

# The Federal Idea

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## Introduction

Discussions about the division of powers in a federation are often difficult and controversial because vested interests are full of emotion. A few simple rules of engagement make these discussions easier and more productive.

*The first* is to clarify the scope of discussion. Are the discussions about devolution taking place within the context of the existing constitution or are constitutional amendments also envisaged?

*The second* is to focus on making history rather than re-writing history. Focusing on a better future avoids the unproductive “blame games”.

*Third*, focusing on results and outcomes that matter for people also creates a more positive environment for discussions about devolution. This avoids the “winners and losers” of discussions framed in term of powers, and overcomes resistance to change. Reasonable people may disagree on the most efficient division of powers between governments and agree on a common and shared desirable outcome.

That said, even with the best intentions, discussions about devolution of powers and federal-state relations are difficult because we all bring baggage to the table. This is the result of our past experience. There are different perspectives depending on whether you look at the situation from a national, state or local perspective. These perspectives can enrich the discussion if we are aware of the baggage we carry and the mental map we bring to the conversation. This applies to all of us.

## Different Mental Maps—Different Perspectives

We are all the result of our learning and experiences. My experience as a Canadian and a senior official for many years has undoubtedly influenced my views on federalism. So let me come clean on this.

I come from a country that epitomises “diversity”.

- **Ethnic Diversity:** Canada’s population is multi-ethnic, multi-faith, multi-racial and multi-cultural. Canadians speak more than 200 mother tongues. Fifty-seven percent of Canadians speak English and 21 percent speak French. The first language of 56 percent of the immigrant population in Canada is an Asian language. Eighty-one percent of the population of Quebec is French-speaking. The other provinces are English-speaking and only one province is officially bilingual.
- **Geographic Diversity:** Canada spans six time zones and borders three oceans.

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- **Demographic Diversity:** One in five Canadians was born outside of Canada. In Toronto, the largest Canadian city, it is one in two (Privy Council Office, 2015).
- **Legal Diversity:** Canada is governed by three systems of law – common law, civil law and Aboriginal rights. Four percent of Canadian are Aboriginal, and 60 percent of them live in the Western provinces (Privy Council Office, 2015).
- **Economic Diversity:** Some provinces depend heavily on natural resources while others depend on the industrial and service sectors.

Canada is one of the most decentralised federations in the world. Its provinces have jurisdiction over health, education, municipal institutions and natural resources. They also have their own taxing and borrowing powers. Subnational revenues amount to 55 percent of total government revenues. This compares to 46 percent in the USA, 35 percent in Germany and 10 percent in Mexico.

In spite of such diversity, Canadians have found ways to reconcile their differences and stay united. Canada is an “old” federation. It was created in 1867. For almost 150 years, Canadians have managed to find practical solutions to reconcile their diversity with the need for unity, and their aspirations for shared prosperity with the need for mutual help.

There are constant tensions in a federation and Canada is no exception. Canadians have created an elaborate machinery to manage federal-provincial relations on an on-going basis.

Discussions about national unity are continually on the public agenda. At times, they even dominate the political agenda. There have been three referenda on the future of Quebec within the Canadian federation; there may be more in the future. Canadians talk about unity. They work hard at it, and continue to invent ways to build a peaceful future together.

So, like everyone, I bring baggage to the conversation on federalism and devolution of powers. Mine is that I believe that federalism, as a model of governance, is well adapted to the challenges of the 21<sup>st</sup> century, and that it provides the flexibility to adapt to a diversity of needs and circumstances—as long as there is the political will to use that flexibility.

The most important challenge for a long-lasting and successful federation is not a perfect design (there is no right way of managing a federation), it is to ensure there is the *political will* to make pragmatic use of the flexibility that this model of governance provides.

Some lessons one can draw from the Canadian experience are that:

- The division of powers between the federation and the states does not tell the whole story.
- A shared commitment to federalism and the way powers are exercised are as important as the division of powers between levels of government.
- Politics and political will are the *key drivers* of change on how a federation evolves.

But enough about Canada...

Models of governance are deeply contextual. They evolve through a unique combination of politics, circumstances and public support.

No two federations are the same. Each is unique in light of past events, culture, history and circumstances. I will therefore refer to the “federal idea” rather than “federalism” to describe some key features of federations by drawing from international examples and practice.

## The Federal Idea

There is no single way to conceive or manage a federation.

- Some federal states, like Malaysia and Canada, have a parliamentary system; others, such as Argentina and Brazil, have a presidential system.
- Some are large countries like India; others small like Switzerland.
- Some are ethnically diverse like Malaysia, others are not.
- Some federations use a first-past-the-post voting system (Canada), others use proportional representation (South Africa).

Countries that have opted for a federal system of government did it for compelling and often similar reasons. For example, countries are always searching for ways to ensure peace, co-operation, prosperity and mutual benefits. The greater the diversity among constituent members, the more relevant the “federal idea” is as a way of governing.

Federal systems of government seek to reconcile issues in ways that would not be possible in a unitary state. This is one of the benefits derived from belonging to a vast system with the need for flexibility, unity and diversity. As a result, many federal systems share some common characteristics.

## Divided Sovereignty

Countries that have adopted a federal system of government found it necessary to divide powers and sovereignty to reap the benefits of co-operation among constituent members. This is in sharp contrast to a unitary government in which regional authorities are subordinate to the national government. In a federation, the constituent states have as much sovereignty in their sphere of responsibility as the national government has in its own.

Governments have individual and shared responsibilities. They act separately on some matters and collectively on others. In a federal system, sovereignty is divided.

## Enabling Conditions

The federal idea requires putting in place a number of enabling conditions to ensure that governments can act independently in their own spheres and collectively in others for the benefit of the federation.

Respect for democracy and fiscal federalism are among the enabling conditions of well-functioning federal systems.

- *Respect for democracy* means respect for the political choices of people at the national and subnational levels. The political process contributes to the renewal of federations. It also ensures the active involvement of citizens in the governance of their country.
- *Fiscal federalism* ensures that fiscal capabilities are commensurate with government responsibilities. It also builds solidarity among governments by sharing risks, pooling resources to generate greater equality of opportunities and ensuring a level playing field across the federation.

## Unity and Diversity

Federal systems must find their own ways of reconciling unity and diversity. This involves balancing the protection of individual rights (including political rights), diversity of needs and circumstances with the need for unity.

This is not an easy task. Diversity may be an asset, and can even be an engine of common wealth, growth and prosperity. It is a matter of balance. The federal idea is well adapted to the challenge of governing our increasingly pluralistic and diverse modern societies.

A pluralistic society does not happen by accident.

- It requires deliberate policies to protect the rights of people from different ethnic groups, faiths or cultures.

- It benefits from an inclusive concept of citizenship.
- It requires measures that encourage the active contributions of citizens to the life of their country.

## Solidarity and Subsidiarity (Proximity)

The federal idea embodies the principles of solidarity and subsidiarity.

*Solidarity* because the constituent members are interdependent and share responsibility to contribute to the efficient functioning of the union. There are no airtight ways of dividing responsibilities among governments. Whatever the division of power, governments must find ways of working together.

*Subsidiarity* because it is beneficial to solve problems as close as possible to the people most directly affected. Doing so reduces costs, improves service delivery and encourages more responsive and accountable governments. It also builds the capacity of citizens and communities to play an active role in addressing issues of concern to them.

## Politics as Drivers of Change

Federations are living systems. To survive and prosper, they must evolve and adapt to changing needs and expectations.

An independent supreme or constitutional court may act as an independent referee to arbitrate divergences in the interpretation of laws and the constitution. But ultimately, the most important arbitrages are political. Politics is the main driver of change. This gives parliamentarians very special responsibilities.

- They are guardians of the constitutional order.
- They are the “keepers of the flame” and ensure that the spirit of the federation is alive and well.
- They are the stewards of public institutions and work to steer people and society through a process of change to ensure prosperity in the changing landscape of the world we live in.

The daily actions and decisions taken by government transform the way societies govern themselves.

The initial compact is important. It provides a solid foundation for the functioning of society. It ensures stability and continuity. But one of the most important strengths of a federal system is its flexibility. This is the capacity to adapt and experiment with new ways of producing results of value to society.

- Powers can be reallocated, devolved to bring decisions closer to people or to centralise them in government.
- Funding formulas can be changed to ensure a better fit between responsibilities and capabilities or to improve accountability.
- State and local governments may be given more responsibilities to encourage the active participation of people and communities in the life of their country.

Governments at the federal and state level can build on each other's strengths. They can also duplicate and neutralise each other. In the end, it is the political will to give effect to the federal idea in practice that determines how a federal system evolves. Actions and decisions reveal the true and deeper convictions of the people in positions of authority.

Most changes take place incrementally. The evolving system of governance will endure if it is able to meet the deeply-held aspirations of citizens.

In some cases, a country may reach a point of inflection; for example, when there is an increasing disconnect between people's aspirations and government's actions (e.g. Czechoslovakia, the Czech Republic and Slovakia in 1993). Change can then happen very quickly but, I would add, in an unpredictable way and sometimes at great cost to society.

By and large, federal systems are resilient. In that sense, they are a modern system of governance because they are well adapted to the fast-changing context of the world we live in.

It is with this as a backdrop that I will venture some observations about the trajectory of the federal idea in Malaysia over the past 50 years from an external perspective. In particular, I will try to identify areas where Malaysia is following a divergent path from that of many other federations. This may be relevant to upcoming discussions about devolution between the federal government and the State of Sarawak.

## The Trajectory of the Federal Idea in Malaysia

The Chief Minister of Sarawak informed the State Legislative Assembly on 17 August 2015 of his intention to "work with the federal government to decentralise some matters currently under the federal and concurrent lists of legislative authority to the State of Sarawak." This is an important statement. It opens the possibility for setting an ambitious transformation agenda for Sarawak and Malaysia.

## Trajectory 1: A Multi-Tier System of Government – Each Sovereign in Its Own Sphere

Someone once described Malaysia as "a centralised unitary state with federal features" (Loh 2009, 195). From the outside looking in, there may be some truth to this:

- The division of powers and fiscal arrangements clearly favour the national government.
- Most of the states depend on the centre for solvency.
- The amending formula makes it easy for the federal parliament to change the constitution without an active role by the states, provided it has a two-thirds majority.
- The federal laws prevail in cases of inconsistency between federal and state laws.

The design of the federation of Malaysia reveals that the initial intention was to provide the states with a "measure of autonomy" while building a strong central government with financial matters firmly in federal hands (Andrew Harding and James Chin, 2014, 21).

The states of Sarawak and Sabah enjoy a special status. They benefit from some special authorities and were granted special protection. That said, it is fair to say that the federation of Malaysia is more centralised than most other federations (Francis E. Hutchinson, 2014). The most important point is that, while the initial design of the federal model was highly centralised, the trend in Malaysia has been towards more centralisation over the past 50 years.

### *Issues for Consideration*

This trend should be taken into account to understand the dynamic forces at play that have led to the progressive transfer of responsibilities from the state to the federal government.

A key challenge may be to find ways to better protect and prevent further erosion of the existing authority and of responsibilities that might be devolved to the State of Sarawak in the future.

Many options are available to counter a tendency towards excessive centralisation.

- Some countries have a process to engage both levels of government on any matter that affects the division of powers. This is the case for Canada, Australia, Switzerland and South Africa.

- Some have a regular review process.
- Others have given residual legislative power in matters that benefit from the active engagement of people and communities to sub-national governments. This is the case in the USA, Brazil, Nigeria and Germany.
- Other measures are of a more administrative nature.

One of the ways to prevent erosion is to ensure that parliamentarians representing the people of Sarawak in the legislative assembly and in both houses at the federal level keep a vigilant watch on developments that may affect the authority of the state. Parliamentarians are the stewards of the federal idea.

This can best be achieved if parliamentarians have an adequate appreciation of the constitutional system.

### **Trajectory 2: Enabling Conditions for the Federal Idea**

I mentioned respect for democracy and fiscal federalism as enabling conditions for a federal system where governments act as one in some domains and separately in others. The elections of 2008 and 2013 indicate that this federation is finding it challenging to work with parties of different political stripes at the federal and state levels. It may take some time to overcome this difficulty: tolerance for political debates and conflicting views are signs of governance and political maturity. The Malaysian federation is still young.

I will focus instead on fiscal arrangements. Adequate fiscal arrangements are needed to ensure the effective functioning of federal systems.

The fundamental principle is to ensure that each level of government has the fiscal means to fulfill its responsibilities and be held accountable for the use of taxpayers' money. The absence of reasonable fiscal arrangements creates dependencies and discourages communities from taking charge of the problems they face. This erodes the natural resilience of communities.

Many federations have put in place elaborate fiscal arrangements. Malaysia also has a fairly elaborate system.

The international tendency has been to locate funds where services are provided and revenues where they are generated. This means locating funds for health care, schools or welfare service at the state level because this is where the benefits will be felt. It also means that states predominantly benefit from state-level revenues generated by energy production, forestry or natural resources. Such arrangements reward initiative and encourage an entrepreneurial spirit.

An example of this kind of fiscal arrangements can be found in Germany. Länder (regional governments) collect a majority of taxes and have exclusive legislative powers over education, universities, culture, local authority matters and the police (European Union: Committee of the Regions). Similarly, in Canada, the provinces take in the majority of revenues generated by oil-and-gas extraction or mining.

The State of Sarawak is in a better position than most other states in Malaysia because it raises 80 percent or more of the state's total revenue from its own resources (L.S. Wilson, 1996, 9). The Chief Minister of Sarawak is rightly proud of the healthy financial position of the state, its prudent financial management and favourable credit rating.

### ***Issues for Consideration***

The Chief Minister's proposition to gain a greater share of revenue generated by natural resources extraction is in line with international trends. His demand for 20 percent of revenues from oil and gas is relatively modest by international standards, but other aspects may also deserve consideration.

An issue deserving consideration is how to ensure that fiscal arrangements are not vulnerable to arbitrary or unilateral decisions. This seems to have been the trajectory in Malaysia in the past. For instance, projects are typically approved individually, funding is tied, and formula-based funding does not take sufficient account of the diversity of circumstances on the ground.

Some federations negotiate fiscal arrangements in great detail. This is done to ensure stability, predictability and accountability. It also reduces the uncertainty associated with the vagaries of political cycles or vulnerabilities resulting from changes at the helm of governments.

Unlike other federations, Malaysia displays a high level of discretion in the management of fiscal transfers. Multi-year financial arrangements spanning a number of electoral cycles provide greater certainty, even if they must be re-negotiated periodically.

Proper control mechanisms are needed to ensure accountability for the use of taxpayers' money, whether the funds are generated locally or transferred from another level of government.

### **Trajectory 3: Power, Purpose, Capabilities**

The Chief Minister of Sarawak indicated that the purpose of the discussions on devolution is to ensure that the rakyat "benefit from more effective and efficient government".

People may disagree about what level of government is best positioned to provide a service but they may agree on a common purpose that would make

a difference in people's lives. Co-operation may be easier to achieve on that basis.

Governments use legislative and executive powers to fulfill their mission—to build a better future and improve the lives of citizens. Clarity of purpose is necessary for successful discussions on the devolution of powers. But there is more. Nothing much happens unless public organisations have the capacity to convert aspirations and ideas into reality.

If it were sufficient merely to have legislative and executive powers for results to materialise by magic; we would all be rich and there would be no war and no crime.

For instance, the State of Sarawak enjoys a special status in the federation. It was given special powers and special safeguards. These include:

- Some control over immigration;
- Some special power over the appointments to the civil service; and
- The guarantee that “the indigenous peoples of both Sarawak and Sabah shall enjoy the same ‘special rights’ given to the Malay community of Malaya” (James Chin, 2014, 154-155).

And yet, indigenous people suffer disproportionately from preventable diseases and experience higher rates of infant and maternal mortality than the Malay community. They suffer widespread and persistent poverty, high rates of illiteracy and limited access to medical care. A significant portion of the rural population of Sarawak does not have access to basic amenities such as water, electricity and roads. Powers alone do not create better living conditions; powers do not guarantee outcomes.

Focusing on *outcomes* broadens the conversation and clarifies how each level of government can be part of the solution. It bridges the gaps between shared aspirations and current reality. It also reveals the need to *build the capacity* of public organisations to transform ideas into reality.

### ***Issues for Consideration***

*An important question for parliamentarians is: What will be different in the life of the people of Sarawak in five or ten years from now if the State of Sarawak is granted more powers?*

A state can be ambitious in asking for more responsibility, flexibility and autonomy as it gains the capacity to do more and to do better, but it should be careful not to take on more than it can handle.

*Building capacity takes time.*

A key question for the civil service is: What systems, skills or competencies does the civil service of Sarawak need to produce better results in new and existing areas of responsibilities?

Devolution of power and capacity-building must work hand in hand.

### **Trajectory 4: Solidarity and Proximity**

A trend in many countries has been towards a greater devolution of powers as well as decentralisation and de-concentration of public services to bring them closer to citizens and communities. The driving force behind these changes has been an increasing awareness of the need to encourage the active contribution of communities, citizens and families to work with government to generate better results. This trend is not limited to countries with a federal system; it is also evident in unitary states:

- The United Kingdom has felt the need to move towards greater devolution and encourage a more active role at the community level.
- Indonesia has provided special status of autonomy to four provinces.
- The Philippines has granted administrative autonomy to five provinces on Mindanao Island.
- France has established an extensive program of decentralisation, de-concentration and consolidation at the local level over many years.

There are many reasons for this. One is the changing expectations of citizens. People expect to have a say in matters of interest to them and to play an active role alongside government. Modern information and communications technologies give them the means to ensure their voices are heard.

Malaysia has pursued a divergent path from other countries. The trend towards greater centralisation here has been compounded by another trend that has encouraged duplication by establishing numerous federal agencies at the state and local levels. As a result, co-ordination is more difficult than ever. There are many ways of reversing this.

### ***Issues for Consideration***

Overlap and duplication can be resolved by administrative means if there is a will to take action. Methods such as developing streamlined protocols, creating harmonisation agreements, assigning a designated lead agency, establishing single-service windows or co-locating could ease overlap.

It is for each country to figure out what measures would work best in the circumstances they face.

The discussion on devolution and decentralisation should not be limited to relations between the federal government and the state.

Is the State of Sarawak prepared to consider devolution and a greater decentralisation within the state to bring decisions closer to people and communities? In other words, is the state prepared to do on its territory what it demands of the federal government?

Countries governed through a federal system of governance have, in fact, more than two levels of government. Two aspects may be worthy of consideration.

**Cities:** Countries are becoming more urban, and big cities contribute to the economic dynamism of a country. Cities act as innovation hubs, attracting investment and people with a diversity of highly specialised skills. Cities have special needs that require co-ordinated action at the federal and state levels. Should the state consider special approaches to better meet the needs of Kuching?

**Residents and District Offices:** There were Divisional and District Offices in Sarawak before equivalent mechanisms existed in most developed countries. The Residents and District Offices once provided a common platform for government-wide co-ordination at the regional and local levels. The forthcoming discussions offer an opportunity to rediscover the importance of Residents and District Offices for government-wide co-ordination on behalf of all state agencies and federal ministries.

Discussions on devolution offer an opportunity to encourage a different sharing of responsibilities with users and beneficiaries of public services, their families and communities. Such initiatives encourage development and help to build a world-class public service.

## Conclusion: Politics and the Factor-YOU

Politics has set the trajectory of Malaysia as a federation. Politics will set the trajectory for the future.

It is important to remember that the success of a country is not pre-ordained. It is created day by day. As parliamentarians, the decisions you make and the actions you take will influence the course of events and impact the overall performance of your country.

The way you think and the way you frame issues will have a direct impact on the solutions that will be found and the results that will be achieved. This is what I call the *Factor-YOU* of public governance.

Discussions on devolution can be framed in many ways: to right the wrongs

of the past or to build a better future; to address grievances or to search for a new balance to yield results that will improve the lives of citizens. They can list areas for change or be designed as an on-going process for managing the federal-state interface.

The politics of devolution will not be limited to elected officials. It will also take shape in the public sphere. It is important to reflect on the public dimensions of discussions about the exercise of power in society.

Whatever the outcomes, you can expect that there will be strong differences and demand for more. This is a defining characteristic of public debate on the devolution of powers—it is never over.

As you prepare for discussion, it may be wise to clarify in your own minds what responsibilities can best be fulfilled at the federal level to serve the interest of the federation.

Parliamentarians have many roles. They make laws and hold government to account. They give voice to people's needs and represent interests on their behalf. They share a responsibility to guide society through a process of change. They are the guardians of public institutions and the stewards of the collective interest.

Discussions on the exercise of power in society are fundamentally about the careful stewardship of society towards a better future.

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