



Summary

Countries with a federal form of government responded in distinctive ways to the health and economic crises caused by the Covid-19 pandemic. Constitutional *INSIGHTS* No.7 explores what can be learned from this experience about the purposes, design and operation of federations, including for the division and allocation of powers and fiscal resources; collaboration and cooperation between levels of government; and the challenges of democratic accountability. It builds on an earlier brief on *Implementing Federalism* (Constitutional *INSIGHTS* No.2) that examines some of these issues in a non-Covid context.

About this series

The **Melbourne Forum on Constitution-Building in Asia and the Pacific** is a platform co-organized by the Constitution Transformation Network and International IDEA. It brings together scholars and practitioners of constitution-building from across the region, to share their perspectives on critical issues, as a contribution to global understanding of the field.

This series captures insights from the Melbourne Forum in an accessible and practice-oriented format.

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About the author

This issue of Constitutional *INSIGHTS* was written by Cheryl Saunders. It draws on discussions at the fifth Melbourne Forum on Constitution-Building in Asia and the Pacific, held online on four consecutive Thursdays in September 2020.

How Federations Responded to Covid-19

Introduction

The Covid-19 pandemic that swept across the world in 2020 caused health and economic crises that required action at international, national and subnational levels of government. Responses to the pandemic offer insight into the workings of all forms of multi-level government, including—most obviously—federations. This issue of Constitutional *INSIGHTS* explores what has been learnt during this phase of the Covid-19 pandemic about the design and operation of federations. It draws on presentations to the 2020 Melbourne Forum about how governments dealt with the pandemic in Australia, India, Malaysia, Nepal, Pakistan and Solomon Islands, but the issues raised are reflected in the experiences of federations across the world. The insights gained are not confined to formal federations but are relevant in countries with other forms of multi-level government, and for countries considering transition to decentralized government.

This issue of Constitutional *INSIGHTS* answers the following questions:

- What was distinctive about a federal form of government in dealing with the pandemic?
- How did the federal division of powers work in dealing with the pandemic?
- What was the impact of the distribution of fiscal resources?
- What role did collaboration between levels of government play?
- How effective was democratic accountability during the pandemic?
- What insights for the future can be drawn from these experiences?

1. What was distinctive about a federal form of government in dealing with the pandemic?

A federation involves two or more levels of government. Each has constitutional powers of its own and institutions to exercise them. Each is democratically accountable for the use of their own constitutional powers. For these reasons, federalism is said to offer both unity and

The existence of two levels of government, each with their own constitutional powers and democratic accountability, shaped the responses of federal countries to the pandemic.

diversity, through constitutional arrangements that provide for both self-rule and shared rule.

These characteristic features of a federation affect the design and implementation of any public policy. They were particularly significant in government responses to Covid-19 for a range of reasons:

- An effective response to the pandemic potentially required exercise of the constitutional powers of both (or more) levels of government.
- In dealing with the pandemic, it was useful to have central or national action on some matters and more localized action on others, to respond to different conditions around the country.
- Accountable, democratic government at two or more levels helped to build public trust in the strategies that governments were pursuing to manage the crises, and to encourage acceptance and compliance.

Understanding how federations responded to Covid-19, therefore, throws light on the structure and operation of federalism as a form of government.

Federations around the world responded differently to the pandemic in policy terms, with different outcomes. All of them had to grapple with legal, political, ideological and logistical tensions between and among the different levels of government over the course of a tumultuous year. Some did so reasonably well, keeping the opposing poles of unity and diversity in balance in a way that proved effective—Australia is an example of this. Generally speaking, when problems emerged, they fell into one of two categories:

- In some federations, there was *inadequate coordination between levels of government*, on matters for which a greater degree of unity would have been useful. In some cases, this happened because governments disagreed on the appropriate policy response. Pakistan is an example of a federation where the provinces favoured a lockdown in the early months of 2020 but the centre did not (Kureshi 2020). In other cases, lack of coordination was simply the result of unilateral action by one level of government, without adequate consultation, which created problems for other governments to resolve. For example, in India, the nationwide lockdown initiated by the central government in March 2020 caused considerable hardship as workers travelled back to their own villages, leaving other levels of government to respond as best they could (Menon 2020).
- Another common problem was *over-centralization, diminishing the potential advantages that local knowledge, responsiveness to local conditions and local legitimacy* could bring to the management of the pandemic. Nepal is an example of a relatively new federal form of government, where institutions are still adjusting to the rules and practices of a federal government. Although Nepal does have national disaster management legislation, enacted in 2017 after the new Constitution came into effect, which assigns specific roles to the several levels of government, the response to the pandemic instead relied on older legislation, passed when Nepal was still a

The problems that emerged in the responses of federal countries to the pandemic related to inadequate coordination between levels of government on the one hand, or over-centralization on the other hand.

highly centralized state (Karki 2020). Reflecting the absence of a developed federal culture in the country, national committees with no provincial representation effectively directed the response to the pandemic.

Even where government actions were uncoordinated or dominated by a single level of government, the fact that a country was a federation was a significant factor in its response to the pandemic. If nothing else, it ensured that there were at least two levels of democratically elected government, each one available to address the problems that the pandemic posed.

2. How did the federal division of powers work in dealing with the pandemic?

The division of powers between the levels of government created tensions over priorities, but also meant that different interests each had a champion.

Covid-19 was met with a range of policy responses from governments. Some of the more common responses include: the closure of external borders; quarantine for new arrivals; restrictions on interactions between people—by, for example, requiring schools and places of business to work remotely; testing and tracing; income support; and the development of health systems to deal with this new and unpredictable virus.

In most federations, the authority to take the range of necessary actions was divided between the levels of government. As a rough generalization, the powers associated with health often lay with subnational levels of government, while those concerning the economy and external relations lay with the centre. An allocation of powers along these lines is consistent with the capabilities and strengths of each level of government. To that extent, it reflects the idea that public power should be exercised at the lowest level at which it can effectively be done—sometimes described as the principle of subsidiarity. In some federations, of which Pakistan and Australia are examples, this division of power created some tension between governments over the level of priority to be accorded to either limiting the spread of the virus or maintaining the economy (Kureshi 2020; Twomey 2020). On the other hand, dividing power in this way also provided a form of checks and balances, making it more likely that concerns about both health and the economy would be taken into account.

Exactly how the division of powers worked in individual federations varied, with differences in the schemes for allocating federal power and in the ways particular powers were allocated and described.

In terms of the constitutional scheme for allocating power, there is a relevant distinction to be drawn between the use of separate exclusive and concurrent lists for both levels of government—for example, in India—and the use of a single, largely concurrent list, which ends up leaving residual powers to constituent units, as in, for example, Australia. Powers in an exclusive list cannot be exercised by another level of government. Powers in a concurrent list may be exercised by either. In Australia, for example, to illustrate this point, the failure of the centre to exercise its

quarantine power in relation to international travellers automatically left this field to the individual states (Twomey 2020).

Another relevant variation in the design of a federal division of powers concerns the allocation of executive power. In a federation such as Nepal, where subnational governments can execute central law, the subnational level had a useful role to play, even after the centre effectively monopolized the legislative process. In a federation such as Australia, where the allocation of executive power tends to follow legislative power and the subnational level of government does not execute federal law, the centre is constrained in the action it can take by its capacity to implement its own laws in practice. This aspect of Australian federal design also helps to explain the centre's otherwise curious reluctance to take responsibility for quarantine during the pandemic: it did not have the administrative resources to do so. As a result, quarantine was left to the states to manage, although within a general framework of highly effective collaboration between the levels of government.

There are other differences between federations in the way in which particular competences or powers are allocated or described. In Nepal, for example, 'communicable disease' is a central competence and 'disaster management' is on the concurrent list. In Australia, by contrast, 'quarantine' is a concurrent power but both communicable disease and disaster management otherwise fall within the residual power of the states, and so are not mentioned expressly. These examples are useful not only to support the point about differences in the allocation of federal power but also to show why cooperation between levels of government may be needed—a point taken up in Section 4.

In any federation, declaration of a constitutional state of emergency may cut across the federal division of powers. India is an example of a federation where a declaration of emergency under Constitution article 353 authorizes the central legislature to exercise powers other than those allocated to it and the central government to give instructions to state governments in the exercise of state executive power. However, not all constitutions specifically provide for emergencies; not all constitutional emergency provisions deal with health emergencies; and not all constitutional provisions that could cover a health emergency were actually used for the purpose of managing the Covid-19 pandemic. In the absence of a constitutional emergency provision, a power to deal with emergencies may be allocated to one or another of the levels of government or allocated between them. In cases of this kind, responding to the emergency created by the pandemic was merely another application of the federal division of power. So, for example, in Australia, most of the subnational governments invoked general emergency powers under legislation, while emergency powers invoked by the centre dealt only with matters within its direct control.

The many different ways to divide, allocate and describe the powers of each level of government underlie the different responses of federal countries to the pandemic.

The greater fiscal resources typically available to the central level of government influenced how federations responded to the pandemic and had an impact on its social and economic consequences.

Collaboration between levels of government occurs through both informal and formal mechanisms. In some cases, during the pandemic, new mechanisms for intergovernmental relations emerged, which may prove to last even as the pandemic recedes.

3. What was the impact of the distribution of fiscal resources?

Fiscal issues also affected the response of federations to the pandemic, in several ways.

First, almost any response to the pandemic was costly and the economic impact of the pandemic was potentially devastating. These realities affected what countries could do in response to the pandemic and the policies that they decided to adopt. For example, a country with limited fiscal capacity to adapt its hospital system to the challenging new demands of Covid-19 might prioritize measures to prevent the virus taking hold in the first place, as was, arguably, the case in Solomon Islands (Kekea and Ride, 2020). In an example of a different kind, a country without the resources to put broad-based income support in place for those unable to work from home might resist or at least restrict lockdowns, to enable people to continue to support themselves, as, arguably, occurred in Pakistan.

Second, whatever the fiscal capacity of the country as a whole, in most federations the central level of government has greater access to fiscal resources than the subnational level, which usually requires extensive arrangements for fiscal transfers. In responding to Covid-19, this had several consequences. It meant that income support and other relief programmes (if they existed at all) were likely to be initiated and funded by the centre, although in some cases, as in Nepal, these programmes were administered at multiple levels of government (Karki, 2020). Fiscal considerations also meant that procurement of costly health equipment and other supplies typically fell to the centre, which had the resources for the purpose or might be able to obtain them through international negotiations or encouraging local production. Central procurement also enabled federations to take advantage of economies of scale, while requiring close collaboration between the levels of government to determine need and to organize distribution. These issues will continue to be important as vaccines become available, presenting the challenge of procurement in a new context.

4. What role did collaboration between levels of government play?

In all federations, collaboration and coordination between and across levels of government is necessary or desirable on a wide range of matters. Ideally, it occurs in a way that maximizes the benefits of federalism by pooling the knowledge and capacities that each level of government brings to the table, as well as coordinating the exercise of formal power.

In dealing with Covid-19, collaboration was even more obviously necessary than usual. Depending on the context, it was both vertical, bringing together the levels of government, and horizontal, coordinating activities between subnational governments themselves. Collaboration was driven by a range of factors. In some cases, it was used to coordinate the exercise of powers distributed between the levels of government, often including local government, to achieve a common goal. In other

Federations are distinctive in that each level of government is democratically accountable to its own people. The challenges of democratic accountability encountered during the pandemic were present at both levels of government.

cases, powers relevant to the management of the pandemic overlapped, requiring coordination for that reason. In most cases, local knowledge and capacity was essential in effectively managing lockdowns and delivering care. The novel character of Covid-19 also meant that collaboration offered a useful means for governments to learn from each other and to experiment with different solutions. In addition, as mentioned earlier in Section 3, central procurement of health supplies, informed by local need, helped to maximize scarce resources.

Intergovernmental procedures may be informal or assume varying degrees of formality. Informal collaboration took place in all federations, as a necessary precondition for carrying out the business of government in a way that might respond meaningfully to the challenges presented by Covid-19. Procedures of this kind are often bilateral, involving communication between political leaders and other officials. They have a low profile and may often go completely unremarked.

Practice in relation to formal collaboration was variable during the pandemic. In some cases, of which Pakistan and Nepal are examples, the assumption of greater authority by the centre led to the establishment of central committees, without subnational involvement, to develop strategies to manage the pandemic (Kureshi 2020; Karki 2020). In both cases, more cooperative procedures were available but were bypassed. At the other end of the spectrum, in Australia the demands of the pandemic caused the existing intergovernmental machinery to be abolished, in favour of a new, more streamlined 'National Cabinet', in which heads of government met remotely, but as often as required throughout the year. The National Cabinet enabled governments to share information and experiences and to agree on broadly consistent strategies and outcomes, leaving room for variable localized responses (Twomey 2020). The National Cabinet was advised by the Australian Health Protection Principal Committee, comprising the Chief Health Officer from each jurisdiction, which also was organized along intergovernmental lines, in a clear illustration of Australian institutional dualism.

5. How effective was democratic accountability during the pandemic?

A federal form of government provides for elected governments that are accountable to the people and responsible for governance in the public interest at each of at least two levels of government. In the context of the pandemic, this feature assumed particular significance. Governments at all levels had the power and authority to contribute to key decisions about the management of the virus. As significant political actors in their own right, they had some ability to influence the course of events. Even where decisions were unilaterally taken by the centre as, for example, in Nepal and Pakistan, federal government made a difference to the capacity of governments to implement decisions in a way that was responsive to local needs on the ground.

Multi-tiered democratic government, which is a hallmark of federations, also encountered the same challenges to democratic accountability as

occurred in other types of government. In some cases, the challenges were caused by the pandemic; in others, the pandemic created the opportunity and excuse for political leaders to weaken democratic practice. In a federation, such challenges potentially presented themselves at both levels of government. Some additional accountability problems also arose from the operation of federalism itself.

Some of the principal problems for democratic accountability that potentially affected federal systems at all levels of government, in dealing with Covid-19, were as follows:

- The pandemic complicated the holding of elections as they fell due, causing them to be postponed in some cases or requiring new election procedures to be adopted in others.
- The pandemic also complicated regular meetings of legislatures and legislative committees, when social distancing requirements were in place or internal borders closed. In Malaysia, this proved convenient to enable a new administration with an uncertain majority to consolidate power (Tay 2020). In Australia, both the need for air travel and internal border closures initially inhibited the meeting of the central legislature, also hindering the accountability procedures for which legislative meetings are required (Twomey 2020). Solutions in the form of virtual meetings or meetings involving a smaller number of physically distanced representatives provided part of an answer, where they were lawfully possible, but altered the dynamics of the legislature in ways that were hard to predict.
- Responses to the pandemic tended to exacerbate the concentration of power in the executive branch, at all levels of government. Some jurisdictions activated statutory emergency powers, which gave the executive extensive power to impose curfews, close places of worship and amusement, require mask-wearing and mandate social distancing, in ways that would normally be considered an unacceptable infringement of civil liberties. While such actions are subject to judicial review, courts were more likely to find that such restrictions were proportionate in emergency conditions. The expansion of executive power, even for limited periods under emergency legislation, is all the more significant in jurisdictions where legislatures are meeting infrequently, and especially in parliamentary systems where legislatures have the responsibility of holding governments to account.

As the pandemic recedes, the opportunity will arise to take stock of these challenges and ways to address them. In some cases, this may involve assessing the way emergency powers worked, with a view to reform. In other cases, it may involve the review of electoral procedures or procedures for legislative meetings to ensure that the problems encountered in 2020 can be avoided if and when other emergencies occur. In federations, these processes of review and reform are needed at both levels of government, independently or in collaboration with each

In federations, additional problems for democratic accountability arose from the operation of executive-dominated intergovernmental relations.

other, to maintain the integrity of multi-level democratic government on which federalism depends.

In a federal context, additional problems for democratic accountability may be created by intergovernmental arrangements, in ways that have been demonstrated by the experience of dealing with Covid-19. Almost by definition, intergovernmental relations take place between executive governments in ways that are not always captured by traditional mechanisms for democratic accountability. Such arrangements also tend to be complex and opaque and difficult for the media and the public at large to follow.

The Australian experience with intergovernmental collaboration during the pandemic makes this point clearly. The new National Cabinet process, established early in 2020 to deal with the pandemic, is structurally linked to the centre's own Cabinet system, which is a critical component of parliamentary government. The rationale for this arrangement was apparently to ensure that the National Cabinet operated according to the same rules of confidentiality as the central Cabinet, with the same exemption from freedom of information legislation (Twomey 2020). Despite the significance of the decisions that are taken in the National Cabinet, the only public information about what has occurred comes from whatever political leaders choose to reveal in the wake of meetings. In the short term, in the context of the pandemic, the frequency with which media conferences were conducted by all leaders may have blurred the significance of this shortfall. However, it remains a systemic problem, which will require attention in due course.

At their best, federal countries were able to deal effectively with the pandemic by combining local responsiveness, capacity and democratic accountability with collective action.

6. What insights for the future can be drawn from these experiences?

The pandemic that swept the world in the course of 2020 was an extraordinary event, one that will eventually pass. The experiences of responding to it, however, have left their mark on federations in several ways:

Dealing with the pandemic offered a practical demonstration of the benefits that a federal form of government can offer.

- At its best, this was shown through the capacity of federations to combine local responsiveness, capacity and democratic accountability with collective action, as appropriate. Even where this did not occur, federalism offered a form of check and balance, in which one level of government at least partially compensated for an inadequate response from the other.
- At the very least, therefore, the experiences of dealing with the pandemic offered new insight into the practical operation of each federation. In some cases, it is likely to have strengthened commitment to multi-level government as a result. In the new federation of Nepal, it demonstrated what federalism might mean for the first time. Not all federal reactions to the experiences of dealing with Covid-19 were positive, however. In Pakistan, while multi-level government proved beneficial in some ways, tensions between

The experience of the pandemic can help to guide design choices in the future, in particular in relation to the allocation and administration of powers between the two levels of government.

the centre and the provinces ultimately led to a judicial challenge, in which the Supreme Court placed weight on the importance of uniformity and interpreted provincial powers in a way that limited provincial capacity to respond to the pandemic. (Kureshi 2020).

The different experiences of federations in dealing with Covid-19 throw additional light on the significance of design choices in the federal distribution of powers.

- In particular, experience at the subnational levels demonstrated the importance of having the capacity to effectively exercise the powers allocated. This consideration should inform an understanding of the abstract principle of subsidiarity as a guide to the federal distribution of powers. It might also affect decisions about who should do what in the exercise of concurrent powers in practice. In addition, dealing with the pandemic in 2020 has demonstrated the positive aspects of arrangements under which the subnational level of government executes, or may execute, central legislation. Even in federations where legislative power is significantly centralized, the authority of constituent units to execute central legislation ensures that both levels of government nevertheless can make a contribution to federal democracy.

In some federations, the challenges of dealing with Covid-19 may have left a continuing institutional mark.

- In Nepal, there were suggestions that the experience of the crisis left both central institutions and communities more appreciative of the potential of federalism. In a positive example of a similar kind, the success of intergovernmental relations in Australia during the pandemic may continue to affect intergovernmental culture and processes in dealing with other matters, once the pandemic passes. Pakistan offers an example of a different kind, where the political and judicial reactions against the 18th amendment, as it operated during the pandemic (Kureshi 2020), could be a catalyst for greater centralization as the immediate crisis recedes. In these cases specifically, as well as more generally, there is work to be done in observing the extent to which the changes in the practice of federal democracy that occurred in connection with responses to the pandemic actually survive the challenging periods that will follow, as vaccines are distributed, economic crises are tackled and the memories of 2020 fade.

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About the Constitution Transformation Network

The Constitution Transformation Network within Melbourne Law School brings together researchers and practitioners to explore the phenomenon of constitutional transformation. <<http://law.unimelb.edu.au/constitutional-transformations>>

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ISBN: 978-91-7671-463-8 (PDF)

DOI: <<https://doi.org/10.31752/idea.2021.7>>8

Design and layout: International IDEA

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