces and municipalities. In practice, the PCC's agendas emerge through a process of consultation. Discussions in meetings are open and frank, consensus is sought, but there is no voting procedure. In some provinces, the draft PCC agenda is tabled in the provincial cabinet for the purpose of broader provincial consultation. Examples of agenda items from past meetings include rural development strategy, the state of school infrastructure in the country, vacancies in the public service, the alignment of intergovernmental planning, and preparations for the 2010 FIFA World Cup. Progress with a national

support program for municipalities, quarterly reports on provincial and local expenditure, and audit outcomes are currently standing agenda items.

PCC takes resolutions, not binding decisions; the IGR Act is explicit that all IGR forums are consultative structures, not executive decision-making bodies.[99] However, PCC resolutions are formally tabled in cabinet for adoption as national executive decisions. In other words, formally, they become binding on the *national* executive as decisions of cabinet. This procedure establishes the appropriate relationship between cabinet and PCC and provides certainty about the content of PCC resolutions. The PCC derives its stature and authority less from its formal power as a statutory institution than from the political authority of its members—the most senior executive offices in the country. In practice, it is a powerful and respected body whose decisions are implemented even if not legally binding. To date, there has been no major friction between the PCC and provinces controlled by opposition parties, or with the NCOP.

Neither extended cabinet nor the PCC employ formal voting procedures; instead, they strive for consensus through informed debate.

Provincial and District Intergovernmental Forums

The nine Premier's Coordinating Forums (PCFs) facilitate IGR between each province and its local governments. The PCF is chaired by the premier and comprises the executive authorities (executive mayors) of metropolitan and district municipalities.[100] The executive mayors of the municipalities are not statutory members of the PCF, but are represented by the district executive mayors. Many local municipalities comprise large cities and towns and thus are more powerful institutions than districts; for that reason, they want to represent their own interests directly in IGR, not through districts or even organized local government. The role of the PCF is similar to the PCC, with a strong focus on coordinated planning and implementation of national and provincial legislation in the province. Like the PCC, the PCF does not take binding executive decisions, but it is unclear whether all provinces have a procedure for submitting PCF resolutions to their cabinets. Most PCFs meet more frequently than twice a year, and generally their agendas deal with national and their own provincial concerns. The main criticism of the PCF model is that local mayors are not statutory members in their own right. This is a particular problem in the case of locals that include the largest secondary cities, whose interests are then indirectly represented in the PCF via the district mayor. There are often tensions between a city and its district council, and the former would prefer to represent itself in IGR forums. Some provinces have introduced adaptations to the model; for instance, some include local executive mayors in the membership of the PCF.

The District Intergovernmental Forum (DIGF) is chaired by the executive mayor of the district and comprises the mayors of local municipalities in the district.[101] The IGR Act defines its key roles as coordinating district-wide integrated development planning and clarifying functional arrangements between the district and local tiers.

Sector IGR Forums and Meetings

National IGR forums (MINMECs) promote IGR in concurrent areas of national and provincial responsibility.[102] MINMECs comprise the national minister, counterpart provincial ministers, and organized local government. Most MINMECs predate the IGR Act, but the legislation defines a standard role for MINMECs to discuss "matters of national interest within a functional area."[103] Some provinces have an equivalent forum with municipalities called a MUNIMEC. Organized local government has a statutory right to participate in all IGR forums to represent the collective interests of local government.[104]

The Local Government MINMEC (LGMINMEC) is a prominent national forum that has played an influential role in the formulation of the national policy on local government and its subsequent implementation. The LGMINMEC sometimes holds joint sessions with other MINMECs and regularly serves as a conduit between other ministries and local government.

Interdepartmental meetings between national and provincial orders are routine. Within the national government, a cabinet committee and departmental *cluster system* was introduced to promote interdepartmental collaboration, and much of the interdepartmental work takes place there. Provincial directors general are also members of these clusters. There also are a multitude of special-purpose intergovernmental technical task teams involving representatives from the provincial order and organized local government. Examples include intergovernmental task teams on public works programs and municipal service delivery. Most provinces have also adopted the national cluster model to promote purposeful collaboration between their departments and municipalities. Similarly, there are provincial intergovernmental task teams where provincial and local civil servants work together, for example on municipal plans and budgets.

Provincial Infrastructure Coordinating Council (PICC)

The PICC is a new structure established by the Infrastructure Development Act in 2014 as one of the foundations of the development state.[105] Its purpose is to coordinate infrastructure development across sectors and spheres from planning to implementation, and its members include the president (chair), the national ministers responsible for infrastructure, the nine provincial

premiers, the executive mayors of metropolitan municipalities, and representatives of organized local government.[106] With the PICC, corporatization is at its most developed and there is a fundamental shift in the pattern of IGR. All major infrastructure projects that meet criteria for national economic significance are potentially subject to the jurisdiction of the PICC and mandatory obligations created under the legislation.[107] The Act goes further than any other IGR legislation by conferring powers of executive decision-making on the PICC, including the power to expropriate land.[108]

Avoidance and Management of Intergovernmental Disputes

The IGR Act provides for intergovernmental dispute-settlement procedures and requires the executive authorities of the three orders to use these to resolve disputes before they can go to court.[109] These provisions give effect to the principles in the Constitution that the orders should avoid disputes and seek to resolve their differences through political discussion, not court action. Among other things, parties to a dispute must formally declare an intergovernmental dispute in writing and actually meet to try to resolve the matter. They may also request the national minister responsible for IGR to mediate their dispute. Before deciding a dispute, courts look for clear evidence of effort to solve disputes, such as compliance with these statutory measures, and follow the Constitution's clear instruction to send a matter back to the parties in the case of non-compliance.[110]

This dispute-settlement regime only applies by default, that is, in the absence of more specific statutory dispute-resolution measures. One such measure is provided in the Division of Revenue Act, which provides for an annual division of revenue between the three orders. Formal disputes are rare, however, and have only occurred between orders governed by different political parties. In a case on September 1, 2008, the City of Cape Town (under the Democratic Party) successfully challenged in the High Court a decision by the provincial government of the Western Cape (then led by the ANC) to appoint a judicial commission of enquiry into its affairs.[111] The Court also held that a party's non-compliance with the dispute-settlement procedures in the IGR Act did not affect the Court's discretion to decide the IGR dispute.

Assessing the Impact of Executive IGR Structures

It is impossible to determine with any degree of certainty whether the institutionalization of IGR has led to more or less productive forms of cooperation and contestation between the orders. There are no standard indicators for measuring the quality of IGR. Even if there were, it would be impossible to isolate the effect of institutionalization on IGR from the many other variables that affect the conduct of IGR, such as the internal

workings of political parties. No firm conclusions can be drawn about whether the IGR Act has contributed to better coordination of policy, plans, and budgets across the boundaries of the orders, or the provincial and local orders securing greater influence over the formulation of national policy. However, some observations about the formal, procedural attributes of IGR can be drawn from facts relating to the implementation of the act.

First, the statutory IGR structures are established and operating in all three orders, suggesting a high level of compliance with the IGR Act.[112] Second, orders under the control of political parties other than the ANC routinely participate in IGR structures chaired by ANC officials, even when the two political parties are decrying each other in public or are locked in dispute.[113] This fact implies that the IGR structures in the act enjoy broad political legitimacy and that there is a level of maturity in IGR despite the rough and tumble of interparty politics. Third, national concerns dominate the agendas of national IGR forums. This reinforces hierarchy in relations between the orders but may also suit the other two orders inasmuch as they are willing to leave it to the national government to provide a national overview of an issue in meetings. In practice, an issue that is specific to a province will rarely make it onto the agenda of a multilateral forum, but will usually be dealt with in a bilateral meeting between the national department and the province. Fourth, corporatization is strongest in the case of infrastructure development, as this is seen as one of the foundations of the developmental state. The new PICC fundamentally alters the incentives and practice of IGR by establishing national control over the planning and delivery of major infrastructure projects and assuming executive powers hitherto not conferred on an IGR structure.

Fifth, despite the hierarchical nature of executive IGR, some provinces have developed their own institutional innovations by, for example, including local mayors in forums or, as in the case of the Western Cape PCF, rotating the chair between the province and its local governments.

The Civil Service

South Africa has a dual civil service, which again illustrates the strong role played by local government.[114] There is a unified national and provincial civil service governed by national legislation that provides uniform conditions of service. Local government has its own public administration governed by separate legislation. Public sector wage negotiations are also conducted through two separate labour bargaining processes. Levels of remuneration can differ markedly for related post categories in the civil service and local government, and pension funds are different. Public servants moving to or from local government resign from their present positions. The ANC intends to create a single public service for all three orders to

provide for the mobility of officials between the orders, but so far attempts to do so have come to nought. The national government introduced a bill to create a single public service, but due to the high costs involved and strong resistance from the unions (which feared changes to conditions of service of workers), the bill was withdrawn in 2008.[115]

There is a fine line between politics and administration. Generally, directors general and municipal managers are political appointees. The ruling party has a policy of political deployment, which is widely criticized for promoting political interference in the appointment of civil servants, particularly municipal managers.[116]

Public servants play a crucial role in IGR. At the official level, provincial directors general are members of the departmental clusters that develop the draft programs of action for cabinet and oversee their implementation. In addition, the clusters meet every fortnight on matters of common interest, including proposed legislation. IGR forums are generally supported by a dedicated technical team comprising senior civil servants, although it is difficult to tell how effective these are.

In the national government, the main responsibility for regulating IGR is shared between four departments. The presidency is responsible for the overall coordination of government policy. The Ministry of Cooperative Governance and Traditional Affairs administers the IGR Act and local government legislation. The National Treasury is responsible for intergovernmental fiscal relations and public finance policy, and is a powerful force in all aspects of policy and IGR. The Ministry of Public Service and Administration is responsible for the national and provincial public service. However, departments that regulate provincial and local competences also have a direct and significant influence on the practice of IGR and the evolution of the intergovernmental system.

Provincial and Local Responsibility for IGR

In the provinces, the premier is responsible for IGR, but departments of local government are responsible for IGR with municipalities. Turf battles are common between these two organs over which is ultimately responsible for coordinating IGR with the local order in the province.[117] The district mayor is responsible for coordinating IGR within the district.[118] Predominantly rural provinces and municipalities generally have limited resources and capacity to promote their interests in IGR processes.

IGR Conferences

There have been several "all of government" IGR conferences. Provinces also routinely hold joint conferences on IGR to share practice, experience, and lessons.[119] These conferences, which may involve politicians and civil servants, have no formal status within the IGR system and are primarily platforms for learning and sharing experiences.

Informal IGR

The IGR Act codified existing institutions to provide a more stable and predictable framework for executive IGR but, in practice, informal contact between the orders remains a crucial dimension of IGR. In some sectors, policy networks have emerged, with officials forging strong relations over many years. Because of its electoral dominance in all three orders, the ANC has an enormous influence on the conduct of IGR. In practice, major policy decisions in any order of government under ANC control are rarely taken without their first going to the highest party organs. The influence of party politics in government can be pernicious, for example, when it leads to interference in procurement processes for corrupt purposes or to the abuse of appointments to the civil service, both of which are common and widespread problems.

V. Joint Agencies and Specialist Commissions

The Financial and Fiscal Commission (FFC) and the Public Service Commission (PSC) are independent constitutional bodies that play an important role in IGR.[120] They are funded through specific grants, and they employ their own staff. The FCC makes recommendations on the provincial and local equitable shares, the division of revenue, and the financial implications of devolution. The president appoints its members, three of whom are selected after consultation with provincial premiers, and two after consultation with organized local government. The FCC submits recommendations to Parliament and provincial legislatures, but its recommendations are not binding on these organs.

The PSC comprises fourteen commissioners appointed by the president, five of whom are approved by the National Assembly; the remaining nine are nominated by provincial premiers, with one commissioner per province. The PSC's main function is to make recommendations on improving public administration. The PSC must report annually to the National Assembly and provincial legislatures where matters affect provinces, which it does through its annual *State of the Public Service Report*.

The establishment of joint national–provincial agencies to foster IGR is not a common practice, although in recent years, some policy sectors have started to use special-purpose vehicles to coordinate planning and service delivery between the orders.[121] Recent national land transport legislation, for example, creates several joint agencies as part of an integrated transport

strategy for the country.[122] Transport regulatory authorities are to be set up in all three spheres of government and may perform functions relating to "receiving any applications for operating licences" (from private commuter service providers) on behalf of each other when needed.[123] National Regulators as well as the Provincial Regulatory Entity (PRE) will review and determine these inter-region transport activities.[124]

The national government has conducted several governance reviews in the past eighteen years that have a direct bearing on IGR. In 1996, the Presidential Review Commission made recommendations to the president on the organization of the public sector, which informed the major cabinet restructuring initiatives of 1999–2000, which led to the creation of the cluster system.[125] In 1998, the Ministry of Provincial and Local Government appointed a commission of external experts to conduct an assessment of IGR in practice. The commission recommended the introduction of a uniform legislative framework for MINMECs, a recommendation that was implemented by the IGR Act.[126] The presidency has also conducted comprehensive ten- and fifteen-year reviews of government performance, which have had a great influence on the policies of the ruling party and government at all levels.[127]

VI. Intergovernmental Agreements

At least four types of agreements are used in the conduct of IGR: delivery agreements, implementation protocols, memorandums of understanding, and agency service-delivery agreements.

Delivery Agreements

The delivery agreement is an innovation introduced in 2009 applying to all ministerial portfolios. It is an intergovernmental agreement that sets objectives and targets for each sector that is signed by the national minister and his or her provincial and local counterparts and linked to the minister performance agreement with the president. Whether these agreements have improved intergovernmental relations in any significant way is not clear.

Intergovernmental Protocols

The IGR Act provides for IGR agreements in the form of implementation protocols (IGR protocols).[128] They were introduced to promote greater clarity, certainty, and stability in the conduct of IGR. Their use is encouraged in situations where the implementation of national policy requires close intergovernmental coordination. Executive organs in all three orders must consider that option when a national priority is at stake, but it is not

mandatory. The IGR Act specifies the minimum content for IGR protocols to ensure consistency and a clear division of accountabilities between organs of state in regard to joint work. They do not have a legal status, but it is likely that a court will examine protocol breaches when adjudicating IGR disputes, although there is no example of this yet. IGR protocols have been used to manage the practical effects of provincial boundary changes and improvements in the education sector in one province, but they are a new instrument and still not widely used. More recently, the presidency has developed national outcome targets for the public sector to give effect to the national government's policy priorities. The presidency intends to use the implementation protocols in the IGR Act as a device for negotiating and formalizing an intergovernmental division of labour with the provincial and local orders in regard to the national targets.

Service Delivery and Other Agreements

The third type of IGR agreement is the agency agreement (often called a service-delivery agreement), which governs agency relations when one sphere of government performs a delegated function or provides a service on behalf of another.[129] Service-delivery agreements are binding contracts, not implementation protocols. They are used by provinces for the vehicle licensing and traffic services that most large cities undertake as agents on their behalf. There is no common format or central repository for these agreements, and there is scant empirical information about their general efficacy as an IGR tool, although anecdotal evidence suggests that there is significant variation in their quality and use. Indeed, the fact that municipalities constantly complain about unfunded mandates in policy sectors where agency relationships are common could suggest that some agreements are the product of unilateral imposition rather than careful negotiations between the orders concerned.

MOUs and Other Agreements

Finally, memorandums of understanding (MOUs) are generic instruments sometimes used in situations where non-state parties (such as business or civil-society organs) and executives want to enter into a cooperative arrangement for some developmental purpose. In most cases, these are declarations of commitment or a form of social compact, rather than binding contractual arrangements. For example, between 2005 and 2007, all forty-four district municipalities convened growth and development summits that resulted in multi-stakeholder agreements on investment in local economic development in their areas. The most successful use of the MOU is the agreement that governed the relationship between

the national executive, the provincial executives of affected provinces, host cities, and the multitude of other partners that were involved in the complex preparations for the 2010 FIFA World Cup.[130] However, this was an example of a special binding contractual arrangement of limited duration, with guaranteed financial obligations by the national government to meet a particular international obligation, rather than standard IGR instruments.

In general, IGR between the orders are not based on a contractual model that creates binding obligations on the parties through consent. Implementation protocols and other "types of IGR agreement" are intended to promote political and administrative certainty on common national priorities, not to reduce IGR to legal contractual obligations. In the cases of agency relations, however, agreements are contractual in nature and create binding obligations, at least presumptively, because higher orders have substantial power to impose agency relations on lower orders. Dealings that involve private third parties making financial investments in public infrastructure (as in the World Cup) are contractual in nature and create binding obligations on the parties.

VII. Intergovernmental Fiscal Relations

South Africa has a highly centralized intergovernmental fiscal system.[131] The national government has exclusive control over the major tax instruments, revenue collection, and division of revenue between the orders. It has wide powers to regulate subnational fiscal powers, borrowing, budgeting, and financial management, and (with the FFC) it determines the equitable share formula for apportioning revenue between provinces and between municipalities. The National Treasury controls all of these levers of the fiscal system, making it one of the most powerful institutions in the state. It exercises its influence in IGR through a wide array of legislation, its stewardship over highly regulated IGR institutions, and through softer, less visible, but no less influential means such as Treasury circulars. While these only have the status of guidelines, in effect they direct all facets of budgeting and financial management of the overall state.

Intergovernmental fiscal relations are transacted through four main institutions that comprise an intergovernmental budget system. The first is the Medium-Term Expenditure Framework and budget process. The state's budget process, through which policy priorities become concrete spending programs, is governed by the Medium-Term Expenditure Framework (hereinafter MTEF), which sets out planned expenditure for all departments over three consecutive years. The MTEF falls under the responsibility of the National Treasury and is served by its own cabinet and intergovernmental relations machinery and organized around an annual

calendar of standardized budget preparation events and timelines. There are three phases to the preparation of the MTEF. The first phase involves determining the baseline for the budgets of national and provincial departments, the second the reprioritization of budgets according to national priorities, and the third the consolidation and adoption of the MTEF by the national cabinet.[132]

The first two phases have an in-built intergovernmental process. National and relevant provincial departments are clustered into function groups, for the purpose of ensuring that expenditure is categorized according to government objectives (such as health), not simply individual administrative units (departments of health).[133] Currently, these functions are organized around twelve national government outcomes.[134] Function budgeting recognizes that "policy outcomes require co-operation among complementary stakeholders."[135] National and provincial departments with concurrent responsibilities must make "recommendations on sector-wide reprioritization."[136] In the second phase of the process the function groups and national coordinating departments "work collaboratively to achieve consensus on the MTEF" for onward submission to the cabinet.[137] Their recommendations to the cabinet must take into account the priorities of the national development plan and the MTSF, outline an implementation plan, indicate trade-offs, and establish key performance indicators.[138]

The second institution is the Ministers' Committee on the Budget (MINCOMBUD), a special inter-ministerial cabinet committee chaired by the minister of finance, who prepares a draft budget and division of revenue for cabinet approval. The third is the Budget Council, a statutory IGR structure that comprises the minister of finance, who chairs the body, and the nine provincial ministers of finance.[139] The Budget Council is a powerful institution that has a broad influence on national policy. The last is the local government counterpart of the Budget Council, the Budget Forum, which includes organized local government and provincial ministers responsible for local government.

The National Treasury's assertive role in IGR is often contested, and the accusation that it makes policy through the budget is a common one. There are frequent tensions between the National Treasury and the other two orders. National Treasury has repeatedly expressed concerns about provincial under-spending on infrastructure and social services, particularly the maintenance and refurbishment of hospitals and schools, and inadequate own-revenue collection by municipalities. Provinces and municipalities, on the other hand, complain that provincial social services and basic municipal services respectively are underfunded by the National Treasury.[140] Thus, competitions between the orders over access to and the use of financial resources are routine events in fiscal IGR.

VIII. IGR and Efficiency in Policy-Making and Implementation

Co-operative government is coordination intensive, often at the expense of efficiency and accountability. IGR have become more systematic in recent years, but practice varies considerably. There are no uniform indicators for measuring the impact of IGR, and causality would be difficult to determine even if there were. The effectiveness of IGR is extrapolated from proxies, notably indicators for measuring compliance (inputs), expenditure (outputs), and progress toward target completion (outcomes). These underscore the integrated nature of the South African model. The cluster system and the distribution of competences are key institutional weaknesses with a distinct IGR impact.

Clusters sought to overcome silos by integrating the work of state departments. Instead, clusters have helped to confuse lines of accountability. In some cases, they have created joint-decision traps, added another layer of bureaucracy, and introduced overly elaborate reporting systems, with few dividends for decision-making, accountability, and policy coherence. Clusters have also not prevented major policy failures (the electricity sector, for example), nor have they prevented unfunded mandates from being imposed on local government. They have thus created complexity but brought little efficiency to intergovernmental coordination or provincial influence to national policy debates. Their main function is to exert national departmental control over provincial departments to ensure the delivery of national policies.

There are two main problems with the distribution of competences.[141] First, the Constitution does not provide clear definitions of functions, and many provincial and local functional areas overlap. Provincial–municipal health services, roads, and planning are telling examples. In these cases, it is often unclear where one order's authority ends and the other's begins. This has led to conflicting interpretations of functions, duplication in service delivery, and conflicts detrimental to efficient and accountable government.

The second problem lies with the effectiveness of national–provincial concurrency of competences. Provinces often spend their social budgets on priorities other than the national priorities for which budgets were allocated. National departments are concerned that these budget variations undermine national equity consideration. The problem is common in the concurrent education, welfare, and public health sectors, and has prompted the national executive to centralize social security grants payments (previously a provincial function). The National Treasury recently proposed tighter controls on provincial discretion in these sectors, in the form of increased use of conditional transfers, in an attempt to rectify this problem. But the proposals have caused tensions with provincial officials. Provinces believe they are within their rights to shape their own budgets, and that this increasing use of conditional grants to secure national interests undermines their autonomy as governments.

There are some notable achievements, however. For one, the intergovernmental financial transfer system is well established, and intergovernmental relations work effectively in this context, although there is growing concern about high levels of grant dependency in provinces and municipalities, especially the larger cities. A formidable National Treasury and well-constructed legislative frameworks are possible reasons for the effectiveness of intergovernmental fiscal relations. Second, progress in meeting basic needs has been considerable. Millions of people now have access to social grants, housing, health care, schooling, potable water, dignified sanitation, and electricity in their homes.[142] It would be difficult to credit improved access to public services only to the effectiveness of IGR arrangements, but IGR have undoubtedly played a part, along with other factors such as consistent growth in provincial education and health budgets, well-designed instruments (social security grants), and historically capable and consistently well-managed sectors (water). Despite the progress, there remain severe problems in each of these policy sectors.

IX. The Impact of IGR on Democratic Accountability

The media, opposition parties, and civil-society organizations have consistently raised concerns about government's accountability to citizens.[143] The strongest concern is the perceived subservience of legislatures to executive government, Parliament's especially, which undermines multi-party democracy, public debate, and executive oversight. The second is the national executive's dominance over subnational orders, with the latter largely in the position of agent to the national principal. In the past, some provincial premiers have decried the reduction of provincial governments to spending agencies of the national government. A third concern is that the national government's drive to coordinate and integrate government blurs lines of accountability and undermines decision-making effectiveness.

But institutional restraints such as a transparent budget process, a powerful media, and resurgent parliamentary oversight have proved important counterweights to the opaqueness of IGR. To further strengthen transparency and accountability in IGR, the IGR Act allows (without prescribing) the national executive to provide an annual report to Parliament on the state of IGR in government.[144]

In some policy sectors, non-government actors are structurally included in governance, and hence are influential players in the formulation of policy and the conduct of IGR. The most important inclusive institution is the National Economic Development and Labour Council (NEDLAC), a statutory structure that brings together government, business, and labour to

negotiate economic and labour policy.[145] The NEDLAC played a key role in designing the labour regime and the country's response to the global financial crisis.[146] The presidency has also established numerous expert advisory councils in key areas of policy, including HIV/AIDS and the economy. The newly established National Planning Commission, which comprises leading academics and experts, and which recently produced the first national development plan for the country, will play an increasingly prominent role in shaping long-term development.

X. Overall Assessment of the Impact of IGR and Future Directions

South Africa's corporatized, "integrationist" model of co-operative government is a product of the political settlement that abolished white-minority rule and introduced constitutional democracy. A strong national order reflected the black majority's aspirations for national self-determination, and the necessity of integrating and rebuilding a society that had been balkanized to further the ends of racial exclusion and exploitation. Constitutionally protected provincial and local orders reflected the need to accommodate political minorities by providing sufficient self-government at subnational levels to check majority rule. The principles of co-operative government sought to define an intergovernmental bridge between the orders that would ensure effective, coherent government for the country. Co-operative government thus promotes and balances the interests of national unity and subnational diversity while checking their worst inclinations toward either national domination or subnational parochialism. How has the practice of IGR affected the delicate balance of federal power in the nineteen years since ratification of the Constitution?

First, perhaps most important, an intergovernmental architecture has evolved rapidly and is working, if not always effectively. The main lines of intergovernmental engagement are well established. Increased formalization has made the key points of contact between the orders more predictable. All three orders use IGR institutions in pursuing their interests. That is an important achievement in a country that is deeply scarred by its history of political division and racial conflict. In general terms, therefore, the IGR institutions that emerged after 1994 have played their part to consolidate the federal system and contain the pressures of a society undergoing major political and structural change.

Second, in general, IGR are hierarchical and executive centred. The national executive in particular is the dominant influence in IGR. The incentives for strong and directive national leadership are inherent in the Constitution's design. The formalization of executive IGR in legislation explicitly reinforced hierarchical relationships centred on the realization

of national policy objectives. In return for formalized channels of national control, however, provincial and local governments have much greater certainty about the crucial points in the decision-making process where they can and must leverage their own interests.

Other external factors have created the momentum for increasing centralization. A single dominant political party with strong tendencies toward centralization and a manifesto focused on achieving fundamental social and economic change is one of the most important influences shaping IGR. With political power increasingly concentrated around the national structures of the dominant political party in the country, similar centralizing shifts within IGR were inevitable as party hierarchies became replicated in the formal business of government. The adoption of a macro-economic austerity framework—focused on achieving faster growth and controlling public expenditure—also allowed the National Treasury to assert strong control over virtually all aspects of provincial and local expenditure and management. Targets for national redress linked to the Bill of Rights and the Millennium Development Goals, which the provincial and local orders were principally responsible for achieving, further elevated the executive's role in overseeing all aspects of implementation. However, by failing to use their constitutional powers to the full, Parliament and provincial legislatures and governments were also acquiescent in the rise of the national executive. This was especially true of the National Council of Provinces, according to Parliament's own self-assessment, where provinces seldom if ever take a formal stand against these centralizing shifts.

This being said, centralizing tendencies within the ruling party have not gone unchecked. The recall of President Thabo Mbeki by his party in 2008 was partly a reaction to centralization within the ruling party during his tenure. Since then, Parliament has begun to assert itself in relation to the executive, for example by staking a role for itself in budget processes, hitherto the sole preserve of the Treasury. These developments may or may not signal a new direction for IGR under the fifth democratic national and provincial governments, elected in 2014. The government's establishment of a National Planning Commission for the country in 2010 would suggest that central control in some areas of policy is likely to increase further.[147] However, the outcomes of the national and provincial elections of 2014 firmed up the boundaries between the provincial and national orders in the case of at least one province. In the Western Cape, an opposition party retained control of both the province (2014 elections) and the major metropolitan municipality, Cape Town (2011 local elections). The 2014 election also showed that the ANC is vulnerable in the large metropolitan areas. These political developments could herald a new era of adversarial IGR, increase the incidence of formal IGR disputes and provide a test for

the effectiveness of the wide array of formal IGR mechanisms that have been established.

A third general feature of IGR is *both* centralization and devolution of functions. Each is determined by pragmatic considerations confronting the national government in particular service-delivery sectors, rather than by a clear federal policy blueprint. Centralization, rather than devolution, is the firm trend with regard to provincial functions. Certain provincial responsibilities in the social development (social security grants) and education (training colleges) sectors have been shifted to the national order. Further restrictions on provincial expenditure discretion in the health, social, and education sectors are probable. Corporatization is the trend in the area of infrastructure development, reflected in a new kind of IGR institution with executive powers: the PICC.

The case of local government is more complex because there are plans to devolve some functions and centralize others. The Constitution and national policy give local government a strong developmental mandate and significant powers. Municipalities have an important place-shaping role and are the intended sites of direct citizen involvement in governance. The eight largest cities are home to the majority of the population and the major economic centres in the country. In theory, therefore, local government is in a much stronger position to exercise self-government than provinces because there is real and substantial fiscal decentralization to municipalities.

But decentralization in this context has neither escaped the influence of an assertive national government nor gone unchecked. National policy targets govern the major sectors of municipal service delivery and grant funding is tailored to these. Major reforms in the electricity sector and to the local public service, still in the wings, will encroach on local autonomy if pursued. But the greatest threat to local self-government comes from within the local sphere itself. Corruption, maladministration, and unresponsive local leadership are serious problems. Since 2005, civil protests in municipalities have become fixtures of the local political landscape, and local institutions consistently rank low on the scales of public confidence according to citizen surveys. The national government has used these problems as pretexts for assuming a more directive role in local affairs. In 2009, cabinet adopted a highly intrusive national turnaround strategy for local government, which among other things, envisaged putting municipal capital budgets under the control of a national authority.

Devolution of functions to local government has also fuelled tensions between provincial and local government. The relationship between some big cities and their provinces is especially difficult, and contestation over officially provincial functions, such as housing and public transport, is commonplace. Cities want these provincial functions devolved so that they can manage their built environments more effectively. Provinces are threatened by the economic might of cities and fear losing power through further devolution.

Because subnational governments implement national policies and account for more than half of total public expenditures, the national government's emphasis on improving efficiency and accountability will likely lead to stronger national control. The global financial crisis and a skills shortage in the economy gave further impetus to efforts to strengthen public accountability and monitor state performance more effectively.

The practice of IGR in South Africa has evolved dynamically since 1996 when the Constitution was adopted, but has now reached something of a crossroads, where the future of subnational government may be at stake. The fifth democratic government was elected in 2014 with a strong mandate to embark on radical economic reform to address the country's high levels of poverty, inequality, and unemployment, and the pressure to address the structural problems in the political economy will undoubtedly drive policy reform over the next five years. The new government has declared its intention to adopt a stronger role for the state in the economy by creating a new National Planning Commission to drive long-term planning in the country, adopting a national development plan, and introducing new legislation to corporatize decision-making on infrastructure development under national control. Cities will undoubtedly play a more prominent role in IGR as national government takes forward a new urban development framework that is currently on the drawing board. A review of the constitutional framework for provincial and local government is also part of the ANC's plans for the next five years, and for the last few years the national government has been developing a White Paper on Cooperative Government. These developments are a signal that increased centralization of IGR in the future is decidedly possible—perhaps even drastic reforms to multi-level government to further limit subnational autonomy.

Notes

1. The concept of corporatized intergovernmental relations comes from a paper prepared for 2012 Conference of the International Association of Centers for Federal Studies (IACFS) by Derek Powell and Phindile Ntliziywana, "'South Africa Inc.': The Rise of the Developmental State and the Corporatization of Intergovernmental Relations" that will be published as a chapter in a forthcoming book by IACFS.
2. See also Nico Steytler, "Republic of South Africa," in John Kincaid and G. Alan Tarr, eds, *Constitutional Origins, Structures and Change in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2005), pp. 311–46; Christina Murray, "Republic of South Africa," in Katy Le Roy and Cheryl Saunders, eds, *Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006), pp. 258–88; Bongani Khumalo and Renosi Mokate, "Republic of South Africa," in Anwar Shah, ed., *The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal and Kingston: McGill-Queen's University Press, 2007), pp. 262–86; Christina Murray and

Salim Nakhjaveni, "Republic of South Africa," in Hans Michelmann, ed., *Foreign Relations in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2009); Jaap De Visser, "Republic of South Africa," in Nico Steytler, ed., *Local Government and Metropolitan Regions in Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 2009), pp. 267–97.

3. The last national population census was in 2011. The best estimate is used to predict the 2013 mid year population. Fifty-one percent of the population (approximately 27.16 million) is female. Approximately 29.2 percent of people are between the ages of zero and fourteen years, and only 7.8 percent are older than fifty-nine years of age. Statistics South Africa, *Mid-Year Population Estimates, 2013* P0302 (Pretoria: Statistics South Africa, May 14, 2013), p. 2.
4. For a recent critical history of apartheid see David Welsh, *The Rise and Fall of Apartheid* (Johannesburg and Cape Town: Jonathan Ball Publishers, 2009).
5. After a failed attempt in 1992, multi-party negotiations got underway in earnest in 1993. South Africans elected the first democratic government (of national unity) in 1994 under an interim constitution and a multi-party Constitutional Assembly which drafted a new constitution between 1994 and 1996. For an excellent, contemporary account of the political negotiations see Steven Friedman and Doreen Atkinson, ed., *The Small Miracle: South Africa's Negotiated Settlement* (Johannesburg: Raven Press, 1994).
6. Constitution of the Republic of South Africa 1996, section 40.
7. The nine provinces are Gauteng, Western Cape, Kwa-Zulu-Natal, Mpumalanga, North West, Limpopo, Eastern Cape, Northern Cape, and Free State.
8. The official languages (with the percentage of the population speaking a language as home language) are Isi Zulu (23.8 percent), isiXhosa (17.6 percent), Afrikaans (13.3 percent), Sesotho sa Leboa (9.4 percent), English (8.2 percent), Setswana (8.2 percent), Sesotho (7.9 percent), isiTsonga (4.4 percent), Sepedi (2.7 percent), siVenda (2.3 percent), and isiNdebele (1.6 percent). Statistics South Africa, *Census 2001*, quoted in The Presidency of the Republic of South Africa, *A Nation in the Making: A Discussion Document on Macro-social Trends in South Africa* (Pretoria: The Presidency, 2004), p. 33.
9. Gauteng is the smallest province geographically, but has the largest share of population (22.4 percent) and is the largest contributor to national GDP (33.5 percent). The Northern Cape is the largest province, but only has 2.3 percent of the country's population and contributes the least to GDP (2.2 percent). See Statistics South Africa, *Mid-Year Population Estimates PO302* (Pretoria: Statistics South Africa, 20 July 2010), p. 4; and Global Insight, *Comprehensive Profile of All Nine Provinces of Selected Indicators on Development and Governance* (Gauteng: Global Insight, 2008), p. 6.
10. Constitution, section 167.
11. Socio-economic rights include, for example, rights to housing, health care, education, water, and social security. The legal tradition is common law in that it is casuistic or judge made, in contrast to the civil-law tradition which is codified and systematic. On the origins and character of the South African common law, see Hahlo and Kahn, *The South African Legal System and Its Background* (Johannesburg: Juta and Co., Ltd, 1968), pp. 132–3 and 521–3.
12. A district council shares jurisdiction over local functions with the local councils in the area of the district, and national legislation determines the distribution of functions between the two tiers. For an account of the structure, powers, and functions of local government see generally Jaap De Visser, "Republic of South Africa," in Nico Steytler, ed., *A Global Dialogue on Federalism, Volume 6, Local Government and Metropolitan Regions in Federal Systems* (Montreal and Kingston: McGill-Queen's University Press, 2007), pp. 267–97. For the description of the quantity of municipalities see South African Government Information, *Local Government* (South African Government Information, 2010/11), http://www.info.gov.za/aboutgovt/locgovt/ (accessed July 24, 2013).

13. Constitution, section 152.
14. South African Cities Network, *State of the City Finances Report* (Gauteng: South African Cities Network, 2008), p. 4.
15. Constitution, section 163. The legislation concerned is the Organized Local Government Act 52 of 1997.
16. On intergovernmental fiscal relations see Bongani Khumalo and Renosi Mokate, "Republic of South Africa," in Anwar Shah, ed., *The Practice of Fiscal Federalism* (Montreal & Kingston, London, Ithaca: McGill-Queen's University Press: 2007), pp. 262–86.
17. The provincial share of nationally collected revenue is generally 41–43 percent of the total division. Transfers comprise 96 percent of provincial revenue, and provincial-own revenues about 3.7 percent. About 85 percent of provincial revenue is allocated to education, health, and social development services, which are concurrent functions. Republic of South Africa, National Treasury, *Provincial Budgets and Expenditure Review 2005/6–2011/12* (Pretoria: National Treasury, 2009).
18. Constitution, Chapter 3.
19. Constitution, section 41 (1).
20. Ibid, section 41(3).
21. Ibid, section 42(4).
22. Ibid, section 74.
23. Ibid, section 41(2).
24. Ibid, section 167.
25. *Minister of Police and others v Premier of the Western Cape and others* 2013 (12) BCLR 1405 (CC), paras 18–19. *National Gambling Board v Premier of KwaZulu-Natal* 2002 (2) BCLR 156 (CC) *Doctors for Life International v Speaker of Parliament and Others* 2006 (12) BCLR 1399 (CC).
26. *Minister of Police*, para 18.
27. Nico Steytler, "The Constitutional Court: Reinforcing South Africa's Hourglass System of Multi-Level Government" (unpublished paper, 2014).
28. Nico Steytler, "Judicial Neutrality in the Face of Ineptitude: The Constitutional Court and Multi-level Government in South Africa," in H-P. Schneider, J. Kramer and B. Caravito, eds, *Judge Made Federalism* (Baden: Nomos Verlag, 2009), p. 27.
29. Nico Steytler, 2014, p. 19.
30. In the 2014 national and provincial elections, the African National Government Congress (ANC) was returned to Parliament with about 62 percent of the vote, and it controls eight of the nine provinces. The Democratic Alliance is in government in the province of the Western Cape, the City of Cape Town, and several other municipalities mainly in that province.
31. This message was clearly spelled out in the ANC's election manifesto for the 2014 national and provincial elections: "Our struggle has now reached the second phase, in which we will implement *radical socio-economic transformation* to meaningfully address poverty, unemployment and inequality. Far-reaching economic transformation is the central question this election must answer." ANC, *Together We Move South Africa Forward* (ANC, 2014), p. 3, http://www.anc.org.za/2014/wp-content/themes/anc/downloads/Manifesto_Booklet.pdf (accessed July 2, 2014).
32. This policy framework for growth through fiscal austerity is known as *Growth, Employment and Redistribution (GEAR)* and remains in force today despite mounting criticism from the labour unions that it produced wealth for the capitalist elites and jobless growth and poverty for the black population.
33. For an account of this period of growth see Trevor Manuel, *Budget Speech: Address by the Minister of Finance to Parliament*, February 20, 2007, http://www.info.gov.za/speeches/2007/07022115261001.htm (accessed August 30, 2010).
34. For an account of the impact of the global financial crisis on the economy see Pravin Gordhan, *Budget Speech: Address by the Minister of Finance to Parliament*, February 17, 2010, http://www.treasury.gov.za/ (accessed August 30, 2010); and OECD, *Economic Surveys: South Africa*, Volume 2010/11 (OECD, July 2010).

35. Ntsakisi Maswanganyi, "IMF Slashes SA's Economic Growth Outlook to 2.3 percent" *BDlive* (8 April, 2014), http://www.bdlive.co.za/economy/2014/04/08/imf-slashes-sas-2014-economic-growth-outlook-to-2.3 (accessed July 2, 2014). For data on 2014, see http://www.tradingeconomics.com/south-africa/gdp-growth-annual (accessed February 19, 2015).
36. International Monetary Fund, "South Africa—Article IV Consultation," *IMF Country Report* 13, no. 303(2014): 4. Data on past growth and unemployment can be obtained from Statistics South Africa, *Press Statement* (May 25, 2010) and Statistics South Africa, *Quarterly Labour Force Survey (QLFS) Quarter 2 (April-June) 2010* (July 27, 2010), p. 2. Real GDP per capita in 2008 was estimated at R24,498. The Presidency, Government of South Africa, *Development Indicators* (Pretoria: The Presidency, 2008), p. 2. Prior to the 2008–9 recession the unemployment rate was very high at 23.5 percent (2008) using the official definition (which excludes people who have not actively looked for employment in the last six months: discouraged work-seekers). Statistics South Africa, *Quarterly Labour Force Survey (QLFS) 1st quarter 2009 PO211* (Pretoria: Statistics South Africa, May 2009).
37. The Gini coefficient (which measures income inequality with 0 representing perfect equality and 1 perfect inequality) increased from 0.64 in 1995 to 0.69 in 2005, falling to 0.63 in 2013, with significant shifts within population sub-groups (International Monetary Fund, ibid). Iraj Abedien, "Achievements, Failures and Lessons of the South African Macroeconomic Experience, 1994–2008," *Transformation Audit: Risk and Opportunity*, The Institute for Justice and Reconciliation (Cape Town: The Institute for Justice and Reconciliation, 2008), pp. 6–7. Life expectancy at birth is 50.3 years for males and 53.9 years for females (Statistics South Africa, ibid, p. 3). Social security grants are now provided to about thirteen million people, but poverty levels are high, with an estimated 40 percent of households living below a poverty line of R480 per month (The Dinokeng Scenarios, *Three Futures for South Africa* www.dinokeng.co.za, 2009, p. 25, viewed May 5, 2009).
38. The ANC government is an alliance between the ANC, the South African Communist Party, and the country's largest labour union, the Congress of South African Trade Unions (COSATU). The latter is a powerful voice in the ruling alliance and is fiercely critical of government's economic policy, wanting greater state intervention in the economy, including nationalization of banks and mines. The Economic Freedom Fighters (EFF), a paramilitary-style breakaway faction of the ANC's youth wing led by former President of the Youth League Julius Malema, contested the 2014 national and provincial elections on a ticket of radical economic liberation, including expropriation of white-owned land without compensation, and garnered 1.2 million votes (or around 6 percent of the total) .
39. For this argument, see Ben Turok, *From the Freedom Charter to Polokwane—The Evolution of ANC Economic Policy* (Cape Town: New Agenda: South African Journal of Social and Economic Policy, 2008).
40. The Millennium Development Goals are eight social and economic priorities for 2015 agreed upon by 189 countries at the United Nations Millennium Summit in 2000 and further specified at the 2005 World Summit. United Nations Development Program South Africa, *What Are the MDGs* (UNDP South Africa, 2013), http://www.undp.org.za/millennium-development-goals (accessed July 24, 2013).
41. Pravin Gordhan, *Budget Speech: Address by the Minister of Finance to Parliament*, February 17, 2010, http://www.treasury.gov.za/ (accessed August 30, 2010).
42. Nico Steytler and Derek Powell, "The Impact of the Global Financial Crisis on Decentralized Government in South Africa," *Journal of Studies on European Integration and Federalism* 358 (Winter 2010): pp. 148–72.
43. Powell and Ntliziywana, op.cit. The national development plan was drafted by the National Planning Commission, an expert advisory body, and adopted in 2012. It is widely seen as a sensible program of action, though heavily criticized by COSATU and the SACP for its retention of GEAR's neo-liberal approach to economic reform. See National Planning Commission, *National Development Plan 2030: Our Future—Make It Work* (Pretoria: NPC, 2012).

44. Department of Provincial and Local Government, *Cooperative Government, Service Delivery and the Practice of Intergovernmental Relations*, unpublished research paper prepared by the Applied Fiscal Research Centre (AFREC) (University of Cape Town, 2008), p. 3.
45. Department of Provincial and Local Government, *The Implementation of the Intergovernmental Relations Framework Act—Inaugural Report 2005/06–2006/07* (Pretoria: The Department of Provincial and Local Government, 2008), p. 11.
46. For a detailed analysis of the Infrastructure Development Act 23 of 2014, see Powell and Ntliziywana, op.cit. The Act was promulgated by the President on May 30, 2014 and came into effect on July 1, 2014.
47. The intervention was a complete failure. See Derek Powell, Michael O'Donovan, Zemelak Ayele, and Tinashe Chigwata, *Operation Clean Audit 2014: Why it Failed and What Can Be Learned*, http://www.mlgi.org.za/talking-good-governance/talking-good-governance (accessed July 3, 2014).
48. A major review of provincial and local government was launched in 2007 and was still underway at the time of writing. Department of Provincial and Local Government, *Policy Process on the System of Provincial and Local Government: Background Policy Questions* (Pretoria: The DPLG, 2007).
49. Constitution, section 43.
50. Ibid, section 160.
51. Ibid, section 42(4).
52. Ibid.
53. The NCOP was modelled on Germany's *Bundesrat*. It was a key institution of the federal formula underpinning South Africa's political settlement. See generally Christina Murray, "Republic of South Africa," in Katy Le Roy and Cheryl Saunders, eds, *A Global Dialogue on Federalism, Volume 3, Legislative, Executive and Judicial Governance in Federal Countries* (Montreal and Kingston: McGill-Queen's University Press, 2006), pp. 258–88.
54. Constitution, sections 60a nd 61.
55. Ibid, section 67.
56. Ibid, sections 73–77.
57. Christina Murray, Yonina Hoffman-Wanderer, and Karla Saller, *NCOP Second Term—1999–2004* (Parliament of the Republic of South Africa, unpublished report, 2004), p. 38.
58. Parliament, *The National Council of Provinces—Perspectives on the First Ten Years* (Cape Town: Parliament of the Republic of South Africa, 2008), pp. 12–21.
59. For example, the NCOP convened a summit on IGR in 2008 to commemorate its tenth anniversary.
60. See Parliament, *Report of the Independent Panel Assessment of Parliament* (Cape Town: Parliament of the Republic of South Africa, 2008); *The National Council of Provinces—Perspectives on the First Ten Years* (Cape Town: Parliament of the Republic of South Africa, 2008); and *Parliament Since 1994—Achievements and Challenges* (Cape Town: Parliament of the Republic of South Africa, 2006); and C. Murray, Y. Hoffman-Wanderer, and K. Saller, *NCOP Second Term—1999–2004* (Parliament of the Republic of South Africa, unpublished report, 2004); C. Murray, D. Bezruki, L. Ferrell, J. Hughes, Y. Hoffman-Wanderer, and K. Saller, *Speeding Transformation: Monitoring and Oversight in the NCOP* (Cape Town: Report of the Parliament of the Republic of South Africa, 2004); and C. Murray and L. Nijzink, *Building Representative Democracy—South Africa's Legislatures and the Constitution* (Cape Town: Parliamentary Support Programme, 2002).
61. Parliament, *Report of the Independent Panel Assessment of Parliament* (Cape Town: Parliament of the Republic of South Africa, 2008), p. 27.

62. Parliament, *The National Council of Provinces—Perspectives on the First Ten Years* (Cape Town: Parliament of the Republic of South Africa, 2008), p. 30.
63. Parliament, Ibid, 35.
64. Parliament, Ibid, 56., quoting C. Murray, D. Bezruki, L. Ferrell, J. Hughes, Y. Hoffman-Wanderer, and K. Saller, *Speeding Transformation: Monitoring and Oversight in the NCOP* (Cape Town: Report of the Parliament of the Republic of South Africa, 2004).
65. Parliament, *Report of the Independent Panel Assessment of Parliament* (Cape Town: Parliament of the Republic of South Africa, 2008), p. 94.
66. Parliament, *The National Council of Provinces—Perspectives on the First Ten Years* (Cape Town: Parliament of the Republic of South Africa, 2008), p. 40.
67. See the discussion in *Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others* 2012 (6) BCLR 583 (CC).
68. The Association of European Parliamentarians for Africa has a support project for provincial legislatures called the South African Provincial Legislatures Programme (SAPL), which focuses on capacity-building for representatives with respect to legislative duties, oversight, and public representation functions (http://www.awepa.org, viewed on May 9, 2009).
69. Constitution, section 73(2) read with section 77(3).
70. Money Bills Amendment Procedure and Related Matters Act 9 of 2009.
71. Constitution, section 44.
72. Act 41 of 2003.
73. Constitution, section 99.
74. Constitution, section 156(4). The procedures for assignment are contained in Local Government: Municipal Systems Act 32 of 2000, sections 9–10.
75. The Constitution Seventeenth Amendment Bill [B8–2009] purported to give effect to this plan. See Chris Yelland, "SA Electricity Distribution Industry: Government Goes Back to the Drawing Board (November 23, 2010)," http://www.dailymaverick.co.za/article/2010-11-23-sa-electricity-distribution-industry-government-goes-back-to-the-drawing-board#.U7VE_BCSyoM (accessed July 3, 2014).
76. See generally Helen Zille, *State of the Province Address 2009: Address by the Provincial Premier of the Western Cape* (May 29, 2009).
77. Minister for Higher Education and Training, *Media Briefing on the Further Education and Training Colleges Turnaround Strategy, Imbizo Media Centre, Parliament, Cape Town* (November 14, 2012), http://www.gov.za/speeches/view.php?sid=32298 (accessed July 3, 2014).
78. Financial and Fiscal Commission, *Submission for the Division of Revenue Bill 2010/2011* (May 2010), p. 27.
79. Constitution, section 146.
80. The more assertive tone is clearly evident in Helen Zille, *State of the Province Address 2009: Address by the Provincial Premier of the Western Cape* (May 29, 2009).
81. Constitution, section 44(2).
82. Ibid, section 100 and 139(7).
83. Ibid, section 139(1).
84. On the distinction between dualist and integrated systems, see the Introduction to this volume.
85. Ibid, sections 139(4) and (5).
86. The departments were education, health, provincial treasury, public works, and roads and transport. The problems were serious, some of which were that the province had 2.7 billion rand in unauthorized expenditure and the education department was unable to deliver learning materials to school learners. National Treasury, *Presentation to the Select Committee on Public Accounts: S100(1)(b) Intervention in Limpopo* (June 12, 2012), pp. 2–10.

87. Financial and Fiscal Commission, *Submission on National Intervention in Financially Distressed Provincial Government* (July 10, 2012), p. 13.
88. Thabo Rapoo, "Chapter 5: Reflections on Provincial Government in South Africa since 1994," p. 92, www.hsrcpress.ac.za/downloadpdf.php?pdffile..05_Democracy (accessed September 27, 2010).
89. There were thirty-six interventions between July 2009 and April 2014. Derek Powell, Michael O'Donovan, Zemelak Ayele, and Tinashe Chigwata, *Municipal Audit Consistency Barometer* (Multi-Level Government Initiative, University of the Western Cape, 2014), http://www.mlgi.org.za/talking-good-governance/20140630%20Municipal%20Audit%20Consistency%20Barometer.pdf (accessed July 4, 2014).
90. An example of this practice was the section 100 intervention in Gauteng in 2012. FFC, Ibid, 13.
91. The Limpopo Premier (since removed by the ANC) dismissed the national intervention in the province as politically motivated. There is no record of him ever offering an explanation for the insolvency of the province or an apology. Sipho Masondo, Sabelo Ndlangisa, "State Pulls Out of Limpopo" *City Press* (August 11, 2013).
92. The Gauteng government did this in the 2012 intervention.
93. For example, see the Supreme Court of Appeal decision in *The Premier of the Western Cape v Overberg District Municipality* (801/2010) [2011] ZASCA (March 18, 2011).
94. Constitution, section 163.
95. IGR Act 13 of 2005, section 1.
96. Ibid, section 4.
97. IGR Act 13 of 2005, sections 22 and 28.
98. The President's Coordinating Council was established in 1999 and transformed into a statutory structure by the IGR Act in 2005, sections 6–8.
99. Ibid, section 32.
100. Ibid, sections 16–20.
101. Ibid, sections 24–7.
102. Ibid, sections 9–15.
103. Ibid, section 11.
104. Ibid, section 31.
105. Powell and Ntliziywana, p. 17.
106. Infrastructure Development Bill, section 3(3).
107. Powell and Ntliziywana, p. 18.
108. Infrastructure Development Act, section 5.
109. Ibid, chapter four.
110. *National Gambling Board v. Premier of KwaZulu-Natal*, 2002 (2) BCLR 156 (CC).
111. *The City of Cape Town v The Premier of the Western Cape and others* case number 2008 (6) SA 345 (C) 5933/08. With control of the province passing from the ANC to the DA, there were several other disputes between the province and national government which did not become formal IGR disputes. One example was the provincial government's proposal to change the form of executive structure in Cape Town from a mayoral committee system (which excluded the ANC) to an executive committee (which would have included political parties in proportion to their electoral support, and hence the ANC), which was resisted by the DA-led City. For an account of the dispute see Omolabake Akintan and Annette Christmas, *Intergovernmental Dispute Resolution in Focus: The Cape Storm*, Community Law Centre Working Paper (December 2006), http://www.communitylawcentre.org.za/clc-projects/local-government/publications/co-operative-government-local-government-redefining-the-political-structure-of-district-municipalities-the-reality-of-the-current-functioning-of-district-municipalities-is-that-even-where-the-context-suggests-that-there-is-potential-for-the-district-s/Dispute%20Paper%20

IGR%20Framework%20Act.pdf/ (accessed August 30, 2010). Another dispute concerned the outgoing ANC government's transfer of housing land in the province to the national housing agency on the eve of the elections. See Helen Zille, *State of the Province Address 2009: Address by the Provincial Premier of the Western Cape* (May 29, 2009).

112. This point is made in Yonatan Fessha and Nico Steytler, *Provincial IGR Forums: A Post-IGR Act Compliance Assessment* (Community Law Centre, 2006), p. 28 and in government's own assessment; Department of Provincial and Local Government, *The Implementation of the Intergovernmental Relations Framework Act—Inaugural Report 2005/06–2006/07* (Pretoria: The Department of Provincial and Local Government, 2008), p. 26.
113. Fessha and Steytler, ibid. Observe that at the height of the dispute between the City of Cape Town and the Provincial Government of the Western Cape, the two governments continued to attend and work together in the provincial IGR forum.
114. Chapter 10 of the Constitution, the Public Service Act of 1994, the Public Service Regulations of 2001, the Public Finance Management Act 1 of 1999, and Treasury Regulations 2001 provide the legislative framework for the national/provincial public service. Local administration is governed by the Local Government: Municipal Systems Act 32 of 2000 and the Municipal Finance Management Act 56 of 2003.
115. A report of the National Treasury projected that the integration of the different pension funds alone would increase government's cost by R6.3 billion. National Treasury, *Local Government Budgets and Expenditure Review 2003/04–2009/10* (National Treasury, 2008), p. 196.
116. *Vuyo Mlokoti v Amathole District Municipality & Mlamli Zenzile*, The High Court of South Africa (Eastern Cape Division), case number: 1428/ 2008.
117. IGR Act 13 of 2005, section 37.
118. Ibid, section 38.
119. For example, the Western Cape Province hosted an interprovincial conference on IGR in 2009.
120. Constitution, sections 196 and 220.
121. National government has proposed the creation of six Regional Electricity Distributors (REDs) in the country which will assume responsibility over electricity reticulation and distribution functions that are currently the responsibility of the national electricity distributor and municipalities.
122. National Land Transport Act 5 of 2009, sections 12 and 20.
123. Ibid, section 26.
124. A description of the National Public Transport Regulator can be found at Transport Department, "Members Eligible for Appointment of the National Public Transport Regulator, Notice 305 of 2012" *Government Gazette* (Republic of South Africa, April 13, 2012), http://www.info.gov.za/view/DownloadFileAction?id=163460 (accessed July 25, 2013). The information concerning provincial powers can be found on South African Government information, *MEC Carlisle and Deputy Minister Cronin to announce the official change of the Provincial Operating Licensing Board to a newly established Provincial Regulatory Entity* (October 26, 2011), http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=22699&tid=47230 (accessed July 25, 2013).
125. The Presidential Review Commission, *Report of the Presidential Review Commission on the Reform and Transformation of the Public Service in South Africa—Developing a Culture of Good Governance* (Pretoria: Presidential Review Commission, 1998).
126. Intergovernmental Relations Audit, *Final Report—Towards a Culture of Cooperative Government* (Pretoria: The Department of Provincial and Local Government, 1999), p. 191.
127. The Presidency, *Towards a Ten Year Review—Synthesis Report on the Implementation of Government Programmes* (Pretoria: The Presidency of the Republic of South Africa, 2003) and *Towards a Fifteen Year Review—Synthesis Report of the Implementation of Government Programmes* (Pretoria: The Presidency of the Republic of South Africa, 2008).

128. IGR Act 13 of 2005, section 34.
129. Delegations made pursuant to Constitution, section 238.
130. Department of Provincial and Local Government and GTZ, *IGR Working Together for Development—A Series of Six Case Studies* (Pretoria: The Department of Provincial and Local Government, 2008), p. 16.
131. See generally Bongani Khumalo and Renosi Mokate, "Republic of South Africa," in Anwar Shah, ed., *A Global Dialogue on Federalism, Volume 4, The Practice of Fiscal Federalism: Comparative Perspectives* (Montreal and Kingston: McGill-Queen's University Press, 2007), pp. 262–86.
132. National Treasury, *Medium-Term Expenditure Framework Guidelines: Preparation of Expenditure Estimates for the 2014 MTEF* (Pretoria: National Treasury, 2013), p. 1.
133. Ibid, 10.
134. Ibid.
135. Ibid.
136. Ibid, 11.
137. Ibid, 12.
138. Ibid.
139. Among the earliest IGR structures in the county, the Budget Council and the Budget Forum were established by the Intergovernmental Fiscal Relations Act 97 of 1997.
140. Premier Zille has recently raised concerns about the funding of health services in her province. See Helen Zille, *State of the Province Address 2009: Address by the Provincial Premier of the Western Cape* (May 29, 2009).
141. National Treasury, *Concurrency* (Pretoria: The National Treasury, unpublished report, 2008); *South Africa's Intergovernmental System: Are We Running the Risk of Fiscal Determinism?* (Pretoria: The National Treasury, 2007); N. Steytler and Y. Fessha, *Defining Provincial and Local Government Powers and Functions: The Management of Concurrency* (Cape Town: Community Law Centre, University of the Western Cape, unpublished report, 2006).
142. Statistics South Africa, *Community Survey 2007* (Pretoria: Statistics South Africa, 2007).
143. Good Governance Learning Network, *Local Democracy in Action: A Civil Society Perspective on Local Governance in South Africa* (Cape Town: Good Governance Learning Network, 2008).
144. IGR Act 13 of 2005, section 37.
145. Established by the National Economic Development and Labour Council Act 35 of 1994.
146. Framework for South Africa's Response to the Global Recession (February 19, 2009).
147. The National Planning Commission is a new initiative of the government and was mandated in the February 2010 release of the Revised Green Papers. President Jacob Zuma furthur detailed the mandate during his address at the inaugural meeting of NPC on May 11, 2010. This information can be found online at The Presidency, *National Planning Commission* (Republic of South Africa), http://www.npconline.co.za/ (accessed July 24, 2013).